HON. KIMBA WOOD AND HON. CHARLES BRIEANT

On Judging Today in the District Courts

HON. CHARLES BRIEANT was awarded the New York County Lawyers' Association's Weinfeld Award for Distinguished Administration of Justice in October 2006. The presentation speech by Chief Judge Kimba Wood of the U.S. District Court for the Southern District of New York and Judge Brieant's acceptance speech are reprinted here.

This is a wonderful occasion to honor and celebrate our beloved colleague, Judge Charles Brieant, who has been a towering presence on our court for 35 years and is still going strong (he is the second longest serving federal district judge on active duty). During the past 35 years, he has uplifted both the spirit of *justice* and the spirits of his colleagues and the litigants who appear before him with his deep sense of fairness, honesty, and independence as well as with the breadth of his knowledge, which extends far beyond legal doctrine and includes not only an encyclopedic knowledge of the history of New York but also a full understanding of human foibles.

Judge Brieant is universally admired for the unique blend of erudition and practicality that characterize his decisions, which is all the more impressive when you consider that he has authored well over 700 reported decisions in the district court and more than 20 decisions when he sat by designation in the court of appeals. Of his nine decisions that reached the U.S. Supreme Court, six were upheld (in four of those six, the Supreme Court sided with Judge Brieant rather than with the court of appeals). His decisions have helped refine innumerable areas of the law, including the challenging field of federal securities law. For example, in one of his early decisions involving federal securities law (upheld by the Supreme Court after the court of appeals had reversed his decision), he helped establish that, to state a claim under Rule 10b-5, deceptive or misleading conduct must be alleged. *Green v. Sante Fe Industries Inc.*, 391 F. Supp. 849 (S.D.N.Y. 1975); *Sante Fe Industries Inc. v. Green*, 430 U.S. 462, 474–480 (1977).

Judge Brieant is known for his astonishingly wide breadth of knowledge and for his ability to draw upon that knowledge, seemingly effortlessly, as he frames and illuminates legal issues. His opinions regularly include quotations from a diverse array of sources beyond the usual legal fare—including old English proverbs; religious and philosophical texts (such as the Hindu Code of Manu); political figures, including Thomas Jefferson; and literature and social commentary, ranging from the lyrical, classical poet Pindar of Thebes (whose best work was created a little less than 500 years before the birth of Christ) to George Bernard Shaw's *Maxims for Revolutionists*. To mention just *one* such case—a case that involved an agreement between a college athlete and sports agents, which violated the rules set by the National Collegiate Athletic Association—Judge Brieant not only quoted William Faunce, the president of Brown University, but also drew upon his own knowledge of New York case law in the 1940s, citing a decision dealing with the "infamous gangster and bootlegger Arthur Flegenheimer (better know as Dutch Schultz)." *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987). The judge's wide-ranging erudition has prompted one of his former clerks—now federal Judge Shira Scheindlin—to wonder if he had received a better education than others did, or if he simply works harder to read widely outside the law.

Judge Brieant's decisions are unique, blending, as they do, the scholarly quality described above with an understanding that decisions should be grounded in practical experience and that justice should be served as efficiently as possible. In litigation involving multiple districts—a consolidated proceeding of more than 100 federal securities class action lawsuits brought against various broker-dealers—Judge Brieant found a practical way to ensure the efficient administration of justice. After preliminarily approving a settlement of the suits, he enjoined—pursuant to the All-Writs Act and Federal Rule of Civil Procedure 23(d)—suits in state court by state attorneys general who were trying to obtain greater restitution for the class action plaintiffs; Judge Brieant found that such suits were likely to impair the federal court's jurisdiction and its ability to rule on the settlements. The injunction was up held by the Second Circuit. In *re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985). Judge Brieant also never hesitates to point out practical reality, as when he noted in one case that, even though his "decision should begin by invoking the usual literary convention of modern federal courts, quote: 'the familiarity of the reader with all prior proceedings herein is assumed[,]' [s]uch an assumption here would be preposterous," because the decision was written "in the aftermath of a more than thirteen month criminal jury trial conducted before [another judge]." *United States v. Ianniello*, 740 F.

Supp. 171, 175 (S.D.N.Y. 1990).

The judge's sensitivity to the practical consequences of his decisions was honed, in part, during his long service in politics (during all of which he maintained a busy career as a lawyer at Bleakley, Platt & Schmidt). From 1948 to 1971 (the year he became a federal judge), Judge Brieant served the town of Ossining, N.Y., as, successively, water commissioner, town justice, and town supervisor, and he was also a special assistant district attorney for Westchester County and later a New York state legislator for New York County.

His public service attuned him to the distinct roles of the courts, on the one hand, and the more political branches of government, on the other. This awareness is reflected in many of his decisions. To take just one example, he clearly articulated these different roles in an action brought by a high school student and his parents challenging the constitutionality of a mandatory community service program established by a school district and its Board of Education. Judge Brieant found that the program did not violate the plaintiffs' constitutional rights under the 13th and 14th Amendments to the U.S. Constitution, but he carefully pointed out that they could also fight the provision in the political realm—they could petition local officials for either an exemption from the program or a limitation of the program, and they retained the right to "throw the rascals out" at the next School Board election. *Immediato by Immediato v. Rye Neck Sch. Dist.*, 873 F. Supp. 846, 851 (S.D.N.Y) 1995), *aff'd*, 73 F.3d 454 (2d Cir. N.Y. 1996), *cert. denied*, 519 U.S. 813 (1996).

Judge Brieant's decisions reflect not only his wealth of knowledge and experience but also his delightful sense of humor. Who could forget his opinion in *Idaho Potato Com'n v. M&M Produce Farms & Sales*, in which he provided a lengthy description of the potato (which he pointed out was more formally referred to as *solanum tuberosum*). He discussed the origin and history of the potato, cited statistics concerning the current consumption of potatoes and the size of the potato industry, and then noted: "These consolidated cases represent a legal challenge to the power of the Idaho Potato Commission and the entire Idaho potato industry; the outcome and effect of which is clearly no small potatoes." In another case, Judge Brieant provided a three-page exegesis of the origins of the bagel and the English muffin. And, to give one last example of his wit: In an opinion in a securities case involving a paper company, Judge Brieant expressed, in a footnote, a thought that I suspect has at some point crossed all of our minds, when he said: "EPA debarment" of that paper company, if applied industrywide, "might result in a Federal Government without paper, an outcome fervently to be wished."

Throughout his career, Judge Brieant has remained optimistic—at least cautiously optimistic—about humans' capacity to do good. He believes, as he once said, that "the world is honeycombed with honesty"—that crookedness exists, but it is rare. This reminds me of the time when I had just become a judge and Judge Brieant was giving me sage advice on the lofty ins and outs of judging, then threw in a little practical advice. He told me that whenever a lawyer hands you a document in court, hold it up high and shake it a bit, to make clear to all that no money was attached to it.

I cannot close this essay without paying tribute to the remarkable range of Judge Brieant's political skill as chief judge even to this day. He used his talent for consensus building to promote collegiality among our judges. He also gained more local control over our court budget and devised programs to speed case management. His political astuteness was invaluable in bringing about the construction of two new courthouses in New York: the Daniel Patrick Moynihan Courthouse in Manhattan and the courthouse in White Plains. These projects required Judge Brieant to re-enter the political arena on behalf of his fellow judges (which I suspect he relished). He obtained for us courtroom space worthy of those who seek justice in our court. To bring these construction projects to fruition, Judge Brieant astutely enlisted the support of the U.S. Congress, the General Services Administration, and the Administrative Office of the U.S. Courts. He took advantage of his ingenuity and constant good grace to resolve countless issues that cropped up along the way.

The administration of justice in our court has been enhanced immeasurably by Judge Brieant, whose contributions we honor today by giving him the New York County Lawyers' Association's Edward Weinfeld Award for Distinguished Administration of Justice, which I am proud to present. **TFL**

Hon. Kimba Wood is the chief judge of the U.S. District Court for the Southern District of New York.

I thank Chief Judge Wood, President Robertson, Chairman Marino, members of the New York County Lawyers' Association, and fellow lawyers for this award. I am deeply honored and humbled that the committee has awarded me this distinctive honor for contribution to the administration of justice in the tradition of Judge Edward Weinfeld. The committee said I could speak about anything I cared to speak about, and I have chosen to speak briefly about Judge Edward Weinfeld, who was always Ed or Eddie to even the greenest baby judge to arrive at Foley Square, a cordial friend, and a mentor to all of us who came after him. I would also like to address some of the gradual and hardly noted changes in what it means to serve as a district judge today, as contrasted with 1950, when Judge Weinfeld came to the court and as contrasted with 1971 when I arrived on the bench.

I chose this topic because a whole generation of

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judges and lawyers has no direct memory of Judge Weinfeld. I am now the only judge who is not on senior status in the Southern District whose service overlapped with Judge Weinfeld's. Judge Weinfeld, who, were he here today, would be 105 years old, entered duty 56 years ago in what was then a much different legal world. When Edward Weinfeld came to the court, he was one of only a total of 16 judges (some of whom were on senior status). The Second Circuit Court of Appeals, as then constituted, consisted of only six judges: Learned Hand, Augustus Hand, Thomas Swan, Harrie B. Chase, Charles Edward Clark, and Jerome N. Frank. Our court then was the court of the high seas and high finance. Today, we are the court of the working people, dealing with all their concerns and problems, including employment discrimination, arbitrary local and state government, due process, civil rights, and the protection of First Amendment rights.

Although Ed Weinfeld could be austere and businesslike in the way he conducted a trial, he was outgoing, friendly, and collegial, in the best sense of the word, insofar as his colleagues on the district court and the court of appeals were concerned. He sought out a newly appointed judge to make that judge feel comfortable and confident and aware that he or she was not alone. Judge Weinfeld extended his friendship to all new arrivals immediately and without being asked. His wise counsel was available whenever he was in the building, which was during most of his waking hours, and he was patient with the needs of the foolish, as I can testify based on personal experience.

Judge Weinfeld is remembered today primarily for the quality of his jurisprudence and the many cogent, literate, and authoritative decisions he wrote. To me he is memorable for his efforts in maintaining the traditions and the mystique of the Mother Court. Although he was never the chief judge, he was well known for his peer leadership of the court, and no so-called reform was ever adopted over his objection.

I remember Ed Weinfeld most for his oft-repeated reminder that there is no such thing as an unimportant case. Because he regarded every case as important, he spent long hours at work supported by a series of wonderful law clerks and his outstanding administrative assistant Marie Vollrath, who in those days was called a secretary. Marie took shorthand and so did Judge Weinfeld. He would take bench notes in shorthand and she would transcribe his notes.

The caseload today is far greater. In 1950, 6,197 civil and criminal cases were filed in the Southern District. In fiscal year 2005, just shy of 13,000 cases were filed—more than twice as many. In 1950, the Southern District had 11,831 total cases pending; in 2005, that figure was 19,302.

One thing our court has lost in the ensuing years is the number of civil cases that actually go to trial. We don't quite know why this happened. It may be that there is a modern generation of lawyers who don't trust what a jury might do. It also may be that the entire system has focused on an unseemly and inappropriate effort to obtain settlements. Clearly, a judge should not coerce settlements. If I do so, I do not do so consciously; it's just my enthusiasm coming out. But Judge Weinfeld would never even discuss settling a case with the lawyers. His position was that the case was set for trial on the appointed date. If the attorneys wanted to settle the case themselves, they could, and if they didn't want to, Judge Weinfeld would just as soon try the case. In later years, this dynamic was not in full effect, because then Magistrate Judge Sol Schreiber reviewed the entire civil printout of Judge Weinfeld's cases to ascertain if settlement was a possibility.

The modern judge is quickly becoming a slave to statistics. He or she is, of necessity, concerned with caseload numbers, and there is now a congressionally sponsored monitoring of judges to ascertain whether they have undecided motions or cases that they have been holding for too long a time and what their backlog of old cases is. None of this was any concern to Judge Weinfeld's generation of judges. There was no expectation that a district judge would engage in the minutia of case management and scheduling, which is today's standard. In spite of Judge Weinfeld's hands-off policy toward settlement, he always maintained one of the lowest pending caseloads among the judges.

I submit to you that we have lost something when we have become too preoccupied with case management, caseload numbers, and institutional pressures to settle cases, which may be counterproductive with respect to the administration of justice. The judge who closes the most cases and can conduct the fastest trial is not necessarily the best judge. Ed Weinfeld realized all this. He could conduct a fast-moving trial, but never at the cost of accuracy or fairness.

Another thing that has entered our lives since Judge Weinfeld came to the bench is the undue politicizing of judges. Ed was quick to admit that, but for his long stalwart service to his political party and his friendship with Senator Lehman, he would have remained an individual practitioner in Manhattan, as he was—and successfully so—when he became one of the early members of the New York County Lawyers' Association. He was proud of his service as an elected member of the Constitutional Convention of 1938, and he engaged in no pretense that his appointment was nonpolitical.

In Judge Weinfeld's day—and even to a great extent in my own—a nomination from the President followed by a blue slip from senators and certification by the American Bar Association that the candidate was

qualified was generally all that was needed for confirmation, and confirmation took only weeks instead of months. Today, it seems to me the confirmation process is a horror show. When my nomination became public in mid-January 1971, my friends, partners, and clients all congratulated me and wished me well, and then I didn't receive a single new client or new piece of legal business to accomplish from that day until July 31, when my commission was signed. Today's nominees can wait even years before they are confirmed, and very often some of them are simply not confirmed for partisan reasons, leaving an impression with the public that they had failed perhaps because of some dark secret evil lurking in their personal lives. The verb "to bork" has evolved to describe the process of destroying a judicial nominee through a concerted attack on his or her character, background, and philosophy, as happened with Judge Robert Bork, then a respected member of the D.C. Circuit. Facing this gauntlet of political harassment, which seems to be attached to the confirmation proceeding, is a great deterrent for a practicing lawyer such as Judge Weinfeld was, and as I was. The only people who can go through it today are those who hold public office for which the paycheck continues or those who are independently wealthy, as well as a few stealthy characters unknown even to Google. Is that what we want for our courts?

And the media are of no great help. If a judge issues a decision in a high-profile case, or in a case that declares new rights, or one that has the facial appearance of having been not too well considered, the news article reporting the decision will include the name of the President who appointed the judge immediately following the name of the judge who rendered the decision. Great judges and even fools have been appointed by every President, and the identity of the appointing President is ultimately no realistic predictor as to how a judge will rule in a particular situation. Why is this information newsworthy? Because the politicizing of judicial selection has made it so.

Has the quality of the work judges perform changed for the worse? Every opinion that came from Judge Weinfeld's chambers was, in the final analysis, his own work. Each ruling was cogent and literate and authoritative. He represented the finest part of the 19th-century judicial culture that thought of the law as a large, brooding presence in the sky that was devoted to and controlled by neutral principles. Those principles could be discerned and applied to a case then before the court by diligent study, logical reasoning, and extensive research and study of cases that had already been decided.

I suggest that this mode of decisionmaking is now history. Judges today are largely legal realists, concerned with achieving a desired outcome based on the facts of the case, viewed against a just result, and after a calculated prediction of what the reaction of an appellate panel may be. I have told the law clerks who are preparing to take the bar exam that only on the bar exam does the widow ever lose the farm. Not only are personal views and outcome determinative reasoning all too frequently injected into decisions today, there is a broadening disregard of the neutral principles taught in law school and believed in by our profession for centuries. It is increasingly presumed that such neutral principles may be wrong, unjustified, and capable of immediate reformation if the facts or needs of a particular lawsuit require this such action. If you look long enough, you can find a bunch of string cites from the *Federal Reporter* 3d Series to support almost any absurd proposition. This decisionmaking is quick and easy and finds support in a cynical attitude in the universities and in the street that the law is really not a body of neutral principles that should govern our decisions but, rather, some blunt tool with which to achieve desired social purposes or, at worst, that the law is a hostile, political instrument for oppression and domination and deserves no respect at all.

My friend and mentor Judge Whitman Knapp held and shared with me his judicial philosophy, which lies somewhere between that of Judge Weinfeld and the views of these modern nihilists. Judge Knapp carried an active civil caseload into the last days of his life, saying he loved his work because it gave him the opportunity to help people. He could help them by resolving their disputes, by settling or, if necessary, deciding their cases based on the facts, by applying common sense, and by administering natural justice without much concern for precedent, because the precedents today are all over the place. The act that Edward Weinfeld would have denied this proposition, which is held by most of his successors, represents, I think, one of the most significant changes in the court that has occurred during his lifetime and mine.

And, of course, there have been more changes since 1950, which could be discussed if time permitted. Suffice it to say that Judge Weinfeld left a meaningful mark on the history of this court—a mark we all are pleased to recognize.

On April 14, 1988, I presided as chief at an extraordinary session of our court convened in memory of Hon. Edward Weinfeld. At the event, Justice Thurgood Marshall, the principal speaker, said that Judge Weinfeld stood for and lived up to maintaining "reverence for the law, respect for the law, respect for your fellow lawyer, and respect for the court." As I know you do, I honor his legacy to all of us and to our learned profession as lawyers.

I appreciate this award and your support and friendship. I count myself privileged to continue to serve on what Judge Edward Weinfeld described as the "greatest court in the country, bar none." Thank you. **TFL**