

The 23rd Annual Chief Justice Joseph Weintraub Lecture

"Reflections of a Newly-Minted Justice"

Presented by

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Good evening.

I start the evening with a humble confession: I am so very, very honored to have been asked to deliver the 23rd Annual Chief Justice Joseph Weintraub Lecture at Rutgers School of Law-Newark. There are only two parallels I have with Chief Justice Weintraub: we were both graduates of the law school of Cornell University and we both were fortunate enough to be called to serve on the Supreme Court of New Jersey. In light of Chief Justice Weintraub's extraordinary legacy, that is where the parallels end, at least for the present. I also reviewed the distinguished list of prior Weintraub lecturers and I am honored to be in their company. Hopefully, I will prove myself worthy of both my fellow Cornellian and my predecessors at this podium.

My topic tonight - "Reflections of a Newly Minted Justice", the selection of which I will address in a moment - requires

that we look back and, in doing so, some beginning point must be chosen. I have limited my review to the past year because it has been, to say the least, a whirlwind. It was exactly a year ago today that I was interviewed by retired Justice Alan Handler at the request of the Governor, an event that marked the very first step in my being before you tonight. It was quickly followed by further vetting - both by way of investigations and personal interviews - a meeting with the Governor, the Governor's announcement of his intent to nominate me as an Associate Justice of the Supreme Court of New Jersey, and culminating in my appearance before the Senate Judiciary Committee and ultimate confirmation by the New Jersey State Senate.

That process - breathtaking as it was - was immediately followed by the arduous task of transitioning an active multi-jurisdictional litigation practice, seeking to match the right lawyer with the right case and client, all the while engaging in the all-too-important job of the care-and-feeding of the clients.

No sooner had I barely completed that process than it was time to take the oath of office and start service as an Associate Justice of our Supreme Court. That required the establishment of chambers, the hiring of a permanent secretary and transitory law clerks and, in a nutshell, turning my life

askew. Having done so, I was at the mercy of the relentless pace of work at the Supreme Court. Throughout it all, I lacked what I used to call, in the hurly-burly of practice, the "luxury of thought": the ability to reflect contemplatively on events and one's role as either a participant in past events or as one who can attempt to shape the future.

Into this maelstrom came Dean Stuart Deutsch of the Rutgers School of Law - Newark with a totally unexpected invitation: would I give the 23rd Annual Chief Justice Joseph Weintraub Lecture here at Rutgers? I was honored to be considered, and asked what topic would be appropriate for the lecture. The Dean kindly volunteered that speaking on the transition from an in-the-trenches trial lawyer to a Justice of the Supreme Court would be of interest to his audience. I was immediately relieved, as this topic would not lend itself to controversy and, therefore, would not later appear at issue in a case before us, a proscription on speech that is far more easily stated than observed. More to the point, this was a topic I thought I could readily address, given that I could speak of matters that, not to put too fine a point on it, were so intimately familiar to me.

My enthusiasm waned when word got out that I was delivering this year's Weintraub lecture. More than one well-intentioned person made certain that I fully understood what an honor it was

to be selected as a Weintraub lecturer and just how stratospheric the expectations of the audience were going to be. My initial enthusiasm was quickly replaced by sheer panic. How could I - or, for that matter, anyone else - ever deliver a scholarly lecture on the topic Dean Deutsch had suggested? Had I just made a dreadful mistake?

After more than a few anxious moments, clarity came to me. I came to see that Dean Deutsch had actually done me - and, hopefully, tonight I can do each of you - a great service. The Dean's choice of topic would require that I embark on a process of reflection I should have engaged in more fully at several checkpoints during the year past. I do not know if the Dean selected this topic with this result in mind, but his choice is nonetheless cloaked in serendipity. Once again, the old adage of "I would rather be lucky than good" proved its worth.

As one must do in reflection - and my topic tonight is "Reflections of a Newly-Minted Justice" - one must select reference points as the fulcrums for comparison. In doing so, I employed, as I have throughout my career as a lawyer, the analytical principle first pronounced by the mediaeval philosopher William of Occam, one we now know as either Occam's Razor or the principle of parsimony: one should not make more assumptions than the minimum needed and one should not increase, beyond what is necessary, the number of entities required to

explain anything. With that as my lodestar, my reflections have thus led me to several mileposts; chronologically, these are: pre-nomination, post-nomination but pre-confirmation, post-confirmation but pre-investiture, and post-investiture.

However, before I address these, and mindful that my jumping-off point was that of a practitioner, I must focus on the end point: being a Justice of our State Supreme Court. Please indulge me in that sight detour.

Regrettably, there is no handbook for being a Justice; one can cast about - as I did - in search of guidance but there is no one comprehensive compendium of skills required for judging that can serve as the standard against which one's performance as a Justice can be measured.

To the extent that such a yardstick exists, it is likely Senior U.S. Circuit Judge Frank M. Coffin's book "On Appeal - Courts, Lawyering and Judging." I make no scientific basis for that claim. I have, however, two distinct reasons for that claim. First, I read Judge Coffin's book during my post-confirmation/pre-investiture stage and many of his lessons resonate in what I have been called on to do during my post-investiture activities. That, however, is a completely subjective assessment. I do have a more objective gauge by which to measure Judge Coffin's book: two different people - both highly accomplished lawyers/judges who will remain

anonymous for now - strongly commended Judge Coffin's book to me, one lending me her copy and the other actually buying me my own copy (which I now keep handy in my chambers). Because the other books I received at the time ranged from the newly published Encyclopedia of New Jersey - likely designed to improve my parochial view of New Jersey as having a northern boundary somewhere just above Trenton - to a volume on particularly silly laws aptly titled "Ludicrous Laws and Mindless Misdemeanors" - meant in the faint hope I would not add to the already perceived surfeit of the incomprehensible - Judge Coffin wins this bout by acclamation. Given each their proper due, let me join their voices in commending Judge Coffin's sage advice.

In addition, I searched elsewhere for helpful definitions on what being a judge was. Interestingly, Article XXIX of the Constitution of the Commonwealth of Massachusetts tells us at length that "[i]t is essential to the preservation of the rights and every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court

shall hold their offices as long as they behave themselves well;
. . . ."

The simple beauty that lies in that statement - that we expect our judges to be free, impartial and independent as the lot of humanity will admit - cannot be understated. In this calculus, the latter qualifier - the one that requires all judicial action to be tempered by one's humanity - undergirds a free, impartial and independent judiciary. We also want those judges to serve for "as long as they behave themselves well", a temporal limitation that should inform each judge in his or her exercise of the office. My reflections on the craft of judging made me realize that Justice Benjamin Cardozo had it right when he enjoined that "[t]he method of free decision sees through the transitory particulars and reaches what is permanent behind them."

How judges are viewed in the context of the important work they perform is often prey to the political winds that may then be blowing. One need only witness the recent controversy the role of the judiciary as the arbiter of disputes engendered in the sad events surrounding the public death of Ms. Terri Schaivo to experience the extremes of how judges are perceived, with one camp believing that the Schaivo incident is but further proof of a judiciary run amok, while others maintaining that how the

judiciary handled the Schaivo events will be remembered as one of the judiciary's bright shining moments.

Whether any lasting lessons can be drawn from that controversy remains to be explored in the fullness of time. The fact of the controversy, however, highlights how the judiciary's role is always difficult and often misconceived. As I searched for an overarching rationale for what judges are about, I kept returning to what are likely the apocryphal words of Louis Buchalter, a notorious 1930's gangster, who prohibited any assassination attempts on judges, claiming that "We leave judges alone because they're the only hope we have." I have also been guided by words that have been attributed to Justice Byron White, who played football at both the college and professional level - earning the nickname of "Whizzer" White - having done the latter while he attended law school. According to urban legend, Justice White was asked by a then current professional football player how he liked being a judge. Justice White's response was: "How would you like being the umpire instead of a player?" In Justice White's terms, I needed to shift from being a player in the litigation arena, to being an umpire.

As that comparison underscores, accepting the mantle of a judge requires a sea change in perspective. It is undisputed that the life of a lawyer is and should be one of service: service to one's clients, service to one's family, service to

one's community and service to one's profession. Becoming a judge, however, requires that one elevate one's commitment to service: much like those who make a commitment to religious orders, becoming a judge requires a commitment to serve the cause of justice beyond that which we expect from lawyers. That commitment - as all true commitments do - requires sacrifices. By and large, for judges, those sacrifices include the virtual cloistering of judges to insure that they are free of undue influence, the almost monastic withdrawal from the ebb and flow of the practice of law, the surrender of the right to express individual views because a judge cannot avoid speaking not as an individual but as a representative of the branch of government meant to level the playing the field for all, and, of course, the economic sacrifices caused by the disparity in remuneration between the private sector and public service.

That said, I know of few judges who, given this special opportunity to serve, would step away from it. On the contrary, most judges I have been privileged to know view their service as a blessing. The first Director and founder of the Peace Corps, Sargeant Shriver, said it best: "Being of service is a gift you can give yourself."

Having thus defined the end product, let me return again to the beginning: the making of a judge in New Jersey.

Not to be too pedantic on the subject, but the formal constitutional process by which one becomes a Justice of the Supreme Court of New Jersey does not start until the Governor, under the authority of the Constitution of 1947, gives seven days' prior public notice of the intent to nominate a candidate for that office. Once that seven day prior notice period expires, the Constitution calls on the Governor to transmit the nomination to the Senate for its advice and consent to the nomination. It is the period heading up to the Governor's notice of intention to nominate that I address first.

How does one get nominated? The basic qualifications are set forth in the 1947 Constitution: the nominee must "have been admitted to the practice of law in this State for at least 10 years." That qualifier casts a rather large net. The more immediate question is, once one has been admitted to practice law in New Jersey for at least 10 years, how does one get nominated? My candid answer, after a morbidly large amount of reflection, is: I simply do not know. I was a practicing lawyer with no interest in or connections to politics. Although I know I was known to some who do have a great interest in and participate in New Jersey's politics and I do have a rudimentary understanding of the various forces that cause elected officials to act as they do, I cannot, with specificity, trace the genealogy of my nomination.

Later on, during the post-nomination/pre-confirmation process, I was privileged to meet and spend some time with a number of retired New Jersey Supreme Court Justices and I asked each of them the same question: how did I get here? Unanimously, I received the same answer: the same way all of us got here, by happenstance. Therefore, my reflections have yielded no great truths or piercing insights for you on the pre-nomination process. I have resigned myself to the fact that the entirely unsatisfying answer I did get then - that we all get here by happenstance - was and remains correct.

When I do reflect on that pre-nomination stage, there is one conclusion I draw but for which I cannot claim ownership. At one of the rare instances when I had the opportunity to discuss the pre-nomination process with my wife, she - who is also a lawyer - rather matter-of-factly told me that, consciously or not, I had been preparing my whole life for that moment. Whether that insight was true still remains to be seen. Nevertheless, it is comforting to me to think that at least one person believes that my nomination was the product of something more than random chance. I can say with certainty that when I look across our Court, I am struck by the fact that each of my colleagues themselves prepared their whole lives for what they now do and I can only pray I am equal to that task.

Both figuratively and literally, there is a very bright line that divides the pre-nomination stage from the post-nomination but pre-confirmation stage. That bright line is called "The Press Conference" and is more aptly described as feeding time in the shark tank. One need say nothing more than state the obvious: once one runs the gauntlet of The Press Conference, one can harbor no doubt that the pre-nomination process - indeed, life as one knows it - is entirely and without equivocation at an end. That brings us to the post-nomination but pre-confirmation stage.

This stage requires that two virtual strangers engage in a stylized ritual mating dance for which there are no set rules or patterns; the kind and level of interactions are determined by who the participants are. As a political neophyte, this became my baptism into the nitty-gritty of democracy in action. The ultimate goal is to insure that legislators - who are called upon by the Constitution to advise and consent as to a judicial nomination - are sufficiently informed as to the nominee's strengths and shortcomings to carry out their constitutional obligations.

And what a magnificent dance it is. Although the events then were too recent for me to view with any perspective, even the short lapse of time between then and now makes me recall those days with awe and appreciation for all of the

participants. Regardless of political stripe, each legislator it was my privilege to meet - lawyers and non-lawyers alike - treated my nomination to the Supreme Court of this State with reverence. As jaded as we may all be about the political process - often with good cause - there is also much about our political process that deserves our praise. Then, as now, I am of the view that, at least as far as my confirmation process went, our political system worked precisely the way it was designed to and, more importantly, as normatively it should.

The capstone of this process is the Senate Judiciary Committee hearing followed by a vote by the Senate in plenary session. The very public Judiciary Committee questioning of a candidate - one, I can attest, that is not always the most comfortable of circumstances - provides a glimpse of the transparency that thereafter governs a judge's life. One sits there at the base of the panel and all eyes and ears are focused on what comes from that spot in the hearing room. The questions asked can and do take many forms. The substance of the answers given as well as the form in which they are provided constitute the basis for the Committee's, and the public's, view of the judicial candidate. If one survives that process, one is then judged by the Senate as a whole. I was unaware, until I arrived at the Senate on the day it was to vote on my nomination, that the custom in New Jersey is that Supreme Court Justice Nominees

sit in the well of the Senate, next to the Senator who will be moving the question. As I sat there, I thought of how the men and women all around me have earned the distinction of being direct descendants of those long-ago senators of Rome who first assumed the mantle of representative government. There is a moment when the overhead board flashes "advice and consent" as the motion under consideration that causes the pulse to quicken. And then the confirmation process is completed and one moves on to the pre-investiture stage.

Privately, I have referred to this period as my "lady-in-waiting" or apprenticeship time. That, however, does not do it justice, as it really was the changing of one mode of existence for another. My entire adult life was defined by who I am: a lawyer. Yet, here I was, about to abandon that so very comfortable life for one which held both unfathomable mystery and untold promise: becoming a Justice of the New Jersey Supreme Court.

In addition, this period required that I engage in an entirely counterintuitive process. As a lawyer, the first imperative is to build one's practice; no matter how good a lawyer one may be, there is no opportunity to put those skills to the test without clients. I was now to dismantle in an orderly manner what I had spent my professional career building.

I confess that I grotesquely underestimated the toll that exercise would take. Clients who were personally happy for me couched their cheer with one reservation: "you're not leaving until you finish MY case, are you?" Those sentiments were as gratifying as they are impractical; had I stayed to finish everyone's case, my tenure on the Court would have been delayed another 25 years. I had to find a way to deal with the client's sense of loss - the idea that their lawyer was abandoning them - while insuring an orderly transition. I came to fully appreciate the bond that grows between a lawyer and his or her client. It is ironic that my full appreciation of clients came only when I parted from them. I pray that practicing lawyers go about this process somewhat smarter than I did and keep that special relationship between client and lawyer always in the forefront of their thoughts. It can only make the relationship better and, thus, the representation by the lawyer better.

After what seemed both as brief as a blink of an eye or as long as an eternity, it came time to "don the robe" as it were. A specific New Testament verse constantly ran as a refrain in my mind: "When I was a child I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things." Little did I realize just how prophetic those words were.

The time was past for what was drilled into all of us in law school - thinking like a lawyer - and it was time to start thinking like a judge. Here, again, there is no handbook or handy set of instructions to lead the way. Instead, by trial and error, each of us must find our own way.

As a small aside, I admit that, in finding my way, I have been advantaged by the caliber of my colleagues on the Court, as judges and as human beings. They have, in word and deed, shown me what it is to be a judge on the highest court of this State.

There is no one-size-fits-all method of judging that each of us can do without individual tailoring. On the contrary, as I look back on this Court term, I see in me a different judge - in fact, a different person altogether - than the one who first heard arguments last September. In that transformation, I have been informed mostly by what the late Justice Haneman called his commandments for judicial conduct. As reported to this very gathering by United States Chief District Judge John Bissell on the occasion of delivering the 20th annual Chief Justice Weintraub lecture, those of Justice Haneman's commandments that are particularly relevant to a Supreme Court Justice - there are seven of them - are that a Justice should remember:

- First, to cultivate the art of listening and not unnecessarily interrupt counsel. His purpose is to understand counsel's theory and argument and not to

impress the court room with his own erudition and knowledge.

- Second, to distrust first impressions.
- Third, that, in writing opinions, he should be as brief, succinct and simple in his expressions as possible. He should not ask himself how many questions he can decide, but rather how few he must decide. It is easy, by becoming verbose or prolix, to lay a foundation for bad law.
- Fourth, to lay his opinions aside for a reasonable time after they are written. When they are cool, he may find that they do not state what he intended, or poorly express his intended conclusions.
- Fifth, to decide matters at the earliest possible date after presentation has been concluded. It is well to remember that "justice delayed is often justice denied."
- Sixth, to follow the dictates of his conscience and let no outside influences affect him. It takes more moral courage to decide a case consistent with the law but against public opinion than it does to decide a case doubtful on the law, but favorable to public opinion or pressure.

- And, seventh, that he has a terrible responsibility involving life, liberty, property and happiness of litigants, and that his first responsibility is always that they obtain justice without fear or favor.

I cannot and do not claim that I have adhered to these commandments in every instance. Also, after discovering these commandments, adopting them as my own and experienced life on the Court, lately I have made one very practical modification or addition so as to accommodate the advice it is said that an experienced Justice Hugo Black once gave to a then brand-new Justice Harry Blackmun: "Never ask too many questions from the bench, because if you don't ask many questions, you won't ask many foolish questions."

These reflections inexorably lead to the rather unremarkable conclusion that I now view things so very differently. In its most fundamental iteration, the change lies in perspective. For example, as a practicing lawyer, I would look at an issue of law or a statute for its application to a specific client and fact pattern, and then and only then would I consider the broader implications at play. Now, my task is to discern what principled rule of law undergirds the analysis and how its expansion or contraction will generally advance the cause of justice in general and provide for a fair resolution in the specific cause before us. It represents a world of

difference: instead of extrapolating from the specific to the general, I now look at the general and seek to reduce it to the specific. As one of my colleagues on the Court told me in another context, it is akin to the difference between a horse chestnut and a chestnut horse.

This process has also reaffirmed my abiding respect for our tripartite system of government, acknowledging that each branch of government is due appropriate deference when acting within its sphere. It is nothing short of extraordinary that orderly governance results from the cacophony that is our unruly and often discordant democratic system. Largely, I have come to realize, it is the result of great ideas implemented by the best in, and of, and for the people.

Finally, I have come to realize that, no matter how experienced a practitioner I was, I barely scratched the surface of the sheer scope and breathtaking majesty that is the law. Every day presents the opportunity to learn my craft anew, from a different perspective, and with new considerations in mind. We who have chosen the law as our profession must occasionally stop and marvel about that concept we call the law. It is, at the same time, uplifting and humbling.

During my speech at my swearing-in last September, I referred to my appointment to the Court as "the culmination of a long-held but softly-whispered dream." I want to thank Dean

Deutsch, the Law School and each of you for the privilege of permitting me to speak of it not in a whisper, but in a voice loud enough for all to hear.

Again, thank you all very much, and good night.