

NLWJC-Sotomayor-Box0007-Folder00001

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Doug Band

Subseries:

OA/ID Number: 12754

FolderID:

Folder Title:
Sonia Sotomayor [2]

Stack:

V

Row:

6

Section:

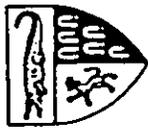
3

Shelf:

5

Position:

2



The Yale Law Journal

Volume 88
Number 4
March 1979

Statehood and the Equal Footing Doctrine:
The Case for Puerto Rican Seabed Rights

by

Sonia Sotomayor de Noonan

88 YALE L.J. 825

Reprint
Copyright © 1979 by
The Yale Law Journal Co., Inc.

Notes

Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights

In the near future, negotiations between Puerto Rico and the United States will probably explore statehood as an alternative to the island's current "commonwealth" status.¹ The island's dearth of land.

1. Commonwealth status means the island enjoys self-government in local affairs under its own constitution and association with the United States under the Puerto Rican Federal Relations Act of 1950, §§ 1, 4, 48 U.S.C. §§ 731(b), 731(c) (1970). For a discussion of the continuing debate concerning the nature of commonwealth status, see Cabranes, *Puerto Rico: Out of the Colonial Closet*, *Yonatan Post*, Winter 1978, at 66.

The island's ongoing economic difficulties have exacerbated dissatisfaction with the commonwealth arrangement and the island's political parties are voicing demands for a status change. See, e.g., Garcia Pausalacqua, *20 Years of Anticolonialism*, *San Juan Star*, Apr. 23, 1977, at 27, col. 2 (attacks on commonwealth status have brought "[c]olonialism in Puerto Rico" to "its deathbed"); *Puerto Rican Factions Hit Island Status*, *Wash. Post*, Aug. 19, 1977, at A1, col. 6 ("For the first time, virtually the whole spectrum of political opinion in Puerto Rico appeared before a U.N. committee . . . and criticized the island's commonwealth status.")

Statehood is currently the foremost alternative to the "fast collapsing" commonwealth. Garcia Pausalacqua, *Hispanic State or La Republica—II*, *San Juan Star*, Mar. 3, 1977, at 27, col. 2. The island's statehood parties since 1952 have received increasingly larger percentages of the vote, culminating in the 48.3% that they received in 1976. See Letter from Michael E. Vere, Director, Legal Counsel Section of the Office of the Commonwealth of Puerto Rico to José A. Cabranes, Lecturer in Law, Yale Law School (Mar. 28, 1978) (on file with *Yale Law Journal*). Although this percentage partly reflected protests against the island's economic state under the commonwealth party, the trend toward statehood is clear. *Puerto Rico: the oil issue*, 11 *LATIN AMERICAN POLITICAL LEX.* Feb. 4, 1977, at 38.

President Ford's New Year's Eve statehood proposal suggests some United States support for the statehood alternative. See *President Proposes Puerto Rican State; Urges U.S. Initiative*, *N.Y. Times*, Jan. 1, 1977, at 1, col. 6. Presidential-elect Carter indicated his willingness to support statehood "if the people who live there prefer that." *Carter Weighing Personnel to Fill Sub-Cabinet Jobs*, *N.Y. Times*, Jan. 2, 1977, at 1, col. 5 & 44, col. 5. A Gallup poll conducted in December 1976 found three out of every five Americans in favor of statehood for Puerto Rico, 39% on *Mainland Favor State in Gallup Inc. Poll*, *San Juan Star*, Jan. 5, 1977, at 1, col. 1.

A bid for statehood by Puerto Rico has increasingly been viewed as inevitable. See, e.g., *Puerto Rico Turnabout*, *Wash. Post*, Aug. 20, 1977, at A14, col. 1 (editorial) (although mainland has focused little attention on issue of statehood for Puerto Rico, "question is coming"); Ramon, *Has P.R. Passed The Point Of No Return?* *San Juan Star*, Jan. 15, 1977, at 19, col. 2 ("[I]sland's economic abandonment by the U.S. will inevitably result in its complete political absorption through statehood"). *Just see Nordheimer, Puerto Rico Is Torn by Dispute Over Seeking Statehood Status*, *N.Y. Times*, Apr. 30, 1978, at 1, col. 4 (statehood will not receive more than simple majority in plebiscite and Congress likely to reject statehood petition).

based resources and its ongoing economic stagnation and poverty.² coupled with the possibility of offshore oil and mineral wealth,³ will create political pressures for Puerto Rico to demand exclusive rights to exploit its surrounding seabed⁴ in an area ranging from nine to 200

2. See, e.g., Hoyt, *The Mineral Industry of Puerto Rico*, 2 Min. Y.B. 623, 624 (1974) (island's mineral production includes only cement, clay, lime, salt, sand and gravel, and stone); Lens, *Puerto Rico could become the United States' next Vietnam*, Dallas Times Herald, Aug. 14, 1977, at 1-1, col. 1 & 1-8, col. 1 (discovery of copper and nickel deposits may allay but will not cure island's economic problems).

3. Since the increase in oil prices in 1972, the island has been beset by serious economic difficulties. See, e.g., Nordheimer, *supra* note 1, at 56, col. 1 (Puerto Rico has become "welfare state", with 63 percent of the population qualifying for Federal food stamps); 60% of Puerto Ricans' Income Below Poverty Level, N.Y. Times, Jan. 1, 1977, at 5, col. 2 ("unemployment [over 30%], inflation and high taxes . . . have seriously crippled Puerto Rico's economy").

4. Studies have shown the possibility of oil and gas deposits from two to nine miles off the northern coasts of the island. The deposits could yield an estimated 200,000 barrels of oil per day, an amount sufficient to supply the island's current daily consumption of 140,000 barrels. Letter from Michael E. Veve, Director, Legal Counsel Section of the Office of the Commonwealth of Puerto Rico (Mar. 31, 1977) (on file with Yale Law Journal). Other reports have indicated strong possibilities of limestone or dolomite off the northern coasts. Western Geophysical Company, Evaluation of Hydrocarbon Prospects of the Island of Puerto Rico, Final Report 12 (Feb. 1975) (report to Puerto Rico Water Resources Authority) (on file with Yale Law Journal). Mobil Oil Corporation has offered to explore for oil in three northern coast locations. Licha, *Exploración en Tres Puntos*, El Nuevo Dia, Feb. 5, 1977, at 2, col. 1. The discovery of manganese nodules, pentacoated pellets each containing a wealth of cobalt, nickel, copper, and manganese, have reportedly been made within 200 miles of Puerto Rico's southern coast. Pasaluacua Christian, *Romero's miraculous fish oil—II*, San Juan Star, Mar. 19, 1977, at 24, col. 1.

5. Puerto Rico might also seek rights to conserve and manage fishing in a 200-mile economic zone, see note 116 *infra* (defining economic zone). The United States has recently declared such a zone. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 356 (codified at 16 U.S.C. § 1811 (1976)); cf. Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea, art. 56, 57, U.N. Doc. A/Conf. 62/W.P.10 (July 13, 1977) (recommending 200-mile exclusive economic zone over living and nonliving natural resources) (hereinafter cited as Composite Text). Although Puerto Rico's demands for rights over the seabed and over fishing management might involve a similar 200-mile limit, the two demands would involve different rights, responsibilities, and duties. Compare Convention on the Continental Shelf of the United Nations Conference on the Law of the Sea, art. 2, U.N. Doc. A/Conf. 13/L.55 (Apr. 29, 1958) (declaring rights to exploit continental shelf exclusive to coastal state) (hereinafter cited as Continental Shelf Convention) with Convention on Fishing and Conservation of the Living Resources of the High Seas of the United Nations Conference on the Law of the Sea, art. 7, U.N. Doc. A/Conf. 13/L.54 (Apr. 28, 1958) (requiring coastal state's right to impose regulations to conserve fish but prohibiting discrimination against foreign fishermen) (hereinafter cited as Fishing Convention).

Puerto Rico would likely seek the exclusive right to explore and exploit the natural resources of the seabed. See p. 845 *infra*. The federal government currently authorizes the Secretary of the Interior "to grant to the highest responsible qualified bidder" leases for the exploration and development of the submerged lands under national control. See Outer Continental Shelf Lands Act of 1953, § 205(a), 43 U.S.C.A. § 1337(a) (West Supp. 1978). A payment of royalty is required. *Id.* § 1337(b). Similarly, Texas authorizes a School Land Board to lease to the highest bidder the exploration and exploitation rights to its submerged lands. See Tax. N.Y. Reg. Code Ann. tit. 11, § 52.011, 019 (Vermon 1977). Louisiana, on the other hand, authorizes its State Mineral Board to issue leases to the bidder making the "bid most advantageous to the state." See La. R.V. Stat. Ann. § 30:127(a) (West Supp. 1978). In the Mining Law of 1975, P.R. Laws Ann. tit.

Puerto Rican Seabed Rights

miles into the sea.⁵ The inclusion of such a provision in Puerto Rico's compact of admission could be politically necessary and practically essential.⁶

Nevertheless, because such an agreement would grant the island

28, § 117(A) (Supp. 1977), the Secretary of Natural Resources of Puerto Rico is directed to obtain from leases of submerged lands "the highest financial return possible, consistent, however, with the widest possible exploitation or extraction of the commercial mineral." This history of exploitation of submerged lands indicates that the island would follow a leasing program if it were to secure the right to explore its seabed as a state.

5. There is presently considerable disagreement about whether Puerto Rico or the United States has the right to exploit the island's seabed resources. See *Puerto Rico: the oil issue*, *supra* note 1, at 97 (United States and Puerto Rico "waging a quiet but persistent struggle . . . over the island's title to offshore mineral rights"); Agrall, *Puerto Rico y la Tercera Conferencia de las Naciones Unidas Sobre el Derecho del Mar* (unpublished paper) (on file with Yale Law Journal) (history of island's efforts to secure rights over seabed at Third United Nations Conference on the Law of the Sea). In its Mining Law of 1975, P.R. Laws Ann. tit. 28, § 111 (Supp. 1977), the island claimed ownership of all exploitable commercial minerals in its continental shelf, which at present extend about 12 miles into the sea. Pasaluacua Christian, *Romero's miraculous fish oil*, San Juan Star, Mar. 9, 1977, at 16, col. 1. The United States failed to recognize this claim and Puerto Rico submitted a bill to Congress, H.R. 7827, 95th Cong., 1st Sess. (1977), still in committee, seeking jurisdiction, like that exercised by Texas and Florida, over three marine leagues (nine nautical miles). Pasaluacua Christian, *Island 'drift' in a lonely canoe*, San Juan Star, Mar. 6, 1978, at 15, col. 2.

6. Commonwealth supporters have been lobbying for Puerto Rico to claim control over the 200-mile economic zone recognized in the Composite Text, *supra* note 4, art. 56, 57. See, Bryan, *Cooked Cree la Isla Esid Perdido Oportunidad Para Que se Eribiese Limite Sobre sus Aguas Territoriales*, El Mundo, Feb. 21, 1977, at 11-9, col. 5; *RHC calls for pressure on U.S. to obtain rights to offshore oil*, San Juan Star, July 1, 1977, at 3, col. 1.

The United States has declared its rights over the continental shelf to the limits of its exploitability. (Outer Continental Shelf Lands Act of 1953, § 202, 43 U.S.C.A. § 1332 (West Supp. 1978)). In the Third Law of the Sea Conference, the United States proposed the recognition of a 200-mile economic zone, see note 116 *infra* (defining economic zone). In which coastal nations could exclusively exploit the natural resources of the seabed. Documents of the Second Committee, United States Draft Articles, 37 Third U.N. Conference on the Law of the Sea (Caracas, Venez.) 222, art. 1, 2, U.N. Sales No. E.75. V.5 (Aug. 8, 1974). Thus by the time the question of seabed for Puerto Rico is faced by Congress, the United States may well recognize a 200-mile shelf zone. Therefore Puerto Rico could at a minimum ask for control in the limit of exploitability, 12 miles, and at the maximum request the 200 miles being recognized by the international community. See Composite Text, *supra* note 4, art. 57.

6. It is unlikely that opposing political parties of the island would allow seabed negotiations to concede to the federal government Puerto Rican resources as valuable as those of the seabed. See, e.g., Pasaluacua Christian, *supra* note 3 (wealth resources have potential of "reducing and ending . . . dependence on Federal Aid Programs . . . [and it] would not look good for [Government] to be accused of giving away to the Federal Government Puerto Rico's [natural] resources and thus binding us over in the bondage of Federal debt forever"); *RHC Calls for Pressure on U.S. to Obtain Rights to Offshore Oil*, *supra* note 5 (former Governor calls on seabed government to demand 200-mile zone).

Seabed resources would add Puerto Rico in solving the economic difficulties exacerbated by its mineral deficiencies, especially in oil, see note 2 *supra*, and may be necessary to compensate for the increased economic burdens imposed by seabed. See UNITED STATES—PURATO RICO COMMISSION ON THE STATUS OF PUERTO RICO, HEARINGS ON THE STATUS OF PUERTO RICO, S. Doc. No. 108, 89th Cong., 2d Sess. 993-002 (1966) (Dr. Alvin Maynor (seabed) would require greater contribution to federal purse, and labor com would increase prohibitively if federal minimum wage law applied to island). *But see id.* at 623-95 (Arthur Burns) (seabed for Puerto Rico is economically feasible).

seabed rights denied to any of the fifty states at their admission to the Union,⁷ it would probably meet with opposition based on the "equal footing doctrine."⁸ That doctrine "prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded" when the state enters the Union.⁹ Although the Supreme Court in *Alabama v. Texas*¹⁰ held that Congress has the power under the property clause of the Constitution to grant existing states unequal seabed rights,¹¹

7. See pp. 825-33 *infra* (discussing *United States v. Texas*, 359 U.S. 707 (1959)), which vested seabed rights in federal government at state's admission because of equal footing doctrine).

8. See note 9 *infra*.

Another objection involves a possibility that the Puerto Rican government might seek to favor its citizens in granting rights to exploit the seabed. See Mining Law of 1975, P.R. Laws Ann. tit. 28, § 117(14) (Supp. 1977) (requiring every person who leases right to extract commercial minerals to agree that "insofar as economically possible, persons residing in Puerto Rico be employed for the work's origination and carried out under such lease, and that such persons be trained in such operations as require technical skills"). Puerto Rico as a state, however, would be subject to challenges of such actions based on the privileges-and-immunities and equal protection clauses. U.S. Const. amend. XIV, § 1; see, e.g., *Toussier v. Witell*, 354 U.S. 385, 395-403 (1948) (Smith Carrillo licensing scheme discriminating against nonresident fishermen declared invalid under privileges-and-immunities clause); *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 56-58 (D. Md. 1975) (Maryland statute requiring processors to have office in state contrary to equal protection clause). It is beyond the scope of this Note to discuss the propriety of such favoritism by a state toward its own citizens.

9. *United States v. Texas*, 359 U.S. 707, 719-20 (1959) (plurality opinion). The equal footing requirement first appeared in the Northwest Ordinance of 1787. See 1 *Two Documentary History of the Ratification of the Constitution* 168 (M. Jensen ed. 1976) (quoting Ordinance in full), as a condition demanded by Virginia for its cession of western lands to the Union. See Hanna, *Equal Footing in the Admission of States*, 3 *Baylon L. Rev.* 519, 523 (1951) (history of equal footing clause). Beginning with the admission of Tennessee in 1796, all states were admitted using the equal footing clause. *Id.* Congressional concern and belief in the necessity for "equality" of states was quite evident when Hawaii attempted, during its statehood negotiations, to secure control over the seabed between its islands and was rebuffed by equal footing arguments. See *Statehood for Hawaii: Hearings on S. 49, S. 31 & H.R. 3173 Before the Senate Comm. on Interior and Insular Affairs*, 85d Cong., 1st & 2d Sess., pt. 2, at 40-53 (1954) (history of Hawaii's demands and their resolution). Hawaii finally agreed to accept a condition in its act of admission that the Submerged Lands Act of 1953 "shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing states thereunder." *Id.*, pt. 3, at 725.

It seems probable that similar equal footing arguments will arise during Puerto Rico's negotiations over statehood because it is an often assumed that entering the Union would automatically require relinquishment to the federal government by the island of its rights to seabed resources. See, e.g., O'Toole, *Offshore Oil Issue Raised in P.R. Proposal*, *Wash. Post*, Jan. 2, 1977, at A2, col. 3 (President Ford's statehood proposal may have been motivated by desire to federalize island's offshore resources); Passatiqua (Christian, *supra* note 3) (island's rights over seabed would disappear if it became state; under statehood it would be entitled to only three miles under United States laws). Finally, precedent indicates that opposition by existing states or the executive might arise if the island were granted disproportionate rights. See notes 101 & 102 *infra*.

10. 317 U.S. 272 (1954) (per curiam).

11. *Id.* at 273; see U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

Puerto Rican Seabed Rights

the Court has not directly addressed the question whether the equal footing doctrine permits Congress to grant rights to an incoming state that exceed those granted to any existing state at its admission.¹²

This Note suggests a new historical analysis of the equal footing doctrine that demonstrates that the doctrine poses no barrier to such an extensive seabed grant upon Puerto Rico's admission into the Union. The Note defines the submerged lands issues left unsettled by the case law, and derives a framework for the equal footing doctrine from a historical analysis of submerged lands and equal footing cases. It then applies this framework to Puerto Rico's claims and demonstrates that Congress may, without violating the equal footing doctrine, cede seabed rights to the island on admission.¹³ Finally, the Note suggests considerations for the language of such an agreement and defines its limitations.

I. The Allocation of Seabed Rights

In a long line of cases,¹⁴ the Supreme Court has invoked the equal footing doctrine to vest control over the seabed in the federal government.¹⁵ Although their reasoning and results have been subjected to numerous criticisms,¹⁶ the cases retain their precedential value.¹⁷ The

12. See pp. 825-33, 838 *infra*.

A mere expectancy or even a promise of seabed control after admission would not be a sufficient guarantee for Puerto Rico as it commingles itself to the irrevocable status of statehood. Seabed rights are inextricably tied to the other economic and political issues surrounding Puerto Rican statehood. See note 6 *supra*. The grant of seabed rights must be simultaneous with admission. See Passatiqua (Christian, *supra* note 3) (admission to Union without full seabed rights would be "crucial test" on Puerto Rican people).

13. The present Governor of Puerto Rico, Carlos Romero Barcelo, has declared that if his party is returned to power in 1980, he will pursue a plebiscite for statehood the next year. *Newswatch*, Sept. 11, 1978, at 35. In order to make an objective and informed decision concerning their future, the Puerto Rican people need to understand the difference between the constitutional and the political prices that statehood would require. The equal footing framework developed in this Note can be applied to test the constitutional basis of any condition for admission demanded by Congress or by Puerto Rico.

14. See, e.g., *United States v. Texas*, 359 U.S. 707 (1959); *United States v. Louisiana*, 359 U.S. 699 (1959); *United States v. California*, 382 U.S. 19 (1947).

15. See pp. 831-33 *infra*.

16. See, e.g., Hanna, *The Submerged Land Cases*, 3 *Baylon L. Rev.* 201, 204 (1951) ("few judicial decisions . . . contrary to the expressed views of more well-informed lawyers"); Nauloka, *Title to Lands Under Negotiable Waters*, 32 *Maag. L. Rev.* 7, 37 (1948) ("United States Supreme Court is wrong . . . in holding that the Federal Government has paramount rights to the tidelands"). But see Clark, *National Sovereignty and Dominion Over Lands Underlying the Ocean*, 27 *Tul. L. Rev.* 140, 141 (1948) ("historical, political and practical" reasons exist for federal dominion over seabed).

17. See *United States v. Maine*, 420 U.S. 515, 519, 524 (1975) (reaffirming reasoning and results of cases vesting rights over seabed in federal government). A Special Master appointed by the Court to take and review evidence in *Maine* found that the historical conclusions of the submerged lands cases were correct. Report of Albert B. Maria, Special Master, at 75-81, *United States v. Maine*, 420 U.S. 515 (1975) (hereinafter cited as Special Master's Report). The Court in *Maine* accepted the Master's findings, 420 U.S. at 522-25.

cases merit careful analysis, because the Court has never explicitly decided whether the equal footing doctrine is a constitutional limitation on the power of Congress to set the terms for admission into the Union and, if so, whether this limitation precludes Congress from granting disproportionate seabed rights to an incoming state.

Until the 1940s, the leading authority concerning states' rights to control over the seabed was the 1845 case of *Pollard's Lessee v. Hagan*.¹⁸ *Pollard* held that because Alabama had been admitted to the Union on an "equal footing" with the other states, it was entitled to the same rights of sovereignty and jurisdiction over shorelands as were possessed by the original states.¹⁹ For over a century *Pollard* stood for the broad proposition that states owned title to all "navigable waters, and the soils under them"²⁰ within their historic boundaries.²¹ A series of Supreme Court decisions from 1947 to 1950, the *Tidelands Cases*,²²

18. 44 U.S. (3 How.) 212 (1845). In *Pollard*, the Court rejected plaintiffs' claim to certain shorelands based on a federal patent issued after Alabama's admission into the Union. Plaintiff had argued that the United States in Alabama's compact of admission retained ownership of the lands. *Id.* at 220-21.

19. *Id.* at 228-29. The Court held that, at the time of the American Revolution, "the people of each state became themselves sovereign," and possessed the absolute right to all navigable waters and soils within the colony. *Id.* at 229 (quoting *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842)). The independent colonies retained this sovereign right at the formation of the Union. *Id.*

The Court in *Pollard* also invoked the premise that the federal government could not permanently hold or condemn lands within the boundaries of a state without the state's express consent. *Id.* at 223. The Constitution reserved title to "shores of navigable waters, and the soils under them" to the original states. *Id.* at 250. Alabama was admitted on an equal footing, because the Court impeded to the state at the time of its admission ownership of and sovereignty over all lands that it did not explicitly cede to the federal government in its compact of admission. *Id.* at 223. The Court found that a provision reserving for the United States waste and unappropriated lands (public lands) did not include shorelands, and that a condition concerning freedom of navigable waters was only a "regulation of commerce" and did not confer property rights on the United States. *Id.* at 250. Therefore, the federal patent to plaintiff was invalid. *Id.*

It was not until 1875, in *Kohl v. United States*, 91 U.S. 367 (1875), that the Supreme Court held that the power of eminent domain was inherent in sovereignty and that, consequently, in order to implement its constitutional functions, the United States could condemn lands within a state without the state's consent. *Id.* at 373-74. In *United States v. Texas*, 359 U.S. 707 (1950), the Court plurality further held that an express state grant at admission was not necessary in order for a state to relinquish title to the United States. *Id.* at 718.

20. 44 U.S. (3 How.) at 250.

21. *Pollard* actually held that states owned title to all "shores of navigable waters, and the soils under them." *Id.* (emphasis added). Nevertheless, subsequent cases interpreted *Pollard* to mean that a state owned title to all tide waters and their beds within the state's territorial boundaries. See, e.g., *The Abby Dodge*, 223 U.S. 166, 175 (1912); *McCready v. Virginia*, 94 U.S. 391, 394-95 (1876). For a general history of cases relying on the *Pollard* rule, see *Naupaka*, *supra* note 16, at 21-37.

22. "Tidelands" is a misnomer given to three submerged lands cases—*United States v. Texas*, 359 U.S. 707 (1950), *United States v. Louisiana*, 359 U.S. 699 (1950), and *United States v. California*, 352 U.S. 19 (1947). See Hyder, *United States v. California*, 19 *Miss. L.J.* 265, 265 & nn.2-3 (1948) (*Tidelands Cases* involved lands under tide waters and not tidelands, lands covered and uncovered by ordinary tides).

Puerto Rican Seabed Rights

overtuned this broad reading of *Pollard*, but failed to provide a consistent or clear framework for evaluating subsequent equal footing claims.

In the first *Tidelands Case*, *United States v. California*,²³ the Court upheld the federal government's claim to all submerged land rights in the three-mile marginal seas claimed by California.²⁴ Because the original states had never acquired imperium (regulatory power) or dominium (ownership interest)²⁵ over the submerged lands of the marginal sea, and because California was admitted to the Union on an equal footing with the original states, the Court held that California had demonstrated no ownership of the claimed area.²⁷ *Pollard* was distinguished by the fact that acquisition, protection, and control of the three-mile marginal belt "has been and is a function of national external sovereignty."²⁸ Thus, lands in which "national interests" such as defense, commerce, and foreign affairs were dominant were deemed

23. 352 U.S. 19 (1947).

24. "Marginal sea" and "territorial sea" refer to the three-mile belt of water measured from the seaward edge of inland waters. See *United States v. Louisiana*, 394 U.S. 11, 22 (1969) (defining terms); *Manchester v. Massachusetts*, 159 U.S. 240, 258 (1895) (recognizing one league as minimum limit).

25. 352 U.S. at 34-36, 39-40. California argued that because the original states acquired title to the three-mile belt from the English Crown and because it had been admitted on an equal footing with the original states, it accrued to the same right of title over the submerged lands. *Id.* at 23. California also pleaded several defenses all of which the Court dismantled summarily. *Id.* at 23-24 & n.2, 39-40.

26. The California majority held that national interests required that the federal government have the "powers of dominion and regulation" over the marginal belt. *Id.* at 35. Justice Frankfurter, in dissent, used the terms "dominium" and "imperium." *Id.* at 43-44, to refer to what the majority labelled "dominion" and "regulation." He argued that although the majority was right in denying California a proprietary interest in dominium over submerged lands and in asserting that national interests conferred regulatory power on the federal government, the majority failed to explain how the federal government acquired dominium. *Id.* at 44. Justice Frankfurter's "imperium" and "dominium" terminology was later adopted by the plurality in *United States v. Texas*, 359 U.S. 707, 712-13 (1950).

27. 352 U.S. at 32, 38-39. Without an evidentiary hearing, the Court said that it could not conclude that "the thirteen original colonies separately acquired ownership of the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." *Id.* at 31 (footnote omitted). In *United States v. Maine*, 420 U.S. 515 (1975), a Special Master finally conducted a hearing on historical evidence, see Special Master's Report, *supra* note 17, at 25-63, and the Court explicitly found that the colonies had not owned the three-mile belt. 420 U.S. at 522. *Id.* see *Hardwick, Illig & Patterson, The Constitution and the Continental Shelf*, 26 *Tex. L. Rev.* 398, 406-26 (1948) (colonies and original states were landowners of submerged lands).

28. 352 U.S. at 34. The Court limited the *Pollard* rule to cover only state ownership of inland waters and soils under them (land between the lines of the ordinary high and low water marks). *Id.* at 36. The *Pollard* rule had been applied in other cases involving the marginal sea. See note 21 *supra* (citing cases). The *California* Court read those cases as involving only the right of states to regulate fishing in the absence of conflicting congressional legislation. 352 U.S. at 37-38.

to be within the "paramount rights" and powers of the federal government after the admission of a state into the Union.²⁹

Three years later, the Court followed *California "a fortiori"* in *United States v. Louisiana*,³⁰ and expanded its reasoning in *United States v. Texas*.³¹ Texas, as an independent republic, had claimed and exercised both imperium and dominium over submerged lands three marine leagues (nine nautical miles) from its shore.³² Texas argued that at its admission it ceded to the United States only imperium, and not dominium, to this area.³³ Justice Douglas, writing for the Court plurality, disagreed, holding that "although dominium and imperium are normally separable and separate,"³⁴ "national interests and national responsibilities" compelled federal control of both regulatory and property interests in the seabed.³⁵ Because it entered the Union on an equal footing with the original states,³⁶ Texas automatically lost all

29. 352 U.S. at 34-36, 38-39.

30. 359 U.S. 699, 705 (1950). Based on a 1938 state statute, Louisiana claimed control over the seabed within 27 miles of its shores. *Id.* at 703. The United States sought a declaration of its rights in the area. *Id.* at 701. The Court held that the federal government's sovereignty extended to the entire area claimed by Louisiana, even though no local claim to the seabed beyond three miles had been proven. *Id.* at 704-05. The Truman Proclamation of 1945, Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945), had declared United States "jurisdiction and control" over the continental shelf, but, as was explained in an accompanying release, Exec. Order No. 9633, 3 C.F.R. 437 (1945), the Truman Proclamation did not purport to vest title to the shelf in either the federal or state governments. *But see Note, Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 *Yale L.J.* 356, 379 (1947) (Supreme Court could use Truman Proclamation to vest title to shelf in federal government). It was not until three years after *Louisiana* that Congress declared it "to be the policy of the United States that the subsoil and seabed of the [shelf area outside the marginal sea] appertain to the United States." Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212, § 3, 67 Stat. 462 (codified at 43 U.S.C.A. § 1332 (West Supp. 1978)). Once again, as in *United States v. California*, 352 U.S. 19 (1947), the Court in *Louisiana* failed to explain how the federal government acquired dominium over the shelf. *See note 26 supra* (discussing *California* Court's failure to explain national acquisition of dominium).

31. 359 U.S. 707 (1950) (plurality opinion). The United States in *Texas* sought a declaration of rights over the submerged lands in the Gulf of Mexico bordering Texas. *Id.* at 709.

32. *Id.* at 712-13. The Court plurality assumed the validity of Texas's claim that it had exercised imperium and dominium over the three marine league belt as a Republic. *Id.* at 717.

33. *Id.* at 712-13. The intention to cede only imperium, Texas argued, was evidenced by the retention of vacant and unappropriated lands in its compact of admission. *Id.* at 714-15; see *Joint Resolution for Annexing Texas to the United States*, J. Res. 8, 26th Cong., 2d Sess. 797 (1845). The United States responded by arguing that Texas's grant of all property necessary to the public defense implicitly ceded the marginal belt to the federal government. 359 U.S. at 714-15.

34. 359 U.S. at 719 (footnote omitted).

35. *Id.*

36. Justice Douglas found the equal footing doctrine to control and bind the substance of admission even without the agreement of the state in the terms of the admission declaration. The Justice relied on the equal footing clause of the Joint Resolution for Annexing Texas to the United States, J. Res. 8, 26th Cong., 2d Sess. 797 (1845), to dispose

Puerto Rican Seabed Rights

seabed dominium to the federal government.³⁷

In 1953, Congress passed the Submerged Lands Act,³⁸ which vested ownership of the marginal sea and its resources in the states³⁹ and provided that states could claim a greater seaward boundary to a limit of three marine leagues in the Gulf of Mexico⁴⁰ if "it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."⁴¹ In a per curiam decision in *Alabama v. Texas*,⁴² the Court denied the motions of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act.⁴³ Alabama and Rhode Island claimed that by granting some Gulf states an extended boundary over the three miles to the three marine league limit, the Submerged Lands Act violated the equal footing guarantees in their acts of admission and resulted in their "inferior sovereignty."⁴⁴

The Court, which included only three members of the majority that had decided the *Tidelands* Cases, summarily upheld the Submerged Lands Act on the ground that Congress, under the property clause of the controversy, 359 U.S. at 719. Texas, however, was not admitted under that "Joint Resolution" but under the Joint Resolution for the Admission of Texas into the Union, J. Res. 1, 25th Cong., 1st Sess. 106 (1845). The latter resolution was never "submitted to me accepted by Texas." *Hanna, supra* note 9, at 520. The Court plurality later ordered the amendment of the Texas opinion to make correct reference to the proper document. *United States v. Texas*, 340 U.S. 848 (1950), 37, 359 U.S. at 718.

38. Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-1315 (1970)). The Act was intended to undo the effects of the *Tidelands* trial. *See S. Rep. No. 133, 85th Cong., 1st Sess. 8, reprinted in* [1953] U.S. Code Cong. & Ad. News 1474, 1481 ("purpose of [Submerged Lands Act] to write the law . . . as the Supreme Court believed it to be in the past—that the States shall own . . . all lands under navigable waters within their territorial jurisdiction"); H.R. Rep. No. 675, 85th Cong., 1st Sess. 5, reprinted in [1953] U.S. Code Cong. & Ad. News 1395, 1399 (Submerged Lands Act fixed as law that which prior to *California* "believed and accepted to be the law of the land"—that states own submerged lands within their boundaries). The Supreme Court viewed the Act as an exercise of Congress's power to dispose of public property, and not as a mandate to overturn the *Tidelands* Cases. *See United States v. Louisiana*, 363 U.S. 1, 7 (1960).

39. 43 U.S.C. § 1311(a) (1970).

40. *Id.* § 1301(b) ("in no event shall the term 'boundaries' . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico").

41. *Id.* § 1312.

42. 347 U.S. 272 (1954).

43. *Id.* at 273.

44. Complainant Alabama's Brief in Support of Motion for Leave to File Complaint and Complaint at 57-72; *Alabama v. Texas*, 347 U.S. 272 (1954) (Alabama grant extends only to three-mile belt; any greater grant to other states denies equal footing and results in making Alabama's sovereignty inferior); Brief for Complainant Rhode Island at 10; *Alabama v. Texas*, 347 U.S. 272 (1954) (Rhode Island claims Submerged Lands Act violates equal footing clause).

the Constitution, could divest itself of the "public domain."⁴⁵ Justice Douglas, the author of *Louisiana and Texas*, and Justice Black, the author of *California*, relied on the equal footing doctrine to argue that Congress had no authority to "relinquish elements of national sovereignty over the Oceans."⁴⁶ The new Court in *Alabama*, however, overruled *Texas* sub silentio by holding that Congress in a postadmission grant could separate property interests in the seabed from national sovereignty.⁴⁷ The Court subsequently confirmed Congress's power to cede federal "property" to states in unequal portions.⁴⁸ Recently, in *United States v. Maine*,⁴⁹ the Court reaffirmed the results of its *Title-Lands Cases* by upholding the paramount rights of the federal government to the continental shelf⁵⁰ outside the marginal sea.⁵¹ Thus it re-

45. 347 U.S. at 273.

46. *Id.* at 279 (Black, J., dissenting); see *id.* at 282 (Douglas, J., dissenting). Justice Douglas viewed federal powers over submerged lands as "incidents of national sovereignty" that could not be "abdicated" without undermining the equality of states the equal footing clause required. *Id.* at 282-83.

47. See 34 B.U.L. Rev. 504, 507 (1954) (*Alabama* "tacitly repudiated" *Texas*); cf. 50 U. Miami L. Rev. 203, 213 (1975) (Submerged Lands Act, granting seabed rights to states, is "de facto repudiation" of prior rationale for vesting control in federal government). *Texas* and *Alabama* indicate that the Court perceived a difference between a grant at admission and a grant after admission. The *Texas* plurality viewed seabed rights as so intertwined with sovereignty as to be inseparable at admission. Otherwise "there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States." 539 U.S. at 719. A seabed grant after admission, however, "was merely an exercise of" paramount national power. *United States v. Maine*, 420 U.S. 515, 524 (1975). This reasoning fails to explain the argument in *Texas* that in the case of seabed rights, property rights (luminium) follow and commingle with sovereignty (imperialium). 539 U.S. at 719. In effect, the underpinning of *Texas* was overturned because in *Alabama* the Court found property rights separate and separable from national sovereignty. *But cf.* p. 840 *infra* (harmonizing results of *Alabama* and *Texas*).

48. In *United States v. Louisiana*, 363 U.S. 3 (1960), and *United States v. Florida*, 363 U.S. 121 (1960), the Court recognized claims under the Submerged Lands Act by Texas and Florida for dominion over three marine leagues in the Gulf of Mexico, but denied similar claims by Louisiana, Mississippi, and Alabama. Texas and Florida showed that it was the intention of Congress to recognize the extended boundaries that existed at the time of Texas's admission to the Union and at the time of Florida's readmission after the Civil War. This showing of congressional intent was the sole element necessary to establish entitlement under the Submerged Lands Act. *United States v. Louisiana*, 363 U.S. 1, 29-30 (1960).

49. 420 U.S. 515 (1975). The defendants in *Maine* were the 13 states bordering the Atlantic Ocean. *Id.* at 516-17.

50. Continents shelves have typically been defined as those slightly submerged portions of the continents that surround all the continental . . . mass that forms the lands above water. They are that part of the continent temporarily (measured in geological time) overlain by the oceans. The outer boundary of each shelf is marked by a sharp increase in the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean depths.

H.R. Rep. No. 215, 83d Cong., 1st Sess. 6, reprinted in [1953] U.S. Code Cong. & Ad. News 1385, 1390.

51. 420 U.S. at 527-28.

Puerto Rican Seabed Rights

mains unclear whether the equal footing doctrine is a constitutional bar to a congressional grant of disproportionate seabed rights to an incoming state. In light of subsequent cases, it cannot be argued that the *Texas* decision settled this question.

II. The Equal Footing Doctrine: A Historical Reinterpretation

One reason the submerged lands cases seem confused or inconsistent is that the Court has never adequately defined the content or sources of the equal footing doctrine. The equal footing doctrine ultimately rests on concepts of federalism: the United States is a "union of political equals."⁵² Although superficially derived from a clause common in statehood compacts,⁵³ equal footing in this century has emerged as an amalgam of constitutional and statutory precepts. Constitutional principles alone act as an affirmative limitation on congressional power to negotiate terms in compacts of admission, but statutory precepts also guide courts as they interpret such compacts.

A. The Constitutional Component of the Equal Footing Doctrine

The Constitution provides that "[n]ew States may be admitted by the Congress into this Union."⁵⁴ Congress may, on "penalty of denying admission," require any conditions for entry into the Union.⁵⁵ Since the admission of Ohio in 1802,⁵⁶ Congress has imposed on states a variety of special conditions that have limited the sovereign and political powers that states can exercise after admission.⁵⁷ On the other

52. *Case v. Traftus*, 39 F. 750, 752 (C.C.D. Or. 1889). ("The doctrine that new states must be admitted . . . on an 'equal footing' with the old ones does not rest on any express provision of the constitution . . . but on what is considered . . . to be the general character and purpose of the union of the states . . . —a union of political equals.")

53. See p. 836 *infra*.

54. U.S. Const. art. IV, § 3, cl. 1. See generally Park, *Admission of States and the Declaration of Independence*, 33 *Temm. L.Q.* 403, 405 (1960) (five procedural methods by which states have historically been admitted).

55. *Coyle v. Smith*, 221 U.S. 559, 568 (1911); cf. *Brittle v. People*, 2 Neb. 198, 216 (1872) (how states will be admitted is political question to be settled by territorial residents and Congress—not courts).

56. See Enabling Act of Ohio, ch. 40, § 2 Stat. 173 (1802). Prior to Ohio's admission, Vermont, Kentucky, and Tennessee, the first three states added to the new union, were admitted without the imposition of conditions. See An Act for the admission of Tennessee, ch. 47, § 1 Stat. 491 (1796); An Act for the admission of Vermont, ch. 7, § 1 Stat. 191 (1793); An Act admitting Kentucky, ch. 4, § 1 Stat. 189 (1791). For an explanation of enabling acts and acts of admission, see Park, *supra* note 54, at 405 (enabling act authorizes constitutional convention whereas act of admission ratifies admission of state; act of admission need not be preceded by enabling act).

57. See note 40 *infra* (examples of conditions); Dunning, *Are the States Equal Under the Constitution?* 3 *Pourneau Sci. Q.* 425 (1888) (conditions imposed on incoming states in nineteenth century); Park, *supra* note 54, at 406-10 (conditions imposed in twentieth century).

capital before 1913.⁶⁴ The Court held that under the equal footing doctrine Congress cannot, as a condition of admission, either place limitations on the powers of a new state or demand the right to exercise powers over a new state not authorized by the Constitution.⁶⁵ The Court suggested for the first time that the equal footing doctrine derived its force not merely from the inclusion of an equal footing clause in acts of admission, but also from the constitutional imperative of equality among the states.⁶⁶ It asserted that the words "this Union" in Article IV of the Constitution⁶⁷ refer to "a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."⁶⁸

The holding in *Coyle* rested on notions of "dual federalism." Under this doctrine federal and state governments were viewed as fully independent in their respective spheres of power, with federal powers enumerated by Article I and all other powers reserved to the states by the Tenth Amendment.⁶⁹ As a result, Congress cannot in an act of admission diminish or impair the sovereign and political powers of an incoming state, including the power to designate its capital.⁷⁰

hand, since the admission of Tennessee in 1796,⁵⁸ Congress has included in each state's act of admission a clause providing that the state would enter the Union "on an equal footing with the original States in all respects whatever."⁵⁹ To eliminate the tension between "equal footing" clauses and the conditions limiting the sovereign and political powers of particular states after admission,⁶⁰ the Supreme Court in the nineteenth and early twentieth centuries held the conditions to be either valid exercises of Congress's commerce or property powers⁶¹ or state constitutional provisions that could later be removed by the amendment process.⁶²

Nevertheless, the Supreme Court struck down one such condition in 1911 in *Coyle v. Smith*.⁶³ The Court in *Coyle* upheld an Oklahoma statute moving the state capital from Guthrie to Oklahoma City against a challenge that the move violated the state's enabling act. Plaintiff, a property owner in Guthrie, claimed that the statute contravened a condition in the act under which the state had agreed not to move its

58. See An Act for the admission of Tennessee, ch. 47, 1 Stat. 491 (1796).

59. See Hanna, *supra* note 9, at 523-24. Prior to Tennessee's admission, Vermont and Kentucky were each "received and admitted into this Union, as a new and entire member of the United States of America." An Act for the Admission of Vermont, ch. 7, 1 Stat. 191 (1793); An Act Admitting Kentucky, ch. 4, 1 Stat. 189 (1793). This language is close to the equal footing terminology, although the phrase is not used explicitly.

60. In reviewing the conditions imposed on states, the nineteenth century scholar suggested that "the theory that all states have equal powers must be regarded as finally defunct." Dunning, *supra* note 57, at 452. Many of the conditions commonly imposed upon incoming states, such as the duties to keep navigable rivers toll-free for United States citizens and tax nonresident and resident proprietors equally, see, e.g., Enabling Act of Louisiana, ch. 21, § 3, 2 Stat. 641 (1811), were grounded in Congress's constitutional powers. Other less common conditions, such as requirements that state constitutions provide that government officials be literate in English, see, e.g., Enabling Act of New Mexico and Arizona, Pub. L. No. 61-219, § 2, 29 Stat. 557 (1910), or that polygamous marriages be prohibited, see, e.g., Enabling Act of Utah, ch. 138, § 3, 28 Stat. 107 (1894), did not involve matters that were generally viewed at that time as subject to federal regulation. See C. BRADB, AMERICAN GOVERNMENT AND POLITICS 459-72 (4th ed. 1926) (states in eighteenth and nineteenth century differed widely in self-imposed electoral requirements); C. CURTIS, ADMISSION OF UTAH: LIMITATION OF STATE SOVEREIGNTY BY COMPACT WITH THE UNITED STATES 17 (1887) (opinion pamphlet) (Constitution reserved to states power to control domestic relations, including polygamy; Utah's power limited because of terms of compact of admission).

61. U.S. CONST. art. I, § 8, cl. 3 (commerce clause); *id.*, art. IV, § 3, cl. 2 (property clause); see, e.g., United States v. Sandoval, 231 U.S. 28, 38 (1913) (conditions relating to regulation of affairs with Indian tribes within commerce power clause); *Serrano v. Minnesota*, 179 U.S. 223, 250 (1900) (provisions relating to federal property within power to dispose of property).

62. *Coyle v. Smith*, 221 U.S. 559, 568 (1911) (dictum); accord, *Brittle v. People*, 2 N.H. 196, 218 (1872); see *Minnesota, Provisions by a State of the Conditions of its Enabling Act*, 10 CALIF. L. REV. 591, 605 (1910) (Congress cannot "keep a State in tutelage after it comes into the Union"; state can always amend its constitution).

63. 221 U.S. 559 (1911).

64. *Id.* at 563-64; see Enabling Act of Oklahoma, Pub. L. No. 59-234, § 2, 34 Stat. 267 (1906). The condition was not included in the state's constitution but was adopted in a separate ordinance. 221 U.S. at 564-65.

65. 221 U.S. at 573.

66. *Id.* at 580.

67. U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . .").

68. 221 U.S. at 567.

69. The term "dual federalism" was coined by Professor Corwin. See E. CORWIN, THE TRULY OF THE SUPREMACY COURT 1 (1934). He used the term to describe the judicial approach to federalism that prevailed from the Taney Court to the New Deal. *Id.* at 50.

Many of the Supreme Court's decisions before the New Deal reflected dual federalist notions. See, e.g., United States v. Butler, 297 U.S. 1, 77-78 (1936) (Agricultural Adjustment Act unconstitutional because taxing power cannot be used for federal regulation in area reserved to states); *Hanneman v. Dagenhart*, 247 U.S. 251, 273-76 (1918), overruled, United States v. Darby, 312 U.S. 100, 116 (1941) (Act of 1918 to prevent interstate commerce in products of child labor unconstitutional as federal intrusion into state matters). See generally M. VILZ, THE STRUCTURE OF AMERICAN FEDERALISM 88 (1961) (under dual federalism, exercise of federal government's constitutional powers limited by state sovereignty; Tenth Amendment frequently invoked to curtail express congressional power); Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (federal and state governments are coordinate with and equal to one another).

70. 221 U.S. at 573 (sovereign and political powers of incoming states cannot be "constitutionally diminished, impaired or shorn away by any conditions, compact or stipulations" in acts of admission).

The equal footing doctrine, however, does not require the equality of states in the manner in which they exercise sovereign and political powers. For example, in such matters as powers delegated to the three branches of government or in local governments, the arrangements of the states vary substantially. Compare CAL. CONST. art. IV, V (delegating general powers to autonomous executive branch; relying externally on fed-

Conversely, the equal footing doctrine, based on notions of sovereign equality, might also prohibit the enlargement of the powers of particular states into areas granted by the Constitution to the national government. This inversion of the constitutional equal footing doctrine formed the basis for the Court's 1950 plurality decision in *United States v. Texas*.⁷¹ Although it did not explicitly hold that Congress could not expand the sovereign and political powers of an incoming state in a compact of admission, the Court plurality cited constitutional reasons as preventing "any implied, special limitation of any of the paramount powers of the United States in favor of a State."⁷²

Since 1957, the doctrine of dual federalism has been replaced by theories of "cooperative federalism." Under cooperative federalism, federal and state governments are viewed as sharing powers and functions, although national powers and interests take precedence over state sovereignty.⁷³ Consistent with this more expansive view of federal sovereignty, the plurality opinion in *Texas* suggested that the equal footing doctrine "prevents extension of the sovereignty of a State" into an area of paramount rights of the United States "from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States."⁷⁴

with *L. Compt. arts. III-VI* (containing specific and detailed delimitation of powers, duties, and organization of three branches and of local governments). Additionally, the courts have historically validated congressional power to control the formation and content of constitutional amendments. See *Id.* 835 *supra*. The equal footing doctrine permits each state after admission to choose to exercise the same degree of sovereign and political powers as every other state. *Cf. Case v. Toftun*, 39 F. 730, 732 (C.C.D. Or. 1889) ("true constitutional equality between the states . . . extends to the right of each . . . to have and enjoy the same measure of local or self government").

71. 339 U.S. 707, 719-20 (1950); see *Frost, Judicial Expansion of Seaward Boundaries Above Submerged Lands*, 16 N.Y.U. INT'L L. REV. 235, 242 (1961) (*Texas* plurality used concept of "concrete equal footing").

72. 339 U.S. at 717; see *Id.* at 718 (United States responsibilities with respect to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like" compel conclusion that United States' supremacy over seabed must be unbridled).

73. See Corwin, *supra* note 69, at 21 ("cooperative conception of the federal relationship"). Cases after 1957 have reflected the cooperative federalist notions. See, e.g., *Fry v. United States*, 421 U.S. 542, 547-48 (1975) (interference with state affairs by application of Economic Stabilization Act to state employees upheld as within national congressional exercise of power); *United States v. Darby*, 312 U.S. 100, 124 (1941) (Fair Labor Standards Act upheld even though it affected state sovereignty; national government can "present in all means for the exercise of a granted power"). See generally M. RUDOLPH, *The New Federalism* 21-23 (1972) (constitutional revolution of 1957 began view of federal and state cooperation in "running programs" and in "issuing statutes," as state powers no longer held to impede or limit national powers). The Court has, nevertheless, recently moved to limit notions of cooperative federalism. See National League of Cities v. Usery, 426 U.S. 833 (1976) (Tenth Amendment affirmative limit on commerce power when legislation infringes on state sovereignty).

74. 339 U.S. at 719-20 (citation omitted).

The *Texas* plurality, however, returned to a model of dual federalism by assuming that exclusive federal control over the seabed was necessary.⁷⁵

The Court in *Alabama v. Texas*⁷⁶ was misguided in not addressing the constitutional equal footing arguments.⁷⁷ The reasoning in *Texas* required the *Alabama* Court to determine whether the Submerged Lands Act undermined the constitutional "equality of States" so as to make them "different in [the] dignity and power" that they share as co-equal members of the Union.⁷⁸ Because the *Alabama* Court did not consider the constitutional language in *Texas*, the latter opinion should not be understood to bar affirmative congressional actions that vest seabed rights in some states that are greater than those enjoyed by other states.⁷⁹

B. *The Statutory Component of the Equal Footing Doctrine*

Ultimately, the holding in *United States v. Texas*⁸⁰ must be viewed as turning on statutory, not constitutional interpretation. Although the Constitution guarantees sovereign equality to the states, it does not ensure their economic or proprietary equality. Because state sovereignty includes the right to acquire and to dispose of property,⁸¹ and because the Constitution gives Congress plenary power to grant federal lands to the state,⁸² equality either in size or in percentage of public lands held among the states would be unrealistic.⁸³ Acts of admission,

75. Under dual federalism, federal and state governments were viewed as co-equal, supreme in their independent spheres. See p. 837 *supra*. The plurality, by coalescing imperium and dominium, returned to a view of separate and independent spheres of government, which was a touchstone of dual federalism thinking.

76. 347 U.S. 272 (1954) (per curiam).

77. See note 47 *supra* (Court may have believed that there was no equal footing issue involved in post-admission grants); *Alabama v. Texas*, 347 U.S. 272, 291 (1954) (Douglas, J., dissenting) (Court treated equal footing as "trivial and insubstantial").

78. *United States v. Texas*, 339 U.S. 707, 720 (1950) (plurality opinion) (quoting Corie v. Smith, 221 U.S. 559, 566 (1911)).

79. At most, constitutional principles merely create a rebuttable presumption that state compact of admission grant equal seabed rights. See p. 840 *infra*.

80. 339 U.S. 707 (1950).

81. This right is equal, in the absence of constitutional or statutory limitations, to that of an individual disposing of land. See, e.g., *South San Joaquin Irrigation Dist. v. Neumiller*, 2 Cal. 2d 485, 489, 42 P.2d 64, 66 (1935); *Bjork v. Arden*, 203 Minn. 501, 503, 281 N.W. 965, 968 (1939).

82. U.S. CONST. art. IV, § 3, cl. 2 (property clause); see *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam) ("The power over the public land thus entrusted to Congress is without limitations.")

83. States currently vary widely in geographical size and in the extent to which the federal government owns public lands within their boundaries. See, e.g., BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 197, 227 (1977).

Moreover, reveal a wide variation in the property rights possessed by particular states upon their entry into the Union. Texas and Florida, for example, came into the Union with generous grants of public lands, but most other states have received very limited property grants from Congress in their compacts of admission.⁸⁴

Interpreting the statement in *Texas* that the equal footing doctrine has a "direct effect on certain property rights,"⁸⁵ specifically on the right to exploit submerged lands, remains a problem. This finding can be harmonized with the holding in *Alabama v. Texas*⁸⁶ only if *Texas* is understood to have involved statutory interpretation of the equal footing clause in the state's act of admission.⁸⁷ The act did not discuss the submerged lands issue, so the *Texas* plurality faced the question whether the state could retain prior title by implication. The Court plurality held only that the Constitution prevented such an implication, not that Congress could not, if it had so desired, have made an explicit grant of title.⁸⁸ The constitutional language supported the plurality's presumption that Texas had no greater property rights than other states. Such a presumption could have been rebutted by a showing of an express provision in the compact of admission that vested dominion in the incoming state.⁸⁹

The Court in *Pollard's Lessee v. Hagan*⁹⁰ held that property rights to the beds of inland waters belong to the states.⁹¹ The *Tidelands Cases* reached the opposite result for offshore lands, because "national in-

84. Unlike other states, Texas was allowed to retain its vacant and unappropriated lands. This retention was permitted in order that the state would be able to pay the debts and liabilities it had incurred as a Republic. Joint Resolution for annexing Texas to the United States, J. RES. 8, 28th Cong., 2d Sess. 707 (1845); see P. GATTS, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 316 (1968) (at admission, Florida was granted 62%, Louisiana 38%, and Alaska 28% of public land areas with remainder retained by federal government).

85. 339 U.S. at 716 (plurality opinion).

86. 347 U.S. 272 (1954) (per curiam).

87. See United States v. Texas, 339 U.S. 707, 715 (1950) (plurality opinion) (plurality held that dominion over Texas's seabed vested in federal government because "equal footing" clause of the Joint Resolution admitting Texas to the Union signifies "... the concurrency" of control over area).

88. See P. 838 *supra*.

89. The *Texas* plurality found that Texas's historical proof of dominion, while a Republic, over its three marine leagues seabed was insufficient to overcome the presumption that such dominion had been relinquished. United States v. Texas, 339 U.S. 707, 717-18 (1950). Subsequently, the *Alaska* Court held that Congress had exercised its "paramount national power" by transferring seabed rights to the states in the Submerged Lands Act. United States v. Maine, 429 U.S. 515, 524 (1975). It thus appears that Congress can abrogate federal control over the equal footing doctrine over the seabed involving any state by an express provision in the compact of admission.

90. 44 U.S. (3 How.) 212 (1845).

91. *Id.* at 230; see P. 830 *supra*.

Puerto Rican Seabed Rights

terets, responsibilities, and therefore national rights are paramount."⁹² The *Alabama* Court assumed, without so deciding, that seabed rights were mere property rights.⁹³ The failure of the *Alabama* Court lay in not overturning the holding in the *Tidelands Cases* that seabed rights were interests "so subordinated to political rights as in substance to coalesce and unite in the national sovereign."⁹⁴ By upholding the federal power to cede submerged lands, the *Alabama* Court overturned the reasoning of *Texas*⁹⁵ that although "dominium and imperium are normally separable and separate," in some cases "property interests are so subordinated to the rights of sovereignty as to follow sovereignty."⁹⁶ No apparent reason exists to allow the separation of property from sovereignty in statutes like the Submerged Lands Act, while preventing such a separation in acts of admission. Therefore, the constitutionally based presumption of federal control over the seabed imposed by the equal footing doctrine can be overcome. Puerto Rico need only secure Congress's agreement to an express grant in its act of admission.

III. Seabed Rights as Property Rights

The Court has ruled that a grant of three marine leagues to some states does not undermine the constitutional equality of states.⁹⁷ The question remains whether a congressional grant of seabed rights of 200 miles to Puerto Rico on admission to the Union would be an unconstitutional "subtraction in favor of" Puerto Rico "from the national sovereignty of the United States."⁹⁸ Such a grant would not, however, compromise national supremacy,⁹⁹ for the right to exploit the seabed, under both American and international law, is alienable.¹⁰⁰ Such a

92. United States v. California, 332 U.S. 19, 36 (1947); see United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion); United States v. Louisiana, 339 U.S. 699, 704 (1950).

93. 347 U.S. at 273 (per curiam).

94. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

95. See P. 834 *supra*.

96. 339 U.S. at 719 (plurality opinion) (footnote omitted). But cf. P. 840 *supra* (discussing results of *Alabama* and *Texas*).

97. *Alabama v. Texas*, 347 U.S. 272, 273-74 (1954) (per curiam) (upholding constitutionality of Submerged Lands Act).

98. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

99. To avoid confusion, this discussion will use national "supremacy" in refer to the sovereignty in the federal as against the state governments. This concept involves federal supremacy in the areas designated by the Constitution. The word "sovereignty" in the international sense denotes the primary powers of individual nations as against one another and will be used as such throughout this discussion.

100. See P. 834 *supra*; P. 843 *infra*.
The Commonwealth of Puerto Rico can claim the American right to explore and exploit its seabed under international law. The Continental Shelf Convention, *supra* note

grant should be upheld against any equal footing challenge by other states¹⁰¹ or by the Justice Department.¹⁰²

Congress, a court should hold, can alienate seabed rights in any way it chooses. It may, for example, make such an express provision in a compact of admission, because a commingling of sovereignty with property rights is no more essential in the 200-mile zone than it is in the smaller zone at issue in *Alabama v. Texas*.¹⁰³ Any other conclusion would be at odds with principles of American and international law that have recognized not only the difference between imperium and dominium over the seabed, but also the difference between sovereignty over the sea and sovereignty over the seabed.¹⁰⁴

The Truman Proclamation,¹⁰⁵ the first claim by a major coastal nation to rights over the continental shelf and its resources,¹⁰⁶ avoided use of the word "sovereignty" and only referred to "jurisdiction and control" in order to signify that the United States' claim extended only to the right to exploit the resources of the shelf, not to sovereignty

4, which the United States has ratified, states that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources." *Id.* art. 2(1). In the *North Sea Continental Shelf Cases*, the International Court of Justice held that the right to explore the continental shelf and exploit its natural resources was inherent in the coastal State—the rights estab- "ipso facto and ab initio." [1969] I.C.J. 4, 22. One study has concluded that the current United States claim to the continental shelf of the Commonwealth departs from prevailing international law and practice under which overseas departments and associated states, without representative votes in metropolitan governments, exercise control over the coastal seabed. F. JAMES, *CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES* 27-29 (1978).

A coastal State's exclusive right to exploit the seabed does not preclude it from transferring its right, as long as the consent is express. Continental Shelf Convention, *supra* note 4, art. 2(2). Therefore, under international law, Puerto Rico and the United States can agree in a compact of admission who will receive the benefits of exploiting the seabed. See *Submerged Lands Act: Hearings on S.J. Res. 17, S. 294, S. 107, S. 107 Amend., S.J. Res. 18 Before the Comm. on Interior and Insular Affairs, 85d Cong., 1st Sess. 1066 (1955)* (Jack Tate, Deputy Legal Adviser, Dept. of State) (international community unconcerned about way United States divides its rights over seabed with states) (hereinafter cited as *Hearings on Submerged Lands Act*).

101. In *Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam) states challenged a disproportionate grant of seabed rights to other states. See p. 833 *supra*.

102. The Justice Department brought the submerged lands cases challenging the right of Gulf states to the three marine leagues limit. See *United States v. Florida*, 363 U.S. 121 (1960); *United States v. Louisiana*, 363 U.S. 1 (1960). The executive need not agree with a congressional grant of seabed rights to a state and could therefore seek to overturn a congressional grant in a compact of admission. Cf. Veto of Bill Concerning Title to Offshore Lands, 1952-1953 Pub. Papers 379 (Truman veto of first Submerged Lands Act), 103, 347 U.S. 272 (1956) (per curiam).

104. See Daniel, *Sovereignty and Ownership in the Marginal Sea*, 3 *BAYLOR L. REV.* 243-56 (1951) (distinction between ownership of seabed and sovereignty over waters, and dual rights in marginal sea).

105. Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945).

106. See A. Sinjela, *Land-Locked States and the Contemporary Ocean Regime 303-05* (1978) (unpublished J.S.D. dissertation, Yale Law School) (on file with *Yale Law Journal*) (prior to 1945, few claims to continental shelf made and those made largely concerned with fishing conservation).

Puerto Rican Seabed Rights

over the sea.¹⁰⁷ Both Congress and executive officials premised the Submerged Lands Act on the separability of national supremacy and property rights over the seabed.¹⁰⁸ Finally, the separability of property and full sovereignty rights in the high seas was recently evidenced by American creation of a 200-mile zone of "exclusive fishery management authority," in which the United States claimed the power to regulate one resource of the high seas without asserting sovereignty over the area.¹⁰⁹

The Court in *United States v. California*¹¹⁰ viewed the possibility of international obligations concerning the seabed as bolstering the necessity for national control of the area.¹¹¹ The international community, however, has generally followed the American view that sovereign rights over the high seas are separate from exploitation rights over the resources of sea lands.¹¹²

Article 2 of the Continental Shelf Convention of the 1958 Geneva Convention on the Law of the Sea accorded to coastal states the exclusive power to exercise "over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."¹¹³ The Informal Composite Negotiating Text of the ongoing Law of the Sea Conference incorporates the same provision of coastal state right to explore the shelf.¹¹⁴ Neither provision in any way prevents a coastal state from consenting to alienate these rights.¹¹⁵ The Composite Text

107. Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945); *id.* ("The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.")

108. See, e.g., *Hearings on Submerged Lands Act*, *supra* note 100, at 512-14 (Douglas McKay, Secretary of Interior) (United States controls submerged lands, regardless of property rights); S. Rep. No. 133, 85d Cong., 1st Sess. 5-6, reprinted in [1953] U.S. CODE CONG. & AD. NEWS 1474, 1479 (Submerged Lands Act grants property rights, not constitutional rights). But see pp. 846-47 *infra* (federal government by invoking eminent domain can recapture any seabed grants).

109. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101-102, 90 Stat. 356 (codified at 16 U.S.C. §§ 1811-1812 (1976)).

110. 310 U.S. 19 (1947).

111. *Id.* at 35.

112. See 4 M. WHITMAN, *DECRET OF INTERNATIONAL LAW 789-823* (1963) (development and acceptance of continental shelf doctrine). Some nations continue to claim that the shelf is inseparable from the high seas and therefore not subject to appropriation. See 2 Third U.N. Conference on the Law of the Sea (Caracas, Venez.) (18th mtg.) 152, U.N. SALVA No. E. 775, v.4 (July 29, 1974) (Mr. Upadhyaya, Nepal delegate). Other nations have claimed sovereignty over both the shelf and the high seas. See 1 S. LAY, R. CHIRACILLI & M. NANOQUIST, *NEW DIRECTIONS IN THE LAW OF THE SEA 15-16* (1975) (Brazilian claim of complete sovereignty).

113. Continental Shelf Convention, *supra* note 4, art. 2(1); see *id.* art. 1 (right to exploit shelf to limits of exploitability); *id.* art. 3 ("rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas").

114. Composite Text, *supra* note 4, arts. 76, 77(f) (coastal state right to exploit seabed up to distance of 200 nautical miles).

115. See *id.* art. 77(g) (rights to shelf exclusive unless exploration consented to by coastal state); Continental Shelf Convention, *supra* note 4, art. 2(f) (*ibid.*).

also proposes the creation of a 200-mile economic zone¹¹⁶ under which coastal states have absolute rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and sub-soil and the superjacent waters."¹¹⁷ In short, the right to exploit the seabed, properly defined, is simply a property right not necessarily commingled with national supremacy. Thus a grant to Puerto Rico of seabed rights at admission would not be a "subtraction in [its] favor . . . from the national sovereignty of the United States."¹¹⁸

IV. Seabed Grant Proposal and Its Limitations

The equal footing doctrine's rebuttable presumption of national property rights to the seabed makes the right to exploit seabed resources a negotiable condition in Puerto Rico's bargaining for admission.¹¹⁹ Therefore Puerto Rico should seek a specific grant of seabed rights in a compact of admission. The federal government can, however, constitutionally regulate or terminate the rights to exploit the seabed secured in a compact. The main protection available for the island against a "taking" of its seabed rights is an explicit calculation of just compensation in its compact of admission.

116. The economic zone is an area "200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Composite Text, *supra* note 4, art. 57. In the economic zone the coastal state has absolute rights of exploitation, *see note* 117 *infra*, and jurisdiction for purposes of research, environmental preservation, and construction, *see Composite Text, supra* note 4, art. 56(j)(b).

117. Composite Text, *supra* note 4, art. 56(l)(a). Control over the economic zone and control over the continental shelf involve a concomitant 200-mile limit. *See id.*, art. 57, 7d. Although sovereign rights for exploitation purposes are absolute in the shelf, *see id.*, art. 77(2), coastal states nevertheless have an affirmative duty under certain conditions to give access to other States in the economic zone, *see, e.g., id.*, art. 69 (land-locked state's right to participate in exploitation of economic zones of adjoining coastal states).

118. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

119. Puerto Rico's bargaining position would be strengthened if it could establish ownership of the seabed as a commonwealth. *See notes* 5 & 100 *supra* (controversy over ownership of island's seabed); island's right to continental shelf under international law. (Congress's grant to the states in the Submerged Lands Act of 1953, Pub. L. No. 83-51, § 3, 67 Stat. 30 (codified at 43 U.S.C. § 1311(a) (1970)), was motivated by a desire to restore historic title to the states. *See note* 38 *supra*. Historic title is not, however, necessary to Puerto Rico's demands: congressional power to cede federal lands is "plenary" and "without limitation." Alabama v. Texas, 347 U.S. 272, 273-74 (1954) (per curiam). In concluding the Submerged Lands Act, the Court relied on historic title to the seabed only in searching for congressional intent to grant submerged lands to the state at admission. *See note* 48 *supra*. Federal control of the island's seabed resources while it remains a commonwealth would not bar the island from claiming the resources at the time it seeks admission.

Puerto Rican Seabed Rights

A. Considerations for a Specific Grant

Puerto Rico may seek to include in any compact of admission language granting the island the right to explore and exploit the natural resources of the seabed to the extent recognized by the international community.¹²⁰ In order to ensure that the grant of seabed rights to Puerto Rico will be sufficiently specific, the language used in other grants of seabed rights should be replicated:¹²¹ "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals,"¹²² including sand, gravel or coral,¹²³ and all other living organisms sedentary to the seabed.¹²⁴ Puerto Rico's demand should seek to encompass all rights recognized by the United States in international agreements.¹²⁵ The grant should also follow the Submerged Lands Act in affirming the imperium rights of the United States.¹²⁶

120. Current international law favors the recognition of sovereign rights over 200 miles of seabed. *See Composite Text, supra* note 4, arts. 56, 57. At minimum, Puerto Rico could seek the right to explore its seabed to the limits of exploitability, *see note* 5 *supra*, a right recognized in the Continental Shelf Convention, *supra* note 4, art. 1, which the United States has ratified. Ratifications and Accessions to the Convention, U.N. Doc. ST/LEG/S Rev. 1 (Apr. 12, 1961).

121. It is beyond the scope of this Note to propose the exact language of a seabed grant. Such language will require extensive negotiations because many problems of delimitation and jurisdiction exist. Cf. Note, *Jurisdiction Over the Seabed: Persistent Federal-State Conflicts*, 12 *U.S. L. Ann.* 291, 297-99 (1976) (establishment of baselines from which to measure state control, shifting of coastlines, and pollution and environmental controls are issues currently in dispute between federal and state governments). In addition, if the United States were to sign an international agreement such as the Composite Text, *supra* note 4, before the island's bid for statehood, the language of a seabed grant would have to account for any international obligations the federal government had incurred.

122. Submerged Lands Act of 1953, § 2, 43 U.S.C. § 1301(c) (1970).

123. In the Conveyance of Submerged Lands in Territories Act of 1974, Pub. L. No. 93-455, § 1, 88 Stat. 1210 (current version at 48 U.S.C. § 1705(a) (Supp. V 1975)), the United States gave Guam, the Virgin Islands, and American Samoa title to their marginal sea. The grant excepted oil, gas, and other minerals from the grant but included "coral, sand and gravel." The inclusion of both minerals in the proposed grant would leave no doubt as to the meaning of Puerto Rico's demands for "mineral resources."

124. Composite Text, *supra* note 4, art. 77(f) (natural resources of shelf include "living organisms belonging to sedentary species").

125. The rights would include those agreed upon in the Composite Text, *supra* note 4, which has already been ratified in the United States, *see note* 120 *supra*.

126. Submerged Lands Act of 1953, § 6, 43 U.S.C. § 1314(a) (1970):

[T]he United States retains all its navigational, scientific and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and national resources . . . vested in . . . the respective States. . . . Congress viewed this section as superfluous, but included it in the Act to safeguard against

B. *The Limits of a Grant to Exploit Seabed Resources*

The seabed is directly related to federal exercise of powers over national defense, the conduct of foreign affairs, world commerce, and navigation.¹²⁷ In order to effect these constitutional powers, Congress is empowered both to enact laws regulating the seabed¹²⁸ and to take state submerged lands.¹²⁹ Congress can, therefore, subsequently regulate or take back in exercise of its constitutional powers any right that it might grant to Puerto Rico in its compact of admission.

Such regulation or taking after admission is highly probable. Federal energy and environmental policies have recently led Congress to regulate seabed mining.¹³⁰ Treaties involving the seabed will likely limit exploitation by guaranteeing freedom of navigation and cable placement.¹³¹

The one safeguard that would be available to Puerto Rico if Congress were to take back seabed rights granted in a compact of admission is that provided by the Fifth Amendment: any taking by the federal government to execute its constitutional powers must include just compensation.¹³² If the federal government acquires ownership of the

the national sovereignty concerns expressed in the *Tidelands Cases*. See *Hearings on Submerged Lands Act*, supra note 100, at 1368 (Sen. Jackson) ("[T]he constitutional provision . . . is purely surplus language. If we have exclusive rights under the Constitution, there is nothing we can do to change it.")

127. The relation of the seabed to the exercise of these important federal powers is evidenced by the difficulties that concerns with military defense, foreign affairs, commerce, and navigation created in developing a consistent United States policy on the law of the sea. See Hollick, *Bureaucrats at Sea*, in *New Era of Ocean Politics* 1-2 (A. Hollick & R. Osgood eds. 1974) (law of the sea encompasses complex array of issues that resulted in shifting American policies).

128. See, e.g., United States v. *Randall*, 389 U.S. 121, 123 (1967) ("power to regulate navigation confers upon the United States a 'dominant servitude' that empowers it to take submerged lands without compensation"); United States v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961) (similar).

129. See, e.g., *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 315 U.S. 508, 534 (1941) (Congress empowered to take state's submerged lands in exercise of commerce power); *California v. United States*, 395 F.2d 201, 268 (9th Cir. 1968) (United States can condemn state's submerged lands but must pay compensation; lands not valueless because submerged and unused).

130. See 43 U.S.C.A. § 1348 (West Supp. 1978) (safety regulations for exploitation of outer continental shelf).

131. See *Compulsory Tonnage Act*, supra note 4, art. 58 (freedom of navigation in economic zone guaranteed by coastal states); *id.*, art. 79 (right to lay submarine cables and pipelines on continental shelf given to all signatories).

132. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"). Although it need not compensate states for submerged lands taken for the purpose of regulating navigation, see note 128 supra, the federal government must provide compensation for the condemnation of state property for any other public purpose. See, e.g., *United States v. Carmack*, 329 U.S. 290, 242 (1946); *California v. United States*, 395 F.2d 201, 263-64, 264 n.5 (9th Cir. 1968).

Puerto Rican Seabed Rights

Puerto Rico seabed or regulates it so as to constitute a "taking."¹³³ Puerto Rico should be reimbursed. Although environmental or navigational limitations are likely to be viewed as regulation and therefore noncompensable,¹³⁴ American alienation of seabed rights by treaty should be treated as a taking.¹³⁵

Even though there must be compensation for any taking, Puerto Rico's property interest in the seabed might be undervalued. To enforce the constitutional mandate of just compensation, courts rely on "the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking."¹³⁶ The "highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future" must be considered in determining the fair market value.¹³⁷ Future use must be within a reasonable time,¹³⁸ based on a known and provable market,¹³⁹ and exploitable without substantial expenditure of capital.¹⁴⁰ An owner, such as Puerto Rico, would be compensated for the "highest and most profitable use" to which it put its seabed at the time of taking. The

133. Although public regulation can reduce market value of private land without compensation, see, e.g., *Village of Euclid v. Ambler Realty Co.*, 372 U.S. 365 (1926) (upholding zoning ordinance as within state's police power), an owner must be compensated if deprived of all reasonable economic use for the property regulated, see *Costello, "Fair Compensation and the Accommodation Power: Antidotes for the Taking Impulse in Land Use Control"*, 75 *COLUM. L. REV.* 1021, 1051 (1975) (under reasonable beneficial use test, landowner allowed reasonable economic returns on property). See generally C. Braccia, *Land Ownership and Use* 630-31 (2d ed. 1975) (lower proposals commonly used to reconcile "police power vs. taking").

134. See *United States v. 422,978 Square Feet of Land*, 445 F.2d 1190, 1194 n.7 (9th Cir. 1971) (history of Supreme Court cases holding regulation for navigational purposes noncompensable); cf. *Dunham, A Legal and Economic Basis for City Planning*, 56 *COLUM. L. REV.* 650, 668-67 (1958) (regulation to prevent public harm within police power and noncompensable).

135. Cf. *United States v. 50 Feet Right of Way or Servitude, In, Over and Across Certain Land*, 337 F.2d 956, 960 (5d Cir. 1964) (taking of land for pipeline to aid navigation noncompensable; compensable if taken for any other reason).

136. *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (footnote omitted); see *Danforth v. United States*, 308 U.S. 271, 283 (1939) (just compensation means value at time of taking).

137. *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969); see *Olson v. United States*, 292 U.S. 246, 255 (1934) ("highest and most profitable use" test).

138. See note 137 supra (citing cases).

139. *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969); *Mills v. United States*, 363 F.2d 78, 81 (8th Cir. 1966). Evidence of minerals may be used in determining the market value of land, but future demand for the mineral must have some objective support. "Merely physical adaptability to a use does not establish a market." *United States v. Whitehurst*, 337 F.2d 768, 771-72 (4th Cir. 1964) (footnote omitted).

140. *United States v. 1,291.83 Acres of Land*, 411 F.2d 1081, 1084 (6th Cir. 1969); *United States v. 2,035.04 Acres of Land*, 350 F.2d 646, 648 (6th Cir. 1964). The mere existence of mineral deposits is not sufficient; the minerals must be exploitable. See *Mills v. United States*, 363 F.2d 78, 81 (8th Cir. 1966).

minerals of the submerged land would be treated as one element affecting the market value of the lands taken, but would not be separately valued.¹⁴¹ Puerto Rico would not be compensated for the quantity of minerals in the lands or for any unknown minerals the lands contained.¹⁴²

Puerto Rico and the United States could agree that compensation be provided for those losses that courts normally find noncompensable, and could provide at admission a formula for calculating the compensation. The federal right to eminent domain cannot be abridged by contract,¹⁴³ but the "Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. . . . Nor does it bar them from embodying that agreement in a contract. . . ."¹⁴⁴

Various methods of adjusting the constitutional measure of just compensation could be devised. For example, a simple reasonable return above fair market value could be agreed on to compensate for any unknown uses of the lands at the time of the taking. Second, the quantity and quality of minerals in the lands could be estimated at the time of taking and then multiplied by a fixed price per unit agreed on in the compact of admission.¹⁴⁵ A court could be directed in the compact of admission to determine the future income stream by this multiplication method, then subtract expected cost of production—in essence, to capitalize profits.¹⁴⁶ Puerto Rico could demand that this capitalized estimate serve as the measure of compensation.

141. Courts have not permitted separate valuation of the quantity and quality of minerals, multiplied by a fixed price per unit because such valuation is speculative and uncertain. See, e.g., *Georgia Kaolin Co. v. United States*, 214 F.2d 284, 286 (5th Cir. 1954); *United States v. Land in Dry Bed*, 143 F. Supp. 314, 317-18 (S.D. Cal. 1956); 4 J. SACAMAN, *NICHOLS: THE LAW OF EMINENT DOMAIN* § 13.22 (P. Rohan 3d rev. ed. 1977) (valuation of lands containing mineral resources).

142. See note 141 *supra* (citing cases); *Mills v. United States*, 363 F.2d 78, 81 (8th Cir. 1966) (minerals in land must be known and capitalizable).

143. See *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) ("[E]minent domain is an attribute of sovereignty . . . It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will." (citations omitted)); *Contributors to Pa. Hosp. v. Philadelphia*, 245 U.S. 20, 23 (1917) (contract restraining eminent domain "ineffectual for want of power").

144. *Albrecht v. United States*, 329 U.S. 786, 793 (1947) (citation omitted); see *United States v. Fuller*, 409 U.S. 488, 494 (1973) ("Congress may . . . provide . . . that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment.")

145. The possibility is to agree to use the fair market value of the minerals at the time of the taking as the fixed price. Of course, this method can be used only when quality and quantity can accurately be estimated.

146. The court has accepted the multiplication or capitalization of profits method in an eminent domain context. See *State Illeg. Gas Comm'n v. Nunn*, 233 Or. 547, 559, 579 P.2d 579, 585 (1963). See generally Note, *Valuation in Eminent Domain Cases—Use of the Multiplication Method in Valuing Mineral Deposits*, 36 *Am. L. Rev.* 753 (1972) (arguing for this method).

Although it requires speculation about future markets, technology, and return on investment, the last method is well-known in the law.¹⁴⁷ The valuation method is irrelevant unless a taking occurs; but if seabed rights are taken, then some speculation is preferable to the alternative of noncompensation for potential minerals in the seabed.

Conclusion

The American experience with colonialism in the early half of this century¹⁴⁸ has left the United States with responsibility for several small, economically poor dependencies.¹⁴⁹ Some of these, like Puerto Rico, may seek statehood unless they are accorded a greater measure of self-government.¹⁵⁰ Accommodations between the federal government and an incoming state such as Puerto Rico, involving, *inter alia*, rights to the seabed, could help the new state to overcome its economic problems. This Note has shown that for Puerto Rico the only bar to the creation of such rights is political, not legal. The question is whether the present fifty states would be willing to grant to Puerto Rico a right that states have not obtained or preserved for themselves.

147. See, e.g., *State Highway Comm'n v. Nunn*, 233 Or. 547, 556, 579 P.2d 579, 584 (1963) (stating that frequently impossible as practical matter not to use capitalization method in valuation); *In re Atlas Pipeline Corp.*, 9 S.E.C. 416, 421-40 (1941) (Chapter X of Bankruptcy Act requires courts to judge whether reorganization plans are "fair and equitable, and feasible"; judgment necessitates projections of earnings, remaining economic life, and capitalization rates for corporations); I.R.C. § 167 (provisions must be made of useful life and obsolescence of assets in computing depreciation).

148. See J. PRATT, *AMERICA'S COLONIAL EXPERIMENT* 56 (1926) (Spanish American War "opened the door of a colonial career to the United States"); Woodward, *Empire Beyond the Seas*, in *THE NATIONAL ESTABLISHMENT* 518-57 (J. Blum 2d ed. 1968) (era of manifest destiny, imperialistic stirrings, and white man's burden).

149. See note 148 *supra* (citing sources); Letter from Ruth G. Van Cleve, Director, Office of Territorial Affairs, Dep't of the Interior (Apr. 4, 1978) (on file with Yale Law Journal) (compiling per capita income of American territories); Office of the Commissioner of Puerto Rico, *Basic Industrial Facts on Puerto Rico—1975* (1976) (reporting island's per capita income).

150. Some sentiment for statehood in the future has, for example, also been reported in the Virgin Islands. See Macriolis, *Political Attitudes in the Virgin Islands*, in *VIRGIN ISLANDS* 193, 202 (J. Boush & R. Macriolis eds. 1970).

It is conceivable that Puerto Rico would settle for less than statehood, if the arrangement conferred greater autonomy than that provided by the current commonwealth status. For example, in 1975, after two years of deliberations, the Ad Hoc Advisory Group on Puerto Rico, a committee composed of presidential appointees and delegates chosen by the Governor of Puerto Rico, made its recommendations for greater island control over its economic programs and international affairs. See REPORT OF THE AD HOC ADVISORY GROUP ON PUERTO RICO, COMPACT OF FRATERNITY UNION BETWEEN PUERTO RICO AND THE UNITED STATES BY 100 (1975). President Ford's New Year's Eve statehood proposal, however, was made in lieu of an endorsement of the proposed compact. *Test of Ford Puerto Rico Statement*, N.Y. Times, Jan. 1, 1977, at 5, col. 1. The President apparently found that statehood within the American system was more attractive than a more autonomous form of commonwealth status.

SUFFOLK UNIVERSITY LAW REVIEW

VOLUME XXX

1996

NUMBER 1

**RETURNING MAJESTY TO THE LAW AND POLITICS:
A MODERN APPROACH**

Hon. Sonia Sotomayor and Nicole A. Gordon

Returning Majesty To The Law and Politics: A Modern Approach*

Hon. Sonia Sotomayor[†] and Nicole A. Gordon^{††}

Even after participating in many different aspects of the practice of law, it is still possible to retain an enthusiasm and love for the law and its practice. It is also exciting to address future lawyers about the practice of law. This is not easy to do, unfortunately, in the context of recurring public criticism about the judicial process.¹

The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is "correct" is often difficult to discern when the law is attempting to balance competing interests and principles, such as the need to protect society from drugs as opposed to the need to enforce our constitutional right to be free from illegal searches and seizures.² A con-

* This Article is based upon a speech that Judge Sotomayor delivered in February 1996 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

† Judge, United States District Court, Southern District of New York; A.B. 1976, Princeton University; J.D. 1979, Yale Law School. Judge Sotomayor previously practiced as a commercial litigation partner at Pavia & Harcourt, a New York City law firm, and served as a member of the New York City Campaign Finance Board, the New York State Mortgage Agency, and the Puerto Rican Legal Defense and Education Fund. Prior to entering private practice, Judge Sotomayor was an Assistant District Attorney in New York County.

†† Executive Director, New York City Campaign Finance Board; A.B. 1974, Barnard College; J.D. 1977, Columbia University School of Law. Ms. Gordon has previously served in other private and government positions, including as Counsel to the Chairman of the New York State Commission on Government Integrity. She is also the current President of the Council on Governmental Ethics Laws (COGEL), the umbrella organization for ethics, lobbying, campaign finance, and freedom of information agencies in the United States and Canada. The views expressed in this article are not necessarily those of the New York City Campaign Finance Board or COGEL.

1. See, e.g., Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at A1 (describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association); John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8 (asserting damage manufacturers have done to society is "trivial" compared with harm lawyers do); Don Van Natta Jr., *Group Urges More Scrutiny For Lawyers*, N.Y. TIMES, Nov. 10, 1995, at B1 (discussing recommendations for improving legal system and combatting public criticism by Committee on the Profession and the Courts assembled by New York State's highest court).

2. See generally 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH

fused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.³

Unfortunately, lawyers themselves sometimes feed that cynicism by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases.⁴ Similarly, instead of attempting to control criminal or unethical conduct occurring in our profession and promoting the honorable work of most of us, many lawyers respond by denigrating the professionals in certain practice areas, like personal injury law. Further, many neglect to focus on the core issues that rightly trouble the public, such as whether there is fraud and deceit in the prosecution of claims, and if so, what we should do about it.

Today, we will discuss how we can satisfy societal expectations about "The Law" and help create a better atmosphere in which public officials, and especially lawyers and judges, can inspire more confidence and respect for the "majesty of the law" and for the people whose professional lives are devoted to it.

I. THE LAW AS A DYNAMIC SYSTEM

The law that lawyers practice and judges declare is not a definitive, capital "L" law that many would like to think exists. In his classic work, *Law and the Modern Mind*, Jerome Frank aptly summarized the paradox existing in society's attitude toward law and its practitioners:

The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.

Respect for the bar is not difficult to explain. Justice, the protection of life, the sanctity of property, the direction of social control—these fundamentals are the business of the law and of its ministers, the lawyers. . . .

But coupled with a deference towards their function there is cynical disdain of the lawyers themselves. . . . The layman, despite the fact that

AMENDMENT (3d ed. 1996) (explaining that exclusionary rule protects constitutional right to be secure against unreasonable searches and seizures).

3. See *Judge Baer's Mess*, N.Y. TIMES, Apr. 3, 1996, at A14 (criticizing federal judge's reversal of initial exclusion of drugs and confession as unconstitutional seizure). According to one editorial, "[o]ne of the major troubles with most lawyers is that they actually believe their profession is making the United States a better place to live." *Time For Real Legal Reform Is Now, Before Lawyers Bring Nation Down, Series: The Trouble with Lawyers*, FT. LAUDERDALE SUN-SENTINEL, Jan. 4, 1996, at 14A.

4. See Max Boot, *Stop Appeasing the Class Action Monster*, WALL ST. J., May 8, 1996, at A15 (detailing how corporate mass-tort defense lawyers criticize class actions yet offer few alternatives or solutions).

he constantly calls upon lawyers for advice on innumerable questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane.⁵

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism," postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, [and] subject to incalculable changes," while the public instead needs and wants certainty and clarity from the law.⁶ Because a lawyer's work entails changing factual patterns presented within a continually evolving legal structure, it appears to the public that lawyers obfuscate and distort what should be clear. Frank, however, pointed out that the very nature of our common law is based upon the lack of certainty:

The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.*⁷

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by acceding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that the law is not fixed and that change in the law is inevitable and to be welcomed: "Without abating our insistence that the lawyers do the best they can, we can then manfully [sic] endure inevitable short-comings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible."⁸

Frank's thesis, set forth in 1930, should continue to attract examination today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction entirely, as when *Brown v. Board of Education*⁹ overturned *Plessy v. Ferguson*,¹⁰ or as the common law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed "caveat

5. JEROME FRANK, *LAW AND THE MODERN MIND* 3 (Anchor Books 1963) (1930).

6. *Id.* at 5. In the preface to the sixth printing of *LAW AND THE MODERN MIND*, Frank took issue with the notion that his theories and their advocates constituted a school. *Id.* at viii-xii. Instead, Frank preferred to be viewed as a "factual realist" or as he described himself, a "fact skeptic," as opposed to a "rule skeptic." *Id.* at xii.

7. *Id.* at 6-7 (footnotes omitted).

8. *Id.* at 277.

9. 347 U.S. 483 (1954).

10. 163 U.S. 537 (1896).

emptor."¹¹ As these cases show, change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.

Lawyers must also continually explain the various reasons for the law's unpredictability. First, as Frank describes, laws are written generally and then applied to different factual situations.¹² The facts of any given case may not be within the contemplation of the original law.¹³ Second, many laws as written give rise to more than one interpretation (or, as happens among the circuit courts, differing or even majority and minority views).¹⁴ Third, a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction.¹⁵ Fourth, the function of the law at a trial is not simply to provide a framework within which to search for the truth, as understood by the public, but it is to do so in a way that protects constitutional rights.¹⁶ Against these and other constraints, including, as Frank observed, an unknown factor—i.e., which version of the facts a judge or jury will credit—competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients.¹⁷

11. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-96, at 677-83 (5th ed. 1984) (outlining movement from notion of caveat emptor to liability for losses caused by defective products); RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (detailing common law evolution of liability for defective products).

12. See FRANK, *supra* note 5, at xii (describing how courts apply legal rules to unique cases).

13. See *id.* at 127-28 (criticizing mechanistic approach to law that would treat people like mathematical entities to achieve predictability).

14. See *id.* at 121 (discussing statistical evidence concerning differences among judges).

15. Cf. Jeremy Paul, *First Principles*, 25 CONN. L. REV. 923, 936 (1993) (discussing how cases of first impression force judges to create law and affect law's unpredictability).

16. See *United States v. Filani*, 74 F.3d 378, 383-84 (2d Cir. 1996) (discussing varied goals of the trial in American jurisprudence). In *Filani*, the United States Court of Appeals for the Second Circuit considered a drug conviction based on the judge's improper questioning of the defendant. *Id.* at 382-83. In discussing the history and role of trial judges in England and the United States, the court stated:

One of the reasons for allowing an English judge greater latitude to interrogate witnesses is that a British trial, so it is said, is a search for the truth. In our jurisprudence a search for the truth is only one of the trial's goals; other important values—individual freedom being a good example—are served by an attorney insisting on preserving the accused's right to remain silent or by objecting to incriminating evidence seized in violation of an accused's Fourth Amendment rights. The successful assertion of these rights does not aid—and may actually impede—the search for truth.

Id. at 384.

17. FRANK, *supra* note 5, at xiv-xv. Of course, there are many instances in which lawyers can predict reliably what the outcome of a particular case will be. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 83-86 (1995) (analyzing systemic pressures to plea bargain in criminal cases). Cases that reach the trial stage do not reflect the multitude of cases that are resolved early—even before the complaint stage—precisely because the parties have quite a clear expectation of how their cases would be decided. See *id.* at 83

This necessary state of flux, as well as our reliance on the adversary system, give rise to a cynicism expressed by Benjamin Franklin in the mid-seventeen hundreds, but equally reflective of the public mood today:

I know you lawyers can with ease
Twist words and meanings as you please;
That language, by your skill made pliant,
Will bend, to favor every client;
That 'tis the fee limits the sense
To make out either side's pretense,
When you peruse the clearest case,
You see it with a double face. . . .
Hence is the Bar with fees supplied;—
Hence eloquence takes either side. . . .
And now we're well secured by law,
*Till the next brother find a flaw.*¹⁸

This image raises perhaps the greatest fear about the role of law and lawyers: that on the same facts, and presented with the same law, two judges or juries would reach different results in the same case because of a lawyer's presentation.¹⁹ Whether the concern is that only the wealthy can afford the best lawyers, or simply that the more "eloquent" attorney can get a better result, it is an intimidating possibility to a public that seeks certainty and justice from the law. From the vantage of a judge, however, it is not a correct or complete picture of what happens in the courtroom. To the extent judges and juries reach different results, much, as Frank observed, may be attributable to the fact that judges and juries react differently to facts because their life experiences are different.²⁰ Working from the same facts and within the confines of the same law, however, it seems that gross disparities in result do not frequently occur.²¹ But the law does evolve, and to assist its evolution and at the same

(noting some defendants readily admit guilt and acknowledge responsibility for wrongs committed).

18. Benjamin Franklin, *Poor Richard's Opinion*, in *LAW: A TREASURY OF ART AND LITERATURE* 151, 151 (Sara Robbins ed., 1990).

19. Compare *BMW v. Gore*, 116 S. Ct. 1589, 1592-94 (1996) (considering constitutionality of \$2 million punitive damages award for undisclosed automobile paint repairs), with *Yates v. BMW*, 642 So. 2d 937, 938 (Ala. Civ. App. 1993) (noting jury in virtually identical Alabama fraudulent car repainting lawsuit awarded no punitive damages), *cert. quashed as improvidently granted* by 642 So. 2d 937 (Ala. 1993).

20. See FRANK, *supra* note 5, at xii-xiii (recognizing judge and juries bring personal prejudices to trials). In extreme cases, of course, a lawyer (or a judge or jury) can be entirely incompetent or otherwise entirely fail to do a proper job.

21. This conclusion is based both on personal experience as a judge and on the statistically small number of jury verdicts set aside or new trials ordered by judges. Of course, case law principles require that appellate courts give jury verdicts a great deal of deference. See *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336-38 (1994) (stating civil jury verdicts are historically afforded deference on judicial review unless damages too large); *United States v. Powell*, 469 U.S. 57, 67 (1984) (commenting

time maintain their own credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Ben Franklin's description is correctly derisive.²²

Frank's point that the public fails to appreciate the importance of indefiniteness in the law must be addressed through better education of the public by lawyers and others, including government officials.²³ In addition, the public has other needs relating to the law: the need, for example, for lawyers to act honorably, beyond what any law, regulation, or professional rule may require. This need requires a different response.

II. MORALITY IN PUBLIC SERVICE

What are our expectations of lawyers, judges, and of public servants generally? Over the years, the response to scandal and disappointment in lawyers and in our public officials has varied. A history of ethical codes that have apparently not provided sufficient guidance to practitioners has recently led to tighter restrictions. In the public sphere, we have for some time been engaged in passing laws and regulations intended to curb unworthy behavior. This may not always be adequate for public officials or for lawyers. Some would argue that reliance on regulations alone defuses the notion of personal responsibility and accountability.

Charles Dickens on a visit to the United States in the nineteenth century described his sorrow when confronted with the American approach to regulating gifts to public servants:

The Post Office is a very compact and very beautiful building. In one of the departments, among a collection of rare and curious articles, are deposited the presents which have been made from time to time to the American ambassadors at foreign courts by the various potentates to whom they were the accredited agents of the Republic; gifts which by the law they are not permitted to retain. I confess that I looked upon this as a very painful exhibition, and one by no means flattering to the national standard of honesty and honour. That can scarcely be a high state of moral feeling which imagines a gentleman of repute and station likely to be corrupted, in the discharge of his duty, by the present of a snuff-box, or a richly-mounted sword, or an Eastern shawl; and surely the Nation who reposes confidence in her appointed servants, is likely to be better served, than she who makes them the subject of such very mean

that deference to jury's collective judgment brings element of finality to criminal process); *Binder v. Long Island Lighting Co.*, 57 F.3d 193, 201-02 (2d Cir. 1995) (finding appellate court grants "strong presumption of correctness" when reviewing whether jury verdict is "seriously erroneous").

22. Franklin, *supra* note 18, at 151.

23. See Roberta Cooper Ramo, *Law Day More Important than Ever for Keeping Strong*, CHL DAILY L. BULL., Apr. 27, 1996, at 8 (emphasizing importance of legal profession keeping citizenry well informed about Constitution and legal system).

and paltry suspicions.²⁴

There is indeed a national plethora of legislation at every level of government restricting activities of government officials.²⁵ This legislation, among other things, controls the receipt of gifts; limits outside employment and the amounts of fees and honoraria; restricts post-employment contact with government; curbs the extent of political activities; requires the acceptance of the lowest (but not necessarily best) bids on government contracts; and sets prohibitions on the manner and ways in which to address financial and other conflicts. These rules are extremely important, even vital, notwithstanding Dickens' eloquent statement to the contrary. They protect the public from many kinds of inappropriate influences on government officials, and they perform another crucial service in providing guidance to and protecting those they regulate. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes.²⁶ If specific rules have their place, however, that does not mean that we should limit the standard we apply to public officials to the technical question whether those rules have been broken, rather than aspiring to the highest in moral behavior. As a "Nation," we have not sufficiently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we over-emphasize social morality, concentrating on personal scandals that we cannot regulate, and then pass detailed rules, hoping to elevate professional behavior in that way. If we limit our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

In other countries, professional morality is approached differently. In Europe, for example, public officials often have greater discretion, are better paid, and are held to higher standards of behavior, in some instances resigning their office if there is the hint of financial scandal in their work.²⁷

24. CHARLES DICKENS, *AMERICAN NOTES AND PICTURES FROM ITALY* 123 (Oxford Univ. Press 1957) (1842). It is interesting that in England there is now a heightened sense that laws or rules are in fact needed to regulate the behavior of public officials. See COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIRST REPORT, 1995, Cmnd 2850-I, at 3 (urging remedial legislative action to counter public discontent with ethical standards of public officials).

25. See generally COUNCIL ON GOVERNMENTAL ETHICS LAWS, THE COUNCIL OF STATE GOV'TS, COGEL BLUE BOOK (9th ed. 1993) (compiling information on laws governing campaign finance, ethics, lobbying and judicial conduct nationwide).

26. See Jane Fritsch, *The Envelope, Please: A Bribe's Not a Bribe When It's a Donation*, N.Y. TIMES, Jan. 28, 1996, at D1 (describing subtle distinction between illegal bribes and legal campaign contributions to politicians); Stephen Kurkjian, *Ferber's Conviction Spurs Widening of Probe*, BOSTON GLOBE, Aug. 15, 1996, at B5 (reporting planned investigation of Massachusetts politicians after corruption conviction of former financial advisor to state agencies).

27. See generally Mark Davies, *The Public Administrative Law Context of Ethics Requirements*

The tolerance in this country for questionable behavior by public officials is illustrated by the persistence of extremely troubling—but legal—practices in the public arena. In one of the murkiest and least well-controlled areas, we find ourselves debating what the quid pro quo's are for campaign contributions. Here we have abandoned standards we would surely apply in any other context. We would never condone private gifts to judges about to decide a case implicating the gift-givers' interests.²⁸ Yet our system of election financing permits extensive private, including corporate, financing of candidates' campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.²⁹ Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions.³⁰ As Congress revamps many questionable practices, including the receipt of gifts from lobbyists, it must monitor to the public's satisfaction both whether inappropriate activity is being left unregulated and whether laws and regulations that are put in place are actually enforced. The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.

Similarly, the public wonders whether lawyers have enforceable rules of self-government or any kind of defined professional morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific, troubling situations. For example, almost all professional codes require that a lawyer should represent a client zealously within the bounds of the law and may not suborn perjury or the creation of false documents.³¹ But no rule guides a lawyer who is

for *West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT'L & COMP. L. 319 (1988) (detailing differences between ethics regulations for American and German public officials).

28. Cf. Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 194 (1996) (discussing Texas attorney Joe Jemal's \$10,000 campaign contribution to judge in Texaco-Pennzoil case).

29. See Fritsch, *supra* note 26, at D1 (reporting influence of special interest money as serious political issue).

30. See Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994) (proposing replacement of federal election finance system with total public financing of congressional campaigns).

31. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1995) (noting candor toward tribu-

merely left with a firm and abiding conviction that what is being said or proffered by a witness or client is false. Rules might be ill-suited to answer such dilemmas, but moral imperatives, or what Lord Moulton described in 1924 as "Obedience to the Unenforceable," may be more helpful.³²

Lord Moulton, to be sure a man of his time, spoke of Obedience to the Unenforceable as a standard that people live up to despite the fact that no law can force them to do so.³³ He gave as an example the conduct of the men aboard the Titanic who, facing imminent death, nevertheless adhered to the principle that women and children should be saved first:

Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners. . . . The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.³⁴

Our public officials and lawyers should also be prepared to adopt a culture that depends upon subjective accountability as well as on well-defined, consistent rules and regulations:

The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.³⁵

III. THE BAR'S RESPONSIBILITY

What is the responsibility of a practicing lawyer, and how can lawyers' behavior be changed in ways to encourage greater respect for the legal profession? To take one example of a tolerated but unacceptable pattern, let us examine the lying and misrepresentation that occurs in court.

Some number of witnesses in court lie, including some for the prosecution and some for the defense, and their lawyers suspect as much. Lawyers are not, however, routinely confronted with the clear-cut dilemma

nal prevents lawyer from offering false evidence); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-6 (1983) (declaring lawyer's duties to client and legal system).

32. Lord Moulton, *Law and Manners*, ATLANTIC MONTHLY, July 1924, at 1, 1. Lord Moulton, a judge and member of the British Parliament, served as Minister of Munitions for Great Britain at the outbreak of World War I. *Id.*

33. *Id.*

34. *Id.* at 4.

35. PIERO CALAMANDREI, EULOGY OF JUDGES 45 (John Clarke Adams & C. Abbott Phillips, Jr. trans., 1942).

that a client proposes to "lie" on the stand. A client presents a version of the facts, and lawyers rarely have independent, first-hand knowledge of them. (In criminal cases, clients frequently choose not to take the stand, often on the advice of an attorney, advice that is given for any number of reasons, including the risk of presenting perjured testimony.) What more commonly occurs is that witnesses, often unconsciously, allow selectivity, prejudice, and emotion to color their perceptions. Even when two witnesses directly contradict one another, both may be "telling the truth" from their own points of view or to the best of their recollection. Real life is complex, and we have chosen to use the adversarial system to sort out the truth as best it can.³⁶

To maintain credibility in the system, however, we must study how well we do in fact get at the "truth."³⁷ Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because each side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood.³⁸ But the adversarial system may not always be wholly adequate to the task of exposing wrong-doing and false or inflated claims. Empirical studies have been performed, for example, that examine the reliability of witnesses and jurors.³⁹ Many factors influence witnesses and juries, including subconscious racism and other prejudices. As a profession, we should seek, based upon empirical evidence, ways in which to improve our ability to arrive at the truth. If we undertake this seriously, we will not only do well by the cause of justice, but we will justifiably improve the public's opinion of our profession.

The adversary system may also be ill-suited to resolve certain types of disputes such as those presented by "battles of the experts" in medical malpractice and many other kinds of cases. There is recurring debate about the ability of jurors to evaluate such evidence. The Supreme Court of the

36. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 158-59 (1978) (analyzing how adversary system sometimes encourages attorneys to argue credibility of clients who have made knowingly perjurious statements).

37. See Marvin E. Frankel, *The Search for Truth—An Umpireal View*, 30 REC. ASS'N B. CITY N.Y. 14, 15 (1975) (arguing that the "adversary system rates truth too low among the values that institutions of justice are meant to serve.")

38. See FED. R. CIV. P. 26-37 (setting forth rules governing depositions and discovery in federal civil cases); FED. R. CRIM. P. 16 (establishing rules of evidentiary disclosure by both government and defendant in criminal cases); FED. R. EVID. 607 (allowing impeachment of witness' credibility).

39. See generally JEFFREY T. FREDERICK, *THE PSYCHOLOGY OF THE AMERICAN JURY* (1987) (presenting social scientific research on jury behavior and persuasion); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988) (analyzing jury reliability and phases of jury trial); Christopher M. Walters, Note, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985) (discussing expert witness reliability in eyewitness identification cases).

United States, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁴⁰ has reacted to this debate by expanding the judge's function to require that scientific testimony be evaluated more stringently before it can be presented to a jury.⁴¹ Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another desired bedrock, the certainty of science. We must revisit whether other methods of inquiry into specialized areas—such as the use of court-appointed experts or Special Masters who share their conclusions with juries—may be more useful to resolve these kinds of disputes. The current system, in this particular respect, should somehow be made to work better or should be critically evaluated, and if necessary, replaced.

Finally, the adversary system, almost by definition, cannot address the gray area of the "truth" present in most cases because the system tends to produce all-or-nothing winners and losers. This is why settlements and new forms of "alternative dispute resolution" are so important.⁴² Dickens' remark that honorable lawyers admonish their clients to "[s]uffer any wrong that can be done you, rather than come here [to the courts]," is still timely for many litigants.⁴³ The adversary system has its limitations under the best of circumstances, including the limitations it places on the judges' role, and so we must explain why the benefits of the system outweigh those limitations.⁴⁴ If, as has been said of the democratic form of government, the adversary system is "the worst . . . except [for] all those other forms," then that is the way in which the public should understand it: not as a system expected to accomplish more than any system can.⁴⁵

40. 509 U.S. 579 (1993).

41. See *id.* at 597 (acknowledging Federal Rules of Evidence require judge to ensure scientifically valid principles support expert testimony).

42. See Abraham Lincoln, Notes for a Law Lecture, in *THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 302 (Fred R. Shapiro ed., 1993) ("As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."); Joshua A. Darrell, *For Many, Litigation Retains Important Practical Benefits*, NAT'L L. J., Apr. 11, 1994, at C11 (discussing benefits of alternative dispute resolution).

43. CHARLES DICKENS, *BLEAK HOUSE* 51 (Norman Page ed., Penguin Books 1971) (1853) (quotation marks omitted).

44. Judges sometimes receive criticism if they ask, or let juries ask, too many questions of witnesses. See *United States v. Filani*, 74 F.3d 378, 384 (2d Cir. 1996) (commenting on popular notion that limited questioning by trial judge guards against bias); *United States v. Ajmal*, 67 F.3d 12, 14-15 (2d Cir. 1995) (discussing dangers of prejudice and compromise of juror neutrality in juror questioning of witnesses); see also Bill Alden, *Juror Inquiries Require Retrial for Defendant*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting how improper juror questioning in *Ajmal* case led to reversal and new trial). In today's media-dominated world, jurors are more informed about legal issues than ever before. More explanation by judges why certain legal principles are important or why certain evidentiary rulings have been made may be helpful to contain speculation that can lead juries astray. Similarly, if jurors ask questions that seek to clarify evidence, and if the practice is properly controlled, this may preserve rather than interfere with a jury's impartiality.

45. Winston Churchill, Speech (Nov. 11, 1947), in *THE OXFORD DICTIONARY OF QUOTATIONS* 202 (Angela Partington ed., 4th ed. 1992).

As we ponder how effective our legal system is, we must help create greater credibility in existing, useful mechanisms. A number of years ago, Judge Harold Rothwax of the Supreme Court of the State of New York noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them.⁴⁶ In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was offered one in New York.⁴⁷ Similarly, we recently have heard much about the police practice of tailoring testimony to avoid the suppression of evidence, an apparently common practice that must be known to, or at least suspected by, some prosecuting attorneys.⁴⁸ Often, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate either the law itself or the role and quality of work performed by lawyers in the fields, for example, of personal injury or criminal defense. Lawyers have also unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases.⁴⁹

The response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns at the same time as we challenge overreactions that undermine the principles of our judicial system.⁵⁰ For example, legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases.⁵¹ But to do this is inconsistent with the premise of the jury system. The focus must be shifted back to monitoring frivolous claims, uncovering pervasive misrepresentation in court, and educating the public that no system of justice is perfect. Despite occasional disappointing results, our system does have mechanisms in place that moderate jury verdicts (such as judges' discretion to set aside or reduce unreasonable verdicts), that allow for the discipline of lawyers, and

46. See *Symposium: Ethics in Government*, CITY ALMANAC, Winter 1987, at 20, 20 (noting corruption in legal system succeeds when a few good people do nothing).

47. See Matthew Goldstein, *23 Lawyers Arrested in Insurance Scheme: Inflating of Settlements in Tort Cases Charged*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting praise of whistleblowing attorney who stated he "did what any honest citizen would do"); George James, *47 Accused in an Insurance Claim Scheme*, N.Y. TIMES, Sept. 22, 1995, at B3 (describing district attorney's praise of lawyer as "credit to the legal profession and the general public").

48. See *And What About Justice?*, WALL ST. J., Sept. 1, 1995, at A6 (discussing perjury by law enforcement officers in O.J. Simpson trial and on Philadelphia police force); see also HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 63-65 (1996) (discussing problems exclusionary rule creates for law enforcement officers).

49. See *Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 (publishing attorney's criticism of criminal trials as "indistinguishable from Roman circuses").

50. Cf. *supra* note 47 and accompanying text (describing efforts of New York attorney exposing fraudulent practices by plaintiffs' personal injury attorneys).

51. See Common Sense Product Liability Legal Reform Act of 1996, H.R. 481, 104th Cong. (limiting punitive damages in certain cases).

that can result in punishment of perjurers.⁵²

Criminal law is the most challenging arena in which to satisfy the public that our system adequately addresses problems of apparently wrong verdicts. This is largely because the public either does not understand or does not accept the necessity for safeguards against sometimes overzealous prosecution and the protection of certain civil liberties. The role of criminal defense lawyers in particular is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors and government officials should be especially sensitive to and publicly supportive of the fundamental place constitutional safeguards and the defense bar have in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues who perform essential functions in asserting and protecting constitutional rights.⁵³

If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. For example, in New York State, a recent study of the matrimonial bar concluded that a very significant negative sense exists of matrimonial practice, based on the perception that matrimonial lawyers often take unfair financial advantage of emotionally fragile clients.⁵⁴ Similarly, California found that sexual exploitation of clients

52. See *Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2214 (1996) (applying New York check on excessive damages to federal court); *Bender v. City of New York*, 78 F.3d 787, 794-95 (2d Cir. 1996) (finding verdict of \$300,700 excessive in civil rights action); *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (finding \$1.5 million verdict for pain and suffering excessive); see also 18 U.S.C. §§ 401-02 (1994) (granting courts power to punish contempt of courts' authority, including obstruction of justice); 18 U.S.C. § 1623 (1994) (criminalizing false declarations before any federal court or grand jury); FED. R. CIV. P. 11(c) (providing for sanctions of lawyers who pursue frivolous claims and needless litigation); *Dunn v. United States*, 442 U.S. 100, 107 (1979) (noting Congress enacted § 1623 to "facilitate perjury prosecutions and thereby enhance the reliability of testimony"). Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.

53. See *Miranda v. Arizona*, 384 U.S. 436, 480 (1966) (noting attorney carries out sworn duty by advising client to remain silent during police questioning). The *Miranda* Court emphasized that an attorney's advice of silence in the face of criminal investigation is an exercise of "good professional judgment," not a reason "for considering the attorney a menace to law enforcement." *Id.*; see also *United States v. Filani*, 74 F.3d 378, 384 (2d Cir. 1996) (noting that "fulfilling professional responsibilities 'of necessity may become an obstacle to truthfinding.'" (quoting *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting))).

54. See COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, ADMINISTRATIVE BD. OF THE COURTS OF N.Y., REPORT 1-5 (1993) (identifying criticism of divorce law system and proposing reforms and improvements for lawyers and courts); see also *Carpe Diem*, N.Y. L.J., Mar. 12, 1993, at 2 (citing report critical of divorce lawyers by New York City Department of Con-

was a pervasive enough problem in divorce and other areas of legal practice that the California Supreme Court passed a very hotly debated professional rule setting forth a lawyer's professional obligations in these situations.⁵⁵

Whether the rule will have an effect in California on the public's perception of lawyers depends largely on how vigilantly their colleagues and others hold lawyers to the rule: Will lawyers actually be reported to the bar association when they are suspected of having inappropriate sexual relations with a client? How aggressively will they be investigated? And will they be held accountable if they continue to represent a client with whom they are having an impermissible sexual relationship?

Failure to enforce such a rule will again feed the public's mistrust, which arises in part from the sense that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, disciplinary proceedings have until recently been closed to protect lawyers from unjust criticism and harm to their reputations. Despite a recommendation by its Task Force on the Profession that these proceedings be made public, the House of Delegates of the New York State Bar Association has opposed the measure.⁵⁶ Unquestionably, unjust criticism of a professional can be devastating. But it is worth examining whether that concern is better addressed by creating a quick, fair process for determining whether a charge is unfounded than by continuing a practice of not airing complaints publicly.⁵⁷ Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to monitor them. One way or another, there must be convincing public justification for the manner in which discipline and performance are regulated.

In the political sphere, the sense that elected officials fail to police themselves is equally prevalent. Partisanship is the accepted "adversarial" mechanism that is supposed to maintain checks and balances and protect the public in various contexts, including in the fields of elections and campaign finance.⁵⁸ Bipartisan commissions, such as boards of elections

sumer Affairs commissioner).

55. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-120 (1995) (prohibiting lawyer from engaging in sexual relations with a client in specific circumstances).

56. See Gary Spencer, *State Bar Opposes Any Public Discipline Procedures*, N.Y. L.J., June 27, 1995, at 1 (reporting bar association refused to endorse "even the smallest step toward opening" disciplinary process to public). The Association of the Bar of the City of New York has endorsed opening up these proceedings. See Committee on Professional Discipline, *The Confidentiality of Disciplinary Proceedings*, 47 REC. ASS'N B. CITY N.Y. 48, 60 (1992) (advocating opening process to public after determination that proceedings should begin).

57. Arguably, lawyers do not exhibit the same heightened sensitivity to the plight their clients suffer when unfair or embarrassing information becomes public through legal proceedings.

58. The Federal Election Commission is, for example, bipartisan by law. See 2 U.S.C. §

or most campaign finance agencies, often reflect a close relationship between commissioners and party politics. The result is often votes on individual matters along party lines rather than on the merits, and policies and procedures that favor the established parties over independent or alternative groups. By contrast, the experience of New York City's Campaign Finance Board—a pioneer agency regulating New York City's program of optional public financing of political campaigns—has been that of a deliberative, non-partisan board that nearly always acts unanimously and certainly always without regard to party affiliation. The non-partisan culture of that board is a model for decision-making in the political sphere. But few legislatures—including the federal Congress—are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, regulation of activity which is vital to the health of our democracy—including campaign finance activity—is largely administered by bipartisan agencies with weak claim to the public's trust.⁵⁹ The legislators' failure to submit themselves to meaningful scrutiny heightens cynicism about our elected officials, many of whom, as we all know, are lawyers.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of concluding legal and political conflicts. Next, we must find effective, confidence-building mechanisms for policing ourselves. Further, we must be prepared to entrust judgments on our own professional fitness not only to our colleagues, but to the public.

IV. THE RESPONSIBILITY OF OTHERS

The changing nature of the law and the conduct of lawyers give the public understandable pause. We must not, however, fall prey to the public's cynicism. We must instead expect more of our profession. There is a limit to how far an individual lawyer can elevate the bar as a whole. What a lawyer can do, as argued above, is educate the public—at the very least in the person of his or her clients—and personally raise standards by living up to a code of conduct beyond what is "enforceable." This responsibility is not confined to attorneys in private practice. The others who operate in or around the legal framework—judges, prosecutors, juries, witnesses, public officials, and the press—must also educate themselves, and others, and apply higher standards of conduct to their own behavior.

Much distrust arises from a lack of understanding, whether about the

437c(a)(1) (1994) (providing that only three of six members appointed to Commission "may be affiliated with the same political party").

59. See Charisse Jones, *Old-Style Board Faulted After Botched Voting*, N.Y. TIMES, Oct. 12, 1996, at 25 (reporting criticism of local bipartisan board of elections as "mismanaged" and "crippled" by political appointments).

purpose and role of the adversary system, the presumption of innocence, the right of every party to be represented by an attorney, or the facts and proceedings of a specific case—even a case as highly publicized as the O.J. Simpson trial. The limitations of the law are also poorly understood. We need the help of the schools, our media, and our public officials to communicate the values and limitations of our system of justice and to free us from simplistic analysis that breeds contempt.

What we should also acknowledge, to broaden the true reach of the law's majesty, is the role that many influences, including the press and the lay public, play in contributing to our intricate legal system.

V. CONCLUSION

What we propose is as follows:

First, lawyers must make a greater effort at educating themselves, their clients, and the public about the key underpinnings of our legal system: the reasons for the law's uncertainty; the values and limitations of the adversary system; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals.

Second, we must re-examine what does and does not work to bring about justice and consider whether we can improve aspects of our system. Is the adversary process the best way of determining whether witnesses are telling the truth or for dealing with the "battle of the experts"? If not, let us improve what we have, or find a better way, recognizing that we cannot achieve perfection.

Third, we must instill among ourselves and our public officials a culture of a high morality, as best we can. We must determine what ethical guidelines are appropriate and then enforce them seriously. We must adopt concrete ways to recognize those among us who practice law and serve the public at the highest moral levels. We must combine to act more honorably both within our own sphere and collectively as a profession, supporting each other in the inevitable controversies that arise when lawyers and government officials properly carry out responsibilities that are ill understood by the public.

Finally, we must enlist not only every group of our profession, including judges, lawyers, legislators, and other public officials, to adhere to higher standards. We must also enlist clients, jurors, journalists, and all our fellow citizens, because we are all touched by the law, and we can all have an influence on how it evolves.

We cannot delay in addressing these moral issues of professional and political conduct. We are faced with on-going instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession and government officials to public scorn and ridicule. The response, if we do not act,

will be an increasing amount of legislation criminalizing and otherwise regulating conduct and a demoralization in the practice of law and public service. We are losing many fine elected officials to retirement who no longer care to operate in a bitterly partisan and hostile atmosphere governed by few meaningful rules of conduct and subject to heightened and unrelenting personal scrutiny by the press. Among our own ranks, senior practitioners complain bitterly of the loss even of professional courtesy among lawyers and office holders.

In Boston, lawyers call their adversaries "brother" or "sister" in court. Anyone who experiences the practice appreciates the grace it adds to the proceedings. This grace is created by the aura of respect the titles seek to convey. In light of the increasing call by lawyers to return to greater professional civility, it is clear we ourselves feel and regret the loss of professional courtesy and respect.⁶⁰ We must first give respect to each other and to the profession—in word and in deed—before we can expect the public to do so.

If we act in these areas, the public discourse, the behavior of our lawyers and public officials as well as their reputations, and, ultimately, confidence in our legal and political systems will be greatly enhanced.

60. See Louis P. DiLorenzo, *Civility and Professionalism*, N.Y. ST. B.J., Jan. 1996, at 8, 8-10, 25 (exploring scope of decline in professionalism among attorneys, uncovering its cause, and suggesting possible solutions); see generally NEW YORK STATE BAR ASS'N, *CIVILITY IN LITIGATION: A VOLUNTARY COMMITMENT* (1995) (explaining suggested guidelines for behavior of all participants in litigation process).

The Genesis and Needs of an Ethnic Identity

Keynote Speech given on November 7, 1996, at the Third World Center, Princeton University, Latino Heritage Month Celebration.

Thank you for the gracious introduction. I am delighted to be here tonight, celebrating Latino heritage month, the Third World center's 25th anniversary and Princeton's 250th anniversary. I am also celebrating my 20th year since graduating from Princeton and it is wonderful to have the opportunity to speak on campus and in a building that contain so many memories for me. Since my graduation, I have had many exciting and challenging experiences, not the least of which has been my appointment to the federal bench. My experiences have taught me much and enriched my life immeasurably. My days at Princeton, however, were the single most transforming experience I have had. It was here that I became truly aware of my Latina identity -- something I had taken for granted during my childhood when I was surrounded by my family and their friends. At Princeton, I began a lifelong commitment to identifying myself as a Latina, taking pride in being Hispanic, and in recognizing my obligation to help my community reach its fullest potential in this society.

In speaking to you tonight, I draw upon my personal experience as a Latina and my knowledge of the special needs of my community. I know, however, that my experience and my community's needs are not unlike those of the many people of color in this room.

As with many people, my identity as a Latina was forged, and closely nurtured by my family through our shared traditions. For me, a special part of my being Hispanic are the muchos platos de arroz y guandoles (rice and beans), y de piener (roasted pig) that I have eaten at countless family functions, and the pasteles (boiled root crop paste) I have consumed year after year during the Christmas holidays. My Hispanic identity also includes, because of my adventurous taste

buds, morcilla (pig intestines), patitas de cerdo con garbanzos (pig feet and beans), y la lengua y orejas del cuchfrito (pig tongue and ears). It means eating coquitos (coconut ices) y piraguas (shaved ice with tropical colored juices added on) during the summer. It is the sound of merengue at all our family parties and the heart wrenching Spanish love songs that we enjoy. It is the memory of seeing Cantiflas, our famous comic, when I was a kid with my cousins at the Saturday afternoon movies.

My Latina soul was nourished each weekend that I visited and played in abuelita's (grandma's) house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas (godfathers and mothers), suegros y suegras (in-laws), their families and the people who lived next door who came over to play dominoes o la loteria - our bingo - using chick peas as markers on Saturday nights.

Does any one of these things make me a Latina? No, obviously not, because each of our Caribbean and Latin American communities has their own unique foods and different traditions at the holidays. My family in Puerto Rico celebrates Three Kings Day, which my family in New York has not done. I learned about tacos only here at Princeton because of my Mexican first-year college roommate, Dolores Chavez, whom you honored last year. She also introduced me to the beautiful song "La Paloma" that is now popular on the East coast as well. Being Latina in America also does not mean speaking Spanish. I happen to speak Spanish fairly well, but my brother, only three years younger, like too many of us educated here, barely speaks Spanish. And even those of us who do speak Spanish, speak it poorly.

If I had pursued my career in my undergraduate history major, I could likely provide you with a very academic description of what being Latino means. For example, I could define Latinos as those people and cultures populated or colonized by Spain who maintained or adopted

Spanish or Spanish Creole as their language of communication. That antiseptic description, however, does not really explain the appeal of morcilla or merengue to an American born child. It does not provide an adequate explanation for why individuals like us, many of us whom were born in this completely different American culture, still identify so strongly with the communities in which our parents were born and raised.

America has a deeply confused image of itself that is a perpetual source of tension. We are a nation that takes pride in our ethnic diversity, recognizing its importance in shaping our society and in adding richness to its existence. Yet, we simultaneously insist that we can and must function and live in a race- and color- blind way that ignores those very differences that in other contexts we laud. That tension between the melting pot and the salad bowl, to borrow recently popular metaphors in New York, is being hotly debated today in national discussions about affirmative action. This tension leads many of us to struggle with maintaining and promoting our cultural and ethnic identities in a society which is often ambivalent about how to deal with its differences.

In this time of great debate, we must remember that it is not politics or its struggles that creates a Latino or Latina identity. I became a Latina by the way I love and the way I live my life. My family showed me by their example how wonderful and vibrant life is and how wonderful and magical it is to have a Latina soul. They taught me to love America, to value its lesson that great things could be achieved if one works hard for it. Princeton, in turn, showed me that in this society, in order to achieve its promise, it is critical to accept the fact that we people of color are different from the larger society, that we must work harder to overcome the problems our communities face, and that we must work together as people of color to achieve changes.

I underscore that in saying this I am not promoting ethnic segregation. I am promoting just the opposite: an ethnic identity and pride which impels us to work with others in the larger society to achieve advancement for the people of our cultures. You here, like me, who chose to be educated in a renowned institution like Princeton, have already accepted the principal that we must work together within our society to integrate its established hierarchies and structures if we are to improve our own lives and that of our communities. Nevertheless, although we should not attempt to isolate ourselves from the larger society, we also must steadfastly refuse to lose our unique identities and perspectives in this process.

As I have described for you, I grew up in a very close knit family. My childhood friends were my cousins. The neighborhoods of my childhood were populated largely by Hispanics. Although I had some experiences with discrimination in high school, it was limited, and I was protected by my family and friends in the close cocoon we had around us. When I came to Princeton, however, that cocoon was gone. Princeton was very different from anything I had ever known. How very different I was from many of my classmates, came starkly alive here.

I grew up in the inner City. The first week at Princeton I stayed mostly in my room. Dolores, my roommate at the time, usually stayed late at the library, and I would fall asleep before she got home. That entire first week, I heard a cricket sound in my room. I became obsessed with that sound. Every night, I tore that room apart looking for the cricket. I didn't even know what one looked like except that I had seen Jimmy the Cricket in Pinocchio and figured it had to have long legs. That weekend my then boyfriend and later to be husband, who had grown up in the more country-like Westchester, came for a visit. I told him about the cricket in the room and he roared with laughter. He explained to me that the cricket was outside the room, on the tree whose leaves

brushed up against my dorm room window. This was all new to me: we didn't have trees brushing up against windows in the South Bronx or in the projects in which I was raised.

We also didn't know about prep schools then, or take skying trips, tennis lessons or European vacations in the South Bronx. Except visits to my family in Puerto Rico, I had barely traveled outside the Bronx. I only visited Westchester, which is the first county just north of the Bronx, when I met my intended husband. How different I felt from many of my classmates for whom many of these experiences were very common. The chasm I felt between us seemed and felt enormous.

My very first day signing up for classes I sat outside the gym next to a woman from Alabama. I remember being intrigued by her very unusual and lovely accent. I began to perceive the depth of our differences when she began to describe her many family members and friends who had attended Princeton. As we sat there, Dolores, my roommate, and Theresa, a friend from Puerto Rico, approached, laughing, and as is sometimes our wont, talking very loudly. At that moment, my Alabamian classmate turned to me and told me, as she looked at the approaching Theresa and Dolores, how wonderful Princeton was that it had all these strange people. How ironic, here I thought she was the strange one.

I spent my summers at Princeton doing things most of my other classmates took for granted. I spent one summer vacation reading children's classics that I had missed in my prior education -- books like Alice in Wonderland, Huckleberry Finn, and Pride and Prejudice. My parents spoke Spanish, they didn't know about these books. I spent two other summers teaching myself anew how to write. I had had enough natural intelligence to get me through my early education but at Princeton I found out that my earlier education was not on par with that of many

of my classmates. When my first mid-term paper came back to me my first semester, I found out that my Latina background had created difficulties in my writing that I needed to overcome. For example, in Spanish, we do not have adjectives. A noun is described with a preposition, a cotton shirt in Spanish is a shirt of cotton, una camisa de agodon, no agondon camisa. Because of this, as with my Latino students, my writing was stilted and overly complicated, my grammar and vocabulary skills weak. I wrote in my first history paper -- authority of dictatorship, instead of dictatorial authority. I spent a lot of time here filling the gaps of my earlier education.

At that time in my life, as I was meeting all these new and very different people, reading classics and relearning writing skills, Princeton was an alien land for me. I felt isolated from all I had ever known, and very unsure about how I would survive here. Accion Puertorriquena, the Puerto Rican group on campus then, and the Third World Center, the building we stand in tonight, provided me with the anchor I needed to ground myself in this new and different world. I met our alumni and upperclass members, like Manny Del Valle and Margarita Rosa who had demonstrated and taken over university buildings in order to push the University to give us the Third World Center. This very annex, Liberation Hall, was built while I was here from funds they had struggled to get from the University. It was a Chinese friend from high school who was here and the Puerto Rican students who volunteered at the admissions office who recruited me to Princeton. At that time, we had no Puerto Rican or Mexican-American professors or administrators. Frank Reed of the Chicano Organization of Princeton, and Charles Hey, another Puerto Rican student, and I, as Co-Chairpersons of Accion Puertorriquena, filed a complaint with the EEOC about Princeton's affirmative action failures. A short time later, Princeton hired its first Hispanic assistant dean of students.

Because of my work with Accion Puertorriquena, the Third World Center, and other activities in which I participated like the University's Discipline Committee, I was awarded the Pyne Prize in my senior year. The kid who didn't know how to write her first semester, was honored for academic excellence and commitment to University service in her senior year. When accepting the Prize, I said then, and I repeat today that it was not I who earned or deserved that prize that day; it was the third world students who preceded me and those with whom I had worked that had created a place for me at Princeton.

In my years here, Princeton taught me that we people of color could not only survive here, but that we could flourish and succeed. More important, I learned that despite our differences from others at Princeton, we, as people of color with varying ethnic experiences, had become a permanent part of Princeton. It gave much to us, but we gave back to it as well. We brought the Puerto Rican Traveling Theater to Princeton and let our classmates experience its richness. We introduced courses on Puerto Rican and Mexican-American history to the Latin American Department. Princeton changed us, not just academically, but also in what we learned about life and the world. At the same time, we changed this place by our presence here. This third world center is just one concrete example among many of how a group of committed students can change a piece of our society in powerful, and permanent ways.

Your differences from the larger society and the problems you face don't disappear when you leave Princeton. I can assure you, however, that your experiences here will permit you more ably to deal with those differences in the future. The shock and sense of being an alien will never again, I suspect, be as profound for you as it has been here. But I know from personal experience that having been educated at Princeton both academically and socially, you are better

equipped to address the very significant problems you and our communities face.

Our society has changed tremendously since I was a child. I suspect that many of you here don't even remember or know about the comedian Cantiflas. Cheaper airplane travel, greater public transportation and more cars, along with other demographic factors, have dispersed people of color across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, lived in the Bronx within miles of each other. From these technological advances, our children will have more opportunities to enjoy, but it will be harder for them to hold on to their ethnic identities. But hold on to them we must because Latinos and all minority groups, despite what part of the country we live in, face enormous challenges in this society.

The following are statistics that many of you are familiar with but which are always worth repeating and remembering. The numbers are taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza.

Latinos represents the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. We are also a young population, with a median age below African-Americans and other groups. We also have slightly larger families than other ethnic groups. The Hispanic school-age population is, because of our demographics, also rapidly growing and although today we account for only 10% of public school enrollment, by the year 2000, we will constitute 1/6 of the students in the nations classrooms, but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population

and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates of any major ethnic group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanics has left school without a diploma, compared to less than one in 16 of African-Americans and one in 15 of Whites. Only 10% of Hispanics over 25 years of age have completed four or more years of college, compared to 11.3% of African-Americans and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Because employment follows from education, we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have managerial and professional jobs. In a comparison none of us likes winning, only African Americans and American Indians do more poorly in gross employment numbers. Latinos, however, have lower per capita incomes than either Whites or African Americans. In 1988, Hispanics had a per capita income of about \$7900, African Americans at about \$8200 and Whites at about \$13,900. The New York Times reported in an article published on October 13, 1996, that last year, earnings for all Hispanic groups dropped while income for blacks and whites rose. I note that among Hispanics, La Raza reports Puerto Rican families as faring worst economically, with the lowest family medians and the highest proportion of families with incomes below \$10,000. Our poverty rates are highest among female-headed Hispanic families.

As the National Council of La Raza has concluded, in this rapidly evolving

technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. That is why third world centers at institutions like Princeton are so important. Princeton graduates, of any ethnic group, are among the educational elite of our communities. We have a responsibility not only to achieve success individually so that we provide role models and opportunities for others but we have a responsibility to help change these foreboding numbers. During my Pyne Prize acceptance speech, I quoted Albert Einstein's ageless words:

Man is here for the sake of other men. ...
Many times a day I realize how much my own
outer and inner life is built upon the labors
of my fellow men, both living and dead, and
how earnestly I must exert myself in order to
give in return as much as I have received.

It is critical for us in our otherwise busy lives, never to forget that we are people of color, of rich cultures, and that we have a responsibility to devote time, when we can, to pro bono work on behalf of our communities, and to give support with money, when we have it, to help our communities face their enormous challenges. I, as many of you, know that studying and training for work is very time consuming. You don't always have time to give to other activities. That is alright. We need to develop our skills. The important thing, however, is not to get lost in studies and personal ambitions but to make sure to take and make time to reach out and volunteer in our communities throughout our lives. Our ethnic identities give us strength. Take pride in them, take sustenance from them, but give back to our communities as well.

We must ensure that all people of color - not just those of us fortunate enough to be educated at institutions like Princeton - share fully in the American dream. We must keep in sight the overriding reality that whatever our regional, cultural or ethnic differences as people of color, the problems of any of us are the problems of all of us. We need to take advantage of our common bonds and work together to our political, social and economic advantage.

It is wonderful to be able to say Yo tengo orgullo en ser Latina pero tambien entiendo me responsabilidad a mi comunidad. Translated: I take pride in being a Latina and I also understand my responsibility to my community. We are fortunate to be a part of a great institution like Princeton. It has a glorious history, and we should take pride in being a part of it. It and its fine reputation will hold you in good stead throughout your lives. My lifetime accomplishments, as yours will be, are in no small measure attributable to my Princeton experience. Nevertheless, for the many reasons I have discussed, we need for you to continue taking pride in whom you are, where you came from, and always to remember that you must take time to give back to others in your communities some of the benefits that you have received. Good night and thank you again for letting me share this evening with you and giving me this opportunity to reminisce. I look forward to meeting as many of you as I can tonight but I expect that as your careers develop, our paths will cross again.

El Orgullo y Responsabilidad de Ser Latino y Latina.

Keynote Speech given on May 17, 1996, at the Hispanic National Bar Association's National Board of Governor's Reception. Association of the Bar of the City of New York.

Thank you Barbara and Jose for the gracious introduction.

In structuring a speech for tonight, I realized that anything I spoke about would be well known to the many members of the people of color bar who are present here today. I knew, however, that we would have many guests here who would not fully understand how people of color came to identify as such and who may not fully know of the needs of our communities. With that in mind, I decided to adapt for tonight a concept I addressed at a recent Dinner Dance held by the Latino and Latina American Law Students Association of Hofstra University School of Law. That concept is an attempt to define what made me a Latina and from where I got my sense of pride in being Hispanic and why I must work in helping my community reach its potential in this society. I draw upon my personal experience

as a Latina but I suspect my experience is not dissimilar from that of the many people of color in this room. As with most people, the essence of my identity was born with and nurtured by my family and the memories they created.

For me, los muchos platos de arroz y guandoles (rice and beans), y de piener (roasted pig) that I have eaten at countless family functions, and pasteles (boiled root crop paste) at Christmas, are part of my Hispanic being. It is also, if you have my adventurous taste buds, morcilla (pig intestines), patitas de cerdo con garbanzos (pig feet and beans), y la lengua y orejas del cuchfrito (pig tongue and ears). It is coquitos (coconut ices) y piraguas (shaved ice with tropical colored juices added on) during the summer. It is the sounds of merengue at all our family parties and the incredibly long and heartwrenching Spanish love songs that my family enjoys listening to. It is the memory of seeing

Cantiflas, one of the most famous Spanish comics, when I was a kid with my cousins at the Saturday afternoon movies.

My Latina soul was nourished each weekend that I visited and played in abuelita's house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas (godfathers and mothers), suegros y suegras (in-laws), their families and the people who lived next door who came over to play dominoes o la loteria on Saturday nights. Did anyone one of these things make me a Latina. No, obviously not, because each of our Carribbean and Latin American communities has their own unique foods, variations thereof and somewhat different traditions at the holidays. I have grown to love tacos only in my adulthood. I was introduced to the beautiful song "La Paloma", in college by my Mexican roommate. It has now become more popular on the East coast but it was not known here while I was growing up. Being Latina is

also not speaking Spanish, which I do. Many of us educated here barely speak Spanish and all too many of us who do speak it, speak it poorly.

A historian or social scientist could likely provide a very academic description of being Latino. For example, we could describe Latinos as those people and cultures populated or colonized by Spain who maintained or adopted Spanish or Spanish creole as their language of communication. That anesceptic description, however, does not provide an adequate explanation for why individuals like us, many of us born in a completely different cultures, still identify so strongly with the communities in which our parents were born.

America, unlikely many other nations, has created a societal image that is in a constant state of tension in dealing with its ethnic identities. We as a society tout the cultural and

racial diversity of our people yet insist that we can function and live in a race and color blind way. That tension today is being hotly debated in national discussions about affirmative action- discussions in which groups like your own will have to take a leadership role. The tension obviously leads many of us to protect our cultures and to promote their importance. Yet, that need did not create me as a Latina. I became a Latina, instead, by the way I love and live my life. It is the mix in me that comes from a family whose very existence showed me how wonderful and vibrant life is and who through their love and support showed me that although I am an American, love my country and could achieve its opportunity of succeeding at anything I worked for, that I also have a Latina soul and heart with the magic that that carries.

Our society has changed tremendously since I was a child.

I suspect that many of the younger Latino professionals here don't

even remember Cantiflas. Cheaper airplane travel, greater public transportation and more cars alone have dispersed people of color across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, essentially lived in the Bronx within miles of each other. Thus, it will be harder for our children to hold on to their ethnic identities. But hold on we must because Latinos and all minority groups, regardless of what part of the country we live in, face as a group in this society, enormous challenges.

The following are statistics that many of you are familiar with but they are always worth repeating. The numbers are taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza.

Latinos represents the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about

five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. We are also a young population, with a median age below Blacks and other groups. We also tend to have slightly larger families than other groups. The Hispanic school-age population is, as a consequence of our demographics, also rapidly growing and although today we account for only 10% of public school enrollment, by the year 2000, we should constitute 1/6 of the students in the nations classrooms but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates

of any major group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanic has left school without a diploma, compared to less than one in 16 of Blacks and one in 15 of Whites. Only 10% of Hispanics over 25 years old have completed four or more years of college, compared to 11.3% of Blacks and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Employment follows education and we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have

managerial and professional jobs. In a comparison none of us likes winning, only Blacks and American Indians do more poorly in gross employment numbers but Blacks do better in education measures than we do. Latinos have lower per capita incomes than either Whites or Blacks. In 1988, Hispanics had a per capita income of about \$7900, Blacks at about \$8200 and Whites at about \$13,900. I note that among hispanics, La Raza reports Puerto Rican families as faring worst economically with the lowest family medians and the highest proportion of families with incomes below \$10,000. I further note that our poverty rates are highest among female-headed Hispanic families.

I doubt this group of lawyers needs to be reminded that although Latinos are about 10% of the general population, we are only 5.6% of the nation's law school population, and only 2.6% of the associates of the 25 largest New York law firms are Hispanic.

We have fewer than 100 Hispanic law professors out of 5700 positions nationwide.

As the National Council of La Raza has concluded, in this fast rapidly evolving technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. That is why events like today are so important. Members of HBNA and members of the bench and bar of people of color in the tri-state area are among the educational elite of our communities. We have a responsibility not only to achieve success individually so that we provide role models and opportunities for others but we have a responsibility to help change these frightening numbers.

It is critical for us in our otherwise busy lives to remember that whatever we do, we should not forget that we are people of

color, of rich cultures, and that we have a responsibility to devote time, when we can, to pro bono work, and to give support with money, when we have that, to help our communities face their enormous challenges. I as many of you know that training for work is very time consuming. You don't always have time to give to other activities. That's alright. We all need to develop our skills and business. The important thing, however, is not to get lost in our work forever but to make sure we take and make time to reach out and volunteer time to our communities throughout our lives.

We must ensure that people of color share fully in the American dream. I am proud to be a member of HBNA who is committed to the goal of addressing issues important to the Latino community. We must keep in sight, however, the overriding reality that whatever our regional differences, the results of our problems are

affecting all of us. We need to take advantage of our common bonds and work together to our political, social and economic advantage.

It is wonderfully to be able to say Yo tengo orgullo en ser Latina pero tambien entiendo me responsabilidad a mi comunidad. We as a national community need for you to continue taking pride in who you are, where you came from but also to remember that you must always take time to give back to others in your communities some of the benefits of what you have received. I wish HBNA's National Board much success this weekend in formulating HBNA's future agenda and in preparing for the next annual convention. I hope the joint committees of the various bars that are here the same success. Good night and thank you again for letting me share this evening with you.

El Orgullo y Responsabilidad de Ser Latino y Latina.

Speech given on March 15, 1996 at the Third Annual Awards Banquet & Dinner Dance for the Latino and Latina American Law Students Association of Hofstra University School of Law

Thank you Cynthia for the gracious introduction. I agreed to speak tonight for two reasons. The first was my desire to spend some time with law students from Hofstra. I have met some of you at various bar functions and have been impressed with your enthusiasm and interest in the law and with Latino issues. Unfortunately, your school's distance from Manhattan makes it difficult for me to attend functions that the school holds during the workday. I am grateful that this event is held at night and that you choose me to be your speaker and share in your celebration.

My second reason for coming tonight was sparked by Cynthia's invitation which told me that your event included not just students and school administrators, but your family and

friends. Very recently, I participated in a very special event when I officiated at my cousin's wedding. She is six months younger than I and this was her second wedding. We grew up together and shared many wonderful times and have many warm memories of these times. At the ceremony, there was not a dry eye, my own included, because I recounted many fond tales of our youth, not the least was how we ended up breaking her brother's leg and how we protected each other from our parents when we first went out dating as teenagers. That ceremony underscored something very important for me. It reminded me that the essence of who I am, the Latina in me, is an ember that blazes forever and that that ember was lit by my family and our friends.

That ember reminds me of, los muchos platos de arroz y guandoles, y de piener that I have eaten at countless family functions, of pasteles at Christmas. It is also, if you have my

adventurous taste buds, morcilla, patitas de cerdo con garbanzos, y la lengua y orejas del cuchfrito. It is coquitos y piraguas during the summer. It is the sounds of merengue at all our family parties and the incredibly long and heartwrenching Spanish love songs that my family enjoys. It is the memory of seeing Cantiflas when I was a kid with my cousins at the Saturday afternoon movies.

My Latina ember was kindled each weekend that I visited and played in abuelita's house. My playmates were my cousins and the children of our extended family that included padrinos y padrinas, suegros y suegras, their families and the people who lived next door who came over to play dominoes o la loteria-(bingo) on Saturday nights. Does anyone one of these things make me a Latina. No. It is not speaking Spanish, which I do. Instead, it is being Latina in the way I love and live my life. It is the mix in me

that comes from a family whose very existence showed me how wonderful and vibrant life is and who through their love and support showed me that although I am an American, love my country and could achieve its opportunity of succeeding at anything I worked for, that I also have a Latina soul and heart with the magic that that carries.

I am very young but I recognize that our society has changed tremendously since I was a child. I suspect that many of the students here don't even remember Cantiflas. Cheaper airplane travel, greater public transportation and more cars alone have dispersed families across greater distances. Growing up, all of my family, except those that remained in Puerto Rico, essentially lived in the Bronx within miles of each other. It pleases me enormously that the students here who may not have had the same opportunities as I to grow up fully immersed in family and our

culture, that you have held on to your Hispanic identities but more importantly, that you understand your obligations and responsibilities as Latinos and Latinas.

We are a group in this society that faces enormous challenges. The following are statistics taken from the 1989-90 Census as reported and analyzed by the National Council of La Raza. Latinos represent the fastest growing segment of the U.S. population. Since 1980, the Latino population has grown about five times as fast as the non-Latino population and Latinos are expected to be the largest ethnic minority in the U.S. in the 21st century. We number about 20.1 million out of 243.7 million Americans, excluding the 3.5 million people of Puerto Rico. [I exclude them because the census count excludes them only.] We are also a young population, with a median age below Blacks and other groups, and we also tend to have slightly larger families than other groups. The

Hispanic school-age population is, as a consequence of our demographics, also rapidly growing and although today we account for 10% of public school enrollment, by the year 2000, we should constitute 1/6 of the students in the nations classrooms but one-third of the student population overall.

We remain, unfortunately, the most undereducated segment of the U.S. Population and by every statistical measurement, the gap between Hispanic and non-Hispanic communities continues to grow at alarming rates. Latinos have the highest school dropout rates of any major group. About 43% of Hispanics ages 19 years and over are not enrolled in high school and have no high school diploma. By age 16-17, almost one in five Hispanics has left school without a diploma, compared to less than one in 16 of Blacks and one in 15 of Whites. Only 10% of Hispanics over 25 years old and over have completed four or more years of college, compared to 11.3% of

Blacks and 20.9% of Whites in the same age group. La Raza notes further that for those students in school, Hispanics share less in gifted and special talent programs and have a higher percentage of students left back or not at age and grade normed achievement levels.

Employment follows education and we should not be surprised that in income statistics, Latinos are also not faring well. Latinos have a much higher unemployment rate than non-Hispanics, 50% over the rate for Non-Hispanics, and 60% above the rates of Whites. We are less likely than non-Hispanics to have managerial and professional jobs. In a comparison none of us likes winning, only Blacks and American Indians do more poorly in gross employment numbers but Blacks do better in education measures than we do. Latinos have lower per capita incomes than either Whites or Blacks. In 1988, Hispanics had a per capita income of about \$7900,

Blacks at about \$8200 and Whites at about \$13,900. I note that among hispanics, La Raza reports Puerto Rican families as faring worst economically with the lowest family medians and the highest proportion of families with incomes below \$10,000. I further note that our poverty rates are highest among female-headed Hispanic families.

As the National Council of La Raza has concluded, in this fast rapidly evolving technological society, unless we educate our children better and improve their opportunities, our poverty gap with the rest of society will only widen.

These statistics are terribly sobering. We have much to do. Nevertheless, an event like today should give us hope. Here are students who have not dropped out. Here are students who are achieving and have real hope of improving their economic status. Here, most importantly, are students who understand fully the

importance of hard work in achieving success but who also understand that they have a responsibility to help change these frightening numbers.

It is important as young people to dream and to be successful. Some of you may go off to work in fairly traditional legal areas. Others of you may stay in public service careers. There is nothing wrong with either choice. Both choices enrich our community. The significant fact is remembering that whatever we do, we should not forget that we are Latinos, of rich and important cultures, and that we have a responsibility to devote time, when we can, to pro bono work, and to give support with money, when we have that, to help our community face its enormous challenges. I as many of you know that training for work is very time consuming. You don't always have time to give to other activities. That's alright. You need to develop your skills. The important thing, however, is not

to get lost in your work forever but to make sure you take and make time to reach out and volunteer time to our community throughout your life.

I tell immigrants who I am swearing in as new citizens that I wish I could describe the United States of America to them as paradise. Everyone knows that the U.S. is not perfect. Even here, not all dreams come true and not all hopes can be realized. If nothing else, economic realities limit many dreams. Yet, the need to dream, the need to hope, the need to believe and know that we live in a land that gives us the chance to have dreams come true, that is the gift of America.

With freedom and liberty and opportunity comes, however responsibility. As citizens and member of this society, we all share the responsibility of working together within our democratic system of government -- to strengthen it -- to ensure that the

promise of America and its freedoms comes to all people in our society.

In America, all people, no matter how rich or poor they start out or end up, no matter what their ethnic or racial or religious background may be, have shared and continue to share in creating this country. We must ensure that Latinos as a group share fully in the American dream. What your parents have done here is wonderful and provides the best that our society has to offer. They have taught you about this country, they have made you Americans but they have not let you forget about your backgrounds and your cultures. I am very honored to have been hear tonight. To congratulate your families for the wonderful way you students of Hofstra have grown up, for the fine men and women you have become and for the generosity of spirit you have shown in your good works here, especially with projects like the workplace program. Your

families here have much to be proud of as do you students. It is wonderful to be able to say yo tengo orgullo en ser Latina o Latinio y tambien entiendo me responsabilidad a mi comunidad. We need for you to continue taking pride in who you are, where you came from and to remember that you must always take time to give back to others in our community some of the benefits of what you have received. Good night and thank you again for letting me share this evening with you.

HOGAN-MORGENTHAU AWARD
JANUARY 17, 1995 -- TAVERN ON THE GREEN

I AM DELIGHTED TO BE HERE TONIGHT. THIS EVENING PROVIDES ME WITH THREE PRECIOUS OPPORTUNITIES. THE FIRST IS TO BE HUMBLLED BY SHARING THE HOGAN-MORGENTHAU AWARD WITH ITS MANY TALENTED AND ILLUSTRIOUS FORMER RECIPIENTS. THIS AWARD IS A TRIBUTE TO THE VALUES OF PROSECUTORIAL EXCELLENCE AND COMMITMENT TO PUBLIC SERVICE THAT EXEMPLIFIES THE LEGACIES OF FRANK HOGAN AND ROBERT MORGENTHAU. THE FORMER RECIPIENTS OF THIS AWARD, LIKE MY DISTINGUISHED COLLEAGUES ON THE BENCH JOHN KEENAN AND PIERRE LEVAL, HAVE ALL CONTRIBUTED GREATLY TO THOSE VALUES AND I AM DEEPLY PRIVILEGED TO HAVE BEEN SELECTED FOR THE HONOR OF CELEBRATING THE SIXTIETH YEAR ANNIVERSARY OF THE HOGAN-MORGENTHAU ASSOCIATION WITH THEM AND ALL OF YOU.

THE SECOND OPPORTUNITY I HAVE TONIGHT IS TO THANK THE MANY FRIENDS I WAS FORTUNATE TO HAVE MET DURING MY YEARS IN THE

MANHATTAN DA'S OFFICE. ALL OF YOU SUPPORTED AND NURTURED ME DURING THOSE YEARS WHEN I FIRST WAS LEARNING HOW TO LAWYER. YOU SHARED WITH ME THE SOMETIMES EXHILARATING AND OTHER TIMES FRUSTRATING MOMENTS BEFORE "PATIENT" JUDGES LIKE JUSTICE BURTON ROBERTS AND "ACCOMMODATING ADVERSARIES" LIKE VERNON MASON. YOU ALL TAUGHT ME MUCH AND I AM ETERNALLY GRATEFUL FOR ALL YOU GAVE ME AND THE FRIENDSHIPS YOU CONTINUE TO SHARE WITH ME NOW.

I ALSO WANTED TO TAKE A MOMENT TO EXPRESS MY APPRECIATION TO THE THREE SUPERVISORS AND FRIENDS FROM THE DA'S OFFICE WITH WHOM I HAD THE MOST CONTACT -- JOHN FRIED, WARREN MURRAY AND RICHARD GIRGENTI. I WAS FORTUNATE TO HAVE WORKED UNDER THE BEST BOB MORGENTHAU'S OFFICE HAD TO OFFER -- INDIVIDUALS OF EXTRAORDINARY LEGAL SKILLS, INTELLIGENCE, AND INTEGRITY. ALL OF YOU CAN TAKE CREDIT FOR THE GOOD SKILLS I PICKED UP AND DISCLAIM THE BAD ONES I DEVELOPED ON MY OWN AND TO

WHICH MANY OF THE LAWYERS WHO APPEAR BEFORE ME NOW ARE ATTESTING.

TO MY MANY FRIENDS HERE TONIGHT IT IS WONDERFUL TO SEE YOU ALL

AND I THANK YOU FOR SHARING THIS EVENING WITH ME.

MY THIRD OPPORTUNITY TONIGHT IS TO PUBLICLY THANK THE
BOSS-- ROBERT MORGENTHAU -- FOR THE MANNER IN WHICH HE CHANGED MY
LIFE FROM THE FIRST MOMENT WE MET. BOB IS UNLIKELY TO REMEMBER
OUR FIRST MEETING. IT OCCURRED IN A SITUATION AND UNDER
CIRCUMSTANCES WHICH I UNDERSTAND HAVE HAPPENED WITH MANY OTHERS.
LIKE FOR MANY OTHERS, HOWEVER, A COMMON MOMENT FOR HIM, WAS A
LIFE ALTERING MOMENT FOR ME.

I MET BOB AT OUR MUTUAL ALMA MATER, YALE. I WAS A THIRD
YEAR LAW STUDENT WHO HAD BEEN STUDYING A TAX LAW TREATISE IN THE
LIBRARY. CONTRARY TO POPULAR BELIEF, YALIES DO OCCASIONALLY READ
BOOKS ON THE LAW INSTEAD OF ON POLICY, PARTICULARLY WHEN
PROFESSORS VISITING FROM HARVARD ARE TEACHING THE COURSE.

SOMEWHERE IN THE EARLY EVENING I TOOK A BREAK AND THE INSATIABLE APPETITE OF STUDENT LIFE HIT ME -- NO, IT WAS NOT THE PANG OF INTELLECTUAL HUNGER -- IT WAS THE HUNGER PANG FOR FOOD AND DRINK. DOWN THE HALL FROM THE LIBRARY I SAW CHEESE AND WINE IN THE BACK OF THE THIRD FLOOR CONFERENCE ROOM AND THAT WAS MORE THAN ENOUGH TO DRAW MY ATTENTION. THE ASSEMBLED SPEAKERS IN THE ROOM WERE PUBLIC INTEREST LAWYERS WHO WERE DISCUSSING THE ALTERNATIVES TO PRIVATE PRACTICE. I DON'T REMEMBER THE OTHER SPEAKERS BECAUSE BOB MORGENTHAU -- FORTUNATELY FOR ME WHO WAS ONLY THERE FOR THE NUTRIENTS IN THE ROOM -- WAS THE LAST SPEAKER BEING INTRODUCED. EQUALLY LUCKY FOR ME, BOB DECIDED HE DIDN'T WANT TO SPEAK LONG AND ANNOUNCED THAT AS THE LAST SPEAKER HE WOULD KEEP IT SHORT. I HAD HIT PAY DIRT AND DECIDED TO STAY AND LISTEN.

AFTER AFFIRMING THE MANY BENEFITS OF PUBLIC SERVICE WHICH THE OTHER SPEAKERS HAD APPARENTLY DISCUSSED, BOB DESCRIBED

HIS OFFICE AND ITS WORK. HE INDICATED THAT A POSITION WITH HIS OFFICE DIFFERED FROM ALMOST ALL OTHER PUBLIC AND PRIVATE WORK BECAUSE ONLY IN HIS OFFICE WOULD YOU BE ACTUALLY TRYING A CASE WITHIN YOUR FIRST YEAR AND WHERE YOU WOULD HAVE SIGNIFICANT AND ULTIMATE RESPONSIBILITY IN THE DEVELOPMENT AND PRESENTATION OF YOUR CASES. AT 24-25 YEARS OF AGE, BOB EXPLAINED, YOU WOULD DO MORE IN A COURTROOM THAN MANY LAWYERS DID IN A LIFETIME.

MANY OF YOU KNOW THAT I WAS BORN AND RAISED IN THE SOUTH BRONX AND HAVE HAD A LIFE-LONG COMMITMENT TO SERVING MY COMMUNITY. MY ATTRACTION TO LAWYERING STARTED WITH WATCHING PERRY MASON -- I AM A CHILD OF TELEVISION. I MAY HAVE BEEN THE ONLY FAN OF THE SHOW WHO LIKED THE EVER LOSING PROSECUTOR, BERGER. MY LIKE FOR HIM DEVELOPED FROM ONE EPISODE IN WHICH PERRY MASON EXPRESSED SYMPATHY FOR THE FRUSTRATION BERGER HAD TO BE FEELING AFTER WORKING SO HARD ON HIS CASE AND HAVING IT

DISMISSED. BERGER RESPONDED BY OBSERVING THAT AS A PROSECUTOR HIS JOB WAS TO FIND THE TRUTH AND THAT IF THE TRUTH LED TO THE ACQUITTAL OF THE INNOCENT AND THE DISMISSAL OF HIS CASE, THEN HE HAD DONE HIS JOB RIGHT AND JUSTICE HAD BEEN SERVED. HIS SPEECH STAYED WITH ME MY ENTIRE LIFE AND SHAPED MY PERCEPTION OF WHAT PROSECUTORS DID. EVERY ONCE IN A WHILE TELEVISION DOES A GOOD THING.

HOWEVER, DESPITE MY INVOLVEMENT IN PUBLIC SERVICE ACTIVITIES IN COLLEGE AND LAW SCHOOL, MY CAREER IN LAW SCHOOL HAD GOTTEN TRACKED ON A TRADITIONAL PATH -- FRIENDS WERE TALKING TO ME ABOUT CLERKING AND I HAD SPENT A SUMMER AT A TOP TEN MIDTOWN FIRM. I WAS INTERVIEWING AT FIRMS IN OTHER STATES BECAUSE MY THEN HUSBAND WAS APPLYING TO GRADUATE SCHOOLS THROUGHOUT THE COUNTRY. I HAD AN INTEREST IN INTERNATIONAL LAW AND HAD APPLIED TO THE DEPT OF STATE, BUT I WAS NOT CONSIDERING ANY OTHER PUBLIC

POSITIONS UNTIL I HEARD BOB TALK. HE SPARKED BY MEMORY ABOUT
WHAT I HAD THOUGHT LAW WAS ABOUT -- SEEKING JUSTICE IN A
COURTROOM. I STOOD ON THE WINE AND CHEESE LINE WITH BOB AND
CHATTED WITH HIM -- I MIGHT HAVE BEEN TEMPORARILY DISTRACTED FROM
WHAT HAD DRAWN ME TO THAT ROOM -- FOOD AND DRINK -- BUT I NEVER
PERMANENTLY FORGET MY PRIORITIES. I ASKED BOB QUESTIONS ABOUT HIS
LIFE AND WHERE HE HAD BEEN AND WHAT HE LIKED ABOUT EACH POSITION.
TO THIS DAY I DON'T KNOW WHY HE DIDN'T WRITE ME OFF AS COMPLETELY
USELESS, I HAD NO IDEA WHO HE WAS OR WHAT HE HAD ACCOMPLISHED IN
LIFE. I DID FIND OUT FAIRLY QUICKLY. DESPITE MY CLEAR
IGNORANCE, BOB DIDN'T WRITE ME OFF AND HE ASKED ME TO INTERVIEW
WITH HIM THE NEXT DAY, WHICH I DID.

HE IN TURN GOT MY RESUME FROM THE CAREER OFFICE AND
SPOKE TO MUTUAL FRIENDS AT THE SCHOOL. BY THE TIME I GOT TO THE
INTERVIEW, WE OVERSPENT OUR ALLOTTED TIME TALKING ABOUT THE

VARIOUS ACTIVITIES I HAD BEEN INVOLVED IN AND HE SOLD ME ON VISITING HIS OFFICE. TWO OR THREE WEEKS LATER, I VISITED THE OFFICE AND SPENT A DAY WITH ANOTHER YALIE, JESSICA DE GRASSIA, TOURING, LOOKING AND ABSORBING. WHEN BOB OFFERED ME A JOB -- I SAID YES BUT HAD THE FURTHER TEMERITY TO EXPLAIN TO BOB THAT MY ACCEPTANCE DEPENDED UPON MY HUSBAND GETTING INTO A GRADUATE PROGRAM HE LIKED IN NYC. MY THEN HUSBAND'S GRADUATE PLANS DIDN'T FINALIZED UNTIL THE SUMMER, YET BOB KEPT HIS OFFER OPEN AND IN AUGUST 1979 MY LIFE IN THE DA'S OFFICE BEGAN.

I HAD HAD ONE TRIAL ADVOCACY COURSE AT YALE AND DONE BARRISTERS UNION, A MOCK TRIAL EXERCISE. MY EDUCATIONAL TRAINING IN CRIMINAL LAW WAS LIMITED TO MY FIRST YEAR COURSES. I WAS SURELY ILL TRAINED WHEN I BEGAN MY CAREER IN HIS OFFICE. YET, BOB TOOK A CHANCE AND GAVE ME AN INVALUABLE GIFT BY HIRING ME. I DON'T KNOW HOW HE SAW THE CHORD IN ME THAT RESPONDED SO STRONGLY

TO TRIAL WORK. I LOVED LITIGATING. I LOVED BEING A PROSECUTOR.
IT WAS WONDERFUL AND ENORMOUSLY GRATIFYING WORK THAT I ENJOYED
TREMENDOUSLY. MOST OF ALL, HOWEVER, I LOVED BEING IN AN OFFICE
SURROUNDED BY PEOPLE WHOSE VALUES I RESPECTED AND WHO TAUGHT ME
SO MANY IMPORTANT LESSONS.

I WAS TAUGHT TO BE THOROUGH IN MY INVESTIGATIONS,
CAREFUL IN MY FACT FINDING, METICULOUS IN MY LEGAL ARGUMENTS.
ALL OF THIS WHILE I JUGGLED HUNDREDS OF CASES. I WAS TAUGHT TO
APPLY FACTS TO LAW -- THE CORNERSTONE OF LAWYERING. I WAS TAUGHT
TO THINK ABOUT THE NEEDS OF SOCIETY AND TO RESPOND TO THOSE NEEDS
BY PROSECUTING VIGOROUSLY AND WITH PASSION. YET, MOST OF ALL, I
WAS TAUGHT TO DO JUSTICE. IT IS THAT LESSON OF JUSTICE WHICH HAS
STAYED WITH ME THROUGHOUT MY CAREER AND IT IS THE CALL TO DO MY
WORK JUSTLY UPON WHICH I NOW ATTEMPT TO STRUCTURE MY LIFE AS A
JUDGE.

YOU SEE, IN BOB MORGENTHAU'S OFFICE I LEARNED THAT JUSTICE WAS NOT EASILY DEFINED -- THAT IT WAS BOTH A PROCESS AND A RESULT THAT RELIED UPON FAIRNESS AND INTEGRITY. PART OF THE PROCESS WAS IN INVESTIGATING THOROUGHLY AND OBJECTIVELY TO ENSURE ALWAYS THAT ONLY THE LEGALLY GUILTY WERE PROSECUTED. I REMEMBER MANY A SESSION IN JOHN FRIED'S AND THEN WARREN MURRAY'S OFFICE IN WHICH WE DISCUSSED NOT THE PROSECUTION OF CASES BUT THEIR DISMISSALS BECAUSE WE SIMPLY HAD INSUFFICIENT OR UNPERSUASIVE EVIDENCE. IN THE OFFICE I WAS A PART OF, IT WAS NEVER THE VERDICT AT THE END OF THE CASE THAT MATTERED BUT WHETHER WE HAD CAREFULLY AND FULLY INVESTIGATED ALL AVENUES OF EVIDENCE, PUT FORTH THE BEST AND THE MOST POTENT ARGUMENTS IN A SKILLED MANNER AND FAIRLY PRESENTED THE EVIDENCE TO THE JURY FOR DETERMINATION.

I ALSO REMEMBER MANY A SESSION WITH JOHN AND WARREN WHEN WE TALKED ABOUT WHAT WAS FAIR AND JUST IN THE PLEA OFFERS WE

EXTENDED -- FAIR AND JUST IN LIGHT OF THE STRENGTH OF OUR CASE
AND ITS IMPACT ON BOTH SOCIETY AND THE DEFENDANT. ALTHOUGH
VIGOROUS PROSECUTION WAS IMPORTANT, SO WAS COMPASSION WHEN THE
CIRCUMSTANCES WARRANTED IT.

I KNOW THAT AS THE OFFICE HAS GROWN, IT HAS ALMOST
DOUBLED SINCE MY TIME THERE, AND THAT THERE HAS BEEN A GREATER
BUREAUCRACY PUT IN PLACE. I WORRY THAT WITH SIZE AND THE
EMPHASIS ON INCREASED LAW ENFORCEMENT IN OUR SOCIETY, THAT THOSE
IN SUPERVISORY ROLES WILL LOSE SIGHT OF THE IMPORTANCE OF
ENCOURAGING YOUNG PROSECUTORS TO REMEMBER THAT JUSTICE WINS WHEN
WHAT THEY DO IS DONE FAIRLY AND WITH COMPASSION FOR ALL
PARTICIPANTS IN THE PROCESS. VICTIMS UNQUESTIONABLY MUST BE
PROTECTED BUT WE AS A SOCIETY SUFFER IRREPARABLE HARM WHEN THAT
GOAL SUPERSEDES RESPECT FOR CONSTITUTIONAL PROCESSES AND
OBJECTIVE AND HUMANE EVALUATION OF CASES.

THERE IS NO EASY DEFINITION TO THE WORD JUSTICE.

BECAUSE OUR JURISPRUDENCE DEVELOPS FROM THE FACTS OF CASES, OUR JUSTICE ENCOMPASSES A COMPLEX IDEA TIED TO THE CIRCUMSTANCES OF EACH SITUATION. IN MANY RESPECTS, THE COURTS AND LAW ARE THE LEAST SUITED INSTITUTIONS TO RENDER JUSTICE BECAUSE THEY ARE NOT SYSTEMS STRUCTURED ON COMPROMISE. WE HAVE BUILT PLEA BARGAINING AND SETTLEMENTS INTO THESE INSTITUTIONS BUT WE HAVE DONE THIS BECAUSE THE END RESULT OF LEGAL PROCESS IS TO FIND A WINNER. HOWEVER, FOR EVERY WINNER THERE IS A LOSER, AND OFTEN THE LOSER IS HIM OR HERSELF A VICTIM OF THE ILLS OF OUR SOCIETY.

DESPITE THE FACT THAT THERE IS NO EASY DEFINITION TO THE WORD "JUSTICE," NOT JUST LAWYERS BUT ALMOST EVERY PERSON IN OUR SOCIETY IS MOVED BY THE WORD. IT IS A WORD EMBODIED WITH A SPIRIT THAT RINGS IN THE HEARTS OF PEOPLE. IT IS AN ELEGANT AND BEAUTIFUL WORD THAT MOVES PEOPLE TO BELIEVE THAT THE LAW IS

SOMETHING SPECIAL. THEREFORE, DESPITE THE DIFFICULTY IN DEFINING THE WORD, THOSE OF US WHO CHOOSE THE LAW AS OUR PROFESSION ARE COMPELLED TO BE FOREVER VIGILANT IN GIVING THE CONCEPT OF JUSTICE MEANING AND IN SPENDING TIME REGULARLY IN ITS PURSUIT.

I AM MOST GRATEFUL TO BOB MORGENTHAU AND HIS OFFICE IN TEACHING ME HOW IMPORRTANT THE DEMANDS OF JUSTICE ARE. IN BOB'S OFFICE, I LEARNED TO CONSTANTLY STEP OUT OF MY ROLE AS A PROSECUTOR AND TO LISTEN TO MY ADVERSARIES AND TO RESPECT AND APPRECIATE THEIR PERSPECTIVES. IT WAS ALL TOO EASY AS A PROSECUTOR TO FEEL THE PAIN AND SUFFERING OF VICTIMS AND TO FORGET THAT DEFENDANTS, DESPITE WHATEVER ILLEGAL ACT THEY HAD COMMITTED, HOWEVER DESPICABLE THEIR ACTS MAY HAVE BEEN, WERE HUMAN BEINGS WHO HAD FAMILIES AND PEOPLE WHO CARED AND LOVED THEM. APPRECIATING THIS FACT DID NOT EXCUSE THE REPREHENSIBLE ACTS I PROSECUTED BUT IT WAS MY FIRST STEP IN UNDERSTANDING THE

BALANCING OF HUMAN FACTORS JUSTICE REQUIRED.

EQUALLY, AS A PROSECUTOR, I ALSO LEARNED TO APPRECIATE AND RESPECT THE IMPORTANCE AND WORK OF DEFENSE ATTORNEYS AS DEFENDERS OF OUR CONSTITUTION AND ITS PROMISED RIGHTS TO INDIVIDUALS AND TO OUR SOCIETY. BOTH SIDES IN THE CRIMINAL SYSTEM ARE EQUALLY NECESSARY AND EQUALLY IMPORTANT TO DOING JUSTICE. I NEVER SAW DEFENSE ATTORNEYS AS ENEMIES, WE WERE AND ARE SOLDIERS ON THE SAME SIDE ONLY WITH DIFFERENT ROLES. THE GOAL OF THE MISSION IS THE SAME--JUSTICE. I LEARNED THAT JUSTICE DOES NOT HAVE A SIDE. IT IS A RESULT THAT DEPENDS ON A FAIR PROCESS BEING HONORED. IT IS RESPECT FOR THE INTEGRITY OF A PROSECUTOR'S WORD AND ACTION THAT TYPIFIES THE BEST OF THE HOGEN-MORGENTHAU TRADITIONS, AND IT IS THAT INTEGRITY WHICH I WAS TAUGHT AND FOR WHICH I AM GRATEFUL.

I HOPE, AND EXPECT BECAUSE IT IS BOB MORGENTHAU'S

OFFICE, THAT THE YOUNG PROSECUTORS OF TODAY ARE ENCOURAGED TO
LEARN AND HOLD SACRED THE THINGS I WAS TAUGHT. IT WAS THOSE
LESSONS THAT MADE MY WORK IN BOB'S OFFICE VALUABLE. BOB -- THAT
CHANCE MEETING BETWEEN US WAS THE MOST SPECIAL MOMENT OF MY LIFE.
I KNOW THAT MY STORY IS VERY SIMILAR TO THAT OF MANY HERE -- IF
NOT IDENTICAL IN CIRCUMSTANCE OF MEETING, AT LEAST IDENTICAL IN
RESULT -- WE BECAME LAWYERS PROUD TO HAVE BEEN A PART OF YOUR
OFFICE, GRATEFUL FOR THE TIME WE SPENT THERE AND INDEBTED FOR THE
MANY GIFTS IT GAVE US. ON MY PERSONAL BEHALF-- THANKS TO YOU AND
TO MY MANY FRIENDS HERE WHO MADE MY EXPERIENCE SO EXTRAORDINARY.

A JUDGE'S GUIDE TO MORE EFFECTIVE ADVOCACY

Keynote Speech -- The 40th National Law Review Conference
March 19, 1994, The Condado Plaza Hotel, Puerto Rico

When I left New York earlier this week, the newscasts were advising us of the impending arrival of the sixteenth snow storm of the winter season. My office told me yesterday that it was snowing yet again in the City. In August, when the New York skies were blue and the vegetation lush, I did not fully appreciate how grateful I would be tonight for the invitation to speak to you. With each passing snow day, my gratitude has increased exponentially.

I join my voice to that of the other speakers tonight who have conveyed appreciation to Cecilia Duquela, Chair of this Conference, for the wonderful job she has done. She has been a delight for me and my staff to deal with and an honorable

representative of a fine law journal and its school. I also thank all of the students of the Revista Juridica de la Universidad Interamericana de Puerto Rico and the Dean and faculty of the law school for hosting this Conference. You have provided a beautiful setting with stimulating topics of discussion and enjoyable events. I have also been delighted to have met the many distinguished guests who have spoken and attended the Conference, some of whom are here tonight. Finally, I thank you the conferees and other guests for the opportunity to share my thoughts as a recently appointed federal judge about the experience of judging and what it has taught me about effective and efficient advocacy. For reasons I will shortly discuss, I have concluded this past year that effectiveness and efficiency in advocacy are synonymous terms for persuasive advocacy.

I selected my topic for tonight in October of this past

year, shortly after the law journal invited me to speak and as I celebrated my first anniversary on the bench. As many do with other important anniversaries, I reflected upon all that had occurred, all that I had learned, and all that remained for me to learn and do. During my nomination process, all of my future colleagues on the bench told me that I was about to be given the privilege of having "the best job in the world." A year and a half later, I join in their opinion.

In no other legal work I know of in the private or public sector is there greater variety and in depth treatment of legal issues than in judging. From the common diversity cases involving personal injury or partnership, corporate or contract disputes to the more complex cases involving antitrust, securities, habeas and other constitutional questions, I, as a federal judge, do not superficially investigate those areas of

law but I learn them in greater depth and at a greater speed than I ever did as an advocate or as a law student in semester long courses. The greater gift, however, is not just the intellectual stimulation of the work but the opportunity I am given to do work that is not merely an academic exercise but which directly and profoundly effects individuals and our society.

In my first year alone, I presided over the class action settlement of claims of institutionalized mentally deficient patients for regular access to greater sun light. I decided a first amendment challenge to an ordinance that banned the display of fixed religious displays in a City's parks. The power of my position became a stark reality for me when I learned that the City Council and its legal staff spent days in emergency sessions considering how to approach my decision. Ultimately, they decided not to appeal my injunction and a menorah was

displayed in the City's park during the Passover season. With a heavy heart because I believe that those charged with doing justice like the police and prosecutors have a responsibility to do their work with the highest degree of integrity, I suppressed evidence in a major narcotics case because I found that the magistrate judge had been misled into issuing a search warrant. Just last month, I presided over a civil forfeiture trial by the United States government against the twenty-five year Clubhouse building of the Hell's Angels Motorcycle Club of New York.

I have done exciting things. However, I have also addressed intellectually less weighty or fascinating matters. In fact, a good portion of my work may fall into that category. Although every case is important to the parties and I try very hard to give all my cases the same degree of care -- albeit not the same time since that is impossible and not necessary for many

issues -- there are routine and frankly boring cases. I have tried a \$35,000 sprained ankle case under the Federal Employees Liability Act. I spent weeks writing an opinion on whether non-longshoreperson harbor workers should be treated like longshore persons for purposes of negligence recovery under the Longshoreman's and Harbor Act. If you do not understand the issue or its importance to the defendant, you know now why I spent so much time trying to understand the case and the defense arguments. The Second Circuit affirmed my judgment, describing my opinion as straight forward and on point while explaining that the defense simply had a tortured argument. Here, as a new judge, I thought I was missing something and I repeatedly read the voluminous and turgid submissions of the defense until I finally decided that If I was missing something in the defense argument, I was incapable of finding it. The Second Circuit did

not find it either but the practical lesson I took from the experience was not just that I should trust my legal instincts but that unless I spent less time on incomprehensible submissions, my docket would grind to a screeching halt.

Judge Patricia Wald of the D.C. Circuit Court and Justice Anthony Scalia of the Supreme Court have both adequately and elegantly described the frustrations and burdens of judging. If any of you are interested, Judge Wald's article is entitled "Some Real-Life Observations about Judging" and it appears in the 1992 volume 26 of the Indiana Law Review [at page 173]. Justice Scalia's remarks were delivered before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents on February 19, 1988, and a discussion of Justice Scalia's remarks can be found in an article written by Professor Judith Resnik contained in the 1988 volume 6 of the Southern

California Law Review [at page 1877].

Perhaps because I am so new to the work, however, I have not been disillusioned or frustrated as of yet, and I hope that for the rest of my judicial career, my work remains the "best job in the world." Among my comments to my law clerks and friends as I reflected about my first year, I expressed the regret that I had not judged before I lawyered. When I practiced if I had known a fraction of what I have learned in my first year as a judge, I would have been that much better a lawyer. [As an aside, my actual statement was that I would have been invincible as a lawyer. I had to tone it down for the sake of some decorum and humility.] In some civil law countries, there are different schools for careers as a judge or a lawyer. In our legal system, however, without the experience one gathers as a lawyer, it is impossible to function as a judge and fully understand the

nuances of legal analysis.

As new lawyers, clerking for a judge is probably the next best step to being a judge. Because many of you are editors on law journals, you will likely have this experience. But for those of you who do not and even those of you who do, I bring to your attention the following observations I now, having had the experience of judging, make about effective and, as I have said previously, efficient advocacy. My observations and recommendations are not new and very simple. All were told to me, or I read, in bits and pieces through law school and in my practice. Because most of you are graduating this year, and are just about to begin your careers, I thought it might be helpful to underscore that advise^c which I now as a judge have grown to more appreciate. ✓

Judge Wald of the D.C. Circuit in her article, [page

178], on Real-Life Judging, states, and I paraphrase in part:

"The elegant prose, the visionary idea, the qualitative leap forward in the law [by judges has now been] cancelled by . . . practical necessit[ies]"

Judge Wald was speaking about the practical necessity of reaching consensus among circuit court panels, a difficulty described to you on Thursday by Judge Naveiro de Rodon in her panel discussion. Practical necessities, as recognized by Judge Wald in a different part of her article, however, effect all levels of the judiciary. Although district judges decide cases alone and do not have to work toward consensus, they still have the burdens of an ever burgeoning word-load. Less than 80% of the decisions of district judges are ever appealed. Of the over 100,000 opinions rendered by lower courts in a given year, the Supreme Court, with nine judges, hears slightly over 125 cases a year. When my dear friend and mentor, Judge Jose A. Cabranes of

the United District Court for Connecticut, was asked how he felt when he was reversed by the circuit court, he responded "It does not bother me in the least, I reverse them every day." He is right. Given the almost unreviewable nature of the majority of our decisions, you, as proxies for the interests of your clients, should appreciate how important it is to ensure you capture your judge's attention. This need on your part will grow as Congress increases our burdens by continuing to federalize more crimes and passing more statutes granting remedies to ever wider groups as with the Americans with Disabilities Act. In short, we can not afford to have our dockets grind to a halt because of ineffective or inefficient advocacy.

When I started as a judge in October 1992, I had 376 civil cases reassigned to me. That number represented the average case load in my district. Unlike other districts, I did

not have criminal cases reassigned to me but only began to have new criminal indictments assigned in rotation each week.

Nevertheless, in my district, the average case load of criminal cases is about one-third the civil docket, or about 125 criminal cases. In my first year, I rendered about 70 written opinions, of varying lengths and complexity, and a number of other opinions I read into the record. I did reduce my caseload by fifty cases by the end of that first year. However, at the end of my year, three of my colleagues left the district bench -- Judge Pierre Leval to the Second Circuit, Louis Freeh to the F.B.I. and Ken Conboy back to private practice -- and with their departures, my case load in the last five months mushroomed to 428 cases despite the fact that I have rendered just over 50 opinions in that same time period and even more opinions on the record than I had the prior year. Moreover, I now have over 85 pending motions and

over fifty criminal cases on my docket.

My burden is not unique. Judge Anne C. Conway of the United States Middle District of Florida, who took the bench at about the same time I did, had just that past winter of 1993 reported in the American Bar Association Journal on Litigation, Volume 9, that she had 570 civil cases with 1070 motions reassigned to her when she took the bench. She reduced her caseload by 100 cases and her motions to just a little over 500 by the end of her first year. Yet, she reported that despite greater efficiency, she found her motion calendar increasing. Now, her accomplishments have been reached by a herculean effort -- she starts her day at 7:00am and goes through the late evening. I admire her. I am a New Yorker and 7:00 am is a civilized hour to finish the day not start it. I can not achieve efficiency her way. If the federal bench is over burdened,

however, take note that most state courts are in critical emergency situations. New York's lower state court judges have over 1800 cases a piece.

No judge should bear his or her work-load as a badge of honor. One human being, no matter how efficient, can ^{not} adequately do justice to all of the cases on dockets this big. Consider the situation in practical terms. There are 365 days in a year.

Assuming you have a judge like me who works six days a week and takes some vacations (well, you do see me here), you are left with about 250-275 working days a year. With a case load of over 500 cases, no one case should physically, without regard to desire or dedication -- take more than half a day on a case.

Yet, most trials consume at least two days, and many complicated criminal cases at least two weeks. I do not even mention the month and longer trials that are common at least in my district.

The Hells Angel trial and another international narcotics trial each took the last two months before me. Many cases settle without the intervention of a judge. But, many cases are addressed more cursorily and summarily than anyone would want them to be and many cases are not heard at all. In the end, no one is happy -- not the judges who takes pride in their work but are forced to be less attentive than they would like, not the lawyers who labored hard in presenting their arguments and are then treated summarily or delayed for months sometimes years in receiving a decision, and not the parties who want and deserve a fair day in court but do not see it. Unfortunately, in a system this overworked, the claims of some people will not be fairly heard and we can not pretend otherwise.

In assuming my responsibilities, I have immersed myself in books and articles about efficient judging. Each day I learn

more and my mistakes teach me more. Since I anticipate that judging is a continuous learning process, I do not see my improvements ever ending. The rest of my speech now, however, is intended to give you as lawyers some ideas about how to ensure that you, as the agent for your client's interests, get heard in the mounds of papers and cases that exists in the judicial landscape.

My first piece of advice for effective advocacy is write clearly. As it is often said, clear writing reflects clear thinking. Whether it is an unfair conclusion or not, I start with the presumption that a poorly written brief is a product of, if not poor, at least, untrustworthy lawyering because a poor writer is someone who does not care about the art and skill of their profession. As it is also often said -- and I will hereafter stop with the cliches -- there are no natural writers,

just writers who work at developing their skills.

If you have read Strunk and White, *Elements of Style*, reread it every two years. If you have never read it, do so now. This book is only 77 pages and it manages, succinctly, precisely and elegantly to convey the essence of good writing.

Go back and read a couple of basic grammar books. Most people never go back to basic principles of grammar after their first six years in elementary school. Each time I see a split infinitive, an inconsistent tense structure or the unnecessary use of the passive voice, I blister. These are basic errors that with self-editing, more often than not, are avoidable. To be an advocate, you must love to argue. To argue effectively, you must communicate effectively. There are stronger writers than others. I consider myself merely an average writer. Nevertheless, every advocate should at least strive to be technically correct in

their writing.

Because we are in Puerto Rico, it is important that I underscore that we who are bilingual often have to spend more time and energy in improving our writing. There are natural linguistics explanations for many common errors made by bilingual people. For example, adjectives in Spanish are expressed differently than in English. Descriptive nouns are structured in Spanish with the use of "of". Thus, in Spanish, we do not say "cotton shirt", we say "shirt of cotton" or "camisa de algodón" y no "algodón camisa." Well, as a result of this structure, many Spanish speaking American students often, unconsciously, use convoluted phrasing for simple adjectives. This was brought to my attention in college by a history professor, who later became my thesis advisor and a mentor, and who in my first college semester kindly pointed out to me that "authority of

dictatorship" could more simply and accurately be stated as "dictatorial authority."

To catch many simple and complex mistakes in writing requires that you edit yourself. I am taken aback by how many briefs I receive that appear to be first drafts. I have chastised attorneys in my opinions for slipshod written presentations. Improvements in writing do not happen magically, you have to work on them. In my chambers, I edit every opinion prepared by my clerks. The simplest opinions go through at least 2 if not 3 drafts by me. I edit more complex opinions as often as 6 to 8 times and periodically more often. Justice Kennard of the California Supreme Court, a very well respected writer, has told me that she and her five clerks, sitting together, edit every line of every opinion. I have no idea how she manages to find the time to do this but her approach should give you a clear

idea of the importance of editing.

My second piece of advice is a collorary to the first -
- keep your written submissions brief. No play on words is
intended. The reason for this advise^c is self-evident in the
context of the statistics I have given you. Overburdening a
judge with every conceivable argument you have found or can
conceive is counter-productive. Although most clerks to judges
are thorough, every argument in a voluminous brief can not be
given equal attention. I say clerks because although I read ^{every} very
brief, I simply do not have time to reread every brief numerous
times. I read my clerk's bench memo or draft opinion, I read the
briefs and I stop to reread carefully only that brief which is
clearly and persuasively written. The best briefs succinctly
state their argument, but also concisely summarize, explain and
discount their opponent's arguments. That is the brief I turn to

when I am editing the work of my clerks because against that brief I measure whether my clerks have addressed every pertinent argument.

As editors of law journals, you pick up one terrible habit -- string cites. Think of them as nooses you should strive always to loosen from your neck of writing. The habit of thorough and exhaustive research you have learned is absolutely essential to effective advocacy. If a proposition is truly black letter law, however, one cite is enough. Judges, within a few years on the bench, know the history of most major areas of the law. New judges and clerks may not but they do not need for you to educate them in your briefs. Just give them the cites of the one or two cases that best present a history or explanation of the law in the area at issue. Do not give us your learning process on paper, just give us the results of the best arguments

you have found. Take judges to the issue you are addressing and explain why it is an issue at all, i.e. is the law unsettled or unclear, are the facts unclear, is this a new twist to an old problem, do you want the judge to reject existing law and reformulate it, hopefully in your client's favor.

I want to underscore, brevity is not a substitute for thoroughness. Good lawyering requires you to consider and research every conceivable argument for and against the position you are advocating. Inexperienced lawyers particularly spend hours if not days or weeks exploring multiple and innumerable legal dead-ends. Effective lawyering, however, requires you to distill your research and thinking down to its important, best and strongest points. It is heart breaking after laborious and exhaustive research to realize that what you need to say can be said in five pages. As a result, young lawyers often write

lengthy memos or briefs which essentially recount the steps of their research. You are doing yourselves a disservice because you will not capture the attention of the person you must convince if you have lost them in the irrelevant. If you feel compelled by emotional necessity to advise the court or your partners of what you have done, do it in a short footnote.

In short and above all, you must be prepared for every contingency with complete research but your only chance of attracting the attention of harried judges, is to state the important issues of your case up front and succinctly. An efficient presentation means cutting the extraneous, summarizing the important but tangential and concentrating on the significant.

Equally as important to effective advocacy is not misleading the Court about the law or the facts of your case. Do

not cite cases merely to have a cite or take words out of a case to give an impression of a holding when the words when used were in a different context. Before you leave law school, learn the difference between dicta and a holding. Learn what is controlling precedent for the court system you are in. It amazes me how many lawyers cite other district court cases as controlling authority. The only binding precedent upon a district judge is the Supreme Court or its circuit court. Not even the law as established by other circuits controls decisions of a district judge in another circuit. Similarly, in the New York state system, each lower court is only bound to the decisions of the highest court or of its own intermediate appellate division. Further, do not cite a legal principle, without explaining its exceptions, in a footnote at least if the exceptions are not applicable to your case. Clerks spend

countless hours tracking down exceptions they later determine, as you obviously did because you did not mention them in your brief, are not relevant to the case. You should increase your malpractice insurance if you simply missed the exception.

Obviously, if there is a case contrary to your position, even if it is a decision by a non-controlling source, cite it to the court. Your entire argument should have explained to the Court why that contrary opinion is not persuasive. If there is an argument that superficially appears applicable or an argument in a related field, bring it to the judge's attention in a footnote and explain why you do not think it is relevant to or distinguishable from your case. The worst thing a judge can ever conclude about you as a lawyer is that you are untrustworthy in your arguments. I was furious the other day when an attorney failed to tell me that the circuit had explicitly left an area of

the law undecided and that three other of my colleagues had issued opinions on the issue contrary to counsel's argument. I know that for those lawyers who do this I rarely if ever give them the benefit of the doubt. I will reserve decision to go back and double check their arguments. If you are in a middle of a trial, that can be a devastating interruption in your presentation as an advocate and will result in long delays in your motions being decided.

There are some lawyers out there who believe that overwhelming a court with papers and documents is a good way of hiding a bad case and delaying judgment against a client. I find this particularly true in papers opposing summary judgment motions. This tactic may work periodically but the price you pay for this type of bad lawyering is that your work and arguments eventually will not be respected. In summary, face the

weaknesses in your case directly and answer up front why the court should ignore or distinguish the weakness from existing law or on the facts.

For my third point, I turn to oral advocacy. My intent here is not to repeat the advise^g contained in trial advocacy courses on proper and effective opening and closing statements, direct and cross-examinations or motion or appellate arguments. There is a legend of materials on these topics and in a short speech, I could not do justice to the wealth of advise^g that exists. I simply wish to underscore that brevity and clarity is as important in oral as in written presentations.

Neither jurors as triers of facts nor judges like being inundated with documentary evidence. Most cases can be distilled down to less than half a dozen documents, sometimes just 1 or 2. Yet, I receive boxes and boxes of exhibits in too many cases.

That impresses your client -- until they get your bill for the time and cost of collating and copying. In the interim, you have lost the favorable impression and potency of your valuable documents. To the extent possible, try to get stipulations of facts among counsel and cut out of your presentations all documents relating to those agreed upon facts. Also, prepare a small volume of just the critical documents so the Judge can refer to them easily or take them home without losing an arm to heavy weight. Jurors who sit side by side like sardines in jury boxes appreciate not having to fumble with heavy volumes on their laps and at their feet. Finally, all exhibits should have an index. Moreover, a topic index, listing relevant exhibits under issue headings is also very helpful. When I write my opinions I often have one or more issues about which I would like to more fully look at the evidence. A topic index is invaluable in

assisting that process because even the best organized chronological or theme organized exhibits support or inform various different issues.

Similarly, when you give a judge deposition transcripts, it is useful to give a one page summary of what that witness proves in the deposition testimony and why it is important to your case. That way, the judge will understand why they are reading the materials. Judge Leonard Sand in an 1987 article in the ABA Journal on Litigation, also suggests that parties take one deposition transcript and bracket in different color crayons the designations each party wants in the record. This way the judge gets one transcript, and not separate sheets with each party designating a page and line in the transcript. That kind of cross-referencing to a transcript is time-consuming and frustrating.

Finally, in oral presentations, remember that although some repetition is necessary to ensure that a point is made, less repetition is needed with a judge. Moreover, you lose both the attention and patience of judges and jurors with overly long presentations. If a long presentation is unavoidable, i.e. the witness simply has too much to cover, make sure your beginning explains what you are doing and why and that your end explains again what you have done.

In conclusion, respect the limited time judges have. With thought, the most complex case can not only be explained simply but can be presented simply. Today, effective advocacy requires that you think first and foremost -- how do I make this easy to understand and to absorb in the shortest time possible. Because of necessity, an efficient presentation has become the effective presentation and not infrequently, the winning

presentation.

I will heed my own advise and keep my remarks brief. I hope that you take from your careers as much as I had from my own as a lawyer. I also hope and expect that some of you in the future will have the opportunity to enjoy the privilege and honor of judging. A critical part of that enjoyment in either or both roles starts and ends with doing what you do better each day. It means appreciating the art of your profession and spending time developing your skills. Seeing an effective advocate in court is a magnificent and pleasurable experience for a judge. I also hope that during what I expect will be my long tenure on the bench, I will have the opportunity to have some of you appear before me and that at the end of your presentation, I will be able to say that you have mastered your art. My wishes for successful careers to all of you. Good evening.

WOMEN IN THE JUDICIARY

Panel Presentation - the 40th National Conference of Law Reviews
March 17, 1994, The Condado Plaza Hotel, Puerto Rico

When I finished law school in 1979, there were no women judges on the Supreme Court or on the highest court of my home state, New York. This past year alone there has been a quantum leap in the representation of women in the legal profession, and particularly in the judiciary. In addition to the appointment of the first female United States Attorney General, Janet Reno, and the election of the first female, and only Hispanic, President, Roberta Cooper Ramos, of the American Bar Association, an institution founded in 1878, we have seen the appointment of a second female justice on the Supreme Court, Associate Justice Ruth Bader Ginsburg, the appointment of a female chief judge, Justice Judith Kaye, to the Court of Appeals, the highest state court of New York, and the appointment to that same court of a second female judge, also not insignificantly, the first hispanic, Judge Carmen Beauchamp Ciprack.

As of 1992, women sat on the highest courts of almost all of the states and the territories including Puerto Rico, who can claim with pride the service of my esteemed co-panelist, The Honorable Miriam Naveira de Rodon, Associate Judge of the Supreme Court of Puerto Rico. One Supreme Court, that of Minnesota, has

a majority of women justices.

As of September 1992, the total federal judiciary, consisting of circuit, district, bankruptcy and magistrate judges, was 13.4% women. As recently as 1965, the federal bench had had only three women serve. Judges who are women on the federal bench are likely to increase significantly in the near future since the New York Times reported on January 18, 1994, that 39% of President Clinton's nominations to the federal judiciary in his first year have been women and he has vowed to continue that statistical pace in his future nominations.

These figures and the recent appointments are heartwarming. Nevertheless, much still remains to happen. Let us not forget that between the appointment of Justice Sandra Day O'Connor in 1981 and Justice Ginsburg in 1992, 11 years had passed. Similarly, between Justice Kaye's initial appointment as an associate judge to the New York Court of Appeal in 1983 and Judge Ciprack's appointment this past year, 10 years had also passed. Today, there are still two out of 13 circuit courts and about 53 out of 92 districts courts in which no women sit. There are no district women judges in the federal courts in at least 22 states. Our 13.4 percentage of the federal judiciary translates to only 199 female judges of a total of 1,484 judges in all

levels of the judiciary. Similarly, about 10 state supreme courts still have no women. Even on the courts which do have women, many have only one woman judge. Amalya Kearse, a black woman appointed in 1979, is still the only woman on the Second Circuit of New York. The second black woman to be nominated to a court of appeals. Judith W. Rogers, Chief Judge of the District of Columbia, was only recently named by President Clinton. The first hispanic female federal judges were only appointed in the fall of 1992. We had a banner year with 3 appointments -- myself in the S.D.N.Y. and two colleagues, Judges Baird and Gonzalez to districts in California. We this year will have a fourth female hispanic with the nomination and likely appointment of Martha Vasquez in New Mexico. Yet, we still have no female hispanic circuit court judges or no hispanic, male or female, US Supreme Court judge.

In citing these figure, I do not intend to engage you in or address the polemic discussion of whether the speed or number of appointments of women judges is commensurate with the fact that women have only entered the profession in any significant numbers in the last twenty years. Neither do I intend to engage in the dangerous and counterproductive discussion of whether the speed and number of appointments of

female judges is greater or lesser than that of people of color. Professor Stephen Carter of Yale Law School in his recent book on Affirmative Action points out that we excluded people do ourselves a disservice by comparative statistics or analysis. I accept and endorse his proposition that each of our experiences should be valued, assessed and appreciated independently.

I have, instead, raised these statistics as a base from which to discuss what my colleague Judge Miriam G. Cedarbaum of the S.D.N.Y. in a speech addressing "Women on the Federal Bench" and reprinted in Vol. 73 of the Boston University Law Review [page 39, at 42], described as "the difficulty question of what the history and statistics mean?" In her speech, Judge Cedarbaum expressed her belief that the number of women on the bench was still statistically insignificant and that therefore, we could not draw valid scientific conclusions from the acts of so few.

Yet, we do have women in more significant numbers on the bench, and no one can or should ignore asking and pondering what that will mean, or not mean, in the development of the law. I can not and do not claim this issue as personally my own. In recent years there has been an explosion of research and writing in this area. For those of you interested in the topic, I commend to you a wonderful compilation of articles written on the

subject in Volume 77 of Judicature, The Journal of the American Judicature Society for November-December 1993. This Journal is published out of Chicago, Illinois.

Judge Cedarbaum in her speech, however, expresses concern with any analysis of women on the bench which begins, and presumably ends, with a conclusion that women are different than men. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we could not "reason" or think "logically" but instead acted "intuitively".

While recognizing the potential effect of individual experiences on perceptions, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to and achieve a greater degree of fairness and integrity based on the reason of law. From a person, who happens to be a women, like Judge Cedarbaum, one can easily see the genesis of her conclusions. She is a wonderful judge -- patient, kind, and devoted to the law. She is the epitome of fairness. She has been tremendously supportive of me this past year and a half and she serves as an example of what all judges

should aspire to be.

Yet, although I agree with and attempt to work toward Judge Cedarbaum's aspirations, I wonder whether achieving the goal is possible in all, or even most cases, and I wonder whether by ignoring our differences as women, men or even people of color, if differences exist, we do a disservice both to the law and society.

Just this month, the Supreme Court in Liteky v. United States, has recognized that personal bias and partiality are inherent in the task of judging. In deciding when judges should recuse themselves from cases, the Supreme Court recognized the existence of "appropriate" bias born of reactions that develop during a case from the facts of the case and "inappropriate" bias which stems from "extrajudicial" sources like information passed on by a non-party or ex parte, or from deep seated opinions that make fair judgment impossible. Justice Kennedy in his concurring opinion, joined by three other justices -- a split in our High Court, not something new -- expresses a concern similar to that voiced by Judge Cedarbaum which is that good and bad bias are impossible to determine because they depend so much on historical context and self-perception. Therefore, Justice Kennedy advocates a return to an objective standard in which what a reasonable

person would perceive as unbiased and impartial controls whether a judge disqualifies him or herself. I am not sure this is any less objectionable or more objective than Justice Scalia's majority approach in Liteky that presumed that a "reasonable person" could only be measured within the societal context with its current mores.

Whatever the reasons why we may have a different perspective as women -- either as some theorists suggest because of our cultural experiences or as others postulate like Prof Carol Gilligan of Harvard University in her book entitled In a Different Voice because we have basic differences in logic and reasoning, is in many respects a small part of the larger practical questions we as women judges and society in general must address. I accept Prof Carter's thesis in his Affirmative Action book that in any group of human beings, there is a diversity of opinions because there is both a diversity of experiences and of thought. Thus, as stated by Prof. Judith Resnik in her article in Vol. 61 of the S. Cal L. Rev. 1877 (1988), entitled On the Bias: Feminist Reconsideration of the Aspirations for Our Judges:

...there is not a single voice of feminism, not a feminist approach, but many who are exploring the possible ways of being that are distinct from those structured in a world

dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not (and perhaps will never inspire to be) as solidified as the legal doctrine as the legal doctrines of judging can sometimes appear to be"

No one person, judge or nominee, will speak in a feminine or female voice. Yet, because I accept the proposition that, as Prof. Resnik explains, "to judge is an exercise of power" [pg 7] and because as Prof. Martha Minnow of Harvard Law School explains, there is no "objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice" [Resnik page 10] in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Prof. Minnow, "Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective" What that means to me is that not all women, in all or some circumstances, or me in any particular case or circumstances, but enough women, in enough cases, will make a difference in the process of judging.

The Minnesota Supreme Court has given us an example of this. As reported by Judge Wald in her article entitled Some Real-Life Observations about Judging contained in a comment in Vol. 26 of the Indiana Law Review 173 (1992), the three women on

that court, with the two men dissenting, agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the U.S. Court of Appeals and on state supreme courts have tended to vote more often than their male counterparts to support claimants in sex discrimination cases and more often in cases involving euphemistically as I refer to them "underdogs" like criminal defendants in search and seizure cases. In a another real life example, in the Menendez trial in California, a jury split six men to six women on whether a lesser verdict should be returned against a son charged, with his brother, in killing their parents. For those of you law students, particularly editors on law journals, lost in the bowels of the law library and intricacies of the Uniform Book on Legal Citations, the Menendez brothers defended the homicides as an act of despair generated by years of abuse. The state prosecuted on the theory of financial gain from the rather sizeable inheritance the brothers may collect if acquitted of the charge. Although the brothers were tried together, they were tried before two separate juries because certain evidence came in against one but not the other brother. Both juries hung but the press has been fascinated by the gender split in the Eric

Menendez verdict voting in which the women wished to acquit or at least bring in a verdict less than the highest count and the men did not.

As recognized by Professor Resnik, Judge Wald, and others, whatever the causes, not one women in any one position, but as a group, we will have an affect on the development of the law and on judging.

In private discussions with me on the topic of differences based on gender in judging, Judge Cedarbaum has pointed out to me that the seminal decisions in race and sex discrimination have come from Supreme Courts composed exclusively of white males. I agree that this is significant except I choose to emphasize that the people who argued the cases before the Supreme Court which changed the legal landscape were largely people of color and women. I recall that Justice Thurmond Marshall, Judge Constance Baker Motley from my court and the first black women appointed to the federal bench and others of the then NAACP argued Brown v. Board of Education. Similarly, Justice Ginsburg, with other women attorneys, was instrumental in advocating and convincing the court that equality of work required equality in the terms and conditions of employment. Whether born from experience or inherent physiological

differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender makes and will make a difference in our judging.

Justice O'Connor has often been cited as saying that "a wise old man and a wise old woman reach the same conclusion" in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes the line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, if Prof. Martha Minnow is correct, there can never be a universal definition of "wise." Second, I would hope that a wise woman with the richness of her experiences would, more often than not, reach a better conclusion. What is better?

I like Professor Resnik hope that better will mean a more compassionate, and caring conclusion. Justice O'Connor and my colleague Miriam Cedarbaum would likely say that in their definition of wise, these characteristics are present. Let us not forget, however, that wise men like Oliver Wendel Holmes and Cardozo voted on cases upholding both sex and race discrimination. That until 1972, no Supreme Court case ever upheld the right of a women in a gender discrimination case. I like Prof. Carter believe that we should not be so myopic as to

believe that others of different experiences or backgrounds are incapable of understanding the values of a different group. As Judge Cedarbaum pointed out, nine white men (or at least a majority) on the Supreme Court in the past have done so on many occasions for different issues. However, to understand takes time and effort, components not all people are willing to give. For others, their experiences limit their ability to identify. Yet others, simply do not care. In short, I accept the proposition that a difference there will be by the presence of women on the bench and that my experiences will effect the facts I choose to see as a judge. I hope that I will take the good and extrapolate it further into other areas than those with which I am familiar. I simply do not know exactly what that difference will be in my judging, but I accept there will be some based on my gender and the experiences it has imposed on me.

As pointed out by Elaine Martin in her forward to the Judicature volume:

Scholars are well placed, numbers-wise-to begin the proposition that the presence of women judges makes a difference in the administration of justice. Yet, a new set of problems arises for such researchers. Just what is meant by difference, and how is it measure? Furthermore, if differences exist, why do they exist and will they persist over time? In addition to these empirical questions, there are normative ones. Are these possible gender differences good or bad? Will they improve our system of

laws or harm it?

In summary, Prof. Martin quote informs me that my quest for answers is likely to continue indefinitely. I hope that by raising the questions today, you will start your own evaluations. For women lawyers, what does or should being a women mean in your lawyering. For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach.?

For me, since Senator Moynihan sent my name to President Bush in March of 1990, as a potential federal judicial nominee, I have struggled with defining my judicial philosophy. The best I can say now four-and-a-half years later, one-half year since I assumed my responsibilities, is that I have yet to find a definition that satisfies me. I do not believe that I have failed in my endeavor because I do not have opinions or approaches but only because I am not sure today whether those opinions and approaches merit my continuing them. Each day on the bench, I learn something new about the judicial process and its meaning. I am reminded each day that I render decisions that affect people concretely and that I owe them constant and continuous vigilance in checking my assumptions, presumptions and

perspectives and ensuring that to the extent my limited abilities and capabilities permit me, that I reevaluate and change them as circumstances and cases before me require. I can and do, like my colleague Judge Cedarbaum, aspire to be greater than the sum total of my experiences but I accept my limitations, I willingly accept that we who judge must not deny the differences resulting from experience and gender but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies and prejudices are appropriate. There is always danger in relative morality but since there are choices we must make, let us make them by informing ourselves on the questions we must not avoid asking and continuously ponder.

[This is a very rough draft, with some original handwritten line edits, of a speech that was hastily typed on a laptop computer prior to delivery. I do not have a final, clean version of this speech.]

YALE LAW SCHOOL PREISKEL/SILVERMAN SPEECH
NOVEMBER 12, 1993

Doing What's Right: Ethical Questions for Private Practitioners
Who Have Done or Will Do Public Service.

I was delighted to be invited to speak to you today. I have very fond memories of my time at Yale and returning is a pleasure, particularly when I am given an opportunity to discuss a topic for which I have a passion: public service, and which, I am gratified to see, the Law School has grown to appreciate. My years here were the transition years away from the social and political upheavals of the Vietnam and the post Kennedy civil rights years. As a result, although at that time there was a core group of students involved in public service projects with Legal Aid and capital punishment cases, the clinical programs were very limited and the core group very small. I myself was more involved in purely academic pursuits with law journals than in public service concerns. As I have interviewed law clerks this past year, however, I have been delighted with the expansion in the variety of clinical programs at the law school -- the Mental Disability, Immigration, Greenhaven, Prisoner Rights, Homeless Advocacy, and Housing programs (I'm sure I've missed some and apologize) and I have also been impressed with the leadership role Yale has taken in work like the Haitian Refugee project.

Certainly, Yale's faculty has always and does provide intellectual challenges for its students. For some of us, the abstract study of law itself is fascinating. Nevertheless, it is exciting to combine intellectual engagement with social good and I

appreciate that the culture at the Law School must be much more stimulating on social issues than it was when I was here. It is always nice to see change for the better.

In very recent years the law school's leadership role in supplying our nation with public servants has been particularly noticeable. Yale has always done so. In my time, we had people like Cyrus Vance as Secretary of State. Now, however, the Law School has filled some very visible public positions like the Presidency of the United States, back-to-back, and the Supreme Court with its alumni. I am sure the publicity has not harmed Dean Calabresi's fund raising efforts or diminished the attractiveness of the law school to potential applicants. It is this very type of symbiotic relationship between public service and private benefit that aroused my interest in the topic I have chosen today.

The presence of our alumni in public positions underscores the fact that individuals with strong intellectual and income producing capabilities are often drawn to public work and service. Clearly, there is a drive and need in many such people to "do good" for others and it is a drive that motivates people to forego money -- for the ill-paying scale of public work is legendary -- and to endure the often disheartening frustrations occasioned by the limited resources generally available to government legal agencies and public interest law firms to do their work.

Recognizing the onerous burdens that choosing public service imposes, I hesitated in raising my topic -- Doing What's

Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service." My topic suggests that I am advocating an additional burdens to an already disadvantaged option and attempting to undermine one of its very few but very potent attractions -- the creation of contacts and knowledge which can later assist in private practice. I certainly do not want to discourage public work. Nevertheless, newspaper accounts are almost daily reporting on incidents that not only call into question the ethicacy of how private industry uses former public employees to lobby public entities but how public service lawyers exploit their former public positions or anticipated future positions to earn money in their private practice.

The Secretary of Commence Ron Brown's actions have starkly illustrated my point. Mr. Brown before leaving his very prestigious Washington law firm to join the Clinton administration, wrote to his clients to bid them adeau, In the process he reminded them of his new appointment and of the competence of his partners to serve their needs, He also invited them to stay in touch with him and visit him. Mr Brown has also chosen not to recused himself as Secretary from involvment in issues that effect companies who retain his former law firm. As an aside, I might mention that Mr. Brown's son has been hired by a lobbying firm with a clientele similar to that for which Mr. Brown had worked. Mr. Brown's actions in protecting his income-producing potential after he leaves the government has been very direct and well publicized. I do not address here any potentially illegal actions like the recent

Justice Department's investigation of Mr. Brown about an allegation that he has accepted payment in return for attempting to influence US policy on Vietnam. That type of conduct is clearly controlled by legal standards. My focus is not what is already within the law, although I will allude to it in order to mark our starting point, but my question is where should we place the ethical line at which self-promotion for future benefit should be placed.

We should be careful in judging Ron Brown because he may simply be unapologetic about a reality that is an integral part of public service. In fact when questioned about his lobbying during his confirmation hearings, he off handedly retorted that it only proved he was an effective advocate. The major elect of New York City, Rudy Guiliani, a former US Attorney was hired by three laws firms after his initially failed run for major four years ago. The three law firms paid him and an assistant about half a million dollars a year to join them. At none of the firms did he generate that much in client billing and this ^{MAY} accounts for his leaving two of those firms. However, it was an interesting investment for the law firms that are not lobbyist in the Washington sense and also unquestionably a very generous perk of public service for Mr. Rudy Guiliani when he had to make a living in the private sector. Similar to the major-elects story, when Robert Abram attorney general of NYs decided to leave public service after more than two decades, he was hired by one of the premiere law firms of NYC to develop business with the former Soviet Union countries. Now, Bob Abrams for the last eight years has run a state office and prepared
.....
a failed campaign for the Senate. I'm impressed that he had the time to develop skills and contacts with the former eastern bloc.

These are very direct examples of how public service is exploited in private practice. Some of you may want to argue that

these examples are titilating but that they should not drive the discussion of ethical rules because this level of benefit from former public service is limited to just a few, elite public officers. To the extent that common ^{people} folks can exploit their former positions, well, there generally are laws which control those situations. For example, President Clinton has passed an executive order that ^{no} executive aides must commit to not lobbying before government agencies which they supervised for five years. Similarly, most government agencies in most cities and states bars, ^{for} lawyers from working before the agency that had employed them, ~~for~~ ^{at least two years!} ~~at least two year.~~ However, these rules simply address the more blatant forms of exploitation of public service. They do not address the more subtle forms.

For those of you who may not realize it, government agencies like Legal Aid societies, United States Attorneys Offices and District Attorneys offices ~~often~~ forge personal relationships that exist for lifetimes and those relationships influence appointments to other government jobs as well as the swapping of business in private practice. This is contact building at its best and most subtle because it doesn't implicate lobbying but it does ^{involve} ~~implicate~~ private gain.

I draw on a personal example to illustrate my point and to underscore that this subtle exploitation of past public service is ~~not a~~ ^{as} ~~question without~~ ^{quite} ~~significant~~ importance ^{both} ~~to~~ the individaul involved ^{and} ~~but~~ to our society, in general. ~~The consequences are~~ important. As you know, I started my legal career with Robert

Morgenthau office, Manhattan's District Attorneys office. When I left there I went into private practice. I did not practice criminal law ^{at my firm} so I did not have the opportunity there to exploit the knowledge of criminal law and the criminal justice system ^{that I had argued}. Nevertheless, my ^{prior} association with Mr. Morgenthau did assist in my appointment while in private practice to serve on a number of public committees -- the NYC Campaign Board, the New York State Mortgage Agency Committee, the Governor's task force of race and cultural relations, and on PRDLEF, The work for the DA's office in combination ^{with} of the prestige of my partnership in a firm that specialized in international business law made me an attractive candidate for public service on ^{boards} of ^{directors}. ^{of these types of organizations} I took personal pride that I never attempted to draw on my work for these ^{organization} projects to generate work for my firm. I never accepted appointment to a committee involved in any of my firm's specialities and I did not have my partners try to develop new business in the public service areas in which I was involved. Needless to say, some of my partners felt that my decisions ^{as} were a bit counterintuitive ^{productive} for them and somewhat burdensome. ~~for the firm.~~ My contributions of time to public service was obviously at the expense of my firm. ^f Despite a standard that most lawyers do not adhere to, I am not pristine and do not intend for you to conclude so. When Senator Moynihan's committee reviewed my qualifications for the federal bench, they spoke to all of the people I served ^{with} on these various boards ~~with~~. Equally significant, all these people -- participants in the public service arena -- in turn were friends

with the people who sat on the Senator's committee--those people too were public interest veterans. Who knows, ~~who~~, who knows who? Now, there is nothing ^{inherently} wrong in people who know you giving recommendations. I suspect almost everyone would agree. However, remember that in private practice this process resulted in my being able, for a very personal gain, to exploit my public service to get a very attractive job, ^{on federal judgeship}. The process of patronage appointments in government is well known as is the ills it occasions. But, is the subtle benefit of having people know you who are influential any less dangerous than direct patronage? Is the most qualified person the one who knows the ^{friends of or the} decision makers ^{themselves} and has impressed them for whatever reason? How does the really smart lawyer with extraordinary legal skill equalize the field and get selected on merit? Now, like with all these issues, the question gets fudged and lost in the quagmire of how do you define "qualified." Some would say that an individual whose talent hasn't come to the attention of others may not have all the necessary skills for a public position. But this type of answer begs the ^{whole} question and doesn't address how one could ^{or should} minimize influence. ^{Should we} Assuming ^{control} it? obviously, however, that one has accepted the proposition that the influence of who you know is an ill, how do you control it?

^{as noted}
~~For many years~~, most governments and good government groups have centered their attention on controlling the contributions of special interest groups, generally businesses and corporations, to political campaigns and in limiting the lobbying efforts of former public employees immediately after they leave

office. For example, we have the Federal Elections Law and many states, and cities, including New York City have passed comprehensive laws not just limiting contributions to campaigns but imposing extensive reporting requirements about both expenditures and contributions. We have federal laws on lobbyist reporting their work and contributions and on elected officials accepting payments or benefits from lobbyist. All the complicated and extensive ethics and conflict laws and regulations, however, are generally not enough fully to address the subtle forms of public service exploitation in private practice.

I will be drawing many examples brought to my attention on this issue by my prior service on NY City's Campaign Finance Board. I was a founding member of that Board and participated in formulating NYC's comprehensive regulations on campaigns. I served on the Board with pride until my appointed to the bench. NYC's campaign rules have been praised and touted as exemplary by many good government groups. My experience on this Board taught me some very important lessons. No matter how stringent and detailed your rules might be, those intent on evading them will manage to find a way and those intent on breaking them will. For example, NYC's campaign law limits not just contributions to but expenditures by campaigns. Exempted from the campaign expenditure limit are those expenses related to complying with the law. In this last election in New York City, Mayor Dinkin's campaign was investigated because they attributed to this exemption a very high percentage of the salaries of some of their most costly campaign

workers, like the Campaign Manager. Now I was not a member of the Board during this investigation and am only relating what I have read in the papers, but the Board disallowed these deductions and fined the Dinkins campaign over a quarter of million dollars for false reporting. This is not an insignificant amount when your limit for the entire campaign cycle is only about, if I recall correctly, 4mil, and you are in the last week of a close race. The Board has announced that it is now thinking of passing a rule that would limit the campaign law compliance exemption to 15% of total expenditures. Again, I do not suggest that the Dinkins campaign ^{intentionally} broke the law, I simply point out that for every ethics rule some one will seek a way around it.

Ethical rules by their very nature are generally self-regulating. Few organizations or agencies have the resources to investigate fully the panoply of ethical violations that arise. The rather limited success of bar associations in monitoring our profession is a testament to this failure. Just last year, New York State's insurance reimbursement to victims of legal malpractice totalled over, I believe, 10 million dollars.

~~These bent to break ethical guidelines are rarely caught.~~
Now, influence peddling is rarely committed to writing or visible. While on the City's Campaign Board, I was disappointed to learn that a partner in a major City law firm had arranged to have a number of his partners give contributions to a campaign and then had the firm reimburse the partners for their outlay. Our Board's ^{own Board's} law limited the contributions a partnership or a corporation could

make, therefore, by having the individual partners write checks, the firm's contributions limits were ignored. The law firm was investigated by the NY City District Attorney's office and ultimately reached an agreement where it was not prosecuted in exchange for paying a fine of over 100, 000. Now, at moments I wasn't sure whether I was disappointed because members of our bar were implicated in a charge of intentionally seeking to violate laws or whether I was disappointed that they were so ignorant in how they went about their actions. Issuing their partners back-to-back checks for contributions given to the campaigns seemed rather unsophisticated. The episode, however, made me realized that it would have taken very little for the firm to evade the law, it simply could have waited until the end of year and silently incorporated contributions into its compensation calculations for its partners

Well do these limitations in ^{policing} ethical rules ^{mean} suggest that we shouldn't have them? Absolutely not, despite the burdens imposed by such rules and even in the face of their non-enforcement history, ethical rules set the parameters of what we as a society find acceptable. In all human pursuits, we have to rely on the good will of the participants in our endeavors. No one has the resources to enforce all laws. By having rules, ^{however,} we stimulate discussion and we stretch ourselves to improve our commitments to our goals. Accordingly, I excuse my selection of my topic today by pointing out that the rules I ask you to think about are not intended to scare you away from public service. Neither do I

believe the rules should be thought of as burdens on public service. Instead, I encourage you to accept the consideration of them to inform your conduct as you make choices in the future of what limits you will set upon yourselves when you leave public service and begin earning a living.

Among the campaign promises that President Clinton has had difficulty in achieving, has been in honoring his commitment to pass ethical rules for his administration which would be the most exacting of their kind. Now, the President has passed rules which are much more comprehensive than his predecessors. Nevertheless, with many private business candidates indicating they could not accept a place in his administration if the broad rules he originally proposed were passed, President Clinton had to reduce the scope of his rules. SO, from an original proposal that would have barred an administration employee from lobbying for five years before any federal agency, the new executive order he passed bars lobbying only from those agencies an individual supervised. The rule, however, does not prohibit the aide from working for an organization that does lobby in this way, but only limits his or her personal lobbying efforts. The way around this rule is self-evident. As the NY times observed "remote control" lobbying is almost impossible to detect and can be done without violating the letter of the rule, although it might violate its spirit. For example, the rule does not appear to prohibit a former agency employee from explaining to a colleague how the public aspects of his former agency operate.

Not just lobbying is controlled by regulation for a period of time but other typical rules bar lawyers from arguing cases or handling cases before agencies they have worked with for a period of time. However, just like remote control lobbying, this rule does not control the influence and benefit of not who you know but what you know about government regulations and rules. Although Most government rules bar appearance before an agency for a period of time, the rule doesn't bar the attorney from giving clients legal opinions or from exploiting the special knowledge imparted by working in any area of the law while in public service. This may account for why so many lawyers who practice tax law were IRS agents. Recognizing that particularly for lawyers their is an advantage solely in specialized knowledge, should we be limiting their ability not just to practice before an agency but to practice in an area at all for a period of time? How long is enough? Should time measure it or if not, what circumstances. Do we consider evening the playing field by keeping a player out all together. Now, there is the argument that a public service employee was disadvantaged by poor pay for a period of time, and should not be kept from making a living for a longer period. However, the presumptions of that argument may be changing in our society. With the recession, for example, many mayor law firms have reduced their staffs. With that reduction has come a very talented pool of individuals to the public world. But there as well, jobs are limited and can one, in a recessive economy, really say that anyone who has had a job at all is "disadvantaged" because pay is low? I

just

doubt the unemployed lawyers out their would agree.

Well, what is wrong with special knowledge about a field? In a vacuum, nothing, but where does the possession of that knowledge unfairly disadvantage an opponent and isn't the public weal harmed when those who have served it, denigrate it by manipulating it. I venture no opinion on right or wrong here, I simply raise the question and ask whether recognizing the question, the bars in private praction should be broader than they now are. Should you bar lawyers from practicing in their specialty? Should that bar be total for the government entity with which an attorney worked so that the lawyer shouldn't work for a firm that does practice before that agency? How far the bar?

And, what do we do about sublte influence. There are many government entities, for example, who now put out their legal work for bidding. Yet, lawyering is a service which has very little objective criteria for measurement, You can ask a law firm how many cases have you handled in this area of the law but the inquiry has limited value because it tells you nothing about the complexity or quality of the cases handled. I can assure you that multimillion claims are often less complex than the habeas cases that come before me. Thus, bidding has its disadvantages for the public weal and in any event, it is not a fool proof way of controlling influence. Who gets invited to bid sometimes depends on who know who and knowledge imparted between friends on how to attractively structure a bid is valuable information. Finally, in close bids, a former agency employee whose talent is known, still

has an advantage. Is there something wrong is giving or selecting a friend whose work we know to be good something bad? Why do we usually say no. Most lawyers send work to law school friends and for sure, lawyers often send work to people they worked with in public service. Do we control that -- how? Should we bar it? Should we have rules requiring that people on selection committees for granting jobs or appointments never review the application of friends. Should you require selection committees ^{to know} to set forth their prior experience with an applicant who they are proposing.

Should you require selection committee members ^{to remove themselves entirely} from involving themselves at all in a process in which they know a lead contender? How do or do you want to make up for personal knowledge gained through public service. When and where? ^{if you do, how do you define know or level of friendships}

I started my saying that I was a proponent of public service. Doing good for people is generally the highest reward of public service. It would be naive and disingenuous for anyone to argue that all use of the knowledge and contacts developed in public service should be outlawed. Use of public service in private practice is not and should not be a "dirty" thing. As I explained earlier, while at Yale, I went through a fairly traditional career - I did journal, I worked for a big law firm, I was interviewing till almost the end exclusively with firms. Fortuitously, one evening I was leaving the library when I smelt food in a conference and I walked in. A panel on public service job alternatives was going on and Robert Morgenthau, the DA of Manhattan and former US ATTORNEY of the Souther District of New York was speaking. He was

describing the work of his office, and at the end of his speech in which he had touted the importance of the work, its challenge, etc, he said to the group that he could promise anyone that came to work for him the greatest amount of responsibility and the power to exercise it in cases at an earliest point of our careers. He predicted that it would be years before anyone who left his office would be given as much responsibility and no other lawyers out of school would be given comparable experience. Having just spent a summer working in a big and famous law firm, and having watched a seventh year associate worked almost 72 hours straight on a temporary restraining order and then seeing the partner briefed for an hour argue the case, Mr. Morgenthau convinced me I was on the wrong track. I spoke to him that night, interviewed with him the next day and he invited me to NY. I went and at the end of the day, he offered me a job, I ^{took} thought it and have never regretted the decision. ~~The path he gave me~~ ^{has} led to my ^{having} doing the best job any

lawyer could ever have--being a judge, and particularly a federal judge. What Bob Morgenthau didn't tell me was that the alumni from

his employment populated all levels of government, that my co-workers over time would rise to high levels of government and that the friendships I formed in my work in his office and by my association with him would be important the rest of my life. This

is important for you to know and what is equally important to appreciate is that the process has great value. Part of that process, however, is recognizing that we should not abuse it and should, as part of our commitment to our ideals, strengthen by

thought and discussion the close questions. I hope you are not disappointed by ^{my}not presenting a detailed ethics proposal. I did not do so because groups like Common Cause spend their time developing those proposals and they are a better source for specific ideas. My intent was to stimulate your thought about these issues and to invite you to give them thought as you choose among your career options now and later in your lives. Thank you for having me.

I need only point to the heart breaking example of Elizabeth Holtzman, the former Congresswoman who rose to stardom during the Watergate Congressional investigation and who is soon to be former Comptroller of the City of New York. Ms. Holtzman's political career of twenty-five years has been halted by the taking of a political contribution from a bank whose affiliate was actively seeking and subsequently was granted by Holtzman's office a significant part of the city bond business. There are many questions concerning the Holtzman situation and I do not mean to imply that she violated any laws or even any ethical rules, but I use her example only to suggest that the fine line between public service and private interest is always a close one.

Citation	Rank (R)	Database	Mode
4/2/93 NYLJ 1, (col. 1)	R 86 OF 111	NYLJ	Page
4/2/93 N.Y.L.J. 1, (col. 1)			

New York Law Journal
Volume 209, Number 62
Copyright 1993 by the New York Law Publishing Company

Friday, April 2, 1993

Highlight

WOMEN LITIGATORS DISCUSS BATTLING BIAS IN COURTROOM

By Edward A. Adams

ON WEDNESDAY, during a trial before Manhattan federal District Court Judge Sonia **Sotomayor**, one witness referred to another witness - a woman in her 30s - as "little girl."

Judge **Sotomayor**, who describes herself as someone who likes to take charge of the courtroom, considered telling the witness to use a more appropriate description, but she decided it was a matter for the lawyers to handle.

During cross-examination, counsel used that description, said by a witness brought on by opposing counsel, to benefit his client. "If I went with my instincts, I would have deprived [the client] of that opportunity," the judge told the audience at a two-day program on "The Woman Advocate" which began yesterday at the Grand Hyatt.

The conference, sponsored by the American Bar Association Section on Litigation and Prentice Hall Law & Business, highlighted the difficult decisions that female litigators and judges make each day in courtrooms around the city.

The audience of approximately 600 women and a handful of men were told that while women have made great strides in the legal profession in recent decades, women constitute only 16 percent of the profession. In the courtroom - where stereotypically male characteristics of dominance and aggression remain prized - being an effective representative of the client without being viewed as too aggressive is a difficult balance, said panelists.

Janet S. Kole, a partner in Philadelphia's Cohen, Shapiro, Polisher, Shiekman & Cohen, said that during a pretrial conference, a judge in a Philadelphia County Court greeted her by kissing her hand and saying "So how are you, little lady?"

"It was clear to me it was a put-down in front of my opposing counsel," said Ms. Kole. Instead of commenting to the judge at that moment, she put her strongest witness on first to "show I'm not a wimp."

Correcting lawyers or judges on their use of characterizations like "little lady" or "Miss" - a subtle but common form of gender bias - varies depending on the circumstances, said panelists.

Certainly, if the case itself involves gender issues or the references harm your client, the lawyer needs to speak out. If the problem persists, particularly if the offender is a judge, the lawyer needs to build a record for appeal. But panelists conceded that few decisions have been reversed because of a judge's gender bias.

Copyright (C) 1997 The New York Law Pub. Co.

If the bias is directed against the lawyer, consideration must be given to whether speaking out will harm the client, said several panelists.

Correcting a judge or opposing counsel in a "soft" way, with humor or flattery, is one approach, said panelists. "Even though I know a lot of the fauning is because of my position, you can't avoid liking your ego being stroked," said Judge **Sotomayor**.

The timing of a complaint also is important. Female attorneys should remember that after a decision has been reached in a case, there is nothing wrong in saying something to a judge who made biased comments, said Judge **Sotomayor**.

Other members of the panel were Janet Benshoof, president of the Center for Reproductive Law and Policy; Lawrence J. Fox, partner at Philadelphia's Drinker Biddle & Reath; Susan M. Karten, partner at Castro & Karten and Elizabeth M. Schneider, professor at Brooklyn Law School.

Survey Results

The sexes agree that a lawyer's gender makes a difference in the courtroom, but differ dramatically on what that difference is, according to a survey of 700 members of the ABA litigation section discussed yesterday.

Sixty percent of respondents said they believe male and female attorneys behave differently before a jury, while 57 percent said the sexes behave differently before a judge.

Almost half of female lawyers (47 percent) said women are less aggressive than their male counterparts in a jury trial, while only 22 percent of male lawyers agreed with that statement.

On the other hand, 16 percent of the males said women attorneys are harsher than males in a jury trial, while only 3 percent of women agreed.

And 19 percent of men said women use their femininity with the jury, while only 3 percent of women agreed. About 22 percent of women attorneys said male lawyers "buddy up" to a male judge, while only 1 percent of male lawyers pled guilty-as-charged.

4/2/93 NYLJ 1, (col. 1)

END OF DOCUMENT

Copyright (C) 1997 The New York Law Pub. Co.

**SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART I, QUESTION 15(2)**

Attached are copies of all unpublished opinions referenced in Question 15(2)

EUROPEAN AMERICAN BANK, Appellant,
v.
Dolores BENEDICT, a/k/a Dolores Cogliano,
Appellee.

94 CIV. 7110 (SS).

United States District Court, S.D. New York.

July 17, 1995.

Helfand & Helfand, New York City, for
appellant; Bruce H. Babitt, of counsel.

Finkel Goldstein Berzow & Rosenbloom, New
York City, for appellee; Neal M. Rosenbloom,
Gary I. Selinger, of counsel.

AMENDED OPINION AND ORDER [FN1]

SOTOMAYOR, District Judge.

*1 European American Bank ("EAB" or "appellant") appeals from an Order dated July 21, 1994 (the "July Order") by the Honorable Francis G. Conrad of the United States Bankruptcy Court for the Southern District of New York. Pursuant to Fed.R.Civ.P. 60(b) and Fed.R.Bankr.P. 9024, the July Order vacated an earlier Order of the bankruptcy court dated March 11, 1994 (the "March Order"), which had extended EAB's time to file a complaint against Dolores Benedict ("Benedict" or "appellee") declaring Benedict's guarantee obligation to EAB nondischargeable under § 523 of the Bankruptcy Code (11 U.S.C. § 523). [FN2] In addition, the July Order barred EAB from prosecuting a complaint objecting to Benedict's discharge or to the dischargeability of the obligation, and discharged appellee's obligation to EAB. For the reasons discussed below, I affirm the July Order of the bankruptcy court.

BACKGROUND

At issue in this appeal is whether EAB is barred from challenging the dischargeability of a loan it made to appellee's company, Cogliano Benedict Photographics Inc., which loan Benedict personally guaranteed. Benedict filed a Chapter 11 bankruptcy petition on April 13, 1993; the deadline to file complaints objecting to the discharge of debts under § 523(c) was set for August 23, 1993. Debts set

forth in § 523(a), including debts for fraud, are excepted from discharge in bankruptcy. Section 523(c), however, specifies that some of these nondischargeable debts, including debts for fraud, will be discharged unless the creditor timely requests the bankruptcy court to determine the dischargeability of the debt. In order to conduct discovery to test whether Benedict had procured the loan fraudulently, EAB timely moved to extend its time to file a complaint under § 523(c). The bankruptcy court granted a 30-day extension.

On or about September 1, 1993, appellee converted her Chapter 11 case to one under Chapter 7. The conversion notice to creditors indicated that the new deadline under Bankruptcy Rule 4007(c) for the filing of complaints to contest the dischargeability of debts was January 10, 1994. [FN3]

EAB maintains that despite its repeated attempts from September through November 1993 to obtain documents and examine appellee, Benedict refused to comply with EAB's discovery demands. EAB moved on November 18, 1993 to compel discovery and to require Benedict's attendance at a Rule 2004 examination, or alternatively, to dismiss the bankruptcy case (the "November Motion"). The motion's return date was set for December 20, 1993, three weeks before the January 10, 1994 Rule 4007(c) deadline. At the request of Benedict's counsel, however, the return date of the motion was adjourned until February 7, 1994. EAB did not move for an extension of time to file its complaint objecting to the dischargeability of the debt owed to it.

On January 11, 1994, the day after the 4007(c) deadline passed, appellant and appellee met. Benedict agreed to reaffirm EAB's debt under § 524(c) (the "Reaffirmation"), and stipulated to extend EAB's time to object to the discharge of its debt should she later rescind the Reaffirmation (the "Stipulation"). Upon being advised of the Reaffirmation, the bankruptcy court scheduled a hearing for February 7, 1994, later adjourned to March 3, 1994. After holding a Reaffirmation Hearing of the nonrepresented debtor, Judge Conrad indicated, without specifying his reasons on the record, that he would not approve the Reaffirmation or Stipulation. He also asked whether a meeting of creditors had been held and whether the 60 days had

expired with respect to objections to discharge. EAB's counsel replied, "It will expire, I believe, next week sometime." (Tr. March 3, 1994 at 3). Judge Conrad directed EAB's counsel to submit an order extending EAB's time to file a complaint under § 523 through June 20, 1994, and signed the Order on March 11, 1994.

*2 Appellee thereafter obtained new counsel, who objected to the March Order, contending that it was untimely as it was entered after January 10, 1994. New counsel moved to have the March Order vacated as it was signed under a mistake of fact. In addition, appellee rescinded the Reaffirmation and Stipulation. At a hearing held on June 28, 1994, Judge Conrad agreed that he had signed the March Order extending EAB's time to file a complaint under the mistaken impression that the deadline for filing had not already passed. On July 21, 1994, Judge Conrad vacated the March Order pursuant to Fed.R.Civ.P. 60(b) [FN4] and ordered EAB not to file and prosecute a complaint objecting to appellee's discharge or the dischargeability of the obligation. In so doing, the bankruptcy court rejected EAB's argument that its motion to compel discovery should have been deemed a motion to extend time under 4007(c). This appeal followed.

DISCUSSION

This court has jurisdiction to hear this appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). On an appeal from an order of the bankruptcy court, the bankruptcy court's legal conclusions are reviewed de novo and its findings of fact are accepted unless clearly erroneous. See, e.g., *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1388 (2d Cir.1990).

Appellant argues that the bankruptcy court erred in two ways: first, by reading EAB's November Motion to compel discovery as not including a motion to extend the Rule 4007(c) deadline; and second, by refusing to recognize the Reaffirmation and Stipulation agreed to by the parties, and later rescinded by appellee.

1. EAB's November Motion

EAB argues that a request for an extension of time to file a § 523 complaint was implicit in its November Motion to compel discovery, because its

need for additional time in which to secure documents and conduct a § 2004 examination should have been apparent to the bankruptcy court. Benedict responds that the bankruptcy court could not have construed the November Motion as a request for an extension to file a complaint, because a request for a 4007(c) extension must be explicit.

EAB relies on *In re Sherf*, 135 B.R. 810 (Bankr.S.D.Tex.1991) and *In re Lambert*, 76 B.R. 131 (E.D.Wis.1985), for its position that the bankruptcy court should have construed the November Motion as implicitly including a motion for an extension of time; Benedict relies on *In re Kennerley*, 995 F.2d 145 (9th Cir.1993), to counter that position. These cases are not binding authority on this court, although they are apparently the only precedent that discusses whether motions that do not explicitly request extensions under Rule 4007(c) may be construed as including such requests.

In *Sherf*, 135 B.R. 810, creditors filed an "objection" to dischargeability, which was served on the debtors. Thereafter, the clerk's office informed the creditors that they needed to file a complaint objecting to discharge, not merely an "objection." The creditors then timely served a complaint objecting to debtor's discharge, but neglected to file the complaint properly because they did not obtain a separate case number or pay a filing fee. The creditors were not informed of their mistakes until after the Rule 4007(c) deadline. The bankruptcy court held that a pleading filed before the Rule 4007(c) bar date that puts the debtor on notice as did the creditor's "objection" could be treated as a motion to extend time for filing a complaint. 135 B.R. at 815.

*3 Unlike the "objection" and the served but not filed complaint in *Sherf*, however, the November Motion to compel discovery here did not mention the filing of a complaint under § 523, nor did it even mention objections to discharge or dischargeability. The November Motion did not give any notice to appellee or the court as did the objection and the actual complaint served but not filed in *Sherf*.

In the second case relied on by appellant, *Lambert*, 76 B.R. 131, creditors moved the bankruptcy court for relief from a stay to permit them to pursue misrepresentation claims in state

court. Included with the motion for termination of the stay was a copy of a complaint the creditors intended to file in state court. The court construed the motion for relief from a stay as one for an extension of time for filing a complaint to determine dischargeability of a debt and allowed the state court action to proceed. In upholding the ruling by the bankruptcy court, the district court noted that the order was "consistent with the principles behind the bankruptcy law, which preclude a debtor from escaping liability for fraudulent actions." 76 B.R. at 132. The district court discussed no caselaw in its decision, and the decision was not appealed to the Seventh Circuit.

The Ninth Circuit, however, criticized Lambert in Kennerley, 995 F.2d 145. In Kennerley, the bankruptcy court had barred a fraud action from proceeding against the debtor because the creditor had failed to file a timely complaint of nondischargeability, and the district court had reversed the bankruptcy court's order. The Ninth Circuit reversed the district court, rejecting the creditor's argument that his motion to lift the automatic stay should be considered a motion to extend the deadline under Rule 4007(c). Quoting what it termed the "well-reasoned decision" of the bankruptcy court, the Ninth Circuit emphasized, "[Creditor's] motion for relief from the automatic stay did not request an extension of the deadline; it did not mention the deadline'.... In fact, the motion does not even mention Rule 4007 or § 523(c)." *Id.* at 147. In addition, the Kennerley court noted that Lambert conflicts with Ninth Circuit caselaw, which strictly construes Rule 4007(c). *Id.*

I am persuaded by the reasoning in Kennerley. Like the motion in Kennerley, EAB's November Motion did not request an extension of the dischargeability bar date, nor did it mention Rule 4007 or § 523(c). The bankruptcy court had no cause to scrutinize the November Motion to conclude that EAB might be asking for other forms of relief it had not requested, given the specificity of the notice of motion, which reads in part:

NOTICE OF MOTION FOR AN ORDER TO COMPEL DISCOVERY AND REQUIRE DEBTOR'S ATTENDANCE AT EXAMINATION AND/OR IN THE ALTERNATIVE TO DISMISS THE DEBTOR'S BANKRUPTCY CASE
PLEASE TAKE NOTICE that upon the annexed

motion (the "Motion") and proposed order of European American Bank ("EAB") by its counsel, Helfand & Helfand, will move this court ... for an order pursuant to Rule 45 of the Federal Rules of Civil Procedures [sic] made applicable by Rules 2004, 2005 and 9016 of the Federal Rules of Bankruptcy Procedure, to compel the debtor to permit discovery and require the Debtor to appear and be examined and/or in the alternative to dismiss the Debtor's bankruptcy case pursuant to Bankruptcy Code § 707(a)(1) and Bankruptcy Rule 2003.

*4 Given the particularity of this notice of motion, EAB's contention that the bankruptcy court should have assumed that the motion sought an extension of time to object to dischargeability is unreasonable. Moreover EAB, a bank represented by counsel, had brought a specific motion for a deadline extension in the superseded Chapter 11 case; Judge Conrad had no reason to believe that EAB would not do the same in the Chapter 7 action, if EAB was seeking that relief. Finally, the November Motion was filed approximately seven weeks in advance of the 4007(c) deadline; there was no reason for the bankruptcy court to think that counsel for EAB would not subsequently file a timely motion for an extension if it perceived a need to do so. See Kennerley, 995 F.2d 145, 147 (9th Cir.1993) (creditor's motion for relief from automatic stay should not be considered a request for an extension of the deadline; "[a]t the time the motion was filed, the deadline was some six weeks in the future, and plenty of time remained for [creditor] to file a timely dischargeability complaint").

The Ninth Circuit's reasoning in Kennerley is also consistent with the conclusion of other circuits that have held Rule 4007(c) to be a strict statute of limitations. See, e.g., *In re Themy*, 6 F.3d 688, 689 (10th Cir.1993) (Rules 4007(c) and 9006(b)(3) "prohibit a court from sua sponte extending the time in which to file dischargeability complaints"); *In re Alton*, 837 F.2d 457, 459 (11th Cir.1988) ("There is 'almost universal agreement that the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a late filed motion to extend time to file a dischargeability complaint.'"); *In re Pratt*, 165 B.R. 759, 761 (Bankr.D.Conn.1994).

I too find the "strict statute of limitations" view of Rule 4007(c) to be consistent with the language of

the Rule and its legislative history. The current Bankruptcy Rules, promulgated in 1983 and amended thereafter, eliminated the discretion of the bankruptcy courts in setting dischargeability deadlines. For example, former Rule 409(a) provided that the bankruptcy court set the deadline for filing a complaint objecting to dischargeability "not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors...." Current Rule 4007 removes the discretion of the bankruptcy court by statutorily fixing a 60 day period to file dischargeability complaints. In addition, the bankruptcy court's discretion to extend deadlines also has been eliminated: Former Rule 409 provided that the bankruptcy court "may for cause shown, on its own initiative or on application of any party in interest, extend the time for filing a complaint objecting to discharge." Current Rules 4007 and 9006 eliminate the court's authority to extend deadlines sua sponte; Rule 4007(c) provides that, in order to extend the bar date, "[t]he motion shall be made before the time has expired," and Rule 9006(b)(3) provides that enlargement of time under 4007(c) may be obtained "only to the extent and under the conditions stated in those rules." See, e.g., *In re Klein*, 64 B.R. 372, 374-75 (Bankr.E.D.N.Y.1986).

*5 While the limitations on a court's ability to set and extend deadlines does not directly address appellant's argument that its November Motion should be construed as including a request for an extension, I agree with the reasoning in *Kennerley* that a broad reading of the November Motion that would construe a motion to compel discovery as a motion to extend the deadline for filing a dischargeability complaint would be inconsistent with the overall strict interpretation which should be accorded to Rule 4007(c). [FN5]

Appellant further argues that the bankruptcy court should have extended the dischargeability complaint deadline under its general authority granted in § 105(a) of the Code, which allows the court to act to prevent an abuse of the bankruptcy process. Appellant relies on *In re Greene*, 103 B.R. 83 (S.D.N.Y.1989), *aff'd* without opinion, 904 F.2d 34 (2d Cir.1990), *cert. denied*, 498 U.S. 1067 (1991), in which the district court upheld the bankruptcy court's use of § 105(a) to extend the deadline for objections to dischargeability. The

facts in *Greene*, however, are decidedly different from the situation here.

The *Greene* court extended the filing deadline for a creditor who was neither included on the creditor list nor had actual notice of the bankruptcy, unlike EAB, who was properly notified of appellee's filing of bankruptcy. Moreover, the *Greene* court was persuaded that the appellants before it were not honest debtors, but rather, had attempted to use the process "for purposes other than a good-faith effort to secure a fresh start." *Id.* at 88. Here, on the other hand, despite repeated cries by EAB of foul play on the part of appellee, Judge Conrad stated when granting appellee's motion to vacate the March Order, "The facts here cannot lead me to the conclusion that counsel for the bank has made here, that the Debtors have some sort of unclean hands." *Tr.* June 28, 1994 at 26. As the district court is bound to the bankruptcy court's findings of fact unless they are clearly erroneous, see, e.g., *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1388 (2d Cir.1990), I accept Judge Conrad's finding of the lack of bad faith on the part of appellee.

EAB further argues that its earlier deadline extension in appellee's Chapter 11 case and its discovery requests put Benedict on notice that EAB intended to object to the dischargeability of the obligation owed it. It is important to bear in mind that notice is not the only purpose of the Bankruptcy Rules. Instead, the Rules are intended to serve other goals, among them, "the prompt closure and distribution of the debtor's estate," *Pioneer*, 113 S.Ct. at 1495, and the promotion of "the expeditious and efficient administration of bankruptcy cases by assuring participants in bankruptcy proceedings 'that, within the set period of 60 days, they can know which debts are subject to an exception to discharge,' " *Rockmacher*, 125 B.R. at 384 (quoting *In re Sam*, 894 F.2d 778, 781 (5th Cir.1990)). While the operation of the Rules may lead in some cases to harsh results, "[t]he bankruptcy system simply could not operate if every deadline, which by its nature can cut off someone's lawful rights, could be contested on equitable grounds." *In re Collins*, 173 B.R. 251, 254 (Bankr.D.N.H.1994).

2. Rescission of Reaffirmation and Stipulation

*6 EAB also argues that the Bankruptcy Court acted arbitrarily in overlooking the Reaffirmation

and Stipulation entered into by the parties on January 11, 1994, the day after the deadline passed for EAB to file an objection to appellee's discharge or the dischargeability of debts owed it. In the Stipulation, appellee agreed to extend EAB's time to object to dischargeability should she rescind the Reaffirmation. Benedict later rescinded both the Reaffirmation and Stipulation.

EAB's argument is specious. It provides no legal authority for the novel proposition that litigants, through a stipulation, can bypass a court's exercise of its obligation to decide whether cause exists to extend a statutorily controlled deadline. See, e.g., *In re Snyder*, 102 B.R. 874, 875 (Bankr.S.D.Fla.1989) ("[T]his court will not permit litigants to bind this court, by bargaining for delay beyond that specified by the Rules and the Code"). Judge Conrad did not abuse his discretion by refusing to recognize the Stipulation.

CONCLUSION

For the reasons stated above, I affirm the Order of the bankruptcy court dated July 21, 1994, case no. 93-B-41894 (FGC), and direct the Clerk of the Court to enter judgment accordingly.

SO ORDERED.

FN1. The substance of this Amended Opinion and Order is identical to the Opinion and Order issued on June 26, 1995; the changes in this Amended Opinion and Order are technical only and do not alter the legal conclusions of my previous Order.

FN2. Unless otherwise specified, all statutory references are references to the Bankruptcy Code, Title 11 of the United States Code. All references to "Rules" are references to the Federal Rules of Bankruptcy Procedure.

FN3. Rule 4007(c) mandates: A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors.... On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

FN4. Fed.R.Civ.P. 60(b) provides: On motion and

upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake....

FN5. Appellant does not argue that his failure to file for an extension of the Rule 4007(c) deadline was a result of "excusable neglect," presumably because most courts have interpreted Rule 9006(b)(3) as eliminating the possibility that a deadline may be extended under 4007(c) because of excusable neglect. See, e.g., *In re Rockmacher*, 125 B.R. 380, 383 (S.D.N.Y.1991) (when dealing with extensions of time under Rule 4007(c), "the excusable neglect standard of rule 9006(b)(1) is explicitly excepted from consideration by rule 9006(b)(3)"); *In re Savage*, 167 B.R. 22, 27 (Bankr.S.D.N.Y.1994) (Bankruptcy Rule 9006(b)(3) does not make allowance for excusable neglect); *In re Figueroa*, 33 B.R. 298, 300 (Bankr.S.D.N.Y.1983) ("It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim"). Accord *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 113 S.Ct. 1489, 1495 (Supreme Court explained that existence of excusable neglect doctrine for filing late claims in Chapter 11 cases but not in Chapter 7 cases reflects the different policies of the two chapters: "Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.").

END OF DOCUMENT

BOLT ELECTRIC, INC., Plaintiff,
v.
**The CITY OF NEW YORK and Spring City
Electrical Manufacturing Co., Defendants.**

No. 93 CIV. 3186(SS).

United States District Court, S.D. New York.

March 23, 1994.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 Pursuant to Fed.R.Civ.P. 12(b)(6), defendant, the City of New York ("NYC"), moves to dismiss the amended complaint in this diversity action for contract nonpayment. Defendant NYC contends that the alleged contract at issue is unenforceable because it does not comply with NYC statutory and regulatory requirements, and because it violates public policy. For the reasons discussed below, defendant's motion is granted.

Background

Plaintiff, Bolt Electric, Inc. ("Bolt"), is a New Jersey corporation which seeks payment for lighting and related materials it designed or supplied for a reconstruction project of the Eastern Parkway in Brooklyn, New York ("the Project"), supervised by the Department of Transportation ("DOT"). In 1987, after a competitive sealed bidding process, NYC awarded Naclerio Contracting Co., Inc. ("Naclerio"), a 58.7 million dollar contract for the Project ("the Contract").

At issue in the instant motion before me are outstanding payments for materials ordered by Naclerio from Bolt in February 1988 and October 1991. The February 1988 purchase order included materials which Bolt claims it specially designed for the Project. The subsequent October 1991 purchase order included several of the February 1988 materials, as well as certain new items. It is unclear how much payment Bolt received for the materials in these purchase orders.

Bolt also contracted with L.K. Comstock & Company, Inc. ("Comstock"), a Naclerio electrical subcontractor under the Contract, to supply lighting

materials for the Project. Bolt claims that these materials were specifically required under the Contract. NYC, however, was not a party to either agreement between Bolt and Naclerio, or Bolt and Comstock.

The Naclerio Contract with NYC was ill-fated. As time passed, the Project fell further and further behind schedule and was delayed several years. As the Project languished, Naclerio's financial status also grew tenuous and, in 1990, Naclerio filed for bankruptcy protection. [FN1] Naclerio did not pay Bolt or Comstock during 1990 and 1991, and both informed NYC of their respective nonpayment problems with Naclerio. Eventually, in 1991, Comstock informed NYC that it was withdrawing from the Project because of nonpayment.

Naclerio thereafter requested that Bolt provide the lighting materials it had ordered. Despite the existing and potential nonpayment problems, Bolt agreed to continue with the Project on two conditions. First, Bolt demanded full payment for outstanding debts on materials it had already provided. Second, it wanted NYC to guarantee payment of all remaining materials.

Although it is unclear whether Naclerio complied with Bolt's first condition, Bolt claims that it continued producing the Naclerio items because NYC met its second condition by providing a guarantee of payment. Bolt alleges this guarantee is commemorated in a letter dated September 25, 1991, from DOT Deputy Commissioner Bernard McCoy ("the McCoy Letter").

*2 The McCoy Letter states, in pertinent part, that:

[a]ll conforming material ordered by Naclerio on their Purchase Order with [Bolt] will be paid to Naclerio by the City of New York.

In the event Naclerio Contracting Co., Inc. defaults in its contract with the New York City Department of Transportation, the Department will purchase from Bolt Electric, Inc. all materials ordered specifically for the Eastern Parkway contract.

Affidavit of Gilman J. Hallenbeck ("Hallenbeck Affidavit"), Exhibit H.

Relying upon the McCoy Letter as a guarantee, Bolt accepted another purchase order from Naclerio

for over two million dollars of lighting materials, including materials previously ordered but which Bolt had refused to deliver due to nonpayment problems. Bolt states that some of the materials included in this order had previously been inspected and approved by NYC. Bolt also continued to prepare and deliver other materials for the Project.

Bolt learned, during the summer of 1992, that NYC might declare Naclerio in default. According to Bolt, at a meeting with NYC officials in August 1992 and at subsequent meetings, NYC officials "assured Bolt that even if Naclerio was released and a new general contractor was brought on board, NYC would honor its commitment to purchase from Bolt the materials ordered by Naclerio." Bolt's Memorandum of Law in Opposition to Defendant the City of New York's Motion to Dismiss ("Bolt's Memorandum"), p. 9. The NYC officials also instructed Bolt to continue working on the Project. *Id.*

Naclerio's default was indeed imminent and, in October 1992, the NYC declared Naclerio in default. Bolt maintains that at another meeting on October 26, 1992, with several NYC officials, including DOT Assistant Commissioner Lawrence Gassman and DOT chief lighting official Steve Galgano, NYC again explicitly directed Bolt to continue work on the materials ordered by Naclerio and on new materials not previously ordered. Bolt claims that, with the McCoy Letter in his hand, DOT Assistant Commissioner Gassman assured Bolt that "the City will honor its commitment to you," *id.* at 10, and Bolt, again relying on these assurances, continued to produce the requested items.

After the declaration of Naclerio's default, NYC decided to complete the Project by submitting it to the Project's surety, Aetna Casualty & Surety Company ("Aetna"). Although Aetna hired subcontractors other than Bolt to work on the Project materials, Bolt alleges that Aetna promised that Bolt would continue to serve as the electrical materials supplier of the Project and that the NYC guarantee in the McCoy Letter would be honored. Notwithstanding these assurances, on February 12, 1993, the Project's new electrical subcontractor notified Bolt that it was no longer on the Project. Defendant Spring City was ultimately selected to supply the materials previously contracted by

Naclerio in the October 1991 purchase order. [FN2]

In the case before me, Bolt seeks \$2,592,746.20 for payments due under the February 1988 and October 1991 purchase orders, which Bolt contends NYC is bound to pay pursuant to the guarantee set forth in the McCoy Letter. Bolt also claims that in reliance on NYC's assurances of payment, Bolt released its liens against Naclerio and Comstock for prior purchase orders, and, at NYC's request, withdrew its third-party complaint against NYC in an Ohio lawsuit against Bolt, filed by one of its suppliers for expenses associated with the Project. Hallenbeck Affidavit, ¶¶ 27-28.

*3 Defendant NYC moves to dismiss Bolt's complaint against it, arguing that there is no legally viable agreement between NYC and Bolt which requires NYC to pay for the items in the purchase order. Initially, NYC argued that a municipal contract is valid and legally binding only if it complies with the express statutory requirements of competitive sealed bidding or the statutorily recognized alternatives to the sealed bidding process. NYC contends that because Bolt never participated in the bidding process, or otherwise complied with alternative procurement prerequisites, the McCoy Letter cannot constitute a valid contract with NYC. Also, a contract which does not satisfy the statutory prerequisites, according to NYC, is a nullity because it violates NYC's laws and rules and, hence, contravenes public policy.

At the oral argument on the extant motion, held October 23, 1993, NYC conceded that the bidding requirement was not absolute and that it could be avoided in certain situations, including when a contractor defaults. Transcript of October 23, 1993 Hearing, pp. 3-4; 7; 9. [FN3] However, NYC asserted that even in the case of a default, it may circumvent the bidding requirement only after it has formally declared the contractor in default. The timing of the default announcement, NYC argued, is dispositive and anything preceding the announcement is without legal significance unless it complies with the statutory bidding prerequisites.

A consistent theme of NYC's arguments is that, ultimately, any contract which has not satisfied the applicable statutory requirements is invalid as against public policy. Defendant NYC's public policy argument may be summarized succinctly as

alleging that the statutory restrictions on a municipality's right to contract cannot be ignored or avoided because they are fundamental to "responsible municipal government." Thus, public accountability, according to NYC, is paramount.

Bolt responds that the McCoy Letter did not have to comply with bidding requirements or any alternative contracting process, and that NYC's "official" declaration of Naclerio's default is irrelevant to whether NYC agreed to pay Bolt for the materials ordered for the Project. Bolt also argues that if I determine that some approval was required in order for NYC to enter a valid procurement agreement with Bolt, I should overlook such a requirement on purely equitable grounds because there is no proof of "fraud, collusion or other impropriety in the execution of the [McCoy Letter]." Bolt's Memorandum, p. 22. Bolt further contends that it is unfair to deny recovery against NYC where Bolt has acted in good faith and upon reliance of NYC's assurances.

DISCUSSION

A. The Motion to Dismiss for Failure to State a Claim

Dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir.1991), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In considering the motion, the allegations in the complaint must be construed favorably to the plaintiff. *Walker v. New York*, 974 F.2d 293, 298 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993).

*4 Defendant NYC does not challenge Bolt's interpretation of the McCoy Letter, but rather, for purposes of this motion, NYC accepts the proposition that a contract between DOT and Bolt existed. Memorandum of Law in Support of City's Motion to Dismiss the Amended Complaint ("NYC's Memorandum"), pp. 1-2. NYC argues

that because the McCoy Letter does not comply with mandatory statutory requirements, however, it is an unenforceable contract, either because it is statutorily invalid or because it violates public policy. [FN4]

NYC agrees that there are two categories of valid contracts exempt from the competitive bidding requirement. The first category is best described as contracts which are formed in accordance with alternative methods to competitive bidding explicitly set forth in the Charter, like the non-bidding process for emergency procurements. See New York City Charter § 315. Since the parties agree that the alleged contract between Bolt and NYC does not come within the coverage of any of these alternative mechanisms, there are no viable arguments that the McCoy Letter satisfies these sections of the New York City Charter ("Charter"). [FN5]

The second category of bid-exempt contracts includes contracts which are valid if they are a consequence of a default of a contractor, and entered into in order to complete the work under a contract which has been previously submitted for bidding. See N.Y.C. Administrative Code § 6-102(b) (1992). The McCoy Letter arguably falls within this category. *Id.*; see also Contract, Article 48.

Nevertheless, regardless of whether the contracts were formed in accordance with recognized alternative nonbidding procedures, or as a consequence of a default, all NYC contracts must satisfy certain approval procedures set forth in the Charter, New York City's Administrative Code ("the Administrative Code") and the Procurement Policy Board Rules ("PPB Rules").

As discussed below, NYC's mandatory approval requirements and public policy claims are its most defensible and compelling arguments. Any agreement or contract with Bolt, in furtherance of the Contract and for purposes of completion of the Project, must satisfy the requirements set forth in NYC's rules and regulations. These requirements are alternatives to the competitive sealed bidding process which, though theoretically less burdensome, are mandatory and cannot be waived. Since the McCoy Letter does not comply with these statutory requirements, NYC argues it is invalid and to recognize such a contract would violate public policy. I agree.

1. Declaration of Default as a Municipal Contract Prerequisite

New York State's General Municipal Law § 103.1 requires that contracts for public works must be awarded to the lowest bidder.

Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than seven thousand dollars and all purchase contracts involving an expenditure of more than five thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein ..., to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section....

*5 N.Y. GEN. MUN. LAW § 103.1 (McKinney 1986). [FN6]

The Charter specifically states that all City procurement contracts shall be awarded pursuant to a competitive bidding process initiated by NYC's issuance of an invitation for bids. Interested bidders submit sealed bids and NYC awards the contract to the lowest responsible bidder. New York City Charter § 313. However, as already stated, and as NYC recognizes, the bidding process is not inviolate or mandatory in all cases. See *United States v. City of New York*, 972 F.2d 464, 471-72 (2d Cir.1992) (New York City Charter includes valid exceptions to the traditional state law requirement that New York City bid all its contracts). The Charter provides for methods of awarding procurement contracts, without use of the bidding procedure, see e.g., New York City Charter § 312 (exceptions to the procurement process), § 315 (emergency procurement), § 317 (alternatives to competitive sealed bidding), and, as the parties agree, under the Contract here, NYC could complete the work without rebidding, if Naclerio defaulted.

Bolt argues that since NYC could contract without bidding to complete the work after Naclerio's default, it has the authority, as a matter of law, to enter into an agreement, such as the McCoy Letter, to pay for the Project materials. NYC counters that a formal declaration of a default is a prerequisite to the valid formation of a municipal contract to complete the work under the defaulted contract.

I am not persuaded that NYC cannot act on what ultimately is its discretionary authority to complete the Contract, in anticipation of a default, simply because it has not yet formally declared a default. To hold otherwise would place an unwarranted and unjustified burden on NYC from invoking its discretion—discretion which appears otherwise unencumbered. Cf. *In re Matter of Leeds*, 53 N.Y. 400, 403 (1873) (readvertising may be inappropriate where it causes an injudicious delay); *City of New York v. Palladino*, 146 A.D. 850, 131 N.Y.S. 807, 809 (1st Dept.1911) (readvertising for contract to collect refuse not required, in part, where accumulating refuse was menace to the public).

Despite the total absence in the General Municipal Law, the Administrative Code or the Contract of any time provision of the sort NYC proposes, NYC requests that I read into these sources a requirement that a formal declaration of default must precede any attempts to secure the means by which to complete the work under the contract. Such an interpretation is unwarranted and unjustified by the plain language of the law or the Contract which permits NYC to complete the Contract "by such means and in such manner" as it deems desirable. See Article 48. NYC must be free to react in potentially urgent situations, like securing specially-designed materials or the services of a subcontractor, prior to a default. Otherwise, NYC would bear an unnecessary risk in the completion of its defaulted contracts.

*6 Defendant NYC relies on the language of Article 48 of the Contract to support its argument that the bidding-circumvention provisions found in this Article are triggered only once a default is actually declared and the contractual notice requirements are followed. Article 48, in relevant part, states simply that the Commissioner of the Department of Highways of the City of New York, after declaring the Contractor in default, may then have the work completed by such means and in such manner, by contract with or without public lettings, or otherwise, as he may deem advisable, utilizing for such purpose such of the Contractor's plan, materials, equipment, tools and supplies remaining on the site, and also such subcontractors, as he may deem advisable.

This language alone is insufficient to support NYC's conclusion that its discretion is limited. This Article addresses only the actual act of

completing the Contract, it does not state that NYC could not take, pre-default, actions to facilitate such completion.

In fact, the language of the Contract clearly provides that if the contractor defaults, NYC may complete the work "by such means and in such manner" as advisable. Thus, the Contract grants NYC broad discretion in furtherance of completing the work, without any prohibition on NYC from agreeing, pre-default, to pay Bolt for the undelivered Project materials should Naclerio default. Nothing therein suggests that the notice requirements which exist, in part, for the benefit of the contractor, also prohibit NYC from acting in anticipation of a default, without bidding.

2. Comptroller Requirements on All Municipal Contracts

The ability to exercise discretion to complete work without rebidding before or upon a default does not, however, relieve the City and contractors from complying with other legal obligations and requirements. NYC maintains that any contracts or agreements not submitted for bidding, must still comply with other statutory requirements set forth in the Charter, the Administrative Code and the PPB Rules. These requirements mandate that contracts be filed and registered with the NYC Comptroller prior to their implementation. NYC's Memorandum, pp. 14-22.

Three provisions control in the instant case. First, Charter § 328(a) states:

Registration of contracts by the comptroller. a. No contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the comptroller and (2) either the comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section, or the comptroller has grounds for not registering the contract under subdivision b of this section. (emphasis added) [FN7]

Thus, all contracts and agreements are effective only upon filing and registration with the Comptroller. See *Prosper Contracting Corp. v. Board of Educ. of the City of New York*, 73 Misc.2d 280, 341 N.Y.S.2d 196, aff'd, 43 A.D.2d 823, 351 N.Y.S.2d 402 (1st Dept. 1974).

*7 Second, § 6-101 of the Administrative Code states, in relevant part:

Contracts; certificate of comptroller. a. Any contract, except as otherwise provided in this section, shall not be binding or of any force, unless the comptroller shall indorse thereon the comptroller's certificate that there remains unexpended and unapplied a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same.

* * *

c. It shall be the duty of the comptroller to make such indorsement upon every contract so presented to him or her, if there remains unapplied and unexpended the amount so specified by the officer making the contract, and thereafter to hold and retain such sum to pay the expense incurred until such contract shall be fully performed. Such indorsement shall be sufficient evidence of such appropriation or fund in any action.

d. The provisions of this section shall not apply to supplies, materials and equipment purchased directly by any agency pursuant to subdivisions (c) and (d) of section three hundred [twenty nine] of the charter. [FN8] (emphasis added)

By reference to Charter §§ 329(c) and (d), § 6-101 excludes any small purchases such as direct agency purchase of goods in amounts not exceeding \$1,000 in costs per transaction, or, upon the prior approval of the Commissioner of General Services or the Mayor's approval, an amount not exceeding \$5,000. The \$5,000 limit may only be increased with the additional approval of the Comptroller. These increases must be published in the City Record.

Lastly, PPB Rule § 5-07(b) provides that:

[n]o contract or agreement executed pursuant to the New York City Charter or other law shall be effective until:

(1) The Comptroller has registered the contract or thirty (30) days have elapsed from the date of filing, during which the Comptroller has neither raised an objection pursuant to subdivision (i) below nor refused to register the contract pursuant to subdivision (h) below. (emphasis added)

These sections establish that, with the exception of contracts for goods costing small amounts, clearly

not the situation in Bolt's case, NYC and its agencies cannot unilaterally enter contracts or agreements absent approval by or registration with the Comptroller.

Recognizing the extent of NYC's discretion and the need for flexibility, especially under exigent circumstances, does not equate with discarding statutory and regulatory requirements governing NYC contracts. In accordance with New York law, even if NYC chose to proceed with Bolt under the Naclerio Contract, before or after the default, the McCoy Letter would not be enforceable unless it satisfied all requirements which govern contracts awarded by other than the competitive sealed bidding process.

Bolt argues, and NYC concedes, that a mere irregularity or technical violation of statutory requirements does not prohibit recovery on a quasi-contract basis. See, e.g., *Ward v. Kropf*, 207 N.Y. 467, 101 N.E. 469 (1913) (contractors can recover under a quasi-contract analysis where local entity failed to comply with legal requirement that the maximum and minimum cost of improvement be stated in proposition to electors, in order to avoid unjust enrichment by local entity for benefit received from actual services provided); *Littlefield-Alger Signal Co. v. County of Nassau*, 43 Misc.2d 239, 250 N.Y.S.2d 730 (Sup.Ct. Nassau Co.1964) (low bidder is entitled to recover for the services it provided even though contract is invalid because county executive failed to execute it where defendant received a benefit from the services and there is no offense to public policy). However, even quasi-contract recovery is unavailable where "the making of the contract flouted a firm public policy or violated a fundamental statutory restriction upon the powers of the municipality or its officers...." *Cassella v. City of Schenectady*, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (citing *McDonald v. Mayor*, 68 N.Y. 23, 28; *Seif v. City of Long Beach*, 286 N.Y. 382, 36 N.E.2d 630 (1941); *Brown v. Mt. Vernon Housing Auth.*, 279 A.D. 794, 109 N.Y.S.2d 392 (2d Dept.1952); 6 WILLISTON, CONTRACTS (rev. Ed.) § 1786A; 2 Restatement, Contracts § 598).

*8 The Bolt case is not a case of a mere technical failure in executing an otherwise valid contract. As discussed below, the Bolt contract clearly violates New York's public policy against recognizing

agreements by municipal agents who act without authority to contract on behalf of the municipality. See *McDonald v. Mayor*, 68 N.Y. 23 (1867).

3. NYC's Public Policy Claim

New York's public policy is clear that municipal contracts or agreements which do not satisfy all of its procurement requirements are neither valid nor enforceable. In New York, a municipality's authority to contract is strictly limited statutorily. *Henry Modell & Co. v. City of New York*, 159 A.D.2d 354, 355, 552 N.Y.S.2d 632, 634 (1st Dept.) (citing *Genesco Entertainment, A Div. of Lymutt Industries, Inc. v. Koch*, 593 F.Supp. 743, 747-48 (S.D.N.Y.1984), appeal dismissed, 76 N.Y.2d 845, 559 N.E.2d 1288, 560 N.Y.S.2d 129 (1990)). The restrictions exist to "protect the public from the corrupt or ill-considered actions of municipal officials." *Id.* It is well established that a municipal contract which violates express statutory provisions is invalid. *Granada Bldgs., Inc. v. City of Kingston*, 58 N.Y.2d 705, 708, 444 N.E.2d 1325, 1326, 458 N.Y.S.2d 906, 907 (1982) (citations omitted). Thus, where municipal agents act without authority, any contract formed is without legal validity. *Id.* According to the court in *Modell*,

"where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established regulations, no liability can result unless the prescribed procedure is complied with and followed."

Id., quoting *Lutzken v. City of Rochester*, 7 A.D.2d 498, 501, 184 N.Y.S.2d 483 (4th Dept.1959).

Moreover, to accord legal validity to a contract which fails to comply with the statutory mandates is contrary to public policy. As stated in *Genesco*,

[t]o allow recovery under a contract which contravenes [statutory restrictions on a municipal corporation's power to contract] gives vitality to an illegal act and grants the municipality power which it does not possess "to waive or disregard requirements which have been properly determined to be in the interest of the whole." []

Genesco, 593 F.Supp. at 747-48 & n. 14, quoting *Lutzken*, 7 A.D.2d at 499, 184 N.Y.S.2d at 486.

The alleged agreement with NYC contravenes

public policy because it does not comply with NYC's registration and filing requirements, critical components of a process designed, in part, to avoid corruption, to ensure sufficient appropriations for municipal contracts and to protect against fiscal excess. Cf. *Cassella v. City of Schenectady*, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (plaintiff cannot recover in quasi-contract where local Civil Service Commission failed to certify plaintiff for appointment as fire surgeon, where invalidity is based on irregularity or technical violation because contract flouts firm public policy, and contract violates a fundamental statutory restriction upon powers of municipality or its officers). In the Bolt case, the Comptroller's oversight is exactly the type of monitoring of a financially strapped project envisioned by the legislature, for, as the parties concede, the Project had exceeded its expected completion schedule and expenses. Thus, concerns over financial viability, which are fundamental aspects of municipal contracts, were practical realities of the Project. Thus, the manner in which the Bolt contract was formed undermines the very purpose of the municipal law in failing to have the Comptroller, the entity responsible for the monitoring of the fiscal integrity of NYC projects, certify and approve the agreement.

B. Bolt's Estoppel Claims and Request for Relief

*9 Bolt contends that since the McCoy Letter is not tainted by any impropriety chargeable to Bolt, however, that I should recognize NYC's promises and assurances for payment of the Project materials. Bolt maintains that it acted completely in good faith and upon reliance of NYC's assurances when it withdrew liens against Naclerio and Comstock, and dismissed third-party claims against NYC in pending litigation. Bolt's allegations, in essence, are complaints that NYC acted in a devious manner in seeking Bolt's abandonment of these legal claims and that, therefore, NYC should be estopped from asserting mandatory compliance with the statutory and regulatory prerequisites as a defense to this litigation.

Generally, estoppel is not available in New York against public entities for the unauthorized acts of their agents. *Granada*, 58 N.Y.2d at 708, 444 N.E.2d at 1326, 458 N.Y.S.2d at 907 ("because a governmental subdivision cannot be held answerable

for the unauthorized acts of its agents ..., we have frequently reiterated that estoppel is unavailable against a public agency.") (citations omitted).

The estoppel rule is based, in part, on New York's public policy which charges those bargaining with municipalities with the burden of determining the contracting authority of municipal representatives. Those dealing with NYC must ascertain the extent of the municipal agent's authority and must be aware of the statutory and regulatory requirements applicable to municipal contracts. *McDonald*, 68 N.Y. 23. A party bargains or contracts with a municipality at its own risk and bears the burden of being informed of the applicable procedures and requirements. *Modell*, 159 A.D.2d 354, 552 N.Y.S.2d at 634; *Gill*, 152 A.D.2d at 914, 544 N.Y.S.2d at 395 (citing 27 NY JUR 2D, Counties, Towns and Municipal Corporations, §§ 1217, 1218). Cf. *Parsa v. State of New York*, 64 N.Y.2d 143, 147, 474 N.E.2d 235, 237, 485 N.Y.S.2d 27, 29 (1984) ("A party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them.") (citations omitted). As clearly stated by the First Department, "those dealing with municipal agents must ascertain the extent of the agents' authority, or else proceed at their own risk." *Modell*, 159 A.D.2d 354, 552 N.Y.S.2d at 634, citing *Genesco*, 593 F.Supp. 743.

Bolt is responsible for knowing the extent of DOT's authority, as well as the limits of that authority in entering any agreements on behalf of NYC. See *id.* In this case, as already fully discussed, the statutory and regulatory prerequisites were never satisfied. Those requirements are clearly set forth in the Charter, Administrative Code and the PPB Rules--public documents which are available to those who contract with NYC agencies and employees. The alleged promises or assurances by NYC contained in the McCoy Letter are not enforceable merely because Bolt claims it was treated unfairly. Bolt may seek payment from other responsible parties, such as Naclerio or Comstock. What it cannot do is demand that NYC pay for Project materials, pursuant to an agreement which is not valid under the law, or as a public policy matter.

*10 Moreover, under New York law, a party cannot recover on an invalid contract or in quantum

meruit. *S.T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305, 298 N.E.2d 105, 108, 344 N.Y.S.2d 938, 942 (1973). New York recognizes an exception to this harsh rule of complete forfeiture in cases where the plaintiff "entered into the contract in good faith, the contract does not violate public policy, and the circumstances indicate that the municipality would be unjustly enriched." *Gill, Korff, and Associate, Architects and Engineer, P.C. v. County of Onondaga*, 152 A.D.2d 912, 914, 544 N.Y.S.2d 393, 395 (4th Dept.1989) (citing *Vrooman v. Village of Middleville*, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424 (4th Dept.1982), appeal denied, 58 N.Y.2d 610, 449 N.E.2d 427, 462 N.Y.S.2d 1028 (1983)). While Bolt relies on cases which have held that recovery is possible where these mitigating factors exist, these factors do not exist in the case before me.

For example, in *Vrooman v. Village of Middleville*, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424, 426 (4th Dept.1982), the court held that the plaintiff could recover, even though the contract was unenforceable for failure to comply with a statutory requirement that the Commissioner of Health be a party to the contract, because there was no violation of public policy and the village benefited from plaintiff's services. The court concluded that the contract did not violate the public policy against extravagance and collusion because the State had mandated the local project and because the services provided by the plaintiff "were essential to effectuate [the State's] directive." *Id.* at 426. To excuse the local entity from any liability, where the local entity clearly benefited from plaintiff's services, would "encourage disregard of the statutory safeguards by municipal officials." Since there was no harm to the taxpayers the court determined that recovery was appropriate. [FN9]

The Bolt case is different. As noted previously, the agreement here violates a clearly established public policy. The filing and registration requirements were essential checks on the financial stability of the Project—a Project financially overextended and with a tenuous fiscal status—to ensure that NYC and the taxpayers were not overpaying for services or committing otherwise unavailable City dollars. In direct contrast to *Vrooman*, the instant case presents a situation where recognizing the municipal agreement could result in NYC paying twice—first to the main contractor

Naclerio or the surety, and then to Bolt. This "harm" to the taxpayers is exactly what the municipal legislation intends to avoid.

Also, unlike *Vrooman*, NYC did not benefit from essential services provided by the plaintiff. Indeed, it is unclear how much of the Bolt materials were actually provided to the Project. Lastly, I cannot agree that the concern in *Vrooman* over judicially encouraged official circumvention of statutory requirements, is relevant to the instant case. Since there was no clear "benefit" which accrued to NYC or DOT, this case does not present a situation wherein illegal or inappropriate conduct results in unjust enrichment or a windfall for the municipality.

*11 The other cases cited by Bolt are similarly unconvincing and distinguishable. See *Shaddock v. Schwartz*, 246 N.Y. 288, 294, 158 N.E.2d 872, 874 (1927) (Cardozo, C.J.) (plaintiff may recover based on a moral obligation to pay the reasonable value for work performed, despite drafting error in its bid for public contract, where there is no injury to the City's fisc and the City actually benefited by accepting the bid since it was the lowest); *Gladsky v. City of Glen Cove*, 563 N.Y.S.2d 842, 846 (2d Dept.1991) (plaintiff may recover, pursuant to its agreement with the municipality, for expenses, such as title examination costs, incurred in reliance on the contract for sale of real property); *Albert Elia Bldg. Co. v. New York State Urban Development Corp.*, 54 A.D.2d 337, 344-45, 388 N.Y.S.2d 462, 468 (4th Dept.1976) (where competitive bidding statutes were violated, contractor's good faith and lack of fraud, collusion or wrongdoing by the State mitigates against the harsh remedy of contractor's full forfeiture and, instead, contractor must refund the difference between the costs for work done and an estimated bidding price for the work); *Galvin v. New York City Housing Auth.*, 78 Misc.2d 312, 315, 356 N.Y.S.2d 942, 946 (Sup.Ct. N.Y. Co.1974) (absent collusion between Housing Authority and contractor, Housing Authority may negotiate modifications to contract without public bidding for a new contract).

Bolt's unsupported allegations that NYC acted in a deceptive manner to induce it to release NYC, Naclerio and Comstock from liability does not alter my decision. In its opposing memorandum, Bolt accuses DOT officials of acting "somewhat deviously, it now appears" in directing Bolt to abide

by the promises in the McCoy Letter, and encouraging it to withdraw its claim against NYC in the Ohio lawsuit. Bolt also charges that, in direct reliance of NYC's guarantees of payment, Bolt released liens on the purchase orders against Naclerio and Comstock. See Hallenbeck Affidavit, ¶¶ 27-28. NYC raises serious questions as to the veracity and accuracy of these claims, and argues that what Bolt is seeking in this litigation is lost profits, not the costs for goods supplied to NYC. For example, NYC states that Bolt has received a \$100,000 payment from Comstock for supplies for the Project and that NYC has not received any items for which Bolt now seeks payment.

Assuming, as I must on a motion to dismiss, that NYC acted in a deceptive manner, Bolt's allegations are still without sufficient support to withstand the motion to dismiss. [FN10] Bolt's conclusory statements setting forth a tale of deceit fail to set forth conduct so unconscionable on the part of NYC so as to warrant avoiding the usual prohibition on estoppel in cases involving municipalities. As discussed above, this is certainly not the case where the actions of the municipal representatives are so egregious that they have tainted the entire contractual bargaining process, or where the municipality is accorded a windfall based on deceptive actions by its representatives. [FN11]

*12 I also note that, although Bolt has made unsupported allegations of injury and loss attendant to its withdrawal of legal claims, based on NYC's false statements, Bolt's submissions suggest otherwise. For example, Bolt's withdrawal of the liens against Naclerio and Comstock is without prejudice to refile, and, apparently, since the suit is still pending in Ohio, there has not been a judgment issued against Bolt. See Hallenbeck Affidavit, Exhibit G.

Conclusion

For the reasons stated, defendant the City of New York's motion to dismiss the amended complaint for failure to state a cause of action as a matter of law, as against the City of New York, is GRANTED and the Clerk of the Court is directed to enter judgment dismissing the amended complaint against this defendant. The amended complaint otherwise stands against the remaining defendant, Spring City.

The claims against the City of New York are separate and distinct from the claims involving Spring City, and there being no just reason for delay of entry of a final judgment, I order that final judgment be entered in favor of defendant the City of New York and that the Order be certified pursuant to Fed.R.Civ.P. 54(b).

SO ORDERED.

FN1. Judge Cornelius Blackshear of the United States Bankruptcy Court for the Southern District of New York dismissed Naclerio's bankruptcy petition on January 5, 1993.

FN2. Plaintiff claims that it provided defendant Spring City certain crucial information about the design of its materials and the bid price, which Spring City then improperly used to obtain the work assignment under the Contract. Amended Complaint ¶¶ 23-26. Defendant Spring City is not a party to the instant motion and I do not consider the claims against it at this time.

FN3. The Contract established that once NYC declared Naclerio in default, NYC could complete the contract without proceeding through the competitive sealed bidding process. NYC admitted that in the case before me, it had, in fact, chosen to complete the Project by submitting it directly to the surety. Transcript of October 23, 1993 Hearing, pp. 3-4, 9. Consequently, any argument that bidding for the Bolt contract was mandatory is without support.

FN4. Defendant NYC argues, however, that even if one assumes the existence of a valid contract between NYC and Bolt, the only appropriate permissible interpretation of the McCoy Letter is that NYC promised to pay Naclerio for delivered goods or, in the case of a default, to pay Bolt, for unpaid, undelivered materials.

FN5. In November 1989, the New York City Charter abolished the Board of Estimate, effective January 1990. Under the 1989 Charter, New York City's Mayor and appointed officials approve awards of contracts which have not gone through the competitive bidding process. This Charter provision predated NYC's September 1991 McCoy Letter to Bolt.

FN6. General Municipal Law § 103.1 has been amended to increase the contractual price of contracts subject to the bidding process. The last such amendment, effective January 1, 1992, raised the contract amount to \$20,000 for public contracts and \$10,000 for purchase expenditures. This amendment does not affect the case before me since its effective date postdates the formation of the contracts at issue here and the outstanding debts to Bolt for the February 1988 and October 1991 purchase orders clearly exceed the monetary requirements under the amendment.

FN7. Section 328 became effective under the 1989 Charter on September 1, 1990. Subdivisions (b) and (c) do not apply to the case before me.

FN8. According to the Charter's historical notes, § 344 was renumbered § 329, effective September 1, 1990. However, § 6-101(d) of the Administrative Code continues to refer to Charter §§ 344(c) and (d) rather than § 329. For purposes of clarity, my Opinion refers to § 329 not 344.

FN9. The court also noted that, by ordering the preparation of the plans for the project and subsequently approving the plaintiff's plans, the Commissioner of Health had acted sufficiently in compliance with the statutory requirement to be a party to the contract. *Vrooman v. Village of Middleville*, 91 A.D.2d 833, 835, 458 N.Y.S.2d 424, 426 (4th Dept.1982).

FN10. On the present record, Bolt's allegations of intentional deceptive conduct by NYC appear suspect. Notably, Bolt's submissions to this Court contradict its claim that NYC deceived Bolt into withdrawing legal action against NYC. The correspondence from Bolt's vice president, Gilman J. Hallenbeck, for example, fails to lend credence to Bolt's claims of fraudulent inducement regarding the Ohio lawsuit. Bolt Electric had New York City dismissed as a defendant [in the Ohio lawsuit] as a courtesy since the Corporation Council had assured Bolt that New York City was aware of the problem Bolt was experiencing and the City was going to do everything in its power to solve the problem. Gilman J. Hallenbeck Affidavit, Exhibit G, Hallenbeck's Letter to Commissioner Chris Ann Halpin, Department of Highways, dated October 1, 1992.

FN11. I do not decide here whether Bolt reasonably relied on NYC's assurances. Arguably, any such reliance on NYC's statements as to payment in accordance with the McCoy Letter is not reliable because Bolt was bound to ascertain the authority to make such promises and should have known that the alleged agreement set forth in the McCoy Letter was invalid for failure to comply with the legal requirements discussed fully in this Opinion.

END OF DOCUMENT

UIF W. RUNQUIST, as trustee of Runquist and
Co., Inc., Profit Sharing Trust.
Plaintiff,

v.

DELTA CAPITAL MANAGEMENT, L.P., John
M. Lefrere and William H. Gregory.
Defendants

No. 91 Civ. 3335 (SS).

United States District Court, S.D. New York.

Feb. 18, 1994.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 Pursuant to Fed.R.Civ.P. 60(b), plaintiff UIF W. Runquist moves to reconsider my Order dated July 15, 1993 adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Magistrate Judge Lee recommended dismissing plaintiff's federal fraud claim pursuant to Fed.R.Civ.P. 56(c), and dismissing plaintiff's common law claims pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute. For the reasons set forth below, the motion for reconsideration is denied.

BACKGROUND

The facts of this case are set forth in detail in my Order dated July 15, 1993 (the "Order") adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Although I assume familiarity with the Order, I briefly summarize the relevant procedural history of this case.

Plaintiff Runquist purchased a limited partnership interest in Delta Capital Management ("Delta") allegedly in reliance upon false statements made by Delta's general partners, pro se defendants John LeFrere and William Gregory. On December 3, 1991, LeFrere moved for summary judgment on the ground that plaintiff could not prove reliance, a necessary element for a fraud claim under federal law.

The action was referred to Magistrate Judge Barbara E. Lee on December 13, 1991 by Judge

Kimba M. Wood. On February 20, 1992, Magistrate Judge Lee established April 6, 1992 as the deadline for plaintiff's submission of papers in opposition to the summary judgment motion. Plaintiff filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first Report and Recommendation (the "Report"). The Report concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of its case; (2) had not arrived at a scheduled Status Conference; (3) had not served defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had made no timely effort to oppose plaintiff's summary judgment motion. On the record, Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to demonstrate reliance, and dismissing the outstanding common law claims against LeFrere for failure to prosecute.

On August 28, 1992, plaintiff objected to the Report and moved for reconsideration. Plaintiff's counsel, Louis S. Sandler, alleged that he drafted an affidavit in opposition to the summary judgment motion in December 1991. Sandler claims he discussed the affidavit with plaintiff on January 2-3, 1992. However, no affidavit was ever filed with the Clerk of the Court. Sandler blames this omission on a disgruntled secretary who left his firm's employment in January 1992. Sandler attached what purported to be a copy of the lost affidavit to the motion for reconsideration. The copy was not signed, but Sandler represented that the affidavit would be re-executed upon plaintiff's return from Sweden on August 29, 1992. Affidavit of Lewis S. Sandler, sworn to August 28, 1992, ¶ 4.

*2 On September 24, 1992, Magistrate Judge Lee considered an affidavit executed by plaintiff on September 14, 1992. The September 14 affidavit differs substantially from the draft affidavit attached to plaintiff's August 28, 1992 motion for reconsideration. Magistrate Judge Lee issued a Supplemental Report and Recommendation, which concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. Supplemental Report at 3. It also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the common law claims

for failure to prosecute. *Id.* at 5.

Plaintiff renewed its objections and filed another motion for reconsideration. The motion contained yet another affidavit, this time identical to the draft attached to the August 28 motion. Apparently this affidavit was sent to Judge Wood's Chambers on or about August 31, 1992. This affidavit was not filed with the Clerk of the Court, and was not part of the record considered by the Magistrate Judge. Curiously, this affidavit was executed in New York on August 28, 1992. According to Sandler in his August 28 motion and affidavit, his client was in Sweden until August 29.

On November 17, 1992, Magistrate Judge Lee issued a Second Supplemental Report and Recommendation. After considering the latest affidavit, she determined again that it failed to establish material issues of fact sufficient to pierce the pleadings. Magistrate Judge Lee also adhered to her recommendation to dismiss the remaining claims for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

I issued an Order on July 15, 1993 (the "Order") adopting Magistrate Judge Lee's Second Supplemental Report and Recommendation. The Order concluded that reliance had not been proven, and that summary judgment of the federal fraud claim was appropriate. The Order also found that:

[A] plaintiff who, inter alia, repeatedly fails to serve one defendant after being so instructed by the Court, fails to serve another altogether, fails to arrive at a scheduled Status Conference, fails to engage in discovery, fails to oppose a motion for summary judgment, and engages in a pattern of suspicious, dilatory tactics with regard to the production of affidavits, has evidenced, at a minimum, a failure to prosecute warranting dismissal with prejudice pursuant to Fed.R.Civ.P. 41(b).

Order at 11-12 (footnote omitted). The Order dismissed the complaint with prejudice. *Id.* at 13.

Plaintiff brings this motion for reconsideration of my Order. In the motion, plaintiff states that it opposed the summary judgment motion in a timely manner. As evidence of this proposition, plaintiff offers two forms of proof. First, plaintiff attaches a copy of a receipt from a notary public, who notarized a document for Runquist on January 2,

1992. Plaintiff alleges that that notarized document was the original affidavit in opposition to the defendant's motion for summary judgment.

*3 Second, plaintiff attaches a letter it sent to defendant LeFrere. The letter is dated January 14, 1991, [FN1] and advises LeFrere that attached is a copy of "the affidavit of Ulf W. Runquist in opposition your Motion for Summary Judgment." Pl.Ex. B. At the bottom of the letter appears a handwritten endorsement by LeFrere that reads:

Lew,

I will be sending a retort to Bill Runquist's affidavit against my motion for Summary Judgment in the next several days. I will send you a copy of such the same day it is mailed to the court.

Sincerely,

John M. LeFrere

Plaintiff maintains that this note demonstrates that LeFrere misled the Court into believing that he never received the affidavit. Plaintiff points out that LeFrere's most recent papers are now unsworn.

Plaintiff concedes that it "cannot explain" what happened to the original affidavit prepared in December 1991. Affidavit of Lewis S. Sandler, executed July 30, 1993 (hereinafter "Sandler Aff."),

¶ 2. However, plaintiff argues that because the affidavit was "promptly re-executed," the loss of the affidavit was not a sufficient basis for granting summary judgment or dismissing the remaining claims. Sandler Aff. ¶ 12. Plaintiff also denies that there was anything surreptitious about the re-execution of the original affidavit. Sandler claims that the document is simply misdated August 28 instead of August 31. In Sandler's words, "[i]t was a classic slip." Sandler Aff. ¶ 7. To support this claim, Sandler submitted a photocopy of Runquist's passport, which bears a stamp indicating that plaintiff returned to the United States on August 29, 1992.

Plaintiff also maintains it was "not at fault for not pressing discovery." Sandler Aff. at 3. Plaintiff argues that it believed discovery had been stayed until resolution of the summary judgment motion. Plaintiff supports this claim with a letter from LeFrere to Judge Wood's Chambers in which he states that the upcoming pretrial conference and trial date are "stayed indefinitely until resolution on my Motion for Summary Judgment." Pl.Ex. C.

Plaintiff also states that engaging in discovery would have been futile, "[a]s co-defendant Gregory had not been served, and therefore, any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6.

DISCUSSION

Rule 60(b), F.R.Civ.P., provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence ...; (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied ...; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) strikes a balance between "serving the ends of justice and preserving the finality of judgments." *Neimaizer v. Baker*, 793 F.2d 58, 61 (2d Cir.1986) (citing *House v. Secretary of Health and Human Services*, 688 F.2d 7, 9 (2d Cir.1982); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir.1981)). The district court's responsibility is to "maintain a balance between clearing its calendar and affording litigants a reasonable chance to be heard." *Enron Oil Corp. v. Diakuhara, Bulk Oil (U.S.A.), Inc.*, 10 F.3d 90, 95 (2d Cir.1993) (citations omitted). The Rule should be construed broadly to do substantial justice, while keeping in mind that final judgments should not be lightly reopened. *Neimaizer* at 61 (quotation omitted). Because 60(b) motions seek extraordinary judicial relief, they should be granted only on a showing of exceptional circumstances. *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir.1990), *aff'd*, 501 U.S. 115, 111 S.Ct. 2173 (1991) (citations omitted). See also *Bicicletas Windsor, S.A. v. Bicycle Corp. of America*, 783 F.Supp. 781, 787 (S.D.N.Y.1992) (60(b) motions "not granted lightly") (citations omitted).

*4 The decision to grant 60(b) relief lies within the discretion of the district court. *Maduakolam v. Columbia Univ.*, 866 F.2d 53, 55 (2d Cir.1989). In cases where the party seeking 60(b) relief has not been heard on the merits, all doubts should be

resolved in favor of that party. *Salomon v. 1498 Third Realty Corp.*, 148 F.R.D. 127, 128 (S.D.N.Y.1993) (citing *Sony Corp. v. S.W.I. Trading, Inc.*, 104 F.R.D. 535, 539-49 (S.D.N.Y.1985)).

Plaintiff has not specified which subsection of 60(b) underlies its motion. Rule 60(b) motions seeking to undue the mistakes or omissions of counsel could, on the face of the statute, be considered under 60(b)(1) or 60(b)(6). Rule 60(b)(6) may be used to rectify mistakes or omissions by counsel that are the result of "extraordinary circumstances." *PT Busana Idaman Murani v. Marissa by GHR Industries Trading Corp.*, 151 F.R.D. 32, 34 (S.D.N.Y.1993) (citing *United States v. Cirami*, 563 F.2d 26, 34-35 (2d Cir.1977) ("*Cirami II*") (other citations omitted)). See also *United States v. Cirami*, 535 F.2d 736, 741 (2d Cir.1976) ("*Cirami I*") (even gross negligence by attorney does not justify use of 60(b)(6)). Plaintiff, however, does not allege any extraordinary circumstances that would justify considering the mistakes and omissions of counsel under Rule 60(b)(6). Attorney Sandler even characterizes one of his mistakes as a "classic slip." Sandler Aff. ¶ 7.

Under Rule 60(b)(1), however, the Second Circuit has "consistently declined" to alter judgments in cases where the mistake or omission was the result of counsel's "ignorance of the law or other rules of the court, or his inability to efficiently manage his caseload." *Neimaizer* at 62 (quoting *Cirami I* at 739 (other citations omitted)). Furthermore, 60(b)(1) relief will not be granted to remedy the consequences of a poor litigation strategy. *Id.* (citing *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 695 (5th Cir.), cert. denied sub nom., *Chick Kam Choo v. Esso Oil Corp.*, 464 U.S. 826 (1983)). See also *Spray Tech Corp. v. Wolf*, 113 F.R.D. 50, 51 (S.D.N.Y.1986) (same).

Speaking in the context of vacating default judgments, the Second Circuit has provided additional guidance. District courts should not grant a 60(b) motion made by an "essentially unresponsive party" whose actions have halted the adversary process. *Maduakolam* at 55 (citing *Sony* at 540). In cases where the unresponsive party seeks 60(b) relief, denial of the motion is justified as a means to protect the other party from "interminable delay and continued uncertainty as to his rights." *Id.*

In cases where counsel's mistake or omission falls within one the previously enumerated examples of an inexcusable mistake or omission, clients cannot seek 60(b) relief. *Neimaizer* at 63. This principle is based on the theory that a person who selects counsel cannot avoid the consequences of the agent's acts or omissions. *Id.* at 62 (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962) (other citations omitted)).

*5 Guided by these principles, I turn to plaintiff's motion. I start by noting that plaintiff's numerous arguments concerning the affidavit in opposition to the summary judgment motion miss an important point. The summary judgment motion was not granted because no affidavits were ever filed. The fraud claim was carefully evaluated by both Magistrate Judge Lee and myself prior to dismissal.

Magistrate Judge Lee generously considered the substance of each submitted affidavit, despite their irregularities. In her Supplemental Report and Recommendation of September 24, 1992, Magistrate Judge Lee concluded that the affidavit executed on September 14, 1992, failed to establish a genuine issue of material fact. Supplemental Report at 3. The affidavit misdated August 28 was considered by Magistrate Judge Lee in her Second Supplemental Report dated November 17, 1992. She again determined that even in the light most favorable to plaintiff, the affidavit still did not establish material issues of fact sufficient to defeat defendants' motion.

I refused to consider the misdated affidavit because it was never filed with the Clerk of the Court pursuant to Fed.R.Civ.P. 5(e), and therefore was not part of the record as required for de novo review under Fed.R.Civ.P. 72(b). Order at 8-9. I did, however, consider the substance of the September 14 affidavit, which was drafted with the benefit of the guidance provided by Magistrate Judge Lee's Original Report and Recommendation. Viewing the affidavit in the light most favorable to plaintiff, I agreed with Magistrate Judge Lee that "its failure to pierce the pleadings made it inadequate to defeat the defendant's motions." *Id.* The affidavit made nothing more than "conclusory assertions of fact" that repeat the pleadings. *Id.* No new information had been submitted to the Court that would have suggested that plaintiff would be able to pierce the pleadings and establish a genuine issue of material fact. See *id.* at 9-10 (citing cases).

Repetition of arguments that have received full consideration fails to constitute a genuine ground for 60(b)(1) relief. *Peterson v. Valenzo*, 803 F.Supp. 875, 877 (S.D.N.Y.1992), *aff'd*, 996 F.2d 303 (2d Cir.1993).

The complex saga encompassing plaintiff's affidavits is one of many factors suggesting that plaintiff has interfered with the adversary process and has consequently failed to prosecute under Fed.R.Civ.P. Rule 41(b). [FN2] Plaintiff's belief that the dismissal for failure to prosecute was unwarranted because the original affidavit was "promptly re-executed" belies reality. *Sandler Aff.* ¶ 12. Even if *LeFrere* received the affidavit in January, counsel fails to explain adequately why the affidavit was not filed with the Clerk of the Court. See, e.g., F.R.Civ.P. Rule 5(e); Local General Rule 1(a); Local Civil Rules 1(b), 3(a)-(c). Counsel cannot shift the responsibility for the failure to file to his secretary. The New York Code of Professional Responsibility provides, in part:

*6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyers maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product.

New York Code of Professional Responsibility, Ethical Canon 3-6 (1990). That seven months, a missed Status Conference, and two reports by a Magistrate Judge passed before counsel re-executed the affidavit suggests that counsel's supervision over his client, his staff, and this case was lacking. I also note that when counsel re-executed the affidavit in August 1992, he again disregarded proper procedural rules by sending the affidavit to Judge Wood's Chambers rather than to the Clerk of the Court. The result of this action was a gross waste of the time and the resources of Magistrate Judge Lee, who issued two supplemental reports in less than eight weeks because she was, understandably, unaware of the existence of the re-executed affidavit at the time of her first supplemental report.

The failure to comply with the discovery schedule established by Judge Wood also justifies the conclusion that plaintiff failed to prosecute the case. In fact, the Second Circuit has held that failure to participate in discovery justifies denial of a 60(b) motion. *Salomon* at 128 (citing *Sieck v. Russo*, 869 F.2d 131, 134-35 (2d Cir.1989)). See also

Maduakolam at 56 (same). Plaintiff suggests that its failure to participate in discovery was in the interests of judicial economy. Plaintiff states that because defendant Gregory had not yet been served, "any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6. This statement overlooks the fact that Gregory was not present in the litigation because plaintiff ignored Judge Wood's repeated instructions to serve a complaint on Gregory in a timely manner. Plaintiff's second justification for failing to participate in discovery, that somehow discovery had been stayed definitely because of the LeFrere's letter to Judge Wood, is also inadequate to warrant 60(b) relief. The letter does speak of postponing the trial date pending resolution of the summary judgment motion. Pl.Ex. C. However, the letter makes absolutely no reference to the discovery timetable. *Id.* Regardless, the letter of a pro se defendant does not render the timetable established by Judge Wood irrelevant.

should retain subject matter jurisdiction even though the main federal claim was dismissed on a summary judgment motion. 28 U.S.C. § 1367(c)(3).

END OF DOCUMENT

Finally, plaintiff's counsel offers absolutely no explanation for missing a scheduled Status Conference. Nor does plaintiff explain why it failed to serve a defendant despite being instructed to do so by Judge Wood. In short, plaintiff's actions display an inexcusable pattern of obstruction of the adversary process. Although the Second Circuit affords "extra leeway" to pro se defendants who fail to meet procedural requirements, such protection does not extend to plaintiffs who are represented by counsel. *Enron Oil* at 95-96. Plaintiff has failed, as a matter of law, to establish any valid reason for invoking this Court's extraordinary powers under Rule 60(b).

CONCLUSION

*7 For the reasons stated above, plaintiff's motion for reconsideration of my Order of July 15, 1993 is DENIED, and the Clerk of the Court is instructed to enter judgment in favor of defendants and dismissing this action with prejudice.

SO ORDERED.

FN1. Sandler claims that this date is a mistake and should read January 14, 1992.

FN2. For purposes of this motion I assume that plaintiff would be able to convince this Court that it

Copr. © West 1997 No claim to orig. U.S. govt. works

MANDATE

91 CV 3335
SDNY
Sotomayer

JAN 13 1994
5 0 17 1994

072793

GCP

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

DOC. 37

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE GEORGE C. PRATT,
HONORABLE PIERRE N. LEVAL,
HONORABLE GUIDO CALABRESI, Circuit Judges.

----- x
ULF W. RUNQUIST, as Trustee of RUNQUIST & CO., INC. PROFIT SHARING TRUST,

Plaintiff-Appellant,

- against -

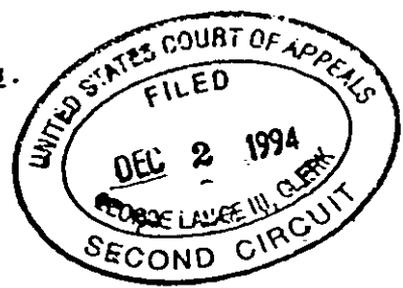
Docket No. 94-7284

DELTA CAPITAL MANAGEMENT, L.P.,

Defendant,

JOHN M. LEFRERE & WILLIAM H. GREGORY,

Defendants-Appellees.
----- x



This appeal from a judgment of the United States District Court for the Southern District of New York, Sonia Sotomayer, Judge, came on to be heard on the transcript of record and was argued by counsel for plaintiff-appellant and by defendant-appellee John M. Lefrere, pro se.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby reversed and remanded.

Plaintiff Runquist alleged in his complaint that he had purchased a limited partnership interest in Delta Capital Management, L.P. ("Delta") in reliance upon false representations made by Delta's general partners, pro se defendants John LeFrere and William Gregory. Specifically, the complaint alleges that LeFrere and Gregory had furnished plaintiff with written materials, which they had prepared, that included a "confidential" offering memorandum stating that Delta did not intend to invest more than 50% of its total assets in any one industry, or more than 25% of its assets in the securities of any issuer. In reliance on that

— MANDATE ISSUED: 12/23/94 —

reopened already

memorandum, Runquist invested \$750,000, his life savings, in Delta. Unfortunately for him, at the time of his investment, more than 75% of Delta's assets were invested in securities of First Executive Corp., a company which has since suffered severe financial reversals, and whose stock is now virtually worthless.

Runquist asserted violations of federal securities laws as well as state-law claims of breach of fiduciary duty, negligence, and common-law fraud. On December 3, 1991, LeFrere moved for partial summary judgment on the ground that Runquist could not prove reliance.

Judge Kimba M. Wood referred the motion to Magistrate Judge Barbara E. Lee. On February 20, 1992, Magistrate Judge Lee established April 6, 1992, as the deadline for Runquist's submission of papers in opposition to the summary-judgment motion. Runquist filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first report and recommendation, which concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of his case; (2) had not arrived at a scheduled status conference; (3) had not served the complaint on defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had failed to "oppose LeFrere's timely motion for summary judgment". Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to show a triable issue as to reliance; she further noted that "the absence of reliance * * * is fatal to plaintiff's [federal] claims against all defendants". In addition, she recommended dismissal under F.R.C.P. 41(b) of the pendent state common-law claims against all defendants for failure to prosecute under F.R.C.P. 41(b).

On August 28, 1992, Runquist filed objections to the report and moved for reconsideration before the magistrate judge. Focusing on the magistrate judge's statement that plaintiff had failed to oppose the summary judgment motion, plaintiff's counsel alleged that he had drafted an affidavit in opposition to the motion in December 1991; that he had discussed the affidavit with Runquist on January 2-3, 1992, but later learned it was never filed with the clerk because of a disgruntled secretary who had left his firm's employment in January 1992. He attached to the motion for reconsideration what purported to be a copy of the unfiled affidavit. The copy was not signed, but the attorney represented that the affidavit would be re-executed upon Runquist's return from Sweden the next day, August 29, 1992.

In a supplemental report and recommendation dated September 24, 1992, Magistrate Judge Lee considered a submitted affidavit execut-

ed by Runquist on September 14, 1992. That affidavit differed substantially from the draft affidavit attached to Runquist's August 28, 1992, motion for reconsideration. Magistrate Judge Lee concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. She also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the state common-law claims for failure to prosecute.

Runquist renewed his objections and filed another motion for reconsideration before the magistrate judge. That motion contained an affidavit identical to the draft attached to the August 28th motion. Runquist claimed that this affidavit had been sent to Judge Wood's chambers on or about August 31, 1992; however, the affidavit was not filed with the clerk and was not part of the record considered by the magistrate judge. Curiously, Runquist's signature purported to have been notarized in New York on August 28, 1992, which was one day prior to Runquist's return from Sweden, according to his attorney's affidavit included in the August 28th motion. (The attorney later explained that, in notarizing his client's affidavit, he had simply made a mistake as to the date.)

On November 17, 1992, Magistrate Judge Lee issued a second supplemental report and recommendation. She determined that even with his latest affidavit Runquist still had failed to establish a material issue of fact. She also adhered to her earlier recommendation to dismiss the remaining claims for failure to prosecute.

On July 19, 1993, Judge Sotomayer, to whom the case had been reassigned, rejected Runquist's objections, adopted the second supplemental report and recommendation of Magistrate Lee, and dismissed the entire complaint.

Runquist's motion for reconsideration and for relief from the judgment under F.R.C.P. 60(b) was denied on February 16, 1994.

Runquist raises two issues on appeal: (1) whether the affidavits and exhibits submitted to the district court raise a triable issue of fact on his fraud and reliance claims under federal law; and (2) whether the district court abused its discretion by dismissing all of the remaining claims under rule 41(b).

A. Summary Judgment

When a district court reviews objections to a magistrate judge's report and recommendation for summary judgment, it must

make a de novo determination of the motion "upon the record, or after additional evidence". Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636(b)(1)(c). Here we look at the entire record as it was before the district court.

The August 28th affidavit, submitted to the magistrate judge in draft form on the first motion for reconsideration and subsequently submitted in executed form, raised triable issues of fact as to whether defendants had misrepresented Delta's investment plan to Runquist and whether Runquist reasonably relied on those misrepresentations. In his motion for summary judgment, LeFrere attempted to show that Runquist could not have relied on any misrepresentation by defendants, asserting that Runquist had been provided with substantial information concerning Delta's investment practices prior to signing the subscription agreement. These allegations were directly countered by Runquist's August 28th affidavit. If the August 28th affidavit were considered, it is apparent that summary judgment would be inappropriate.

The question, then, is whether the district court should have considered the August 28th affidavit. By the time the matter came before the district court, Runquist had submitted a signed and sworn copy of the affidavit, albeit one bearing a questionable date. Runquist also had submitted both his sworn statement, contained in his September 14th affidavit, that he had in fact sworn to an affidavit identical to the August 28th affidavit when it was originally presented to him in January 1992, and a copy of a receipt from the notary public who notarized Runquist's signature on January 2, 1992. It was apparent that any failure either to oppose LeFrere's original summary judgment motion or to file the August 28th affidavit properly in the first instance was attributable to counsel's manifold shortcomings, rather than to Runquist's default. We do not condone counsel's numerous missteps. Simple adherence to the Federal Rules of Civil Procedure would have avoided the need for numerous motions for reconsideration and additional explanatory affidavits. However, under the particular circumstances of this case, where the plaintiff himself has repeatedly taken timely action to present evidence to the court, we believe that, given our well-established preference that cases be decided on the merits, the August 28th affidavit should have been considered and summary judgment should have been denied.

B. Dismissal for Lack of Prosecution

Runquist also contends that the district court's rule 41(b) dismissal of his remaining claims was an abuse of discretion.

Rule 41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant. Unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Although this rule speaks of dismissal on a defendant's motion, a district court may also act on its own motion, Schenck v. Bear, Stearns & Co., 583 F.2d 58, 60 (2d Cir. 1978), as it did in this case. We have noted, however, that "dismissal [for failure to prosecute under 41(b)] is a 'harsh remedy to be utilized only in extreme situations.'" Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988) (quoting Thielmann v. Rutland Hosp., 455 F.2d 853, 855 (2d Cir. 1972)). Our standard of review for such dismissals under Rule 41(b) is abuse of discretion. Schenck, 583 F.2d at 60.

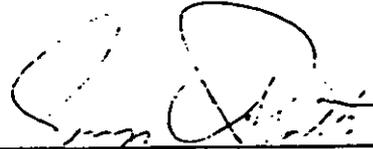
We assess a rule 41(b) dismissal in light of the record as a whole, considering the following factors: (1) the duration of the plaintiff's failures; (2) whether the plaintiff had received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) whether the judge has adequately assessed the efficacy of lesser sanctions. Harding v. Federal Reserve Bk. of New York, 707 F.2d 46, 50 (2d Cir. 1983).

Applying these factors to the record in this case, we conclude that the district court should not have dismissed these claims. There is no doubt, of course, that the failures of Runquist's attorney were many and continued over several months. However, the district court did not discuss the possible efficacy of other, lesser sanctions, a factor to which we have attached particular importance. See Schenck, 583 F.2d at 60 (stating that "[t]he sound exercise of discretion requires the judge to consider and use lesser sanctions in the appropriate case"). Moreover, it is conceded that no express warning that further inaction would result in the termination of the case was given before dismissal.

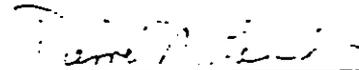
Runquist v. LeFrere
No. 94-7284

We understand and sympathize with the district court's frustration in dealing with the repeated inadequacies of Runquist's counsel. We think, however, that, despite counsel's many failings, the imposition of the harsh sanction of dismissal, without warning and without considering the efficacy of lesser sanctions, was excessive in the circumstances of this case.

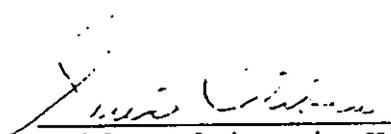
The judgment of the district court is reversed and the case is remanded for further proceedings.



George C. Pratt, U.S.C.J.



Pierre N. Leval, U.S.C.J.



Guido Calabresi, U.S.C.J.

THIS DOCUMENT CONTAINS UNRELATED CASES
BEFORE THIS OR ANY OTHER COURT

A TRUE COPY
GEORGE LANGE III, CLERK

