

Beyond the questions of privacy and free speech raised by the Wikileaks case, which will go unanswered due to BJB's dismissal, the nature of Wikileaks itself is still unresolved. The bank's complaint referred to Wikileaks as "an entity of unknown form," and Wikileaks was not represented by counsel before the court at any time during the dispute.

This case offers several lessons, the most immediate of which is that the Internet significantly complicates the imposition and effects of prior restraints. BJB, and to some extent Judge White, argued that whatever overreach the restraining orders and permanent injunction may have contained were motivated by the difficulty in protecting the legitimate property and privacy interests of the bank and its customers. These attempts backfired; rather than controlling the potential injury pending resolution of the underlying legal issues, the court's efforts brought attention to the dispute and to the disputed documents. Another lesson, however, is that courts will need to exercise caution and creativity if they are to recognize and protect important interests of specific parties in cyberspace without disregarding the substantial implications of their actions for the free flow of information protected by the First Amendment. jsj

Judicial Legitimacy Overcomes the First Amendment:

Kraham v. Lippman

TODD A. CURRY

Are regulations meant to protect the public perception of judicial legitimacy justified even when they may restrict an individual's First Amendment rights of political association? That question was the core issue in *Kraham v. Lippman*, 478 F.3d 502 (2nd Cir. 2007), a Federal Court of Appeals for the Second Circuit case stemming from a New York rule on appointment of fiduciaries wherein the court held that the prohibition of party leaders and their law firms from receiving fiduciary appointments did not violate the First Amendment. While the *Kraham* Court never uses the term judicial legitimacy, its continued discussion of needing to improve the "public confidence in the judicial system" (at 506) clearly identifies this concept as the key issue in this case. In answering the question above, the Court in *Kraham* chose to side with judicial legitimacy at the expense of the First Amendment.

The term fiduciary, which arises from the Latin word *fiduci*, meaning "trust," has come to describe a relationship in which an individual has the legal authority to act for or on the behalf of another individual. The state courts in New York have a rich history of appointing individuals as fiduciaries to serve on the behalf of individuals in a number of different circumstances, including as a guardian for an incapacitated individual, receivers in foreclosure proceedings, and as guardians ad litem for those not able to protect themselves. Fiduciaries are generally not paid by the government, but

instead they are paid by the parties to the proceeding, often a decedent's estate, and as a result the compensation can be quite considerable.

New York judges have often been accused of appointing fiduciaries based on cronyism instead of merit. As early as the nineteenth century, public confidence in the judiciary waned as a result of fiduciary appointments that were perceived to be based on familial relationships or political-party connections. For instance, Albert Cardozo, father of famed New York Court of Appeals judge and Supreme Court justice Benjamin Cardozo, resigned his seat on the New York Supreme Court in Manhattan in disgrace because of his history of questionable fiduciary appointments (Kaufman, 1998). Consequently, New York has attempted to regulate fiduciary appointments. For example, in 1986 the first version of Rule 36 of the Rules of the Chief Judge went into effect. This rule provided that relatives of judges in the New York court system were ineligible for fiduciary appointments (Marks, 2003).

While prohibiting certain types of questionable appointments, the initial version of Rule 36 did not resolve the question of appointments based on partisan ties. This changed after public confidence of the judicial system of New York was called into question when two politically connected Brooklyn attorneys drafted a letter to top Democratic Party officials, claiming that despite their years of service to the party they were no longer being assigned fiduciary positions. The plain implication of the letter, which became public, was that these two men had an expectation of being assigned fiduciary appointments due to their political activity. As a direct result of the public outcry from this scandal, Chief Judge Kaye of the New York Court of Appeals, in agreement with the Administrative Board of the Courts and by approval of the New York Court of Appeals, amended Rule 36 in 2003. Section 36.2(c)(4)(i) provides:

No person who is the chair or executive director, or their equivalent of a State or country political party, or the spouse, sibling, parent or child of that official, shall be appointed while that official serves in that position and for a period of two years after that office no longer holds that position. This prohibition shall apply to the members, associates, counsel and employees of any law firms or entities while the official is associated with that firm or entity.

The amended Rule 36 became an issue in *Kraham*. Bonnie Kraham, a licensed attorney in New York, was elected cochair of the Orange County Democratic Party in 2002 and remained in that position until after the amended Rule 36 went into effect. Following her resignation as a party officer, she found that law firms would not consider her for employment because they would forfeit their ability to receive fiduciary appointments. Kraham then brought suit in the District Court for the Southern District of New York, claiming that amended Rule 36 limited her employment opportunities and violated her First Amendment right to freedom of political association. The district court, utilizing a rational-basis, and not a strict-scrutiny, standard, deter-

mined the restrictions did not violate Kraham's First Amendment rights, a decision now affirmed by the Second Circuit Court of Appeals.

Before the Second Circuit, Kraham argued the district court erred by using a rational-basis standard to evaluate Rule 36, because limiting an individual's ability to gain employment is "by definition significant" (at 510). Writing for the court, Judge Sonia Sotomayor disagreed, holding that the rule limited partisan association only at the margins and that it did not affect the internal party structure or the method in which party leaders are chosen. The rule itself merely provided an imposition on Kraham involving activities outside of her duties as party chair, but did not regulate her actions with respect to the party itself.

While the court agreed that the rule would cause some individuals to make a choice between serving in positions of party leadership and suffering potential economic consequences, or not engaging in partisan activities to preserve their economic interests, the rule fulfills its purpose of eliminating corruption in the fiduciary-appointments process. As such, rational basis was the appropriate standard for review.

The court also held the rule was not overbroad in its restrictions. First, applying the restriction to party leaders and their law firms was necessary because of Chief Judge Kaye's findings that fiduciary appointments were made disproportionately to party leaders and to their law firms, and this restriction was necessary to combat the public perception of impropriety. Second, the two-year period following an individual's service to the party was consistent with other similar restrictions in New York and served the government's goal of increasing judicial legitimacy in the eyes of the public. The court concluded that the government clearly met the requisite standard because of its justifiable goal of increasing judicial legitimacy, even at the expense of the First Amendment.

While Alexander Hamilton's axiom that the judicial branch possesses neither the purse nor the sword is often overstated, there should be little doubt that judicial legitimacy is consistently in the mind of judges. Rule 36 amounts to an attempt by the courts to police their own to protect the judiciary from questions of impropriety when making fiduciary appointments. Under these circumstances the Second Circuit's decision in *Kraham v. Lippman* should be expected, especially when considering that the rule's creator and facilitator are based in the same branch of government, the judiciary. **jsj**

REFERENCES

- Kaufman, A. L. (1998). *Cardozo*. Cambridge: Harvard University Press.
- Marks, L. K. (2003). "Court-Appointed Fiduciaries: New York's Efforts to Reform a Widely-Criticized Process," 77 *St. Johns Law Review* 29.