

The Making of Tomorrow's Appellate Judge

Address by Senior Circuit Judge Frank M. Coffin of the United States Court of Appeals for the First Circuit to a Federal Judicial Center Seminar for New Federal Appellate Judges, New York University, June 25, 1994

You may well ask why the Federal Judicial Center thought it a good idea to have someone like me address you on the vaulting theme of what it means to be an appellate judge. This effort might be viewed as one rivaling in supererogation the carrying of coals to Newcastle. For I have never seen a similar group of new federal appellate judges with more judicial experience in their backgrounds. All of you have been judges prior to your present appointment, except one, who has already served two and one half years on his federal court of appeals. Indeed, you average two prior judgeships apiece. And four of you have had appellate experience. Obviously, there is nothing I can tell you that you do not already know.

But perhaps this very wealth of judicial experience presents us with a priceless opportunity to probe together what it is about appellate judging that is precious, unique, and deserving of our eternal vigilance to nourish and preserve. After nearly thirty years of life as a federal appellate judge, I find that I cherish old insights and welcome new ones and constantly marvel at this elegant, humane, and useful craft that I have been privileged to practice.

So our hope is that this session will help stimulate your own reflection and develop ideas that, when the pressures of your work crowd upon you, will serve the combined functions of worry beads, compass, and aerial photograph of your terrestrial setting and be a stimulant for the retention of a serene perspective. So, when you leave, you will take these remarks with you. I ask that you put them in your desk and take them out and read them in the year 2000 and every five years thereafter.

Although I make no apology for such a session as this, I confess to considerable uneasiness in casting myself as a fount of wisdom, as a Polonius to your Laertes. Instead, I'll borrow my story from another of Shakespeare's jewels, one that celebrates its 400th birthday this year, "The Merchant of Venice."

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Once upon a time in the closing years of the twentieth century, there was a very old and very wise Senator. In his youth and early middle age he had been a distinguished lawyer. He therefore considered one of his highest - and most pleasant - privileges that of nominating candidates for federal judgeships. When we look in on him, he is facing such an occasion. A vacancy had occurred on the Court of Appeals for the circuit covering his state, and the seat "belonged" to his state. This would probably be the last chance he would have to name a circuit judge and he felt a responsibility even greater than usual.

He knew, of course, the general ritual of judge-choosing. There was an infinitely detailed questionnaire to be filled out by the prospective candidate. If he or she were not derailed by that, there was a sifting by selection committees of the senator, the American Bar Association, and the staff of the Senate Judiciary Committee. These days, there was in addition keen sensitivity to any remark or conduct concerning race, sex, and social security taxes. In addition, ethnic, gender, and racial diversity must be weighed. One would think that these were more than enough guarantees of a good pick. But the Senator wondered. He went ahead and appointed his own selection committee and continued to brood.

One evening he sat by his fireside, reading one of his Shakespeare favorites, "The

Merchant of Venice." He liked this, not just because it was still a gripping play, but because of its demonstration of the uses to which strict construction could be put. In the hands of an expert, it could produce any result, the Senator thought. For example, Portia was the ideal judge in Shylock's mind when she held Antonio to his promise to give Shylock, on default of payment of his bond, a pound of flesh, to be cut off nearest the heart. She didn't even read into the contract any obligation to supply a surgeon to stop up wounds. A praiseworthy conservative. Then, however, this "Daniel come to judgment," carrying strict construction a step farther, advised Shylock that the bond gave him "no jot of blood," and that shedding even one drop would cause Shylock's lands and goods to be confiscated. If ever there was a liberal applying a rule of lenity in the guise of strict construction, Portia qualified.

The Senator finished the play, pondered a bit, and soon felt his hair on the nape of his neck prickling. An idea was germinating. Not Portia's judging but the method her father had decreed for choosing her spouse. The caskets. The gold one, which promised the chooser "what many men desire;" the silver, promising "as much as he deserves;" and the lead, demanding of its chooser that he "hazard all he hath."

The next day the Senator called his selection committee together and told them to choose not one but several finalists, making sure that each had competence and character. He told them that he wanted to reserve for himself a final inquiry. In due course the committee had whittled down fifteen or twenty aspirants to four. On an appointed day the four reported to the Senator's inner sanctum in the Capitol.

The Senator sat behind his massive desk, four small boxes placed in front of him. He said, "Ladies and gentlemen. I congratulate all of you. I know I would not make a mistake in sending any of your names to the President. But in making this selection, I face a new fact. All of my past nominees have served, or will have served, most of their judicial tenure in the twentieth century. The person I now nominate, if the President appoints, and the Senate confirms, will serve most of his or her life in the twenty-first century. I must look ahead to the peculiar needs and demands of that era. My present purpose, therefore, is to try to select the candidate who will best fulfill the needs of tomorrow's judge.

"I have determined upon a method. You see these four boxes. They are made of different metals, the intrinsic value of which you must disregard. But each bears an inscription, which relates to the wisdom contained in its interior. Each of you is to look into each casket, absorb its message, and decide which one you choose as the most important. Then you are to tell me succinctly why you chose that casket. I shall then, the fates willing, make my decision. Go now and brood upon the caskets."

While the judicial aspirants are engaged on their solemn, sometimes intense, inquiry, I may tell you what each box contained. The bronze casket bore this inscription: "Who chooseth me shall have as much as he deserves." Inside was this document:

Qualifications

On the occasion of the presentation of a bust of Learned Hand, then seventy-five, to Harvard Law School, New York Court of Appeals Judge Thomas Thacher listed the qualities that had made Hand a great judge: true humility, conscience, learning, and craftsmanship.

These four, with some elaboration, still suffice.

-- Humility, the acknowledgement that one may well be wrong and that the right answer comes only painfully, is a synonym for "judicial temperament" and is far better than brilliance.

-- Conscience, a nose for justice, needs be accompanied by a governing ability to discriminate between those things that involve important principle and those that do not.

-- Learning, the product of a conscientious dedication to the job.

-- Craftsmanship, the development of pridesworthy skills in preparation on both facts and law, in working with law clerks, in advancing understanding from the bench, in fruitful discussion with colleagues, in the research, organization, and writing of opinions, in a sensitive and open collegiality.

The silver casket was inscribed: "Who chooseth me endureth." Its document reads:
Frustrations

Michelangelo, lying on his back for months while painting the ceiling of the Sistine Chapel, would be an expert witness for the proposition that even the most glorious of occupations has its down side. This is true of appellate judging. These are the inherent frustrations of the job.

-- Open-ended work. There is always more that one could read and write about a case. And there are always more cases. Backlog is an ever present problem.

-- Tedium. Sprinkled liberally among interesting cases are lengthy and often indecipherable pro se petitions and annoying dilatory motions, not to mention the inevitable petitions for rehearing. For every case offering an intellectual challenge there are several which range from the frivolous to run-of-the-mill; in such a case, it is hard to write like a Cardozo, Holmes, or Hand.

-- Feelings of inadequacy. Seldom will one finish reading briefs and approach oral argument with a feeling of mastery. One's accumulated wisdom seems never to fit a new case.

-- The constraints of collegiality. A judge may often suffer feelings from annoyance to outrage as he deals with nitpicking or intransigent colleagues. He learns instinctively to temper both thoughts and language to fit the perceived tastes and avoid the predictable prickliness of his colleagues.

-- Defeat. One's failure to persuade a panel, the en banc court, or, on certiorari, the Supreme Court is never easy to abide without bitterness.

-- Anonymity. There are few professions attracting so little public

attention or even professionally valuable feedback.

-- Isolation. Both the nature of the solitary work and the elaborate system of ethical restraints cabin an appellate judge, making her occasionally wonder at the sense of leaving a much more highly paid, gregarious, and unconfined profession.

The gold casket carried this promise: "Who chooseth me shall gain what many men desire." Its document reads:

Rewards

When David Bazelon was appointed to the D.C. Circuit Court of Appeals in 1950, he sought an interview with Learned Hand. As he entered Hand's chambers, the venerable judge came to meet him, exclaiming, "Isn't this just the greatest job in the world!" The ingredients of that conclusion are the following:

-- Opportunity to serve. The privilege of doing what one likes to do and does best in the service of the public good, justice, is the judge's incalculable reward.

-- Independence. The judge serves no client except justice, works for no boss except the court, has no deadlines except those self imposed. This, as any practitioner would concede, is a pearl of great price.

-- Continuous intellectual challenge. There are sustaining satisfactions in an appellate judge's quiet quintette of functions: reading, listening, discussing, thinking, and writing.

-- Creativity. There is the joy of the craftsman in achieving the right result, accompanied by cogency of reasoning and clarity of expression of all that is necessary to say and nothing that is not.

-- Relationships. Substituting for a broader social life are deeply satisfying friendships with one's colleagues as well as with an ever expanding family of present and former law clerks.

-- Respect. Finally, although plaudits and praise are rare, a worthy appellate judge enjoys the respect of his peers, the legal community, and a discriminating segment of the general public. The profession remains an "honorable" one.

The lead casket bore this warning: "Who chooseth me must give and hazard all he hath." The document reads as follows:

Hazards

While appellate judging has its built-in frustrations, which "go with the

territory," the very times we live in are releasing forces which, unattended to, can threaten the core value of appellate judging, the application of a writing judge's (and ultimately his colleagues') best thought to a case. These are some of the looming perils:

-- Caseload pressures. Remorselessly increasing caseloads, bringing with them pressures to adopt shortcuts cheapening the deliberative process, to proliferate the number of judges, and to create additional courts and layers of courts.

-- Non-judicial demands. The bureaucratic- administrative burden on judges includes work for Judicial Conference, circuit, and court committees, meetings, conferences, educational seminars and workshops, and resulting increments of rules, procedures, and reports. These activities already account for roughly a third of a judge's time.

-- Technology. The very availability of electronic mail, fax, video, and other marvels of the cybernetic age can pose a trap for appellate judges if they feel that the capacity to make instant response dictates the desirability of making such response.

-- Complexity. We seem to be in an age of such increasing sophistication and refinement of concepts that even seasoned appellate judges have a difficult time understanding some opinions. The morass of cases applying the sentencing guidelines puts medieval scholasticism into the shadow.

-- Collegiality and civility. These allied values are threatened by the increasing size of appellate courts and the infrequency of a judge sitting with any one colleague.

-- Legislative actions and inaction. Federal and particularly state appellate judges suffer from a lack of adequate support for keeping judicial compensation abreast of increases in the cost of living, and for staff, equipment, and general operations. On the other hand, lawmakers increasingly turn to actions, such as federalizing many crimes, which turn out to add unforeseen burdens to already overburdened courts. Rarely does the public appreciate either kind of problem.

Meanwhile, the four aspirants have been peering into all the caskets and, brows furrowed, have been doing some hard thinking. Finally, the Senator called the meeting to order and called on the first aspirant, who had chosen the bronze casket, with its discussion of qualifications. The candidate drew a long breath and said, "Merit is everything. The whole point of a judicial selection process is to choose on the basis of qualifications. Nothing else is as important." The Senator smiled and said, "You have spoken and chosen in accordance with your own strength. For you are indeed well qualified, having been a highly respected trial judge."

The second candidate, chooser of the silver casket, spoke on the subject of frustrations and said they were well understood and would pose no problem in adjusting to life on an

appellate bench. The Senator nodded and observed, "I note that for ten years you have been a managing partner of a large law firm. I doubt if any judicial frustration can rival what you must have lived through. Life on the bench would be a welcome change."

The chooser of the gold casket said that the rewards of an appellate judge's work and life were very similar to those the candidate had always pursued. The Senator agreed, commenting, "I respect your answer. As a well published scholar and teacher of law for the past two decades, you must feel entirely at home with the rewards described in your casket's document."

Finally, the candidate who chose the lead casket said wryly, "Well, I guess I chose trouble because that's what I've faced during my whole professional career. Anyway, I reason that if these threatened perils are not dealt with satisfactorily, we won't be able to attract people with top qualifications, the frustrations will mount, and the rewards will shrink." The Senator added, "You speak from a certain amount of experience. As a young legal services lawyer, you were trying to increase access to the courts by the indigent. As a partner in your firm, you instituted and headed up the pro bono department. And as a member of the bar association, you were active in trying to persuade its leaders to accept new goals."

The Senator paused, then addressed all the candidates. "You are as promising a group of candidates as I have seen. You have all responded honestly, according to your nature. Each of you has made a valid argument. But I now make my choice. I choose our lead casket candidate. For I see the big challenge for tomorrow's judge as that of preserving what is in essence a highly individualistic profession, reminiscent of the 18th century, under the conditions that will prevail at the start of the 21st century. The essence is a quality of deliberation, both individual and collegial, that is not susceptible to mass production techniques or even high tech devices.

"To preserve this essence requires, in addition to the qualities the rest of you have embraced, a judge with a deep sense of institutional preservation. By this I don't mean the usual establishment-supporting activities or clinging to the status quo. Indeed, this new kind of institutional sense will involve a commitment to undertake activities new to the judiciary to preserve the old essence. I think my winner has that commitment and the proven ability to carry it out. So now I bid you farewell. You will have other opportunities, I have no doubt. And perhaps this experience will prove to have value for you. I would like our successful candidate to stay behind a moment. I have something else to say."

After the three losers had left, the Senator said, "There is another document I want to give you. And I ask you to keep it close to your heart. It tries to address these new threats on the horizon." This was the document:

Cautions for Tomorrow's Judge

1. Be jealous of your time. All cases deserve your best judgment, but not all deserve your full time and energy. Learn to prioritize and discriminate; learn when to delegate and when not to. Rigorously ration your time for non-judicial tasks.
2. Be not afraid of technology. This means not only being open to new devices and processes but also not allowing technology to control you.
3. Choose simplicity where complexity is not necessary to the approach or the result
4. Cultivate collegiality self consciously. What once happened naturally when courts were smaller now must be nourished by careful planning.
5. Help develop an external agenda for your court. This will include

better and more ways to gain the sympathetic interest of lawmakers and the executive branch, an increased and systematic attention to relations with the press, and new ways of reaching out to the public to increase its awareness of the needs and workings of the courts.

6. Above all, preserve a tranquil mind. Serenity, the knowledge that you are doing your best work at a pace that you can keep up with zest, is the sine qua non of an excellent appellate judge. Do not, therefore, think it a source of pride to find yourself immersed in your work day and night without respite and refreshment of mind, body, and spirit. As Justice Brandeis said, "I can do twelve months work in eleven, but not in twelve."

As the candidate finished reading, the Senator rose and said, "There's one more thing I should say. If you think of only all these 'do's' and 'don't's,' you will overlook a key ingredient of the job - joy. The Greeks, some 2,500 years ago, had a definition of happiness that somehow fits: 'The exercise of vital powers along lines of excellence in a life affording them scope.' If you add 'in pursuit of a justice-oriented society,' that would pretty well describe the work you will soon take up."

As the grateful candidate left the Senator's office, walking on clouds, the voice of the old man could be heard, "Get me the White House. . . . Tell the President that we're getting a good judge. . . thanks to Shakespeare."