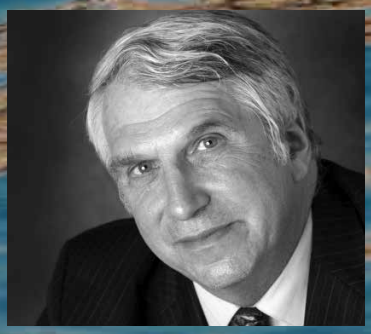
Reflections On Judge Jack Weinstein

By Mitchell Dinnerstein, Esq.



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The walk to justice is not straight and the thwarting of Judge Weinstein's inclusions among those District Court judges who are occasionally designated to the Second Circuit is a deviation from justice. Deprived of his good work at the appellate level, legal practitioners and the public at large have been shortchanged.

Lawyers who practice in the Eastern District of New York sometimes have the good fortune of having one of their cases assigned to the Honorable Judge Jack Weinstein. Judge Weinstein will turn 94 this year. Appointed by President Johnson in 1967, he has been a judge in the Eastern District of New York for 47 years. Judge Weinstein is more than just brilliant and a scholar of the law. He is also a good and great man who tries every day to dispense justice in his Courtroom. I once heard Judge Weinstein say that judges should turn to the Preamble of the United States Constitution to appreciate the Founding Fathers original attention to justice. They wrote, in the very first words in the Preamble, "We the People in order to form a more perfect Union establish justice". The rest of the Constitution is, he reflected, "just commentary" about how to go about doing that. How simple.

It is true that Judge Weinstein has received numerous accolades from the legal community too numerous to mention. His contributions are acknowledged by the highest level of the judiciary. In April of this year, for instance, Justice Steven Breyer of the Supreme Court of the United States, will make a keynote address at DePaul University Law School about Judge Weinstein's impact on topics of justice. At the subsequent symposium, speakers will discuss topics such as what it means to be a judge to seek justice in American courts. Justice Breyer's selection of Judge Weinstein as the subject of his address speaks of Judge Weinstein's life work of trying to bring about justice for people.

For criminal defendants, Judge Weinstein's writings, for example, regarding mandatory minimum sentences may finally bring a groundswell of Congressional action against the barbaric and cruel sentences judges are currently required to impose. It may fairly be said that Judge Weinstein is the conscience of the judiciary and at least, in this area, will eventually help make change of the law.

It is sadly too long in coming. I reflect today about what might have been. Judge Weinstein has remained a District

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Court judge for his entire judicial career. He has not risen to the Second Circuit or for that matter to the Supreme Court, despite his obvious and well recognized talents. If promotions were based on merit only, Judge Weinstein would have been promoted. His talents could have even been better utilized if he was given at least a regular opportunity to make law in an appellate setting.

Judge Weinstein's stature should be that of the great Supreme Court judges, no less than a Holmes or Cardozo or Brennan. Just think how different and how much more responsive to the rights of individuals the law would have been if Judge Weinstein had sat on the Supreme Court for the last 47 years instead of in a District Court. Judge Weinstein's role in formulating the law, although of great value, has been sadly diminished by the fact that he has not advanced beyond the District Court level.

I write today to discuss my view of why Judge Weinstein has not advanced to an appellate court where his judicial imprint would have been greater. It is the common practice in the federal system, for District Court judges to be invited periodically to judge in the nearby Appellate Courts. One would think that a judge as undoubtedly brilliant and creative as Judge Weinstein would have been invited often to preside in the Appellate Court, here in the Second Circuit, to assist that Court in its decision making. He would unquestionably be respected as a positive, intellectual force who could add to the legal literature from the Circuit. Instead, he has been shunned by the Second Circuit. The Second Circuit has demurred from inviting him since 1990.

To review Judge Weinstein's last trip to the Second Circuit, one has to go back to January 8, 1990. In two of the cases argued on that day, *USA v. Riley, 906 F. 2d. 841 (2nd Cir., 1990);* and *USA v. Patrick, 899 F. 2d. 169(2nd Cir. 1990),* Judge Weinstein filed dissenting opinions. A review of those cases and Judge Weinstein's dissents follows.

The issue in *USA v. Riley* was whether to suppress items seized after law enforcement officials were issued a search warrant to seize bank records, business records and a safe deposit box at defendant's residence. The issue for the Circuit was whether the search warrant was sufficiently particularized. The District Court suppressed stating that the warrant was partially unsupported by probable cause and insufficiently particularized. The majority from the Circuit reversed. s*upra at 842.*

Judge Weinstein dissented. Judge Weinstein, critiquing the majority opinion, expressed the following view that the majority apparently took umbrage with:

"The majority opinion constitutes one small step forward in the current war on drugs and one giant leap backward in the centuries-old struggle against general search warrants." s*upra at 846*

Judge Weinstein agreed with the majority that there was sufficient evidence to find that the defendant was involved in drug transactions, only that the majority had improperly accepted a search warrant, that in his view and that of the District Court judge, was written so broadly

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that it constituted a general search warrant and therefore violated the Fourth Amendment.

Judge Weinstein explained that one of the items seized from the defendant's home was an expired rental agreement for a commercial storage locker in a town 10 miles away. The issue for Judge Weinstein was whether there was a basis under the warrant to seize the rental agreement. Law enforcement, based upon the seizure of this rental agreement, obtained a second search warrant for the locker and then obtained additional evidence against Riley. The majority found that the warrant language "other items that constitute evidence of the offenses of conspiracy to distribute controlled substances" was sufficiently particularized to justify the seizure of the rental agreement. Judge Weinstein disagreed. He warned that "vague boilerplate language so construed creates grave dangers to personal liberty". *supra at 847.* On this basis, apparently shared by the District Court judge, Judge Weinstein found that the language of the warrant did not justify the seizure of the rental agreement, and therefore was a general warrant which violated the Fourth Amendment.

Judge Weinstein also dissented in *United States v. Patrick, 899 F.2d.169 (2nd Cir. 1990).* The issue in *Patrick* was whether United States custom officials at the Canadian border in Niagara Falls had probable cause to detain and arrest Patrick who then made an inculpatory statement.

The somewhat unusual facts were not generally in dispute. Taylor, a female, and Patrick, a male, were both walking across a bridge between Canada and the United States. Taylor possessed an American passport. Patrick had a Jamaican one. There was no evidence that they were walking together or were seen in communication with one another, only that they were crossing from Canada to the United States on a well-used footpath between the countries. Each separately told a similar story. Each of them had wanted to get off the bus in the United States, but mistakenly traveled across the border to Canada. Realizing their mistakes independently, they decided to take the short walk back to the United States. There was no evidence that they knew each other or had even spoken to one another.

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Taylor was searched, presumably as a border search. Cocaine was found in her pocketbook. Taylor was placed under arrest. Patrick, who was carrying a black backpack, apparently was also searched to negative results. Still, the majority determined that based on Patrick's story to the customs officials (of failing to get off the bus in the United States), a similar story to Taylor's, custom officials had probable cause to detain, arrest and question Patrick. Then, an inculpatory statement was made by Patrick. The majority found that the statement was admissible, overruling the District Court judge who had found that Patrick's "proximity" to Taylor did not warrant Patrick's arrest. *supra at 171.*

Judge Weinstein agreed with the District Court judge and dissented. He voted to suppress the statement, finding that there was no probable cause to arrest Patrick. He presented his reasoning with eloquent emphasis on the higher causes of the issue.

"Were we not involved in a war on drugs (with the usual threat to civil liberties posed by any such serious national conflict) and had defendant been a citizen of the middle class (instead of a member of three minority classes by virtue of socioeconomic status, color and alienage), the good people who guard our borders would not have so encroached on his freedom, and this case would never have arisen. The lesson must be relearned in every generation—allow the rights of the least powerful to wither and the corrosion of injustice leaches out justice in the rest of society". *supra at 172.*

The majority of the Court has the right, of course, to disagree with Judge Weinstein's analysis. That is, of course, not the point. It would be wrong though, if their disagreement with Judge Weinstein's views, was the reason to blackball him from sitting by designation on the Second Circuit. There appears to be no other recognizable reason, other than that members of the Second Circuit disagreed with his views and then they chose not to designate him for routine Second Circuit assignments. It is not debatable that Judge Weinstein has the intellect and the talent to judge wisely in any Courthouse. It is not just Judge Weinstein though who has been shortchanged by him not being given regular opportunities to judge cases in the Second Circuit. The rest of us – lawyers, scholars and all the people referenced in the Preamble to the Constitution – all would have benefitted from his wisdom. We have all been shortchanged. A