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Timothy John Casey

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## PRESIDENT NIXON'S PRESCIENCE: THE HONORABLE KEVIN THOMAS DUFFY

TIMOTHY JOHN CASEY<sup>†</sup>

Our Union is in quite a state. And why shouldn't it be? Foreign terrorists and domestic corporate chiefs have sold short its sense of security and plundered its reserves. Lady Liberty's posture has shifted from that of a welcoming woman to a wary pugilist. It is still too early to know, but not to wonder whether venues like the World Trade Center, Kandahar, and Pyongyang will some day resonate along side other poignant reminders of our Union's fragile state. It is, though, beyond dispute that these are soul-trying times<sup>1</sup> in desperate need of stand-up<sup>2</sup> men and women. If ever there were an era in which to *enjoin* the decay of our nation and its confidence, it is now.

*Enter the Judge.* The Honorable Kevin Thomas Duffy, Senior Judge for the Southern District of New York, stands out among his distinguished colleagues and personifies the judicial remedy needed for a twenty-first century America that has come too close to irreparable harm. Keen observers of our judiciary have aptly noted that federal trial judges wield their Article Three power with fewer restraints than the Justices of the United States Supreme Court.<sup>3</sup> During his three-decade tenure on the federal bench, this empowered jurist has deftly managed a docket with an uncanny magnetism for dangerous defendants and thorny issues of

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<sup>†</sup> B.A., 2001, Georgetown University; J.D., 2004, St. John's University School of Law. The Author is grateful to the following individuals for their generosity of time and insight: The Honorable P. Kevin Castel, Judge, United States District Court for the Southern District of New York; Boris Kostelanetz, Esq.; Teri A. McManus, Esq.; and, of course, to the Honorable Kevin Thomas Duffy for his time and for three decades of service worthy of a much more detailed analysis than is provided here. John & Lorraine Casey are to parents as Kevin Duffy is to judges, i.e., *sui generis*. I therefore dedicate this Essay to them with thanks.

<sup>1</sup> See THOMAS PAINE, *The American Crisis: I, in COMMON SENSE AND OTHER POLITICAL WRITINGS* 55 (Nelson F. Adkins ed., 1953) ("These are the times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands it *now*, deserves the love and thanks of man and woman.").

<sup>2</sup> *Id.*

<sup>3</sup> The Honorable Barrington D. Parker, Judge, United States Court of Appeals for the Second Circuit, Visiting Jurist Speaker, Remarks at St. John's University School of Law (Oct. 29, 2003). Judge Parker noted, for example, that a judge of the Second Circuit requires two other signatures even to assign counsel.

international importance. As individuals empowered by Article Two of our Constitution shamelessly attempt to impinge upon the jurisdiction of the courts, this judge stands out as living, breathing evidence of why such attempts may not only be a fool's errand, but a terribly unconscionable and perhaps even unconstitutional idea.<sup>4</sup>

Kevin Thomas Duffy's public service spans five decades during which time he has donned a variety of hats. Most notably, he has worked as an Assistant United States Attorney, a Regional Administrator for the Securities and Exchange Commission, and a professor of law.<sup>5</sup> This New York lawyer has made numerous contributions as a prosecutor, practitioner, and professor. They are, though, largely beyond the scope of this piece. This Essay merely asserts that Kevin Thomas Duffy is a paradigmatic judge for our troubled nation at the start of an already tumultuous turning point in its history.<sup>6</sup> In particular, he brings to the

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<sup>4</sup> Attorney General John Ashcroft, for example, has arguably impinged upon the independence of the judiciary with a new plan to monitor and compile lists of federal judges who make downward departures from the Sentencing Guidelines. See Alan Vinegrad, *Deferred Prosecution of Corporations*, N.Y. L.J., Oct. 9, 2003, at 5 ("The Department of Justice has taken a number of steps recently to combat what it sees as overly lenient practices by some federal prosecutors and judges."). Judge Miner of the Second Circuit recently quipped that if the panel on which he sat were to agree with the defense over the prosecution on a sentencing manner, "you'll probably take our names and report them to the attorney general." Tom Perotta, *Panel Laments Lack of Judicial Discretion*, N.Y. L.J., Oct. 28, 2003, at 1. Chief Justice William H. Rehnquist, in his capacity as head of the Judicial Conference of the United States, has criticized the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, the law that "authorize[s] the collection of information on the sentencing habits of federal judges." *Id.* While resigning from the federal bench, the Honorable John S. Martin of the Southern District of New York voiced sharp criticism for the United States Sentencing Guidelines and noted that he did not want "to be a part of our unjust criminal system." Zachary Berman, *Judge Martin Leaves Bench Critical of Sentencing Guidelines*, N.Y. L.J., Aug. 15, 2003, at 1. Judge Martin also observed that he "find[s] most disturbing how much power Congress has ceded to the Justice Department. This is a very dangerous system, when you give the United States Attorney that much power and you have taken the discretion that should be in sentencing out of the hands of [federal judges]." *Id.* (alteration in original). With respect to the vast powers of government attorneys, Judge Duffy has commented that, "[h]e or she has the august majesty of the sovereign behind his or her every utterance; the economic power in the hands of some individual government lawyers can wreak total devastation on the average citizen." *Silverman v. Ehrlich Beer Corp.*, 687 F. Supp. 67, 70 (S.D.N.Y. 1987).

<sup>5</sup> From 1958 to 1959, Judge Duffy served as an Assistant United States Attorney. From 1959 to 1961, he was the Assistant Chief of the Criminal Division in the Southern District of New York. From 1969 to 1972, he was the Regional Administrator for the Securities and Exchange Commission in New York. The judge has taught at Brooklyn Law School, New York University School of Law, Pace Law School, and Fordham University School of Law.

<sup>6</sup> The Author is, of course, not alone in this view of Judge Duffy. For example, Judge Duffy was selected to act as the mediator in the enormous Enron shareholder and bankruptcy actions. See Anthony Lin, *Southern District Mediator Named for Enron Litigants*, N.Y. L.J., May 30, 2003, at 1. One week later, the judge recused himself due to his stock ownership in one of the

disputes before him three signature qualities that make him an exemplar for his colleagues on the bench and at the bar: (1) a distinctive, learned appreciation of the expansive breadth of precedent; (2) an uncompromisingly high expectation of the men and women who practice before him; and (3) an utterly independent pen with which he attempts to inject clarity and justice into the controversies that reach his courtroom. In 1972, with the advice and consent of the United States Senate, President Richard Nixon vested Kevin Thomas Duffy with considerable powers. This Essay posits the simple thesis that such power resides in gifted, trustworthy hands.

### I. AN OLD COURTHOUSE AND A YOUNG LAWYER

Few venues in New York County hold a candle to 40 Foley Square when it comes to housing ghosts. Names like Friendly and Hand still resonate within its walls and its opinions. There are, though, fewer and fewer attorneys who can attest to first-hand encounters with these legal giants whose writings, even today, bind our nation's most prestigious and storied circuit. Judge Duffy benefits from an experiential knowledge of these specters of the Second Circuit. He carries with him vivid memories of their vibrant personas, keen senses of humor, and even a few burns of his own from one of the hottest benches in New York's jurisprudential history.

#### A. *A Second Circuit "Baptism by Fire"*

Attorneys often recall their first few appearances in court with nostalgia and even a touch of humility. For a litigator, it is a rite of passage that indelibly sears itself into one's memory. Kevin Duffy made one of his first court appearances before none other than Judge Learned Hand.<sup>7</sup> To bring home the import of that statement to a non-lawyer, one might analogize the experience to a first-century Christian in Rome encountering a lion for the first time in the Coliseum. Judge Hand was undeniably an imposing, awe-inspiring force from the bench, and his abrasive inquisitions of attorneys who were fortunate enough to practice before one of his panels are well documented.<sup>8</sup> Boris Kostelanetz,<sup>9</sup> a man

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interested parties. See Anthony Lin, *Conner Takes Mediator Role in Enron Case*, N.Y. L.J., June 18, 2003, at 1.

<sup>7</sup> Interview with Kevin Thomas Duffy, Senior Judge, United States District Court for the Southern District Of New York, at 40 Foley Square, New York, N.Y. (Sept. 25, 2003).

<sup>8</sup> Interview with Boris Kostelanetz, Esq., Offices of Kostelanetz & Fink, in New York, N.Y. (Sept. 18, 2003); see also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 142 (1990) (noting Judge Hand's "famous rudeness to lawyers at oral argument").

whose photograph Noah Webster negligently omitted to place next to the definition of “gentleman” in his famous dictionary, argued before Judge Hand as a young Assistant United States Attorney. He recalls that “the Foley Square Courthouse would literally shake when [Judge Hand] ran the show.”<sup>10</sup> Of Judge Hand’s many oratorical gifts, Mr. Kostelanetz recalled his “shout” most vividly after more than fifty years.<sup>11</sup>

Despite having worked on the Second Circuit as a clerk earlier in Judge Hand’s tenure,<sup>12</sup> young Kevin Duffy’s experience in the lion’s den was no aberration from the norm. Judge Duffy recalls the event as a “tongue lashing,”<sup>13</sup> and he notes that among the many questions Hand had for him on that day was whether or not he owned a dictionary.<sup>14</sup> Later that day in the courthouse cafeteria, Judge Hand approached Mr. Duffy and assured him that his abuse was intentional but not mean spirited. Hand explained that Duffy, having been grilled by a master, would now be better equipped to practice before and interact with the rest of the Second Circuit.<sup>15</sup> Little did either man then know that Judge Hand had just instructed a future judge of the Southern District of New York<sup>16</sup> who would on occasion sit by designation on panels of the very same circuit from which the difficult initiation came.<sup>17</sup>

#### *B. Kevin Duffy as Sui Generis*

This Essay grows out of an attempt to compare Judges Hand and Duffy. The Author has been fortunate enough to meet with Judge Duffy

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<sup>9</sup> Mr. Kostelanetz has served as an Assistant United States Attorney for the Southern District of New York, Special Assistant to the Attorney General of the United States, and Chief of the War Frauds Section for the Department of Justice. He is today an internationally recognized litigator in the taxation bar. Mr. Kostelanetz is known both for his exceptionally warm, generous spirit and his excellence as a practicing attorney.

<sup>10</sup> Interview with Boris Kostelanetz, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> In a memorial tribute to the Honorable David N. Edelstein, Judge Duffy describes his position, “I remember David as a Federal Judge who as a man was kind to me when I was a brash young Bailiff-Court Crier/Law Clerk to a Circuit Judge in the venerable New York City Federal Courthouse at 40 Foley Square.” Judge Kevin T. Duffy, *David N. Edelstein: A Personal Remembrance*, 69 FORDHAM L. REV. 3, 3 (2000).

<sup>13</sup> Interview with Kevin Thomas Duffy, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Judge Hand served as a judge in the Southern District of New York from 1909 to 1924.

<sup>17</sup> See, e.g., *Conte v. Justice*, 996 F.2d 1398 (2d Cir. 1993). For a markedly distinct appellate panel on which the judge sat, see ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE ELSINORE APPEAL: PEOPLE V. HAMLET* (1996) [hereinafter *THE ELSINORE APPEAL*].

on two occasions.<sup>18</sup> After only a few moments of dialogue, it became painfully apparent that any such comparison would be virtually fruitless. In his demeanor, writing, and personality, Judge Duffy is *sui generis*, that is, one of a kind. Any attempt at comparing the two would do a great disservice to both judges. It is, though, worth mentioning that one of the few ways in which Judge Duffy emulates Judge Hand is his ardent appreciation for the independence of the judiciary and for the individuality of the judges who compose it.<sup>19</sup>

### *C. Nursery Rhymes, Clerkships, and Clarity in Prose*

Kevin Duffy served as a law clerk to the Honorable J. Edward Lumbard of the Second Circuit during some of the halcyon days in the life of the court.<sup>20</sup> This position afforded him numerous opportunities to interact with the famous circuit judges of that era. While it would be virtually fruitless to compare Kevin Duffy to any one of these legendary jurists, even the most independent individual cannot help but benefit from an atmosphere such as this. One notable lesson from that era, as Judge Duffy recalls, is a lecture from Judge Hand on the importance of clarity when participating in any proceedings before the Second Circuit. “Kevin, tell us the facts and the law. Put it in Mother Goose language.”<sup>21</sup> As will be discussed below, Judge Duffy has taken this admonition to heart.

## II. A DISTINCTIVE APPROACH TO PRECEDENT

Judge Duffy has been fortunate enough to walk among and interact with the authors of some of the Second Circuit’s most celebrated opinions. One can detect hints of this portion of the judge’s background in reverent allusions to these writers’ excellence:

Judge Learned Hand was a master of the English language and Judge Henry Friendly was a master of legal reasoning. Yet, a combination of the two would have difficulty in figuring out exactly why Rockefeller

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<sup>18</sup> Interview with Kevin Thomas Duffy, *supra* note 7; The Honorable Kevin Thomas Duffy, Senior Judge, United States District Court for the Southern District of New York, Visiting Jurist Speaker, Remarks at St. John’s University School of Law (Oct. 2003).

<sup>19</sup> Interview with Kevin Thomas Duffy, *supra* note 7.

<sup>20</sup> See James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 387 (1995) (treating the history of the Second Circuit during Judge Hand’s tenure and noting “Hand’s tenure stretched from 1924 to 1961, . . . it was during that time that the [court], stimulated by the growth of the Eastern Seaboard and aided by some of the finest minds on the federal bench, rose to fame.”).

<sup>21</sup> Interview with Kevin Thomas Duffy, *supra* note 7.

Group, Inc. and Rockefeller Center Properties have brought this case to this court at this time.<sup>22</sup>

In addition to the genuine first-hand familiarity with which Judge Duffy can cite to a Hand or Friendly opinion, his judicial and extra-judicial writings are marked by his reliance upon an expansive field of precedential authority.

### *A. Ancient Origins of Litigation*

In assessing the merits of a legal argument or interpreting the meaning of a contractual provision, judges may look to a variety of precedential sources. In perhaps its broadest definition of the term, *Black's* defines "precedent" as "[a] course of conduct once followed which may serve as a guide for future conduct."<sup>23</sup> A judge's *raison d'être*, it can be argued, is to evaluate a panoply of authorities and appeal to those which most directly lead to a just adjudication of the case at bar.<sup>24</sup> One hallmark of Judge Duffy's jurisprudence is the array of authorities to which the judge appeals. That is, his writings manifest an acute awareness that the particular dispute at hand is not likely to be entirely novel. Instead, the controversy lies upon a timeline that extends far back into history. In his own words:

Wearing a black robe does not assure one of getting a direct pipeline to the Almighty or even a peek at what Platonists would call absolutes or ideals. Our law is the perception of the judges as to what the customs of society are—as such customs might evolve from a sense of absolute justice. Thus, the law changes.<sup>25</sup>

This concise portrayal of the legal process consistently rings true in the writings of the judge. It is also illustrative of the Judge's keen awareness of the ancient origins of the legal process and the gradual changes that take place in American "customs."

### *B. Adam and Eve on the Stand*

Nowhere is the judge's sense of the ancient underpinnings of the litigation process more apparent than in the opening chapter of his text on

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<sup>22</sup> 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc., 77 B.R. 409, 410 (S.D.N.Y. 1987).

<sup>23</sup> BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

<sup>24</sup> Cf. Jack Van Doren, *Is Jurisprudence Politics By Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, n.1 (1998) ("A wise judge chooses, among plausible constitutional philosophies, one that will generally allow him to reach results he can believe in.") (quoting Justice Hugo Black, in ROGER NEWMAN, HUGO BLACK: A BIOGRAPHY 435 (1997)).

<sup>25</sup> Kevin Thomas Duffy, Remarks at the Law Day Luncheon at Fordham University School of Law (May 10, 1995).

the cross-examination of witnesses.<sup>26</sup> The chapter, entitled “The Genesis of Cross-Examination: Examination of Witnesses in Biblical Times and in Other Historical Epochs,” literally begins at the beginning<sup>27</sup> and constitutes an expansive historical treatment of cross-examination in various civilizations throughout history. The piece spans Babylonia, Greece, Rome and concludes in nineteenth-century England.<sup>28</sup>

The piece also contains a pocket part. Therein one finds the biographical window into the mind of one of its authors. Even the most accomplished reference librarian would be hard-pressed to locate another text that not only covers Solon and Quintilian<sup>29</sup> but also has a cumulative annual supplement. The reason for this is simple: Babylonians and pocket parts make strange bedfellows, but not in the mind of Kevin Duffy.<sup>30</sup> The chapter, at the start of a pragmatic text on cross-examination, is illustrative of the way in which the judge weaves well-worn precedent into modern decision making.

*C. Mt. Sinai and Cold Chillin’ Records:*<sup>31</sup> *The Convergence of an Unlikely Twain*<sup>32</sup>

In arguably his most celebrated application of an ancient doctrine to a seemingly modern dispute, the judge looked to the Book of *Exodus* to explain his resolution of a case involving musical licensing.<sup>33</sup> The case essentially involved the question of who owned the copyright to the hit song, “Alone Again (Naturally).” In reaching his decision to grant a preliminary injunction to the plaintiffs, Judge Duffy wrote:

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<sup>26</sup> ROBERTO ARON ET AL., CROSS-EXAMINATION OF WITNESSES: THE LITIGATOR’S PUZZLE 1 (1989).

<sup>27</sup> See *id.* at 2. The authors cite to *Genesis* 3:9-13 and observe that God’s interrogation of Adam may have “establish[ed] mankind’s right and authority to ask questions, and the obligations of the questioned person to answer.” *Id.*

<sup>28</sup> See *id.* at 1.

<sup>29</sup> *Id.* at 21, 23.

<sup>30</sup> The authors reconcile the pragmatic nature of the text and its initial appeal to history: Before a trial, lawyers usually have neither the time nor the will to study scholars’ writings about the different parts of the judicial process. Although it may seem ludicrous to suggest that lawyers read about the different components of advocacy as well as the roots of legal institutions, we do so because we believe that such study will provide a fascinating world of knowledge which will facilitate the understanding of both the matters at hand and the sources of the ideas studied.

*Id.* at 2.

<sup>31</sup> Cold Chillin’ Records was a defendant in *Grand Upright Music Ltd. v. Warner Bros. Records*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

<sup>32</sup> See THOMAS HARDY, *The Convergence of the Twain*, in COLLECTED POEMS OF THOMAS HARDY 288 (1972).

<sup>33</sup> *Grand Upright*, 780 F. Supp. at 183.



"Thou shalt not steal" has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.<sup>34</sup>

As one commentator describes it, "[w]ith the mere restatement of an ancient fundamental adage . . . a recent federal district court decision has finally resolved an area of much legal debate."<sup>35</sup> The markedly distinct order stands out not only for its unique invocation of ancient dogma, but also for its steadfast refusal to accept the argument that digital sampling should be permitted because it has become commonplace in the music industry.<sup>36</sup> As noted above, Judge Duffy has described his role on the bench as an interpreter of "customs of society . . . as such customs might evolve from a sense of absolute justice."<sup>37</sup> It is a two-part test, and the defendants in the instant action did not meet its rigorous second benchmark. The judge, therefore, referred the *civil* matter to the United States Attorney for the Southern District of New York for the possible *criminal* prosecution of the defendants.<sup>38</sup>

#### D. "No Documents Satisfy Your Query"

If one were to type "United States In the Matter of Rachmones" into a standard legal search engine such as Westlaw or LexisNexis, an error

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<sup>34</sup> *Id.* For an equally fascinating instance of the judge's appeal to ancient principles, see *In re Medway Power*, 985 F.Supp. 402 (S.D.N.Y. 1997). The lawyers in that case faced a series of historical questions at oral arguments. *Id.* at 403 ("At oral arguments, I asked petitioner's counsel a series of hypotheticals concerning what weight he would give to rulings of tribunals, such as a feudal patriarch or a Bet Din (Jewish religious court).").

<sup>35</sup> Erick J. Bohlman, Comment, *Squeezing the Square Peg of Digital Sound Sampling into the Round Hole of Copyright Law: Who Will Pay the Piper?* 5 SOFTWARE L.J. 797, 798 (1992). The author qualifies his praise by noting "the opinion did not resolve all related legal issues, particularly regarding controversial practices in which artists sample single notes of a copyrighted work or electronically manipulate samples." *Id.* at 789-799; see also Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 401 n.112 (1994) (calling Judge Duffy's ruling an instance of the "ire" of the court with respect to the practice of digital sampling); Michael L. Baroni, Comment, *A Pirate's Palette: The Dilemma of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. MIAMI ENT. & SPORTS L. REV. 65, 89-90 (1993).

<sup>36</sup> *Grand Upright*, 780 F. Supp. at 183.

<sup>37</sup> Kevin Thomas Duffy, *supra* note 25.

<sup>38</sup> *Grand Upright*, 780 F. Supp. at 185 ("This callous disregard for the law and for the rights of others requires not only the preliminary injunction sought by the plaintiff but also sterner measures.").

message like the one stated above would almost certainly appear. That is because there simply is no such decision. This minor detail did not stop Judge Duffy from referring to this “case” when sentencing a criminal defendant in the summer of 1993.<sup>39</sup>

The facts of the case, much more at home amidst the pages of a work by Clancy or Le Carré than in the *Federal Supplement*,<sup>40</sup> involved a Jewish FBI translator who warned an innocent fellow Jew that he was unwittingly involving himself in a dangerous enterprise.<sup>41</sup> Elephant, the defendant-protagonist, reads as a sympathetic character, who even went so far as to consult his rabbi before deciding to carry out his religious obligations to warn the innocent man in contravention of federal law.<sup>42</sup> In an apparent response to the “extraordinary facts of the case,”<sup>43</sup> Judge Duffy made a downward departure from the applicable range in the Sentencing Guidelines and sentenced the defendant to eighteen months imprisonment and three years of supervised release, as opposed to the statutory twenty-seven-month minimum.<sup>44</sup> Notably, the judge made reference in his sentencing to “the case of United States In the Matter of Rachmones.”<sup>45</sup> Rachmones, the Yiddish word for compassion, was a subtle, insider’s reference to the reasons underlying the downward departure.<sup>46</sup>

#### *E. A Human Being on the Bench*

Like his colleagues, Judge Duffy does not appear to enjoy sentencing the individuals convicted in his courtroom.<sup>47</sup> Though he does not relish the task, he brings to it his hallmark reliance upon tested wisdom. In the instance outlined below,<sup>48</sup> the judge considered the defendant, his crime,

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<sup>39</sup> See Jonathan Groner, *Religious Conscience Versus the Law*, LEGAL TIMES, June 7, 1993, at 1.

<sup>40</sup> The trial court’s ruling was not published in the *Federal Supplement*.

<sup>41</sup> See Groner, *supra* note 39, at 1.

<sup>42</sup> Judge Newman, author of the excellent opinion on appeal, begins “This appeal is a sad tale of high moral teachings gone awry. . . . Mindful of the Biblical command, ‘Thou shalt . . . not suffer sin upon [thy neighbor],’ *Leviticus* 19:17, he sought the advice of his rabbi.” *United States v. Elephant*, 999 F.2d 674, 675 (2d Cir. 1993).

<sup>43</sup> *Id.* at 676.

<sup>44</sup> *Id.*

<sup>45</sup> Groner, *supra* note 39, at 4.

<sup>46</sup> See *id.* (“Duffy was alluding to a courthouse joke that goes back decades in the Southern District, in which a non-Jewish judge who knows his Yiddish bamboozles a patrician lawyer with the non-existent citation.”).

<sup>47</sup> See, e.g., *United States v. Jacobson*, No. 92 CR. 0724, 1993 WL 361588, at \*4 (S.D.N.Y. Sept. 15, 1993) (“I know of no trial judge who takes pleasure in sentencing.”).

<sup>48</sup> In an analogous scenario, Judge Duffy sentenced a promising young trader. See *Ex-U of I. Student Gets 3 Years for Insider Scam*, CHI. TRIB., Oct. 27, 1988, at C1 (“Stephen Wang Jr., a

and, perhaps most notably, the gifted nature of the individual standing before him.

### 1. *U.S. v. Jacobson*: An "Apologia" to the Second Circuit

Andrew Kogut, a pharmacist and seemingly successful businessman, pleaded guilty to "conspiring to distribute and distributing illegal prescription drugs,"<sup>49</sup> before Judge Duffy. In particular, Kogut sold pharmaceuticals to his unsuspecting customers that had been obtained in "an illegal prescription drug diversion scheme."<sup>50</sup> The judge sentenced him to twelve months in prison and fined him \$10,000.<sup>51</sup> Notably, the judge did not impose comparable sentences on any of Kogut's co-defendants who also pleaded guilty to selling illegally obtained pharmaceuticals.<sup>52</sup>

In an extraordinarily unusual maneuver, the Second Circuit panel to which Kogut's appeal was assigned solicited the input of Judge Duffy in order to understand the reason for this sentencing disparity.<sup>53</sup> His response is a testament to both the discretionary powers of a trial judge and the reasoned exercise thereof. The author of this succinct and sometimes scathing "apologia,"<sup>54</sup> described the difference between Kogut and his co-defendants, "It was Mr. Kogut's superior abilities, his intelligence, his experience as well as his good fortune, which made his actions all the more culpable. Quite simply, Mr. Kogut should have known better."<sup>55</sup> The Opinion, an eloquent, defensive explanation of the human ingredient in sentencing calculations, has the judge's fingerprints all over it. From a citation to Aleksandr Solzhenitsyn's *Gulag Archipelago*,<sup>56</sup> to its subtly

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former trainee with Morgan Stanley and Co., was sentenced Wednesday to three years in prison for his involvement in the second largest insider-trading case in U.S. history.").

<sup>49</sup> *Jacobson*, 1993 WL 361588, at \*1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*4 ("Although Mr. Kogut asserts that his 'criminal behavior was indistinguishable from that of six of the eight sentenced co-defendants,' I disagreed then and disagree now."); see also Daniel Wise, *Justification for Higher Sentence Offered*, N.Y. L.J., Sept. 20, 1993, at 1 ("The term was more than twice as long as that given to any of the other 10 pharmacists who also had pleaded guilty to charges of selling black-market prescription drugs.").

<sup>53</sup> *Jacobson*, WL 361588, at \*1 ("To the best of my knowledge, there is no procedure to request a trial judge's view of the issues presented in an outstanding appeal. The Court of Appeals, however, in an order dated August 25, 1993, has requested my comments in this matter.") (citation omitted).

<sup>54</sup> *Id.* at \*1 ("Therefore, I take pen in hand and submit this as my apologia.").

<sup>55</sup> *Id.* at \*3.

<sup>56</sup> *Jacobson*, WL 361588, at \*4 (writing that "Congress could have created a different system if it had so wished. For example, a defendant could be sentenced by committee, operating academically and avoiding all human contact with the defendant, toting up non-human

articulated wonderment at the circuit panel's decision to question the judge,<sup>57</sup> it is an extremely satisfying rationale of what must have appeared to the appellate court as a seemingly irreconcilable set of sentences. It also arguably contains hints of the Lucan parable from which we receive the instructive adage, "To whom much is given, much will be expected."<sup>58</sup>

### III. SETTING A HIGH BAR FOR THE LEGAL PROFESSION

From attorneys, to whom much responsibility and esteem has been given by our nation, Judge Duffy expects much. In the *Jacobson* sentencing, the judge observed that the defendant's customers "relied on his expertise and professionalism."<sup>59</sup> In addition to being an important factor in assessing Kogut's guilt, the observation may also serve to illuminate the exceptionally high standards to which this jurist holds his fellow members of the bar who practice before him. By representing their clients in federal court—and in this courtroom in particular—lawyers opt to take on a gravely important duty.

#### A. "Insults" Great and Small

The judge's admonitions directed at the practicing bar grow out of an appreciation for the cumulative impact of malpractice on the profession and society at large. In his own words:

I must point out that our civilization is being eroded not only by the criminals in our society, but also by the little insults that we wreak upon our culture. The lawyer who overbills his or her clients not only damages them, but that lawyer diminishes himself or herself by attacking the trust that Everyman should have for the law. Certainly the lazy judge attacks the fabric of our civilization in a different way than the corrupt judge—but, both do damage to it.<sup>60</sup>

Among the sources of his disappointment with the profession in its present state appear to be the deleterious effects of the hourly billing

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considerations to impose mandated terms of imprisonment" and citing Solzhenitsyn's description of such an alternative sentencing system).

<sup>57</sup> *Id.* at \*4 ("I should have hoped that after twenty years on the bench, my motives required no explanation.").

<sup>58</sup> *Luke* 12:48 (New American).

<sup>59</sup> *Jacobson*, WL 361588, at \*1. For a high-profile instance of the judge's unwavering stance on the duty of an attorney to all his or her clients regardless of the notoriety of any one of those clients, see *Simpson v. Rothwax*, No. 94 Civ. 8704, WL 681844, at \*1 (S.D.N.Y. Dec. 2, 1994) ("Mr. Neufelds' position in the *Gil* case is no different than that of any other lawyer who undertakes the defense of a criminal case and then finds a more interesting or lucrative matter presented.").

<sup>60</sup> Kevin T. Duffy, *The Need for Values*, N.Y. L.J., May 10, 1995, at 2.

system of the modern American law firm.<sup>61</sup> In a strongly worded Memorandum involving, in part, the award of attorneys' fees, the judge lashed out at the bar and this practice. In particular, he warned of the potential for "indolence, lack of imagination and down-right incompetence"<sup>62</sup> rooted in the compensation system. With typical color and literary emphasis, he considered the applicability of Dickens's *Bleak House* to the present-day case.<sup>63</sup> It should be noted, to complete the picture, that the judge is just as likely to reward excellent lawyering as he is to condemn malpractice. When he encounters officers of the court who are worth their salt, he does not begrudge them their just praise or purse. In one notable instance, the judge even awarded the attorneys more in the way of fees than were requested in their application.<sup>64</sup>

*B. "The Eastern Intercollegiate Records in Sentencing"*<sup>65</sup>

In his often-quoted line from *Walden*, Henry David Thoreau notes that "obsequious attendance" without "sincerity and truth" would not

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<sup>61</sup> On numerous occasions, Judge Duffy has set forth his articulate dissatisfaction with the practice of hourly billing, or more precisely, the apparent abuse thereof. See *In re Ames Department Stores*, No. 93 Civ. 2192, 1995 WL 338253, at \*2 (S.D.N.Y. June 7, 1995) ("Too many members of the bankruptcy bar have grown accustomed to submitting 'billable hours' without regard to anything other than their own profit. It is for all of them that I now take pen in hand."). Judge Duffy participated in a symposium discussion on Rule 11 of the Federal Rules of Civil Procedure. *Amended Rule 11 of the Federal Rules of Civil Procedure: How Go the Best Laid Plans?* 54 FORDHAM L. REV. 1 (1985). The judge's remarks constitute a well-supported and sometimes lighthearted defense of the Rule. See *id.* at 20 ("One of the reasons for Rule 11 is to get rid of stupid, senseless, baseless lawsuits brought not by pro se litigants but by lawyers. . . . Rule 11 is intended to terrorize unethical lawyers bringing baseless lawsuits. What is so wrong with that?").

<sup>62</sup> *Katz v. Pels*, No. 90 Civ. 7787, 1992 WL 163152, at \*1 (S.D.N.Y. June 23, 1992).

<sup>63</sup> *Id.* ("Dickens' comments in *Bleak House* about the lawyers involved in *Jarndyce v. Jarndyce* still may be applicable to the hourly billed case today."); see also Michael C. Silberberg, *Reductions in Award of Attorneys' Fees*, N.Y. L.J., Aug. 6, 1992, at 3 ("Judge Duffy's opinion is garnished with strident language.").

<sup>64</sup> *Commodity Futures Trading Comm'n v. Volume Investors Corp.*, No. 85 Civ. 2213, 1990 WL 170508, at \*1 (S.D.N.Y. Oct. 31, 1990) ("In this case, the work of the attorneys and the receiver was of the highest caliber . . . their professionalism, innovation, and dedication to high ethical standards should be rewarded."). Despite a willingness to praise others when it is warranted, the judge does not appear to stand on ceremony. See Richard Bernstein, *Holding Court in Bombing Trial*, N.Y. TIMES, Oct. 3, 1993, at 35 ("[The judge] walks into court every day in the same fashion, telling people to 'sit down, sit down' as soon as he is through the door and well before he has actually reached the bench, as if the rituals of respect normal in any judicial proceeding are incompatible with such an unpretentious man of the people.").

<sup>65</sup> See THE ELSINORE APPEAL, *supra* note 17 ("I have a feeling that the question of sentencing came up because a suggestion was made by someone that I hold the Eastern Intercollegiate Records in Sentencing.").

satisfy his appetite.<sup>66</sup> Like this famous naturalist, Judge Duffy counts on the honesty *and* attendance of lawyers representing individuals on his docket. Failure to meet both prongs of this test inevitably leads to severe consequences. In one telling case, Julio Cesar Rojas, a criminal defense lawyer, failed to appear in court on behalf of his client on two separate occasions.<sup>67</sup> After being warned of the consequences of a third absence, Mr. Rojas once again failed to appear.<sup>68</sup> Judge Duffy responded by issuing a bench warrant for his arrest and ultimately sentenced him to a three-month prison sentence for being in contempt of court.<sup>69</sup> Reminding the bar that presence is a *sine qua non* of effective advocacy, the judge asked Mr. Rojas, "How well do you represent clients when you don't show up?"<sup>70</sup>

### C. A Reminder to the Justice Department

The judge undoubtedly holds attorneys to exceptionally high standards.<sup>71</sup> Lawyers are, of course, not the only individuals entrusted with the administration of justice in our nation. The judge therefore reserves neither his ink nor his "ire"<sup>72</sup> for the practicing bar. During the highly publicized trial of the six defendants charged in connection with the armed robbery of a Brinks truck and the murder of three individuals,<sup>73</sup> the judge issued an Opinion and Order that required an immediate end to conditions of pre-trial confinement that he determined were "punitive."<sup>74</sup>

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<sup>66</sup> HENRY DAVID THOREAU, *Walden*, in WRITINGS OF HENRY DAVID THOREAU (2002). Thoreau famously describes his dissatisfaction:

I sat at a table where were rich food and wine in abundance, and obsequious attendance, but sincerity and truth were not; and I went away hungry from the inhospitable board. The hospitality was as cold as the ices. I thought that there was no need of ice to freeze them.

*Id.* at 364.

<sup>67</sup> See Deborah Pines, *Duffy Jails Criminal Defense Lawyer for Contempt*, N.Y. L.J., Oct. 26, 1994, at 1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> The judge has described special standards applicable to government lawyers. See *Silverman v. Ehrlich Beer Corp.*, 687 F. Supp. 67, 69–70 (S.D.N.Y. 1987) ("First, an attorney in the employ of the government is not on the same footing as a private attorney. . . . the attorney representing the government must be held to a higher standard than that of the ordinary lawyer.").

<sup>72</sup> See Harmon, *supra* note 35, at 401 n.112.

<sup>73</sup> Boudin v. Thomas, 533 F. Supp. 786 (S.D.N.Y. 1982).

<sup>74</sup> See *id.* at 791 ("The punitive nature of Ms. Boudin's confinement is further reinforced by her singular treatment. . . . To date, she has never been convicted of any crimes."). The conditions of Boudin's *pre-trial* confinement included: not being allowed to have contact visits with her infant child and "restricted confinement in her cell for the majority of the day, inability to go to the law library, or participate in the available educational programs or utilize the recreation area." *Id.*

The Opinion is a very specific, carefully reasoned disapproval of needlessly punishing a young mother in the custody of the correctional system. It begins with a lengthy, eloquent reminder of certain “fundamental principles” pertaining to the “[l]iberty [of] all Americans.”<sup>75</sup> In sum, the writing is a quintessential admonition of the judge—concise, filled with telling examples, and sharply worded.

#### IV. THE LONG ARM OF THE SOUTHERN DISTRICT

It is not unusual for decisions rendered by the judges of the Southern District of New York to have far-reaching and often international implications. Major corporations, high profile criminal defendants, and foreign sovereigns are no stranger to its brimming docket of cases. Throughout much of his tenure, Judge Duffy has presided over such disputes on the world’s stage. To these controversies, all too often pregnant with the potential for chaotic drama, the judge has lent an authoritative but neutral pen and presence.

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<sup>75</sup> *Id.* at 787. The introductory paragraph is the heart of the Opinion and Order. Devoid of a single citation, it states:

Liberty for all Americans, no matter to what philosophy they may adhere, is based upon reasonable restraints on individual action imposed for the common good. These restraints are embraced by Americans as a guarantee of their freedom and are found in our laws, rules and regulations. They are to be enforced in a totally nondiscriminatory manner. Adherence to these principles both by individuals and by government officials cannot be avoided because of mass hysteria over the alleged revolutionary ideas of an individual nor from the craven fear of criticism from the mass media. It is embarrassing for this court to have to remind the United States Department of Justice and its representatives of these fundamental principles; yet it appears necessary to do so in this matter.

*Id.* For another example of Judge Duffy’s dissatisfaction with the pre-trial conditions of confinement of a defendant in a highly publicized criminal case, see *Warden Scolded on N.Y. Bomb Suspect’s Treatment*, WASH. POST, June 1, 1995, at A3. The article discusses and describes Judge Duffy’s admonition to the warden of the Metropolitan Correctional Center for the alleged treatment of Ramzi Yousef, who at the time was accused of planning the 1993 bombing of the World Trade Center. The article observes, “[Judge Duffy] scolded [the warden] of the Metropolitan Correctional Center for allowing guards to take everything from toothpaste to the Koran away from [the] defendant . . . ‘This case . . . is being watched by the entire civilized and perhaps uncivilized world,’ Duffy said.” *Id.*; see also Peg Tyre, *Judge Scolds Warden: Terror Suspect’s Rights at Issue*, NEWSDAY, June 1, 1995, at A7 (“[Judge Duffy] ordered the warden of the [prison] to take the witness stand and sharply criticized him for using draconian security measures . . . [the judge] ordered [the warden] to file a formal affidavit explaining why he had violated Yousef’s civil rights.”). The article goes on to quote the judge as saying, “Whether you realize it or not, you are responsible . . . for feeding those who would be against this country in foreign lands, with ammunition as to this country being totally and completely insensitive.” *Id.* (alteration in original).

*A. Iranian Assets and an Administration's "Wrath"*<sup>76</sup>

On November 4, 1979, Americans working in the United States Embassy in Tehran, Iran were taken hostage.<sup>77</sup> After being held for four hundred and forty-four days, fifty-two Americans were finally released.<sup>78</sup> The interim and aftermath of this historic standoff wreaked havoc on America's national confidence.<sup>79</sup> American courtrooms simultaneously hosted a less heart-rending, but equally complex drama that became known as the "Iranian Asset Litigations."<sup>80</sup> In the Southern District alone, ninety-six distinct suits were brought, each of which were essentially based upon "the government of Iran, its agencies and instrumentalities, hav[ing] expressed an unequivocal intention of avoiding their just debts."<sup>81</sup> As cases poured into court, the aggregate sums involved quickly escalated to "many billions of dollars."<sup>82</sup> With the progression of the litigation and the escalation of national tensions, the pages of the federal reporters began to brim with Executive Orders, "severed . . . diplomatic ties,"<sup>83</sup> and the murky contours of sovereign immunity.<sup>84</sup>

When federal trial dockets wake up in the middle of the night in a cold sweat, they have in all likelihood just dreamt of the consolidation of ninety-six actions such as these. In early 1980, this nightmarish ball of legal and political twine rolled into Judge Duffy's courtroom.<sup>85</sup> Several

<sup>76</sup> See Amy L. Kearsse, *Sketches of 3 Judges Who Prohibited Primary*, N.Y. TIMES, Sept. 10, 1981, at B7. ("[During the crisis] Judge Duffy ruled on a series of financial actions by the Administration . . . He incurred the wrath of the Carter Administration by issuing what it considered 'ambiguous' rulings.").

<sup>77</sup> Jimmy Carter Library & Museum, *The Hostage Crisis in Iran*, at <http://jimmycarterlibrary.org/documents/hostages.phtml> (last visited on Oct. 18, 2004).

<sup>78</sup> See Steven R. Weisman, *Reagan Takes Oath as 40th President*, N.Y. TIMES, Jan. 21, 1981, at A1.

<sup>79</sup> Charles G. LaBella, *The Iranian Litigation: Implications for American Business Interests*, 3 CARDOZO L. REV. 195, 196 n.4 (1982) ("What followed in Iran were 13 months of captivity for the American citizens. In the United States, the American people kept a constant vigil for their countrymen . . .").

<sup>80</sup> See Kevin Thomas Duffy, *Foreign Sovereign Immunity in the Second Circuit After Texas Trading and Verlinden*, 48 BROOK. L. REV. 979, 980 n.10 (1982).

<sup>81</sup> *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 122 n.1. (S.D.N.Y. 1980).

<sup>82</sup> *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 74 (S.D.N.Y. 1981).

<sup>83</sup> *Iran Power*, 502 F. Supp. at 122.

<sup>84</sup> For a commentary on the topic of sovereign immunity by the judge, see generally Duffy, *supra* note 80.

<sup>85</sup> See LaBella, *supra* note 79, *passim*, for an excellent discussion of the clash between the "enormous constitutional powers of the President as the chief architect of foreign affairs" and "the Foreign Sovereign Immunities Act of 1976 . . . through which Congress directed that the administration of commercial claims against foreign sovereigns, including the question of sovereign immunity, shall rest with the federal judiciary."



preliminary tasks initially fell to the judge, including resolution of disputes over service of process,<sup>86</sup> foreign sovereign immunity from the pre-judgment attachment of assets,<sup>87</sup> and the effect of President Carter's actions on the status of Iran in an American courtroom.<sup>88</sup> Ultimately, Judge Duffy found that the President exceeded his powers when he issued executive orders which "*inter alia* nullified the orders of attachment and transferred a portion of the attached Iranian assets out of this country for eventual return to Iran."<sup>89</sup> In so ruling, the judge found himself in the distinct minority of federal courts that had confronted the thorny issue.<sup>90</sup> Ultimately, Judge Duffy's views differed from those of the United States Supreme Court, which was "not prepared to say that the President lacks the power to settle such claims."<sup>91</sup> Despite this difference of opinion, Judge Duffy's judicial writings from this era remain a valid, fruitful assessment of the crisis's impact on the separation of powers in our nation.<sup>92</sup>

If the reader has ever wondered what Article Three of our Constitution looks and feels like, she may simply run her eyes and fingers across the pages of the Federal Supplement on which Judge Duffy treated the thorny cases born of this crisis. The judge brings his trademark pedagogy, clarity, and utter independence to an unsettling morass of competing interests, treaties, and power struggles. Portions of the Opinions and Orders issued during the controversy arguably even fit within what Judge Posner has referred to in the context of judicial writings as "literature," or "the body of texts that survive the context in which they

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<sup>86</sup> *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 77-78 (S.D.N.Y. 1980).

<sup>87</sup> *See Iran Power*, 502 F. Supp. at 126-27.

<sup>88</sup> *Id.* at 126 ("Additionally, there is the question of what effect, if any, do the President's actions in dealing with the Iranian situation have upon that foreign state's entitlement to immunity from pre-judgment attachment."); *see also* LaBella, *supra* note 79, at 246 ("During the fury of the crisis, the courts were asked to apply vague, and at times conflicting, statutory provisions to an ever-changing and politically volatile situation.").

<sup>89</sup> *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 102 (S.D.N.Y. 1981).

<sup>90</sup> *See, e.g., Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981).

<sup>91</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *see also* LaBella, *supra* note 79, at 246 ("The Court, it seemed, was compelled to avoid the international diplomatic fallout likely to ensue if the Agreement was held unconstitutional.").

<sup>92</sup> The lower court opinions in the Iranian Assets Litigation remain didactic to this day. *See* LaBella, *supra* note 79, at 198 ("Now that the exigencies of the Iranian situation are over, one is tempted to say that the affair involved a situation not likely to be repeated. . . . The realities of the present international situation . . . belie any such complacency."). LaBella also noted that "Judge Duffy's conclusion appears to be supported by the legislative history of the [Foreign Sovereign Immunities Act]." *Id.* at 241 n.231.

were created because they speak to us today.”<sup>93</sup> To select one among several such portions:

This is a court of law before which all parties stand equal. I preside over these actions not as a patriot, but rather as a judicial officer, sworn to faithfully and impartially discharge all the duties incumbent upon me as a United States District Judge. However, my oath of office does not require that I decide legal issues in a vacuum nor in an ivory tower removed from the clamor of reality. Such is the task of legal scholars. Instead, I must resolve issues in the context of the real world. Mindful of these basic principles, I turn to consider the legal questions at hand.<sup>94</sup>

In passages such as these, the reader can detect not only a commitment to neutrality but also a genuine judicial self-awareness. That is, the judge continually reminds<sup>95</sup> the reader of the surroundings—a courtroom—and goes to great lengths to find a middle ground between the flurry of media activity surrounding the crisis in Iran and the “ivory tower.”

*B. A Docket with an Uncanny Magnetism for Thorny Issues and Dangerous Defendants*

New York City is reputed to be the city that does not sleep. Its courts and those who work in them can, at times, commiserate with their surroundings in this respect. It is not insomnia that keeps the judges and law clerks from their rest, but a seemingly endless parade of litigants with time-sensitive disputes that demand the immediate attention of the court.

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<sup>93</sup> POSNER, *supra* note 8, at 143 (citing generally JOHN M. ELLIS, *THE THEORY OF LITERARY CRITICISM: A LOGICAL ANALYSIS* (1974)).

<sup>94</sup> *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 123 (S.D.N.Y. 1980).

<sup>95</sup> Such reminders are vivid and sharply worded. *See New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 75 (S.D.N.Y. 1980) (“This court must . . . reject entirely the blatant jingoist appeals to emotionalism offensively put forth by at least one attorney involved in these proceedings. It is with a sense of deep sadness that I must remind even one person that this is a court of law and justice.”). There is no shortage of equally poignant descriptions of the difficulty of deciding these matters amidst a heated political climate. *See Marschalk Co. v. Iran Nat'l Airlines*, 518 F. Supp. 69, 102 (S.D.N.Y. 1981).

Before closing, I wish to add a few general observations. Perhaps, it would have been more felicitous for this court merely to adopt the reasoning proffered by the government. That could have eventually led to a quick and facially clean resolution of the knotty problem presented by the instant situation. The Constitution, however, will not allow it. My responsibility to future generations and the continuation of constitutional government in this country will not allow it.

The Presidents are not to be condemned for the actions they took, for among the prime benefits obtained was the release of those held as hostages. Now that the hostages have been released and the crisis no longer burns hot, a calm and dispassionate review is possible.

*Id.*

On February 26, 1993, Judge Duffy issued a Memorandum and Order that directed New York City "not to interfere with the conduct of the [Ancient Order of Hibernians's] 1993 New York St. Patrick's Day Parade by requiring the inclusion of any contingent which has not been approved by the [Hibernians] and the Parade Committee."<sup>96</sup> That very day, terror came to lower Manhattan as the World Trade Center was attacked for the first time.<sup>97</sup> The criminal trials associated with the bombing and other terrorist conspiracies<sup>98</sup> would subsequently make the short, cross-town trip to Judge Duffy's courtroom.

The trials would be historic events in the life of 40 Foley Square. The pool of potential jurors is a telling symbol of the complexities that pervaded even the most preliminary stages of the process. Due to the massive media coverage surrounding the bombing and its aftermath, impaneling an impartial and untainted band of New Yorkers was exceptionally complex. Judge Duffy sent out 5,000 summonses, which was "perhaps the largest number of jury summonses ever sent out in this district."<sup>99</sup> The scope of the damage and its unprecedented nature in America also foreshadowed that this would be a markedly distinct trial. Contemporary commentators referred to the bombing as "the worst terrorist assault ever to take place on American soil," and noted that not only were six individuals killed but more than 1,000 individuals sustained injuries.<sup>100</sup> Also, there was reportedly 500 million dollars in damage to the building and surrounding areas.<sup>101</sup>

Judge Duffy's rulings throughout the two trials garnered extensive media attention and critique.<sup>102</sup> One of the most significant and concise assessments came, only recently, from the Second Circuit. In a per curiam

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<sup>96</sup> N.Y. County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 370 (S.D.N.Y. 1993).

<sup>97</sup> Douglas Jehl, *A Tool of Foreign Terror, Little Known in the U.S.*, N.Y. TIMES, Feb. 27, 1993, at L24 ("[I]f the explosion that rocked the World Trade Center today was indeed caused by a car bombing, as the F.B.I. believes, it would be the largest such attack in American history, experts said.").

<sup>98</sup> Judge Duffy also presided over a trial related to a plan to blow up twelve American commercial airplanes. See *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003) ("The plot to bomb the United States-flag airliners was uncovered in January 1995, only two weeks before the conspirators intended to carry it out.").

<sup>99</sup> *Bomb Judge Casts Wide Juror Net*, THE COMMERCIAL APPEAL, Aug. 7, 1993, at A2 (quoting Judge Duffy); see also John J. Goldman, *Judge in Trade Center Case Weighs Trial Move to Ohio*, L.A. TIMES, Aug. 7, 1993, at A2.

<sup>100</sup> Richard Bernstein, *N.Y. Bombers Given 240 Years Each*, DENVER POST, May 25, 1994, at A1.

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., *District Judge Duffy Takes Tough Stance with Attorneys*, N.Y. L.J., Sept. 14, 1993, at 1.

opinion, the Second Circuit observed, “Judge Duffy carefully, impartially, and commendably conducted the two lengthy and extraordinarily complex trials from which these appeals were taken. The fairness of the proceedings over which he presided is beyond doubt.”<sup>103</sup> Since the Second Circuit has captured the excellence with which the judge managed these extraordinarily challenging proceedings, this Essay will only briefly point out three aspects of the trial that seem especially relevant to a portrait of the judge.

### 1. Grounds for Recusal

Being a trial judge can be an extraordinarily dangerous and thankless occupation. Kevin Duffy is walking, heavily guarded proof of the many unsung sacrifices that accompany a black robe in one’s wardrobe. As a result of credible threats, United States Marshals guard Judge Duffy twenty-four hours a day. This protection necessarily includes rides to and from the courthouse every day for the rest of his tenure on the bench.<sup>104</sup> The Internal Revenue Service (“IRS”), in a maneuver that defies belief, determined that the car ride to the courthouse constitutes taxable income.<sup>105</sup> Judge Duffy observed the “silliness” of the decision and lightheartedly discussed the constitutional implications of the tax.<sup>106</sup> In particular, he reportedly gave the IRS “an A plus in tax law” but noted their “difficulty with the United States Constitution.”<sup>107</sup> That is, a federal judge’s salary cannot be reduced while in office.<sup>108</sup>

On a much more somber, but equally incredible note, two defendants in the criminal prosecutions following the 1993 World Trade Center bombing moved to have Judge Duffy recuse himself.<sup>109</sup> The defendants based their motion on the fact that information had come to light regarding *their own* alleged plan to “kidnap[] and possibly hurt[] an unnamed federal judge”<sup>110</sup> and a prosecutor.<sup>111</sup> The defendants and their arguments, a caricature of “unclean hands,” did not prevail.<sup>112</sup> Judge Duffy’s denial of

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<sup>103</sup> *Yousef*, 327 F.3d at 173.

<sup>104</sup> *Taxed Judge Scolds I.R.S.*, N.Y. TIMES, Dec. 17, 1993, at B3.

<sup>105</sup> *See id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* For another instance of the judge’s unwillingness to mince words, see *United States v. Tramunti*, 377 F. Supp. 1 (S.D.N.Y. 1974). The opinion begins, “John Spurdis is a liar.” *Id.*

<sup>108</sup> U.S. CONST. art. III, § 1.

<sup>109</sup> *United States v. Yousef*, No. 93 CR. 180, 1999 WL 714103, at \*1 (S.D.N.Y. Sept. 13, 1999).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at \*2–3 (“Now, Yousef and Ismoil seek to benefit from these shenanigans of their own and upset the convictions each so richly merited.”).

their motion ought to be required reading for all men and women nominated to the federal bench and anyone who romanticizes the life of a trial judge. One among several jaw-dropping passages is the following:

It is of particular note that Yousef's threats made absolutely no change in my life. I have received death threats for the last quarter century. Such are well known to trial judges. Like most of my colleagues, such threats do not inhibit the fulfillment of our oath of office to "faithfully and impartially discharge" the duties of our office.<sup>113</sup>

The Order stands out as understated but articulate evidence of an unwavering commitment to render justice in the cases that reach one's docket. Just as death threats are set at naught, normalcy and due process remain at a premium. Citations pervade the Order.<sup>114</sup> It is a unique blend of conformity to precedent and absolute defiance of individuals bent on circumventing the legal process. Judge Duffy sets out in great detail the reasons underlying his denial of the motion and then moves on to rule on a discovery motion. Despite what most individuals might view as a life-changing event, it is justice as usual at 40 Foley Square.

## 2. Sentencing

As described above, sentencing can be an extraordinarily didactic, biographical window into a trial judge. It is, as Judge Duffy notes, an area that defies automation and necessarily cries out for human involvement.<sup>115</sup> The World Trade Center case was no exception. Sentencing procedures did not permit the imposition of a life term for any of the defendants.<sup>116</sup> Instead, the guidelines called for "any term of years."<sup>117</sup> Judge Duffy relied upon actuarial tables, computed the life expectancies of all of the victims from the bombing, and finally came to 180 years.<sup>118</sup> Two other counts of the indictment required thirty years each. This resulted in a final sentence of 240 years.<sup>119</sup> In addition, the judge imposed a fine of 250,000 dollars and an order requiring any profits derived from a recount of the

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<sup>113</sup> *Id.* at \*3. Upon taking senior status six years ago, Judge Duffy wrote a letter to President Clinton in which he described his continued commitment to providing "substantial judicial service." *Today's News Update*, N.Y. L.J., Sept. 18, 1997, at 1.

<sup>114</sup> See *Yousef*, 1999 WL 714103, at \*2-3 (citing at least six cases that establish the high standards necessary for a judge's recusal).

<sup>115</sup> See *supra* notes 52-58 and accompanying text.

<sup>116</sup> The niceties of the complex sentencing issues have been described at length. See, e.g., *United States v. Salameh*, 261 F.3d 271, 275 (2d Cir. 2001); Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. TIMES, May 25, 1994, at A1.

<sup>117</sup> Bernstein, *supra* note 116, at A1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

bombing to go directly towards restitution for the families of the victims.<sup>120</sup> As one commentator noted, the sentence was “unusual but appropriate . . . a year behind bars for every year of life taken from their victims.”<sup>121</sup> The sentence speaks for itself and has garnered ample commentary.<sup>122</sup> Needless to say, the judge was called upon to inject a human, creative element into the sentencing process, and he answered the call.

### 3. A Penny for your Thoughts, Billions for a Leak

High profile criminal defendants almost inevitably mean that the road to an impartial trial will be filled with obstacles. Perhaps chief among such impediments is incredibly pervasive press coverage of the proceedings. To put it mildly, if lambs played nearly as large a role in document production as they did just two centuries ago, this trial would likely have put the species on our nation’s endangered list. Kevin Duffy, however, does not have a publicist. The extensive ink in periodicals only spelled an enormous jury pool and difficult choices regarding an appropriate venue.<sup>123</sup> Mustering substantial creativity, the judge developed an unprecedented gag order worthy of the massive media interest in the case, “\$200 for the first blab and [a] squar[ing of] subsequent fines: \$40,000, \$1.6 billion, etc.”<sup>124</sup> One commentator noted that the Order would either “ensure a fair trial” or “retire the national debt.”<sup>125</sup> One scholar, Professor Abraham Abramovsky of Fordham Law School, praised the judge for “stem[ming] . . . an inevitable tide of prejudicial information . . . about terrorism.”<sup>126</sup> The most notable and celebrated imprimatur came from on high—retired Chief Justice Warren Burger of the United States Supreme Court. He noted that “[N]o prosecutor . . . should ever, except in the most remarkable situation, ever make out-of-court statements about a pending case, especially a highly controversial case . . . Judge Duffy should be commended and other judges should take note.”<sup>127</sup> The seemingly extreme gag order, when viewed in

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<sup>120</sup> *Id.*

<sup>121</sup> *Fit Penalty for Terror, and Murder*, N.Y. TIMES, May 26, 1994, at A22.

<sup>122</sup> *See, e.g., id.*

<sup>123</sup> *See supra* note 99 and accompanying text.

<sup>124</sup> *Judge Imposes Costly Gag Order*, CHI. TRIB., Apr. 4, 1993, at 12. The Second Circuit, in a brief Per Curiam Opinion, disagreed with Judge Duffy. The Second Circuit panel vacated the order. *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993).

<sup>125</sup> *Judge Imposes Costly Gag Order*, *supra* note 124, at 12.

<sup>126</sup> Larry Olmstead, *In Trade Center Bombing Case, Two Rights Collide*, N.Y. TIMES, Apr. 29, 1993, at B3.

<sup>127</sup> Chief Justice Warren Burger, Address at the Robert Taylor Memorial Lecture at the University of Tennessee (Apr. 13, 1993).

light of the widespread media coverage and a national sentiment pregnant with the possibility of retributive prejudice, was in fact a measured response in pursuit of conducting the trial in its entirety within the four walls of the courtroom.<sup>128</sup>

### CONCLUSION

The advent of terrorism in America and an unsettling dearth of integrity among some of our nation's top executives are two of the many signs that we are at the start of a new page in our history. If this most recent decade is at all indicative of days to come, we find ourselves at the start of a taxing and heart-rending rite of passage in the life of our nation. An independent, self-sacrificing, and erudite judiciary has the potential to be an immeasurably significant curb on the excesses that currently confound America. Dating well into the last century, Commanders-in-chief have selected the men and women that comprise our federal judiciary today. Presidents face the Herculean task of selecting jurists, not for a term of years, but essentially for the remainder of the judges' lives. The President is called upon to nominate bright men and women with a durable commitment to neutrality and justice.

If sheer brilliance were the driving factor behind judicial nominations, we could do away with the Senate Judiciary Committee. The hallowed space in which they confer could be replaced with a high school gymnasium, a stack of Scantrons, and a standardized legal examination. Fortunately, the President, the Committee, and the entire Senate instead probe potential candidates regarding the application of their often-immense intellects to the legal process. Ideally, those charged with populating our judiciary seek out the rare combination of fidelity to one's oath of office and the skills necessary to discharge the duties thereof.

In his selection of Kevin Thomas Duffy, President Nixon found just such a combination and demonstrated true prescience. In deciding to make this Regional Administrator of the SEC one of the youngest federal judges in the nation, the President must have seen in this thirty-nine year-old man the potential for enduring dedication to justice and vast reservoirs of energy. Like so many of his colleagues, Kevin Thomas Duffy has demonstrated that he is a repository of significant wisdom. Fortunately for litigants appearing before him, this judge, to whom so much has been

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<sup>128</sup> Judge Duffy's commitment to avoiding the deleterious effects of media coverage in the courtroom is well documented. *See, e.g.*, *United States v. Meyerson*, 677 F. Supp. 1309, 1313 (S.D.N.Y. 1988) ("The United States Attorney's motion for my disqualification apparently arises out of my long-established and oft-stated belief that cases should be tried in the courtroom and not in the newspapers.").

given, has exceeded expectations and tirelessly applied that wisdom for more than thirty years.

Saint Francis of Assisi is celebrated for his paradoxical admonition to his thirteenth-century colleagues, "Preach always, when necessary use words." This saint, it seems, understood that track records and reputations, like images, are worth a thousand persuasive words. More recently, Chief Justice William H. Rehnquist has spoken out in favor of repealing the legislation that allows for monitoring federal judges with respect to the sentences they impose. It is an unfortunate state of affairs that the Chief Justice's words are even necessary to point out that "naughty" and "nice" lists are the exclusive prerogative of Santa Claus and not the Executive branch of our government. Keeping tabs on judges in this way seems not only untoward, but also unsound. It runs counter to their individuality and independence upon which we rely so heavily. In assessing the wisdom of constraints such as these lists, a close reading of the Almanac of the Federal Judiciary should suffice. *See, e.g.,* The Honorable Kevin Thomas Duffy.



## NOTES