

## Hon. John Marshall Meisburg Jr.

By  
Ellis L. Bert

Judge John Marshall Meisburg Jr. is a federal administrative law judge with the Office of Hearings and Appeals, Social Security Administration, Jacksonville, Fla., and has been an ALJ for four years.

He has completed 26 years of federal service, in all three branches of the federal government — judicial (law clerk to U.S. district judge); legislative (Capitol Hill legislative aide and subcommittee counsel); and executive (ALJ with OHA/SSA, U.S. Department of Justice, U.S. Equal Employment Opportunity Commission (EEOC), U.S. Office of Special Counsel (MSPB), and Federal Deposit Insurance Corporation (FDIC).

He is married to the former Denise Beth Eanett of Coral Gables, Fla., and they have six children — boys and girls ranging in age from 4 to 14.

Judge Meisburg graduated from the University of Kentucky, with a bachelor's degree in political science in 1968 and a juris doctor in 1971. He was a member of Sigma Chi Fraternity, the University of Kentucky debate team, and the Moot Court Board.

Career moves have taken him to seven different federal agencies in six different cities — Louisville, Atlanta, Washington, Miami, Orlando and Jacksonville, and he has been involved on some of the major social, legal, and political issues of the day.

Judge Meisburg's legal practice involved employment discrimination, whistleblower reprisal, sexual harassment, prisoners' rights, banking and commercial law, federal disability adjudication, EEO, personnel and civil service law, legislative drafting, Bivens suits against government officials, and federal court adjudication.

At age 24, in 1971, Meisburg was appointed a law clerk to a federal district judge — James F. Gordon, chief U.S. district judge for the Western District of Kentucky at

Louisville, his hometown. He was responsible for the preparation of hundreds of decisions in civil cases, orders, and judgments.

During his clerkship, Meisburg assisted and advised the judge in the early stages of *Haycraft v. Board of Education*, 418 U.S. 918 (1974) (the landmark Louisville school desegregation case that was to catapult Judge Gordon into major public prominence and was to impact in a significant way the social fabric of Louisville and Jefferson County, Kentucky). School busing to achieve integration was emerging as the most important political and legal issue in the nation. *Haycraft* was appealed to the Sixth Circuit and to the U.S. Supreme Court, and then remanded to Judge Gordon for implementation. Judge Gordon was ordered to desegregate the Louisville schools and busing became the only means available to do so. When he did so, *Haycraft* became the most prominent and controversial legal case and social issue in the 20th century in Louisville.

In 1973, Judge Meisburg became a Trial Attorney with the U.S. Equal Employment Opportunity Commission (EEOC) Regional Litigation Center in Atlanta. The commission was just 8 years old, and federal court litigation authority had just been granted to the EEOC by Congress and President Nixon in 1972. Affirmative action was beginning to make its impact upon the country. Procedural battles were being waged in federal courtrooms as to the meaning of certain provisions of Title VII of the Civil Rights Act of 1964. But "procedure is substance," and these early battles were critical to the future success of the agency, and the battle against discrimination. One major issue was whether the EEOC was required to file suit within 180 days of a charge of discrimination. One of Judge Meisburg's cases, *EEOC v. Mississippi Federated Services*, 8 FEP Cases, Par. 731, (1973), helped the EEOC to establish the principle that no such legal requirement existed, and if there was a delay of even two or three years before the commission filed suit due to its backlog, the suit could still proceed. *Id.* Delays of five to seven



years or more were looked upon less friendly by the court, and often the doctrine of "laches" would be applied in those cases. Another one of his cases, *EEOC v. General Telephone Co.*, was settled by Consent Decree, and a provision calling for affirmative action goals and timetables was approved by the court in Nashville.

Meisburg never forgot the idealism that he found at EEOC in Atlanta in 1973. The Regional Litigation Center itself was a mix of all races, religions, and sexes — blacks, whites, Jews, Hispanics, gentiles, as well as women — a picture of what private industry could be and one day would be. It was also the most efficient EEOC litigation center in the country.

In 1974, he was honored by the regional attorney as the second most productive trial attorney in the office of 40 trial attorneys. He filed suit against 30 companies in the South between 1971 and 1973, and prevailed on all motions and cases for the commission, setting a great deal of favorable precedent in their wake for the government.

In 1975, Meisburg went to Washington to become an attorney with the U.S. Department of Justice — the Special Litigation Section of the Criminal Division. Special Litigation had been formed in the wake of the Watergate scandal, to represent federal officials sued in civil suits arising out of a criminal context. Difficult decisions had to be made as to whether the DOJ would represent officials involved in such civil suits as defendants when, in a related criminal case, the same official was being prosecuted by the DOJ; this presented many complex conflict of interest and public policy issues. For over a year, Meisburg was on the trial team in *Jane Fonda v. Richard Nixon et al*, a case in which Fonda, the movie star (now wife of Ted Turner) charged the Nixon White House, the FBI, and the CIA with illegal electronic surveillance, harassment, illegal mail tampering, and other alleged invasions of privacy. At one point, Meisburg represented John Ehrlichman, of Watergate notoriety, in a deposition. Discovery in this case involved thousands of FBI files worldwide due to Fonda's vocal opposition to the war in Vietnam, and her many trips to North Vietnam. The case lasted over seven years, and was eventually settled prior to trial. The *Fonda* case proves the old maxim that every major American political issue eventually finds its way into court in some manner.

At the DOJ, Meisburg also represented the Bureau of Prisons and the Board of Parole in civil litigation filed by federal prisoners in the federal courts in the wake of the Attica riot, and the role of the DOJ was to assist U.S. attorneys around the country defend this litigation explosion. In two cases, he established precedent for the government that federal prisoners are not entitled to due process hearing before being transferred from one prison to another. *Currey-Bey v. Jackson*, 422 F.Supp. 926 (D.C. Cir. 1976); *Thevis v. Bureau of Prisons*, (E.D. Ky. 1976).

In another prisoner right's case, Meisburg persuaded the Ninth Circuit Court of Appeals by use of legislative history that the Administrative Procedure Act, 5 U.S.C.

552a (APA) did not apply to federal prison disciplinary hearings — a ruling with wide implications throughout the country. *Clardy v. Levy*, \_\_\_F2d\_\_\_ (9th Cir. 1976). He was not, however, able to persuade the Seventh Circuit that due process hearings did not apply to "Special Offender" classifications. *Auckland Holmes v. Bureau of Prisons*, 541 F.2d 1243 (7th Cir. 1976). The Auckland Holmes case was the only case he lost in government law, and that decision was reversed in a later decision in another case by the *en banc* Seventh Circuit. By representing the Bureau of Prisons and the Board of Parole at this time in history, Meisburg had the opportunity to assist the federal court in defining the proper scope of prisoner rights under the federal Constitution — a major civil rights issue in the 1970's.

In 1976, Meisburg transferred from the criminal to the Civil Division of the Justice Department, where he became involved in litigation involving two dreaded diseases — leprosy and swine flu. The leprosy case involved claims by U.S. Public Health Service doctors in Palo Alto, Calif., that they were entitled to "hazardous duty pay" for treating "lepers" or victims of "Hansen's Disease," the new term for leprosy.

Before the case was assigned to Meisburg, the district judge had threatened to hold the head of the Civil Division in contempt for numerous discovery delays. Meisburg flew to California, engaged in two weeks of complex discovery, filed a motion for summary judgment, which was granted by the court, and the case was dismissed. *Davis v. Droke*, \_\_\_F.Supp.\_\_\_\_, (C.D.Cal. 1977), *aff'd in part, rev'd in part*, 651 F.2d 1278 (9th Cir. 1981).

In the swine flu litigation, thousands of Americans had filed claims and suits against the federal government for injuries suffered as a result of the swine flu vaccinations begun by President Gerald Ford. Meisburg was involved in the early stages of reviewing the claims and suits. Since then, millions of dollars have been paid to the victims. The amount of litigation surrounding the swine flu vaccine was so extensive that a separate reporter system was created by Commerce Clearinghouse. See, e.g., *Wolfe v. Merrill National Laboratories*, 433 F.Supp. 213 (M.D. Tenn. 1977). While at first, the government strategy was to defend all such claims, Meisburg recommended settlement of most of these cases due to their obvious merit. Thousands of Americans had been paralyzed with Guilliane-Barre syndrome and had died due to the vaccine, and this had been admitted on national television by Secretary Joseph Califano of HEW. Meisburg's position was eventually adopted by Attorney General Griffin Bell and President Carter, and most of the claims were settled prior to trial.

In late 1977, Meisburg joined the staff of U.S. Congressman John Breckinridge of Kentucky. During this time, Meisburg drafted numerous speeches, letters, press releases

(continued on page 16)

## ■ Judges Profile (cont. from page 15)

es, and position papers for Representative Breckinridge on abortion, gun control, and other controversial issues.

On July 4, 1978, Meisburg established a solo, private legal practice a few blocks north of the White House. He was one of the first lawyers in the nation to run a legal ad for business in the *Washington Post*. He recalls now that "my phone began ringing off the hook." Meisburg specialized in employment/personnel law and employment discrimination and had an early victory in a federal civil service case in which the Navy reinstated a federal worker it was about to terminate because he proved that her supervisor had judged her performance based on only a few months of work after he took over, rather than on an entire year of performance preceding the evaluation and decision to deny a within grade increase. *Mary Coon v. U.S. Navy*, (1978) (Within grade increase granted retroactively).

Although only in private practice for one year, during that year, Meisburg filed the most prominent case of his legal career — *Mechelle Vinson v. Capitol City Savings and Loan (Merit Savings Bank)*, the landmark case of sexual harassment.

Meisburg conducted the initial interview with Mechelle Vinson, and filed the complaint in federal court in Washington, based upon the affidavit of the plaintiff and two other women who all asserted sexual harassment by a branch bank manager. Meisburg's theory was to prove sexual harassment against Vinson by showing a pattern of sexual harassment against other female employees of the bank, a theory attempted in *Paula Jones v. President Bill Clinton*. The *Vinson* Supreme Court decision stands for the proposition that sexual harassment is actionable employment discrimination in violation of Title VII of the Civil Rights Act of 1964, and that it can be proven by the "hostile environment" theory as well as the *quid pro quo* theory. *Vinson v. Meritor Savings Bank*, 106 S.Ct.

2399(1981). The *Vinson* case was settled out of court after 10 years of litigation.

In 1979, Judge Meisburg accepted a position as senior trial attorney with the U.S. Equal Employment Opportunity Commission in Miami, Florida. In Miami he was involved in two major EEOC litigation efforts in federal court — a class action suit for race and sex discrimination against a meatpacking and slaughterhouse in Ocala, and an age discrimination suit against Eastern Airlines for the failure to hire flight attendants over the age of 40.

In *EEOC v. H.S. Camp*, 542 F.Supp. 411 (M.D. Fla. 1982) Meisburg was the lead trial attorney in the longest EEOC federal court trial in the nation in 1981 — six full weeks of federal court time. After five years in the liability stage, the court held that the defendant, H.S. Camp, had discriminated against blacks and women in promotions, job assignments, and in segregated facilities. Senior Judge Charles Scott held that Camp had maintained segregated rest rooms from the period 1974 to 1980 (right up to the time of the trial, and 15 years after the passage of Title 11 of the Civil Rights Act of 1964 making such practices illegal). The *Camp* case was significant, because it was the first time the EEOC had made its presence known in central Florida in a major case. The didactic, salutary and chilling effect that the *Camp* case had on central Florida is renown.

In a case related to *Camp*, Meisburg obtained a Temporary Restraining Order (TRO) to protect a witness from being terminated from her job at Howard Johnson's Motel and Restaurant in retaliation for her testimony in the *Camp* case. *EEOC v. Howard Johnson Co.*, 23 EPD Par. 31,099 (M.D. Fla. 1981). A female witness in *Camp*, Eileen Barber, a local waitress, became the subject of harassment by her supervisor because she had testified for the EEOC in the *Camp* case, and her name and testimony was reported on the front page of the Ocala newspaper. Barber

testified that her boss told her "we can't have your name, and our name involved in the newspaper in this way." She was told that she was being fired. Meisburg filed a motion for a TRO to save her job, flew to Jacksonville to argue the motion in federal court, and Judge Scott ruled in favor of EEOC. On oral argument, he stated that if it became known across the state that when someone testified for the EEOC in court, and he or she could be harassed or fired, the effectiveness of the EEOC would be seriously damaged because the pool of witnesses would dry up due to the chilling effect caused by publicly known retaliation. It was a classic case of retaliation that had been anticipated by Congress when the law was enacted under President Lyndon Johnson. Judge Scott issued the TRO, one of the few ever granted to the EEOC. Judge Scott also ruled that EEOC need not show "irreparable harm" to be awarded a TRO, even though that was the classic legal requirement, because of the special wording of the Title VII, the EEOC enabling statute, providing for such relief. As a result of his efforts in *EEOC v. H.S. Camp*, and *EEOC v. Howard Johnson's*, Meisburg was nominated for Federal Employee of the Year in 1980.

In *EEOC v. Eastern Airlines Inc.*, 28 EPD Par 32, 662 (S.D.Fla. 1982), Meisburg was the lead trial attorney on a government trial team that negotiated a consent decree with Eastern to settle an age discrimination case involving hiring of flight attendants. After two years of massive discovery, Eastern agreed to hire 13 of the 23 claimants, and to divide a pool of back pay and travel benefits equally among all 23. Affirmative action to hire more persons over 40 as flight attendants, and amended hiring standards to allow "gray hair" and "non-distracting wrinkles" in flight attendants were also included.

During the period 1983-91, Meisburg served as a staff attorney for eight years with the U.S. Office of Special Counsel (OSC) (Merit Systems