

DEDICATION

HON. ELLSWORTH A. VAN GRAAFEILAND

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If I could ask him, I have no doubt that the late Judge Van Graafeiland would tell me I could find something more useful to do than write his dedication. A tough questioner on the bench and a fierce dissenter, the Judge was a modest, unassuming person in chambers—a mentor, a role model, and a teacher to his many law clerks, one of whom I was fortunate to be. The Judge received his L.L.B. at Cornell Law School in 1940, and I am reminded of him each morning I arrive at Myron Taylor Hall.

President Ford appointed Judge Van Graafeiland to the Second Circuit in 1974. No stranger to the federal courts, the Judge was an experienced litigator and senior partner of one of the premier law firms in Rochester, New York, his hometown. He took senior status upon reaching seventy, but stayed on the bench until November 2004, when he died at eighty-nine.

The Judge's opinions were succinct, with asides kept to a minimum (the Judge would approve of my limited use of footnotes). To do justice to them, penned over thirty years, would transform this dedication into a casebook. I have selected a few of his opinions that, I hope, give a sense of the breadth and magnitude of the impact he had.

Let me briefly set the stage. The Judge ascended to the bench in the wake of controversy surrounding the judicial activism of the 1960s and 1970s, often in politically charged areas such as civil rights, voting rights, and the environment. At the core of the controversy, the debate turned on different conceptions of the judiciary's role in the American constitutional order. Some counseled self-restraint, perceiving distinct limits around proper judicial authority; others took an expansive view, urging the courts to assume a more activist role in protecting individual rights.

The Judge was clear in how he saw his job and the role of the courts: not to favor a view of what the law "should" be, however close that view was to his personal beliefs, but rather to identify the relevant legal principles and apply them to the case before him. The Judge

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always read the record meticulously.¹ When considering a case, he saw the people affected by its outcome—their fears and hopes, the particular interests at stake, and the problems that had brought them to court. His opinions spoke directly to them and to the matters being contested.

JUDICIAL RESTRAINT

One of the Judge's early opinions, in a rare en banc decision in which he and three others dissented from a five-judge majority, captured the Judge's sense of the judiciary's function. The plaintiff in *Turpin v. Mailet* alleged he was arrested by two West Haven, Connecticut, police officers in retaliation for filing a lawsuit arising from a third officer's use of excessive force.² Turpin sued the arresting officers for money damages under state and federal law, including 42 U.S.C. § 1983. He also sued West Haven directly under the Fourteenth Amendment, because municipalities were not liable under § 1983.³

In the lower court, Judge Newman, then a district court judge, concluded that a right of action could not be implied directly from the Fourteenth Amendment. The en banc majority reversed, holding the court to have the power to fashion a "common law" remedy for constitutional violations.⁴ It reasoned that, in so doing, it was "doing no more than creating structures for enforcement similar to those normally fashioned by legislatures," "open[ing] a dialogue with Congress," and "invigorat[ing] the political process [so that Congress could] use the court's determination as a focal point for the re-examination of the policy questions involved."⁵

The Judge, in dissent, did not contest the need for redress, but focused instead on who should craft the remedy. By its nature, the Judge wrote, the majority's decision was much more than a "dialogue" with Congress. If the decision was legislative in nature, Congress could later choose to "reverse" it. If, however, it interpreted constitutional guarantees, Congress had no authority to enact laws inconsistent with what the court decided. Identifying which part of the decision fell into what category would be tricky; moreover, the Judge argued, not knowing how to separate them, Congress was more likely to defer, rather than react, to the outcome.⁶

¹ See Joseph M. McLaughlin, *The Second Circuit—Year in Review*, 61 BROOK. L. REV. 347, 354 (1995) ("No one reads a record as carefully as Judge Van Graafeiland.").

² See 579 F.2d 152, 155 (2d Cir. 1978), *vacated and remanded on other grounds sub nom. City of West Haven v. Turpin*, 439 U.S. 974 (1978), *modified*, 591 F.2d 426 (2d Cir. 1979).

³ *Id.*

⁴ *Id.* at 157.

⁵ *Id.* at 157–58 (internal quotation marks omitted).

⁶ *Id.* at 174 (Van Graafeiland, J., dissenting).

The Judge therefore cautioned restraint. In his view, the question was “one of representative democratic government versus judicial autocracy,” specifically “whether the American people, speaking through their Congress and their written Constitution, [had] authorized [the court] to permit an award of damages against municipalities directly under the Fourteenth Amendment.”⁷ In the Judge’s view, the answer was no—Congress had already addressed the question by choosing not to include municipalities within § 1983.⁸ Congress, he reasoned, could amend § 1983 if it chose to include municipalities. In the meantime, the judiciary should remain clear of the legislative process, “expound[ing] the law as it should come before them, free from the bias of having participated in its formation.”⁹ The Judge challenged the majority to address the full impact of the decision. What would be its economic and social effects? Could *any* violation of the Fourteenth Amendment give rise to civil liability? What immunities or defenses would apply?¹⁰ Those questions were a natural consequence of the majority’s decision, but remaining unanswered, they underscored for the Judge that “[i]f intervention [in community government] is to come from the federal government, it should come from Congress, not the courts.”¹¹

REVERSE DISCRIMINATION AND QUOTAS

Federal courts have long wrestled with the Fourteenth Amendment’s requirement that states not deprive inhabitants of “equal protection of the laws.”¹² For claims based on race, the issue has often turned on whether equal protection requires the race-neutral treatment of all individuals or whether it guarantees a minimum outcome for minority groups. The Judge was among the first federal jurists to challenge the constitutionality of racially based quotas. At its heart was a conception of American democracy committed to individuals over groups, requiring protection against all forms of racial classification. That view was encapsulated in several opinions the Judge wrote for the court in the 1970s.

In *Kirkland v. New York State Department of Correctional Services*, the Second Circuit addressed a class action contesting the constitutionality of a New York civil service examination.¹³ Writing for the court, the Judge upheld the district court’s finding that the test was unconstitutional, as well as the district court’s order to develop a new, nondis-

⁷ *Id.* at 173–74.

⁸ *Id.* at 177.

⁹ *Id.* at 173 (quoting Rufus King, a Constitutional delegate).

¹⁰ *Id.* at 179–84.

¹¹ *Id.* at 184.

¹² U.S. CONST. amend. XIV.

¹³ *See* 520 F.2d 420, 427 (2d Cir. 1975).

criminatorily selection process.¹⁴ He was troubled, however, by the imposition of employment quotas.¹⁵ A quota, he thought, might be justified in response to a clear-cut pattern of racial discrimination.¹⁶ In this case, data regarding prior examinations were incomplete, and there was limited evidence of racial imbalance among employees.¹⁷ Moreover, the Judge noted, any quota would negatively affect “a small number of readily identifiable candidates” who would know in advance that they “may be bypassed for advancement solely because they are white.”¹⁸ The outcome, the Judge predicted, would be an escalation of racial tension. Like his *Turpin* dissent, the Judge cautioned the judiciary to “act with great reluctance” in interfering with local government.¹⁹ Absent racial discrimination, “if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators.”²⁰

A subsequent case, *Chance v. Board of Examiners*, involved a New York school board policy known as “excessing,” in which the least senior supervisor was transferred, demoted, or terminated if a supervisory position was eliminated.²¹ The excessing plan was neutral on its face, operating in all cases on a “last-in, first-out” basis. It was challenged, however, for its disproportionate effect on African-American and Puerto Rican supervisors, many of whom were less senior. Writing for the majority, the Judge struck down the district court’s imposition of racial quotas as “constitutionally forbidden reverse discrimination.”²² A key to the decision was what the quota was not. It was *not* remedial, it was *not* designed to benefit supervisors harmed by prior discrimination, and it was *not* put in place to protect against future discrimination.²³ The court concluded that its one goal—to ensure a minimum number of minority supervisors—was constitutionally barred.²⁴ Moreover, like in *Kirkland*, a quota would have had a particularly harsh effect on a small, identifiable group. Some districts had only two or three employees, meaning that a quota would “require a senior, experienced white member of such a group to stand

¹⁴ *Id.* at 425–27.

¹⁵ *Id.* at 429.

¹⁶ *Id.* at 427.

¹⁷ *Id.* at 428.

¹⁸ *Id.* at 429.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See* 534 F.2d 993, 995 (2d Cir. 1976).

²² *Id.* at 998–99.

²³ *Id.* at 998. To the extent supervisors had been denied seniority based on prior discrimination, the court ordered that they should be placed in the same position they would have had if they were not the target of discrimination. *Id.* at 999.

²⁴ *Id.*

aside and forego the seniority benefits guaranteed him by [New York law] and his union contract, solely because a younger, less experienced member” was African-American or Puerto Rican.²⁵ Having reversed the district court’s order, the Judge again counseled in favor of federal-court restraint. “We note that the New York Court of Appeals has specifically held that the Board of Education has the power to establish uniform City-wide excessing rules,” he wrote.²⁶ “Should the question of excessing authority vis-a-vis the community districts and the Board of Education again arise in this proceeding, we trust that the District Court will defer to the New York State courts’ primary concern and expertise in this matter, in so far as it is feasible to do so.”²⁷

THE AGENT ORANGE LITIGATION

The Agent Orange litigation involved members of the United States, Australian, and New Zealand armed forces and their families who sued the United States and several major chemical companies for injuries allegedly arising from exposure to Agent Orange, an herbicide sprayed during the Vietnam War.²⁸ The litigation received nationwide attention, in part as “a method of public protest at perceived national indifference to Vietnam veterans.”²⁹

It was a landmark case, heralding a coming wave of mass-tort litigation. A substantial portion of the Judge’s chambers was taken up by Agent Orange materials. By its conclusion, the trial court’s docket sheet was reported to contain 375 single-spaced pages and roughly 6000 individual entries; an entire room, staffed by two clerks, was needed to house the paperwork.³⁰ I began my clerkship as the Judge was finalizing his opinions. The court issued nine opinions, and the Judge authored four of them (I assisted on one).

The Judge was tasked with addressing various claims against the United States brought by the veterans, their families, and the defendant chemical companies. The court affirmed their dismissal, principally relying on the *Feres* doctrine, an exception to the waiver of sovereign immunity under the Federal Tort Claims Act for injuries to service members that arose during or incidental to their service.³¹ As the Judge noted in dismissing the claims, the *Feres* doctrine cautioned

²⁵ *Id.* at 998.

²⁶ *Id.* at 999.

²⁷ *Id.*

²⁸ *In re* “Agent Orange” Prod. Liab. Litig., 818 F.2d 145, 148 (2d Cir. 1987).

²⁹ *Id.*

³⁰ See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 342 (1986).

³¹ See *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666 (1977); *Feres v. United States*, 340 U.S. 135 (1950).

restraint when the court was asked to pass, as in this case, on the President's and Congress's discretionary military decisions. "Absent a substantial constitutional issue, the wisdom of the decisions made by these concurrent branches of the Government should not be subject to judicial review."³²

The *Feres* doctrine barred the bulk of the veterans' claims against the United States, and there was little evidence to support their separate lawsuit against the chemical companies.³³ Why, then, had they pursued this litigation? The court was concerned that the prospect of lucrative legal fees had been a driving force, perhaps to the veterans' disadvantage. In the lower court, Chief Judge Weinstein had approved a class-action settlement before learning, four months later, of a fee-sharing agreement among the lead lawyers, awarding some of them a substantial windfall.³⁴ The incentive to settle the litigation early, even if not in the class's best interests, was apparent. Under the agreement, as soon as a threshold amount was reached, the lead lawyers' returns diminished.³⁵ In this instance, in light of the weakness of their case, the settlement was likely the best the veterans could do. Anticipating future complex suits, however, the court set aside the fee-sharing agreement (and denied a request for higher legal fees). Judge Miner wrote the court's opinions in this area, but they resonated with Judge Van Graafeiland's long-time experience as a trial lawyer.

INSIDER TRADING

The Judge authored some of the nation's most forward-looking decisions in cases involving financial fraud. Among them was *United States v. Newman*,³⁶ decided shortly after the Supreme Court handed down *Chiarella v. United States*.³⁷ *Chiarella* involved insider trading by the employee of a New York-based financial printer who, having identified the targets of prospective tender offers, bought shares in advance of the bid's announcement.³⁸ The Supreme Court found that those in possession of material nonpublic information had a duty to disclose that information or abstain from trading, or else risk penalty under Rule 10b-5. Disclose-or-abstain, however, was not triggered merely by the possession of inside information. Rather, according to the Court, the obligation arose when the possessor of inside information had a fiduciary duty to the person with whom he traded, prompt-

³² *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 194, 198 (2d Cir. 1987).

³³ *Id.* at 149–51.

³⁴ *Id.* at 218–19.

³⁵ *Id.* at 224.

³⁶ 664 F.2d 12 (2d Cir. 1981).

³⁷ 445 U.S. 222 (1980).

³⁸ *Id.* at 224.

ing an affirmative duty to speak.³⁹ Since Chiarella traded with people to whom he did not owe a fiduciary duty, the Supreme Court held he had no liability under Rule 10b-5.

In dissent, Chief Justice Berger argued that how a trader acquired inside information should bear on liability. Traders should be liable “when an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means.”⁴⁰ Accordingly, “a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading,” leaving open a misappropriation theory—based on a duty to disclose to the market—as an alternative basis of Rule 10b-5 liability.⁴¹

The facts in *Newman* were similar to those in *Chiarella*. Employees of two investment banks had misappropriated confidential information concerning takeovers by the firms’ clients. Like in *Chiarella*, the *Newman* defendants worked on behalf of the acquirers, but used the information to buy target stocks. They owed no fiduciary duties to the investors with whom they traded. The district court, relying on *Chiarella*, dismissed the Rule 10b-5 indictments. The Second Circuit reversed, adopting a misappropriation theory, but one that was markedly different from the approach taken in the *Chiarella* dissent. Rather than a duty to the market, the Judge concluded that the defendants’ misappropriation had breached a duty to their employers and clients.⁴² He reasoned that Rule 10b-5, by its terms, outlaws *any* fraud or deceit “in connection with” a securities transaction, not limited to defrauding purchasers or sellers.⁴³ In this case, the defendants had stolen valuable information from their employers, sullyng their reputation and defrauding them “as surely as if they took their money.”⁴⁴ That was enough to impose insider-trading liability.⁴⁵

Sixteen years later, the *Newman* analysis was confirmed by the Supreme Court in *United States v. O’Hagan*.⁴⁶ The Court endorsed the misappropriation theory, but effectively adopted the Second Circuit standard rather than the *Chiarella* dissent. The focus in *O’Hagan* was on a fiduciary’s use of a principal’s information for personal gain without disclosing that use to the principal. Citing *Newman*, the Court concluded that a misappropriator’s liability was premised on his de-

³⁹ *Id.* at 230–35.

⁴⁰ *Id.* at 240 (Berger, C.J., dissenting).

⁴¹ *Id.*

⁴² *Newman v. United States*, 664 F.2d 12, 17 (2d Cir. 1981).

⁴³ *Id.* at 17–18.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 19.

⁴⁶ 521 U.S. 642 (1997).

ceiving the source of the information, not on a duty running to the investors with whom he traded.⁴⁷

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Judge Van Graafeiland believed that judicial independence imposes an obligation to resolve cases according to strict legal principles. Among them was a requirement to accord proper deference to other branches of government—but also to assess those branches’ actions against the necessary legal and constitutional yardsticks. Striking a balance could be difficult. In a legacy of opinions spanning the spectrum of human interaction, the Judge was persistent in his focus on applying the law to the case at hand, treating each case as a case and not as a platform on which to build new principles of law. Doing so demanded a willingness to decide the issues on the specific facts, not on a preconceived philosophy. That approach, perhaps, best reflected the Judge’s vision of American democracy—a focus on individual liberties guaranteed by the Constitution but principally exercised through elective government.

Following my clerkship, I had a number of opportunities to visit the Judge in Rochester and New York City. I have missed the Judge’s love of the law and his work. Over the years, it set a standard for me, as well as for other law clerks and lawyers, that guided our careers. Above all else, the Judge truly enjoyed being a judge. Sometimes that enjoyment became apparent in his opinions. In *Hormel Foods Corp. v. Jim Henson Productions Inc.*,⁴⁸ for example, the Judge addressed a request by Hormel, the maker of SPAM, for a permanent injunction against Jim Henson Productions for its intended use of a character named “Spa’am” on merchandise related to its film, *Muppet Treasure Island*. In the movie, Spa’am was the high priest of a tribe of wild boars that worshipped Miss Piggy. Henson, thought the Judge, had “hope[d] to poke a little fun at Hormel’s famous luncheon meat by associating its processed, gelatinous block with a humorously wild beast.”⁴⁹ Hormel, however, worried that sales of SPAM would drop off if it was linked with “evil in porcine form.”⁵⁰ Noting that “Hormel should be inured to any such ridicule,” the Judge described a few of the “countless jokes” that played off unfounded suspicions over SPAM’s ingredients.⁵¹ Finding those jokes to be fairly common, the Judge wryly noted, “[O]ne might think Hormel would welcome the

⁴⁷ *Id.* at 651.

⁴⁸ 73 F.3d 497 (2d Cir. 1996).

⁴⁹ *Id.* at 501.

⁵⁰ *Id.* (internal quotation marks omitted).

⁵¹ *Id.*

association [of SPAM] with a genuine source of pork,” before affirming the district court’s denial.⁵²

This dedication is a small tribute to one of Cornell Law School’s preeminent graduates. The true dedication can be found in the countless lives Judge Van Graafeiland touched and the opinions he wrote. That legacy will continue. My hope, in a small way, is to impart to my students the same spark and love of lawyering that the Judge passed on to me.

⁵² *Id.* at 501, 508.