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# NUNC PRO TUNC

**Inside This Issue:**



**Did you know District Judge Susan D. Wigenton is the second female African American District Judge in the history of New Jersey?**

## Justices Agree With Senior District Judge John C. Lifland

**By: Frances C. Bajada, Esq.**

The cold and quiet morning of December 6, 2005 in Washington, D.C. belied the gathering drama that was about to unfold inside the hallowed halls of the Supreme Court of the United States; a drama heightened by the fact that the case would be argued before the newly seated Roberts Court. Among the attendees that day in Court was Senior District Judge John C. Lifland, who had more than just a passing interest in the argument that was about to commence in *Donald H. Rumsfeld v. Forum for Academic and Institutional Rights, Inc. ("FAIR")*. The case had generated much interest; there was not a vacant seat in the Courtroom. Despite his best efforts, Judge Lifland was unable to secure admission to the argument for Joy Lindo and Darrell Cafasso, the law clerks who toiled with him for over a month on the decision that sparked national controversy, a decision that touched on the ever-volatile issue of sexual orientation and the question of academic freedom, during a time of war no less.

Two years prior, Judge Lifland denied a motion to enjoin enforcement of the Solomon Amendment in *FAIR v. Rumsfeld*. The Solomon Amendment, named for its sponsor, the late United States Representative Gerald B. H. Solomon, was introduced as part of the National Defense Authorization Act for Fiscal Year 1995.

Revised in 2005, the Solomon Amendment, 10 U.S.C. § 983 (Supp. 2005), provides that an institution of higher education (including any subelement of such institution) will be denied federal funding if the Secretary of Defense determines that it has a policy or practice that prohibits or in effect prevents the military from gaining access to its campus or students on campus equal in quality and scope to the access provided to other employers. The Amendment carves out an exception to compliance if the Secretary of Defense determines that the institution has a longstanding policy of pacifism based on religious affiliation.

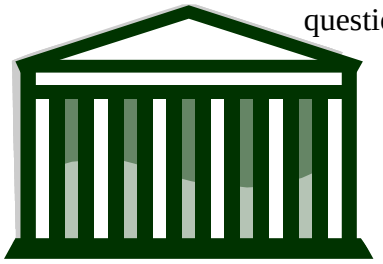
Judge Lifland held the Solomon Amendment constitutional because, *inter alia*, it did not infringe Plaintiffs' free speech and expressive association rights protected by the First Amendment. Plaintiffs (comprised of law schools, law professors and law students) contended that the Solomon Amendment was unconstitutional because, *inter alia*, it "conditions a benefit--federal funding--on the surrendering of law schools' First Amendment rights of academic freedom, free speech

and freedom of expressive association." *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 274 (D.N.J. 2003). Plaintiffs argued that the military's policy that prohibits homosexual conduct, which was codified by Congress during the Clinton Administration and is known as the "Don't Ask, Don't Tell" policy, conflicted with the law schools' policy of nondiscrimination. Unpersuaded by these arguments, Judge Lifland concluded, "the compulsion exerted by the Solomon Amendment, as an exercise of Congress' spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment rights of free speech, expressive association, and academic freedom where that compulsion operates primarily to compel or limit conduct, not speech or expression, and where, to the extent speech or expression is diluted, it can be readily and freely reconstituted, thus preserving the message for propagation by all who wish to express it and to all who may hear it." *Id.* at 275.

The United States Court of Appeals for the Third Circuit reversed and remanded the case to Judge Lifland to enter a preliminary injunction against enforcement of the Solomon Amendment. Finding for Plaintiffs, the Third Circuit held, *inter alia*, that "[w]ithout an injunction, the law schools' First Amendment rights under the expressive association doctrine and the compelled speech doctrine will be impaired during on-campus recruiting seasons." *FAIR v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004).

On March 6, 2006, by unanimous opinion, the Supreme Court reversed the Third Circuit and held that the Solomon Amendment passed constitutional muster. Delivering the Opinion of the Court, Chief Justice John G. Roberts, Jr. explained that, "the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*–afford equal access to military recruiters–not what they may or may not *say*." *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1307 (2006) (emphasis in original). In fact, the Court held that, "[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." 126 S. Ct. at 1301.

When asked about the vindication of his holding in such a monumental case, Judge Lifland was characteristically humble: "[t]his is pretty special, no question."



## Portrait Of A Judge

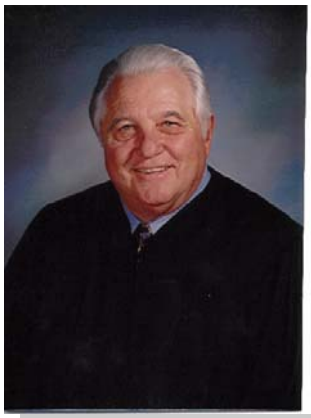
**By: Stacy A. Biancamano, Esq.**

On May 25, 2006, nearly five years after the Honorable Nicholas H. Politan retired from the United States District Court, District of New Jersey, his former law clerks honored his years of distinguished service on the bench in a portrait unveiling ceremony. The portrait of Judge Politan is displayed in the Honorable Dennis M. Cavanaugh's Courtroom to the right of the bench. It serves as a reminder to all those who enter the Courtroom of the character, dedication and integrity of the great jurist who served the Honorable Court for fourteen years.

Judge Politan's remarkable career as a jurist began in 1987, when he was nominated as a United States District Judge by then President Ronald Reagan. When Judge Politan took the bench it marked his return to the very building where he served many years earlier as a law clerk to the Honorable Gerald McLaughlin in the United States Court of Appeals for the Third Circuit.

As a federal judge armed with great intellect and common sense, Politan possessed the uncanny ability to separate the wheat from the chaff when resolving the myriad of cases that came before him. Indeed, Judge Politan quickly earned the reputation among members of the bar for being the federal judge most skilled at settling even the most contentious and difficult civil cases.

While Judge Politan's resolution of numerous complex cases may have eluded the headlines of the local newspapers, his rulings in a number of high profile constitutional cases drew plenty of National atten-



tion. In one of his more memorable cases, Amato v. Wilentz, 753 F. Supp. 543 (D.N.J. 1990), Judge Politan enjoined then Chief Justice Robert Wilentz from censoring the content of the movie "Bonfire of the Vanities." Judge Politan reasoned that the Chief Justice's actions violated the Constitution. In another memorable case, when confronted with the constitutionality of Megan's Law, which required the registration of sex offenders, Judge Politan called it "a knee-jerk reaction" and criticized the Legislature for taking the easy way out by unconstitutionally imposing retroactive registration on people who had already been sentenced. Artway v. Attorney Gen., 876 F. Supp. 666, 685 (D.N.J. 1995). As a result of his decision, Judge Politan was widely criticized by politicians as well as the public. In response to this criticism, Judge Politan told lawyers and law students, at a Rutgers Law School conference on judicial independence, that judges must not allow "public outrage or scorn" to influence their decisions. The Wilentz and Megan's Law decisions exemplify the great courage and conviction displayed by Judge Politan during his career.

In addition to his numerous accolades, Judge Politan is known not only for his tremendous integrity, intellect and common sense, but also for his fun-loving, good-natured and irrepressible personality. During the unveiling ceremony, in a video tribute created by his son Vincent Politan, his former law clerks referred to him as the smartest, most jovial, compassionate and gregarious judge on the bench. James Cecchi, one of the Judge's former law clerks and Master of Ceremonies, thanked the Judge for the opportunities and life lessons provided to all of his law clerks. Former law clerks Cheryl Gross, Kerrie Heslin and Anna Condon-Aguilar reminisced about the daily lunches and how the judge enjoyed being surrounded with good food and good people. John Azzarello, another former law clerk, commented on the Judge's ability to make those around him feel relaxed, especially his law clerks and young lawyers, in a way that demystified the aura of an Article III Judge.

At the ceremony, Don Robinson, affectionately known as "The Chief," perhaps most eloquently summarized the federal family's sentiments for the great judge when he referred to him as the "heart of the courthouse" and told stories of Maestro Politan and his gang. In closing, he turned to Judge Politan and said: "Your pals here today aren't here to say goodbye, we are happy to salute you with bear hugs and say 'Ciao.'"

Today, Judge Politan's judicial legacy lives on, in the hearts of his friends, family, colleagues, former law clerks, and lawyers who appeared before him. The portrait now hanging in Judge Cavanaugh's courtroom is a tribute to Judge Politan's distinguished career as a jurist.

Although he has retired from the bench, Judge Politan continues to strengthen his reputation for settling cases. Through his very successful arbitration and mediation practice, he has already resolved hundreds of securities class actions and will likely resolve hundreds more. Judge Politan's reputation for integrity, intellect and common sense are no doubt secrets to his success. "Ciao" and "Buona Fortuna" Judge Politan.

## The First Female Attorney In The State of New Jersey

**By: Abeer Abu Judeh, Esq.**

The women of New Jersey and in particular female New Jersey attorneys, owe a debt of gratitude to Mary Philbrook, Esq. Her trailblazing fight for admission to the practice of law came at a time when only twelve women had been admitted to practice before the Supreme Court of the United States, only three hundred female attorneys were practicing in thirty states, and law schools were just beginning to accept females.

In Bradwell v. Illinois, 83 U.S. 130, 133 (1872), the Supreme Court, for the first time, ad-

dressed a woman's right to practice law, interpreting it as a privilege and stating: "There are privileges and immunities belonging to citizens of the United States ...[and] it is these and these alone which a state is forbidden to abridge. But the right to practice [law] is not one of them. " In a 7-1 decision, Myra Bradwell was denied the right to become a counselor at law in the State of Illinois. Writing for the majority, Justice Bradley captured that era's view of a woman's primary role in society, stating: "[T]he paramount destiny and mission of a woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."

Mary Philbrook was the second of five children and born in Washington, D.C. on August 6, 1872. Her father, Henry Philbrook, was an attorney and her mother Rebecca Stearns was a suffragist. Soon after Mary's birth, her family relocated to Brooklyn, New York, and finally settling across the Hudson River in Jersey City, New Jersey. Throughout her life, Mary was under pressure to provide for her mother (who later required substantial medical care) and siblings.

Mary never attended college or law school. In fact, she dropped out of high school. However, at that time, New Jersey required no more than a "read" of law at an attorney's office to be granted permission to take the written and oral bar examinations. Passing these examinations guaranteed admission to the Bar. Mary took a stenography class at Drake Business School, whose founder, future assemblyman William Drake, introduced a bill enabling Mary to practice law. This class was all she needed to embark on a legal career. After two years as a stenographer, Mary obtained a position as a legal secretary to Henry Gaede. His partner, future New Jersey Supreme Court Justice James Minturn, encouraged her to become an attorney. Motivated by the financial rewards associated with becoming an attorney, Mary applied to be admitted to practice law. On February 20, 1894, accompanied by Minturn and her mother, Mary presented herself before the Court for admission and was rejected. Similar to the decision in Bradwell, the New Jersey Supreme Court interpreted the right to practice law as that of a privilege, stating "We are of the opinion that until the legislature grants the privilege to women of becoming attorneys, the weight of reason and authority is against the existence of the right."

On March 20, 1895, women's suffrage groups secured a bill allowing women to be admitted to practice in New Jersey. Mary reapplied for admission and was granted permission to sit for the Bar. She passed both the oral and the written exams with honors. On June 6, 1895, she was formally admitted as this State's first female attorney.

Mary's newly acquired right to practice law was only the beginning of a life-long struggle for equality for women. Initially, she worked for Bacot and Read, a law firm in Jersey City, representing suffragettes. She then moved her practice to Newark. The practice was soon converted into one of legal aid. She represented women and indigents in virtually all aspects of the law, including loan sharking, family matters, criminal defense, and landlord and tenant disputes. This experience prepared her for the more challenging position as counsel for the State Board of Children Guardians. Her work with the State resulted in the birth of the juvenile system, by which minors were spared imprisonment in the same facilities as adult criminals.

Given Mary's work with the poor female population, she was appointed to spearhead a nationwide commission to clean up prostitution in the inner cities. She drafted the investigatory report that resulted in the adoption of the Mann Act, prohibiting interstate transportation of immigrant women for purposes of prostitution.

Throughout her years of practice, Mary advocated for equality for women. However, it was not until 1912 that she took on New Jersey's first test case concerning women's right to vote. In Carpenter v. Cornish, 83 N.J.L. 254 (1912), she argued that the New Jersey Constitution of 1776 granted the franchise, i.e., right to vote, to "all inhabitants ... worth fifty cents." However, the New Jersey Supreme Court once again interpreted what was given as a right to a man to be that of a privilege to a woman, thus ruling against Mary's argument.

During World War I, Mary took a position with the War Trade Board. Many female lawyers seized the opportunity to work side-by-side with male attorneys wherever needed on committees, exemption boards and in investigation offices. Their competent

efforts helped lower existing stereotypic barriers. Mary sailed abroad with the Red Cross to help collect lists of refugees. As a Red Cross employee, she returned to the United States in 1919, only to find that women's rights had not advanced.

It was this deplorable state of women's equality that motivated Mary to join the National Women Party (NWP), a militant branch of the feminist movement. NWP members were labeled radical feminists for their uncompromising demands for immediate equality. The NWP fought for "plain justice," utilizing tactics that included daily picketing, dramatic demonstrations and hunger strikes. Their goal was to effectuate the passage of the Nineteenth Amendment, thus guaranteeing women universal equality. The NWP's political maneuvers did not appeal to the National American Women Suffrage Association (NAWSA). The NAWSA was comprised of middle-class women who fought for social betterment of women's conditions, with: "less discrimination with time and on a state-by-state basis." The NWP's more radical approach outcast its members from the more conservative NAWSA.

Following the passage of the Nineteenth Amendment, granting women suffrage, women's rights advocacy subsided. Mary's efforts to amend the New Jersey Constitution to allow for equality between men and women were unsuccessful and earned her more enemies than friends. In an attempt to bypass state-by-state legislation, she focused on international treaty power. This also failed. Mary's interest in New Jersey laws was reignited in 1941, when a commission was appointed to redraft the Constitution. Her letter campaign calling for equality for women was unsuccessful. In 1944, her efforts received a second blow following a bipartisan committee's failure to insist on express women equality in the constitution.

Not one to give up easily, at the age of seventy-five, Mary ambitiously grasped her last straw, organizing a group comprised of New Jersey women organizations to speak on behalf of more than twenty-eight thousand New Jersey women. Her goal was to insert a clause for women's rights in the proposed constitutional reforms. In Peper v. Princeton University Board of Trustees, 77 N.J. 55 (1978), the Supreme Court held that the change in the constitution's language meant exactly what Mary intended it to mean. Writing for a unanimous Court, Justice Morris Pashman declared: "Under our recent 1947 Constitution women were granted rights of employment and property protection equal to those enjoyed by men. This was accomplished by changing the first two words of Art. I, Par. I from 'all men' to 'all persons.'"

Today women constitute an integral part of the American Bar. Nonetheless, the statistics for the year 2004 show that, despite the improved conditions for women lawyers, they remain in the minority. Nationally, 29% of all lawyers are women, 43% of all law firm associates are women and only 17% of all law firm partners are women. In New Jersey, female associates and partners constitute 44% and 16% respectively. Out of 681 United States District judges (37 vacancies), 152 (22%) are females. In academia, 35% of all faculty members are females, 25% of all tenured faculty are females, and 19% of all law school Deans are females. In the corporate arena, female attorneys constitute 15% of all general counsel. Needless to say, much work remains to be done in order to eradicate express and subtle discrimination against women, not only in the State, but nationally.

## Prince of Pleas

**By: Michael Weinstein, Esq.**

"*Haro! Haro! Haro! a l'aide, mon prince, on me fait tort,*" are not words heard often in New Jersey. But they could be. And if they were, they could have serious implications for the person to whom they were directed. That is, of course, once they have figured out what their apparently crazed neighbor is doing sitting there on his knees, yelling, in French, for a prince.

The Clameur de Haro is the ancient Norman custom of crying for justice, and the Channel Islands, off the coast of Normandy, France is the only place where it still survives. Why is this relevant to a District of New Jersey newsletter? Well, the only two places on earth where this unique cry for justice exists is in the independent but related bailiwicks ("states")

of Guernsey and Jersey. Ah, yes, the Bailiwick of Jersey, a community partially comprising the Channel Islands with unique citizens and traditions.

Both the Bailiwick of Guernsey and the Bailiwick of Jersey are British crown dependencies, but neither is part of the United Kingdom. Similarly, New Jersey is part of the United States but talk to any true born and bred New Jerseyian and they feel like we live on our own little island.

Now back to Clameur De Haro. It is an ancient legal injunction of restraint employed by a person that believes they are being wronged by another at that moment. It is often thought to be a plea for justice to Rollo of Normandy, the 10th century founder of the Duchy of Normandy. It survives as a fully enforceable law to this day, but only in the Jersey portion of the Channel Islands and is still used, though infrequently, and nowadays only for civil matters.

The procedure is performed on one's knees before witnesses, in the presence of the wrong-doer and in the location of the offense. The "Criant" with his hand in the air must call out *"Haro! Haro! Haro! À l'aide, mon Prince, on me fait tort."*….Hear me! Hear me! Hear me! Help me, my Prince, for I am being wronged…Following this, the Criant must recite the Lord's Prayer in French which, for this 'joiseian at least, the use of the Clameur De Haro well…may be difficult.

On hearing this, the alleged wrong-doer must cease their challenged activities until the matter is adjudicated in court. Failure to stop may lead to the imposition of a fine, whether they were in the right or not. If the Criant is found to have called Haro without valid reason, they in turn may pay a penalty. Think of it as a loud verbal Order to Show Cause at the site of the alleged wrong.

The ancient custom dates from a time when there was apparently no court and no justice except that dealt out by princes personally. And despite its origins in France, French courts no longer recognize it since the late 18th Century.

Today it is only used in connection with matters involving property, such as in disputes over land ownership or to stop building work. For instance, if an Islander feels their property is being physically threatened, they may go along to the site with two witnesses, take off their hat, fall to their knees and cry to their Duke for justice. Once that has been done, and the court notified within 24 hours, their appeal has to be respected and the alleged trespass or tort must stop until the matter has been sorted out in court. Wouldn't it be nice if things were that simple and cost effective here in our Jersey?

The cry acts as a kind of interim injunction and there is no way the accused wrong-doer can resist it. He has to face court no matter what his excuse or bemusement may be, because the Clameur De Haro is still firmly laid out in Jersey law.

So be warned, should you ever see a client kneeling in a field in New Brunswick, reciting the Lords Prayer in French, you now know why. His efforts may not be without merit.

**Editor: Frances C. Bajada, Esq.**

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