

Celebration of Bailey Aldrich's
Commencement of His Tenth Decade
The Harvard Club, Boston
May 7, 1997
Remarks of Frank M. Coffin

On Wednesday, May 6, 1987, some who are here today gathered at the Hotel Lafayette to help Bailey enter into his Ninth Decade. That turned out so well that we decided to repeat the performance every decade from then on. The format was an appeal to the Really Supreme Court, in which Beelzebub and St. Peter were the advocates, each arguing vehemently that Bailey should eventually be assigned to the other place.

After considerable dissecting of Bailey's opinions for or against the establishment, Beelzebub made a clinching argument: a good many of his constituents were lawyers; while they could foresee that hell was their destination, they never bargained for permanent subjection to double costs and attorney's fees.

Well, the upshot was a Solomonic decision. Since neither place would have him, he just would have to stay put. And so he has. Ten years have passed. Today we honor increased achievement and ever expanding affection. It is fitting that district judges are here in such numbers, for Bailey has a foot in both the district and the circuit courts. Indeed, I suspect that the district court claims a special place in his heart. There, at least, he doesn't have to tolerate nonsense from his colleagues . . . that is, not right away.

Today's event not only honors the man but gives us the opportunity to reflect upon almost half a century of court history in this building. The story of Aldrich, Judge, begins with two cases of Aldrich, Esquire. One was a jury trial in a hideously complex case. Throwing to the winds the received wisdom of his seniors, he wrote out and read his closing argument. His elders were infuriated, until, that is, the jury brought in a favorable verdict. The opposing lawyer was not a bad lawyer himself. Joseph Welsh was his name, and he was not reluctant to sing Bailey's praise to Senator Saltonstall when the time came to make a district court appointment.

The other case was not tried. It was settled, some time in the 1940's. Bailey's client did the paying. Not much of a victory there. But let Senator Saltonstall tell the story, as he did at the presentation of the splendid portrait of Bailey by Gardner Cox in 1979. It seems that Senator Langer of North Dakota, a member of the Judiciary Committee, was a stubborn curmudgeon on any appointments east of the Mississippi, particularly any involving Ivy League institutions. With some trepidation, they went to Bailey's confirmation hearing. After the amenities, in Senator Saltonstall's words:

Well, [Senator Langer] waved a piece of paper: "You are all right," he said. "You were the lawyer who when I was libeled by the Boston Herald recommended that I be paid \$25,000." That was the end of the hearing.

In his remarks, Bailey observed, "My beginning, I suspect, makes me the only Judge that you will know of, who used his client's money in order to purchase a Judgeship."

Let's take a look at what our courts were back then, 43 years ago. The district court consisted of five judges (Chief Judge Sweeney, and Judges McCarthy, Wyzanski, Ford, and Aldrich); the court of appeals had three (Chief Judge Magruder, and Judges Woodbury and Hartigan), a total of 8. Now the district court has 14 actives and 5 seniors, and the court of appeals 5 actives with 5 seniors, for a total of 29. In 1954 the total judge strength of the circuit was 12; today it is a total of 50, of whom 16, or about one third, are seniors.

I came on the court of appeals in November of 1965. Ed McEntee had started in September. During that year, the court of appeals had consisted of but one active judge, and the three seniors were not very active. Bailey imported judges from the rest of the country. But he treated them most charitably in assigning opinions. In what is probably an unequalled tour de force, he wrote 50 signed opinions and undoubtedly all of the unsigned ones out of the court's total of some 65.

Bailey began his appellate career with Volume 271 Fed 2d. He saw Fed 2d through its Vol. 999 and Fed 3d, as of the moment, up to Volume 108 -- a total of 837 volumes (at 5 volumes a foot, these occupy some 167 linear feet of shelf space). In these volumes are 801 signed opinions and Lord knows how many P.C.'s.

But Bailey's opinions will not take up many linear feet. They are short. Although they are reader friendly in one way, they make demands on the reader in another. One must read carefully, observe where the commas are, what the referents are, and, occasionally, what the double entendres are. Bailey's good friend, Ammi Cutter, late Justice of the Supreme Judicial Court, told of the origin of this compacted terseness at the portrait hanging. At law school, Bailey served as Case Editor of the Harvard Law Review. In Ammi Cutter's words, "In those days the student editors did not regard as beneath them compact, useful, one-page accounts of interesting recent decisions."

I have one more historical fact that trumps everything I have said. As I reflected on Bailey's 43 years on the bench, almost 38 of which have been spent on the court of appeal, I wondered in what small company he stood. So I called Bill Burchill at the Administrative Office. He reported back to me that his tenure as an Article III judge, including district court and circuit court service, is the longest of any judge in the United States. He is Number 1. He is not the oldest in years, being only Number 24, but is the longest in service. Now, while good health may not necessarily reflect merit, such a quantitative record, combined with Bailey's record of sustained quality, is a compelling basis of both pride and celebration.

Life on our court, thirty plus years ago was golden in its simplicity. One opinion spoke for both the panel and the en banc court. The staff attorney function was performed when Bailey attacked the papers on his window sill that he received from Clerk Roger Stinchfield. We began with traditional diversity, common law cases and felt the sea change bringing us increasing numbers of civil rights and federal statutory cases. With only one clerk and five day argument sessions, we were not idle.

Our circuit conferences had just begun to move beyond an informal meeting and lunch in the courthouse. Our new Circuit Justice, Abe Fortas, pushed us to expand. Expand we did -- dramatically. Our first "biggie," at the Colonial Inn on Route 128 in Wakefield drew not only Justice Fortas, but Chief Justice Warren and Justice Clark. Two years later we had a conference that was equally memorable but for different reasons.

At noon we held a judicial hearing in a Dartmouth College case, involving some 45 students now in jail. They had violated an order not to enter a college building. We denied bail pending a prompt hearing but induced New Hampshire to make defendants available to counsel. Then, toward dinner time, we were picketed by students protesting Puerto Rico draft prosecutions and urging independence. Finally, Justice Fortas had sent his remarks to Judge Aldrich to read. We soon learned why. This was the eve of his resignation from the Court. Bailey carried out his mission with aplomb, although he had difficulty getting past the first sentence, which read, "Many things have happened since last we were together."

What to say about Bailey without driving him out the room from embarrassment? First,

his caring collegiality. He manifested this memorably in the moral support and respect he gave Ed McEntee when we had any case involving a birth control issue and Ed, a loyal Catholic but also a steadfast judge, had to go home and brave a sternly disapproving priest and parish.

Second, the defining themes of his approach to cases. We begin with his instinct for fairness - the quality that led him, though a brand new district judge, to declare a mistrial when Senator McCarthy disobeyed his order and made a flamboyant front door entry into the courtroom in front of the jury. Fairness in turn is informed by rationality. While he is a respecter of precedent and the other restraints under which we work, if both fairness and rationality so dictate, he is open to change, even to reversing one of our own precedents. And if all this leads to a result that will be vilified, he has another weapon in his armory -- courage.

Third, the heights to which he has lifted the bench during oral argument. What I said 18 years ago at the presentation of Bailey's portrait still holds true. I spoke of his typical series of carefully structured questions -- never put to a pro se or a hapless, floundering counsel -- that would escalate, each one narrowing and deepening the focus. I said:

When counsel are prepared, resourceful and undaunted their responses produce a dialogue wonderful to behold. The result may be to wind up in a concession of counsel as to a point or issue, a clarification of a position or occasionally the gracious acknowledgement of the Judge that his problem has been solved. Whatever the specific result, the salient fact is that for a few golden moments oral argument has once again risen to Olympian levels.

Finally, beyond the bench and chambers, and unsuspected by many, is the Bailey who is an inexhaustible source of delight to his friends. This comes through in Gardner Cox's tribute to his portrait subject. Apparently the studio posing sessions were so hilarious that it is a wonder that a likeness - let alone that marvelous portrait - ever emerged. They would sing every song in their considerable repertoire. Cox missed Bailey when the job was done, saying, "For one thing, when I can't remember the words to 'Pale Hands I Love Beside the Shalimar' or 'Whose Baby Are You Dear' there is no one I can turn to."

Bailey and Betty have been wonderful friends to Ruth and me. For years, when cruising the mid-coast of Maine, we would put into Tenants Harbor where Bailey always provided a mooring, refreshment, good conversation, and occasionally help in obtaining some replacement for a defective stove or other equipment. I have included Betty because she is a full partner of the Aldrich achievement, not merely through the heartstrings that bind the two together. It does not take one long to sense that Bailey deeply respects the intelligence and sense of his wife. On one occasion, Bailey was about to issue his opinion dealing with the vulgar graffiti of rebellious students in the late 1960's. Who would cavil at Betty's suggestion that he call a spade a spade rather than paraphrasing the infamous imprecation as "Up against the wall, incestuous son"?

So all of us, Bailey, join you in celebrating a superb life and work as you enter this your tenth decade.

* * *

Now comes the business part of this meeting. The tradition is to bestow some sort of a gift on the guest of honor at this point. But Bailey, as we know, is not traditional. We are sensitive to his aversion to receiving a gift from his colleagues. We want to honor that sentiment with all the acquiescence that it deserves. And so let me make perfectly clear that what we are about to present is not a gift. It is, rather, a lease of personalty, with a provision that it is revocable by the lessors at any time, provided that they (1) give a rational written explanation for their revocation, (2) that they confine their views to a single page, (3) that they use simple

Anglo-Saxon words of not exceeding two syllables, and (4) that they are unanimous. Some irreverent souls might think this is the equivalent of a gift outright, but we refuse to elevate substance over form.

As a token of our respect, affection, and gratitude for his lively companionship over the years, we offer this small but elegant tribute, a physical symbol of the craftsmanship of your work.