NATO military community, a position he held until his retirement.

Those who know Gus recognize that he is not a person who can sit idle for long. Following his retirement he went to work for the Grumman Corp., where he advanced to the position of senior vice president for Washington operations. He left Grumman in 1988 to serve as executive vice president and then president of the University of New Hampshire, a position he held until 1992. In October 1992, following 4 years of service as a member of the board of directors of the Retired Officers Association [TROA], he was unanimously selected as TROA's chairman of the board, a position from which he is now retiring.

Mr. President, through Gus' stewardship, the Retired Officers Association continues to play a vital role as a staunch advocate of legislative initiatives to maintain readiness and improve the quality of life for all members of the military community—active, reserve, and retired, plus their families and survivors. I will not describe all of his many accomplishments at TROA, but I would like to focus briefly on a few that illustrate the breadth of his concern for our Nation's military people. As chairman, he led the fight for continued access to the military health care system for retirees and directed TROA's efforts to maintain the viability of the commissary system. Taken together, these comprise two of the most important institutional benefits provided as inducements for a career in service.

Under his direction, TROA spearheaded a bipartisan initiative to provide military retirees the same cost-of-living adjustment [COLA] as Federal civilian retirees will receive. His zeal in fighting to compel Congress and the administration to honor past commitments to our service personnel and their families is legendary.

On a national scope, Gus has been a vocal and effective champion of a reasoned, judicious approach to the downsizing of our Armed Forces. As Gus has so appropriately emphasized, if implemented haphazardly, the drawdown will undermine our national security and produce a "hollow" military force. No one in this Nation can speak with greater knowledge and experience on this issue than Gus Kinnear, and his observations are right on the mark.

Mr. President, my closing observation, which I am sure is shared by all my colleagues, is that Admiral Kinnear has been an outstanding leader, in the military, TROA, and on behalf of the entire retired community. His distinguished military service and his unwavering commitment to the cause of freedom throughout the world are an inspiration for those who have followed and will continue to follow in his footsteps. Our wishes go with him for a long life of health, happiness, and continued success. As a former sailor myself, and in keeping with the highest traditions of the Navy, I join with his many friends in wishing Gus "fair winds and a following sea."

THE RECORD OF JUDGE SAROKIN

Mr. HATCH. Mr. President, President Clinton has nominated Judge H. Lee Sarokin to a seat on the U.S. Court of Appeals for the Third Circuit. I have decided that I must vote against this nomination and look forward to explaining my reasons during floor debate. For now, I ask unanimous consent that a memorandum analyzing the record of Judge Sarokin be included in the RECORD.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

JUDGE SAROKIN'S RECORD

H. Lee Sarokin, President Clinton's nominee to the U.S. Court of Appeals for the Third Circuit, was appointed by Jimmy Carter to the federal district court in New Jersey in 1979. Since that time, Judge Sarokin has earned a reputation as a stridently liberal judicial activist who pursues his own ideological agenda in lieu of applying the law. On a broad range of telltale issues, such as crime, quotas and reverse discrimination, pornography, and minimal standards of decency and behavior in public life, Judge Sarokin has sought to impose his own moral vision. In so doing, he has ignored, defied, and even stampeded binding precedent and higher authority, and has flaunted his own biases and sentiments on the sleeve of his judicial robe.

These are not just the views of outside critics. The Third Circuit itself has, for example, lambasted Judge Sarokin for "judicial usurpation of power," for ignoring "fundamental concepts of due process," for destroying the appearance of judicial impartiality, and for "superimpos[ing his] own view of what the law should be in the face of the Supreme Court's contrary precedent." The New Jersey Law Journal (9/14/92) has reported that Judge Sarokin "may be the most reversed federal judge in New Jersey when it comes to major cases." One can expect that these problems will surely be aggravated if Judge Sarokin enjoys the greater freedom of a circuit judge.

Organizations that have announced their opposition to Judge Sarokin's nomination include the Fraternal Order of Police, the Law Enforcement Alliance of America, the New Jersey State Police Survivors of the Triangle, the U.S. Business and Industrial Council, Organized Victims of Violent Crime, the League of American Families, Citizens for Law and Order, Citizens Against Violent Crime, and Voices for Victims, Inc.

This memorandum provides a detailed look at certain of Judge Sarokin's opinions that are all too illustrative of his approach to judging, as well as an overview of his manifestations of bias and ideology in cases and speeches.

I

(*Kreimer* v. *Bureau of Police for the Town of Morristown*, 765 F. Supp. 181 (D.N.J. 1991), rev'd, 958 F.2d 1242 (3rd Cir. 1992))

Facts

Kreimer, a homeless man who lived in various outdoor public spaces in Morristown, New Jersey,[1] frequented the public library in Morristown. According to library staff, Kreimer often exhibited offensive and disruptive behavior, including staring at and following library patrons and talking loudly to himself and others. Also, according to library staff, Kreimer's odor was so offensive that it prevented the library patrons from using certain areas of the library and prohibited library employees from performing their jobs. A logbook instituted to catalog disciplinary problems faced by the library described incidents such as "Kreimer's odor prevents staff member from completing coping task," "Kreimer spent 90 minutes—twice—staring at reference librarians, "Kreimer was belligerent and hostile towards [the library director], and "Patron [was] followed by Kreimer after leaving Library."

In 1989, the library enacted a written policy prohibiting certain behavior in the library and authorizing the library director to expel persons who violated them. The policy included the following rules:

"1. Patrons shall be engaged in activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials shall be required to leave the building. * * *

"5. Patrons shall respect the rights of other patrons and shall not harass or annoy others through noisy or boisterous activities, by staring at another person with the intent to annoy that person, by following another person about the building with the intent to annoy that person, * * * by singing or talking to others or in monologues, or by behaving in a manner which reasonably can be expected to disturb other persons.

"6. Patrons shall not interfere with the use of the Library by other patrons, or interfere with Library employees' performance of their duties. * * *

"9. * * * Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.

"Any patron not abiding by these or other rules and regulations of the library shall be asked to leave the library premises."

After he was expelled from the library at least five times for violating these rules, Kreimer sued the library and others in federal district court, alleging that the library's policy violated the First Amendment and the Due Process and Equal Protection Clauses of the 14th Amendment.

Judge Sarokin's rulings

Judge Sarokin, in granting summary judgment in favor of Kreimer, ruled that the library policy was facially unconstitutional. Judge Sarokin's opinion included the following rulings:

1. The Library Policy Is Not A Reasonable Time, Place, And Manner Regulation. "[A] public library is not only a designated public forum, but also a 'quintessential,' 'traditional' public forum." Government restrictions on access to a public library must therefore be narrowly tailored to serve a significant state interest and must leave open alternative channels of communications. The library policy is not specifically designed to address disruptive activity, and is therefore, not a reasonable time, place, and manner regulation that is narrowly tailored to serve a significant government interest. Denying a patron all access to library materials leaves no alternative channels open to those without private means of access to the quantity and diversity of written communications contained in a library.

Footnotes at end of article.

2. The Library Policy Is Unconstitutionally Overbroad. Rules 1 and 5 are substantially overbroad. In *Brown* v. *Louisiana*, 383 U.S. 131 (1966), the Supreme Court reversed the convictions under a Louisiana breach-of-peace statute of five black men who peaceably protested in a library. The protesters in *Brown* would be prevented from engaging in the same constitutionally protected protest if they staged it in the Morristown library. This demonstrates that rule 1 is substantially and unconstitutionally overbroad. Rule 5 is unconstitutionally overbroad because it excludes patrons for silently staring at another with the intent to annoy. This is no different from the statutes in *Brown* and *Cox* v. *Louisiana*, 379 U.S. 536 (1965), which excluded people from public spaces for activity that annoyed people but that did not actually cause or threaten a disruption.

3. The Library Policy Is Unconstitutionally Vague. Although the library policy is not a penal statute, failure to comply with the policy results in criminal trespass. Accordingly, a criminal sanction is involved, and the policy should be subject to a strict vagueness challenge. Rule 1 is hopelessly vague. Rules 5 and 9 are unconstitutionally vague as well, since the "annoyance" standard is no standard at all, and the "offensiveness" standard is perfectly vague and subject to arbitrary and discriminatory enforcement.

4. The Library Policy Violates Substantive Due Process. Under the Due Process Clause, the government may not penalize, or afford different treatment to, a disfavored, disliked individual or class of people. Rule 9's prohibition on offensive hygiene makes personal attributes such as appearance, smell, and cleanliness determinative factors and is not limited to actual, material disruptions. The policy was designed with the explicit intention of restricting Kreimer's (and other homeless persons') access to the library. This reader-based restriction "is analogous to prohibited speaker-based restrictions. In this case, the restriction is not because of the reader's views, but because of plaintiff's other personal attributes which the library staff finds 'annoying.'"

5. The Library Policy Violates The Equal Protection Clause. The library's effort to exclude homeless persons who may potentially use the library as temporary shelter from the elements violates the Equal Protection Clause. Just as a poll tax for voting draws an improper line based on wealth, so does the library's hygiene rule, since it has a disparate impact on those poor patrons who do not have regular access to shower and laundry facilities.

6. The Library Policy Violates Article I of the New Jersey Constitution. The policy's restrictions are not reasonable.

The Third Circuit's reversal

The Third Circuit, in a lengthy and thorough opinion, unanimously reversed, making the following rulings:

1. A public library is sufficiently dissimilar to a public park, sidewalk, or street that it cannot reasonably be deemed to constitute a traditional public forum. Nor is it a full-scale designated public forum. Instead, under Supreme Court precedent, it is a limited public forum. Restrictions that do not limit those First Amendment activities that the government has specifically permitted in a limited public forum need only be reasonable and not viewpoint-based. The library policy is reasonable.

2. The library policy is not substantially overbroad. The district court's heavy reliance on *Brown* was improper; in fact, the Court in *Brown* specifically relied on the fact that the protesters did not violate any library regulations.

3. The library policy is not unconstitutionally vague. The district court's use of the vagueness standard applicable to criminal statutes was misplaced, since the library policy is civil in nature and a criminal trespass requires a voluntary act distinct from violation of the rules. The policy does not simply proscribe "annoying" behavior; it lists specific behavior deemed to be annoying. The determination whether a person's hygiene is so offensive as to constitute a nuisance involves an objective reasonableness test.

4 and 5. The library policy does not violate due process or equal protection. The homeless do not constitute a suspect class. The policy is not arbitrary, and the library did not act with a discriminatory intent.

6. The library policy does not violate the New Jersey constitution. Under New Jersey Supreme Court precedent, the policy is clearly reasonable.

Analysis

Judge Sarokin's opinion in *Kreimer* is liberal judicial activism at its worst. Each of Judge Sarokin's rulings noted above is not just wrong, but patently wrong. Judge Sarokin does not simply misread precedent; he defies it and distorts it in furtherance of an ideology that prevents a community from enforcing even minimal standards essential to the public good. By effectively giving Richard Kreimer a right to disrupt and disturb a library, Judge Sarokin deprives the mass of citizens of the right to use a library in peace.

As the Wall Street Journal noted in a fine editorial (6/12/91), the conduct that Judge Sarokin protects when engaged in by a homeless man would never be tolerated if done by anyone else: "When a college professor or business executive looks at a woman in a way she considers disturbing, he nowadays may be subject to reprimands, departmental hearings, threats to his job and status, and accusations of sexual harassment. Mr. Kreimer, on the other hand, has been treated as a hero, embraced by the politically correct who have apparently decided that harassing women is acceptable so long as the harasser is homeless."

The following comments correspond to the above-numbered rulings in Judge Sarokin's opinion and should be read in conjunction with the sound criticisms made by the Third Circuit:

1. Judge Sarokin does not cite any precedent in support of his assertion that a library is a traditional public forum. Nor could he, for the assertion is ludicrous under Supreme Court precedent. Judge Sarokin's assertion that the library is a full-fledged designated public forum is also without any support in precedent. Can anyone who has heard a librarian's shush state in good faith that a library is "devoted to assembly and debate"? Remarkably, Judge Sarokin does not even explore the alternative that the library is a limited-purpose public forum.

2. Judge Sarokin's overbreadth analysis misstates the holding of *Brown*. In stating that the *Brown* protesters engaged in a "constitutionally protected protest," Judge Sarokin attributes to the Court a position taken only by a 3-Justice plurality, as Justice Brennan's opinion concurring in the judgment makes clear. What remains of Judge Sarokin's overbreadth analysis is the sort of hyperimaginative hypothesizing that could doom every statute.

3. One wonders how any policy could survive Judge Sarokin's vagueness analysis. The library policy is carefully drafted.

4. On the due process issue, Judge Sarokin's observation that the policy implements a "reader-based restriction" is refuted by his observation that "the restriction is not because of the reader's views." Amazingly, Judge Sarokin places these statements back to back, as though the second bolsters the first.

5. Judge Sarokin's creation of a suspect class defined by poor hygiene or homelessness has no basis in equal protection precedent. His use of disparate impact analysis also defies the Supreme Court's decision in *Washington* v. *Davis*, which makes clear that discriminatory intent (along a recognized suspect line) is necessary to trigger strict scrutiny.

Judge Sarokin's hearing testimony

Judge Sarokin painted a very misleading picture of *Kreimer* at his hearing:

"There were two issues that were presented to me. * * * The first one was whether or not there was a constitutional right of access to the library under the First Amendment. I said that there was, and the Third Circuit agreed. * * * [T]he only issue with which the Third Circuit disagreed was whether or not the regulations were vague and overbroad. They did not disagree about the First Amendment analysis." [46:1–5, 19–22]

Judge Sarokin's summary of *Kreimer* is mistaken or distorted in the following elemental respects:

As noted above, there were at least six separate legal claims decided by Judge Sarokin: (a) whether the library policy was not a reasonable time-place-and-manner regulation under the First Amendment; (b) whether it was unconstitutionally overbroad; (c) whether it was unconstitutionally vague; (d) whether it violated substantive due process; (e) whether it violated equal protection; and (f) whether it violated Article I of the New Jersey Constitution. Judge Sarokin decided each of these claims in Kreimer's favor. The Third Circuit reversed Judge Sarokin on every claim. In short, Judge Sarokin was 0-for-6, not 1-for-2.

The question whether the First Amendment was implicated at all by the library policy was a minor (and easy) part of the determination whether the policy was a reasonable time-place-and-manner regulation. Judge Sarokin properly devoted only about a half-page of his 17-page opinion to this issue, yet he now incorrectly states that this was one of two major issues in the case.

The real question on the basic First Amendment analysis was what standard of review applies. Judge Sarokin held, without any basis in precedent, that a library is both a traditional public forum and a full-fledged designated public forum and that strict scrutiny therefore applied. These holdings are strikingly groundless, and were repudiated by the Third Circuit. In short, the Third Circuit did "disagree about the First amendment analysis"—and it did so vigorously.

Did Judge Sarokin not even recall that he had relied on unprecedented uses of substantive due process and equal protection to strike down the library policy? Is a judge who wields these weapons so carelessly and thoughtlessly fit for elevation to the Third Circuit? These two constitutional provisions, if misused, are among the most powerful available to a judge who seeks to substitute his own views for those of the legislative branch.

In defending his overbreadth analysis in *Kreimer*, Judge Sarokin incorrectly asserted that the Supreme Court in *Brown* v. *Louisiana* "specifically held that that kind of activity [(a silent protest in a library)] could

not be prohibited." [48:22–23] In fact, only a 3-Justice plurality took this position, as Justice Brennan's opinion concurring in the judgment emphasizes. Yet, even after Senator Thurmond pointed out Judge Sarokin's error [49:1–7], Judge Sarokin stubbornly persisted in presenting his incorrect account of *Brown* v. *Louisiana* [120:7–16].

II

(*Haines* v. *Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), writ granted, 975 F.2d 81 (3rd Cir. 1992); *Cipollone* v. *Liggett Group, Inc.*, 799 F.Supp. 466 (D.N.J. 1992))

Haines: Facts and rulings

In a personal injury action against cigarette manufacturers, Haines sought discovery of certain documents that the defendant companies said were protected by the attorney-client privilege. Haines argued that even if the documents were within the scope of the attorney-client privilege, the crime-fraud exception applied and annulled the privilege. A magistrate judge determined that the documents were privileged and that the crime-fraud exception did not apply.

Haines appealed the magistrate judge's order to Judge Sarokin. Judge Sarokin ordered the parties to supplement the record with materials from the record in a similar case, *Cipollone*, in which he was the trial judge. He then issued a ruling that the crime-fraud exception did apply and that Haines was entitled to discovery of the documents at issue.

Several aspects of Judge Sarokin's opinion merit attention:

1. Judge Sarokin opened his opinion on this discovery dispute with this prologue:

"In light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate costs of their prosperity!

"As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation."

2. In holding that the magistrate judge's ruling could not survive under even the "clearly erroneous" standard of review, Judge Sarokin relied not only on the supplemental evidence that he ordered from the *Cipollone* trial but also on his "own familiarity with the evidence adduced at the *Cipollone* trial discussed in the directed verdict Opinion" in that case. 140 F.R.D., at 694. Judge Sarokin stated that having heard the trial evidence in *Cipollone*, he was "in the unique position of being able to evaluate the full scope of evidence supporting plaintiff's crime/fraud contention in the instant case." Id., at 694 n. 12.

3. In a stated effort to show "some of the most damaging evidence" on this crime-fraud exception, Judge Sarokin quoted extensively from those documents as to which privilege had been asserted. Judge Sarokin claimed to be "recognizing the sensitive task of fulfilling the court's duty to support and justify its holding while temporarily preserving the confidentiality of otherwise privileged documents." 140 F.R.D., at 695.

Third Circuit reversal

In a remarkably impressive opinion, the Third Circuit unanimously granted an extraordinary writ vacating Judge Sarokin's order and removing him from the case. The following aspects of the Third Circuit's opinion are noteworthy:

1. Quoting, and commenting on, Judge Sarokin's opening, the Third Circuit stated that Judge Sarokin "issued an opinion and order purportedly addressing the applicability of the crime-fraud exception and not the ultimate merits of the plaintiff's claims, yet the opening paragraphs of the opinion appear to address the merits." 975 F.2d, at 87.

2. The Third Circuit emphasized that a write was an "extreme" remedy to be used "only in extraordinary situations" and that "only exceptional circumstances amounting to a *judicial usurpation of power* will justify the invocation of this extraordinary remedy." 975 F.2d, at 88 (internal quotes omitted and emphasis added).

3. The Third Circuit ruled that under the statute providing that the district court review the magistrate judge's order under the "clearly erroneous" standard, "the district court is not permitted to receive further evidence." 975 F.2d, at 91. It noted that our "common law tradition [does not] permit a reviewing court [(in this case, the district court)] to consider evidence which was not before the tribunal of the first instance." Id., at 92. Because Judge Sarokin considered portions of the *Cipollone* record that were not in the record before the magistrate judge, his order could not stand. Id. at 93.

4. The Third Circuit also held that "fundamental concepts of due process" required that the defendant companies be given a hearing on whether the crime-fraud exception applies. 975 F.2d, at 97.

5. The Third Circuit sharply scolded Judge Sarokin for disclosing the contents of the documents as to which privilege had been claimed:

"This, too, must be said. Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed procedures until all avenues of appeal are exhausted. Regrettably this protection was not extended by the district court in these proceedings. Matters deemed to be excepted were spread forth in its opinion and released to the general public. In the present posture of this case, by virtue of our decision today, an unfortunate situation exists that matters still under the cloak of privilege have already been divulged. We should not again encounter a casualty of this sort." 975 F.2d, at 97.

At his hearing, Judge Sarokin acknowledged only that his disclosure of privileged documents "probably was an error." [33:24]

6. In what the Third Circuit described as "a most agonizing aspect of this case," it then removed Judge Sarokin from the case on the ground that the prologue to his opinion destroyed any appearance of impartiality. The court noted that the prologue stated "accusations" on the "ultimate issue to be determined by a jury" in the case: whether defendants "conspired to withhold information concerning the dangers of tobacco use from the general public." It further noted that Judge Sarokin's remarks were reported prominently in the press throughout the nation. 975 F.2d, at 97–98.

Cipollone

After the Third Circuit removed him from the *Haines* case, Judge Sarokin recused himself from further action in *Cipollone*. His brief opinion on recusal (799 F.Supp. 466) included two notable remarks:

1. "It is difficult for me to understand how a finding based upon the evidence can have the appearance of partiality merely because it is expressed in strong terms."

2. "I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth based upon the evidence, in forceful language that addresses the precise issues presented for determination. If the standard established here had been applied to the late Judge John Sirica, Richard Nixon might have continued as President of the United States."

Comments on Haines and Cipollone:

1. The Third Circuit's observations that Judge Sarokin's ruling amounts to a "judicial usurpation of power," is contrary to our "common law tradition," ignores "fundamental concepts of due process," eviscerates the defendants' rights of appeal, and destroys any appearance of impartiality scratches only the surface of Judge Sarokin's betrayal of the role of a Judge in this litigation. Among other things:

Consider some of the many other respects in which Judge Sarokin's prologue is grossly inappropriate: What do his blanket assertions about the values of businessmen say about his ability to preside fairly in any dispute between an individual and a business? To whom is he referring as the other "rising pretenders" to the throne of "concealment and disinformation"?

At his hearing, Judge Sarokin ultimately made only a modest concession: "I concede that the language was strong and maybe unduly strong; and if I could take it back, I probably would." [60:11–13] The fact of the matter is that Judge Sarokin could have taken it back: these were carefully composed written comments, not off-the-cuff oral remarks.

Judge Sarokin also stated that "I was also hoping that I could discourage the tobacco companies from continuing to conceal the risks of smoking and deny that they existed." [110:20–23] This statement vindicates the Third Circuit's concern that Judge Sarokin was broadcasting his opinion on the ultimate issue to be decided by the jury.

Judge Sarokin's reliance in *Haines* on his familiarity with the evidence in *Cipollone* is a flat admission of predisposition and bias. He is "unique[ly] position[ed]" to decide the issue only in the sense that he has already made up his mind.

Judge Sarokin's comments in his recusal opinion in *Cipollone* show that he just doesn't get it. It is bad enough that he does not acknowledge that his prologue did not "address[] the precise issues presented for determination"—whether the magistrate judge had committed clear error in determining that certain documents fell outside the crime-fraud exception to the attorney-client privilege—but instead opined, in flamboyant, media-baiting language, on the ultimate issue to be determined by the jury. It is even worse that he casts aspersions on the judges on the Third Circuit panel by charging that they had not exercised independent legal judgment but rather that a "powerful litigant" had "caused" them to decide as they did.

At his hearing, Judge Sarokin claimed, "I did not mean to suggest in any way that because they [the tobacco companies] were powerful, that the Third Circuit did something they would not otherwise have done. I never meant to convey that in that language." [36:20–24] But that is precisely what he conveyed.

This was not the first time that the Third Circuit had to use the extraordinary writ to

overturn a lawless discovery order by Judge Sarokin against these same defendants. See *Cipollone* v. *Liggett Group*, 785 F.2d 1108 (3rd Cir. 1986), granting writ vacating 106 F.R.D. 573.

2. Unchastened by his well-earned scolding, Judge Sarokin personally accepted "the C. Everett Koop Award for significant achievement toward creating a smokefree society," awarded by the New Jersey Group Against Smoking Pollution (GASP). (New Jersey Lawyer, 6/7/93). According to one news account, " Sarokin won the award for sentiments contained" in his *Haines* opinion. (New Jersey Law Journal, 6/7/93.) That a judge would accept an award for an opinion in a particular case is disturbing enough as an ethical matter. That he would do so for a case in which he had already been found to have destroyed the appearance of impartiality is breathtaking in its brazenness.

At his hearing, Judge Sarokin claimed that "[t]hree or four very nice elderly people came up to my chambers" to present the award. "Frankly, I had some doubts about the propriety of taking it, but I just didn't want to hurt their feelings by handing it back to them and saying I can't accept it. * * * I just didn't have the heart to say to them, no, take this back." [117:20–118:6]

Judge Sarokin's admission that he was ruled by his heart rather than his head on this issue of impartiality illustrates the very problem that pervades his opinions.

3. It should be noted that in removing him from *Haines*, the Third Circuit stated that Judge Sarokin "is well known and respected for magnificent abilities and outstanding jurisprudential and judicial temperament." In context, this can only be understood as sugarcoating a bitter pill.

III

(*Blum* v. *Witco Chemical Corp.* ("Blum II"), 702 F. Supp. 493 (D.N.J. 1988), rev'd, 829 F.2d 367 (3rd Cir. 1987))

Facts and ruling

Plaintiffs who prevailed in an age discrimination suit received a statutory award of attorney's fees. Judge Sarokin increased the fee award by a 20% multiplier to compensate for the risk that counsel had undertaken in taking the case on a contingency basis: i.e., and the plaintiffs lost, counsel would have received no payment. On initial review, the Third Circuit remanded so that the district court could apply the approach adopted in an intervening Supreme Court case, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air* 483 U.S. 711 (1987). In addition, the Third Circuit gave extensive guidance on how *Delaware Valley* should be applied. See 829 F.2d 367, 379–382 (3rd Cir. 1987).

On remand, Judge Sarokin first criticized and sarcastically attacked the Supreme Court opinion in *Delaware Valley* and the Third Circuit opinion ordering remand. E.g.:

"The Supreme Court has sent a Christmas gift to this court delivered via the Third Circuit Court of Appeals. It is called 'How To Make an Attorney Fee Multiplier.'" However, the instructions are so confusing and inconsistent that this court has been unable to put the 'gift' together. Before dealing with the specific instructions received, it is necessary to consider what it is that we are to construct. * * *

"The court fears * * * that both the Supreme Court and the Third Circuit Court of Appeals have designed an erector set from which no attorney will ever be able to build a valid claim for a contingency enhancement or multiplier.

"Initially, the Supreme Court has held that determination of this issue requires a marketwide analysis of the legal community and is not to be resolved by considerations of the specific risk encountered in the particular litigation under consideration. This court respectfully submits that evidence of the practices and expectations in non-statutory fee cases [i.e., marketwide] is not relevant. * * * [Moreover,] it is doubtful that analysis of the risk of a specific case can be avoided. * * *

"Reading between the lines of both the Supreme Court and the Third Circuit's opinions in this matter, one may conclude that multipliers or other enhancers are so disfavored as to be virtually non-existent. * * * [T]he proof required by these two decisions is so elusive, burdensome and expensive that the prospect of a hearing to obtain such relief is sufficient in and of itself to discourage counsel who otherwise would undertake such matters." 702 F. Supp., at 494–496 (citizen omitted).

Judge Sarokin nonetheless purported to be "duty bound to apply the decisions above to the facts of this case." 702 F. Supp., at 497. Despite finding that plaintiffs' evidence failed to provide "a basis to make a market-based quantitative finding" and did not include "any substantiated amount by which fees need to be enhanced," Judge Sarokin ordered that a 50% contingency multiplier be added to the attorney's fees awarded. *Id.*, at 500.

Third Circuit reversal

The Third Circuit, in an opinion by Judge Sloviter (a Carter appointee), unanimously reversed. The Third Circuit found that Judge Sarokin had simply defied the Supreme Court's opinion in *Delaware Valley* and the Third Circuit's previous guidance:

"[W]e remanded * * * in light of the Supreme Court's opinion in *Delaware Valley II*. Instead, the district court, without concealing its disapproval of both the Supreme Court's decision and ours, *proceeded in accordance with its own views*." 888 F.2d, at 977 (emphasis added and citation omitted).

The Third Circuit cited "at least four respects" in which Judge Sarokin had deviated from precedent:

1. "It appears that the court proceeded to follow its own view of the relevant market in ascertaining the availability of adequate legal representation."

2. "In making its determination on the risk associated with this individual case, the court failed to follow the clear direction of [the Third Circuit and the Supreme Court]. . . . The district court made no secret of its disagreement with the instruction it received on this issue."

3. "[I]n another departure from the task set for it, the district court established a contingency multiplier for this individual case rather than setting a standard which would be applicable to future litigation within the same market."

4. "Finally, and perhaps most importantly, although the district court concluded that the plaintiffs had failed to meet their burden of proof by not quantifying the contingency premium, the court nonetheless relieved the plaintiffs of their burden of proof." 888 F.2d, at 981–983.

Evidently concerned that Judge Sarokin didn't understand his role as a lower court judge, the Third Circuit concluded:

"[T]he error with the district court's judgment was that the 50 percent multiplier it arrived at was supported only by the court's own intuition. This is precisely what the Supreme Court and this court held is impermissible. Neither the district court nor this court is free to superimpose its own view of what the law should be in the face of the Supreme Court's contrary precedent. Unless and until that Court revises its view or promulgates an opinion of the majority that clarifies the determination that must be made to support a contingency multiplier, the district court and we are bound to the exposition of the law set out in *Blum I*." 888 F.2d, at 983–984.

Comments

1. The particular legal issue at stake in this case is not important. What is important is that, as the Third Circuit itself recognized, Judge Sarokin defiantly refused to follow precedent and instead "proceeded in accordance with his own views" and his "own intuition." Notably, Judge Sarokin did so even while professing to put aside his own criticisms and follow precedent.

2. Judge Sarokin's open contempt for the opinions of higher courts reflects a serious lack of judicial temperament.

3. The Supreme Court ultimately went even further than *Delaware Valley* and held that contingency multipliers are never appropriate. See *City of Burlington* v. *Dague*, 112 S. Ct. 2638 (1992). It this completely repudiated Judge Sarokin's position.

IV

(*U.S.* v. *Rodriguez*, Crim No. 84–18 (D.N.J. 1984))

Facts

Raul Rodriguez was arrested on theft-related charges. At the time of his arrest, he was advised of his rights and provided only minimal information to the police. He spent the night in jail and was then transported to FBI headquarters, where he was handed a form in Spanish advising him of his rights and sitting that (by his signature) he agreed to waive them. He read the first paragraph of the form aloud and signed the form with the false name Lazaro Santana. He then answered certain questions asked of him by an FBI agent. An hour later, he was brought before a magistrate; informed that he was entitled to counsel, he stated that he wished to have counsel appointed for him. From arrest to arraignment, 20½ hours had passed. An FBI agent testified that the purpose of bringing Rodriguez to FBI headquarters instead of directly to the magistrate was to obtain additional information from him.

Despite expressly finding that Rodriguez read the form and was aware of his rights before he spoke with the FBI agent, Judge Sarokin granted Rodriguez' motion to suppress evidence of his statements to the FBI agent. Judge Sarokin offered two reasons in support of his conclusion that Rodriguez did not waive his *Miranda* rights and that his statement should therefore be deemed involuntary:

(1) Rodriguez didn't sign his own name to the waiver form. He signed the name Lazaro Santana. "[I]t does not strain logic to find the use of a name other than one's own to be wholly inconsistent with a voluntary waiver of rights: defendant might well have believed that by using a false name he was not committing himself to anything. *But see United States* v. *Chapman*, 488 F. 2d 1381, 1386 n. 7 (3d Cir. 1971) (contention that signature was not one's own is not relevant to the issue of the voluntariness of the confession)." (Yes, the "but see" cite to contrary Third Circuit authority is part of Sarokin's opinion!)

(2) Upon his appearance before the magistrate—the first point at which he was orally asked, in Spanish, whether he wanted a lawyer—he said he did. This "certainly gives rise to an inference of non-voluntariness with respect to the earlier waiver," especially since the delay between the time of arrest and time of arraignment was long.

Comments

1. Judge Sarokin objects to the fact that the police took Rodriguez to the FBI headquarters rather than directly to a magistrate. Because there is nothing unlawful about this police conduct, Judge Sarokin is forced to concoct another basis for excluding the evidence obtained.

2. The notion that signing an alias is wholly inconsistent with a voluntary waiver is absurd. Rodriguez may simply have been trying to conceal his identity.

3. Judge Sarokin's "but see" citation to controlling Third Circuit precedent is stunning. Does he not regard himself as bound by circuit precedent?

At this hearing, Judge Sarokin claimed that the Third Circuit had held only that the use of a false name is "certainly not dispositive" but could well be relevant. [91:15] Such a claim is contrary to the reading of that precedent made by Judge Sarokin himself in *Rodriguez*. It also finds no support in the Third Circuit case.

Judge Sarokin further stated, "I don't take Third Circuit precedent, set it forth and say, okay, now I am not going to follow it. I just don't operate that way." [115:14–16] There is no question that Judge Sarokin's defiance of precedent is typically less overt. But his unusual candor in *Rodriquez* might well reflect the fact that the opinion was unpublished.

4. That Rodriguez told the magistrate that he wanted a lawyer for assistance at trial is not at all inconsistent with his agreeing to speak with an FBI agent in the absence of counsel.

5. How these two factors could override Judge Sarokin's express finding that Rodriguez read the form and was aware of his rights is baffling.

V

(*Vulcan Pioneers, Inc.* v. *New Jersey Dep't of Civil Services*, 588 F. Supp. 716 (D.N.J. 1984), vacated, 588 F. Supp. 732 (D.N.J. 1984))

In 1980, some New Jersey cities entered into a civil rights consent decree regarding the hiring and promotion of firefighters. The decree set numerical hiring "goals," or quotas, for racial and ethnic minorities. A few years later, Newark, faced with a fiscal crisis, threatened to lay off firefighters. Both nonminority and minority firefighters went back to court to protect their respective interests. The union sought to have seniority honored, as required by state law. The minority firefighters sought to have the seniority system disregarded in favor of preserving the affirmative action quotas.

In May 1984, when a ruling by the Supreme Court in *Firefighters* v. *Stotts* on this very issue was known to be imminent, Judge Sarokin modified the consent decree to require layoffs on a proportional basis rather than according to seniority. Thus, more senior nonminority firefighters were to be laid off in favor of less senior minority firefighters.

In an especially bizarre twist, Judge Sarokin ruled that his order denying whites their seniority rights constituted an unconstitutional "taking" and that the federal government—which vigorously opposed Judge Sarokin's modification of the consent decree—should nonetheless be required to provide compensation for the taking.

Shortly thereafter, the Supreme Court, in the *Stotts* case, effectively reversed Judge Sarokin's decision regarding the layoffs. In his original opinion, Judge Sarokin had expressed sympathy for the nonminority firefighters who would have lost their jobs under his ruling: "Though not themselves the perpetrators of the wrongs inflicted upon minorities over the years, these senior firefighters are being singled out to suffer the consequences." In vacating his own ruling in June 1984, Judge Sarokin changed his tone and attacked the nonminority firefighters:

"The non-minority firefighters and the unions who represent them resisted layoffs in this matter on the ground that they were blameless and innocent of any wrongdoing. But, in reality, they know better. If they have not directly caused the discrimination to occur, many certainly have condoned it by their acquiescence, their indifference, their attitudes and prejudices, and even their humor." 588 F.Supp. at 734.

VI

Judge Sarokin—who describes himself as a "flaming liberal" as a judge[2]—aggressively displays his sentiments and ideology on the sleeve of his judicial robe, especially in the prologues of his opinions. In his own words:

"People have said to me that my opinions read more like editorials or essays than traditional opinions. I have not yet decided whether that is praise or criticism." Comment, "Authority in the Dock," 69 Boston U.L. Rev. 477 (1989).

Here is a sample of Judge Sarokin's sentiments (in addition to those portions of his cases quoted in previous parts of this memorandum):

(*Kreimer* v. *Bureau of Police for Town of Morristown*, 765 F. Supp. 181, 182–183 (D.N.J. 1991), rev'd 958 F.2d 1242 (3rd Cir. 1992)):

"The danger in excluding anyone from a public building because their appearance or hygiene is obnoxious to others is self-evident. The danger becomes insidious if the conditions complained of are borne of poverty * * *.

"[O]ne person's hay-fever is another person's ambrosia; jeans with holds represent inappropriate dress to some and high fashion to others * * *.

"The greatness of our country lies in tolerating speech with which we do not agree; that some toleration must extend to people, particularly where the cause of revulsion may be of our own making. If we wish to shield our eyes and noses from the homeless, we should revoke their condition, not their library cards."

Comments

1. Given the ideological bias manifest in this prologue, it is not surprising that Judge Sarokin proceeded to steamroller or ignore Supreme Court precedent in ruling that the library policy violated numerous First Amendment doctrines, substantive due process, and equal protection. (See Part I for fuller discussion, including Third Circuit reversal.) Judge Sarokin now asserts that his opinion had nothing to do with the fact that Kreimer was homeless. But it is clear from the prologue that this is what motivated Judge Sarokin's lawless ruling.

2. How is the danger of excluding someone based on hygiene "self-evident"? Isn't that just Judge Sarokin's way of skirting the fact that he can't establish his key premise?

3. To note that different people have different standards of taste is not to establish that a community lacks the power to set minimal standards.

4. Why is it presumed that "the cause of revulsion"—Kreimer's offensive odor and disruptive behavior—"may be of our own making"? In fact, Kreimer squandered a large inheritance, turned down job offers, and refused to live in a shelter.

5. Why must we end hopelessness before we can maintain standards of hygiene and behavior in libraries? How can this be reconciled with Judge Sarokin's token disclaimer that "[l]ibraries cannot and should not be transformed into hotels or kitchens, even for the needy"?

(*Galioto* v. *Department of Treasury*, 602 F. Supp. 682 (D.N.J. 1985)):

"In a society which persists and insists in permitting its citizens to own and possess weapons, it becomes necessary to determine who may and who may not acquire them. At issue in this matter is a statute reminiscent of the Dark Ages * * *. To impose a perpetual and permanent [gun] ban against anyone who has ever been committed for mental illness, no matter how ancient the commitment or how complete the cure, is to elevate superstition over science."

Comment

Here's a liberal "two-fer": first disparaging the (politically conservative) right to own guns; then overriding the lines drawn by the legislature.

(*City of Jersey City* v. *Hodel*, 714 F. Supp. 126 (D.N.J. 1989)):

"The issue has been squarely presented: Should a large portion of this park, built in the shadow of the Statue of Liberty, be devoted to mooring the boats of an affluent few or be preserved for the enjoyment of the huddled masses?"

Comment

In fact, neither this issue nor any legal issue was squarely presented: despite his rhetorical flourish, Judge Sarokin dismissed this case as not ripe.

(*Sternberger* v. *Heckler*, No. 84–553 (Oct. 29, 1984)):

"This court has already concluded that the Department of Health and Human Services has no heart, but it appears that its brain is going as well."

(*Plaintiffs' lawyers* v. *defense lawyers* (Speech, ABA, Nov./Dec. 1989)):

"For those of you who represent plaintiffs in toxic tort matters, in addition to making money, I suggest to you that you are performing a vital and significant function. Not only are you seeking and obtaining compensation for those persons who have been injured by our technological society, but, equally, if not more importantly, you have created an awareness in the public that was nonexistent before. * * *. As to those of you who defend these cases, it is a little more difficult to take the high ground; but, there is a risk that frivolous and unsupported claims not only jeopardize the economy or segments of it, but discourage research and development of new products. They also raise costs to the consumer. Therefore, although your efforts may not be viewed as heroic as those of the plaintiff's bar, you likewise serve a vital function in making certain that those companies who are entitled to a defense receive it, and that the frivolous and ridiculous claims are vigorously defended."

Comments

Judge Sarokin exposes his clear bias that plaintiff's lawyers are "heroic" and that toxic tort claims are generally meritorious. What does this do to the appearance of impartiality in a particular case?

At his hearing, Judge Sarokin stated that he thought that his statement "was about as moderate and down-the-middle statement as anybody could make." [110:4–6] That Judge Sarokin, on reflection, still believes that a statement that plaintiff's lawyers are more "heroic" and occupy the moral "high ground" is "down-the-middle" illustrates the problem.

The litigation explosion (Speech, ABA, Nov./Dec. 1989):

"I think that the litigation explosion is a good thing. First of all, it should indicate to all of us that despite the constant criticism of the judicial system, that the people still believe in it, and it is the last place to which they can turn to seek a fair adjudication of their rights and claims. To a large extent the other people have lost confidence in the other branches and look to the courts as their last and final hope."

Comments

Does buying a lottery ticket reflect more one's faith in the lottery system or one's desire to get rich without doing any work? Is Judge Sarokin oblivious to the fact that judicial activism has weakened or emasculated the other branches and thereby contributed to the loss of confidence that people have in them?

FOOTNOTES

[1]According to various new accounts, Kreimer squandered a $340,000 inheritance, turned down job offers, and refused to live in a shelter.

[2]In a May 16, 1994, speech to the Federalist Society, Judge Sarokin described his reaction to the New York police commissioner's "crackdown on the squeegee people": "So as a citizen, I applaud the commissioner and his recognition that permitting this type of activity sets the tone of our cities and affects the fabric of our daily lives. But the judge in me, the flame in me, (as in flaming liberal,) says hold on a minute."

TRIBUTE TO GORDON OSBORNE

Mr. GREGG. Mr. President, I rise today to pay tribute to Mr. Gordon Osborne of New Ipswich, NH. On September 19, 1994, the Northern Textile Association [NTA] will present Gordon Osborne with their gold medal for his lifetime of service to the textile industry.

Mr. Osborne began his career in textiles in 1934 when he joined Warwick Mills in New Ipswich, and by 1948 he had become president of the company.

Mr. Osborne has also been active in the NTA for many years, serving as chairman, president, and, currently, treasurer of the organization.

Mr. President, during his career in the textile industry Gordon Osborne has represented the best of the New Hampshire business community, and it is my pleasure to pay tribute to this fine gentleman today on the Senate floor.

IS CONGRESS IRRESPONSIBLE? YOU BE THE JUDGE OF THAT

Mr. HELMS. Mr. President, the incredibly enormous Federal debt is like the weather—everybody talks about the weather but nobody does anything about it. Many Senators talk a good game when they are back home—about bringing Federal deficits and the Federal debt under control, but take a look at how so many of them vote in support of bloated spending bills that roll through the Senate.

As of Friday, September 9, at the close of business, the Federal debt stood—down to the penny—at exactly $4,679,665,237,940.33. This debt, never forget, was run up by the Congress of the United States.

The Founding Fathers decreed that the big-spending bureaucrats in the executive branch of the U.S. Government should never be able to spend even a dime unless and until it had been authorized and appropriated by the U.S. Congress.

The U.S. Constitution is quite specific about that, as every school boy is supposed to know.

And do not be misled by declarations by politicians that the Federal debt was run up by some previous President or another, depending on party affiliation. Sometimes you hear false claims that Ronald Reagan ran it up; sometimes they play hit-and-run with George Bush.

These buck-passing declarations are false, as I said earlier, because the Congress of the United States is the culprit. The Senate and the House of Representatives are the big spenders.

Mr. President, most citizens cannot conceive of a billion of anything, let alone a trillion. It may provide a bit of perspective to bear in mind that a billion seconds ago, Mr. President, the Cuban missile crisis was in progress. A billion minutes ago, the crucifixion of Jesus Christ has occurred not long before.

Which sort of puts it in perspective, does it not, that Congress has run up this incredible Federal debt totaling 4,679 of those billions—of dollars. In other words, the Federal debt, as I said earlier, stood this morning at 4 trillion, 679 billion, 665 million, 237 thousand, 940 dollars and 93 cents. It'll be even greater at closing time today.

THE JERUSALEM FELLOWSHIPS PROGRAM

Mr. MOYNIHAN. Mr. President, I am pleased to report that the Jerusalem Fellowships Program brought over 120 North American college and graduate students to Israel this past summer, for a unique educational and cultural experience. My distinguished colleague from Pennsylvania, ARLEN SPECTER, and I have enjoyed the privilege of serving as honorary chairman of this exciting program since its inception in 1985.

The Jerusalem Fellows spent 4 weeks touring and studying in Israel. During this period they met individually with Israeli leaders including President Ezer Weizman, Prime Minister Yitzhak Rabin, Former Minister Shimon Peres, Former Prime Minister Yitzhak Shamir, Mayor of Jerusalem Ehud Olmert and members of Knesset Benny Begin and Raphael Eitan.

In every case, there was an opportunity for indepth dialog with these individuals—an unprecedented opportunity for a study mission of college-age students to question cabinet ministers and national leaders. In addition, the fellowships met with Israeli citizens from every walk of life and from every group in that diverse society.

Eighty of the one hundred-twenty Jerusalem fellows had never been in Israel before. They had been selected on the basis of intellectual skills and leadership qualities. I am confident that they will articulate the insights developed during this tour now that they have returned to their campuses throughout North America.

The Jerusalem Fellowships Program was sponsored by Aish HaTorah College of Jewish Studies in Jerusalem, a unique educational institution headed by Rabbi Noah Weinberg, a leading contemporary Jewish philosopher and educator. The program's executive director is Rabbi Chanan Kaufman. The west coast division of this exemplary program is under the honorary chairmanship of our former colleague Governor Pete Wilson. The chairman for the west coast is Barry Goldfarb, a noted industrialist and major philanthropist whose vision and generosity made the west coast program a possibility. Sponsors and members of the advisory committee include:

Ken Abramowitz, Blair Axel, Ariel Berghash, Lon Bernell, Kenneth J. Bialkin, Alan and Mindy Bloom, Abe Briansky, Errol Brick, Herb Caskey, Marc S. Cooper, Kenneth Cowin, Charles Dimston, Mel Dubin, Andrew Duell, Lewis M. Eisenberg, Harold Feld, Marc Feuer, Nina Franklin, Natalie S. Fridman, Alan and Randee Gordin, Joseph A. Gottlieb, Arnold Hochstadt, Jonathan Hany, George Klein, Samuel Klurman, Andrew E. Lewin, Arthur L. Loeb, Stephen Lovell, David Luchins, Leah and Shalom Mark, Danny Messing, Michael Morris, Jack Nash, Joseph Neustein, I. David Pelton, Pfizer Inc., Lester Pollack, Ephraim Propp, George Rohr, Steven Rones, Daniel S. and Joanna S. Rose Fellowship, Jerry Rubin, Irving Schaffer, Alan J. Shefler, Alan B. Slifka, David and Lili Smilow, Ronald and Nina Spiro, Warren Stieglitz, Judy and Charles S. Temel, Arnold Thaler, Phyllis and Arthur Wachtel, Gila Rosenhaus Wiener.

It is obvious from the response to this summer's program that the Jerusalem Fellowships Program has made a significant contribution toward furthering understanding of Israel among North American young people. I salute all who are involved in this magnificent project.

JIM CAULDER: EXCELLENCE IN PUBLIC SERVICE

Mr. HOLLINGS. Mr. President, I rise to salute Jim Caulder, an exceptional public servant, who retired last month after more than three decades of dedicated service with the Social Security Administration. Jim joined the agency during the first year of the Kennedy