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THE JUDICIAL APPOINTMENT PROCESS: HOW BROKEN IS IT?†

Stephanie K. Seymour*

I chose this topic, the judicial appointment process, because of the significance of the issue to our constitutional form of government. The Constitution creates three branches of government—the executive, the legislative, and the judiciary—and mandates that the President appoint members of the judiciary, with the Senate's advice and consent. The history of judicial appointments makes clear that the process has always been political, and the reason for political battles over appointments is patent. The significance of the President's power of appointment cannot be overstated. The more than 800 positions on the federal bench, each bestowing life tenure, present the President with an opportunity to create a legacy that far outlasts his or her time in office.[1] The magnitude of this power has long been understood in the context of Supreme Court appointments, but recently we have begun to see greater recognition of the impact of district and circuit court appointments as well.[2] Some argue this heightened attention is deserved because increasingly restrictive rules of certiorari in the Supreme Court have rendered the courts of appeals "the courts of last resort in ninety-nine percent of the cases that come before them."[3]

I have no quarrel with the political nature of the appointment process. In my judgment, what is broken about the process is the increasing tendency of the Senate to unduly delay individual appointments, particularly to the courts of appeals. This delay impacts the ability of the judiciary to fulfill its responsibility to provide expeditious judicial review. I will first describe some of the history of the selection of federal judges to underscore that the current contentiousness between the President and the minority party in the Senate is merely politics as usual, albeit on an escalated scale. Then I will address

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† Lecture delivered February 19, 2004, at the University of Tulsa College of Law, where Judge Seymour was the Distinguished Judge in Residence. Reprinted, with permission, from 39 TULSA L. REV. 691 (2004).

* Judge, Court of Appeals for the Tenth Circuit. I gratefully acknowledge the invaluable assistance received from my law clerk, Anne Harden, in the preparation of this lecture.

[1] *See* John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 27 (2003) (noting the number of lifetime judicial positions subject to presidential appointment and commenting on their import).

[2] *See* William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 SANTA CLARA L. REV. 391, 482 (2002) (stating that while the Supreme Court receives the lion's share of public attention, district and circuit court appointments are gaining in importance among voters).

[3] Maltese, *supra* note 1, at 27; *see* Ross, *supra* note 2, at 469.

the increasing slowdown in the appointment process and the direct impact it has on the business of the courts, and therefore on the public.

POLITICS AS USUAL

Article II of the Constitution dictates that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint"[4] members of the federal judiciary. The division of the powers of nomination and confirmation reflects the founders' deep concern over the concentration of power. James Madison famously cautioned, "Ambition must be made to counteract ambition."[5] The Senate's advice and consent was thus presented as a check on the tremendous appointment power placed in the executive.[6] As Alexander Hamilton made clear in *The Federalist Papers*, it was also meant to promote transparency and responsibility in the appointment process:

> [A]s there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature, the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors. The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate; aggravated by the consideration of their having counteracted the good intentions of the Executive.[7]

By constitutional design, therefore, the appointment process is one of public political wrangling between the branches. The current state of affairs is thus neither unexpected nor, perhaps, even unintended.[8]

Ideological debates over nominations have been around since the nation's founding. The importance of a nominee's judicial philosophy was not lost

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[4] U.S. CONST. art, II, § 2, cl.2.

[5] James Madison, *The Federalist No. 51*, in THE FEDERALIST 342, 344 (Paul Leicester Ford ed., Henry Holt & Co. 1898).

[6] *See* Alexander Hamilton, *The Federalist No. 76*, in THE FEDERALIST 505, 508-09 (Paul Leicester Ford ed., Henry Holt & Co. 1898) (noting that the cooperation of the Senate "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity").

[7] Alexander Hamilton, *The Federalist No. 77*, in THE FEDERALIST 511, 513-14 (Paul Leicester Ford ed., Henry Holt & Co. 1898).

[8] *See* Michael J. Gerhardt, *Federal Judicial Selection as War, Part Three: The Role of Ideology*, 15 REGENT U. L. REV. 15, 17 (2002-2003) (arguing that criticism of political tension between branches is unfounded, as the Constitution "pits presidents and senators against each other").

on the first Senate, which used the tools of advice and consent as a check on executive power. "In exercising this check, senators generally viewed their core responsibility as determining the fitness of a judicial nominee, and they generally considered ideology as central to their evaluations of a judicial nominee's fitness."[9] The Senate's first "political" rejection of a president's judicial nomination took place in 1795 when it refused to confirm President Washington's selection of the eminently qualified former Associate Justice John Rutledge as Chief Justice because many senators disagreed with his position on this country's treaty with England.[10]

Despite placement of the appointment power primarily in the hands of the executive, "the founders conceived of a major role for the Senate in the selection process."[11] The Senate was expected to give advice as well as consent, and it has revolted when the President failed to consult individual senators before selecting a nominee from their respective states. When President Washington sought to fill a position in Savannah without first conferring with Goergia's Senate delegation, the entire Senate balked and refused to accept the President's selection, effectively forcing the President to withdraw his nomination.[12] This turn of events provides insight into early expectations in the appointment process.

> To the President, the [Georgia] senators signaled an intention to regard prenomination consultation as a norm of the confirmation process. The other senators signaled to their Georgia colleagues that they could be counted on to support them in their decision, and, consequently, that *they* would be worthy of similar support in the future. The president, on the other hand, by withdrawing the nomination, clearly signaled to the whole Senate that he recognized the validity of the advice norm, and would abide by it.[13]

The identification of candidates for judicial office and eventual selection of nominees is a delicate political process. Presidents have historically placed primary control over the selection process in a single member of the administration. President Washington entrusted his Secretary of State with selection, and sub-

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[9] Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 DUKE L. J. 1687, 1705 (2001); *see* Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, 36 U. CAL. DAVIS L. REV. 619, 624-25 (2003); Maltese, *supra* note 1, at 10.

[10] Chemerinsky, *supra* note 9, at 625; *see* Maltese, *supra* note 1, at 10.

[11] SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 6 (1997).

[12] Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS J. 75, 92-93 (2001).

[13] *Id.* at 93 (footnote omitted).

sequent presidents followed suit until President Pierce transferred authority to his Attorney General in 1853,[14] where it remained until recent times, when the President began using advisors in the White House to assist in the process.

Several presidents added innovations. For example, President Eisenhower invited the American Bar Association (ABA) to play a formal role in the process,[15] which continued until President George W. Bush took office,[16] and President Carter employed merit selection commissions for circuit judgeships.[17] Each president identifies which members of his administration will participate, and those officials seek senatorial recommendations, particularly from senators representing states where vacancies exist. Governors, members of Congress, and party loyalists suggest candidates from time to time. Administration officials perform an initial screening and then send surviving candidates a questionnaire. The Justice Department and the ABA Standing Committee on Federal Judiciary receive copies of completed questionnaires, and the ABA rates the candidate. FBI screening follows. Then the Attorney General sends the nomination to the President, and if he approves, the nomination proceeds to the Senate Judiciary Committee, and ultimately to the Senate floor.[18]

The nominees that have emerged reveal the persistent import of politics and patronage in the selection process. Presidents Washington and John Adams appointed Federalists like themselves.[19] Nominations became particularly "party-dominated" under Presidents Jackson and Van Buren, and party loyalty prevailed in the selection process through the Tyler, Polk, Taylor, and Fillmore presidencies.[20] All presidents principally have nominated members of their own party, and President Eisenhower even had all of his nominees cleared by the Republican National Committee.[21]

The first president to recognize the significance of appointments in furthering a policy agenda may have been President Lincoln.[22] By 1896, that awareness had grown, and the Democratic platform laid blame for the national deficit on the Supreme Court's decision striking down the income tax.[23] Presidents Theodore Roosevelt, Taft, Wilson, and Coolidge were also cognizant of the role of the courts in promoting their policy goals,[24] and President

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[14] GOLDMAN, *supra* note 11, at 6.
[15] *Id.* at 115.
[16] *See* Gerhardt, *supra* note 8, at 25. The current administration removed the ABA from its screening process, but Senate Democrats on the Judiciary Committee still receive input from the organization.
[17] GOLDMAN, *supra* note 11, at 238.
[18] *Id.* at 9-11.
[19] *Id.* at 7.
[20] *See id.* at 7-8.
[21] *Id.* at 113.
[22] *See* GOLDMAN, *supra* note 11, at 8.
[23] Ross, *supra* note 2, at 398.
[24] GOLDMAN, *supra* note 11, at 9; *see* Ross, *supra* note 2, at 399-412.

Franklin Roosevelt saw appointment of judges with ideologies similar to his own as essential to the success of the New Deal.[25] The political landscape of the 1930s provides particular insight into the interplay of judicial appointments and presidential policy. Over a third of federal district and circuit courts issued close to 1,600 injunctions in 1935 and 1936, preventing enforcement of President Roosevelt's New Deal legislation.[26] At the time, approximately three-fourths of the federal judiciary was Republican.[27] Putting it plainly, Judge William Denman of the Ninth Circuit Court of Appeals wrote to President Roosevelt in 1936, stating, "The New Deal needs more Federal judges."[28] Over President Roosevelt's twelve years in office, he succeeded in appointing numerous federal judges sympathetic to the New Deal.[29]

Presidents Kennedy and Johnson sought to ensure that civil rights gains in the legislative arena would not be undermined in the courts.[30] In the Kennedy administration, "[i]t was the determined policy not to appoint segregationists to the Fourth and Fifth circuits,"[31] which at the time were the circuits covering most of the southern states. On all courts, an anti-segregationist stance could save an otherwise right-leaning nominee.[32] In the 1964 election, Barry Goldwater used President Johnson's support of controversial Supreme Court decisions as a conservative rallying cry, and his views were echoed in conservative quarters such as the *Wall Street Journal* editorial page.[33] As President Johnson saw his popularity plummet in the quagmire of Vietnam, however, raw politics overtook commitment to racial equality; the White House wrested central command of appointments from the Attorney General's Office, and "loyalty" to the President arguably became the chief attribute sought in nominees.[34]

According to one scholar on the subject, "[j]udicial issues may have influenced the outcome of the 1968 election more than any other election in the nation's history."[35] In a presidential race with Hubert Humphrey, Richard Nixon ran a campaign against a "liberal" federal judiciary and promised to restore "conservative law and order"[36] through his power of appointment.[37]

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[25] *See* GOLDMAN, *supra* note 11, at 19-20.
[26] *Id.* at 30-31.
[27] *Id.* at 31.
[28] *Id.* at 32 (quoting letter from William Denman, J., 9th Cir., to Franklin D. Roosevelt, Pres., *208 U.S. District Judgeships 1933-1945* (Nov. 7, 1936)) (internal quotations omitted).
[29] *Id.* at 38.
[30] *See* GOLDMAN, *supra* note 11, at 166, 170.
[31] *Id.* at 168.
[32] *See generally id.* at 168-70.
[33] Ross, *supra* note 2, at 428-34.
[34] GOLDMAN, *supra* note 11, at 160, 163.
[35] Ross, *supra* note 2, at 434.
[36] GOLDMAN, *supra* note 11, at 198.
[37] *Id.*

In office, President Nixon expressed support for a potential constitutional amendment requiring reconfirmation of all federal judges after a ten-year period.[38] "Undoubtedly, this was tied to policy concerns."[39]

These presidential policy agendas have had to compete with senatorial courtesy.[40] Failure to consult with senators, particularly those from the President's party, before selecting a nominee can have disastrous political repercussions.[41] As noted above, this norm emerged early, cowing President Washington into withdrawing a nomination.[42] President Hoover wanted to improve the quality of the federal judiciary and thus attempted to impose new standards on candidates for appointment.[43] The Senate, however, saw the President's plan as an intrusion into senatorial prerogatives in identifying nominees, and eventually President Hoover caved to political pressure.[44] President Truman saw nominees from Georgia, Illinois, and Iowa blackballed for his failure to consult with their homestate senators.[45] President Kennedy was forced to break his promise not to appoint segregationists to the bench when the Arkansas senators threatened to hold up all of the President's nominees if their selection for an Eighth Circuit appointment was not approved.[46]

In appointing members of my court, President Reagan encountered similar problems with Republican Senator Bill Armstrong of Colorado. The President attempted to appoint Steven Williams, then a professor at the University of Colorado Law School, to a vacancy created when my Colorado colleague William Doyle took senior status in 1984. He did so without consulting Senator Armstrong, and the Senator made it very clear that if Mr. Williams were nominated, the Senator would oppose him. The result was a stalemate. The President finally acquiesced and withdrew Mr. Williams from consideration for the Tenth Circuit, appointing him to the D.C. Circuit instead. The President then requested a list of names of potential nominees from Senator Armstrong and ultimately appointed David Ebel from that list in 1988. The process left my court with a vacancy for four years.

When President Carter took office in 1977, he took issue with the political patronage that resulted from senatorial preeminence in identifying judicial candidates.[47] His primary goal in judicial appointments was to diversify

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[38] *Id.* at 207.
[39] *Id.*
[40] Gerhardt, *supra* note 9, at 1702.
[41] Gerhardt, *supra* note 8, at 27-28.
[42] *See supra* notes 11-13 and accompanying text.
[43] *See* GOLDMAN, *supra* note 11, at 9.
[44] *See id.*
[45] *Id.* at 71-72, 75, 79-80.
[46] *Id.* at 168.
[47] *See id.* at 236.

the federal bench, and in order to do so, he had to wrench control over selection away from the Senate. After intense negotiations with Senator James Eastland of Mississippi, Chair of the Senate Judiciary Committee, President Carter agreed to leave primary control in identifying district court candidates with the Senate, but he established merit selection commissions for nominees to the courts of appeals.[48] As mandated by an executive order establishing the commissions,[49] the President appointed selection panels for each circuit and required each panel to "include members of both sexes, members of minority groups, and approximately equal numbers of lawyers and nonlawyers."[50] When the panels' initial nominations included few women and minorities, President Carter issued a revised executive order explicitly encouraging the panels "to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees."[51]

At the time, there were a total of 510 Article III federal judges.[52] The number of federal appeals had grown to almost 20,000 per year.[53] This exploding caseload resulted in the Omnibus Judgeship Act of 1978,[54] which created 117 new district court judgeships and thirty-five new positions on the circuit courts.[55] These positions presented President Carter with a unique "opportunity to place women and minorities on the bench."[56] When the Attorney General's Office and the Senate seemed insufficiently committed to affirmative action for these new judgeships, the White House applied additional pressure.[57]

The previous "excruciatingly slow pace of diversification of the federal bench"[58] sped up dramatically with President Carter at the helm.[59] When he

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[48] GOLDMAN, *supra* note 11, at 238. There was a fair amount of dissension in the Senate. Democratic Senator Lloyd Bentsen of Texas reportedly expressed the frustration of many of his colleagues in complaining: "I am the merit commission for Texas." *Id.* at 260 (citing Charles R. Babcock, *Picking Federal Judges: Merit System vs. Pork Bench,* Wash. Post, Nov. 7, 1978, at A4 for the quoted language and Martin Tolchin, *Carter Issues Guide for Naming Judges,* N.Y. Times, Nov. 9, 1978, at A18 for Sen. Bentsen's report that he did not recall making the statement).

[49] Exec. Order No. 11,972, 42 Fed. Reg. 9,659 (1977).

[50] *Id.* at 9,660; *see* GOLDMAN, *supra* note 11, at 238.

[51] Exec. Order No. 12,059, 43 Fed. Reg. 20,949, 20,950 (1978); *see* GOLDMAN, *supra* note 11, at 239.

[52] *See* Admin. Office of U.S. Cts., *Table C: U.S. Courts of Appeals: Additional Judgeships Authorized by Judgeship Acts,* www.uscourts.gov/history/tablec.pdf (accessed Mar. 10, 2004) [hereinafter U.S. Cts., *Table C*]; Admin. Office of U.S. Cts., *Table H*: *U.S. District Courts: Additional Authorized Judgeships,* www.uscourts.gov/history/tableh.pdf (accessed Mar. 10, 2004) [hereinafter U.S. Cts., *Table H*]. These charts indicate that there were 404 authorized district judgeships and 97 authorized courts of appeals judgeships in 1977. Adding the nine Supreme Court justices brings the total number to 510.

[53] DIR. ADMIN. OFFICE OF U.S. CTS., MANAGEMENT STATISTICS FOR THE U.S. COURTS 13 (1979).

[54] Pub. L. No. 95-486, 92 Stat. 1629 (1978).

[55] GOLDMAN, *supra* note 11, at 241-42.

[56] *Id.* at 242.

[57] *Id.* at 239-40, 248-49, 254, 257.

[58] *Id.* at 3.

[59] *See id.* at 238.

left office in 1981, he had appointed nearly forty percent of the federal judiciary and placed unprecedented numbers of women and minorities in lifetime positions on the bench.[60] Prior to his administration, for example, only two women had ever been appointed to a federal court of appeals, Florence Allen by President Franklin Roosevelt to the Sixth Circuit and Shirley Hufstedler by President Johnson to the Ninth Circuit.[61] President Carter appointed eleven women to the court of appeals, 19.6% of his appeals court appointees.[62]

My own appointment illustrates both the political nature of the process and President Carter's hands-on involvement. I was a beneficiary both of President Carter's commitment to place more women on the federal courts and the Omnibus Judgeship Act, which created an eighth position for the Tenth Circuit that was designated an Oklahoma position by the President. Knowing President Carter was affirmatively seeking female candidates, I applied in the fall of 1978 to the nominating commission for the Tenth Circuit. The commission's eleven seats were held by six lawyers and five lay people, several women and one minority, and representatives from each of the six states comprising the Tenth Circuit. This same commission had previously been charged with proposing nominees to the Tenth Circuit from Kansas and Utah and had no women applicants for either of those positions.

Unbeknownst to me at the time, my application did not enjoy smooth sailing in the commission. I was later told the following story by a friend in Colorado who had heard it from Josie Heath, a member of the commission from Colorado. The story was subsequently confirmed to me by Ms. Heath herself. Unlike the procedure used for the Kansas and Utah positions, at the initial meeting of the group considering the Oklahoma position the chairman announced that the commission would narrow the field by allowing each member to eliminate one obviously unqualified candidate. He started by stating he was eliminating me. Josie Heath, who was sitting halfway around the table from the chairman, was dumbfounded; she thought my qualifications were quite good. When she asked the chairman why he was eliminating me, he responded that I had four children and obviously could not handle the job. Ms. Heath was so stunned she was temporarily speechless. Fortunately for me, by the time the elimination process got around to her, she had gathered her wits. Her choice for elimination was a male justice on the Oklahoma Supreme Court, who, as it turned out, was the chairman's favorite candidate. It was the chairman's turn to be stunned; he asserted that this applicant was

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[60] GOLDMAN, *supra* note 11, at 238.
[61] *See id.* at 357.
[62] *Id.* at 356 table 9.2.

obviously highly qualified. Ms. Heath responded that the applicant was clearly not qualified since he had five children. After a discussion about the merits of eliminating applicants on the basis of the number of their children, the commission members agreed it was not a proper basis for disqualification and that both of us should remain under consideration.

I was one of a number of candidates invited for an interview with the commission. When I arrived at the appointed time, I was given a number of questions I was told I would have to answer and then placed in a room by myself for half an hour to contemplate my responses. One question asked me to explain what I had done to further the cause of justice. Another asked what I thought my qualifications were for the position and what I would add to the court. After I answered the general questions at the beginning of the interview, each member of the commission was given an opportunity to question me. Among other things, I was asked my opinion of *Roe v. Wade*.[63] I was also asked how having four children might impact my handling of the job. One of the female members of the commission vociferously objected to what she viewed as an unlawful employment question. Unaware of the history of the controversial question, I replied that, knowing Congress was not covered by Title VII of the Equal Employment Opportunity Act,[64] I assumed the judiciary was not covered either. I answered the question.

The end result of the application process was that my name was one of four forwarded to President Carter for his consideration, the others being Pat Irwin, the justice on the Oklahoma Supreme Court, Dale Cook, a sitting federal district court judge who had been appointed by President Nixon, and Lee West, a former state court trial judge and FAA commissioner who was by then practicing law in Tulsa. I was thirty-nine years old at the time, practicing at Doerner, Stuart, Saunders, Daniel & Anderson in Tulsa, and I faced formidable competition from these gentlemen in terms of both legal and judicial experience. Needless to say, the four of us lobbied hard for the position. I had no connections with either senator from Oklahoma, but I did have a friend in Washington, D.C.—R. Dobie Langenkamp, my former law partner and now a professor at this law school, who had taken a job in the Carter administration in the Department of Energy. Dobie helped me make some contacts in Washington, one of whom worked for Rosalyn Carter in the White House. The women's groups in Washington were agitating for women to be appointed, and they did their own lobbying. I was finally nominated.

I did not know until I was doing research for this paper that President Carter was actively involved in my selection. Bob Lipshutz, one of the White

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[63] 410 U.S. 113 (1973).
[64] Pub. L. No. 92-261, 86 Stat. 103 (1972).

House staffers who advised the President on judicial appointments, was asked by the President to write a memo regarding the proposed nominees so the President would be informed.[65] With respect to the vacancy on the Tenth Circuit, Lipshutz's memo listed my name "with the notation: '(white female)—private practice, first female partner in a major Oklahoma firm; first woman to serve as an Oklahoma Bar examiner; experience in complex litigation.'"[66] The three other proposed nominees were also described. The President indicated on the memo his interest in me.[67] The rest is history.

In focusing on affirmative action in its judicial appointments, the Carter administration was, of course, making a political statement. And notwithstanding the use of merit selection commissions, only 7.1 percent of President Carter's circuit court appointees were Republican.[68] When Attorney General Griffin Bell was asked why a large percentage of those surviving this "merit" selection process were Democrats, I recall him responding, "We're not running an affirmative action program for Republicans."

When President Reagan took office, he abandoned the merit selection commissions.[69] He returned to the practice of previous presidents, relying on people within the administration to propose and vet potential candidates. Like Richard Nixon, Ronald Reagan ran for office against the courts. In 1980, the Republican Party platform included a promise:

> We pledge . . . the appointment of women and men . . . whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens, and is consistent with the belief in the decentralization of the federal government and efforts to return decisionmaking power to state and local elected officials. We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life.[70]

President Reagan "fram[ed] his appointment goals in terms of the judicial philosophy he believed would accomplish his political purposes,"[71] and viewed successful appointments as key to promoting his domestic policy agenda.[72]

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[65] GOLDMAN, *supra* note 11, at 249.
[66] *Id.* (quoting memo. from Bob Lipshutz, White House counsel, to Jimmy Carter, Pres., *Judicial Nominees* (Apr. 7, 1979)) (footnote omitted).
[67] *Id.*
[68] *Id.* at 355 table 9.2.
[69] *See* Maltese, *supra* note 1, at 9-10 (describing the ideological vetting of President Reagan's nominees).
[70] GOLDMAN, *supra* note 11, at 296-97 (quoting *1980 Republican Platform Text*, 38 Cong. Q. Wkly. Rpt. 2030, 2046 (July 19, 1980)) (internal quotations and footnote omitted).
[71] *Id.* at 297.
[72] *Id.* at 2, 297-98.

The Reagan administration took the appointment process very seriously. Attorney General Edwin Meese hired a Department of Justice special assistant whose sole and specific purpose was investigating the judicial philosophies of prospective nominees.[73] While the administration insisted it was not quizzing candidates on how they would rule in specific cases, several nominees, especially women, claimed they were asked how they would rule in potential cases concerning abortion.[74]

President Reagan experienced some early problems in the Senate with respect to confirmation of nominees perceived by Democrats as particularly conservative.[75] People for the American Way launched the first media campaign against district and circuit judge nominees in 1985, preventing confirmation of Jefferson Sessions III to a district judgeship in Alabama and nearly keeping Daniel Manion off the Seventh Circuit.[76] Senate Democrats initiated a filibuster of then-Justice Rehnquist's elevation to Chief Justice, but Republicans quickly overcame it to confirm him.[77] Justice Scalia was confirmed without much noise.[78] Then, in 1987, came the nomination of Robert Bork to the Supreme Court. Judge Bork's 1982 confirmation to the Court of Appeals for the District of Columbia had been relatively uneventful.[79] His background as a D.C. Circuit judge, professor at Yale Law School, and Solicitor General and Acting Attorney General under President Nixon made him particularly suited by experience for the Supreme Court nomination. His position as a "conservative intellectual leader"[80] made him attractive to President Reagan. The administration viewed Judge Bork as the person who could turn the tide on the Supreme Court. However, Senate Democrats and liberal interest groups saw the fate of *Roe v. Wade* in Judge Bork's hands and launched an all-out war against his nomination.[81] The result was a fifty-eight to forty-two vote against confirmation. Such prolonged and virulent attacks on presidential nominees have since become known as "borking."[82]

The Senate ultimately confirmed Judge Anthony Kennedy of the Ninth Circuit to the Supreme Court, and the saga came to a close. President Reagan continued to face an incresingly active Democratic opposition, however, and

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[73] *Id.* at 301-02.
[74] *See id.* at 304-05 (citing a Justice Department official's recollection and an NPR report on such questioning of female candidates).
[75] GOLDMAN, *supra* note 11, at 308.
[76] *Id.* at 308-13.
[77] *Id.* at 316.
[78] *Id.* at 316-17.
[79] *Id.* at 316.
[80] GOLDMAN, *supra* note 11, at 317.
[81] Maltese, *supra* note 1, at 8.
[82] *See* Jeffrey W. Stempel, *Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution through Adjudication*, 3 NEV. L.J. 305, 340 (2002-2003) (describing the coining of the phrase "borking").

even saw conservative groups doom one nominee to the Eighth Circuit by labeling her as a "strong feminist" and criticizing her "pro-abortion" stance despite the fact that she had never publicly taken a position on abortion issues.[83] Still, despite this turbulence, President Reagan's success in judicial appointments was tremendous. Indeed, he believed the judiciary he appointed to be "his most enduring legacy."[84]

Though with far less fanfare than his predecessor, the first President Bush continued President Reagan's efforts to "reshape constitutional law"[85] with appointments to the federal bench.[86] The pledge to appoint pro-life judges remained in the 1988 Republican platform, although then-Vice President Bush denied he would employ a "litmus test" if elected president.[87]

President Clinton's focus in judicial appointments was on confirming diverse and highly qualified candidates.[88] He was apparently less concerned with a potential nominee's ideological bent.[89] During his first campaign, he implied he would only put forth nominees who expressed support for abortion rights but retreated somewhat from this pledge once in office.[90] Ultimately, with an aggressive legislative agenda, and eventually impeachment proceedings to confront, President Clinton did not want to waste political capital in the appointment process.[91] To ward off potential Senate battles, President Clinton engaged Republican Senator Orrin Hatch of Utah, Chair of the Judiciary Committee, in negotiations when the Senator assumed the chairmanship in 1995.[92] This move was to the great benefit of the Tenth Circuit because it enabled us to have four vacancies filled in relatively short order. The working relationship between the President and Senator Hatch could not be sustained, however. The conservative Judicial Selection Monitoring Project attacked a number of nominees as elite

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[83] GOLDMAN, *supra* note 11, at 318, 332 & n. ff.
[84] *Id.* at 301.
[85] Neal Devins, *Congress and the Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 773, 774 (2003).
[86] *Id.*; *see* Ross, *supra* note 2, at 446 (noting the relatively obscure role of judicial issues in the 1988 election).
[87] Ross, *supra* note 2, at 447.
[88] Gerhardt, *supra* note 8, at 36.
[89] *See* Jonathan L. Entin, *Judicial Selection and Political Culture*, 30 CAP. U. L. REV. 523, 545 (2002); Ross, *supra* note 2, at 457 (describing the lack of ideologues among President Clinton's nominees and quoting a political scientist's observation that "the main criticism of [Justice] Breyer was that he had too many holdings in Lloyd's of London" (quoting Harvey Berkman & Claudia MacLachlan, *Don't Judge a Book . . .*, Nat'l. L. Rev., Oct. 21, 1996, at A1)); Carl Tobias, *The Bush Administration and Appeals Court Nominees*, 10 WM. & MARY BILL RTS J. 103, 106 (2001).
[90] *See* Neal Devins, *Through the Looking Glass: What Abortion Teaches Us about American Politics*, 94 COLUM. L. REV. 293, 304-05 (1994) (detailing President Clinton's pro-choice judicial agenda); David Lauter, *Clinton Calls for Tougher Gun Controls*, L.A. Times, Oct. 4, 1993, at A3 (noting President Clinton's retreat on a pro-choice "litmus test").
[91] Gerhardt, *supra* note 8, at 33.
[92] *See* Carl Tobias, *Judicial Selection at the Clinton Administration's End*, 19 LAW & INEQ. 159, 169 (2001).

left-wingers ready to "blaze[] an activist trail."[93] Majority Whip Tom DeLay suggested impeaching "liberal" judges already appointed.[94] A conservative media blitz made it difficult for Republican senators to support the administration's candidates, and they began to hold up nominations.[95] Senator Hatch himself held up all of the administration's judicial nominations in order to win a controversial appointment to the district bench favored by conservatives in Utah.[96] Senator James Inhofe of Oklahoma placed a hold on thirty judicial nominees in anger over President Clinton's recess appointment of an openly gay man as Ambassador to Luxembourg.[97] When at the end of 1997 Chief Justice Rehnquist issued a then-rare chastising of the Senate for its slow pace of confirmations, Senator Hatch blamed President Clinton's nomination of "activist" judges for the delay.[98] Notwithstanding the political rhetoric, however, I know from my experience at the time as Chief Judge of the Tenth Circuit that Senator Hatch did a great deal to help President Clinton get his nominees through the Senate as long as it was feasible for him to do so.

When President Clinton left office, a strong Republican opposition, inconsistent Democratic support, and the distractions of impeachment left him with an unimpressive rate of appointment. Forty-two nominees remained unconfirmed, most of whom never received a hearing,[99] and there were nearly 100 vacancies on the federal bench.[100] At the same time, yearly appeals had grown to over 50,000.[101]

With so many vacancies and several aging Supreme Court Justices, it is not surprising that judicial issues became a prominent feature in the 2000 presidential campaign.[102] Sophisticated members of the public were aware that "the election could shift the balance of the [Supreme] Court."[103] Nine days before the election, in the battleground state of Michigan, Vice President Al Gore warned:

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[93] Maltese, *supra* note 1, at 15.
[94] *Id.* at 16.
[95] *Id.*
[96] Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1, 10 (2001).
[97] Sarah Binder, *The Senate as a Black Hole: Lessons Learned from the Judicial Appointment Experience,* 19 BROOKINGS REV. 37 (Spring 2001) (available at www.brookings.edu/press/REVIEW/spring2001/binder.htm); Maltese, *supra* note 1, at 19.
[98] Denning, *supra* note 96, at 9-10.
[99] Maltese, *supra* note 1, at 21.
[100] Gerhardt, *supra* note 9, at 1701.
[101] ADMIN. OFFICE OF U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2000, at 6 (2000).
[102] *See* Ross, *supra* note 2, at 460 (arguing "[j]udicial issues were more prominent in the 2000 election than in any election since 1968").
[103] *Id.* at 461.

> The Supreme Court is at stake. There are going to be three, maybe four . . . maybe even five justices . . . appointed by the next president . . . . Think about civil rights. Think about women's rights. Think about human rights. Think about antitrust law. Think about Federalism. All of these issues are on the ballot . . . .[104]

Pro-life activist Gary Bauer predicted Governor George W. Bush's election would lead to the overturning of *Roe v. Wade*,[105] and many commentators believed the election would have a significant effect on federalism and affirmative action.[106] The awareness among presidents that courts could determine the success of their domestic policy agendas was spreading to the public.

Under the second President Bush, judicial selection procedures underwent immediate changes. President George W. Bush moved central command from the Attorney General's Office to the White House.[107] Citing a perceived bias in the ABA, he cut the organization out of the screening process.[108] In the Senate Judiciary Committee, Senator Hatch dramatically altered the mysterious "blue slip" procedure. At the time, either senator from a judicial candidate's home state could withhold a "blue slip," or in essence, his or her approval, and block a nomination.[109] Senator Hatch had allowed this Senate tradition to continue during the Clinton administration, when Senator Jesse Helms of North Carolina used it to block all of President Clinton's nominees to the Fourth Circuit.[110] But in 2001, Senator Hatch announced that both senators from a state would have to withhold a "blue slip" for a nomination to be blocked, essentially giving Republican senators the ability to trump their Democratic colleagues' disapproval.[111] Having lost the ability to block nominations by other means, Senate Democrats began threatening to filibuster President Bush's nominees.[112] This step marked a significant escalation in the confirmation wars. While moderate nominees have received relatively easy confirmation, those perceived as too conservative now face a stormy Senate.[113] For example, Miguel Estrada did not survive the filibustering and

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[104] *Id.* at 461-62 (quoting *Gore in His Own Words,* N.Y. Times News Serv., Oct. 30, 2000) (internal quotations and footnote omitted).
[105] *Id.* at 463-64.
[106] *Id.* at 464.
[107] Gerhardt, *supra* note 9, at 1697.
[108] *See* Gerhardt, *supra* note 8, at 25. Senator Hatch had ended the ABA's testimony at confirmation hearings in 1997, but President Clinton continued to consult the organization and receive formal ratings of potential nominees. *Id.*
[109] Denning, *supra* note 12, at 84; Maltese, *supra* note 1, at 21-22.
[110] Denning, *supra* note 12, at 83 n.58.
[111] *Id.* at 84; Maltese, *supra* note 1, at 21-22, 26.
[112] Denning, *supra* note 12, at 84.
[113] *See* Maltese, *supra* note 1, at 26.

finally withdrew as a nominee to the D.C. Circuit.[114] White House Press Secretary Ari Fleischer criticized Senate Democrats' lack of bipartisan spirit, but Democrats responded by reminding the White House that judicial appointments had entailed political battles long before the current administration took office.[115]

President Bush has chosen his nominees with politics in mind, and the Senate has responded in kind. That the ideology of nominees matters to both the President and the Senate is nothing new. Professor Erwin Chemerinsky has aptly summarized the situation:

> I once saw it written that every generation believes that it is the first to really discover sex. So, too, it seems that every generation has the sense that it is the first to uncover that ideology has a role in the judicial selection process. This is nonsense. Every President in American history, to a greater or lesser extent, has chosen federal judges . . . based on their ideology. Likewise, since the earliest days of the nation, the United States Senate also has looked to ideology in the confirmation process. This is exactly how it should be.[116]

DANGEROUS DELAY

In my judgment, the breakdown in the judicial selection process comes not so much from the political nature of the process, but from the inordinate

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[114] The Estrada nomination and President Clinton's nomination of Elena Kagan to the D.C. Circuit make for interesting comparison. Both were nominated to the D.C. Circuit, but Mr. Estrada fell to a filibuster, and Ms. Kagan never received a hearing, let alone a vote on the Senate floor. Mr. Estrada earned his undergraduate degree from Columbia. Ms. Kagan earned hers from Princeton, and then received a Masters in Philosophy from Oxford. Both graduated from Harvard Law School, where they were both editors of the *Harvard Law Review*, and both proceeded into prestigious appellate clerkships—Mr. Estrada for Judge Amalya Kearse on the Second Circuit, and Ms. Kagan with Judge Abner Mikva on the D.C. Circuit. Mr. Estrada then clerked for Justice Kennedy on the United States Supreme Court, Ms. Kagan for Justice Marshall. After clerking, Mr. Estrada worked for one year with the New York law firm Wachtell, Lipton, Rosen & Katz, then joined the U.S. Attorney's Office in the Southern District of New York. From 1992 to 1997, he worked as an assistant to the Solicitor General of the United States. Mr. Estrada then became a partner in the Appellate and Constitutional Law Practice Group of the D.C. office of Gibson, Dunn & Crutcher. Following her clerkship with Justice Marshall, Ms. Kagan joined the highly regarded D.C. litigation firm of Williams & Connolly. She then took on law faculty positions, teaching constitutional and administrative law, initially at the University of Chicago and then at Harvard. In addition, she served as deputy director of the Domestic Policy Council in the Clinton administration. Ms. Kagan is presently serving as Harvard Law School's first female dean. Clearly, both Dean Kagan and Mr. Estrada were eminently qualified for the positions for which they were nominated. Neither, however, managed to survive the judicial selection process. For brief biographies of the two nominees, *see* U.S. Department of Justice, *Office of Legal Policy, Miguel A. Estrada: Biography,* www.usdoj.gov/olp/estradabio.htm (accessed Mar. 10, 2004), and Harvard Law School, *Elena Kagan Named Next Dean of Harvard Law School,* www.law.harvard.edu/news/2003/04/03_kagan.php (Apr. 3, 2003).

[115] Maltese, *supra* note 1, at 14.

[116] Chemerinsky, *supra* note 9, at 620.

delays engendered in recent times by the divisive nature of Congress and the increasing level of retaliation for prior wrongs allegedly done by the opposing party in confirmation battles. Major vacancies on the courts of appeals are the result.

What President George W. Bush faces is not a Senate more focused on the ideology of judicial nominees than prior Senates. Rather, he faces a Senate almost evenly split between Republicans and Democrats and a public exceptionally polarized politically. Divided government—the situation in which Congress and the presidency are controlled by different parties—has been the norm since 1969. In half of those twenty-four years, the White House and the Senate have been in opposite hands.[117] The electorate, moreover, has been growing increasingly polarized, with less ticket-splitting and less of a moderate center.[118] The House of Representatives began to reflect this shift in the population after the 1982 mid-term elections, but polarized politics did not truly take hold in the Senate until the mid-1990s.[119] Now, however, the Senate appears even more polarized than the House.[120] It is no coincidence, therefore, that "confirmation gridlock" began in earnest in 1996.[121] And the controversial 2000 election only increased party unity.[122] The hostile reception judicial nominees face in the Senate appears not to represent a constitutional breakdown, but is instead a "byproduct" of the current political climate.[123] The problem for the administration of justice by the courts is not the political nature of judicial selection, but a failure on the part of the Senate to fill vacant positions expeditiously.

The delay in the judicial appointment process spawned by fierce political battles has grown exponentially over the last decade. The average time from nomination of a judicial candidate to final Senate action ballooned to 201 days in 1997, from a low of thirty-two days in President Reagan's first year in office.[124] The 1997 delay was particularly protracted for courts of appeals' nominees, who languished an average of 258 days.[125] One of President Clinton's nominees to the Sixth Circuit, Judge Helene White of the Michigan Court of Appeals, waited four years without a hearing only to have her nomination die with the end of President Clinton's time in

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[117] Maltese, *supra* note 1, at 2.
[118] *Id.* at 3.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *See* Maltese, *supra* note 1, at 12 (noting that party unity was especially strong when George W. Bush took office).
[123] *See id.* at 11-12.
[124] UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 46 (2000) [hereinafter UNCERTAIN JUSTICE] (collection of reports by task forces of Citizens for Independent Courts).
[125] *Id.* at 50.

office.[126] Her time in confirmation limbo surpassed that of any judicial nominee in American history.[127] And the length of the vacancies on the various courts of appeals were, in actuality, much longer than the time any particular nominee waited in the Senate, given the delay from the time a judicial seat becomes vacant to the time a nomination is made. For example, the seat President Clinton nominated Judge White to fill was vacated on May 1, 1995, when Judge Damon Keith took senior status.[128] Nearly a decade later, the position remains vacant.[129]

At the close of President Clinton's second term, more than one in nine slots on the federal bench stood empty.[130] Now, nearing the end of President George W. Bush's first term, the vacancy rate is down to just over one in twenty.[131] Certainly, these numbers indicate improvement. Nevertheless, the time between nomination and confirmation remains substantial. Only fifty-four percent of President Bush's nominees for existing vacancies have received hearings.[132] While a third of those nominees have been waiting less than ninety days for a hearing, two-thirds have been waiting 180 days or more, and a third have been waiting more than a year.[133] Of those nominees who have received a hearing, only a quarter have been reported out of the Judiciary Committee, and of those favorably reported out, several have been waiting more than 180 days for a vote on the Senate floor.[134]

Some circuits have suffered more than others amid undue delay. The Sixth Circuit has been hit particularly hard.[135] President Clinton was unable to secure confirmation for four vacancies on that court.[136] Then, in the year he left office, four Sixth Circuit Judges took senior status. The court—with six-

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[126] Carl Tobias, *Sixth Circuit Federal Judicial Selection,* 36 U. CAL. DAVIS L. REV. 721, 742 (2003).
[127] *Id.* at 722.
[128] *See* Admin. Office of U.S. Cts., *Vacancies in the Federal Judiciary, December 1, 1999,* www.uscourts.gov/vacancies/12011999/judgevacancy.htm (accessed Mar. 10, 2004).
[129] *See* Admin. Office of U.S. Cts., *Vacancies in the Federal Judiciary, February 23, 2004,* www.uscourts.gov/vacancies/judgevacancy.htm (accessed Mar. 10, 2004) [hereinafter *Vacancies in the Federal Judiciary, Feb. 23, 2004*].
[130] *See* Tobias, *supra* note 89, at 108 (noting the number of vacancies at the time President Clinton left office).
[131] *See* U.S. Sen. Comm. on Jud., *Nominations in the 108th Congress, Status of Article III Judicial Nominations,* senate.gov/judiciary/nominations.cfm (Mar. 8, 2004) (noting eighteen vacancies in courts of appeals and twenty-nine district court vacancies).
[132] *Compare Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129, *with* Office of Sen. Patrick Leahy, *Judicial Nominations Summary for the 108th Congress,* leahy.senate.gov/issues/nominations/cover.htm (last updated Feb. 11, 2004) [hereinafter *Summary for the 108th Congress*] (providing names and dates for nominees receiving hearings).
[133] *Compare Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129, *with Summary for the 108th Congress, supra* note 132.
[134] *Compare Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129, *with Summary for the 108th Congress, supra* note 132.
[135] Tobias, *supra* note 126, at 722.
[136] *Id.* at 742.

teen approved slots and two more recommended by the Judicial Conference of the United States—had only eight judges at the start of the George W. Bush presidency.[137] While President Bush successfully appointed four judges to the Sixth Circuit,[138] his four additional nominees have been waiting more than a year for final Senate action.[139] Michigan's Democratic senators are committed to blocking President Bush's nominees from Michigan until he agrees to re-nominate President Clinton's selections for the Sixth Circuit, whose consideration was blocked by the Republican Senate.[140] This extended vacancy necessarily has taken its toll. That court publishes fewer opinions than most circuits, takes longer to resolve the matters before it, and relies more on visiting judges to complete its workload.[141] The stress of laboring at half capacity may also have hampered the court's collegiality, as betrayed by several non-legal disagreements aired in the form of recent Sixth Circuit opinions.[142]

The Fourth Circuit has fared only slightly better in this time of increasing confirmation wrangling. President Clinton sent the Senate nine nominations to the Fourth Circuit in his two terms, but when he left office, five of the court's fifteen positions were vacant.[143] One seat had been open for over a decade, and no judge from North Carolina sat on the court for eight years.[144] The Fourth Circuit now operates with thirteen judges, but it has experienced strain in these years of vacant seats. The court publishes a lower percentage of its opinions than any circuit but one and provides oral argument in a lower percentage of cases than any other federal appellate court.[145]

The D.C. Circuit and the Ninth Circuit are viewed as particularly important courts—the D.C. Circuit because of its exclusive jurisdiction in a variety of cases and the Ninth Circuit because of the sheer number of people for whom it is, essentially, the court of last resort. Likely because of their perceived significance, however, each court has seen substantial nomination delay. From 1977 through 1988, it took a record-breaking average of 157 days for the Senate to take final action on nominees to the Ninth Circuit.[146]

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[137] *See id.* at 723, 742-43.
[138] *See Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129 (citing four current vacancies on the Sixth Circuit).
[139] *See id.*
[140] Tobias, *supra* note 126, at 722.
[141] *Id.* at 743.
[142] *See, e.g.,* Grutter v. Bollinger, 288 F.3rd 732 (6th Cir. 2002), *aff'd,* 539 U.S. 306 (2003); Memphis Planned Parenthood, Inc. v. Sundquist, 184 F.3d 600 (6th Cir. 1999) (denying petition for rehearing en banc).
[143] Carl Tobias, *Federal Judicial Selection in the Fourth Circuit,* 80 N.C. L. REV. 2001, 2028 (2002).
[144] *See id.* at 2003. President Bush filled these lingering vacancies with Judge Roger Gregory of Virginia in 2001 and Judge Allyson Duncan of North Carolina in 2003.
[145] *Id.*
[146] UNCERTAIN JUSTICE, *supra* note 124, at 55.

In 1997 and 1998, the average time was an incredible 310 days.[147] Judges Marsha Berzon and Richard Paez waited more than two and four years respectively before being confirmed in 2000.[148] The position for which Judge Paez was ultimately confirmed had been vacant for a full four years, Judge Berzon's for over three years.[149] President Bush has been unable to fill the two additional vacancies on that court, one of which was vacated in September of 2000, the other in November of last year.[150]

One quarter of the D.C. Circuit is now vacant. President Clinton's nominations of Elena Kagan and Allen Snyder were stalled in the Senate for eighteen and fifteen months, respectively.[151] Neither received a vote in the Judiciary Committee, and Ms. Kagan never even received a hearing although she was a highly qualified nominee.[152] Two of President Bush's nominees have been waiting since July 2003 for a hearing before the Senate Judiciary Committee.[153] As previously mentioned, his third nominee, D.C. attorney Miguel Estrada, withdrew his name when it became clear a Democratic filibuster would doom his nomination.[154]

On my own court, the Tenth Circuit, four of my colleagues took senior status in the period from October 1999 to January 2001. One position was vacant for three and a half years, one was vacant for three years, and the other two were vacant for eleven months each. All of the nominees were highly qualified people, but two were quite controversial because of their perceived views on hot-button issues. While their nominations languished, the work of our court piled up. And the vast majority of our work has nothing to do with the issues that stalled my colleagues' appointments. The delays were thus for perceived views that matter naught to most of the cases we decide. Moreover, even if they did matter, both nominees were eventually confirmed, so

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[147] *Id.*

[148] Elliot M. Mincberg, *Federal Judicial Nominations and Confirmations During the Last Two Years of the Clinton Administration,* in RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 21, 29 (Dianne M. Piché et al eds. 2002) (available at www.cccr.org/chapter3.pdf) (seventh biennial civil rights report by Citizens' Commission on Civil Rights).

[149] *See* Admin. Office of U.S. Cts., *Vacancies in the Federal Judiciary, January 27, 1999,* www.uscourts.gov/vacancies/01271999/judgevacancy.htm (accessed Mar. 11, 2004).

[150] *See Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129 (noting two vacancies on the Ninth Circuit, two nominees by President Bush, and Senate delay of over four months on each).

[151] E.J. Dionne, Jr., *They Started It,* Wash. Post, Feb. 21, 2003, at A27.

[152] *Consult on Judges,* Wash. Post, Oct. 24, 2002, at A34; Jonathan Groner, *Bush May Need to Show Restraint in Judge Picks: Even Split in Senate, Modest Mandate Mean Conservative Court Nominees May Face Confirmation Battles,* Legal Times, Nov. 13, 2000, at 9. For a discussion of Dean Kagan's qualifications, *see supra* note 114.

[153] *See Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129.

[154] John Cornyn, *Restoring Our Broken Judicial Confirmation Process,* 8 TEX. REV. L. & POL. 1, 4-5 (2003); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, "Orderly Shutdowns," Presidential Impeachments, and Judicial "Coups,"* 12 CORNELL J.L. & PUB. POLICY 503, 531-32 (2003).

the delays were meaningless except to the extent they contributed needlessly to the backlog of my circuit.

With the Democrats now filibustering circuit court nominees, President Bush has upped the ante further by making appointments of filibustered nominees under his recess appointment powers.[155] He has made two such appointments to date: Judge Charles Pickering to the Fifth Circuit and William Pryor to the Eleventh Circuit.[156] If the Democrats keep filibustering and the President continues to make recess appointments, the court of appeals potentially could be left with a series of one-year-term judges.

CONCLUSION

From my perspective as a member of the judiciary, the judicial appointment process is quite broken. While the judiciary has cause to complain about it, as Chief Justice Rehnquist has repeatedly done on our behalf, only the President and the Senate have the power to fix the problem. I leave you with this thought: More than 60,000 cases are now filed in the courts of appeals each year.[157] The increasing likelihood of long vacancy rates and the impact on the expeditious handling of this enormous caseload looms large. When judges are appointed to the federal courts, what principle of our democracy should we value most—the right of the President and the Senate to play politics as usual, or the admonition that justice delayed is justice denied?

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[155] *See Vacancies in the Federal Judiciary, Feb. 23, 2004, supra* note 129.
[156] *Id.*
[157] Office of Judges Programs, Admin. Office of U.S. Cts., Federal Judicial Caseload Statistics: March 31, 2003, at 7 (2003) (available at www.uscourts.gov/caseload2003/front/mar03tit.pdf).

SEX CRIMES—FROM LAW TO LITERATURE[†]

Linda Fairstein*

The last two years since I stepped away from the D.A.'s office have been a wonderful time of reflection for me. I have enjoyed a thirty-year career in the law (and I am still practicing law), but being able to combine my two passions, literature and the law, has been a special thrill. I know that many people here were a part of this great profession long before I came to it, and there are others who are much younger than I am, so I am something of a bridge. I thought I might offer some historical perspective on my area of the law at the time I came into it, and as it developed.

A Personal Story

When I was invited to join this organization, I thought back to my first trial. I remembered that perhaps the hardest lesson I ever learned was the first one I learned at that first trial: There is a difference between men and women as litigators. But I think I need to back up in time, to set the stage for this realization.

I graduated from law school in 1972. I had gone to law school from an all women's college, where I had majored in English Literature. That was my major because writing was what I had most wanted to do, but I also had the desire to do public service, because I was a child of the 'sixties and had been inspired by John Kennedy's inaugural speech. At the women's college, we were taught to believe that everything was possible for us. When I got to the University of Virginia law school in 1969, I had three hundred forty classmates, and only eleven of us were women.

From the beginning, the dean of the law school became my mentor. He taught the Criminal Law course and encouraged me when I decided I wanted to join the office of Manhattan's District Attorney. Frank Hogan was the great District Attorney in New York City at the time, and he had been there for twenty-eight years. He was highly regarded nationally as the man who had transformed many prosecutors' offices from political clubhouses to genuine merit appointments. From my perspective, his greatest flaw was that he did not think women belonged in the workplace, espe-

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cially in his workplace. Among the staff of nearly two hundred lawyers in his office were only seven women. I was the only woman in my entering class of twelve lawyers. No woman had ever prosecuted a murder case in New York, and I'm sure that was true in most other places in the country. Frank Hogan usually put women in the law library doing appeals work and never anticipated that we would set foot in a courtroom where blood and guts would be the business of the day. He said to me in my first interview, as I'm sure he had said to many women before me, "This work is too tawdry for a woman like you, and I really don't advise it." Bob Morgenthau, who took over after Mr. Hogan's death and is still the District Attorney in New York City, frequently joked that obviously I thrived on tawdriness because there I was thirty years later.

We women were allowed to try misdemeanor cases, and my first misdemeanor trial during my first year was a petty larceny case. The defendant's name was Romanov. He claimed to have descended from the last tsar, but he had fallen on hard times. His job was selling greeting cards in an elegant store on Fifth Avenue, and he had developed a trick of returning cards, making cash refunds, and pocketing the cash. I think the store detectives had him for about a thirty-five dollar crime that I tried. The case was going according to plan, and the guys who had started with me were great—they stayed with me through every bit of the jury selection and my putting on the direct case and examining the witnesses. Everything seemed to be going according to plan, that is, until Wednesday morning when I finished the direct case. At that point, the defense thought I had done such a great job that they just rested without calling any witnesses! The judge then said, "Come back at two o'clock; we'll do closing arguments at two."

All the guys went to lunch, and I went back to my desk. I was appalled because nobody was there to help me, and I didn't know quite what I was supposed to do for the summation. So I did the only mature thing I could think of at the time—I cried. I was crying when the bureau chief, who previously had worked only with men, walked into the office at the end of the lunch hour. He said to me, "Who died?" I told him nobody died, but I had to do a closing argument and didn't know how to do it. He looked at me and said, "Well, do what the guys do—go into the bathroom and throw up like a man." I preferred crying, but that was a rude awakening for me: I had discovered that there was at least one difference between men and women as litigators.

DEVELOPMENT OF MY SPECIALTY

The path that my career took was actually serendipitous. The year I got out of law school, no D.A.'s office or police department anywhere in the

United States had a unit specializing in sexual assault or domestic violence or child abuse. It simply wasn't a field; there simply weren't laws in place. That year more than a thousand men were arrested in New York City for sexual assault. Eighteen of them were convicted the year I joined the office. It was not that the prosecutors were trying these cases and losing them; the problem was that our laws were so archaic that they prevented us from allowing the victims to enter a courtroom.

When I started practicing in 1972, in New York and most other states of the country the word of a woman alleging a sexual assault was incompetent as a matter of law; women were legally incompetent to testify about sexual assault unless three elements of the crime could be proved by independent evidence. Those three elements were specified. One was the identification of the assailant, which is especially difficult in the area of sexual assault. Many crimes, such as bank robberies, homicides, and drug deals, happen in broad daylight with numerous witnesses. But a sexual assault is the crime least likely to be witnessed by anybody else, and it is the one for which the law required that the offender had to be seen going to the crime scene, leaving the crime scene, or actually with the woman when the sexual assault occurred.

The second element for which there had to be proof was the sexual nature of the attack. That meant that you needed something from the victim's body to provide some medical corroboration, but there were no evidence collection kits in those days and there were no medical protocols in place in hospitals, as there are now in every hospital in every major city and town in this country, to explain to doctors how to collect this evidence. Several years into my practice we heard of something called a Vitulo kit, which was a cardboard box containing a protocol and vials and envelopes of all shapes and sizes. I assumed that "Vitulo" was the name of a leading biochemist who had come up with this solution to the problem. It turned out that Charlie Vitulo was a police sergeant in Chicago who had wrestled with the difficulty of getting evidence in these cases. He had gone home, taken his wife's shoes out of shoe boxes, and had taken those boxes to the local hospital, with labels so that they could get from the hospital to a police laboratory to begin to look for evidence. We have gotten more sophisticated, of course.

The third element for which you needed corroboration was the forcible nature of the attack. A woman who submitted because of the presence or threat of a weapon was deemed by the law to have consented to intercourse, even if she had never seen the man before the time of the attack. And remember, it wasn't enough to have independent proof of one of those elements; there had to be proof of all three. If a woman came to me or my colleagues

and said, "I walked out of Grand Central Station, and somebody held a gun on me and took my wedding ring and my wallet," she could go to a station house, look at mug shots, pick out the assailant, and testify at a trial. The jury might not believe her, but she could do all of that. But if in the same set of circumstances the guy ordered her to go under the stairwell and sexually assaulted her, she was incompetent to testify about the sexual assault unless the three elements were proved by other sources. We sent home women with stories like that every day of the week.

Changes in the Laws

The corroboration requirement, which every territory and state in this country had adopted and adapted, originally came from British case law. Sir Matthew Hale, Lord Chief Justice of the King's Bench in 1672, wrote that because rape is a charge that's easy for a woman to make and hard for a man to defend against, the courts must look at it more carefully than any other crime. That "more carefully" became codified as corroboration. The laws began to change some 300 years later not because any of us in the criminal justice system had the good sense to recognize the inequities but because of the women's movement in the 1960s and resulting agitation. It took 300 years to start getting those laws establishing the incompetence of the woman rape victim off the books. Elimination of the corroboration requirement was the beginning for us in the early 'seventies.

Not only did we need the elimination of old laws, but we also needed the adoption of rape shield laws, which are so much in the news today. Prior to the adoption of those laws, this is the situation faced by rape victims and by those of us who were trying cases against those charged with rape: If a woman was home alone and her house was burglarized and she was sexually assaulted by a stranger, the defense was still allowed to ask her about every sexual encounter she'd ever had in her life. The rape shield laws, which went into effect in every state in the country during the 1970s, were not adopted to put women on better footing than defendants in trials, but merely to make sure that a rape victim will have her day in court and that only when it is relevant will information about other sexual activity be introduced. The rape shield law, then, was the second major improvement that helped us get more women in the door.

I like to think of New York as a liberal or intelligent place to practice law, but until 1983 we had on our books something called an earnest resistance requirement. As I mentioned in connection with the "forcible nature" part of the old corroboration requirement, this meant that even if a woman was faced with a weapon such as a gun or a knife, she was still required by law to have fought against her attacker, or else she was deemed to have

consented to intercourse. I tried many cases where the jury convicted the men, but because the women had not resisted to the utmost, appellate courts overturned the convictions. It was really staggering.

The first high profile case I tried (although in those days they were just called sensational trials) came early in my career. Over a period of time, three women had gone to the police in Chelsea, in lower Manhattan, and each reported that she had gone to a dentist (the same dentist, but the women didn't know each other) and upon coming out of sedation believed that she had been molested while under sedation. After the first one went to the police station in the local precinct, a detective took the report and went to see the dentist. The dentist had had a long, distinguished career in Manhattan; he had been there twenty-eight years. He pulled literature out of his desk drawer and showed the detective that one of the side effects of the sedative was hallucination; he said that the young woman clearly had been hallucinating and had fantasized the sexual encounter. The second victim came in four months later and saw the same detective. The detective had the brochure, so he pulled it out of his drawer, showed it to the woman, and said, "Clearly, you've been fantasizing about that." When the third woman came into the station house, the captain had the good sense to say that there might be more to it.

We began an investigation and found only one case on the books where a dentist had been accused of molesting a patient. That was a case in upstate New York. That dentist practiced in his two-story house, and the police had actually leaned a ladder against the building, climbed the ladder, and looked in while the complaining patient was inside. Conviction. Overturned because the dentist had a reasonable expectation of privacy on the second floor of his house. So we knew we had to look for a better way to check on the dentist in Manhattan.

We went to our colleagues in the Rackets Bureau, where they do all of our white-collar and mob investigations. I was looking for some kind of analogy to a wiretap order that we would use in a mob case, but there was no point using a wiretap, which would capture nothing since the conduct was not spoken. My colleague had the good idea, which was novel in those days because we did not have the equipment we have now, of trying to do the same kind of thing with a concealed video camera. We went to court for a warrant to install a camera, which we placed in an air conditioning duct over the dental chair. We put the monitor in the basement, where the backup team would be watching what happened. The undercover policewoman that we found to do the work would go in for a nine o'clock appointment, with her partner posing as her boyfriend.

The hardest part of the investigation was finding a policewoman with an abscessed tooth. That was essential because the woman really had to need

anesthesia. The one we found was reluctant, but she agreed to do it in exchange for a gold shield—she wanted a promotion to detective. The ground rules were that the minute the dentist touched anything he was not supposed to touch, the backup team would intervene; we were not looking for anything more invasive.

The dentist put the policewoman in the dental chair, administered the anesthesia, and, in his great hurry to get to what he wanted to do, pulled the wrong tooth—an unexpected litigation opportunity for her private lawyer against the city of New York, and she collected nicely. After he pulled the tooth, he lifted her out of the chair and began to undress her and caress parts of her body that had nothing to do with oral surgery. The backup team broke in and said to the dentist, "Stop, you're under arrest." "What for?" "For sexually abusing the patient." And the dentist said, "I'm just resuscitating her; she was in respiratory distress."

The defendant waived a jury, and the case was tried before one of our terrific women jurists. In her ruling, the judge found that squeezing the buttocks was not a known means of resuscitation.

An interesting aspect of the case was that the mainstream media paid no attention to this issue. Back in the 1970s, nobody was writing about the more serious aspects of sexual assault or domestic violence. In this case in particular, we talked to the *New York Times* reporter about covering it because the accused was a licensed health care professional; at that time nobody believed a rapist looked like that. The reporter said simply that the editorial director of the *Times* didn't think this was a topic that interested their readers. The tabloids, on the other hand, had a field day with it. The *New York Post* headline for the conviction was "D.D.S.—Dentist Desires Sex."

Forensic Use of DNA

For half of my thirty years in that office, for half of my legal career, I practiced in this field without knowing that my now three favorite letters of the alphabet—DNA—had been sequenced and could be used forensically. Our work for those fourteen or fifteen years consisted of learning and then teaching police and other prosecutors how to get these victims into the courtroom, make them comfortable, and improve the conviction rate (which would have been impossible *not* to do) while continuing to lobby for legislative reform. In 1986 I was working on a murder case, and the chief pathologist called to tell me about a new scientific technique I needed to consider using in my homicide and rape cases. It was called DNA. I had never heard of it, so I took a crash course from a forensic serologist and did try to use it in the murder case. At that time, though, there was only one laboratory in the United States that processed DNA forensically—it was the FBI lab at Quantico—and you

needed a substantial amount of the substance you were analyzing—an amount about the size of a half dollar—for the lab to be able to work with it. Also, it took six months to get a preliminary result on the DNA, and no court in the United States accepted it as a reliable, scientific technique. As I mentioned, we did try to use it in that 1986 murder case, but at the end of a three-week *Frye* hearing, the judge said, "This science is going nowhere; forget about it; not admissible."

Now, of course, every city has a lab or access to one, and the lab needs less than two nanograms of material to get a result. The turnaround time is less than twenty-four hours. The Police Commissioner of Miami is a former New York policeman, and we had dinner a few nights ago. He told me about a serial rape case they had last year. After they caught the assailant, within three hours they had DNA confirmation for eight rapes that he had committed. And of course this evidence is accepted in every court in the country.

One of the most interesting cases I worked on shortly before leaving the office was a serial killer. Serial killers are not uncommon in fiction, but they are fairly uncommon in real life. We had four murders of teenage girls over a period of time and four other instances of sexual assault. The cases didn't appear to be related. They had happened in different neighborhoods, the modi operandi were slightly different, and we really had trouble developing a suspect. The cases began to match each other by DNA analysis, and when we finally developed a suspect, we discovered that he was a smart young man, a computer programmer. We put twenty-four hour surveillance on him and still had no probable cause to get saliva or blood or anything else we could use to compare DNA. One day he walked into a CompUSA store on Fifth Avenue with a stolen hard drive, and the police escorted him out on this misdemeanor charge. They called me and asked for a search warrant to get a toothbrush or hairbrush, but we couldn't do it because we didn't have probable cause. I called the lab—this was in 1998—and said, "I know this is a stupid question, but does the computer do anything for you?" The head of the serology lab said to me, "Yes, it does. Get me the mouse." "Why would you want the mouse?" "Skin cells." Just holding the mouse for several minutes would leave behind enough DNA to match him to the homicides. While I was drafting that search warrant, the suspect asked for coffee in the station house, and the saliva on the edge of the coffee cup linked him hours later to the murders of four girls and the rapes of the other four.

It is astounding technology. This science and its technology have enabled us to solve cases that even the best detectives and witnesses that I have ever worked with had no way of solving. The whole cold case business is more than a creation of television. There are data banks in every

state, and the federal government has one. Every week now in most large cities in the country, there are somewhere between ten and twenty cold hits—files that were closed five, ten, fifteen years ago, now solved. If the evidence was saved and detectives have been assigned, all we need to do is get that DNA fingerprint developed and put it in a data bank. Many of these cases can even be tried, because homicides don't have a statute of limitations, and many states have been extending other statutes. To me, this probably has been the most exciting part of the work.

This overview has allowed me to reflect on the enormous changes that occurred within thirty years, changes that made the prosecution of these "sex crimes" possible. When I arrived at the D.A.'s office, such prosecution simply wasn't possible. We witnessed and lobbied for major legislative advances. Through education, attitudes have improved. Now science has added tremendously to the solution and prosecution of these cases that once were ignored.

MY OTHER CAREER

As I mentioned at the beginning, my college major was literature because I have always wanted to write. After I had been practicing law for awhile, I was asked to write a nonfiction book about my work, which was rather serious and heavy.[1] That restimulated my interest in writing, and I've always loved to read crime fiction, especially series that had a continuing character who did the actual work in a field that I enjoyed reading about. So I began to write the kind of book I enjoyed reading. The continuing character, Alex Cooper, is a prosecutor whose work mirrors the kind of work that I did, so the professional part is very realistic.[2] The personal part is where I have taken the liberties. I have made her younger, thinner, and blonder, and I also endowed her with a trust fund that I didn't have as a young prosecutor, which gives her a lot more freedom. It's funny—I hear from many people from law school who say that it sounds enough like my voice that they know it's me, and the first question they always ask is this: "So the part about the trust fund—did you have that in law school?"

The writing is fun, and I suppose some of it is cathartic. Usually the murders are things I make up, but the procedural aspects of what the character does are drawn from my own experience. It's a wonderful opportunity to sort of get back at people with whom I have had problems. For example, there are a few judges who have said and done things in cases of mine, and

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[1] SEXUAL VIOLENCE (1993).

[2] Ms. Fairstein's latest Alex Cooper novel, ENTOMBED, was published in January 2005. *Ed.*

I get to write them another way. Also, Alex gets to say things to the judges that I could not have said in real life, which is a lot of fun.

One of the nicest aspects for me has been the transition. Criminal law and literature have been the two driving passions and interests in my life, and I have been able to combine them and to move from one to the other, as the dominant activity in my life. I recently heard from my favorite college professor, an English Literature professor, who wrote to me to say that he was so glad I had returned to literature, my first love. I wrote back, saying that few people consider crime fiction literature, but I was happy if he did. In response, he pointed out that when he goes to the library and looks in the card catalog, by virtue of the alphabet, I am between Ralph Waldo Emerson and William Faulkner, so we'll call it literature.

THE TANGLE OF OUR MOTIVES[†]

John W. Reed*

The title of my remarks might have led you to assume that, as unqualified as I am, I nevertheless am going to comment on our country's presence in Iraq. What are our motives for being there, and how multifarious and tangled are those motives?

The several motives put forth include:

- To strike at the roots of terrorism;
- To find and destroy weapons of mass destruction that are a threat to the Iraqi people and to their neighbors, and to us;
- To remove a possibly mad tyrant and change the Iraqi regime;
- To secure our access to Iraq's oil;
- To establish America's hegemony in the Middle East;
- To make the region safe for modernization, with its concomitant freedoms and human rights;
- To finish an unfinished war; and,
- Perhaps, some would say, to provide economic benefits for our military-industrial complex.

There are others, as well, but that list is enough to make the point that motives for our actions are seldom single and seldom pure.

But wait—Iraq is not what I want to talk about. It was simply the conundrum of Iraq that led me to these thoughts about the complexity and importance of our motives.

Let me offer another current illustration of tangled motives. The deadly attacks of September 11 revealed our vulnerability and, properly, impelled us to move swiftly to shore up our security. For its part, Congress passed the USA PATRIOT Act. (As an aside, I confess that only recently did I learn that the Act's comically Orwellian title, USA PATRIOT, is an acronym: **U**niting and **S**trengthening **A**merica by **P**roviding **A**ppropriate **T**ools **R**equired to **I**ntercept and **O**bstruct **T**errorism. And speaking of acronyms, I recall the story of the little boy who said to his father, "I know what the Bible means." "What do you mean, you 'know what the Bible means'?" "That's easy,

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Daddy. It stands for **B**asic **I**nformation **B**efore **L**eaving **E**arth.") Regarding the PATRIOT Act, Congress may perhaps be forgiven for the fact that the 342-page Act is a confusing mishmash, because it was written in six weeks by a body that was working in a difficult environment, physically as well as psychologically; Congress was housed for much of that period in temporary quarters since the Capitol was sealed off due to the anthrax scare.

Designed for the laudable purpose of preventing another 9/11, the Act is thought by some to have other, less laudable purposes that give the government unnecessarily broad powers over us and excessively diminish our privacy and liberties. As Stephen Schulhofer wrote in a recent book review, "We have seen opportunism on the part of the law enforcement establishment, which has exploited the momentum of 9/11 to expand government power to intrude on privacy in pursuit of wholly unrelated goals." I especially like the comment by Ethan Bronner, of the *New York Times*: "We are at an odd moment in our political debate. Liberals, who favor big government, oppose the one we have now because of who controls it. Conservatives, who shun big government, have discovered the pleasures of having one at their disposal." Talk about tangled motives!

We do know that motives make a difference. Those of us who are lawyers learned that fact in the first-year Criminal Law course. A killing may range from justifiable homicide all the way to first degree murder, depending on the motive, the purpose, the intent, with the penalties ranging from zero to execution. The same physical act has vastly different consequences, depending on the state of mind of the actor. Motives matter.

I found myself remembering discussions we had in college dormitory bull sessions about whether one can ever be truly, totally unselfish. If I help build a homeless shelter by giving my hard-earned money, even sacrificially, or by helping on the weekend to put on the roof, it may well be evidence of my motive to be charitable and generous. But, we used to argue, that gift or that work is also self-serving in that we do it because it makes us feel good, which is an arguably selfish—or at least self-centered—motive.

As sophomoric as such a discussion was, there was enough truth in it to set us thinking, then and now. Last week I sat in Ann Arbor's magnificent, newly remodeled Hill Auditorium and listened to the glorious voice of this generation's true diva, Cecilia Bartoli. Reading the program booklet during intermission, I looked at the long list of contributors to the University Musical Society, sponsor of the concert series. The hundreds of names were not listed in simple alphabetical order. Rather, they were listed in categories labeled Friend, Supporter, Principal, Concertmaster, Conductor, and Impresario, each with an indication of the dollar range of their giving, from as little as $50 to as much as $25,000 and up. And, I'm ashamed to say, I looked

for the names of Dot and John Reed to see who was in the same category and who was ahead, and so on. We are strongly committed to the support of great music; that's a good motive. But no one can be unaware of the scrutiny those gift categories receive; and that's arguably an unworthy motive for giving. And I haven't even mentioned the concomitant income tax deduction. My point, again, is that motives are seldom pure and often tangled.

Incidentally, our new Barristers Foundation has not yet dealt with the question of making public the names of its supporters, but one of our members made a generous contribution on the understanding that his name will not be revealed; and being from Canada, he receives no tax benefit. His motives are pure—unless again, the self-serving pleasure that comes from giving keeps any gift from being pure.

This dilemma, this paradox, is not new. People have talked about it and written about it since at least Biblical times. You will remember that both the Old and New Testaments direct us not to avenge ourselves by returning evil for evil. Those passages then go on to say: "If your enemy is hungry, feed him; if he is thirsty, give him drink." Talk about generous, benign, self-sacrificing conduct! Motives of the highest character: Avoid vengeance, and be generous to your enemy. But do you recall the rest of the sentence? It certainly brings us back down to earth. You are to feed your enemy and give him drink, says the passage, for in so doing you will heap coals of fire on his head. Tangled motives indeed!

I trust that I have made my point—perhaps over-made it: Motives are seldom pure. Motives are mixed. Almost always, we do what we do for several reasons, some good, some not so good. And our task, our goal is give the good motives priority and, to the extent possible, diminish those that are unworthy—to "accentuate the positive and eliminate the negative."

One of the great values of these annual meetings is that they help us think about why we do what we do. The rich variety of presentations, the relaxation of leisure time, the fellowship of talented friends who are both passionate and compassionate—these are among the things that set us to thinking about our lives as lawyers.

Let's go back to when you entered law school. Can you remember your thinking, your state of mind, at that time? Why did you decide to go to law school? Why did you decide to be a lawyer? What were your motives then? Money? Service to others? High social status? Interesting work? An ultimate judgeship? A mixture of these? This semester I am once again in the classroom at Michigan, with a class in Evidence; and it occurred to me to ask my students why *they* had chosen to come to law school and to enter the legal profession. I gave them a not very scientific list of twelve possible motives and asked them to indicate on a scale of zero to five how important each was

as a reason for entering the law. Let me read the twelve suggested reasons:

Family expectations
Parent or other close relative is a lawyer
Law school is a good place to be while I decide what I want to do with the rest of my life
Law is intellectually stimulating
Law will equip me for community leadership or politics
Law will equip me for success in business
Law will enable me to help people solve their problems
Law will enable me to be of pro bono service to the disadvantaged
Law will enable me to effect needed social change
Law will enable me to achieve a high level of income
Law will give me high social status
Law will afford me personal independence in my work life

The students were not asked to rank the options, only to indicate how significant each motive was in their decisions to enter the law. A respondent could very well assign a five to each of several options—or a zero or a three—because everyone had more than one motive, of course.

By mean score, the two lowest ranking reasons for coming to law school were the family connections. Having a parent as a lawyer was far and away the last choice, so if you think your daughter or son is going to choose law because you are a lawyer, lots of luck! And "Family expectations" was the second least important motive for these students. Third from the bottom was the statement "Law school is a good place to be while I decide what to do with the rest of my life." This option was important to the roughly ten percent who, in a separate part of the questionnaire, indicated that they were uncertain about whether they want to become practicing lawyers; but the mean score for this option overall was very low.

Let's go to the other end of the scale. In order, the top motives for entering the law were (1) Law is intellectually stimulating; (2) Law will enable me to help people solve their problems; and (3) Law will enable me to achieve a high level of income. The gap separating these three from all the other reasons was substantial, suggesting a fair consensus on what is important. But another fact is also interesting: The first choice—intellectual stimulation—significantly outranked the next two—to help people and to earn a good income—but those two were separated by a mere five-hundredths of a point. And it's those two I want us to think about for a few minutes.

First, however, just a word about the "intellectually stimulating" motive. That's a good reason for choosing any occupation or endeavor, and it's grat-

ifying to learn that our students look forward to a life of the mind. To serve law and justice best, the profession needs the brightest and best. And I assume that you who are lawyers remember the intellectual challenge as you entered law school.

I may have told some of you about an experience of my own during the first week of law school at Cornell. The teacher of the Contracts course was George Jarvis Thompson, co-author of the second edition of the classic *Williston on Contracts*. In personality severe, he was not unlike Professor Kingsfield of *The Paper Chase*, and all of us were in awe of him, and fearful. We were seated alphabetically, and on about the second day of class Professor Thompson began calling on people in my row. He asked questions of Pollock, Ransom, Ratzkin . . . and then called on Robinson, skipping over me. I breathed a huge sigh of relief and was still savoring my escape when I heard him say, "Mr. Reed, is what Mr. Robinson just said correct?" I, of course, had to admit that I hadn't heard a word Robinson had said, whereupon Professor Thompson lectured me for what seemed an eternity about the importance of the student's role, to the effect that if what Robinson said was correct, he wasn't going to waste our time by repeating it; and if it was incorrect, I had to be prepared to say why it was wrong.

In retrospect, I feel sure that the trap he set by skipping over me was a standard ploy enabling him to deliver his annual lecture on the importance of thinking along with the speaker, whether student or professor. Believe me, we all got the point—and remembered it. Indeed, at my fifty-fifth class reunion seven years ago, ten of us survivors were at dinner, and someone, feeling nostalgic, suggested that each person relate a law school anecdote. When my turn came, I began the story I have just told you. As I got to the part about moving along the row and said, "First, he called on Pollock, . . ." someone interrupted with ". . . then Ransom and Ratzkin, and he skipped to Robinson." I suggest that when a nonparticipant remembers detail like that fifty-eight years later, it is clear and convincing evidence of the impact of the episode. Law school was indeed an intellectually stimulating place, as our students today find it still. And enjoying the intellectual challenge of the law is not a bad motive for being a lawyer.

But let's return to the two next ranking attractions of being a lawyer, as seen by my students. They clearly see it as a helping profession, and, almost equally, a career that can provide an above average income. I honestly cannot remember how I viewed those possibilities when I entered law school. I do not recall thinking about the economic side of things, other than to wonder whether, near the end of the 1930s Depression, I would be able to find a job upon graduation. But I am sure that I thought of how rewarding it would be to have the skills with which to be a counselor and find solutions to my

grateful clients' problems—family, business, personal—and possibly to work for a more just society. (And I probably thought being a lawyer would give me high standing in the community. Interestingly enough, that motive ranked ninth in the survey of my students. Evidently, status is not of critical importance to them.)

I do not know how today's practicing bar would rate these two motives: service and money. From all the hand-wringing in the profession and the criticism in the media, one might assume that the money motive has become paramount, and we talk in terms of a profession that has metamorphosed into an industry. Each of us, surely, practices law with a mixture of both motives. We try to help people, and rejoice when we succeed. We try also to provide well for ourselves and our families and, again, rejoice when we succeed. I cannot imagine a legitimate criticism of that combination.

I do submit, however, that something is lost if the helping motive does not substantially outweigh the money motive. We've all heard about doing well by doing good. That's fine, as long as the emphasis is on "doing good," with "doing well" as merely a collateral benefit. The helping part ought to be an utter joy, not merely the source of billable hours.

I commend to you a statement by our fellow Barrister, John Martzell of New Orleans, quoted in the American Bar Association's on-line report a couple of weeks ago. The question of the week was this: "What dream have you realized since coming to the bar?" Martzell's answer: "Since I came to the bar I have not worked one day—it has been all play. Of course, this means I cannot retire because there is nothing to retire from."

For all too many people—lawyers as well as nonlawyers—money becomes an end itself, with its trappings of power and status. You may remember the wonderful old movie *The Wheeler Dealers*, about some Texas oil millionaires (played by James Garner and Chill Wills and Phil Harris) who are always wheeling and dealing. As they are flying in their private plane on the way to yet another big deal, one of them asks the character played by Phil Harris why he is greedily pushing so hard to make another million or two. He replies, "It ain't the money; money is just a way of keeping score."

What I am really asking about is the effect of our motives—both personally and as a profession. And I am asking whether those motives have significantly changed over the years since we first became lawyers. Indeed, I ask whether we are even aware of what our motives are, or have become. There is a great danger that we get so used to our everyday work, dealing with the in-baskets and out-baskets of our daily lives, that we forget *why* we are doing what we do. Without an awareness of our motives, we slip into mere pragmatism, with the pragmatist's penchant for splitting the difference.

The reality of our lives is thick with ambiguity; and if we have lost our moorings, we suffer from clenching anxiety and paralyzing guilt. Whether one talks about an individual life, or a profession, or a nation, integrity requires a unifying vision, an intellectual underpinning. My concern is that you and I all too often just sail along, unaware of our own motives. It was of such an unthinking person that someone said, "Deep down he's really shallow."

I believe the great benefit—the treasure—of this week together is that we have been made newly aware of our own motives, our vision, the usefulness of our lives. We have been led to ask ourselves what our values are. Justice Abella, Bryan Stevenson, Kim Phuc Phan Thi, Gary Guller, and the others—their words and their lives have said to each of us, "Think. Think about the purposes and the motives of your life."

I would not for a moment try to tell you what your motives should be as you live the life of a lawyer. We might agree or disagree, although I expect we would come pretty close on most issues. But the important thing here, as in so much of life, is that it's the questions, not the answers, that really matter. And if you are asking the questions with an awareness of your underlying philosophy and beliefs, I shall not be much concerned with where you come out. It's when you quit questioning that I begin to worry. I then think of the Ozarks farmer who said, "Grandpa had a mind like a steel trap, but it had been left out so long, it had rusted shut."

So yes, motives matter. And yes, motives are inevitably tangled. Our task, yours and mine, is to be newly and continuously aware of our motives, to sort them out as best we can, and then consciously to act in the light of them. As Sir Thomas More put it five hundred years ago, "The things, good Lord, that we pray for, give us the grace to labor for."

ANSEL ADAMS: ONE WITH BEAUTY[†]

Mary S. Alinder*

I would like to dedicate my lecture this morning to Kim Phuc. Yesterday she personally showed us the profound impact that one photograph can have.[1] Her whole presentation hit me deeply, as it did all of us, but it hit me especially because of my relationship with Ansel Adams. I have narrowed my focus on Ansel for you this morning to address Ansel the artist, because for me, no matter what, that is his essence. But you may know that Ansel was also a fervent environmentalist. He believed strongly that every photograph he made, he made for an inner purpose, an assignment from within to express great beauty. He never made a photograph specifically for a cause—but he was thrilled if a photograph could be used to further a cause, and that's a fine distinction.

Personal History with Ansel Adams

I was lucky enough to work for Ansel. The question I get asked more often than any other is, "How did you get that job?" In 1967 at the University of Oregon my husband, Jim, and I took a workshop on a group of great photographers called Group f/64. Ansel Adams, Imogen Cunningham, and Brett Weston, original members of Group f/64, were among the teachers at the workshop, so we kind of got to know Ansel—but he was already such an icon that he was hard to relate to, I felt.

Jim became more and more prominent in photography and edited the journal for photography professors in the United States. We went to the University of Nebraska, where Jim became a professor in the art department, and we lived in Lincoln for ten years. Our children were all born there. Then Ansel called and invited Jim to run his nonprofit in Carmel. As much as we loved Lincoln—and I still love Lincoln greatly—we could not refuse. So we moved to Carmel in 1977.

I began to get to know Ansel through Jim, and I was at hand when Ansel needed additional help in 1979. Up to that time he had published thirty-five

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[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 5, 2004.

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[1] Kim Phuc Phan Thi, *With Peace, Love, and Forgiveness*, 39 International Society of Barristers Quarterly 374 (2004).

books, had met every deadline in his life, and had an exclusive contract with Little, Brown and Company. He became desperate in 1979 because he had a contract with Little, Brown to deliver a manuscript of an autobiography in 1978, and he had yet to write a word. My background had been in English and editing, among other things; and starting in 1979, where Ansel went, I went, because that was the only way to get the book done. He had so many things going on that it was hard to keep up with him. Each summer he taught workshops in Yosemite for the whole month of June. Every president from John Kennedy onward wanted to meet and speak with him. He was extremely involved in environmental causes and art causes.

It turned out that 1979 was a banner year for Ansel. He was on the cover of *Time* magazine. He had his first huge, solo exhibition at New York's Museum of Modern Art. (In 1940 Ansel had been the cofounder of the Department of Photography at MOMA, the first department of photography in any museum in the world; and yet he had never had a big exhibition there until 1979.) And President Carter asked Ansel to make his official presidential portrait—the first time the official portrait was a photograph instead of a painting. The next year, 1980, President Carter awarded him the Presidential Medal of Freedom. When he awarded the medal, President Carter said this:

> At one with the power of the American landscape, and renowned for the patient skill and timeless beauty of his work, photographer Ansel Adams has been visionary in his efforts to preserve this country's wild and scenic areas, both on film and on earth. Drawn to the beauty of nature's monuments, he is regarded by environmentalists as a monument himself, and by photographers as a national institution. It is through his foresight and fortitude that so much of America has been saved for future Americans.

Even though I was supposed to get that autobiography done, there were always so many other things happening. In fact, we even produced a different book almost every year while he was still alive. One of them resulted after I told Ansel that one of the chapters in the autobiography simply had to be some of his stories about why he made certain photographs. People always wanted to know *why* he took this one or that, and *how* he did it; and he had never written about that. He got so excited about this proposed chapter that it became a spinoff book called *Examples: The Making of 40 Photographs*, published in 1983. That book drew such an audience that it is still in print, but at the time it got in the way of the autobiography, unfortunately.

Ansel died on April 22, 1984. When he died, we had yet to complete the autobiography, but we had just finished proofing all 40,000 of his negatives. That was the first time in his life that they were all proofed. I spent the next year after his death not only finishing the book but going through the 40,000 negatives and selecting almost 300 of them to illustrate the book.[2] It was very important to Ansel that the autobiography be a combination of words and images. This book became his biggest best seller; it was on the *New York Times* best seller list for quite a while. He would have loved to have known that.

Personally, I thought one of the big charms of the autobiography was the cover picture of Ansel, which was made by my husband, Jim. Jim and Ansel used to photograph together a lot. Often, on Saturday morning, when our children were watching cartoons, we would hear a knock on the door at nine in the morning, and Ansel would stand there saying, "Can Jim come out to play?" On one such morning, Ansel went out on our back deck to wait while Jim got ready. It was very foggy that morning, and when Jim came out, he took the picture of Ansel that appears on the cover of the autobiography. (My husband took pictures of Ansel all the time. You would think many people would have done that, but they didn't. I think most people were too shy or too intimidated to take a photograph of the great photographer.)

An edited collection of letters followed the autobiography by a few years,[3] but it took me several more years to come to terms with telling Ansel's story—not how Ansel wanted me to tell it but how I knew I had to tell it from my point of view.[4] Again, the cover photograph was made by my husband. It originally was a color image, but my publisher, Henry Holt in New York, insisted that a book about Ansel Adams could not be published with a color photograph on the front, so it became black and white.

BRIEF OVERVIEW OF THE FORMATIVE YEARS OF ANSEL ADAMS

Let's backtrack now, to see how Ansel got his start. He was born on February 20, 1902, in San Francisco, the only child of Charles and Olive Adams. He was born into a family of great wealth, because his grandfather had made money in the Gold Rush—not by finding gold but by working as a grocery wholesaler. He then had parlayed his grocery position into becoming a lumber baron. He bought many tracts of land in the Pacific Northwest,

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[2] A. ADAMS WITH M.S. ALINDER, ANSEL ADAMS: AN AUTOBIOGRAPHY (1985).
[3] ANSEL ADAMS: LETTERS AND IMAGES, 1916-1984 (M.S. Alinder & A.G. Sullivan eds. 1988).
[4] M.S. ALINDER, ANSEL ADAMS (1996).

built sawmills, and had a fleet of sailing ships. In 1903, when Ansel was a year old, Ansel's father built Ansel's childhood home with lumber from his father's (Ansel's grandfather's) sawmills, out on the western edge of San Francisco and the sand dunes overlooking the Golden Gate. Ansel felt that he could trace the man he became to two critically important events, and one was that his father chose to build his home in this place of great beauty, so that Ansel was raised in those surroundings. The other (which really was the first, not the second) important event was that he was born to that father. Ansel's father was a great nurturer who believed in his son, always.

Ansel's parents weren't formally religious, but his father was steeped in the philosophy of Ralph Waldo Emerson, and he raised Ansel under the beliefs of transcendentalism—that through nature one can find the gateway to God, to a higher being. Another important influence on Ansel was a maiden aunt who lived with Ansel's family. Her "guru" was Robert Green Ingersoll. This is a quotation from Ingersoll: "The firmament inlaid with suns is the real cathedral. The interpreters of nature are the true and only priests. . . . Let us flood the world with intellectual light."

According to Ansel, the greatest physical tragedy that he witnessed or endured was the 1906 earthquake in San Francisco. His father was out of town. Ansel woke up and ran into his mother's room. The chimney had fallen off, and they had a splendid view of the Golden Gate through the hole left by the absence of the chimney, but other than that the house seemed solid. A few hours later, Ansel was playing in the garden when an aftershock struck, and he was thrown into a low wall. His nose was broken. When the family doctor finally came, he said, "Mrs. Adams, I advise you to wait until the boy matures to have the nose fixed." As an adult, Ansel would often laugh and say the boy never matured; his nose was always broken and slanted to the left, like his politics.

Today we would describe or categorize Ansel Adams as hyperactive. He could not sit still. He twitched, he moved when he was supposed to sit still; he ran when he was supposed to walk. He was thrown out of a series of schools for misbehavior. He would laugh inappropriately because he thought school was boring, and it made no sense in his life. Luckily, as I mentioned, he had a great father who understood and supported him, and this was at a time when alternatives were more available and more acceptable. His parents found private tutors for him, and that made a big difference; but Ansel still felt that he was at loose ends much of the time.

In 1914 Ansel heard a piano being played, decided it sounded good, and started playing on his family's piano. In a letter written in 1914, Ansel's father told his sister: "Ansel has developed quite a taste for music lately. He started a few months ago to play on the piano, and heaven knows where

it comes from, but he can read almost anything put before him at sight." Overnight Ansel found discipline and found that he could create beauty out of the chaos of this world; all of a sudden he felt that there was meaning around him. He decided that he was going to be a classical pianist.

In 1915 San Francisco celebrated both its rising from the ashes of the earthquake and the opening of the Panama Canal with the Panama Pacific International Exposition. It opened exactly on Ansel's thirteenth birthday, and Ansel's father gave him a one year pass. So his schooling for 1915 consisted of going to all the great exhibitions of the Exposition, as well as continuing his piano practice.

Besides being hyperkinetic, Ansel was a sickly child. Measles, mumps—any disease that came through he would get. In 1916 he was in bed with the flu. His aunt gave him a book, *In the Heart of the Sierras* by J.M. Hutchings, and upon reading it, Ansel became entranced with Yosemite. He decided that he must go there. He convinced his father that the next family vacation had to be in Yosemite, and on June 1, 1916, they arrived.

They stayed at Camp Curry. If tourism was booming in Yosemite, Camp Curry could take 10,000 people a year. This is what the tourist brochure from 1916 promised: "[I]ce cream daily, chicken every Sunday, . . . two pianos, a barber shop, the only swimming tank in the Valley, and the largest and best hardwood dancing floor in Yosemite—experts say it is not surpassed in California—all for $2.50 a day or $15 per week. All roads formerly led to Rome. All roads now lead to Camp Curry."

During their first day in Yosemite, Ansel's parents gave him the gift of his first camera. His father was a hobbyist and used a Kodak Bullseye. They gave Ansel the American children's camera, which was a Kodak Box Brownie: "You push the button, we do the rest." This was the only year Ansel didn't develop his own prints. Immediately, he decided that other developers weren't good enough. Even at that young age, he began making his own prints.

Every year after that first trip in 1916, Ansel returned to Yosemite—at first with his parents, or at least with his mother, and then alone. His father often could not go because he had to work. The grandfather, who had been the source of the family's wealth, had no insurance and during Ansel's childhood had lost all of his sailing ships and woodmills to shipwrecks, fires, and financial depressions. By the time Ansel was well into his teens, the family had absolutely no money, and Ansel's father had to work the rest of his life just trying to make ends meet and pay off family debts. He was little suited for the kind of work he ended up doing, and he was determined that Ansel would not suffer the same fate, so he gave Ansel the freedom and encouragement to find the path that suited him.

In 1918-19 the world was swept by a Spanish flu pandemic; twenty-two million people died around the world. Ansel, of course, got it and was very ill during the early months of 1919. His aunt gave him another book, a biography of Father Damien who cared for the lepers on Molokai. Ansel became phobic, obsessed with germs, and tried to avoid touching anything. He was sick, mentally as well as physically. He told his parents there was only one way he could be cured; he had to go to Yosemite. His parents, who couldn't afford to go, finally agreed to send Ansel, knowing that friends in Yosemite would look after him. Ansel was so weak that he could barely make the train trip—but by the end of his month in Yosemite, he was tanned, well-fed, strong, and happy. His phobias and his physical ailments were gone. Yosemite, he knew, had healed him. Yosemite was his well-spring. It was his center for health, for photography, for all that was good in his life.

When Ansel returned to Yosemite in 1920, he made his first intentionally created photograph, a soft-focus image of Diamond Cascade. He sent it to his father with this note:

> I have taken . . . a photograph and am enclosing it in this letter. . . . I had the idea all framed several days before undertaking the picture. The idea is . . . to interpret the power of falling water, the light and airy manner of the spray particles and the glimmer of sunlit water. Very easy to think about but not so simple to do. . . . I want you to see what I'm trying to do in pictorial photography—suggestive and impressionistic you may call it—. . . it is the representation of material things in the abstract or purely imaginative way. . . . Hope you like it.[5]

The Diamond Cascade photograph was an example of the style of photography that was prevalent at the time, called pictorialism. The photographs were designed to look like "real art." Photographers felt compelled to do this because realistic photography didn't get much respect; people said it couldn't be art because it was made by a machine. So photographers would make their pictures look like paintings, etchings, drawings.

In 1921, however, Ansel began to move away from soft focus and toward the imagery that everyone associates with him. In 1923 he produced a sharp, crisply focused picture, *Banner Peak and Thousand Island Lake*. About this photograph, he later wrote:

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[5] LETTERS AND IMAGES, *supra* note 3, at 6-7.

> I can recall achieving another layer of meaning in only a few of the photographs taken before 1927. . . . There was one exceptional photograph of Banner Peak and Thousand Island Lake with a glowing evening cloud. I can recall the excitement of the scene, though at the time I had no precise idea of the image I was to make. It seemed that everything fell into place in the most agreeable way: rock, cloud, mountain, and exposure.[6]

Thus, in 1923, the problem with his photography was that, although he could make a really wonderful picture, he couldn't do it consistently.

The other problem was that his music was suffering. He loved photography, but that was supposed to be his hobby; photography was no way, his mother believed, to make a living. Also, music was respectable, and photography was not. But in order to be a classical pianist, one must practice hours every day, which Ansel could not do easily when he was in Yosemite. He had, however, met Harry Cassie Best, a painter who had one of the two pianos in the Valley, and Harry had told Ansel that he could practice on that piano. Harry Cassie Best also had a lovely daughter, Virginia, who was two years younger than Ansel. She was a great Yosemite girl; she loved the outdoors and could hike with the best of them. Also, she, like Ansel, loved poetry, and she was training to become a classical singer. Ansel and Virginia fell in love, out of love, in love, out of love through most of the 1920s.

In 1920 Ansel had begun working for the Sierra Club as the custodian of their headquarters in Yosemite, the LeConte Memorial Lodge, a job he held for four years. In the spring, Ansel would arrive, literally sweep out the mice, and put down his bedroll. When visitors came in, he would show them the collections in the lodge or take them for a hike around the Valley. Every year in the month of July, for two to four weeks, the Sierra Club would go into the mountains. Ansel joined the 1923 outing for a few days but began full participation in those outings only in 1927. Still, the 1923 trip was significant because it was there that he met Cedric Wright, who became Ansel's best friend. Cedric was a serious musician who played the violin out in the mountains on the Sierra Club trips, and photography was his hobby. Cedric was ten years Ansel's senior and quite worldly. He introduced Ansel to the writings of Edward Carpenter, a British philosopher at the turn of the century. (As you might have gleaned, Ansel never was influenced significantly by other visual artists. His sensibilities and his internal aesthetic clock instead were being set by philosophers.) Two quotations from Carpenter's works were especially apt for Ansel: "The object of the

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[6] AN AUTOBIOGRAPHY, *supra* note 2, at 72-73.

Fine Arts is to convey an emotion." "Never again will art attain to its largest and best expressions, till daily life itself once more is penetrated with beauty." Ansel and Cedric swore like blood brothers that they would dedicate their lives to the creation of beauty.

Ansel never stepped back from that determination, even through all the years when it was unfashionable. During the 1930s when the Depression raged and he and his great friend Edward Weston were criticized for photographing rocks while humanity was suffering, he never stepped back. He stayed the course during the Vietnam War when my generation criticized Ansel because we saw no use for pictures of mountains when terrible things were happening in Vietnam and the rest of the world. Ansel finally made me see it differently: In his view, it's exactly at the times of greatest tragedy that we need the sustenance beauty can provide us, the hope it can give us, its vision of our world and what we are fighting for and who we are as human beings.

By 1925 and 1926, his vision was really maturing. In 1926 he met Albert Bender, who was a small patron of the arts in San Francisco. Albert looked at Ansel's photographs and decided that Ansel should do a portfolio. He got on the telephone immediately and sold fifty portfolios to his friends—even though no portfolio existed—and he wrote out a check to Ansel for $500.

This was the turning point in Ansel's life. Until then, he had thought the only way he could make any kind of living was by giving piano lessons, and they were something like seven for ten dollars. He had tried forming a music trio, the Milanvi—Mildred was a violinist, Vivian was a modern dancer, and Ansel was the pianist—but that did not succeed. The one review of the Milanvi Trio I found said that the pianist drowned out the violinist and raced ahead of the dancer. Music was not looking promising, and all of a sudden, Albert showed Ansel that he might be able to make a living as a photographer.

MATURATION AS A PHOTOGRAPHER

Ansel was still working on the portfolio in the spring of 1927 and decided he had to make one more picture. He invited four friends, including Virginia Best and Cedric Wright, to hike to a certain spot off-trail to make a photograph of Half Dome. Ansel took other photographs along the way and had only two plates left by the time they reached their destination; and when they got there, the light wasn't quite right. (I should tell you that Ansel rarely waited for a photograph. People assume he did, but he didn't. He felt that if you waited in one place, you would miss something else

around the corner. But this time they had come so far for a particular shot, and he had to wait for the sun to move further west to illuminate the face of Half Dome.) So the friends had their picnic lunch, and Ansel prepared to take one of the most important photographs of his life. In his words:

> Over the lens I placed a conventional K2 yellow filter, to slightly darken the sky. Finally everything was ready to go. The shadow effect on Half Dome seemed right, and I made the exposure.
>
> As I replaced the slide, I began to think about how the print was to appear, and if it would transmit any of the feeling of the monumental shape before me in terms of its expressive-emotional quality. I began to see in my mind's eye the finished print I desired: the brooding cliff with a dark sky and the sharp rendition of distant, snowy Tenaya Peak. I realized that only a deep red filter would give me anything approaching the effect I felt emotionally.
>
> I had only *one* plate left. I attached my other filter, . . . , increased the exposure . . . , and released the shutter. I felt I had accomplished something, but did not realize its significance until I developed the plate that evening. I had achieved my first true visualization! I had been able to realize the desired image: not the way the subject appeared in reality but how it *felt* to me and how it must appear in the finished print.[7]

The photograph was *Monolith, the Face of Half Dome*, Ansel's first masterpiece.

On January 2, 1928, Ansel and Virginia were married. It was almost a spur-of-the-moment event. On December 26, 1927, Ansel appeared on her doorstep and proposed, and she accepted, having waited around for years. For the wedding, Ansel wore his only shoes, black basketball sneakers, and plus-fours, and Virginia wore her best dress, which happened to be black. Ansel's mother sat in the front row and wrung her hands and cried the whole time because she knew that black was bad luck. Then Virginia went to live with Ansel and his parents, in the family house in San Francisco.

There was a major problem for Ansel and Virginia. They were both romantics, and they had never talked about what marriage should be for them. Ansel wanted a partner; he wanted a woman to develop her own career, to have a studio for friends to come to, to walk together through life achieving everything. He wasn't interested in a typical domestic life or in having children, and he didn't talk to Virginia about that. Virginia wanted

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[7] AN AUTOBIOGRAPHY, *supra* note 2, at 76.

children; she wanted the traditional family; she wanted to be the homemaker. Ansel was a wonderful teacher, and he was a teacher in almost all of his relationships, including his relationships with women. Virginia did not want to be his student. They immediately had problems.

Two years after they were married, Ansel was on a trip and wrote her this: "My love for you is directly proportional to your creative work—proportional to the extent . . . you become a real person. Character is to me an empty shell when it is not filled with vital intention and accomplishment—rather, accomplishment of the beautiful creates character."[8] Ouch!

To make a living, Ansel opened a photography studio in his home. When he announced that he was going to be a commercial photographer to make a living—people didn't buy fine art photographs then—his mother wailed, "But photography cannot express the human soul." Ansel replied, "Mother, perhaps the photographer can." He took out a full-page advertisement in the *Sierra Club Bulletin*, which would reach his best audience; he could sell Sierra photographs to the Sierra Club members and publicize his availability as a portrait photographer.

One job taught him a valuable lesson. He was hired to do a class portrait of kindergarten children. He set the students up in the classroom and took out the flash powder he had brought. (This was before flashbulbs.) He had never used flash powder, and he miscalculated by a multiple of seven how much he needed to use. When he ignited the powder, the result was apocalyptic. The children screamed and dove under their desks, and the fire department came. When the smoke cleared, the teacher ushered the children out into the schoolyard, and Ansel took the photograph in natural light. From then on, he swore by natural light photography.

His largest client in the 1930s was the Yosemite Park and Curry Company, the concessionaires. He made a lot of photographs of Yosemite, especially of winter activities in Yosemite. The purpose, of course, was to draw winter tourism. The steady income enabled Ansel to get his first eight-by-ten-inch view camera, which became his signature camera, and panchromatic film. In a lot of his early landscapes, the skies were "bald"—white, bleached-out—because the film that he could afford, orthochromatic film, was overly sensitive to blue so it overexposed all the skies. (In fact, in the nineteenth century, photographers would trade negatives: "You give me your clouds, and I'll give you these mountains." Clouds from Switzerland would go into a photograph of the Tetons.) With panchromatic film, Ansel could expose for clouds and landscapes together.

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[8] LETTERS AND IMAGES, *supra* note 3, at 42.

The Sierra Club continued to play an important part in Ansel's life. He became very popular on the annual Sierra Club outings. Making the trek every year helped him in his photography; he made some of his greatest photographs on the Sierra Club trips. He was also the leader of the evening entertainment and the keeper of the lost and found. For the evening entertainment he wrote a series of fractured Greek plays, with titles such as "The Trudgin' Women" and "Exhaustos." And he wrote for the *Sierra Club Bulletin*. In early 1932, he wrote this about the 1931 outing:

> Mid-afternoon . . . a brisk wind breathed silver on the willows bordering the Tuolumne and hustled some scattered clouds beyond Kuna Crest. It was the first day of the outing—you were a little tired and dusty, but quite excited in spite of yourself. You were already aware that contact with fundamental earthy things gave a startling perspective on the high-spun unrealities of modern life. No matter how sophisticated you may be, a large granite mountain cannot be denied—it speaks in silence to the very core of your being.[9]

Ansel was elected to the Sierra Club board in 1934 and served on it continuously until September of 1971. He was central to the winning of many environmental battles and to the founding of King's Canyon National Park. Even though he was not on the Board after 1971, he was active in the Wilderness Society and in the politics of environmentalism.

In 1932 a number of photographers came together and decided to fight for the recognition of photography as a fine art. They believed that photography should celebrate its strength with sharply focused images, great depth of field, great tonality. As I mentioned at the beginning, they called themselves Group f/64, and they all pursued straight photography—everyday subject matter, crisp, clean images with great texture and detail. A popular photographer of the time, William Mortenson, was outspoken in his opposition to the Group f/64 approach, and Ansel wrote a letter to him in 1933:

> Mr. Mortenson, there will be salons of Pure Photography long after your creations are to be found only in collections of Photographia Curiosa. . . . How soon photography achieves the position of a great social and aesthetic instrument of expression depends on how soon you and your co-workers of shallow vision negotiate oblivion.[10]

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[9] AN AUTOBIOGRAPHY, *supra* note 2, at 143.
[10] *Id.* at 114-15.

In 1933 Ansel decided his photographs were worthy of being seen by the world, and he took his portfolio to New York, where he met Alfred Stieglitz, the great pacesetter not only in photography but also in painting. When Ansel got to the gallery, Stieglitz asked Ansel to sit down, but the only place Ansel could sit was a radiator because Stieglitz was sitting in the only chair. Ansel gave Stieglitz the portfolio, and Stieglitz looked at every print, one by one, very carefully, closed the portfolio, opened it again, and looked at each print again. He did not let Ansel say a word the entire time. Ansel said it took so long that his bottom was baked into corrugations. He was in agony, but he sat there because Stieglitz had not recognized any photographer from the West, ever. The meeting gave rise to a great friendship, and eventually to an offer of a show at Stieglitz's gallery, American Place, in New York. This amounted to the anointing of the next generation by the greatest man in fine art in the United States, and the person anointed was Ansel.

It was during the preparations for the Stieglitz show that Ansel hired an assistant and fell head over heels in love with her. Her name was Patsy English, and she was twelve years younger than Ansel. She loved having a teacher, and she loved learning about photography. Ansel decided that he would leave Virginia for Patsy—but his family and friends, including his beloved father, argued that he had to stay with Virginia and their two children. In 1936, after the Stieglitz show, Ansel went into a great depression. In fact, he was plagued by depression for the next few years, and was hospitalized twice because of it. He did stay with Virginia, but it was not a happy marriage. For the rest of their lives, most of the time Ansel was in San Francisco, and later Carmel, and Virginia lived in Yosemite.

As I have said, to make a living, Ansel worked as a commercial photographer; he would balance his commercial work with a day of independent, creative work. On one of those days, which we now know was November 1, 1941, he was driving back to a motel in Santa Fe with his son Michael and his friend Cedric after a discouraging day of photographing. Ansel happened to look back over his shoulder and noticed the wonderful light on the crosses of the churchyard of Hernandez, New Mexico. He literally crashed the car into a ditch and yelled to Michael and Cedric to help him set up his equipment. He had little time because the sun was setting behind him; he had time to make one exposure—without changing the lens or anything. His primary control was over the aperture, which he had to figure out instantly on his own because no one could find his exposure meter. And wouldn't you know it, the result became his most famous photograph: *Moonrise, Hernandez, New Mexico*.

What most people do not know, however, is that the familiar image of *Moonrise* is not a straight print. In a straight print (which I got him to make

only after two years of begging), you can see that it was late afternoon, but the sky was bright. He had to go through an intense process in the darkroom to develop the right tones. It sometimes would take him a week to make one print. It was by far his most popular print, and I always thought when he stopped taking print orders as of December 31, 1975, it was because he didn't want to make one more *Moonrise*.

In 1943, Ansel was invited to photograph the Manzanar Relocation Camp, one of the camps where Japanese-American citizens were interned. He was absolutely appalled that we interned American citizens, and he produced a book containing beautiful writing as well as wonderful photographs. For example, he showed one family in which the parents were interned and the son was a soldier in the Army. The son was in an Army hospital, recovering, and Ansel included his letters in the book. Ansel ended the book with these words:

> We must be certain that, as the rights of the individual are the most sacred elements of our society, we will not allow passion, vengeance, hatred, and racial antagonism to cloud the principles of universal justice and mercy.[11]

It was during the 1940s that he made some of his most famous images: *The Tetons and Snake River; Sand Dune, Sunrise; Mount McKinley and Wonder Lake, Alaska*. By then, he had built a camera platform for the top of his car. This allowed him to crop out all of that messy foreground. Many of you are photographers and know what a bane all those weeds in the foreground can be. Getting up on a kind of princely level, on top of his car, made a big difference for Ansel.

OBSERVATIONS OF ANSEL AND HIS LIFE

Editor's Note: Ms. Alinder illustrated her talk with slides, many of which were photographs by Ansel Adams and some of which were photographs of Ansel Adams, his home, his family, and his friends. Some of the comments by Ms. Alinder in response to the slides were side observations that did not fit readily in the context of her prepared remarks. These have been collected here for the insight they offer on the life and work of Ansel Adams.

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[11] A. ADAMS, BORN FREE AND EQUAL (1944), quoted in AN AUTOBIOGRAPHY, *supra* note 2, at 263-64.

In 1962 Ansel moved into a house built for him in Carmel Highlands. The house was built on a bluff overlooking the Pacific, and Ansel was proud that the house was so "tucked in" that it could not be seen from the ocean. It was designed around his work but in a practical way, not in a fancy or showy way.

The house also was designed for entertaining. Ansel was a party animal. He worked really hard all day long, but 5:00 was party time. You would hear the tinkle of glass as Virginia started setting out the ice, and people would start knocking on the door. Ansel was always listed in the phone book, and if you called him and said, "Mr. Adams, may I shake your hand?" or "Mr. Adams, may I show you my photographs?" or "Mr. Adams, can we talk about the Sierra Club?" or anything else, he would say, "Come on over at five o'clock for drinks." It didn't matter that he didn't know who you were. When it got late, Ansel would stand up and bang on a huge temple drum from China that sat on the mantle. It had such reverberation that it was like thunder rolling through the house, and you knew it was time to leave.

Ansel and Virginia had two children, Michael, born in 1933, and Ann, born in 1935. Michael is retired now, but he was an internist, and also a flight surgeon for the Air National Guard. He and his wife own the Ansel Adams Gallery in Yosemite and continue to run it, or rather their children run it. Ann graduated from Stanford with a degree in writing and went on to run the family business called Museum Graphics. It's a publishing house that prints note cards and postcards for fine art photography. Her daughters run that now.

As you might expect, given his own difficulties in school, Ansel believed in alternative ways of learning. He was a great workshop teacher and taught from the mid-1930s to the very end of his life. He was also inventive. I mentioned the top-of-the-car platform that he used to gain a higher vantage point and eliminate distracting foreground. His darkroom was another example. When most photographers use enlargers, they put the negatives in the enlargers and project downward onto tables. Ansel liked to make very big prints at times, so he made an enlarger out of a huge old view camera and he projected the image forward at a metallic wall, onto paper held up by magnets. The top of the metal wall could even hold a whole roll of mural paper. Both the enlarger and the metal wall were on rails so that he could move them closer together for smaller prints or farther apart for large murals.

Ansel spent a lot of time in the darkroom. If you see an Ansel Adams photograph that is signed on the front and not stamped on the back as a special edition print, it means that Ansel did all of the work himself. He did not like to have even an assistant in the darkroom. He might have an assis-

tant help him set up the equipment, but then the assistant would leave and Ansel would develop the print himself.

One thing Ansel was bad about was dates. For example, when asked about his most famous photograph, *Moonrise, Hernandez, New Mexico*, Ansel guessed that he made it in 1944, or possibly 1943. Thanks to modern knowledge and computer technology, however, a young astronomer was able to determine exactly when *Moonrise* was made—November 1, 1941, at 4:49:20 p.m. Mountain Standard Time. We gave a birthday party for *Moonrise* when we learned this in 1981, and everybody had to come dressed like Ansel.

When Ansel turned eighty in 1982, we wanted to do something special, but it was difficult because he was not a man who cared about material goods. (He was proud that his watch had cost only $29.95. He drove a Cadillac, yes, but it was used. We kept every rubber band from every newspaper.) For the party, I went to the pastry chef and ordered a cake that was supposed to be shaped like Half Dome in Yosemite; but unfortunately the chef had never been to Yosemite, which she neglected to tell me. The greater issue, though, was what gift I could give him, which I thought about for months. Then I remembered that Ansel had once told me he didn't want to have a funeral when he died, but if I had to do *something*, I could have music for his friends. So I said to Virginia, "How about if we give him the music while he's alive?" His favorite pianist was the great Russian pianist and conductor, Vladimir Ashkenazy. I tracked down an address and wrote him a letter through his agent in New York. To my surprise, Ashkenazy wrote back personally. It turned out he was an Ansel Adams fan! He had never played in a private house, but he came to Carmel to play a private concert. He came two days early to practice, and Ansel photographed him as he practiced. In fact, Ansel ended up having two covers on Ashkenazy's recordings, and Ashkenazy and his wife are lifelong friends of ours now.

In April of 1984, Vova (that's Ashkenazy's nickname) returned. He loved Ansel so much that he bought a house up the hill from Ansel's and brought his wife and children with him. He was going to perform a second concert for Ansel and his friends on Easter Sunday. A few days before Easter, on Thursday, Ansel wasn't feeling well so I took him to the hospital. It didn't seem that bad; his heart was having some problems but he was feeling fine and having a good time. But he just didn't get better and couldn't go home for the concert. He begged Vova to go ahead and play, which Vova did, and immediately afterward I took Vova to the hospital. Ansel greeted him heartily; Vova gave Ansel his latest recording, which was a Brahms piano concerto; and Ansel gave Vova a big bear hug. We went back to our house to have dinner. I got a phone call a little bit later and ran to the hospital. I

dove through wires—they had Ansel connected to everything—climbed up on the bed and put my face next to Ansel's. The doctor asked me, "Does he want to live?" Now, I don't believe in prolonging anybody's life when it is not good, but when I looked at Ansel, I knew he was still conscious and I knew in all of my being that there was no one more alive than Ansel Adams—so I said yes. The medical staff did everything they could, but he died right then. It was such a shock; no one had expected him to die.

He died on Easter Sunday. On Monday his body was cremated, and Virginia took his ashes home. When the weather got better, his son Michael hiked to the top of a little mountain and placed the ashes there. Shortly after Ansel's death, the two senators from California, Senator Wilson, a Republican, and Senator Cranston, a Democrat, joined together and got the Ansel Adams Wilderness declared. It is roughly 230,000 acres adjoining Yosemite and the John Muir Wilderness.

ANSEL'S VIEWS OF LOVE, FRIENDSHIP, AND ART

I'd like to close by reading my favorite letter that Ansel wrote to his good friend Cedric in 1937:

> A strange thing happened to me today. I saw a big thundercloud move over Half Dome, and it was so big and clear and brilliant that it made me see many things that were drifting around inside of me. . . .
>
> For the first time, I *know* what love is; what friends are; and what art should be.
>
> Love is a seeking for a way of life; the way that cannot be followed alone; the resonance of all spiritual and physical things. . . .
>
> Friendship is another form of love—more passive perhaps, but full of the transmitting and acceptance of things like thunderclouds and grass and the clean reality of granite.
>
> Art is both love and friendship, and understanding; the desire to give. It is not charity, which is the giving of Things, it is more than kindness which is the giving of self. It is both the taking and giving of beauty, the turning out to the light the inner folds of the awareness of the spirit. It is the recreation on another plane of the realities of the world; the tragic and wonderful realities of earth and men . . . .[12]

[12] LETTERS AND IMAGES, *supra* note 3, at 95.

ANYTHING IS POSSIBLE[†]

Gary Guller*

In the spring of 2003, Gary Guller, who had lost most of his left arm in a mountaineering accident in 1986, led an expedition of twenty-nine people with disabilities on a three-week journey from a starting point at 4,000 feet to the 17,500-foot base camp of Mt. Everest. Mr. Guller continued from there to the summit—the only person with one arm to reach the world's highest peak. Mr. Guller's inspiring (and awe-inspiring) address, which included excerpts from a documentary film still in production and numerous slides, is not fully reproducible here, but we wanted to publish a few key elements of his message. The documentary and a book about "Team Everest 2003" will provide the full story.

I have definitely spent my share of time at the bottom of the world; it was not easy to lose my arm as a young man of twenty. But I have grown and learned since then, and around the turn of the century I thought it was about time I went to the top of the world. On May 23, 2003, I stood on top of Mt. Everest. This expedition, however, was not just about Gary Guller standing on top of the world; it was about a group of people working together as a team, enjoying the freedoms that we all should have. The freedom to explore is a freedom we all should enjoy regardless of our abilities—or our disabilities.

* * *

When we got to the mountains, we still had preparations to complete. I would go into villages to get some last minute supplies, and I would hear the locals talking and giving us two or three or maybe four days maximum. I would go back to the team and say, "Guys and girls, there are some whispers out there on the hillsides that we're not going to make it very far." This is when something happened. Most of the team members have been told "no" or "you can't" so much of their lives, whether they were born with their disability or it happened later, that hearing of the negative predictions only

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[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 4, 2004.

* ARUN Expeditions, Austin, Texas; Mt. Everest Summiteer.

fueled their fire to keep going every single day. Every day we had a problem—but when we communicated with each other and brought everybody's assets to the table and looked beyond how they appeared on the outside, we were able to overcome everything that came our way.

Before they get underway, all expeditions go to see a lama. One of the Sherpas and I went to meet with the very old and very wise lama, and we asked him if he would give us all a blessing—not just the summit members but the entire team. I had never seen someone so old move so quickly as he left his house and went down the trail to the village. He opened up the small monastery and gave the whole team the blessing. He talked about how we all should dream that we are equal and that we are whole. After he wished us success, the clouds broke, the sun came through, and it shone right on the lama. At that point I knew something powerful was going to happen over the next couple of months.

We all got to Base Camp, at more than 17,500 feet, which was an amazing accomplishment in and of itself. This team was the largest group of people with disabilities ever to reach the Base Camp of Mt. Everest. We celebrated, and we enjoyed that success. But we had another task to do; I had to continue to the top of Mt. Everest if we really wanted our message to reach the world.

* * *

Four Sherpas and I set out at 5:30 in the morning. At one point on the Ice Fall, we had a close call with an avalanche, which missed us by mere feet. We kept going to Camp One and then to Camp Two, and on up to Camp Three where you dig your camp into the angle of the slope. Then finally we pushed up to Camp Four at 26,000 feet. There were many times between Camp One and Camp Two and Camp Three and Camp Four when I just did not want to keep going. I was tired, my arm was tired, the right side of me was tired, my head was tired, my ears—every part of me was tired. At the Camp Four level, the idea is to rest for three or four hours, drink, keep your wits about you, and then push on to the summit, but we got to Camp Four too late; there was no way we had time to rest and then go for the summit that day.

When the next day dawned, the Sherpas felt really funny, and the wind was blowing and didn't stop. We knew we had to do something pretty quickly because obviously you cannot "hang out" for long at 26,000 feet. We decided to give it one more day, and then we had to go, regardless.

After two and a half nights at Camp Four, the wind hadn't stopped. We knew we had to prepare for our summit ascent. We unzipped the tent, and the wind was blowing. We zipped it back up quickly, put on everything that we

had, double-checked the oxygen, unzipped the tent, and stepped out. Amazingly, the wind stopped, and it didn't blow again for the next twenty-three hours.

When you climb from Camp Four to the summit, you go up to what they call The Balcony and then follow the ridge and start looking into Tibet. You know you're getting really high because you're starting to look down on the summits of mountains you've read about all your life. After about twelve hours I was very tired, but as we rounded a ridge I looked up, and it looked like we had reached the top of the world. I said, "This is the top of the world!" Nima Dawa, the lead Sherpa, said, "This is the *south* summit."

This occurred at about 9:00 in the morning, so we were still doing well on time. From the south summit you can almost see the summit, but what's in between you is a knife edge about one hundred fifty meters long. You actually drop down a little from the south summit and you have to traverse this knife edge. It was 5,000 feet from there down to Camp Two on one side, but on the other side it was 11,000 feet straight down into Tibet. We kept climbing—and I was scared, really scared.

Then we got to the Hillary Step, which is a twenty-foot vertical rock wall at 28,500 feet, and I was looking straight up at it. Nima Dawa climbed over it and looked down at me. I was a good climber when I had two arms, but I knew I couldn't climb a twenty-foot vertical rock wall with one arm. I kept looking at it until Nima Dawa yelled, "Guller, you've got to do something; we cannot stay here." I kept looking and noticed that on the outside edge of the Hillary Step there was a two-inch-wide piece of ice. I thought perhaps I could get the front points of my crampon in that ice, use the ice axe, hit it really high, and pull myself up. My whole life, like a movie, passed before me in my mind. I could see everything, the good parts and the bad; it all was there. The Sherpa yelled again, and I called back, "I'm trying, Nima Dawa!" I had to step up and put my crampons in that strip of ice; and I reached up and drove in my ice axe, stepped up, put my crampons in—and looked down between my legs. Nothing but 11,000 feet of air into Tibet. I realized that I had a choice: I could lower myself back down and go home, or I could pull with everything I had and try to make it to the summit of Everest. I came to terms with where I was, and I accepted the consequences—and I pulled. And after maybe twenty minutes of climbing, one of the Sherpas looked back at me and said, "Congratulations." I looked up and I saw the prayer flags. That's when I knew that if there was just one thing I was going to do in my life for me, it was going to be to stand on top of Everest.

But it wasn't just for or about me. It was about so many people that came together to make the whole expedition and the experience happen. We stood on the summit, my four closest Sherpa friends and I. At the same time, we

all dropped to our knees and put our heads together and cried and cried. None of us could believe it. Then one of the Sherpas handed me the radio. (When you're climbing above Base Camp, you speak often to your base camp team with walkie-talkies.) When I grabbed that walkie-talkie and said, "Summit Team, Summit Team to Base Camp," I could hear not just our base camp yelling and screaming; I heard every expedition on the whole hill, and at Base Camp, and throughout the world celebrating because they knew that this whole expedition made people feel good and look at others differently.

The greatest lesson I learned from the whole expedition is that we can change our own thinking about stereotypes. And we can determine how long others hold their stereotypes of us, of anybody. This expedition was potentially one of the greatest things ever for the disability community, and for those among us who are lucky enough not to be in that position.[1]

[1] Support is always appreciated, and I would happily come, by any means necessary, to your offices, your retreats, or your children's schools to speak about this experience.

WHY I DIDN'T BECOME AN ACCOUNTANT[†]

Joseph P. Kennedy*

Addresses at Barristers' meetings sometimes deal with serious issues in lighthearted ways. Justice Kennedy's humor is so enjoyable that we have chosen to publish not only his comments about the importance of the rule of law and the role of lawyers but also the anecdotes and teasing that accompanied them.

If you'll indulge me, ladies and gentlemen, I want to thank your president, Daniel J. Kelly, of the San Francisco Kellys. I have no idea how he got to be your president, but that is your business. Seriously though, I have known Dan Kelly for only three years, since the Nevis meeting, but already (and I hope I'm not being presumptuous) we're pretty good friends. That might give you some idea of how desperate I am for friendship. I must admit that when I went to Nevis, at first I got Dan Kelly and Mike Kelly confused. They're both from San Francisco, they're both on your executive board, and they're both Polish—right? And one thing is certain: You'd never be able to distinguish them by saying that one is any smarter than the other.

I do thank Dan. My wife, Helen, and I would not be here if it weren't for him. He contacted me about a year ago and said, " Come to Naples." We were so enthusiastic—we had never been to Italy. We even got a Eurail Pass, which we are now trying to sell on eBay.

What an incredible resort this is! I don't want to give you the impression that we haven't been in good hotels before, but it's nice to have a room. Before coming down here, I was talking to one of the judges back home and mentioned that I was going to Naples. He said, "Southwest Florida? Watch out, it's ninety degrees in the shade down there." I said, "That's okay, I won't go into the shade."

I had some difficulty rearranging my schedule to get down here, but I was determined to do it because I wanted to give Joel Pink an opportunity to introduce me. I don't know how much he admires me, but I do know that public speaking is part of his therapy. He's got some unresolved issues. I think he did a good job, don't you? Joel Pink is certainly the best known lawyer in Nova Scotia, perhaps one of the best known lawyers in Canada,

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[†] Address delivered at the Annual Convention of the International Society of Barristers, Ritz-Carlton Golf Resort, Naples, Florida, March 2, 2004.

* Chief Justice, Supreme Court of Nova Scotia, Halifax, Nova Scotia, Canada.

from coast to coast. That's what losing a lot of high profile trials will do for you. He is always in control; no matter how bad things get in the courtroom, Joel always has that "cool." This is a man who has never had a bad hair day. He is a true student of law, not just a badgerer of witnesses. And he has written a procedural text that is used throughout our country, *Pink on Adjournments*, subtitled *327 Ways to Keep from Going to Trial*. It contains a whole chapter on obscure Jewish holidays. Who knew that Mardi Gras was a Jewish holiday? He came before me last year, which was wonderful because I'm always curious to see what the excuse is going to be. The day before the trial he said he couldn't go to trial because his favorite uncle, Uncle Simon, had just died. And I said, "No wonder you're upset, Mr. Pink, because you buried him last June."

I speak to lawyers' groups quite a bit, but this, as Mr. Pink suggested, is the only group that has ever asked me back. That says something about you, and it isn't good. This is a little early for me, I don't usually speak at this hour of the morning or, I guess more accurately, when I do speak at this hour of the morning, eventually my audience goes to jail. I mentioned to a few of our judges in the judges' lounge that I would be speaking here at 9:30 in the morning, so I didn't want to talk about anything too significant, too heavy, too deep; I wanted to be light and somewhat frivolous. One of the judges said, "Why don't you just read a couple of your decisions?"

Harry Wrathall, Q.C., is here today, also from Nova Scotia. I'm proud to see him here with Bette, still together. Back home Harry is a civil litigator and a big biller. If you get close to Harry, you can actually hear the meter ticking. He appeared before me a while back and was looking for a million dollars. I gave him three hundred thousand in damages. He said, "A lousy $300,000, M'Lord? Shouldn't my client get something?"

I was a criminal lawyer. My clients were the kind of guys who gave crime a bad name. They would commit felonies in their alibis. I was exhaustive in the defense of those reprobates, and I was a wonderful examiner of witnesses. Once I had a young lady on the stand. I began by asking, "How old are you?" She said, "I'm sixteen years of age." I then proceeded to question her for four or five hours. Before I sat down, out of an abundance of caution, I said, "I'm not sure I asked you how old you are." The judge said, "She was sixteen when you started, Mr. Kennedy." Another woman claimed that one of my clients had caused her substantial damages. Her whole lifestyle had changed. In cross-examination, I said, "Madam, I gather from your testimony on direct that before the accident, you were living in a paradise. Your life was perfect." She said, "It was, sir." I said, "A veritable Garden of Eden." She said, "Yes, it was." I said, "Madam, tell me this, were there any serpents in your garden?" She said, "No, sir, but you would have been treated courteously."

Once when I had a trial before Judge Vince Morrison, a famous judge in Nova Scotia, we were reaching the end of a trial after a long day in Digby, Nova Scotia. It was five o'clock in the afternoon on a cold winter day, and we needed to get back on the road because we were on circuit. It was time for me to do my summation. Judge Morrison asked, "How long will you be, Mr. Kennedy?" I said, "No more than an hour, M'Lord." He said, "Good–turn off the lights when you leave, will you?" In another trial in Sydney, Nova Scotia, I was representing a group of nuns in a complicated property contract matter before Judge Morrison. There were multiple parties. Judge Morrison said, "Whom do you represent, Kennedy?" I replied, "I represent the Sisters of Charity, M'Lord, and I'm proud to do so." He said, "Is the Pope aware of that?"

Even as a judge I have a hard time. A public defender down in Lunenburg put his client on the stand. The client proceeded to tell the most outlandish story I've ever heard. He went on and on and on and was on the verge of insulting my intelligence, but I couldn't cut him off because I was fascinated. After he finished, his lawyer got up and started making his argument, which was dependent upon the credibility of his client. I have a busy courtroom; I didn't have time for that. I said, "I don't want to cut you off, but I think it's fair to tell you there's not a man, woman, or child in this courtroom with an IQ over fifty who believes one word that your client said here today." He said, "That's probably true, Judge, but what do you think?"

A woman came before me seeking a divorce. I said, "Madam, for God's sake, you've been married to this man for fifty-three years." She said, "Yes, Judge, but enough is enough." Another day, a smart-aleck kid, full of attitude, came before me. I was in quite a mood, too, so I said, "Stand up straight, get your hands out of your pockets, and keep them out." I sentenced him to a three hundred dollar fine and asked, "Can you pay the fine today?" He said, "That depends." I said, "Depends on what?" He said, "Can I put my hands back in my pockets?"

Another defendant, Mr. Fink's client, was charged with multiple counts of fraud. Mr. Fink said, "This man has six identifiable personalities, M'Lord." Not surprisingly, the personality that committed the offenses was not the personality that came to court. Eventually I said, "I do agree and I find, Mr. Fink, that he does have six personalities—and one of them is going to jail."

I'm always fascinated by place names that derive from the native languages in North America. In Nova Scotia we have Tatamagouche and Kejimkujik and Whycocomagh, beautiful place names. Here in Florida I have discovered that just as surely in this state they have place names that derive from the Seminole Indians, the natives in this region—places such as Ocala and Ocklawaha and Tallahassee, and even Miami. Helen and I drove

into a place called Kissimmee a couple of years ago, and I was fascinated by that name. We went into a drive-in restaurant, and I said to the young lady at the counter, "I'm very interested in the name of this place. Could you pronounce it very slowly so I'll be able to understand it?" She said, "It's called Burrr. . . . .gerrr. . . . .King."

While in Kissimmee we went to Sea World, which was close by, and we spent a wonderful morning there. We saw the killer whales perform and the dolphins, and walked all morning. We were really enthralled by that place. By lunch time, we were quite hungry and went into a restaurant on site. Without thinking, I ordered fish. Halfway through the meal, it dawned on me that I was probably eating a slow learner.

I have a couple of Irish stories for the Kellys. A few years ago on Granville Street in Dublin, a beggar came up to me and said "Would you have a pound for a cup of coffee?" I said, "I happen to know that a cup of coffee is only half a pound." He said, "Won't you be joining me, then?" A lady wanted to put an obituary in the *Irish Times*, which is the *Washington Post* or the *New York Times* of Ireland. The fellow at the *Times* said, "That'll be five pounds a word, Madam." She said, "Oh, that's very dear, that's too expensive. Just put in 'Patty died.'" He said, "Madam, it's a minimum of five words." She said, "Put in 'Patty died, Toyota for sale.'"

Ladies and gentlemen, for a few minutes I will be serious, which I can manage for short periods of time. (I'm required to be serious back home on occasion because our court of appeal has no sense of humor at all. Here today from the Nova Scotia Court of Appeal is a longtime Fellow of this Society, Justice David Chipman, who would be a good example of what I'm talking about. It is good to see him looking almost lifelike.) I am aware, of course, that I am speaking to some of the very best trial lawyers in North America, and I want to take advantage of the opportunity to say a few words about the job, about the profession that dominates our lives and that is responsible for our being together today. This will expand a bit on what I said at Nevis three years ago. By the way, when I told Dan Kelly I was going to talk a little bit about what I had already talked about, he said, "You don't have to worry about these guys; they won't remember."

All my life I wanted to be a lawyer, at least from the time when I realized that I couldn't be an accountant because I didn't have the charisma. When I was ten years old and all my buddies would talk about being cowboys and firemen and playing in the National Hockey League, I wanted to be Perry Mason. I watched that show religiously. I cheered when Perry was able to get the witness to confess on the stand—always in the last five minutes. (And I had the hots for Della.) The very best day of my life was the day that letter came, the letter admitting me to law school. It hadn't been clear that that was

going to happen to me because I haven't always been this smart. I'm just glad I didn't have to compete against any girls.

I would like to tell you that I was motivated by the desire to right wrongs, to help the less fortunate, to change unjust laws, to challenge bullies, but I honestly can't remember having any of those worthy ambitions. I simply believed that being a lawyer would be the most exciting, wonderful thing to be. ("Hey girls, I have my briefs in here. I have important pleadings in here. I can't let them out of my sight. That's why I brought them into this bar. Come on over and see my mandamus.") It was going to be the most exhilarating life imaginable. I knew nothing about the registry of deeds, and Perry didn't do probate.

Despite my lack of knowledge going in, it *has* been the most rewarding, satisfying life—more satisfying than any kid could possibly have imagined. Perry didn't get to be a judge, and I don't know whether Perry had a pension plan at all.

We are members of this profession in the United States and Canada, the two great democracies of North America. We are the luckiest one percent of one percent of people on this planet. Do you think about that some days before you go into that pressure cooker, or do you just think about unreasonable clients and billable hours and difficult partners? Do you take ten seconds to consider your good luck? When you go into that courtroom, you go to the show—strategy, drama, unpredictability, lives on the line, futures, the stress of worrying about one wrong word, one dumb question, one missed opportunity.

A while back Helen and I went to see the movie *Chicago*, and we watched Richard Gere do that cross-examination tap dance. It was an amazing depiction of what it's like to have a witness on the run, and I nudged Helen and said, "I used to do that, I know how that feels." She said, "Don't be silly, dear, you can't dance." But I do know how it feels. I know how it feels to make a bogus witness squirm. I know how it feels to make a liar regret it. And so do you. It feels *good*.

What a job! People trust you. They trust you with their life savings, with their lifework, with their families' welfare, with their freedom. You have to try to help those people. That's the pressure that we have—all of those people depending on us. You feel driven to help those people, and at least occasionally we succeed.

The people who come to us for help trust us, but unfortunately we are also a maligned profession. Some people think we are all fast-talking, silver-tongued slicksters, defending the indefensible or promoting the preposterous and able to fool judge and jury with verbal manipulations and tortured logic. No wonder the critics chatter. The Eagles, my favorite rock band, sing

these lyrics: "The more I think about it, Old Billy was right. Let's kill all the lawyers, kill 'em tonight." The Eagles were mistakenly correct because "Old Billy" was right when he said, "The first thing we do, let's kill all the lawyers," in *Henry VI, Part II* (act 4 scene 2). Those famous words were spoken by Dick the Butcher, an anarchist, who was preaching turmoil, chaos, and insurrection. Dick the Butcher was a paramilitary thug, an agent of violence. Shakespeare knew that to attack the structure, to attack the moral order, you first have to go after the lawyers and eliminate the rule of law.

"Rule of law"—I get emotional just speaking those words. We can see what happens if the rule of law collapses. Look at Haiti, look at Rwanda, look at Bosnia, look at Afghanistan, look at California. (I just threw that in for Kelly.) We are the rule of law. We are civil rights. We are the protection of the vulnerable in the path of the mighty. We are full answer and defense. We're habeas corpus, we're product safety, we're child protection. We're *Brown v. Board of Education*. We're Fred Gray. And society wouldn't last a week without us. When we get behind closed doors, it doesn't hurt to remind ourselves of that now and then.

So I am a lucky guy, and I'm indebted to the Louis Brandeises and the Thurgood Marshalls and their equivalents in our country for inspiring me. I'm so proud of the David Chipmans and the Harry Wrathalls for bringing honor to this profession. I thank God for allowing me to be a barrister at the Supreme Court of Nova Scotia and then to be a judge of that court. Now I get the opportunity to watch fine lawyers in action, to watch Joel Pink with a Charter of Rights issue and fire in his eyes. That's a rush.

Ladies and gentlemen, I've had some fun up here today with Joel Pink, Dan Kelly, Mike Kelly, Harry Wrathall, and David Chipman, and I know that you understand the spirit in which I made those remarks. You don't make fun of the mediocre; you can make fun only of the best. It has been my great pleasure to speak to so many good lawyers today, and on behalf of my wife Helen as well as myself, I want to thank you for allowing us to spend a few days with the best.

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