

Thoughts About "Retirement"

Law Clerk Picnic
Kayatta home, July 2, 2006

(Text reflects free-of-text talk)

This is the latest in a gathering that began in 1970 when I was crudely summoned by David Cohen and co-conspirators to respond to an indictment for larding my opinions with objectionable figures of speech and aphorisms, at the General Glover Inn in Salem, Mass. We have convened since then at our home, Two Lights State Park, House Island, David Cohen's home, Bill Patton's in Harvard, Mass., in 1976, to celebrate Midge's 20 years with me, and in recent years at the Kayattas'. Here, three years ago, I attempted to recall highlights of my times as a new judge, as Chief Judge, as an active, post-chief judge, and as senior judge.

We'll continue, in our head-to-head conversations, to talk about times past, but I want to use the next few minutes to talk about the future, which for Ruth and me is one of life's important "passages" - retirement.

First let me qualify this chameleon term. It doesn't carry the sense that I am being taken out of circulation like a bond; nor that I am cruelly being put out like a feckless batter at the plate. I am still, and shall remain a U.S. Senior Circuit Judge. I have simply vacated chambers. I have a different concept of "retire." Just as one can reroof or reshingle a house, I think one can retire an automobile by replacing well worn tires with different treads.

Now I want to tell you about this current phenomenon - how a non-event morphed into an event-filled year. The non-event was my realization that I had to plan ahead and just shouldn't coast along and suddenly announce a decision to vacate chambers. Gail, balancing parenting, householding, education foundation administration, pursuing graduate work in speech pathology, had to plan. So did Barbara and Judge Lipez, who stood ready and eager to annex her. But he had to make hiring decisions a year ahead of time.

So I made my decision in May of 2005 after discussing it with Gail and Barbara. I told chief Judge Boudin in mid-August. A few days later, the Managing Editor of the Forecaster, a weekly newspaper distributed to stores and supermarkets in our part of the coast, came up with an idea rivaling the brilliance of Horace Greeley, William Randolph Hearst, or Rupert Murdoch. I should add that this gentleman is also the husband of Barbara, Moe Melshak. The result was a story in remarkable depth in the Forecaster of September 15, 2005. The arresting news was that I was to retire a year hence, at the end of September, 2006.

You might consider this in the ho-hum category, but you would have underestimated the power of the Forecaster. Back in 1965 I received moderate newspaper attention when I was appointed to the bench in 1965, a little bit less when I moved into the position of Chief Judge in 1972, and almost none in 2001 when I received the Devitt Award in Washington. But the Forecaster wasn't involved on those occasions. This time, I soon found out what real fame was. At our Hannaford Supermarket, the check-out girl spoke to me for the first time ever, saying, "I see, judge, you've retired." When I dropped in at Mill Creek to get a haircut, I was the center of attention, "So, Judge, you're retiring?" And thus it went with our handyman, my dentist, and the mailman.

This ushered in what has become a splendid year. In March, the presentation of an award to me in memory of our late district judge, Mort Brody, took on something of the nature of a

celebration of this transition. My remarks carried the caption, "My Judicial Key Ring." Why that, you may well ask. Well, we had just been through the confirmations of Chief Justice Roberts and Justice Alito. There had been a lot of talk about "judicial philosophy," often as code language meaning what's ahead for *Roe v. Wade*. I confessed that I had not yet discovered an all-purpose, cohesive philosophy. As my old friend, Ed Godfrey, former dean of UM Law School and Justice, said at my Portland portrait hanging, I, like him, was "a worried, eclectic pluralist."

So, instead, I talked about the keys on my judicial key ring - four elements of decision that had been important to me, in aspiration if not in achievement - first, a transparency and candor that laid out all the essential facts, assumptions and steps of decision; second, a sort of standard safety check - asking myself what would be the result of an opposite decision; third, as Bill Kayatta calls it, incremental decision making to maximize consensus; and, finally, an affirmative, outreaching collegiality based on deeply felt respect for each other's strengths. Of course what I should have added was that the ring itself, a vital part of the apparatus, was my clever of clerks.

In May, my court gave us a lovely dinner in the Courthouse, at which Justice Souter spoke and my old colleague Lee Campbell gave a thoughtful summary of the hallmarks of what he calls "the Coffin Court." Next day, May 3, as all of you know, was my last sitting day and we were signally honored by Justice Breyer, who joined us at the bench. Gail sent you the on-line instructions for listening to his moving remarks.

Now we meet today at our own special event.

Friends ask me a very natural question: do I have any regrets? I do in one sense. I shall deeply miss working with Barbara, my valued partner of 23 years. I could not possibly ask for a better one. And I shall equally miss Gail, who has given real substance to the term, "judicial assistant," and has made life and work so comfortable and effective in so many ways. But I have no regrets about the rightness of my decision. I admit that it goes a bit against conventional wisdom for a judge in reasonably good health to step aside from his vocation. Some of my heroes have been judges who have carried the torch with great distinction to a very advanced age, such as John Wisdom, Elbert Tuttle, and, most recently, Max Rosenn. I am presently the third most senior circuit judge in service, behind Jim Browning of the 9th Circuit and Wilson Cowen of the Federal Circuit, and it might be a temptation to hang on a bit longer.

Conventional wisdom is not necessarily wrong because it is conventional. It stresses the need for the discipline of familiar routine, the fulfilling sense of purpose, and the assurance of role identity that continuation of judicial service provides. But I invoke the words of The Speaker in the book of Ecclesiastes:

For everything its season
A time to scatter stones
and a time to gather them.

I have scattered stones aplenty. Indeed, up to the time I became a judge, I changed roles about every five years - from general solo practitioner to law firm partner and trial lawyer; then to the outreaching, assertive life of a political activist and Member of Congress; then to a more institutionally constrained role as a senior executive branch agency official; then to a more free-wheeling international forum where consensus building was the goal - a fitting preparation for the judiciary; and finally to the less assertive external role of judge. So role identity is not a

problem for me. The time for gathering stones is at hand and beckons.

When I face the prospect that I shall no longer be working on cases, I admit that that does give me pause. For, whether the case is cutting edge or routine, each has its challenge in research of law, record interpretation, decision, or writing. Nevertheless, I realize that cases likely to be assigned to me will not involve huge record reading tasks, multiple defendants, or the most controversial issues. I would not have it otherwise. But, as Barbara and I seek to discern the due process implications of the difference in the Internal Revenue Code between a levy and a set-off, or whether possessing a sawed off shotgun is a "violent felony" such that a sentence of a felon having such a gun triggers a mandatory 15 year sentence, I come to the conclusion that even without such challenges, life will probably still be worth living.

This prospect takes on life as I consider gathering the stones I have scattered. You have received my gathering of the earlier stones in the memoir I sent you. But the stones of the last forty years, the years Ruth and I have spent with you, present a complex and fascinating project. It's not a tale of earth-shaking events or celebrities. It's a story of a largely 20th century life lived in or near the main streams of government in a series of memorable eras. There are 58 journals on my shelves spanning these years. I have just begun to read them. I reflect that to have written them, but never to have read or reflected on them would be to leave a rewarding task unfinished.

In my foreword to my memoirs I quoted the Roman poet Martial: "Our lives are two/ If we can relish our past life anew." T.S.Eliot in "Little Gidding" from "Four Quartettes" puts the thought this way: "We shall not cease from exploration/ And the end of all our exploring/ Will be to arrive where we started/ And know the place for the first time."

But the private agenda contains more. There is our home, a constant blessing, which we appreciate more as the years go on. And the nearby, always available companionship and help of a great family. Most important is the piece de resistance, having one's spouse by his side. As life goes on, the complementarity of strengths becomes not only useful but vital. Ruth can reach higher; I can see better. She can, thankfully, cook; I can drive. More - we enjoy our daily routines, our walks, reading aloud, even shopping. We do not yearn to travel. And I still am attracted to my shop and to carving, and an occasional painting.

So we look forward to this very special chapter.

This is most assuredly not "Farewell." You remain our extended family, extended but close to us. We are so proud of you. We take from all these years a feeling of the incredible variety and richness of a unique friendship community. It is the kind of community where, no matter how many months or even years of absence have intervened, when we see each other again, we continue the conversation where we left off. Our home is always open to you and we need you to help us keep in touch - in person, by phone, letter, or even e-mail. Remember, though I am yielding back my chambers, we are not budging an inch in giving up our pride, our continuing interest, or our delight in our matchless community, our "Clever" of clerks.