

Draft Remarks  
Court Dinner, May 2, 2006

I can't think of a better gift on such a time of transition than this occasion - a chance to see and speak with all my colleagues, in the presence of good friends, dedicated staff, and my wife, daughters, and a grandson.

I have so many memories of these past forty years. But it is difficult to remember life before Lee. At the beginning, in 1965, we were the smallest possible court of appeals - three judges, no seniors. We were the Odd Trio: Bailey Aldrich, the long string bean; Ed McEntee, stocky and chunky; and me, Mr. In-between. We were three; now we are ten. The judicial population of the circuit was 20; now it approaches 80. We had one law clerk apiece. In 1969, when New Hampshire District Judge Aloysius Connor died, Bailey suggested I take on Peter Saporoff as an additional clerk (and thereby secure his release from Judge Connor's library, in which I understand he had been confined during working hours).

We had no magistrate judges, no staff attorneys, no circuit executive. And, for my first fifteen years, no en bancs. Only when Steve Breyer came on in 1980 were there enough judges to outvote a two-judge panel majority.

Our working tools were quaint . . . typewriters, carbon paper, the U.S. mails, and law books on shelves.

Our routine in Boston was to sit four or five days, both mornings and afternoons, and recess for lunch at nearby Slagle's with its cornbread, where only Ed McEntee was greeted by the elderly waitresses as "Dearie." After argument, we would first stop by at Brigham's, across the street. Ed and I would take out a coffee; Bailey, who had no weight problem at all, would make us suffer, watching him order a mouth-watering sundae. We conferred in his corner office, on the window sill of which were piles of motions papers. This "window sill" was the lineal ancestor of our twenty staff attorneys.

In Puerto Rico, we stayed at the still elegant Condado Beach Hotel, and, in the evening, strolled to the Swiss Chalet for dinner, sometimes in the revered "Governor's Corner." At our old, now renewed, courthouse in Old San Juan, we unpacked our briefs in a small room adjoining what was the chamber of the solitary Article I judge, Don Clemente Ruiz-Nazario, later that of Article III Judge Jose Toledo, or Pepito as we affectionately called him. In those days we often sat with the Third Circuit in nearby St. Thomas in the Virgin Islands, since there seemed to be a lack of judges interested in visiting this part of the world.

Then came the first changing of the guard. Bailey felt strongly that 65 was the time to go senior. Ed was senior to me by a month and was entitled to be Chief Judge. But, reflecting on the state of his health and his interests, in an act of singular grace, he stepped aside for me. Luckily, Lee was at hand to take Bailey's vacancy, and, after a lightning career as a superior court judge and a federal district judge, ascended to his third judgeship in a single year.

My ten-plus years as Chief marked a busy and accelerating time. This was the Warren Era, with its marked expansion of civil rights and civil liberties. We shared every kind of action that could be brought under Section 1983, and the proliferation of federal statutes. The '70's saw us grapple with Arthur Garrity's judgments in dealing with the desegregation of Boston schools ... with the constant help of Sandy, representing the Commonwealth's Board of Education. Draft cases filled our dockets as immigration cases do today. Pornography, too. On one occasion, the three of us filed into a cell-like room off Washington Street to view Deep Throat, much to Ed McEntee's obvious discomfort. In those times, Bailey would keep book on the length of our

opinions. He averaged 5 pages, Ed 7, and I broke the bank with 9. But our output in the late 70's was impressive. Between 1975 and 1980, I ran between 100 and 140 published and unpublished opinions with a somewhat lower number of memoranda and orders.

We didn't have a Circuit Executive until Lee became Chief, because I insisted that we not exclude our clerk, Dana Gallup, from consideration. Chief Justice Burger had set his mind on ruling out any present holder of a clerk position. I finally won. Lee was the catalyst for having a staff attorney. We were on the beach at the Caribe Hilton in Puerto Rico when Lee brought up the subject. He was very persuasive and Marshall Stein soon came aboard.

The linchpin of our court staff was always, for me, Dana, both as clerk and as Circuit Executive. But his successors Richard and Gary and their teams are giving us their deepest commitment and competence in these more complex times. And I can boast of my own chambers, not in size but in quality. Barbara Riegelhaupt has now been with me 23 years and, as of the end of this month, Gail Rice will have rounded out 20 years. No judge has ever been better served. They have enabled me these past two years to end my judicial career as Justice Holmes described it in a farewell talk, like riders in a race who do not stop short when they reach the goal, but enjoy a little finishing canter before coming to a standstill. I have been able to do what I have always liked best, simply writing a whole opinion from start to finish.

All of you have clearly brought to this court the strength of a diversity of strengths and a high level of ability. I cherish my association with you. As was said on the eve of another court, Agincourt, by Henry the Fifth, "We few. We happy few." We are happy, but in a highly special, convoluted way - a band of siblings linked together in a great enterprise. I best expressed my thought in my remarks several years ago in accepting the Devitt award:

As I reflect on my stroll through the three branches, I find myself dwelling on the varying kinds of loyalties exhibited. Each branch nurtures a different kind. Politics and the legislative branch find their life blood in deep and almost absolute loyalty to party colleagues. In the executive bureaucracy, the career professional instinctively develops a dominant loyalty to his section, department, or agency.... In the judiciary, loyalty is not so simple. It is not unitary, but dual. It is compounded, on the one hand, of a deep affection and respect for colleagues and, on the other, a steadfast loyalty to one's view of what the law requires. And the latter trumps the former, without destroying or even weakening it. It is truly a form of tough love.

And what makes this liveable in a day-after-day confrontation with difficult, emotionally draining contests of principle is a genuine collegiality of mutual respect to sweeten the tough love.

Come fall and I shall observe you from a distance. In this time of increasing caseloads, demanding administrative duties, and tension with Congress, my deepest wish for you is that you somehow retain the instinct for unhurried deliberation, openness, and fairness that together characterize our system of appellate justice at its best. As for me, I shall not vegetate. Justice Holmes ended his little sermon on cantering, saying, "The cantering that brings you to a standstill need not be only coming to rest. It cannot be while you still live. For to live is to function." And I - we, Ruth and I - most certainly intend to function.