Eye on the Bench

Judges

First Circuit's Next Chief Judge Tough On Crime and Consumer Protection

The U.S. Court of Appeals for the First Circuit's next chief judge will be Jeffrey R. Howard, a George W. Bush appointee who has been on the bench since 2002.

He's ''a straightforward criminal law conservative'' and definitely ''on the law and order side,'' former clerks told Bloomberg BNA.

Howard also takes a special interest in consumer protection cases and is ''open minded'' in employment discrimination cases, former clerks said.

Howard will be an ''excellent'' chief because he has a ''very high emotional intelligence'' and is ''very good at understanding people'' and ''what makes people tick,'' former clerks said.

He is also a history buff who knows ''an incredible amount'' about American and New Hampshire history, and is not afraid to share, former clerks said.

Howard will replace current Chief Judge Sandra L. Lynch in summer 2015.

Policing Sparks Legal Interest. Howard's father was a police officer, and he held a summer job with the police department during his undergraduate years at Plymouth State University, Plymouth, N.H., where he graduated summa cum laude, former clerk John M. Greabe of the University of New Hampshire law school, Concord, N.H., told Bloomberg BNA Feb. 6.

Howard said in 2002 it was this experience working as a special police officer and interacting with judges, prosecutors and defense attorneys that piqued his interest in the law, in an interview with the New Hampshire Bar Association.

Howard spent 16 years as a prosecutor in New Hampshire before joining the federal judiciary. He served the state as New Hampshire Attorney General and the federal government as U.S. Attorney for the District of New Hampshire.

According to Greabe, who clerked during Howard's first six years on the bench, he ''always had a strong voice in criminal cases.''

''He was always very principled in that area'' because ''he really knew that world,'' Greabe said.

But, ''despite what I've learned his disposition was, he was very open-minded in looking for cases where there was fundamental unfairness and certainly would act if there was,'' former clerk and Assistant U.S. Attorney Seth Aframe of the District of New Hampshire told Bloomberg BNA Feb. 9.

Aframe noted that one of his ''very first cases'' as a clerk involved reversing a conviction.

As a young clerk, ''he didn't know me, but he listened, he heard me out, and said, okay, you've convinced me,'' Aframe said.

Judge Jeffrey R. Howard

Notable opinions written by Judge Howard in important areas of law include:

- **Administrative Law:** *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006) (74 U.S.L.W. 1716, 5/30/06), *aff'd* by *Rowe v. N.H. Motor Transp. Ass'n.*, 552 U.S. 364 (2008) (76 U.S.L.W. 1508, 2/26/08)—holding that the 1994 Federal Aviation Administration Authorization Act preempts Maine statutes requiring motor carriers to modify their delivery procedures for tobacco products sold via Internet.

- **Business Law:** *Marcoux v. Shell Oil Products Co.*, 524 F.3d 33 (1st Cir. 2008), *aff'd in part* by *Mac's Shell Serv., Inc. v. Shell Oil Products Co.*, 559 U.S. 175 (2010) (78 U.S.L.W. 1549, 3/9/10)—the First Circuit originally held that a gas station franchisee could recover for constructive termination under the Petroleum Marketing Practices Act without abandoning the franchise, but could not recover for constructive nonrenewal unless the parties actually fail to renew their franchise agreement. The U.S. Supreme Court reversed the constructive termination holding.

- **Civil Procedure:** *Good v. Altria Grp., Inc.*, 501 F.3d 29 (1st Cir. 2007) (76 U.S.L.W. 1156, 9/18/07), *aff'd* by *Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (77 U.S.L.W. 1365, 12/16/08)—holding that the Federal Cigarette Labeling and Advertising Act does not preempt smokers' state law claims alleging unfair and deceptive practices by Philip Morris in its marketing of ''light'' cigarettes.

- **Constitutional Law:** *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310 (1st Cir. 2012) (80 U.S.L.W. 972, 1/24/12)—holding that the market participant exception does apply to the dormant foreign commerce clause, meaning a protectionist Puerto Rican law favoring its construction materials for Commonwealth-operated or -funded projects is proper.

- **Criminal Law:** *United States v. Fazal-Ur-Raheman-Fazal*, 355 F.3d 40 (1st Cir. 2004)—holding that a parent can be prosecuted under the federal International Parental Kidnapping Crime Act for conduct that would not be criminal under state law.

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Cross the T's, Dot the I's. ''It goes without saying that it's important to be right on the law, but it's also important to be detail-oriented'' for Howard, according to former clerk Jason Weida of Jones Day, Boston.

Misspelled words and other typographical errors do get Howard's attention, he said.

''When you read an error-laden brief, you sometimes think, sloppy writer, sloppy thinker,'' Weida said.

Howard ''is able to move past that and not judge a litigant's brief just on the fact that it's poorly written,'' but ''focusing on simple things is important for all litigants,'' Weida said.

Pare Down Arguments. Similarly, Howard has publicly advised litigants to ''think carefully about what arguments to include in a brief,'' Weida said.

Howard ''discourages litigants from bringing a litany of arguments for the sake of quantity,'' he said.

''Less is sometimes more,'' according to Weida.

Parties ''should consider their strongest arguments and focus on them,'' especially in light of the First Circuit's heavy workload relative to the small number of judges, he said.

Howard on Administrative Law

■ *Craker v. DEA*, 714 F.3d 17 (1st Cir. 2013) (81 U.S.L.W. 1507, 4/23/13)—affirming the Drug Enforcement Administration's denial of a University of Massachusetts professor's application to cultivate marijuana for medical research.

■ *One & Ken Valley Hous. Grp. v. Me. State Hous. Auth.*, 716 F.3d 218 (2013)—affirming judgment in favor of Maine State Housing Authority and U.S. Department of Housing and Urban Development that five partnerships owning multifamily housing rental projects were not wrongfully denied increases in their Section 8 payments.

Oral Argument Surprises. Howard is ''never mean, he's never inappropriate, he never grandstands'' at oral argument, Greabe said.

''And you can infer from that, that he doesn't like bluster, he wants people to be helpful to the court, not be putting on a show for their clients,'' he said.

Aframe argues regularly before the First Circuit, complementing his behind-the-scenes experience as a clerk for four years. He said at oral argument Howard ''is always testing to see if there's another way to think about the case.''

''His questions are not straightforward,'' Aframe said.

''Very often'' Howard will give a hypothetical or ask ''have you looked into'' an issue that ''isn't really presented right within the four corners'' of the case, he said.

Attorneys appearing in front of Howard should expect to be surprised sometimes, because Howard ''is always looking for another angle,'' he said.

''I myself have had to say, 'You know judge, I just don't know,' '' Aframe said.

Narrow, 'Laser Focus' Opinions. Howard works hard to build consensus among his colleagues on the First Circuit, according to Weida. He described Howard as a ''bridge builder.''

''He wants the court to be in agreement on decisions when it can be and he works hard for that to happen when possible,'' Weida said.

To that end, Howard approaches issues ''with a laser focus'' to craft opinions ''that address that issue, and don't address anything unnecessary,'' he said.

Howard ''doesn't want to go any further'' than he has to in making a decision, Weida said.

Aframe agreed. In practice, ''I realized to the extent I can narrow my position down to something less controversial, that's the way to go,'' Aframe said.

Greabe said one of the things that ''really impressed'' him about Howard was that ''even when he would have a strong reaction to something, he wouldn't act on it immediately.''

''He's very deliberate, and lets things sit, before he takes a position,'' Greabe said.

''I came to appreciate the value in just being deliberate in responding to things that people feel deeply about and could engender some strong feelings,'' he said.

Don't Throw Stones. Aframe said his own practice today has been strongly influenced by two lessons learned from Howard: first, that ''there's two sides to everything,'' so a judge ''shouldn't be doctrinaire,'' and second, ''don't throw stones because you don't know what's going on behind the scenes.''

At the federal appellate level, no matter what the briefs say and what arguments counsel makes, ''typically, there's 100 other things that aren't presented to you,'' Aframe said.

''When you start taking shots'' at counsel ''instead of deciding the case, you're often in territory where you don't know what's going on, and you can be wrong. And he just would not go for any of that, taking shots at lawyers,'' Aframe said.

Greabe agreed. ''Sometimes you know so little about the negotiations or how things are charged in a certain way,'' and Howard ''just had a really good sense of how the world works.''

Howard on Business Law

■ *Jesús-Rentas v. Baxter Pharmacy Servs. Corp.*, 400 F.3d 72 (1st Cir. 2005)(73 U.S.L.W. 1553, 3/22/05)—holding that pharmacists do exercise sufficient discretion and judgment to be considered professionals exempt from the overtime requirements of the Fair Labor Standards Act.

■ *Citibank Global Markets, Inc. v. Rodriguez Santana*, 573 F.3d 17 (1st Cir. 2009)—finding a settlement agreement binding under Puerto Rico law, despite allegations of contractual deceit under Puerto Rican law of dolus or dolo, based in part on the parties' high level of sophistication.

Above Average Supreme Court Record. Due in part to the small number of judges on the First Circuit, Howard's decisions have been reviewed in an average of

1.25 Supreme Court cases per term since taking the bench in 2002, according to a Bloomberg BNA analysis.

He has never had an opinion reversed outright by the high court. Out of four cases when writing for the majority, he has been affirmed twice and affirmed in part and reversed in part once. His opinion was also once vacated-in-light-of another opinion on federal criminal sentencing guidelines.

When joining the majority but not writing, Howard's ''win/loss'' record is 3-6. However, three of those ''losses'' were also vacated-in-light-of, two of them on federal criminal sentencing guidelines issues.

When writing a dissent, Howard is 0-for-2 on convincing the high court to see his side of things.

Overall, Howard's Supreme Court tally is 6-10, but excluding the vacated-in-light-of cases, it's an even 6-6.

That puts his ''winning'' percentage at a solid 37.5 percent, slightly better than the Supreme Court's overall affirmance rate during the same time period.

Howard on Civil Procedure

■ *Josselyn v. Dennehy*, 475 F.3d 1 (1st Cir. 2007)—holding a habeas petitioner who filed a ''mixed'' petition of exhausted and unexhausted claims didn't have good cause for failing to exhaust his claims before the state court, and that he wasn't entitled to a stay of the federal action while exhausting those claims.

■ *Gray v. Evercore Restructuring LLC*, 544 F.3d 320 (1st Cir. 2008)—affirming the dismissal of a trustee's claims of negligence and breach of fiduciary duty based on the affirmative defense of *in pari delicto*, that the plaintiff bears at least substantially equal responsibility.

Prosecutor's View in Cellphone Search Dissent. Howard weighed in on one of the most hotly anticipated decisions of the Supreme Court in 2014, asking whether a warrant is required to search an arrestee's mobile phone, in *Riley v. California*, 82 U.S.L.W. 4558, 2014 BL 175779 (U.S. June 25, 2014)(83 U.S.L.W. 17, 7/1/14).

The high court's holding that police officers generally must get a warrant before searching the data on a mobile phone recognized for the first time privacy distinctions between digital media and more traditional containers of information.

The First Circuit's opinion addressing the issue also held that a warrant was required, but Howard dissented from the majority view, in *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013)(Howard, J., dissenting)(81 U.S.L.W. 1696, 5/28/13).

Howard wrote, ''most of us would prefer that the information stored in our cell phones be kept from prying eyes.''

''But the question here is whether the Fourth Amendment *requires* this court to abandon long-standing precedent and place such unprotected information contained in cell phones beyond the police when making a custodial arrest.''

''I think that we are neither required nor authorized to rule as the majority has,'' he argued.

Howard acknowledged that his ''fact-specific view'' of the case, in which police ''did not browse through voluminous data in search of general evidence'' but ''conducted a focused and limited search of Wurie's electronic call log'' by ''pressing two buttons,'' does ''not comport with the all-or-nothing approach'' adopted by the majority.

''I share many of the majority's concerns about the privacy interests at stake in cell phone searches,'' but there ''must be an outer limit to their legality,'' Howard wrote.

Later, when the First Circuit denied rehearing en banc, Howard and Lynch both issued opinions concurring in the denial and explaining that their motivation was a desire to get the issue before the Supreme Court sooner.

''Ultimately this issue requires an authoritative answer from the Supreme Court, and our intermediate review would do little to mend the growing split among lower courts,'' Howard wrote.

Another dissent that belies Howard's past prosecutorial perspective on evidentiary issues came in a child pornography case, *United States v. Cameron*, 669 F.3d 621 (1st Cir. 2012)(81 U.S.L.W. 710, 11/20/12).

There, the majority held the defendant's confrontation rights were violated by admitting into evidence reports compiled by an internet service provider without giving him a chance to cross-examine the employees who drafted those reports.

In dissent, Howard argued that the court was stretching Supreme Court precedent too far by holding that reports are testimonial just because they indicate where digital images may be located, and that the technicians were just using ''routine administrative methodology for retrieving stored user account data.''

Howard on Constitutional Law

■ *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008)(76 U.S.L.W. 1771, 6/24/08)—holding that the U.S. military's ''Don't Ask, Don't Tell'' policy for handling gay and lesbian servicemembers does not violate substantive due process, equal protection or the free speech clause of the First Amendment.

■ *Lluberes v. Uncommon Productions, LLC*, 663 F.3d 6 (1st Cir. 2011)—affirming that senior executive owners of Dominican sugar plantations are limited purpose public figures required to prove actual malice for defamation claims against makers of a documentary film, *The Price of Sugar*.

Can Cities Conspire? Another major criminal case Howard addressed early in his career involved a slew of public corruption charges against then-mayor of Providence, R.I., Buddy Cianci. Notably, Cianci had been forced to resign as mayor once already due to a felony conviction, but had earned re-election.

In 2001, Cianci was indicted on 27 federal criminal charges including racketeering, conspiracy, extortion, witness tampering and mail fraud. But he was found guilty of just a single count charging a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

In *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004), the First Circuit upheld the conviction.

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But even though Howard ''had a strong view'' and ''had a strong sense of what might have gone on behind the scenes,'' he dissented on statutory interpretation grounds, Greabe said.

Howard argued that ''a municipal entity, which is incapable of being found to have acted with an unlawful purpose, cannot coherently be regarded as a member of an associated-in-fact RICO enterprise that is defined by the shared unlawful purposes of its associates.''

Howard felt that ''a city could not be an illegal organization,'' Greabe said. ''It could be abused, certainly,'' but Howard felt ''it was inappropriate to use RICO in that way,'' he said.

Protecting Consumers. Howard takes a special interest in consumer protection cases, both Greabe and Aframe said.

During part of his time in the attorney general's office, Howard was Chief of the Consumer Protection Division, Greabe said. He still has a bit of a ''consumer rights bent,'' according to Aframe.

''Allegations of fraud or parties taking advantage of individuals he was very sensitive and receptive to the claims,'' Greabe said.

Howard specifically ''took a very strong interest in'' cases involving predatory credit agencies, Aframe said.

Howard's view is, ''don't take advantage of already distressed people,'' Aframe said.

In *Smith v. Dorchester Real Estate, Inc.*, 732 F.3d 51 (1st Cir. 2013), Howard's opinion for the First Circuit affirmed in part the fraud and breach of fiduciary duty claims of a schizophrenic, functionally illiterate trash collector who was induced into acting as a straw buyer for two overvalued residential properties in an illicit scheme.

On the other hand, in *Wen Y. Chiang v. MBNA*, 620 F.3d 30 (1st Cir. 2010), Howard's opinion for the court affirmed the dismissal of Fair Credit Reporting Act claims because there was no evidence that a consumer credit reporting agency, rather than just the plaintiff himself, had ever contacted the bank.

In *Zimmerman v. Cambridge Credit Counseling Corp.*, 409 F.3d 473 (1st Cir. 2005) (73 U.S.L.W. 1741, 6/14/05), Howard's opinion for the court found a credit repair organization can be sued under the Credit Repair Organizations Act unless it is properly designated as tax-exempt by the IRS and operated as a nonprofit organization.

Discrimination Exists. Another area of law in which Howard is ''open-minded'' is employment discrimination, Aframe said.

''He does believe there is discrimination,'' and ''I know we affirmed large judgments for plaintiffs in some cases,'' he said.

In *Quiles-Quiles v. Henderson*, 439 F.3d 1 (1st Cir. 2006) (74 U.S.L.W. 1576, 3/28/06), Howard's opinion for the First Circuit reinstated a jury's statutorily-capped damages award of $300,000 for a U.S. Postal Service worker who was harassed based on his treatment for depression and retaliated against when he complained. The court rejected the Postal Service's argument that daily ridicule was common in a blue collar workplace.

In *Billings v. Town of Grafton*, 515 F.3d 39 (1st Cir. 2008) (76 U.S.L.W. 1487, 2/19/08), Howard's opinion for the First Circuit found the district court erred in ruling as a matter of law that a town administrator's staring at his secretary's breasts did not make her workplace hostile.

On the other hand, in *Benoit v. Technical Mfg. Corp.*, 331 F.3d 166 (1st Cir. 2003), Howard's opinion for the court affirmed summary judgment for a specialized optical and laboratory table manufacturing corporation on a black Haitian man's claims of discrimination and retaliation, where the employer provided nondiscriminatory reasons of persistent tardiness, frequent absences and unwillingness to work cooperatively with his supervisor.

Howard on Criminal Law

■ *In re Grand Jury Proceedings*, 744 F.3d 211 (1st Cir. 2014) (82 U.S.L.W. 1275, 3/4/14)—holding that prosecutors who empanel a new grand jury following the expiration of an earlier one can't enforce subpoenas duces tecum issued by the first grand jury.

■ *United States v. Kelly*, 661 F.3d 682 (1st Cir. 2011) (80 U.S.L.W. 695, 11/29/11)—holding that a suspect's appearance in court via a writ of habeas corpus ad prosequendum does not, without more, trigger the Speedy Trial Act's requirement that a defendant be indicted within 30 days of being ''arrested or served with a summons,'' because the writ is neither.

U.S., N.H. History Buff. Howard ''has two boys who are just a bit older than my two boys,'' and ''he was always giving hints and tips about places to go in New England,'' Greabe said.

Greabe recalled some off-the-beaten-path Revolutionary War forts Howard recommended that ''a lot of people probably don't even know are there.''

Howard on one occasion organized ''a field trip to western New Hampshire, where he's from'' for ''all the clerks and their families,'' according to Aframe, who clerked for four years.

The outing began with lunch at Howard's house, then moved to the estate of renowned Civil War-era sculptor Augustus Saint-Gaudens in Cornish, N.H., the state's only national park. Howard played tour guide and gave an impressive lecture on Saint-Gaudens during the visit, Aframe said.

The group visited several other locations on a ''Civil War tour of western New Hampshire,'' then Howard took everyone to dinner at an inn, Aframe said.

''We did fun things. That's the environment he fosters,'' Aframe said. They also went to Boston Red Sox games together, he said. ''He's a big sports fan,'' Greabe said.

''People will love working for him'' as chief judge, Greabe said.

'Salt of the Earth.' Greabe described Howard as ''salt of the earth,'' and ''as nice a person as you'll ever meet, to everybody,'' he said.

''He is as nice to the court security officers'' as he is to his fellow judges and clerks, Greabe said.

''There's just nothing about him when you meet him that has anything other than a 'man of the people' demeanor,'' Greabe said.

He specifically mentioned Howard's humility. ''There's no pretense,'' Greabe said.

Reflecting that lack of pretense, Aframe recalled that he first interviewed with Howard ''right after he was confirmed,'' and that ''there was no furniture'' in his office yet.

''It was like, metal folding chairs,'' but it made no difference to Howard, he said.

''He's a humble person, a down-to-earth guy,'' Weida said.

''I think it's almost impossible not to get along with Judge Howard,'' he said.

Public Service Career. Born in Claremont, the native New Hampshirite Howard spent most of his pre-judicial career serving the state.

After earning his law degree at the Georgetown University Law Center, Washington, Howard came right back home and worked as an attorney and then deputy attorney general in the Office of the New Hampshire Attorney General.

He would go on to become the U.S. Attorney for the District of New Hampshire and then, finally, the state attorney general himself. Howard also unsuccessfully campaigned for the state's Republican gubernatorial nomination in 2000.

''Jeffrey Howard has been a servant of New Hampshire's people,'' Sen. Orrin G. Hatch (R-Utah) said at Howard's confirmation.

It's Unanimous. Nominated shortly before the Sept. 11, 2001 terrorist attacks, the law-and-order-minded Howard was confirmed unanimously by the Senate.

Hatch praised Howard at the confirmation for writing and implementing ''one of the nation's first effective comprehensive statewide interdisciplinary protocols to combat domestic violence'' during his ''illustrious period of service'' in the attorney general's office.

''Clearly, Mr. Howard is a leader in the areas of fighting for consumers that were the victims of fraud and the rights of abused women,'' Hatch said.

Then-Sen. Judd Gregg (R-N.H.) called Howard ''an extraordinary public servant in New Hampshire.''

''He has been a prominent figure'' in New Hampshire ''for years,'' Sen. Patrick Leahy (D-Vt.) said.

''Mr. Howard's record is impressive,'' and the ''people of New Hampshire can be proud of this nominee,'' Hatch said.

''President Bush has done right by the people of New Hampshire and New England,'' he said.

BY JEFFREY D. KOELEMAY

Biographical Highlights

Born: Claremont, N.H., 1955

Nominated by: George W. Bush, Sep. 4, 2001; confirmed 99-0, April 23, 2002; assumed office, May 3, 2002

Law School: Georgetown University Law Center, J.D. 1981

Legal Career: Attorney, Office of the New Hampshire Attorney General, 1981-1988; Deputy Attorney General, 1988-1989; U.S. Attorney for the District of New Hampshire, 1989-1993; New Hampshire State Attorney General, 1993-1997; Private practice, 1997-2002.

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