

# Legal Times

LAW AND LOBBYING IN THE NATION'S CAPITAL

APRIL 12, 2004

**Inadmissible:** Corporate work is once again hot, and D.C. firms are enjoying the fruits of their labor. Plus, Office of Special Counsel chief changes tune on gay rights. **Page 3**

## A Veteran Gives Voice To Guantanamo Case

Ex-judge, WWII vet John Gibbons will argue that even suspected terrorists deserve access to the courts.

By VANESSA BLUM

John Gibbons, a retired Republican appointee to the federal bench and name partner in a 175-lawyer corporate law firm, seems an unlikely advocate for the rights of detainees at Guantanamo Bay. But come April 20, the 79-year-old Gibbons will play that part before the U.S. Supreme Court.

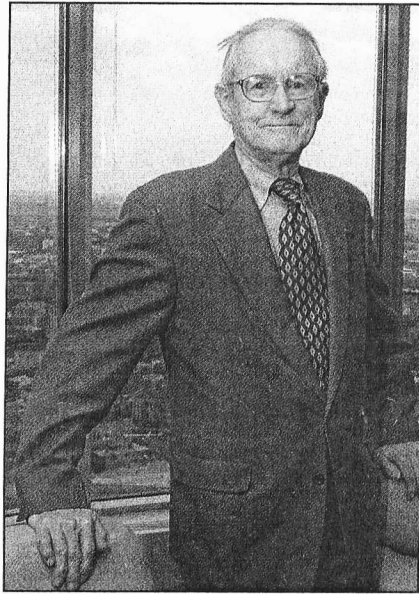
The case presents the justices with their first opportunity to consider whether federal courts have power to review the lengthy detentions of suspected al Qaeda

members in the war on terror. Gibbons, former chief judge of the U.S. Court of Appeals for the 3rd Circuit, says he has no apprehension about walking into one of the term's most contentious and closely watched cases.

"I've been involved in many, many controversial and high-profile cases," he says.

Appointed to a seat on the 3rd Circuit by President Richard Nixon in 1970, Gibbons earned a reputation for being tough, fair, and insightful. Since retiring his

SEE **GUANTANAMO**, PAGE 15



**INTO THE FRAY:** John Gibbons filed an amicus brief on behalf of detainees. He was later asked to handle high court argument.

## Business Lobby Seeks China Trade Accord

Lawyers Shuttle to Beijing As Talks Loom, Relations Falter

By CHRISTINE HINES

Lawyers for American businesses are in the midst of intense negotiations to settle trade differences with China in advance of a high-stakes meeting between top U.S. and Chinese trade officials later this month.

The meeting, to be held April 21 in Washington, D.C., could prevent a battle at the World Trade Organization from escalating, and comes at a time when trade relations between the two countries appear to be fraying.

China—the third largest and fastest-growing U.S. trading partner—entered the WTO in 2001, and has enjoyed an unofficial

SEE **CHINA**, PAGE 18

## Difference of Opinion

Should judges make more rulings available as precedent? How an obscure proposal is dividing the federal bench.

By TONY MAURO

Federal judges are usually a reticent bunch outside the four corners of their courtrooms and their rulings.

But at an April 13 hearing in Washington, D.C., testimony will reveal a judiciary that is passionately and publicly up in arms over an obscure proposal that critics say would drastically change how judges do their jobs and increase litigation costs for clients.

The proposed rule, known as Rule 32.1 of the Federal Rules of Appellate Procedure, would forbid all appeals courts from placing restrictions on the citation of so-called unpublished opinions.

Unpublished opinions—labeled as such because they are not included in the official volumes of pub-



lished rulings—are the usually brief and unpolished decisions that federal appeals courts use to dispose of 80 percent or more of all cases.

Currently, nine of the 13 federal circuits allow lawyers and judges to cite unpublished opinions, though they vary widely on how much weight the opinions should be given. But in the circuits that have rules against the use of unpublished opinions—notably the San Francisco-based U.S. Court of Appeals for the 9th Circuit—dozens of judges, former law clerks, and other lawyers have now gone on record opposed to the idea, urging that circuits be left to devise their own rules.

SEE **OPINIONS**, PAGE 10

## The Trial Of A Judicial Gadfly

Elena Sassower says she was simply speaking out. Capitol Hill cops say she crossed a line.

By TOM SCHOENBERG

Some might say Elena Sassower was raised to be a dissident.

The daughter of two New York lawyers who had their licenses taken away after run-ins with the establishment, the 47-year-old Sassower has spent the last 15 years trying to ferret out judicial corruption. And as co-founder and coordinator of the Center for Judicial Accountability, Sassower has pushed for more public involvement in confirmation hearings of judicial nominees before the Senate Judiciary Committee.

But last year, Capitol Police say, Sassower went too far by interrupting a hearing on the nomination of Richard Wesley to the U.S. Court of Appeals for the 2nd Circuit. On April 12, Sassower is scheduled to face a D.C. Superior Court jury to determine whether she is guilty of a single count of disrupting Congress, a charge that

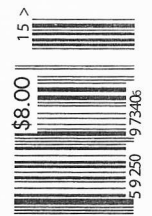


**HOLDING FIRM:** Elena Sassower was arrested for disrupting Congress.

SEE **TRIAL**, PAGE 12

## Resolute Rice Battles Critics

Scenes from the week's biggest spectacle: National Security Adviser Condoleezza Rice gives her side of the story to the 9/11 commission, all the while staying on message, channeling her boss, and sticking it to a former senator. **Page 16**



# Trial of Judicial Gadfly Set to Start in Superior Court

TRIAL, FROM PAGE 1

carries a maximum penalty of six months in prison and a \$500 fine.

Sassower claims she is being targeted for trying to speak out against a judicial candidate.

"I asked to testify at a public hearing," says Sassower, of White Plains, N.Y. "Is that a crime? Is that a crime?"

The case highlights an important fact about the judicial confirmation process: Most nominees are quietly approved in private discussions among senators and administration officials before a public hearing is ever held. While organized opposition to certain nominees—such as Charles Pickering Sr., Priscilla Owen, or Miguel Estrada—can lead to bitter and prolonged public battles between political parties, the fact is that most nominations move rather easily, and quickly, through the confirmation process, without garnering opposition or public attention.

The only way for the general public to be heard on a specific nominee is to convince a committee senator or an influential public interest group to take up the cause—or to have their written comments placed in the record.

So far, Sassower has not had much luck in convincing others to follow her lead.

"She has been a frequent critic of many nominees and quite frequently has gone forward with great fanfare to support her point of view," says Nan Aron of the Alliance for Justice, noting that Sassower contacted her organization about the Wesley matter. Aron says she does not remember much about Sassower's concerns about Wesley, but notes that the judge had strong support from his home state senators—a key point in ensuring confirmation. The alliance did not oppose his nomination.

## A TRADITION OF ACTIVISM

Sassower, a nonlawyer, has been fighting the judicial system for more than 15 years. The daughter of a one-time legal power couple in New York City, Sassower watched her parents fight fruitlessly against what they perceived to be injustices in the system, only to have their bar licenses stripped away.

George Sassower was disbarred in 1987 for filing frivolous claims, according to court records. Despite numerous injunctions in several suits, George Sassower continued to file suits and motions in violation of court orders, leading to criminal contempt proceedings and jail time, court records show. In one case, he was sentenced by U.S. District Judge Nicholas Politian to write "I will obey court orders" 2,500 times a day—though the duration of the sentence is unclear.

Doris Sassower, a family lawyer and former president of the New York Women's Bar Association, had her license suspended in 1991. Her troubles with the bar arose after another lawyer alleged that Doris had refused

to turn over a client's file during a fee dispute, according to an account posted on the Sassower group's Web site. Around the same time, Doris founded the predecessor group to the Center on Judicial Accountability and attacked the process by which judges were selected. Numerous requests for the restoration of her license have been rejected.

"My daughter's no criminal," says Doris Sassower, adding that Elena gave up a full-time job teaching Hebrew to work on judicial matters. "She deserves a medal for what she's put forth on behalf of the public's interest for all these years."

Sassower says her parents are brilliant, courageous people who were abandoned by bar associations and civic organizations once they made claims of judicial misconduct.

"People who talk about judicial misconduct are described as uninged," Sassower says. "People won't believe them. 'It's just sour grapes,' they say.

"You can lose a case," she adds. "But it isn't always fair and square."

Sassower says her file on Judge Richard Wesley consists of two boxes containing thousands of pages of briefs and orders that prove Wesley took part in the issuance of five fraudulent court decisions.

Sassower says Wesley—along with five of his now former colleagues on the New York Court of Appeals—committed fraud when they ruled against her motion to disqualify the New York trial judge overseeing a civil case she had filed. The fraud continued, she says, when the appellate court denied her request for reconsideration and upheld an injunction placed on her by the trial judge.

The case stemmed from Sassower's longtime quest to have complaints that she filed against New York judges investigated. In 1999, she filed suit against the Commission on Judicial Conduct of the State of New York, claiming that the group was a sham that protected corrupt judges behind a veil of confidentiality.

Last May, a week before Wesley's confirmation hearing, Sassower says, she dropped off the materials at New York Sen. Charles Schumer's Manhattan office, hoping that the Democratic member of the Senate Judiciary Committee would investigate her allegations and block Wesley's nomination. At the very least, Sassower says, she asked that she be allowed to testify at the hearing. Sassower says she forwarded her allegations to the American Bar Association, the White House, and other members of the Judiciary Committee.

It should have taken Schumer's staff just an hour to verify her claims, Sassower says.

Wesley, however, was not considered one of President George W. Bush's controversial picks. The New York Court of Appeals judge was known as a conservative, but as *The Buffalo News* would later report, Schumer

gave his support without ever finding out the judge's views on abortion.

Sassower also turned to Sen. Hillary Rodham Clinton (D-N.Y.). According to Sassower, she had a 35-minute phone call with Clinton staffers at which time she presented her allegations against Wesley. Sassower was told that neither Schumer nor Clinton would endorse her testifying.

On May 20 and again on May 21, Sassower says, she left a phone message for Clinton's chief of staff. It was a Capitol Police officer who called her back, Sassower says.

The police officer, she says, told her to stop calling Clinton's office and warned her not to come to Wesley's D.C. hearing, which was to take place the next day.

Sassower responded with another round of letters addressed to Schumer, Clinton, the Capitol Police, and Sen. Orrin Hatch (R-Utah), chairman of the Judiciary Committee, asking that she not be arrested.

## AN ARREST ON THE HILL

Wesley's May 22, 2003, confirmation hearing was expected to be routine. The judge had already met privately with both Sens. Schumer and Clinton.

Schumer, who had effectively blocked other Bush nominees, was one of the first to speak in support of Wesley, praising the judge as not too far right or too far left, according to a transcript of the proceeding.

"I am in full support of Judge Wesley's nomination," Schumer said. "He has made an excellent judge in New York state and he will just be a superb judge here."

Clinton followed with similar remarks: "Judge Wesley has not only been a superb jurist, but has continued to care about the quality of justice and has used his extraordinary experience to try to improve the lives of the people that appear before him and far beyond that."

Before a short recess, Rep. Thomas Reynolds (R-N.Y.) publicly declared his support before the committee. When it reconvened, Sen. Saxby Chambliss (R-Ga.) was the only senator to return. Chambliss asked just three questions—none involved any decisions the judge had issued or related to Sassower's concerns. No other witnesses were called, and Chambliss moved on to three other nominees, who were also quickly interviewed.

As Chambliss adjourned the hearing, Sassower rose from her seat. What happened next is in dispute.

According to Sassower, she read from a prepared statement: "Mr. Chairman, there's citizen opposition to Judge Wesley based on his documented corruption as a New York Court of Appeals judge. May I testify?"

At that point, Sassower says, two Capitol Police officers came up to her and asked her to leave. She then called out three times, asking whether she was being arrested.

The charging information filed by the U.S. Attorney's Office states that Sassower shouted, "Judge Wesley, look into the corruption of the New York Appeals Court." It notes that Sassower also requested to testify. Chambliss, according to the criminal information, struck his gavel twice and requested that police restore order and asked everyone to remain seated. In handwritten text at the bottom of the printed summary, the report states that "after the senator called for order, the defendant continued to shout."

The transcript of the proceeding shows that as soon as Chambliss said the hearing was adjourned, Sassower rose and said something about corruption. Chambliss responded, "I will issue a warning that we'll have order." After that, the transcript notes that Sassower continued: "Are you directing that I be arrested? Are you directing that I be arrested..."

Chambliss then explained to the remaining attendees that "outside witnesses" are welcome to submit letters supporting or opposing nominees.

"[I]t is not our usual procedure to invite outside witnesses to testify" said Chambliss, according to the transcript. "I realize that this lady is disappointed that she's not able to make any statement this afternoon, but her disappointment in no way condones any disruption of this hearing."

Sassower was removed from the room and arrested. Two weeks later, Wesley was unanimously confirmed by the full Senate.

## GOING IT ALONE IN D.C.

Sassower was charged with disrupting Congress. While a misdemeanor, the charge carries a large enough penalty that Sassower was allowed to opt for a jury trial, rather than a bench trial heard solely by a judge.

Sassower is representing herself in the trial, though she has retained veteran protest lawyer Mark Goldstone as an "attorney adviser." Sassower says that the police had planned her arrest prior to her speaking out and that a videotape of the proceeding will back up her account.

Goldstone says the government will have a difficult time proving disruption, given that the hearing was adjourned when Sassower began speaking.

"The government had a year's worth of opportunity to say this is bullshit," Goldstone says.

Since her May 22 arrest, Sassower has challenged the impartiality of every judge who has handled her case.

Last week, she filed a writ of mandamus with the D.C. Court of Appeals requesting that Superior Court Judge Brian Holeman be removed from the matter for "dishonesty" and "deceit." The appeals court rejected the petition on April 8.

Sassower has also subpoenaed Sens. Clinton, Schumer, Chambliss, Hatch, and Patrick Leahy (D-Vt.), as well as certain committee staffers. On April 8, Holeman quashed most of those subpoenas, but ruled that two of Clinton's staffers must testify.

The government, meanwhile, has asked Holeman for permission to introduce evidence that Sassower was arrested for disorderly conduct on Capitol Hill in 1996.

In that case, police arrested Sassower in the hallway outside a Judiciary Committee hearing room where, minutes earlier, she had been denied an opportunity to testify against the nomination of Lawrence Kahn for a seat on the 3rd Circuit. Her pretrial services report also notes that she was arrested for disorderly conduct in New York in 1993.

In court papers, Sassower points out that 30 years ago the committee allowed the general public to comment at confirmation hearings. As evidence, she cites a page in Ralph Nader's book *The Judiciary Committees*. According to the book, one day in 1971, Sen. Roman Hruska (R-Neb.) was the only Judiciary Committee member present during the hearings of seven federal judicial nominees. During the hearing, according to Nader's account, Hruska asked if anyone in the room wished to speak on behalf of or against the nominees. The book does not say whether anyone took up the senator on his offer, but it does say that none of the nominees aroused controversy.

Birch Bayh Jr., a former senator who served on the Judiciary Committee for 18 years during the 1960s and 1970s, says there was no policy that gave citizens the right to testify at confirmation hearings.

Says Bayh, now a partner at Venable: "For everyone to have the right to be heard, it would make it near impossible to do business." ■

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