

Remarks of Senior Circuit Judge
Frank M. Coffin
at the
Unveiling of the Portrait of
Justice Stephen G. Breyer

United States Courthouse
Boston, Mass., January 5, 1998

To say this is a happy occasion is to put it mildly. The felicitous custom of publicly hanging our senior members was reactivated by our institutional guardian, Judge Campbell. This is our sixth portrait, and it is not of one of our aging seniors but of the 20th judge on our court, one of our aging juniors, who has gone on to bigger things.

This might not have happened had not our active judges realized that our wall could be made to accommodate another portrait, in fact was yearning for another portrait, and that we should strike while the Breyer was still hot. They found a willing and able accomplice, Gary Katzmann, and eventually the deed was done. We are all your debtors.

On Tuesday, December 9, 1980, at 1:30 P.M., I was lying languidly in bed with a head cold, when Judge Aldrich's secretary, Mary Sherman, called to tell me that Steve Breyer had just been confirmed by the Senate. Soon Steve called. We had a good talk, which was interrupted when Senator Kennedy, still his boss, was on the other phone.

This was a most unlikely happening. Ronald Reagan had been elected our next President. President Carter had submitted seventeen judicial nominations to the Senate. Among them was the belatedly submitted name of Stephen G. Breyer. None had a chance. . . except the Chief Counsel of the Senate Judiciary Committee who had played fair with the minority Republicans and had won the support of Senators Thurmond, Laxalt, and Hatch. Even with this support, a considerable obstacle race had ensued. But the Senate had finally done the right thing.

I wrote in my journal, "I could not be happier. Steve is so bright, likeable, not arrogant or dogmatic. Only 42, he is almost young enough to be my son, and will be serving the court, hopefully, for at least 30 years."

Only nine days later, Steve's induction into office took place. In retrospect, I wonder if we worried that this was too good to be true, and that Senators would change their minds. We used Jay Skinner's courtroom, the one we are sitting in now. There were several incidents that will not find their way into the history books. Our clerk, Dana Gallup, who was to read the commission, wondered whether he should read the signature of Ted Kennedy, scrawled above that of Jimmy Carter. I assured him that this was, technically, but not in the real world, surplusage.

Then I administered the oath, misdescribing the position as "United States Court Circuit Judge." But nobody complained. Steve then donned a robe belonging to Lee Campbell, and came to the bench. Senator Kennedy, who had run for President earlier in the year, opined that he never had entertained any doubt about Steve's confirmation, since he had been assured by the same pundits who had predicted his own Democratic nomination for the Presidency. Dean Sacks of the Harvard Law School conveyed the idea that that institution was facing the crisis of its life in living without Steve, full time.

Well, he joined our court, making it a court of four judges. Now -- joy, oh joy -- we could have en bancs. He served with us for nearly fourteen years. I cannot hope in a few minutes to do

a decent job of summarizing what he meant to our court. I shall content myself with saying something about Judge Breyer's style, his opinions, his persona, his intuitive feel of the nexus between the majesty of law and the use of space, and his intellectual legacy to us.

First, his style. He was a consensus searcher. He was always pained, initially, with the prospect that there might be disagreement. He would accept disagreement, but only after all avenues leading toward agreement had been pursued.

Aiding him in finding the seeds of consensus was a formidable equipment -- an exhaustive preparation, a penetrating analysis enriched by imaginative analogies, a unique capacity for instant organizing and articulating the pros and cons of all issues, and a ceaseless curiosity and openness to new thoughts.

Second, his opinions. This is not the occasion to attempt a summary of his contributions to the law as a circuit judge. In administrative law, in antitrust law, and in the sensitive and discriminating use of legislative history, among other fields, his opinions were enduring both within and beyond our circuit. But whether an opinion was cutting edge or not, it always was refreshingly clear and readable. And it would have no footnotes. Finally, Judge and then Chief Judge Breyer went out of his way to write opinions in Puerto Rico diversity cases that were sensitive and faithful to the civil law as proclaimed by the Supreme Court of Puerto Rico, and the commentators it respected.

A third bequest of his time with us: his persona. Judge Breyer had a Promethean energy. This enabled him somehow to carry his load of cases, perform his administrative duties as Chief, break in the new Sentencing Commission, teach at Harvard Law School, keep current his and Richard Stewart's popular casebook on administrative law, give talks and seminars here and abroad, and write and deliver a deeply insightful and provocative Holmes Lecture on the concept of effective risk regulation. What made this prodigious productivity acceptable to the rest of us was his constant sense of the ridiculous and his self-deprecating sense of humor, not to mention a humanizing absentmindedness and bumbling impracticality about such things as fixing boilers, opening oysters, and avoiding collision while riding a bicycle.

A fourth legacy is one we have not yet begun to appreciate in the fullest sense -- his consuming dedication to obtaining a new courthouse and making it both a living monument to the dignity of our justice-seeking profession and one which will be accessible to and cherished by the people for whom the pursuit of justice exists.

Finally, I believe his greatest intellectual legacy to us is his resilient and persistent faith that our institutions, given diligent attention, sensitive maintenance and occasional fine tuning, provide a remarkably workable framework for carrying out the aspirations and dictates of our Constitution.

Our story stops as of August 3, 1994, when Judge Breyer became Justice Breyer. We almost lost him a year earlier when the President, after an agonizing period, finally nominated Judge Ruth Bader Ginsburg. I wrote Steve that perhaps his most shining moment was when he so gracefully commented that Judge Ginsburg was "a good pick." The rejoinder was vintage Breyer:

It wasn't that difficult to say that Ruth was a good pick -- occasionally, I can try to be objective!

What makes today's occasion a uniquely happy event is that we are celebrating a former member in mid-career. We have noted the hallmarks of his fourteen years as a member of a lower federal court, where all of us are ever mindful of the written and unwritten rules, practices, principles, and protocols that channel and constrain our judgments. Now he has begun his service on the High Court where occasionally he will face issues where time has made ancient good

uncouth and new law must be wisely fashioned. Moreover, he will face some issues where the crying need is somehow to harmonize views that appear disparate, and others where the need is leadership in developing new views. And the trick will be to know which issues fit each need.

I stand in awe as I contemplate the challenges and opportunities to be faced by the Supreme Court during the first two decades of the next century and millennium. For Justice Breyer will be only 82 in 2020. When the time comes to hang his portrait in the Supreme Court, I look forward to hearing how splendidly all of this has worked out. Then I shall drop in on Bailey Aldrich in his chambers and we shall comment about how gracefully Steve has aged.