

## PANEL: A SECOND VIEW FROM THE FRONT LINES<sup>†</sup>

PROFESSOR JOHN C. COFFEE, JR.<sup>1</sup>: Some of you may think that this panel is going to be déjà vu all over again, because it involves somewhat similar factors, somewhat similar facts, and a similar defendant as were involved in the last panel. But we have one major difference: this panel has two gentlemen who need no introduction, and a third who deserves a very generous introduction. But first, the two who need no introduction, who are both flanking me. One, I could listen to all night because he is engaging and fascinating. And the other [Judge Jed Rakoff],<sup>2</sup> I *do* listen to all night, because we have taught a course together on Tuesday nights for twenty-four years, which basically consists of me making a general, theoretical law professor's pronouncement, and him debunking it for the next two hours.

HONORABLE JED R. RAKOFF: It is an easy job. It is such an easy job.

COFFEE: But that will continue. Now the third member of our panel, who deserves introduction—Reed Brodsky,<sup>3</sup> to my right—has just received, this year, the Attorney General's Award for Distinguished Service. That sounds a lot like the Distinguished Service Cross; only the Congressional Medal of Honor is higher, and the Attorney General cannot award that.

So we have an all-star panel. And I am going to push each of them, just because it is fun to push them and watch them push back. I am going to start with Gary [Naftalis].<sup>4</sup> At the outset of the *Gupta* case<sup>5</sup>—not to say anything about the individual facts or communications between you and your client—you challenged the [Securities Exchange Commission (“SEC”)]'s ability to bring an administrative proceeding against your client under a new provision of the Dodd-Frank Act, which greatly extended the ability of the SEC to go after persons who were not brokers or dealers.<sup>6</sup> You succeeded, and it was quite a signal victory and quite an interesting decision.<sup>7</sup> But

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<sup>†</sup> Excerpts taken from panel discussion at the Columbia Law School Symposium: The Past, Present, and Future of Insider Trading: A 50th Anniversary Re-Examination of *Cady, Roberts* and the Revolution It Began (Nov. 16, 2012). The editors of the *Columbia Business Law Review* have added explanatory footnotes where deemed appropriate.

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<sup>5</sup> See *United States v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012) (sentencing memorandum). Following a jury trial, in June 2012 Rajat K. Gupta was convicted of one count of conspiracy and three counts of substantive securities fraud for providing material nonpublic information to Raj Rajaratnam, the Galleon Group hedge fund manager, who had been convicted of insider trading one year earlier. *United States v. Rajaratnam*, 802 F. Supp. 2d 491 (S.D.N.Y. 2012). In October 2012, Gupta received a sentence of twenty-four months' imprisonment. *Gupta*, 904 F. Supp. 2d at 355.

<sup>6</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended Section 8A of the Securities Act of 1933 by providing the SEC with new authority to impose monetary penalties in administrative cease-and-desist proceedings against “any person” for violations of the securities laws. See Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1862 (to be codified at 15 U.S.C. § 77h-1(g)). Before Dodd-Frank, this remedy was available through administrative proceedings against only registered persons; to obtain civil monetary penalties against non-registered persons, the SEC was required to bring enforcement actions in federal district court. See WINSTON & STRAWN LLP, *THE DODD-FRANK ACT: NEW CURBS ON THE STREET 17* (2010), available at [http://www.winston.com/sitefiles/news/8\\_6\\_2010\\_the\\_dodd-frank\\_act\\_webinar.pdf](http://www.winston.com/sitefiles/news/8_6_2010_the_dodd-frank_act_webinar.pdf).

<sup>7</sup> See *Gupta v. SEC*, 796 F. Supp. 2d 503 (S.D.N.Y. 2011). Gupta brought an action seeking declaratory and injunctive relief, challenging the SEC's power to bring charges against him in an administrative cease-and-desist proceeding rather than a civil action in federal court—which it had done for each of the other twenty-eight Galleon-related defendants—on retroactivity and constitutional grounds. The court denied the SEC's motion to dismiss, but limited Gupta's complaint to the equal protection claim. The case was dismissed when the SEC ultimately agreed to bring any future actions in federal court alone. Joint Stipulation of Dismissal, *Gupta v. SEC*, No. 11 Civ. 1900 (S.D.N.Y. Aug. 8, 2011), ECF No. 27.

with the SEC sidelined and unable to bring an administrative proceeding against you, the Department of Justice indicted your client. Did you win a Pyrrhic victory? Does it ever occur to you looking back that maybe [you] should have let that administrative proceeding go forward? Maybe there would have been less chance of an indictment?

GARY P. NAFTALIS: I wish life were so simple. No, I think, regrettably, the U.S. Attorney's Office and the Department of Justice had their own agenda and priorities, and, I think, would have proceeded with this case just as much. I think on this one, Reed [Brodsky], Jon[athan Streeter],<sup>8</sup> and I would have common ground . . . Reed can speak for the Department of Justice. But I think the U.S. Attorney's Office did not want the SEC to proceed at the time they did, for fear of complicating both the existing trial against Mr. Rajaratnam<sup>9</sup> and any future cases with respect to us. And indeed, prior to us "winning" against the SEC, while the administrative case was still proceeding, the U.S. Attorney's Office made a motion in the administrative proceeding to stay the case so it would not proceed, because they did not want it to interfere with their prosecution. So I do not think we had a Pyrrhic victory. I think that was our one victory.

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<sup>8</sup> Partner, Dechert LLP; former deputy chief, Criminal Division, U.S. Attorney's Office, Southern District of New York. Jonathan Streeter participated in an earlier panel at this Symposium. See Symposium, *The Past, Present, and Future of Insider Trading: A 50th Anniversary Re-Examination of Cady, Roberts and the Revolution It Began*, 2013 COLUM. BUS. L. REV. 463 (2013) [hereinafter Symposium].

<sup>9</sup> Evidence regarding material nonpublic information Gupta provided to Rajaratnam figured prominently in the *Rajaratnam* criminal trial. See *Gupta*, 796 F. Supp. 2d at 508 n.1; *Rajaratnam*, 802 F. Supp. 2d at 500–01.