



JUDGE JOSEPH A. GREENAWAY Nominee to the Third Circuit Court of Appeals

President Obama has nominated Joseph A. Greenaway, United States District Court Judge for the District of New Jersey, to fill the seat on the United States Court of Appeals for the Third Circuit that has been vacant since Justice Samuel Alito was elevated to the Supreme Court in 2005. The Third Circuit covers the federal districts within New Jersey, Pennsylvania, and Delaware.

Nominated to the federal district court at age 39 after practicing law as a commercial litigator, a criminal prosecutor, and in-house counsel, Judge Greenaway has developed an extensive judicial record, authoring approximately 850 opinions. In his thirteen years on the bench, Judge Greenaway has developed a reputation as a judge who displays a moderate temperament, evenhandedness toward the government and private litigants, and a keen intelligence. A review of his record shows that he takes the facts of each case one by one, without professing allegiance to a larger interpretational framework or ideology, and that he is willing to examine the nuances of a given case as well as engage any larger constitutional issues at play. On the whole his decisions are well within the legal mainstream, and his opinions display sensitivity to the plight and rights of plaintiffs and criminal defendants.

This report provides an overview of Judge Greenaway's landmark cases and an analysis of his decisions in several key areas of the law. Despite his extensive record on the bench, Judge Greenaway appears to have authored no decisions regarding reproductive rights, LGBT rights, environmental matters, the Second Amendment, or the Takings Clause.

Qualifications

Judge Greenaway has sterling credentials and an accomplished professional history. Born to West Indian parents living in England in 1957, Judge Greenaway's family emigrated to the United States when he was two. Judge Greenaway grew up in New York, first in Harlem and then the Bronx, where his father was a carpenter and his mother was a nurse. He graduated from Columbia College in 1978 and Harvard Law School in 1981, where he received the Earl Warren Legal Scholarship and was a member of the Harvard Law School Civil Rights and Civil Liberties Law Review. He is married to Veronica Blake-Greenaway, an employment attorney and mediator, and they have two children.

Judge Greenaway began his legal career as a litigation associate at the law firm Kramer, Levin, Nessin, Kamin, & Frankel in New York City, then served as a law clerk to United States District Court Judge Vincent Broderick in the Southern District of New York from 1982 to 1983. In 1983, Judge Greenaway returned to private practice at Kramer Levin, and in 1985 he moved to New Jersey to become Assistant U.S. Attorney for the District of New Jersey. Considered one of the leading federal prosecutors in New Jersey prosecuting drug crimes and enforcing drug laws, Judge Greenaway was promoted to Chief of the Narcotics Division in 1989. In 1990, he left the U.S. Attorney's office to become general counsel of Johnson & Johnson, where he worked until joining the bench in 1996.

President Clinton nominated him to serve on the United States District Court for the District of New Jersey in 1995, where he has served since his confirmation by the Senate in 1996. On several occasions, Judge Greenaway has sat by designation on the Third Circuit, authoring one majority opinion in *Dorsey Trailers Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998), discussed below, and joining the majority in four other cases, including a decision affirming summary judgment for defendants against plaintiffs' personal injury claims arising out of the 1979 nuclear reactor accident on Three Mile Island in Pennsylvania. *In re TMI Litig.*, 193 F.3d 613 (3d Cir. 1999). While serving on the federal bench, Judge Greenaway has been an adjunct professor at Rutgers School of Law in Newark, New Jersey, at Cardozo School of Law in New York, and at Columbia College, teaching courses on trial practice and seminars on the Supreme Court. This year, the American Bar Association's Standing Committee on the Federal Judiciary unanimously gave Judge Greenaway its highest rating of "well qualified."

Fourth Amendment

Judge Greenaway has ruled on a number of matters implicating the Fourth Amendment's protection against unreasonable searches and seizures. In his tenure as a federal district court judge, he has been the first arbiter of evidentiary issues involving the legality of police searches and claims of constitutional violations. Overall, his opinions have been thoughtful and well-reasoned, and are grounded in the law and governing precedent. He does not appear to have a bias in favor of or against defendants or police officers, although he routinely holds both parties to the exacting standards required under law. If confirmed, his approach will be a welcome addition to the Third Circuit Court of Appeals. The following section analyzes a handful of Judge Greenaway's rulings in this area of law.

In *United States v. Crandell*, 509 F. Supp. 2d 435 (D.N.J. 2007), Judge Greenaway granted a motion to suppress evidence he found to be the result of an unreasonable search and seizure. In *Crandell*, the police received an anonymous telephone tip about a man with dreadlocks, who purportedly had a gun, wearing blue jeans and a tan shirt. But, rather than going to the specific location identified by the caller, the two officers following the lead instead proceeded to a different area. And, instead of looking for the unnamed man, the two officers looked for a specific person,

Crandell, whom they thought was the man in question. Notably, at trial, one officer testified that he was uncertain whether there was reasonable suspicion to stop Crandell, whether probable cause existed to stop him and whether the officers had the legal right to stop him. As a result, when the officers reached Crandell, they asked for his permission to be searched, which he granted. Judge Greenaway held that the gun the officers found on Crandell was the result of an illegal search and would be excluded. In so ruling, he found that the tip lacked even the most basic reliability and veracity standards set forth in Supreme Court precedent. *Citing Florida v. J.L.*, 529 U.S. 266, 272 (2000) (J. Ginsburg) (“This Court would take the first step down a very slippery slope . . . [a] simple phone call ‘would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search . . . simply by placing an anonymous call.’”). *Id.* at 451. Although the officers asked for consent, they lacked the necessary reasonable suspicion requirement which predicated the desire to search Crandell in the first instance. On appeal, the Third Circuit remanded the case for reconsideration on whether Crandell was “seized” within the meaning of the Fourth Amendment based on a review of the totality of circumstances. *United States v. Crandell*, 554 F.3d 79, 86 (3d Cir. 2009).

In *United States v. Santos*, 340 F. Supp. 2d 527 (D.N.J. 2004), Judge Greenaway determined that officers failed to demonstrate by a preponderance of evidence that a warrantless search of a house was valid. Police stopped Santos, as he was getting into his SUV, because they thought he was engaged in suspicious behavior. After the police asked for his ID and he said it was in his apartment, the police placed Santos under arrest. Although Santos did not give the officers permission to enter his home, they took his keys and walked up and down the street looking for his apartment. Judge Greenaway held that the officers were not “on a mission to procure Mr. Santos’ driving credentials, but rather sought to confirm their suspicion that [he] was a drug dealer.” *Id.* at 537. Although drugs were ultimately found at his apartment, Judge Greenaway held that the initial arrest was illegal and excluded both the drugs and statements made by Santos following his arrest.

Judge Greenaway dismisses claims of illegal searches and seizures when the law and facts require. On a *habeas* petition, Judge Greenaway denied a Fourth Amendment claim by a defendant who had already litigated the matter in state court. In *Lazicki v. Moore*, 2006 U.S. Dist. LEXIS 18157 (D.N.J. 2006), the defendant argued that evidence admitted at trial was the result of a search lacking probable cause. Judge Greenaway, however, held that the claim was barred since the state had given a “full and fair litigation of a Fourth Amendment claim.” *Id.* at *24 (citing *Stone v. Powell*, 428 U.S. 465 (1976)). Also, in *Ramsey v. Dintino*, 2008 U.S. Dist. LEXIS 23493 (D.N.J. 2008), Judge Greenaway held that the statute of limitations barred a defendant from successfully filing a claim for illegal search and seizure in violation of the Fourth Amendment. The claim, filed over twelve years after the allegedly illegal search, did not meet the two-year statutory requirement.

However, in *Hedges v. Musco*, 33 F. Supp. 2d 369 (D.N.J. 1999), Judge Greenaway denied a § 1983 claim alleging a violation of the Fourth and Fourteenth Amendments’ protections against unreasonable searches and seizures that arguably could

have yielded a different result. A young woman was accused of abusing drugs at school because she returned from a bathroom break with glassy, red eyes. She was immediately taken out of class and underwent a medical examination to determine the presence of illegal substances. Both the physical examination and blood tests were negative and showed no use of alcohol or drugs. The plaintiff alleged that there was no reasonable suspicion for the search, including the testing of body fluids. Judge Greenaway found that in the school setting, administrators need only meet a reasonableness standard for searches... *Id.* at 377 (citing *T.L.O.*, 469 U.S. 325, 341 (1985)). But before determining whether their actions were reasonable, Judge Greenaway held that New Jersey law immunized their actions and precluded a claim against them. *Id.* at 377-79. Although the plaintiffs identified ways in which the teachers failed to follow the exact requirements of the law—including a failure to notify the parents of the ‘physician of choice’ provision which would have allowed them to use a family doctor instead, and a failure to provide a written report of the exam results with a 24 hour period—Judge Greenaway ruled that the violations failed to defeat immunity. Interestingly, he also held that the school did not violate the student’s privacy rights, even though the incident was widely discussed at school because (1) there should be no stigma for being found negative for drugs, (2) there was no evidence that the administrators intended to disseminate the incident.

First Amendment

Judge Greenaway appears to take a fact-specific, case-by-case approach to First Amendment claims. His rulings are well-considered and moderate.

In a notable case raising issues in the school speech context, Judge Greenaway protected the First Amendment rights of two students who sought to wear buttons with a picture of a group of Hitler Youth behind the words “No School Uniforms.” *Depinto v. Bayonne Bd. of Educ.*, 514 F. Supp. 2d 633 (D.N.J. 2007). Judge Greenaway reasoned that the case should be analyzed using the school speech framework articulated in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), despite the fact that the defendants argued that a standard more favorable to the school district should be used because the buttons were “lewd, vulgar, indecent or plainly offensive.”

In two cases appealed to the Third Circuit, the court of appeals reversed Judge Greenaway’s holdings that the First Amendment did not apply to the facts presented. The first such case was *United States v. Various Articles of Merch.*, 230 F.3d 649 (3d Cir. 2000). In that case, the United States sought to seize and destroy 264 German and French magazines aimed at nudist enthusiasts intercepted by U.S. Customs and deemed obscene. Judge Greenaway, after noting that the magazines contained photos of nude children and were likely intended for adults who wished to see photos of nude children, blended the standard for child pornography with the traditional obscenity standard and concluded that the materials were obscene and should be destroyed. The Third Circuit, however, overturned this ruling concluding that the materials should be judged solely under the obscenity standard and that standard was not met. The court of appeals determined that the magazines did not appeal to the prurient interest, did not depict sexual conduct, and

had political value because they “champion nudists’ alternative lifestyle, which lifestyle the nudist community may feel is in danger of being curtailed by government regulation.” *Id.* at 658-59.

The second case where a First Amendment decision by Judge Greenaway was reversed was *Galli v. N.J. Meadowlands Comm'n*, 2005 U.S. Dist. LEXIS 20035 (D.N.J. Aug. 16, 2005). In *Galli*, the plaintiff alleged that she had been employed as Director of Environmental Education for the New Jersey Meadowlands Commission for 18 years and was fired from her job by a newly-appointed Democratic administration because she was not an active supporter of the Democratic governor. Judge Greenaway dismissed the case, reasoning that “Plaintiff’s silence is not a form of expression . . . ; it is simply a complete lack of interest in the topic” that is not political speech protected under the First Amendment. *Id.* at *7-8 & n.3. Upon review, the Third Circuit held that “contrary to the conclusion of the District Court, Galli’s failure to support the McGreevey campaign or the Democratic Party – even if because of a general apathy toward, or disdain for, politics – is constitutionally protected under the First Amendment.” *Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 273 (3d Cir. 2007).

Most of the remaining First Amendment claims presented to Judge Greenaway were retaliation claims. Judge Greenaway, in general, has allowed plaintiffs to proceed with First Amendment retaliation claims in the face of motions to dismiss. In *Baldani v. Twp. of Millburn*, 2008 U.S. Dist. LEXIS 74969 (D.N.J. 2008), Judge Greenaway held that the president of the local Police Benevolent Association stated a claim for violation of his First Amendment rights where he alleged that the municipal defendants told him he would not be promoted because he was president of the Police Benevolent Association and where he alleged that he the defendants retaliated against him for “speaking out” on Police Benevolent Association matters. Similarly, Judge Greenaway held that a *pro se* prisoner stated a First Amendment retaliation claim by alleging that his parole officer falsified records in order to send him back to prison for parole violations, after the prisoner complained about his parole officer to his parole officer’s supervisor. *Thrower v. N.J. State Parole Bd.*, 2008 U.S. Dist. LEXIS 87112 at *9-10 (D.N.J. 2008); *but see Lyden v. Tiger*, 2006 U.S. Dist. LEXIS 16576 (D.N.J. 2006) (where a *pro se* plaintiff claimed that a private individual violated his right to free speech, Judge Greenaway dismissed the suit because the protections of the First Amendment only apply to government actors).

Once the facts have been developed, however, Judge Greenaway takes a fact-specific approach, ruling for the plaintiff in some instances and for the defendant in others. Judge Greenaway ruled for the plaintiff in *Tortorella v. City of Orange*, 2007 U.S. Dist. LEXIS 3352 (D.N.J. 2007), and denied a motion for summary judgment as to most defendants in a case where a police officer claimed that the police department retaliated against him after he and his partner broke the “blue wall of silence” by testifying against fellow officers in a police brutality case. He also carefully considered the facts in *Neary v. Borough of Ridgefield*, 2007 U.S. Dist. LEXIS 94439 (D.N.J. 2007), and found that one plaintiff had presented enough evidence to survive summary judgment with respect to the mayor and Ridgefield as to his claim that he was fired from his job as

a police officer because he actively supported the losing mayoral candidate. However, the motion for summary judgment was granted as to a police official, the Police Commission, and the Borough Council because the plaintiff did not prove that his political speech substantially motivated their actions.

Judge Greenaway, however, has also granted defendants' motions for summary judgment. For example, in *Stouch v. Twp. of Irvington*, 2008 U.S. Dist. LEXIS 54055 at *36-43 (D.N.J. 2008), Judge Greenaway considered the case of a police officer who had a long record of complaining about various aspects of police policy, procedure, and work environment and was ultimately fired after psychological assessments found him unfit for police work. After reviewing the facts, Judge Greenaway concluded that summary judgment should be granted for the defendants on the First Amendment retaliation claim primarily because the plaintiff did not show that the retaliation against plaintiff's protected speech motivated the decision to terminate plaintiff's employment. *See also Laffey v. Plousis*, 2008 U.S. Dist. LEXIS 7528 (D.N.J. 2008) (defendants' motion for summary judgment on First Amendment retaliation claim granted because corporation that terminated defendant's employment was not acting under color of state law and because individual defendants had no control over decisions resulting in the adverse employment actions alleged by plaintiff). Similarly, in *D'Aurizio v. Palisades Park*, 963 F. Supp. 378 (D.N.J. 1997), Judge Greenaway ruled against a plaintiff who claimed a group of Republican officials conspired to fire him from his job as a school custodian in retaliation for his having run for a seat on the Borough Council as an independent. After carefully reviewing the evidence, Judge Greenaway granted the defendants' motion for summary judgment because the plaintiff's evidence did not support his claims and the defendants presented ample evidence that they were motivated by budgetary concerns. *Id.* at 383-86.

Employment Discrimination

In race and gender discrimination cases, Judge Greenaway has displayed a sensitivity to the nuanced factual situations of allegedly hostile work environments and a willingness to preserve a plaintiff's claim. For example, in *Newsome v. Admin. Office of the Courts of N.J.*, 103 F. Supp. 2d 807 (D.N.J. 2000), Judge Greenaway granted defendant's summary judgment on plaintiff's Title VII claim because she had not suffered an adverse employment decision in violation of the statute, but he denied summary judgment on her hostile environment sex discrimination claim, finding that a reasonable juror could find that defendants' actions were sufficiently regular and pervasive or severe to create a hostile or abusive work environment. Denying the defendant's motion for summary judgment on another hostile work environment claim in *Brown v. Norton*, 2008 U.S. Dist. LEXIS 41651 (D.N.J. 2008), Judge Greenaway generously viewed facts relating to the claim that were outside of the statutory time period to be included as part of the "entire scope of a hostile work environment claim." *See also Ramirez v. UPS*, 2008 U.S. Dist. LEXIS 105188 (D.N.J. 2008) (preserving plaintiff's failure to promote and hostile environment claims where plaintiff was subjected to racial slurs and taunts in the workplace); *Wallace v. U.P.S.*, 2006 U.S. Dist.

LEXIS 44385 (D.N.J. 2006) (preserving a hostile work environment claim where plaintiff was fired for forging doctors' notes). *But see Fletcher v. Lucent Techs*, 2005 U.S. Dist. LEXIS 22482 (D.N.J. 2005), *aff'd*, 207 Fed. Appx. 135 (3d Cir. 2006) (granting summary judgment for defendant where plaintiff could not show that lay-offs were a pretext for age and gender discrimination); *Farrell v. Planters Lifesavers Co.*, 22 F. Supp. 2d 372 (D.N.J. 1998), *rev'd in part*, 206 F.3d 281 (3d Cir. 2000) (granting summary judgment to defendant where a narrow reading of the facts suggested plaintiff's allegations of sexual harassment were inconsistent; Third Circuit reversed, ruling that the timing of plaintiff's termination was suspicious and retaliatory).

Although his record on disability rights cases is more limited, Judge Greenaway's record in this area shows a characteristic inclination to closely examine the facts presented in the particular case and preserve a plaintiff's claim where appropriate. For example, in *Poveromo-Spring v. Exxon Corp.*, 968 F. Supp. 219 (D.N.J. 1997), Judge Greenaway declined to adopt a magistrate's recommended ruling and denied the defendants' motion to dismiss plaintiff's claims under the New Jersey disability discrimination law where the plaintiff alleged that her boss had not accommodated her needs caused by a brain injury, and defendants instead suggested she voluntarily transfer departments and job responsibilities. In *DeGirolamo v. Alitalia-Linee Aeree Italiane, S.p.A.*, 159 F. Supp. 2d 764 (D.N.J. 2001), Judge Greenaway granted summary judgment to a foreign airline requiring a passenger in a wheelchair to purchase a second ticket for an attendant who would fly with him, ruling that the airlines' policy was reasonable to protect passenger safety, but ordered the U.S. airline to award plaintiff compensatory damages for violations of the Air Carrier Access Act, the regulations of which expressly prohibit a domestic airline from requiring a wheelchair-bound passenger to pay for an attendant if the passenger believes she can travel independently. *Cf. Simon v. Potter*, 2008 U.S. Dist. LEXIS 53686 (D.N.J. 2008) (granting summary judgment for defendant where plaintiff alleged she was inappropriately fired for missing too much work following an injury but did not present evidence that she was disabled and could not show that defendant's explanation was pretext for discrimination).

In a disability discrimination and retaliation case, *Nusbaum v. CB Richard Ellis, Inc.*, 171 F. Supp. 2d 377 (D.N.J. 2001), Judge Greenaway denied the defendant's motion to dismiss and, rejecting Eighth and Eleventh Circuit precedents on the issue, upheld regulations requiring an employer to notify an employee that her disability leave constitutes leave under the Family and Medical Leave Act.

Labor

Judge Greenaway has a limited and somewhat mixed record in labor law. Most of his decisions in labor cases involved default judgments against employers who did not respond to complaints alleging either failure to comply with a collective bargaining agreement or failure to execute an arbitration award. *See Local No. 1, Int'l Union of Elevator Constructors v. Lift-Tech Elevator Serv.*, 2009 U.S. Dist. LEXIS 62442 (D.N.J. 2009); *Peterson v. Cimorelli Constr.*, 2009 U.S. Dist. LEXIS 46093 (D.N.J. 2009); *Int'l*

Union of Painters v. J&C Dev. Group Inc., 2009 U.S. Dist. LEXIS 34168 (D.N.J. 2009); *Ibew Local Union No. 102 v. Dane Constr. Co.*, 2009 U.S. Dist. LEXIS 25717 (D.N.J. 2009); *Sheet Metal Workers Local Union No. 22 v. Star Mech.*, 2009 U.S. Dist. LEXIS 26838 (D.N.J. 2009).

However, one of Judge Greenaway's most well-known decisions, *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295 (D.N.J. 2005), has not been well-received by labor and immigrant rights advocates. The *Zavala* plaintiffs were undocumented immigrants who worked as janitors in various Wal-Mart stores around the country, and they brought suit against Wal-Mart pursuant to the Racketeer Influenced Corrupt Organizations Act ("RICO"), the Fair Labor Standards Act, Section 1985, and common law. The plaintiffs alleged that Wal-Mart and its contractors were engaged in an ongoing criminal enterprise that systematically employed, harbored, and trafficked in the labor of immigrants, aided and abetted the violation of labor laws, failed to pay required wages, overtime and benefits, and concealed their profits and practices from detection. Ruling on Wal-Mart's motion to dismiss the complaint, Judge Greenaway granted Wal-Mart's motion with respect to plaintiffs' RICO and conspiracy claims, but denied it with respect to plaintiffs' FLSA and common law claims. Judge Greenaway ruled that plaintiffs had not pleaded the requisite underlying predicate acts to allege a RICO claim; however, he dismissed the RICO counts without prejudice, granting plaintiffs leave to amend. *Id.* at 302-16. As for plaintiffs' § 1985 claim, Judge Greenaway dismissed it with prejudice because, although he called it a "close question" as to whether § 1985 was intended to reach any class-based animus other than race-based animus, he would not hold that a class defined as "recent immigrants, including undocumented persons" can seek relief under § 1985. Relying on *Plyler v. Doe*, 457 U.S. 202 (1982), in which the Supreme Court observed that undocumented immigration status is the result of the alien's own actions, Judge Greenaway concluded that the fact that plaintiffs bear responsibility for their status strongly suggests that this was not the sort of class-based discriminatory animus that is covered under § 1985. 393 F. Supp. 2d at 318-20.

Plaintiffs' FLSA and common law false imprisonment claims, however, survived the motion to dismiss. Judge Greenaway rejected Wal-Mart's argument that undocumented workers may not seek relief for unpaid minimum wages under the FLSA, refusing to interpret the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), as precluding a claim for work already performed. 393 F. Supp. 2d at 231-25. He also concluded that plaintiffs alleged sufficient facts to suggest an employment relationship between them and Wal-Mart, even if they were directly employed by janitorial services contractors, which allowed them to state an FLSA claim. *Id.* at 326-331. Finally, Judge Greenaway denied Wal-Mart's motion to dismiss plaintiffs' false imprisonment claim, asserting that Wal-Mart intentionally engaged in a widespread, systematic practice of locking janitors in their stores during their shifts, against their will, causing them physical and emotional harm. *Id.* at 332-35.

The one opinion Judge Greenaway authored sitting by designation on the Third Circuit was a labor case. *Dorsey Trailers, Inc., v. NLRB*, 134 F.3d 125 (3d Cir. 1998). In *Dorsey Trailers*, the NLRB found that Dorsey Trailers had violated the National Labor

Relations Act when it entered into a subcontracting agreement without first negotiating with its employees' union representatives. The unanimous panel of the Third Circuit vacated the NLRB's decision in part, ruling that Dorsey Trailers' agreement with a new truck manufacturer was not a subject of mandatory bargaining. Noting that they were mindful that certain subcontracting agreement must be submitted to union bargaining, the court concluded that this subcontract did not warrant union bargaining because Dorsey's reason for entering the subcontract centered around its business viability, not solely its desire to reduce and/or eliminate overtime. *Id.* at 131-33.

Separation of Powers and International Law

Although his tenure as a district court judge has not afforded him many opportunities to rule on matters of executive power or international law, one lecture Judge Greenaway gave in 1998 and one very high-profile decision he issued in 1999 offer insight into his views on the proper role of courts in matters of foreign policy and national security. In a lecture delivered at Rutgers, "Judicial Decision Making and the External Environment," 51 RUTGERS LAW REV. 181 (1998), Judge Greenaway posited that external factors overtly as well as subliminally affect judges' decision making, focusing on the Japanese internment cases to illustrate his point. Judge Greenaway harshly criticized the Supreme Court's deference, in *Korematsu v. United States*, 323 U.S. 214 (1944) and *Hirabayashi v. United States*, 320 U.S. 81 (1943), to the military's unsubstantiated claims of Japanese-American espionage and untested assertions that internment was necessary for national security. According to Judge Greenaway, the Court was wrong to conclude that it should not second guess or review the military's conclusions, even where the president and Congress had asserted that the military's power to address the exigencies of war should be unfettered.

Judge Greenaway castigated Chief Justice Stone for his ruling in *Hirabayashi*, which upheld the preliminary curfew requirement of President Roosevelt's executive orders without proceeding to review their evacuation and internment provisions, because Justice Stone too quickly accepted that the president's and Congress's actions were within their constitutional war powers without reviewing the veracity of the military's claims of potential sabotage and espionage. Moreover, Judge Greenaway contended that Justice Stone was wrong to issue so narrow a ruling: "although focusing the Court's ruling on the narrowest questions follows the strictures of judicial restraint, given the extraordinary circumstances—a constitutional question of first impression—skirting the evacuation issue seems unconscionable." 51 RUTGERS LAW REV. at 187. Judge Greenaway also criticized Justice Stone for manipulating the release of the decision in *Korematsu*, because of his close relationship with the Roosevelt administration, until the day after it announced that the exclusion of Japanese-Americans from the West Coast would end on January 2, 1945.

Judge Greenaway demonstrated deference to the executive branch and the supremacy of its treaty obligations in his 120-page decision in *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999), one of several high-profile cases brought in the

1990s by survivors of Nazi labor and concentration camps to get reparations and damages from companies that participated in and promoted the Nazi war machine. Elsa Iwanowa, represented by Burt Neuborne and Melvyn Weiss, bringing suit on behalf of herself and a putative class of thousands of forced laborers, alleged that Ford Werke, Ford's German subsidiary, coerced them to perform forced labor under inhuman conditions during World War II without compensation. Iwanowa asserted causes of action for violations of the law of nations and for restitution/unjust enrichment and quantum meruit under state law and under German law. Ford, represented by Warren Christopher and Walter Dellinger, moved to dismiss for lack of subject matter jurisdiction, failure to state a claim, nonjusticiability, and principles of international comity.

Judge Greenaway's long, lucid opinion takes a reasoned approach to analyzing a wide range of issues, including customary international law, German supreme court cases, German statutory questions, and numerous treaties concerning the end of World War II and the reunification of Germany in 1991. In this important ruling for human rights litigation, Judge Greenaway concluded that the use of unpaid, forced labor during World War II violated norms of customary international law and that the court had jurisdiction over the claims under customary international law pursuant to the Alien Tort Claims Act. 67 F. Supp. 2d at 438-42. In a matter of first impression in the Third Circuit, Judge Greenaway agreed with the recent Second Circuit precedent, over contradictory precedent from the D.C. and Ninth Circuits, that individuals, not just state actors, can be liable for violations of international law. *Id.* at 444-45. After an extensive review of the relevant treaties spanning 50 years, Judge Greenaway ruled that individual claims for German reparations were cognizable under the London Debt Agreement of 1953, relieving Germany of its debts to the Allies, but that only a government can pursue those claims on an individual's behalf. Accordingly, Iwanowa's international law claims were dismissed for failure to state a claim upon which relief could be granted. *Id.* at 460-61.

Judge Greenaway also granted the defendants' motion to dismiss Iwanowa's state and German law claims of unjust enrichment as time-barred, even when equitably tolling the statute of limitations until the 1991 reunification treaty, which lifted the London Debt Agreement's 38-year moratorium on forced labor claims. *Id.* at 472-82. Finally, Judge Greenaway concluded he was compelled to dismiss Iwanowa's claims on the ground that forced labor claims arising out of World War II raise nonjusticiable political questions because the executive branch considers these claims as falling within the ambit of government-to-government negotiations. Judge Greenaway also concluded that it would be unmanageable for the district court, without guidance from the political branches of government, to identify thousands of claims of people around the world arising out of events that took place more than fifty years ago. *Id.* at 483-88. International comity also dictated that the court abstain from reviewing Iwanowa's claims out of respect for the pronouncements of the German government, which had taken the position that foreign individuals may not assert direct claims for war-time forced labor against private companies. *Id.* at 489-91.

Access to Justice

Judge Greenaway has a balanced record on access to justice. For example, he denied defendants' motions for judgment on the pleadings for, among other things, mootness where a purported class of homeowners filed a fraud suit seeking refunds for the amounts they were overcharged in connection with mortgage refinancings. *Charles v. Lawyer s Title Ins. Corp.*, 2007 U.S. Dist. LEXIS 48212 (D.N.J. 2007). On the other hand, Judge Greenaway ruled that the owner of a trailer truck towed from a Home Depot parking lot was not a Home Depot "consumer" and therefore, lacked standing to assert claims under the New Jersey Consumer Fraud Act. *Space v. BRPM Towing Serv.*, 2007 U.S. Dist. LEXIS 93724 (D.N.J. 2007).

Judge Greenaway's limited record on preemption suggests an inclination to conclude that federal law does not completely preempt state laws. For example, in *Dent v. Cingular Wireless*, 2007 U.S. Dist. LEXIS 44612 (D.N.J. 2007), the plaintiff filed a wrongful termination suit against Cingular after he was fired for having a criminal record, even though he had disclosed his record to Cingular when he was hired. The defendant removed to federal court, and the plaintiff argued that there was no federal question jurisdiction because his state law claims were not preempted by the Labor Management Relation Act. Judge Greenaway granted the plaintiff's motion to remand to state court, concluding that claims that do not require interpretation of the collective bargaining agreement are not preempted. *See also Mersmann v. Continental Airlines*, 335 F. Supp. 2d 544 (D.N.J. 2004) (remanding to state court a flight attendant's state-based discrimination claims because they were not preempted by the Railway Labor Act).

However, in *Panitch v. Continental Airlines*, 2008 U.S. Dist. LEXIS 28067 (D.N.J. 2008), Judge Greenaway read Third Circuit precedent to provide for a broad definition of the term "service" in the Airline Deregulation Act ("ADA"), preempting the plaintiff's state law discrimination claim against Continental Airlines. Panitch, who suffered from a severe nut allergy, filed a suit under a New Jersey disability discrimination statute, claiming Continental refused to accommodate her disability by declining her request that absolutely no nuts be served on her flight. Citing Supreme Court precedent adopting a broad interpretation of the ADA's preemption provision, Judge Greenaway adopted the majority of circuits' broad definition of "service" to include "provision of food and drink." Accordingly, Plaintiff's claim concerned a service preempted by the ADA, and the court granted summary judgment for the defendant. *See also Orlick v. J.D. Carton & Son, Inc.*, 144 F. Supp. 2d 337 (D.N.J. 2001) (holding that the Carmack Amendment to the Interstate Commerce Act completely preempts state law claims against moving and shipping companies because the cause of action was based on loss or damage to shipped goods, thereby articulating a federal question).

Judge Greenaway also has a few noteworthy cases preserving and promoting a defendant's access to counsel. In *United States v. Jones*, 2008 U.S. Dist. LEXIS 64019 (D.N.J. 2008), the U.S. Attorney sought approval to seek the death penalty against the defendants, so the court had appointed counsel learned in the law applicable to capital cases. After the government decided not to seek the death penalty, the defendants

requested that the continued appointment of their same lawyer. Although the statute did not require continued appointment, Judge Greenaway approved the appointment due to the length of their representation and the unusual complexity of the case. *Id.* at *11-12. And in *Sasonov v. United States*, 575 F. Supp. 2d 626 (D.N.J. 2008), Judge Greenaway granted a *habeas* petition and vacated defendant's conviction for bribery where defendant's counsel incorrectly advised him that his charges would not render him deportable and that his guilty plea would not affect his immigration status.

Conclusion

Alliance for Justice commends President Obama for nominating Judge Greenaway to the United States Court of Appeals for the Third Circuit. Judge Greenaway's judicial record suggests he will be a clear voice on the appellate court and will approach each case fairly and with an open mind. Judge Greenaway will bring to the Third Circuit an extensive background in judicial decision making as well as a demonstrated commitment to preserving access to the courts and promoting our constitutional and civil rights.