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Our 25th Anniversary

In This Issue:

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From the President

Our Incredible Staff

By David R. Schaefer

As I complete the first year of my term as president of the Federal Bar Council, I want to express my appreciation to some people who are critical to the success of our association.

We are fortunate to have an incredible professional staff, led by our executive director, Anna Stowe DeNicola. Anna is an extremely talented lawyer, manager, and event planner. She has put together a phenomenal staff, including Aja Stephens, who oversees all our events and CLE programs; Jennifer Garcia Minaya, who provides key planning and administrative support for our events; Simone Winston, who coordinates our CLE programs; Teresa Ngo-Gutman, who manages our membership and marketing efforts and provides administrative support for the Federal Bar Foundation; Chandra Ramotar, our bookkeeper; and Stephanie Soto, our office assistant. These few individuals accomplish a lot!

My appreciation of the staff has grown as I have become aware of the magnitude of what they do. Over the last year, the Federal Bar Council has sponsored over 40 CLE programs. Each program requires staff assistance to organize and publicize the program, assure that everything is done to qualify for CLE credit, arrange for the location, attend the program, register participants, and otherwise make sure each runs smoothly.

Our two signature events, the Law Day Dinner and Thanksgiving Luncheon – each of which involves close to 1,000 participants – are a major undertaking, as is the planning for our fall conference, this year at Mohonk Mountain House, and our winter conference coming up in February at the Four Seasons Nevis.

Our staff has many other responsibilities that may not be apparent to all or most of our members. For example, they organize our reception for the federal law clerks, which this year was attended by more than 200 law clerks and 30 judges. They provide administrative support for the Federal Bar Council Inn of Court, and they organize a very successful reception in June honoring our Marshall Award recipients.

Our ambitious schedule of programs and events is in good hands. I encourage you to express your appreciation to our staff when you see them or talk with them. I also encourage you to share any ideas you have to improve what we do or to try new approaches to furthering our mission: promoting excellence in federal practice and fellowship among federal practitioners, and encouraging respectful, cordial relations between the bench and the bar.

From the Editor

Talking with Circuit Judge Jon O. Newman

By Bennette D. Kramer

Recently I spoke with Second Circuit Judge Jon O. Newman about his new book about his life, his career, and his 45 years on the federal bench. I was drawn into Judge Newman's book – *Benched: Abortion, Terrorists, Drones, Crooks, Supreme Court, Kennedy, Nixon, Demi Moore, and Other Tales from the Life of a Federal Judge*, William S. Hein & Co., Inc., 2017 – by its warmth and the stories from his career and experience as a judge. Judge Newman said he wanted

his book to be interesting to and accessible by laypersons in addition to lawyers so he included numerous anecdotes and tales to entice the reader. He interspersed stories about his cases with explanations about the legal process that he hopes will help lay people understand it.

Judge Newman had a distinguished and varied career before he went onto the bench. Following graduation from Yale Law School in 1956, he clerked for Judge George T. Washington of the District of Columbia Circuit from 1956 to 1957 and then for Chief Justice Earl Warren from 1957 to 1958. Judge Newman then returned to Hartford, Connecticut, in what he describes as "the most critical career choice I ever made" with the intention of practicing law with a small firm; instead he volunteered to work on Connecticut Governor Abraham Ribicoff's reelection campaign. He then became counsel for the majority of the Connecticut General Assembly and, in 1959, special counsel to Governor Ribicoff. From 1961 to 1962, Judge Newman was the executive assistant to Ribicoff when he was Secretary of the Department of Health, Education, and Welfare, and then administrative assistant to Senator Ribicoff in 1963 and 1964.

In the first of three confirmations by the Senate, in 1964, Judge Newman became the U.S. Attorney for the District of Connecticut. The confirmation process was complicated by the competition by the senators from Connecticut to advance their candidates, but Judge Newman was confirmed. When he became U.S. Attorney, Judge Newman had never tried a case, and he describes himself as "not qualified." But he was eager to jump in, which he did, trying the first case that came his way and learning on the job.

By the end of his tenure as U.S. Attorney in 1969, he had tried many cases. It is not unusual in large districts to have U.S. Attorneys who are not trial lawyers, but Connecticut was a small district with plenty of opportunities for the U.S. Attorney to try cases.

After he stepped down as U.S. Attorney, Judge Newman went into private practice until 1972, when he was nominated and confirmed as a judge of the U.S. District Court for the District of Connecticut at age 39 (which he now considers too young). By that time, although he had had considerable experience with trials and appeals, Judge Newman hit some bumps in the road to confirmation which were partially resolved after Senator Ribicoff had dinner with Senator James Eastland, chairman of the Senate Judiciary Committee. Judge Newman's nomination to serve on the Second Circuit in 1979 was possible only because Congress added two new judgeships to the Second Circuit. Senator Ribicoff was able to convince President Jimmy Carter that Connecticut deserved one of them even though it already had two seats on that court and had a much smaller population than New York.

A Memoir

I asked Judge Newman what prompted him to write the book. He said that he believes that everyone over 50 should write a memoir as a family record. His father, Harold W. Newman, Jr., wrote a memoir when he was 90. Using a manual typewriter, his father wrote 100 pages about growing up in New Orleans, providing a lot of local color.

Judge Newman did not intend for his memoir to be a publishable book, but it grew as he got into his years as a judge. In Part I of the book Judge Newman discusses abortion cases he decided early in his district court career. He was part of a three-judge district court with Circuit Judge J. Edward Lumbard and District Judge Emmet Clarie. His opinions were cited in the principal and concurring opinions of the U.S. Supreme Court in *Roe v. Wade*. He said he put that discussion first because he is best known in the academic literature for those decisions and to the extent anyone knows anything about him it is because of them. These were practically his first decisions upon assuming the district court bench.

He believes that his 20 "immodest proposals" for improvement of the justice system are the most important part of the book. The proposals look to the future and are the most topical part of the book, and the part he most enjoyed writing. I discuss the proposals, which Judge Newman and I talked about at length, later in this column. After the propos-

Judge Newman

als, he liked writing about his experience as a prosecutor and his political years because they produced the best stories. Judge Newman also said that in the book he wanted to explain the judicial process to lay people, including the variety of cases, the way the court operates, and how the appeal writing process works.

45 Years a Judge

Judge Newman was a district court judge in the District of Connecticut for seven years and has been a court of appeals judge for the last 38. I asked Judge Newman whether he preferred the district court or the court of appeals. He replied that he liked both. Judge Newman added that if he could serve on only one for just five years, he would choose the district court and if he could serve on only one for 20 years, he would choose the court of appeals. On the district court, a judge learns how to run a court, maintain order, act as an impartial officer, and deal with the litigants so as to create a sense of fairness. The life of a district court judge is exciting, unpredictable, and every day is hectic, but the job of district court judge becomes repetitious.

In contrast, life on the court of appeals is more leisurely, leaving Judge Newman to "determine the pace of [his] judicial duties." He also found the wide variety of issues that come before a court of appeals judge more satisfying. The court of appeals judges consider issues from all of the 100 trial judges within the circuit, whereas district judges see only the facts and issues before them. Judge Newman does not believe that it is necessary for all court of appeals judges to have been on the district court, but there should be some to impart knowledge and understanding of the district court process and what happens during a trial.

Judge Newman described the placement of the bust of Judge Henry Friendly in the Second Circuit courtroom on the 17th floor as "my most enduring accomplishment related to the court of appeals." The only other bust in the courtroom is that of Judge Learned Hand. Along with Judge Amalia Kearse, Judge Newman got permission from Chief Judge Irving Kaufman, selected the sculptor, oversaw the process, and directed the placement of the bust. Every time he sits in the courtroom, Judge Newman is delighted to see Judge Friendly's bust.

One standard of review of district court opinions is harmless error. Judge Newman said that the court of appeals has to be careful in analyzing any error committed during the course of a trial. If the error really made a difference in the trial, a judge must think long

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and hard about overlooking the error and focus on the fairness of the system. The length of the trial enters into Judge Newman's consideration of whether an error is harmless. That does not mean that a judge never votes to reverse a case following a long trial or that error in a case that had a short trial always means a reversal. There are a lot of considerations, the most important of which is fairness. Ironically, the district court judges sitting by designation on the court of appeals are sometimes the hardest on district court errors.

Becoming Chief Judge

Judge Newman served as chief judge of the Second Circuit from July 1, 1993 to June 30, 1997. As he explains in the book, becoming chief judge arises from a combination of seniority and age. He describes some of the duties of the chief judge, including running the annual Second Circuit Judicial Conference, serving as a member of the Judicial Conference of the United States, and running disciplinary investigations. As chief judge, Judge Newman took steps whenever he could to ensure judicial independence. One of his main accomplishments was his investigation and elimination of administrative delay in Second Circuit cases. He found, by examining every docket, that a few cases were falling through the cracks, and there was nothing in place to make sure the cases were moving along. In fact, a prisoner wrote to the clerk's office and said that nothing had happened in his case for three years. The clerk receiving the complaint simply made a note on the docket record without taking any other action. Judge Newman resolved the issues that were creating the delays, and they do not happen today.

"Immodest Proposals"

I describe a few of Judge Newman's 20 "immodest proposals" below. As Judge Newman said, "All await adoption."

Limiting prospective juror questioning: Judge Newman proposes that voir dire in federal court be limited and that the trial judge ask all the questions. I was very surprised by this proposal because in my experience in the Southern and Eastern Districts of New York, the trial judge does ask all the questions. Apparently, that is not true in the majority of federal courts across the country where lawyers ask the questions and the voir dire can last for days. In all events, Judge Newman considers personal questions about a potential juror's attitudes an invasion of privacy. Lawyers want to shape the jury to get favorable decisions, but juries are supposed to be a cross-section of the community. Even if bias is present, the biased juror will be outvoted and convinced by the facts. Judge Newman is not bothered by biases.

Limiting peremptory challenges to prevent all-white juries: Judge Newman said that all-white juries are prevalent in state court in Alabama and the rest of the South. In death penalty cases, both sides have 20 peremptory challenges. Judge Newman believes that the only way to limit all-white juries arising from racially motivated peremptory challenges is to cut the number of peremptory challenges drastically to one or two. In the federal system the chance of all-white juries is very low. In England, where the jury came from, there are no peremptory challenges.

Reviving the independent counsel: Judge Newman proposes that Congress revive the Office of Independent Counsel in an altered form by creating a bipartisan panel that would appoint an independent counsel for a 10-year term. Ideally, the person selected would be a former prosecutor serving on a law school faculty who could take a leave of absence when called to act. The independent counsel would have broad authority to investigate but could only indict with two-thirds approval of the membership of the bipartisan panel.

Limiting excessive jury awards: Judge Newman proposes that judges in civil cases provide a range of damages suggested by counsel as part of a jury charge. This would provide guidance to the jury and prevent excessive awards.

Supervised depositions: To cut down on the high cost of civil liti-

gation, Judge Newman proposes that all depositions be supervised by a judicial officer – a magistrate judge or a member of a panel of experienced lawyers. Judge Newman says that supervising depositions would cut down on the delay, squabbling, and harassment that occurs during depositions. He said that when he was a district judge a lawyer asked for an adjournment of a trial because he had identified a new witness and he needed to take his deposition. Judge Newman told him to ask the questions at that moment in the courtroom. The lawyer was finished in 15 minutes.

Judge Newman has been told that Japan has a system of judicially supervised depositions, and there are no depositions in Europe. However, litigants in the United States claim that they need the fullest possible exploration of facts for fairness. In this focus on fairness of result, the fairness in the system is lost. The result is that litigation is too slow and costly.

Certainty before imposing death penalty sentences: After a jury decision to impose the death penalty, the judge should determine whether the defendant's guilt was proven to a certainty – a standard beyond reasonable doubt. The court would have to evaluate the evidence and consider whether witnesses were reliable. An example of unreliable witness testimony would be an eyewitness who only saw the defendant once, as opposed to a witness who knew the defendant. Another example would be a jailhouse snitch or a person with immunity who had an incentive to testify to satisfy the prosecution.

Strengthening the federal remedy for official misconduct: Judge Newman points out that the standards for an ordinary tort and a constitutional tort are different. For an ordinary tort the plaintiff has to prove the defendant's negligence and damages. Plaintiffs suing for official misconduct face additional hurdles: immunity and lack of employer liability. Judge Newman proposes to eliminate immunities for officials and make government employers liable for paying damages. Judge Newman recommends changing Section 1983 to permit the U.S. Attorney to bring suit along with the victim; putting the burden on the defendant officer to prove the lawfulness of his or her action, after the plaintiff proves that the misconduct caused harm; and providing for a minimum amount of damages for violation of a constitutional right.

Judge Newman's other proposals are eliminating the standing requirement and permitting anyone to sue government officials; limiting diversity jurisdiction and allowing only discretionary access to federal courts; raising the burden of proof for state of mind; taking "beyond a reasonable doubt" seriously; deterring litigation abuse by setting up a system of warnings followed by suspension or disbarment; allowing contingency fees for defendants' attorneys in civil cases; reviewing unobjected to sentencing errors; using realistic punishment terminology; reducing prison guard assaults by limiting the amount of time guards can serve; and allowing TV in the courtrooms.

Legal History

The Supreme Court's *Worst* Decision on Campaign Finances

By C. Evan Stewart

Jesse Unruh was a legendary figure in California (and national) politics for virtually his entire adult life. And one of his most famous statements was: "money is the mothers' milk of politics." He, of course, was right. That is, until this basic truism ran into the U.S. Supreme Court, when the Court truly split the baby: sometimes money *is*, and sometimes money *is not*. Huh?

Watergate and the Root of All Evil: Money

For the movie *All the President's Men*, William Goldman

(the screenwriter) attributed the phrase "follow the money" to Deep Throat (a/k/a Mark Felt) in his advice to Bob Woodward on how to disentangle the web of intrigue that was broadly labeled Watergate. And in reaction to Watergate, Congress in 1974 passed a number of amendments to the Federal Elections Campaign Act of 1971 in an effort, not just to "follow the money," but to limit severely its impact upon federal elections. The key provisions of the 1974 amendments directed at limiting the impact of money were (i) to limit to $1,000 what individuals or groups could contribute to federal office candidates, and (ii) to limit independent expenditures by an individual or a group advocating any one federal office candidate. (Other provisions (e.g., public disclosure of the names of contributors of more than $100, creation of the Federal Election Commission, etc.) were also part of the new regime; and while those (and other provisions) were also challenged to the Supreme Court, in my judgment they were not so highly controversial, consequential, or impactful, and thus will not be the focus of this article.)

Buckley v. Valeo

To challenge the constitutionality of the 1974 amendments, an odd coalition of discordant political and legal forces (e.g., James Buckley (Conservative Senator, New York), Eugene McCarthy (former Democratic Senator, Minnesota), the New York Civil Liberties Union, the American Conservative Union, etc.) came together and sued the Secretary of the U.S. Senate (Francis Valeo) and the Clerk of the U.S. House of Representatives, both in their official capacities and as the ex-officio members of the Federal Election Commission (also named as defendants were the Commission, the U.S. Attorney General, and the U.S. Comptroller General). Through a complicated process, the lawsuit went quickly to the D.C. Circuit Court of Appeals. And with one very minor exception, the Court of Appeals upheld the 1974 amendments, finding "a clear and compelling interest" in preserving the integrity of the electoral process. *Buckley v. Valeo*, 519 F.2d 817, 841 (D.C. Cir. 1975). With that judicial determination, the plaintiffs moved on to the U.S. Supreme Court.

Lead counsel for the challengers was Ralph K. Winter, a Yale law professor (and later a distinguished judge for the Second Circuit); assisting him (among others) was a young ACLU lawyer, Joel M. Gora, who has gone on to a distinguished academic career at Brooklyn Law School. The challengers argued that "the law was the greatest frontal assault on the First Amendment protection of political speech and association since the Alien and Sedition Acts. It would stifle the voices of outsiders, political underdogs, and dissidents, and thereby … entrench the incumbents in Congress[,] who had written the law precisely to barricade themselves in power." Arrayed against them, defending the federal statute, was a cavalcade of legal heavyweights, including Archibald Cox, Lloyd Cutler, and Solicitor General Robert Bork.

The case was argued before the Court on November 10, 1975. On January 20, 1976, in a 143 page *per curiam* opinion, with five separate concurring and dissenting opinions by different Justices, the Court rendered its decision(s). (The *per curiam* nature of the opinion is itself a tad confusing/misleading. Justice Stevens recused himself from the case and the only thing all eight Justices seem to have agreed upon was that there was a proper "case or controversy" before the Court. Three Justices (Brennan, Powell, and Stewart) did in fact sign on to the whole enchilada. As we will see, the other five Justices could only agree with certain disparate parts of the Court's *per curiam* opinion.) The *per curiam* opinion soared with First Amendment rhetoric:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate

on public issues in a political campaign.

But then the *per curiam* Court, in applying this soaring rhetoric, drew a line of enormous consequence – delineating a Constitutional difference between a campaign *contribution* and a campaign *expenditure*. Thus, some federal limits on campaign *contributions* were fine and dandy, while federal limits on campaign *expenditures* were unconstitutional.

The Court determined that any and all restrictions placed upon what could be spent in federal political campaigns (i.e., *expenditures*) clearly violated First Amendment rights; such moneys constituted protected speech, irrespective of amount(s). At the same time, however, the $1,000 limitation imposed upon individual *contributions* was consistent with the First Amendment because of Congress' express concern with avoiding the fact (or appearance) of corruption. (The limits on contributions were further defended on the ground that they would "act as a brake on the skyrocketing cost of political campaigns.") And yet this did not apply to wealthy individuals underwriting their own campaigns; since the wealthy could not "corrupt" themselves, any limitations on what they could spend on their own individual races violated their (the wealthy's) First Amendment rights.

On its face, the Court's Constitutional distinction between *contributions* and *expenditures* – one is not speech, the other is – made (and makes) no sense; neither did the Constitutional carve-out for the wealthiest Americans who want to hold high political office. And it did not take any period of great reflection to figure these (and other) problems out; many of the Justices noted a number of them in their own separate opinions.

Chief Justice Burger's concurrence and dissent went right after the most obvious flaw. Agreeing with the *per curiam* opinion's determination that campaign *expenditures* were protected political expressions that could not be restricted consistent with the First Amendment, Burger contended that "contributions and expenditures are two sides of the same First Amendment coin." He went on, belittling the "word games" employed to distinguish between the two – saying that such games "will not wash." Burger went on to predict that the contributions rulings would "foreclose some candidacies" and "also alter the nature of some electoral contests drastically." He also noted that the Court's approved finance regime would give "a clear advantage" to candidates with personal fortunes over less affluent opponents, constrained by the fund raising limits of $1,000; other losers in this system would include minority parties and little-known, first-time candidates.

Justice White, in his concurrence and dissent, agreed with Burger's poo-pooing of the delineation between *contributions* and e*xpenditures*. But then he arrived at exactly the opposite conclusion. According to White, neither *contributions* nor *expenditures* constituted speech – rather, caps on spending of any kind are "neutral" vis-à-vis political speech. While it made no sense to cap *contributions* and not *expenditures*, White would have deferred to those with political expertise (i.e., Congress and the president) to determine what should be done "to counter the corrosive effects of money in federal election campaigns." White also disagreed with the *per curiam* opinion's carve-out for wealthy candidates' spending as much as they would like on themselves: "Congress was entitled to determine that personal wealth ought to play a less important role … than it has in past. Nothing in the First Amendment stands in the way of that determination."

Justice Marshall's opinion was directed at the *per curiam* opinion's carve-out for wealthy candidates, pointing out that the political landscape going forward would definitely favor millionaires. Justice Blackmun's opinion dissented from the determination that the $1,000 limit on contributions was constitutional. (Justice Rehnquist's opinion was directed at the *per curiam* opinion's ruling on public financing of campaigns, believing it would serve to entrench the two party system and unconstitutionally penalize minority parties.)

The Aftermath of *Buckley*

While some hailed the *per curiam* ruling for "declaring for the

first time that campaign funding limits violated First Amendment rights," others with political experience knew better. Indeed, as former Senator (and later a D.C. Circuit Court judge) Buckley would later write on the 40th anniversary of the *Buckley* ruling:

> In the wake of the *Buckley* decision, we are left with a package of federal election laws and regulations that have distorted virtually every aspect of the election-process. The 1974 amendments to the Federal Election Campaign Act were supposed to deemphasize the role of money in federal election campaigns. Instead, the limit on individual contributions has made the search for money a candidate's central preoccupation.
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> [And for those] reformers [who] complain about the power of political action committees – the notorious PACs … their proliferation and growth are a direct consequence of the restrictions placed on individual giving.

And as Buckley further noted, the still-current delineation between *contributions* and *expenditures* "makes politics the playground of the super-rich who can finance their own campaigns." Indeed (and not surprisingly), since 2012, a majority of the members of Congress and Senate are millionaires many times over.

As noted by Justice White, the Court – made up of folks who have never run for political office – does not have first-hand expertise or experience with money's role in politics. And in subsequent decisions, the Court often displayed similar proclivities when it came to assessing the role of money in politics. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (holding that the Michigan Campaign Finance Act, which barred corporations from making expenditures in political campaigns, did not violate the First and Fourteenth Amendments); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that the Bipartisan Campaign Reforms Act's restrictions on "soft-money" contributions did not violate the First Amendment).

While some hailed the *per curiam* ruling for "declaring for the first time that campaign funding limits violated First Amendment rights," others with political experience knew better.

But in more recent years, perhaps influenced by Justice Scalia's dissents in *Austin* and *McConnell* (that campaign restrictions at issue in those cases were intended to (and had the effect of) stifling critics of elected officials), the Court has moved in the direction of attempting to correct the crazy-quilt campaign finance system it created by its 1976 ruling in *Buckley*. The first such case was *Citizens United v. FEC*, 558 U.S. 310 (2010). Because so much heat (and very little light) has been directed at *Citizens United*, perhaps a brief re-cap is in order. At issue in that case was whether a non-profit corporation could produce and distribute a movie entitled *Hillary: The Movie*; the movie was critical of Hillary Rodham Clinton who was (at that time) the front-runner for the Democratic Party's presidential nomination in 2008. (In 2004, Michael Moore had done a similar movie critical of President George W. Bush entitled *Fahrenheit 9/11*.) The U.S. District Court for the District of Columbia ruled that the Bipartisan Campaign Reform Act (upheld in *McConnell*) barred corporations (and unions) from making independent expenditures in political campaigns (with criminal penalties for non-compliance). At oral argument before the Supreme Court, Justice Alito asked the government's lawyer defending the law (Deputy Solicitor General Malcom Stewart) whether it could also be used to bar a publishing company from distributing a book critical of Senator Clinton. Stewart answered: "Yes"; at reargument six months later, Elena Kagan (then Solicitor General, now a Supreme Court Justice) essentially affirmed Stewart's candid response – that position may have been the straw that broke the camel's back.

On January 21, 2010, Justice Kennedy issued the Court's (four to five) opinion, ruling that the Bipartisan Campaign Reform Act's provision violated the First Amendment: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens [including corporations or unions], for simply engaging in political speech." By this ruling, the Court's prior decision in *Austin* was overturned, and *McConnell* was partially overruled as well. (Professor Gora, in writing about *Citizens United*, has taken to task Mrs. Clinton for her "chutzpah" in the 2016 election, in which she "repeatedly promised – to great applause each time – not to nominate anyone to the Supreme Court who was not prepared to overrule [*Citizens United*]." Professor Gora not only thought such a litmus test improper, but noted "the irony of a leading presidential candidate attacking a decision that permitted a group of citizens to question her fitness for office." J. Gora, "Money, Speech, and Chutzpah," *Litigation* 48, 52 (Summer 2017).)

More recently, the Court had the opportunity to review some of the 1974 amendments to the Federal Election Campaign Act. In *McCutcheon v. FEC*, 572 U.S. ____, 134 S. Ct. 1434 (2014), the Court (by a five to four vote) struck down the limit on contributions an individual can make over a two-year period to national party and federal candidate campaign committees. Chief Justice Roberts wrote in his plurality decision: "The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse." Justice Thomas concurred separately (thus providing the fifth vote), but argued that *all* limits on contributions are unconstitutional (i.e., *McCutcheon* left intact the limits on how much individuals can give to an individual political candidate (which now maxes out at $2,700 per election)).

Buckley – what the *Wall Street Journal* has called the Court's "original First Amendment sin" – thus still stands, albeit significantly weakened in breadth and devoid of much (if not all) sense. And notwithstanding the *Buckley* Court's prediction, discussed above, money keeps flooding exponentially into our political campaigns at ever faster rates. So let me give the last word to the principal litigant in *Buckley*, Senator/Judge Buckley, who has written: "The answer … is not to place further restrictions on the freedom of speech, as so many continue to argue…. [Rather,] [o]ur current law addresses the problem [of corruption] by requiring a timely disclosure of all contributions over a specific amount. That enables opponents to publicize any gift that might arise to an adverse influence, and the public can then judge whether the contribution in fact is apt to corrupt the recipient."

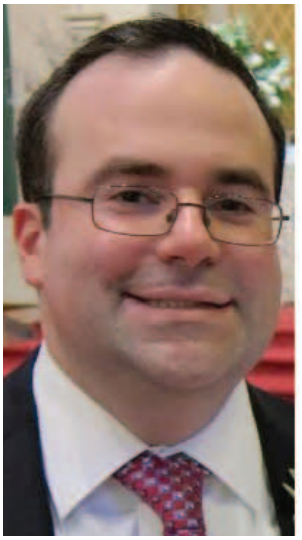
Postscripts

- For those wanting to delve deeper into the legacy of *Buckley v. Valeo*, *see* Volume 25, Issue 1 of Brooklyn Law School's *Journal of Law and Policy* (December 2, 2016).
- Floyd Abrams, who successfully argued *Citizens United v. FEC* in the Supreme Court, has recently published a wonderful book: "The Soul of the First Amendment" (Yale Univ. Press 2017). As Abrams makes abundantly clear, the purpose of the First Amendment is to protect Americans from governmental attempts (to quote Justice Robert Jackson) to seize "guardianship of the public mind." Abrams has been castigated by the political left for aligning himself with the political right in that case. But Abrams does not view the constitutional principle (and amendment) at issue in political terms. As he has written: "What threatens democracy is any law, such as that at issue in *Citizens United*, that makes criminal the showing on television of a documentary – like a movie denouncing a candidate for the presidency of the nation simply because the organization that prepared it had received some corporate grants. The film at issue in *Citizens United – Hillary*: *The Movie* – was, in my view, grotesquely unfair to then-Sen. Clinton. But that sort of political speech is precisely what the First Amendment most obviously protects."

In the Courts

Magistrate Judge Francis' 32 Years of Judicial Service

By Joseph A. Marutollo



On October 28, 1985, Magistrate Judge James C. Francis, IV, entered duty as a U.S. Magistrate Judge. He stepped down last month, after 32 years on the bench. During his last days in chambers, Judge Francis graciously spoke with us about his career.

Judge Francis graduated *summa cum laude* from Yale College in 1974. Having grown up in the civil rights era, Judge Francis saw the law as a means of achieving justice and moving society towards equality. As a result, Judge Francis pursued a law degree, which he received in 1978 from Yale Law School, where he was an editor of the Yale Law Journal. That same year, Judge Francis also received an M.P.P. degree from the John F. Kennedy School of Government at Harvard University.

Judge Francis began his legal career as a law clerk for U.S. District Judge Robert L. Carter of the Southern District of New York. Judge Carter had been a member of the NAACP Legal Defense and Educational Fund, led by Thurgood Marshall, which engaged in many historic civil rights challenges, including, of course, *Brown v. Board of Education*. Judge Francis' experience clerking for Judge Carter helped prepare him, years later, for his role as a magistrate judge. Significantly, Judge Francis saw how Judge Carter was able to put aside his own personal viewpoints to decide cases on the law; indeed, Judge Carter understood the difference between the role of the advocate and the role of the jurist. Judge Francis took these lessons to heart during his tenure as a judge.

After his clerkship, Judge Francis joined the Legal Aid Society of New York, where he served as a staff attorney in the Civil Appeals and Law Reform Unit from 1978 to 1985. While working at the Legal Aid Society, Judge Francis engaged in impact litigation in the areas of housing, education, and the rights of disabled persons. As a young lawyer, he was assigned cases of national importance. It was a critical period in his development as a lawyer, as the Legal Aid Society provided him with meaningful autonomy as well as a support network of supervisors to help guide him through the thickets of litigation. Toward the end of this period, from 1984 to 1985, Judge Francis also served as director of the Disability Rights Unit.

Reflecting on his time with the Legal Aid Society, Judge Francis recounted one of his most significant cases: working on behalf of a young girl named Tamika Walker, who had been completely paralyzed from a motor vehicle accident when she was only two years old. While working with the Disability Rights Unit, Judge Francis learned that young Tamika was being denied her right to public education. He helped bring an administrative proceeding on her behalf and prevailed. Judge Francis later learned that by the year 2000, Tamika was writing poetry featured in *The New York Times*.

Although he thoroughly enjoyed his time at the Legal Aid Society, Judge Francis ultimately decided to apply for a magistrate judge position. He thought his skills would translate to working as a magistrate judge, as he loved writing, enjoyed trying cases, and was dedicated to continuing to serve the public. Upon his appointment in 1985, Judge Francis hit the ground running, and maintained a heavy caseload throughout his tenure. Judge Francis quickly earned a reputation as a diligent, even-handed, and thoughtful judge.

Judge Francis has handled a host of cases throughout his time on the bench, but one of his cases, *United States v. Microsoft*, recently received a great deal of attention. At issue in *Microsoft* is whether U.S. warrants issued under the Stored Communications

Judge Francis

Act apply to emails and other user data stored overseas by providers. On October 16, 2017, the U.S. Supreme Court granted the government's petition for *certiorari* and will hear the case this term. The case will have major implications for companies, as it will determine whether they must comply with orders from the U.S. government to turn over electronic data, even when that data is stored on servers outside of the United States. The ability to issue opinions in weighty cases such as *Microsoft* is what makes leaving the bench so difficult for Judge Francis. Interestingly, the case also shows how much has changed in society since Judge Francis took the bench in 1985, when the internet was in its earliest stages, data was largely stored in filing cabinets rather than on any kind of computer network, and "tweets" were noises made by birds, not a means by which people communicate.

As a magistrate judge, one of Judge Francis's primary duties was to manage settlement conferences and mediations. Given his vast experience in this area, Judge Francis provided helpful insights for attorneys seeking to settle their cases. For instance, Judge Francis recommended that attorneys move beyond the hard-knuckle tactics often taught in law school negotiation courses, where professors frequently recommend that litigants remain wedded to their positions during multiple back-and-forth exchanges. Instead, Judge Francis suggested that litigants understand that settlement negotiation must be fluid to be successful – litigants must be willing to compromise if resolution is truly the objective. Indeed, Judge Francis has seen many potential settlements undone at conferences where one party's attorney tries to make a closing argument in front of the adversary rather than seeking to bridge the divide and actually try to settle the case.

Judge Francis also has advice for young attorneys, many of whom he has mentored over the last three decades as clerks and interns in his office or students in the classes he teaches at Fordham University School of Law as an adjunct professor. Specifically, Judge Francis recommends that young attorneys remember why they went to law school in the first place – most often, to help others and improve society on the whole. Young attorneys should remember that regardless of where they work, whether in government or in a private firm, they should always strive to serve the public interest in addition to their own clients.

Further, Judge Francis recommended that all attorneys keep in mind Federal Rule of Civil Procedure 1: that parties aim to "secure the just, speedy, and inexpensive determination of every action and proceeding." Unfortunately, this rule is routinely ignored in some circles of lawyers, but it is vital to American law and jurisprudence.

Judge Francs plans to remain active in the legal community upon his retirement. But whatever he does next, he will most certainly continue to serve the public interest, as he has been doing throughout his career.

* * *

At press time, Magistrate Judge Francis announced that he has been appointed Distinguished Lecturer at CUNY Law School.

Legal Practice

Advice for Ty Cobb

By Steven M. Edwards

In July, my former partner Ty Cobb went to work for the White House on the Special Counsel's Russia investigation. I thought I would write to him and offer some friendly advice. As I typed my letter, however, I found that this was more easily said than done.

Representing the White House in connection with a criminal investigation is not an easy task. While the White House is like a corporation, and I know that Ty has represented many corporations in connection with criminal investigations, the White House is unusual in that it is the focus of constant and intense public scrutiny, more so than any corpo-

ration in the world. Then there is the occupant of the White House, which presents special problems.

In a normal case, a lawyer representing a corporation in connection with a criminal investigation might want to conduct an internal investigation to learn all of the facts. Knowledge is power, and as my friend Lee Richards has pointed out, the extent of your knowledge may have a direct impact on how you deal with the prosecutor. If you are confident that you have all the facts, you might engage with the prosecutor because you know you can do so with credibility. If you are unsure of the facts, you may want to back off. There is nothing worse than making a representation to a prosecutor, only to find out that what you have said – unbeknownst to you – was wrong.

There are some lawyers who take the position that they do not want to know whether their client is guilty. If they don't know the answer to the ultimate question, they can present a defense based on the best information they have. That approach may be appropriate when a lawyer represents individuals, but it doesn't really work when you represent a corporation. Corporations have responsibilities to regulators and shareholders that may override the importance of winning an individual case. In the corporate world, with thousands of employees and millions of documents, the facts will inevitably come out. The corporation has to position itself to be part of the solution, not part of the problem. For this reason, the approach of many lawyers representing corporations is to gather the facts, present them to the prosecution and try to cut the best deal they can. In fact, some people have criticized lawyers representing corporations in criminal investigations for being nothing more than an arm of the government.

The White House is different. Preserving the credibility of the institution is important, but there is no need to be concerned that the institution will go into bankruptcy or receivership if things do not work out. The White House will always be there, and it will always have an occupant. Unlike representing a corporation, therefore, representing the White House is tantamount to representing the president himself. You can't approach this the way you would approach a corporate investigation. The White House is unique. You have both institutional and personal interests to protect. My advice to Ty: Do the best you can.

Assuming Ty wants to gather the facts, that presents unique challenges as well. It would be difficult to sit down with the president and demand to know all the facts. First of all, that might get you fired, which would not do you or the president any good. Second, it is one thing to sit down for a 15 minute conversation; it is another thing to interview a witness for seven hours after you have reviewed all of the relevant documents. The president might think a 15 minute conversation is sufficient because all you need to know is that there was no collusion, but we all know that facts that seem innocuous standing alone may be problematic when viewed in a broader context. For many prosecutors, the issue is not necessarily what happened – that's for the jury to decide – the issue is whether the prosecutor can get to the jury and win. If you attend a meeting where collusion is proposed, and then you act in a way that is consistent with collusion, that can be enough to enable a prosecutor to get to a jury even though you said at the meeting "that would be wrong, that's for sure." For that reason, it may be important to know the details of who said what to whom over an extended period of time. That may be difficult in this case. The president may not be willing to sit for extended interviews. My advice to Ty: Do the best you can.

Gathering documents and electronically stored information may also be difficult. Presumably Ty has access to White House documents, but there have been articles in the press that White House Counsel Donald McGahn has resisted turning over documents on the ground of executive privilege. Getting documents and electronically stored information from the Trump Organization and the Trump campaign would require the cooperation of dozens of people, and the risk of leaks would be enormous. I'm not sure it makes sense even to try. And then there is the president's electronically stored information. Can you imagine asking the president to turn over his smart phone so you can give it to your forensic people to enable them to down-

load everything on it and analyze the contents? Oh, and by the way Mr. President, they also need access to your server. My advice to Ty: Do the best you can.

In most internal investigations, it is very important to interview the witnesses. Here, most of the witnesses have lawyered up. Many lawyers are reluctant to permit their clients to be interviewed by corporate counsel without some assurance of confidentiality, usually in the form of a joint defense agreement. If the White House's lawyer were to enter into a joint defense agreement with the dozens of witnesses who may have relevant information, the chances of a leak are substantial. Can you imagine the headline: "Trump Seeks to Circle the Wagons by Entering into Joint Defense Agreement with Key Witnesses." Entering into a joint defense agreement does not seem feasible; therefore, it is unlikely that Ty will be able to interview very many witnesses. That is not going to stop the Special Counsel from talking to those witnesses. He doesn't need a joint defense agreement. He can serve a subpoena – not only for testimony but for documents as well. Chances are the Special Counsel is going to know far more than Ty does about the facts. My advice to Ty: Do the best you can.

Given this information asymmetry, does it make sense for Ty to engage with the Special Counsel? One approach would be to sit back and wait for requests from the Special Counsel's office and let the chips fall where they may. You can't get in trouble for misrepresenting the facts if you don't make any representations to begin with. But this is a case of enormous national importance. As counsel to the White House, I would think that Ty would want to make a difference if he can – talk to the Special Counsel, find out what is on his mind, explain the facts (with appropriate caveats), create the impression that the White House wants to cooperate; try to convince the Special Counsel that the White House has nothing to hide (assuming that's true). And Ty needs to do all of this while maintaining his personal credibility. There are going to be dark days; there are going to be times when people double-cross him; when people criticize him; when he wishes he hadn't taken the job. My advice to Ty (you guessed it): Do the best you can.

Another question is whether Ty should talk to the press. In a normal corporate investigation, the best thing to say to the press is "no comment." Nothing good can come for your client by talking to the press about the investigation, and there are a lot of downsides – particularly if you annoy the prosecutor. This situation may be different. Lanny Davis, who played the role that Ty is playing during the Clinton impeachment effort, has criticized Ty for not talking to the press enough. Davis thinks Ty should be on the White House lawn speaking for the president; he should be on the Sunday shows; he should be on the phone speaking off the record with reporters. Interesting advice. One wonders what the White House's director of communications and press secretary are supposed to do. No doubt that Davis has a point – the traditional "no comment" probably doesn't work in this environment – but I think Ty should carefully pick his spots. He should speak up when he has something unique to add and avoid subjecting himself to cross-examination by the press. That may be difficult to do. Microphones are going to be thrust at his face, and "no comment" is going to look like stonewalling. Again, my advice to Ty: (Do I have to repeat it?)

Finally, there is the question of dealing with Congress and the many overlapping investigations on the same subject. Consistency is very important, as is ensuring that witnesses are adequately prepared (which is difficult when you can't even talk to the witnesses). Ty has his hands full managing the White House's response to subpoenas from the Special Counsel, but someone has to take responsibility for the overall effort. Ty is ideally situated to do that because he has managed massive litigations where the battle was being fought on many fronts. He knows how to produce information, how to work with counsel for witnesses and how to present facts. It is a difficult job, especially given Ty's other responsibilities, but if the overall effort fails, it will be of little consolation that it was someone else's fault. All he can do is the best that he can.

***

When I looked over my letter, I decided it was pretty pathetic. Do the best you can – what kind

of advice is that? Instead of writing a letter, therefore, I decided to send Ty an email. I told him: "You have your work cut out for you, but it will be fun." He replied: "Thanks Steve! It will be crazy!" To that I would add something Norman Mailer once said: "Better to be a devil in the fire than an angel in the wings."

FBC News

Pro Bono Opportunities for Small Firms

By Noam Biale and Mark S. Pincus

Taking on pro bono cases may seem daunting to the small firm or solo practitioner. There is no army of associates or summer law clerks to spare on work that will not pay the bills. But that does not mean that a small firm or even a solo cannot take on work that contributes meaningfully to the public interest. The Federal Bar Council provides support for attorneys in all areas of private practice to pursue pro bono representations, and opportunities abound in the federal courts to work on projects that fit with the resources and interests of small firms.

We are both small firm lawyers – one of us is a solo and the other is an associate and pro bono coordinator at a 15-attorney firm – who have managed to fit a commitment to public service within our respective practices. Pro bono work for us is not only a good in itself, but also contributes positively to our other work. We both have had opportunities to take on high-profile pro bono cases that bolster the reputations of our firms. For attorneys in the earlier stages of their careers, pro bono cases are an excellent – perhaps the best – way to get in-court experience. And we both have developed our professional networks through networks of lawyers committed to pro bono representation, including the Federal Bar Council's Public Service Committee.

Pro Bono Opportunities

The types of pro bono opportunities available in the federal courts and supported by the Federal Bar Council are varied. For example, the Public Service Committee, working in conjunction with Chief Judge Robert Katzmann, has actively provided representation for individuals in asylum proceedings. These cases range in their complexity, but a small firm is well-equipped to represent an asylum seeker before U.S. Citizenship and Immigration Services. The Public Service Committee also provides lawyers to advise and assist participants in the Southern District's Young Adult Opportunity Program. Finally, the committee is in the early stages of a new project working with the U.S. Probation Department to provide legal services for individuals reentering society from Bureau of Prisons facilities. In all of these areas, the volunteer lawyer works with attorneys from various non-profits or members of the judiciary, who provide support and infrastructure that ease the burden on the volunteer.

Two ongoing pro bono projects in both the Southern and Eastern Districts of New York are especially suited to small firm or solo practitioners. First, the pro se offices of both districts allow volunteer lawyers to take on limited-scope representations in cases where the presiding judge believes the appointment of counsel would be helpful for a particular stage of the litigation. For example, pro bono counsel can be appointed just to take depositions, or to assist a client in preparing a motion for summary judgment.

The limited-scope nature of these representations allows for lawyers to make a significant contribution to the client's case without taking on the full burden of an ongoing commitment. The directors of the respective pro se offices, Maggie Malloy in the Southern District and Jill Hanekamp in the Eastern District, have cases available at all stages of litigation, depending on the interest and resources of the attorney.

Second, both the Southern and Eastern Districts have started pro se clinics. These clinics are open daily in the courthouses. The Southern District clinic is staffed by lawyers from the New York Legal Assistance Group, led by Robyn Tarnofsky, and the Eastern District clinic is staffed by lawyers from the City Bar Justice Center (through the Federal Pro Se Legal Assistance Project), led by Cat Itaya. The courts' respective clerk's offices refer pro se litigants to the clinics, where volunteer attorneys provide guidance on the Federal Rules of Civil Procedure and advice about the next steps in an individual's case. This legal assistance, formalized by an engagement letter the individual signs with the association, is limited to the advice given within the office hours of the pro se clinic. Of course, firms that provide volunteer lawyers have taken on cases that walk through the door, but that is optional. The commitment is just three hours – an easy way for small firm and solo practitioners to work directly with clients on a pro bono basis.

The Council recently hosted a networking event for small firm lawyers committed to pro bono work. Stay tuned for more events and opportunities in this area in the near future.

Decisions

It's All About Who

By Peter S. Sloane

Sitting in the theater capital of the country, the Southern District of New York has more than its fair share of copyright cases involving Broadway and off-Broadway productions. In a decision dated September 15, 2017, Judge Alvin K. Hellerstein found fair use in a raunchy off-Broadway play parodying Dr. Seuss' beloved children's classic "How the Grinch Stole Christmas." *Matthew Lombardo and Who's Holiday LLC v. Dr. Seuss Enterprises, L.P.*, No. 1:16-cv-09974-AKH (S.D.N.Y. Sep. 15, 2017). The opinion distinguished the decision last year in *TCA Television Corp. v. McCollum,* 839 F.3d 168 (2d Cir. 2016), in which the Second Circuit found no fair use in the use of Abbott and Costello's treasured "Who's on First" routine as a theatrical device within a Broadway show.

Familiarity with the well-known Grinch book plot is assumed. Plaintiff Lombardo authored "Who's Holiday," a one-actress comedic play featuring a down-and-out 45-year-old version of Cindy-Lou Who, the little girl who teaches the greedy Grinch the true meaning of Christmas. The play takes place at Cindy-Lou's decrepit trailer in the hills of Mount Crumpit, the mountain high above Whoville. A decidedly grown up Cindy-Lou speaks to the audience only in rhyming couplets about her life as a hard-drinking, prescription-drug-abusing, middle-aged woman who lives in a trailer park and served time in prison for killing her husband, the Grinch.

In July 2016, Dr. Seuss Enterprises sent the plaintiffs numerous cease-and-desist letters. In response, the plaintiffs halted plans for the show and filed suit seeking a declaration that the play constituted fair use. Over the defendant's objection that discovery was necessary before the fair use issue could be resolved, Judge Hellerstein invited the plaintiffs to file a motion for judgment on the pleadings.

In support of their motion, the plaintiffs argued that discovery was unnecessary because the only task for the court was to conduct a side-by-side comparison of the works and apply the law of fair use. Judge Hellerstein agreed. He

stated that numerous courts in the Southern District have resolved the issue of fair use on a motion for judgment on the pleadings by conducting a side-by-side comparison of the works at issue.

Fair Use

The fair use doctrine is codified in the Copyright Act of 1976. In deciding the motion, Judge Hellerstein applied the four non-exclusive factors set out in the Copyright Act itself.

Judge Hellerstein began his analysis of the first fair use factor, which addresses the manner in which the copied work is used, by considering whether the play is a parody of the book because parody has an obvious claim to transformative value. Judge Hellerstein found that the play "recontextualizes" the book's easily-recognizable plot and rhyming style by placing Cindy-Lou, a symbol of childhood innocence and naiveté, in outlandish, profanity-laden, adult-themed scenarios. In doing so, the court found that the play used juxtaposition to subvert the utopian version of Whoville depicted in the book and to ridicule its saccharine qualities. Judge Hellerstein wryly remarked that "[w]hether the play's parody of Grinch is effective, or in good taste, is irrelevant."

Judge Hellerstein found the Second Circuit's recent decision in *McCollum* distinguishable. In *McCollum,* the defendants used the "Who's on First" comedic routine merely for dramatic effect to capture the audience's attention and to pivot the plot of the play. The Second Circuit found that such wholesale misappropriation was not transformative, and consequently did not constitute fair use, because defendants neither used the routine for a different purpose nor imbued it with a different message, meaning, or expression. Judge Hellerstein found that "[u]nlike in *McCollum,* where it was irrelevant whether the alleged infringer used Who's on First or some other original work, the play's use of Grinch is necessary to the purpose and meaning of the play" because "absent that use, much of the play's comedy and commentary evaporates."

As for the remaining fair use factors, the court declined to give much weight to the creative nature of the copyrighted work, and it found that the amount and substantiality of use was reasonable and that the play would not usurp the market for the book. Accordingly, the court held that the play constituted fair use and it granted the plaintiffs' motion for judgment on the pleadings (and it dismissed the defendant's trademark-related counterclaims).

The decision is on appeal. In the meantime, "Who's Holiday" is scheduled to make its off-Broadway opening in time for Christmas. Under the circumstances, Lombardo might say to theatergoers something to the effect of "welcome, welcome, fahoo ramus, welcome, welcome, dahoo damus, Christmas Day is in our grasp, so long as we can survive the appeal at last."

From the Archives (March/April/May 2013)

Part II: Judge Weinfeld and Watergate: The Critical Connection

By Frank Tuerkheimer

Editor's note: The first part of this article was published in our last issue; here is the conclusion.

By this time, the House Judiciary Committee also had subpoenaed a large number of additional tape recordings. Burning them, at this point, of course, was not an option; instead the president resorted to the opposite approach.

He publicly released his version of 42 of the sought after tapes in a publicly televised address. The release of these hurriedly prepared transcripts did not help the president. The transcripts revealed sordid conversations about politically motivated activities generally considered beneath the presidency. John Dean's earlier testimony about an "enemies list" paled in impact when a transcript revealed presidential conversations of that nature. The transcripts also revealed ethnic slurs and deleted "expletives."

Some expletives are worse than others but the hurried manner in which these transcripts were prepared and released permitted the reader to assume the worst with respect to all. The release of these transcripts with numerous "expletives deleted" was a sufficient stain on the Nixon

presidency to warrant an iconic "Republican" newspaper and bastion of Midwest conservatism – the *Chicago Tribune* – to call for the president's resignation.

But the real problem, of course, was the subpoena. Jaworski's subpoena was issued under Rule 17(c) of the Federal Rules of Criminal Procedure, which the Supreme Court, in *Bowman Dairy Co. v. United States,* 341 U.S. 214 (1951), said was a rule designed to expedite trial by providing for inspection of documents prior to trial; the rule, the Court made clear, was not intended to provide a means of discovery in criminal cases.[1] Again, Judge Sirica denied the motion to quash. The president then appealed to the court of appeals.

In an unusual move permitted under 28 U.S.C. §§ 1254(1) and 2101(e), Jaworski asked the Supreme Court to review the case, bypassing the court of appeals, and the Court agreed. This brings us to the second Judge Weinfeld decision affecting Watergate.

Weinfeld's Second Ruling

Initially the Supreme Court dealt with a justiciability issue: Did the courts have jurisdiction over a dispute between two persons in the executive branch of government –the president and a subordinate of the attorney general?

Augmenting the precedent favorable to Jaworski that the Court cited, the Court relied on the Code of Federal Regulations, which guaranteed the independence of the Special Watergate Prosecutor and permitted him to challenge claims of executive privilege, as well as the unusual provision that his removal required the consensus of eight congressional leaders. *United States v. Nixon,* 418 U.S. 683, 694-95, n.8 (1974).

Having resolved that question against the president, the Court then turned to the validity of the subpoena under *Bowman Dairy*, which set forth very general principles governing a Rule 17(c) subpoena. The Court then noted that both parties agreed that "cases decided in the wake of *Bowman* have generally followed Judge Weinfeld's formulation in *United States v. Iozia,*13 F.R.D. 335 (S.D.N.Y. 1952), as to the required showing." 418 U.S. at 699. *Iozia* was charged with income tax evasion. He issued a subpoena under Rule 17(c) asking the government to produce a number of documents in its files that related to the financial dealing of others. Iozia urged that, under *Bowman Dairy*, the same standard that applied to Rule 16 discovery – documents that may be material to the preparation of the defense – applied to Rule 17(c). Relying on the language of *Bowman Dairy*, decided just one year earlier, Judge Weinfeld disagreed and stated that a "good cause" requirement attached to Rule 17(c) production. His analysis did not, however, end with the ill-defined concept of "good cause," but went on to explain that in his opinion "good cause" meant a showing that: (1) the documents were relevant and evidentiary, (2) they were not otherwise procurable in advance of trial through due diligence, (3) the litigant seeking Rule 17(c) assistance could not properly prepare for trial without the documents and the failure to obtain them in advance of trial would risk delay at the trial, and (4) the Rule 17(c) application was made in good faith and was not a fishing expedition. 13 F.R.D. at 338.

Applying this test, he ruled that Iozia was entitled to some but not all of the documents he requested. In *United States v. Nixon,* after noting agreement that Judge Weinfeld's formulation for the issuance of a Rule 17(c) subpoena governed, the Court referred to the four criteria, spelling them out almost in *verbatim* fashion as articulated in *Iozia.*

The bulk of the Court's discussion then focused on whether the tape records satisfied the first of the *Iozia* requirements: whether the tape recordings were relevant and evidentiary. It noted the obvious proposition that because the tape recordings contained statements by one or more of the defendants named in the indictment, under the rules relating to conspiracy trials, if such statements were in furtherance of the conspiracy, they would be admissible evidence. Clearly focusing on the president without naming him, the Court added, "The same is true of declarations of coconspirators who are not defendants in the case on trial." 418 U.S. at 701. The Court then summarily concluded that the remaining *Iozia* requirements were met:

"[T]he subpoenaed materials are not available from any other source and their examination and processing should not await trial in the circumstances shown [citing *Bowman Dairy* and *Iozia*]." 418 U.S. at 702. End of discussion.

Judge Sirica's order denying the motion to quash was affirmed. The tapes had to be provided.[2]

One of the tapes contained a June 23, 1972, conversation between President Nixon and Haldeman, the president's closest advisor. The tape revealed that the two agreed that Haldeman would contact the CIA to ask it to ask the FBI to stop a pending inquiry in Mexico by telling the FBI that if its investigation continued, it would expose a CIA operation – a complete fabrication.

This bogus use of the CIA to stop an FBI inquiry was done because both the president and Haldeman knew that if the FBI investigation in Mexico continued, it would reveal a financial connection between the Watergate burglars and the Committee to Re-Elect the President. While the conversation between the president and Haldelman was inferable from the sequence of events on June 23, the tape provided direct evidence of that conversation and was deemed the "smoking gun" that provided additional and unambiguous proof of the president's involvement in a conspiracy to obstruct justice. The House Judiciary Committee, which had voted 27 to 11 to impeach the president on the Watergate article, six Republicans joining all 21 Democrats, then changed its vote on the Watergate article to a unanimous 38 to 0 vote, portending certain impeachment by the House of Representatives and virtually certain removal by the Senate. When the president was advised of the erosion of his support in the Senate, he resigned, fewer than two weeks after release of the June 23, 1972, tape recording.

Richard Nixon had been re-elected overwhelmingly in 1972. Only Massachusetts and the District of Columbia voted against him. Yet within one year of his re-election, his presidency was tottering. What accounts for this extraordinary erosion in support for a president re-elected with an almost unanimous electoral margin?

The Saturday Night Massacre stands as a pivotal point in the Watergate saga, a turning point that could only exist if there were tapes in existence that could be the subject of litigation. Both at this turning point and in the final denouement of the Nixon presidency, Judge Weinfeld's decisions are the hidden player.

Notes

[1] The House Judiciary Committee felt that, in light of its constitutional power to impeach, it did not need the assent of the courts with respect to documents subpoenaed as part of the impeachment process. Hence, it did not litigate the validity of its subpoena and ultimately based an impeachment charge on the president's failure to comply with the subpoena. The vote on this article of impeachment, 21 to 17, did not portend the removal of the president on these grounds since a two-thirds vote in favor of removal in the Senate is required.

[2] The final issue addressed by the Court was the president's claim of executive privilege. The Court ruled that, while such a privilege existed and would presumptively apply, under the circumstances of this criminal case, the president's claim of executive privilege was correctly overridden by Judge Sirica. 418 U.S. at 703-17.

Lawyers Who Have Made a Difference

Carol Bellamy

By Pete Eikenberry

I met Carol Bellamy in 1970, when she was an associate at Cravath. I was a candidate for U.S. Congress and Carol was my driver. One day she stepped out of the car as my driver and fell down a

flight of concrete steps at a housing development. Within two hours, she was back at the wheel with band aids on both knees and a broken front tooth. Carol also was my lawyer when my adversary John Rooney (a 28 year incumbent) was using the franking privilege to mail election literature. We took him to court, but we lost in the district court. In an informal conference in the Second Circuit, Rooney's lawyers agreed that he would stop abusing the franking privilege. Two years out of law school, Carol was a poised advocate at the conference.

Carol Bellamy

After the election, my wife Sue found Carol an apartment in Fort Greene and she often stopped by our house. One day Carol caught Sue sewing on a button for our son David. Carol told him he should sew on his own button. David had a little chip on his shoulder for a while – Carol is hopeful that he has forgiven her.

In 1971, Carol and four of her friends, none whom had been admitted more than three years, established the first all woman's law firm. They were ecumenical; they paid their secretary in equal terms with their own compensation. One day the five of them were at dinner celebrating the settlement of a big case (some smoking) when one of them said, "Jan, your skirt is on fire!"

Carol told me she wanted to be the first woman president. So after I lost the primary, I met her weekly at Junior's for breakfast to counsel her on how to start a political career. First, I advised her to become the president of the Brooklyn Heights Reform Democratic club. After five or six weeks, I told her that there was nothing else I could tell her that she did not already know. Carol did become president of the club and her legal career ended in 1972 when she was elected to the New York Senate for the first of three terms. Later, she served for seven years as president of the New York City Council.

Thereafter, she was director of the Peace Corps from 1993-1995 and, in 1995, she became executive director of UNICEF.

While serving as its director, Carol doubled its resources from roughly $800 million in 1994 to more than $1.8 billion in 2004. As noted in a UNICEF publication in 2005:

> Under [Carol's] leadership, UNICEF became a champion of global investment in children, arguing that efforts to reduce poverty and build a more secure world can only be successful if they ensure that children have an opportunity to grow to adulthood in health, peace and dignity. She challenged leaders from all walks of life to recognize their moral, social, and economic responsibility to invest in children – and to shift national resources accordingly.

Presently, Carol is chair of the board of the U.N. Global Community Engagement and Resilience Fund, which globally supports local community initiatives to strengthen the resilience against violent extremist agendas.

Carol Bellamy has had an unparalleled career and continues to commit herself to improving the lives of children and women all over the world through education and pragmatic community based programs.

Carol Bellamy has had an unparalleled career and continues to commit herself to improving the lives of children and women all over the world through education and pragmatic community based programs. As a person, she is a real human being. At breakfast a few years ago, she said, "I have a cat but when I come back from a trip the cat just goes 'Ho humm, what are you doing here?' Someday I would like to have a dog who will jump all over me when I walk through the door." However, in her current position, she is unlikely to be in one place long enough to have a dog. I wish Carol all the best, and, someday, a dog.

Save the Date for These Upcoming Federal Bar Council Events

Privilege Under Siege Here and Abroad? The State of the Corporate Attorney Client Privilege (CLE) (December 5, 2017)

Sentencing Trends Under the Trump Administration (CLE) (December 11, 2017)

Special Counsel (CLE) (December 14, 2017)

The Judiciary Wants Diverse and Women Lawyers to Have Credible Roles in the Courtroom, Part 1 (CLE) (January 23, 2018)

NY Attorney General and NY Department of Financial Services 101 (CLE) (February 1, 2018)

Winter Bench & Bar Conference – Nevis, West Indies (February 10 – February 17, 2018)

Judges' Reception (March 15, 2018)

Law Day Dinner (May 2, 2018)

Summer Kick-Off Reception (June 6, 2018)

CLE program schedules and committee meeting schedules can be found on the Council's website

For more information, visit www.federalbarcouncil.org

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