

## A FOOTNOTE TO A FOOTNOTE

*Speech given by Judge Avern Cohn at the Annual Luncheon for the Michigan Supreme Court Historical Society on April 18, 1996.*

Thank you, Wally, for those nice words and, more importantly, the invitation to speak today. I am pleased to follow in the footsteps of John Fitzgerald, Tom Brennan and John Reed.

I frequently worry that I go too far in my occasional comments and letters-to-the-editor on matters of current concerns to the bench and bar. The invitation to speak today suggests I still have a way to go.

The Michigan Supreme Court Historical Society is an important public institution in our state and deserves the support displayed here today.

Two years ago Professor John Reed explained its purpose very well when he said, “The Historical Society promotes public education and awareness of the Michigan Supreme Court’s historical significance and its role in the development of the law of our state.”

Education and awareness are important not only to knowledge about an institution but certainly to increasing respect for the institution. The Supreme Court is the personification of all the courts in Michigan. Respect for the judicial system can rise no higher than respect for the Supreme Court.

Judges who sit and lawyers who practice have only begun to understand the importance of historical societies. In the federal courts we have only begun to realize this. The Federal Judicial Center, our think tank, now has a Judicial History Office which promotes the formation of local court historical societies and teaches judges archival principles for the preservation of their papers as well as an oral history program and a judicial biographical data base. We now have the Eastern District of Michigan Historical Society under the current leadership of Sharon Woods. It publishes a quarterly newsletter and at its annual meeting invites a prominent speaker. Last year it was John Hope Franklin and two years ago Gerald Guenther, Learned Hand’s biographer. I extend an invitation to join to everyone here today.

My remarks today are a footnote to a footnote in perhaps the Supreme Court’s most profound decision: Scholle v. Hare, II, the 1962 decision which held geographical districting of state senatorial districts unconstitutional. I will not relate the history of that decision. There were actually two decisions. In 1960 the Court denied Scholle’s original action in mandamus asking that the geographical districting of the state Senate be declared unconstitutional. The Court, in a 5-3 decision, denied the petition principally on the

ground that the 1952 constitutional amendment, which provided for geographical districts of the Senate and which was modeled on the federal system, passed constitutional muster. In 1962, following the United States Supreme Court decision in Baker v. Carr, the Court in a 4-3 decision, reversed itself. That decision did not become final until 1964 following the United States Supreme Court decision in Reynolds v. Sims.

Ted Sachs, Scholle's attorney, in 1988 in an article in the Wayne Law Review, repeated in the State Bar Journal, excitingly describes the genesis of the case and its journey through the state court system into and out of the United States Supreme Court very well. It is certainly worth a read.

But before I tell you the story of footnote 2, as I call it, let me remind you who was on the Supreme Court in July 1962. The Chief Justice was Thomas Matthew Kavanagh of Carson City. He came to the Court in 1957 following a four year stint as Attorney General under G. Mennen Williams. Also on the Court was Eugene Black of Port Huron, who started in state politics as a Republican Attorney General and was elected to the Court in 1955 as the nominee of the Democratic Party. Those of you who remember Justice Black and his use of words will agree he was sui generes.

Ted Souris, of Detroit, who still practices law today, was the third justice of Democratic Party origin. He was appointed to the Court in 1960 by G. Mennen Williams at the age of 35. Ted, as many of us know, in an act of great personal courage, in my view, resigned from the Court in the summer of 1967 thereby reducing the Court to its present size. But that is a story for another Historical Society lecture.

The fourth justice of Democratic origin was Otis Smith of Flint, appointed in October 1961 by Governor John B. Swainson after having served as Auditor General. Otis was the first African American to be a Supreme Court justice in modern times and incidentally, at his death, was a member of the board of trustees of our Historical Society.

The fifth Democratic justice, so to speak, was Paul Adams of Sault Ste. Marie, formerly attorney general and also a Swainson appointee. His appointment opened the way for the beginning of Frank Kelley's long career as Attorney General for those of you whose memory does not runneth to the time contrary. He, however, did not participate in the decision of which I speak because of his involvement in the case in 1960 as Attorney General.

The justices of Republican antecedents were Leland Carr of Lansing, Harry F. Kelly of Detroit and John Dethmers of Holland.

Carr came to the Court in 1945 by appointment of then Governor Kelly after service as a circuit judge and a stint as a one-man grand juror investigating legislature corruption. Kelly was a World War I veteran and former two-term governor. He was elected to the Court in 1953. John Dethmers also was appointed to the Court by Kelly in 1946 after serving one term as attorney general.

In today's terms I would say that Kavanagh, Black, Souris and Smith would be characterized as liberals, while Carr, Dethmers and Kelly as conservatives, although in my view not of the Antonin Scalia, Clarence Thomas, William Rehnquist persuasion, but more of the Sandra Day O'Connor, Anthony Kennedy version. Whatever way we characterize them, I think it safe to say that following Baker v. Carr, Gus Scholle and Ted Sachs could feel fairly confident of victory as the Court reconsidered its 1960 decision because an attack on geographical districting was no longer an entry to a political thicket but was now justifiable.

The biographical sketches of the justices in the Michigan manual suggest that the life story of each of them involved is worthy of a talk, or really eight talks.

Now for the footnote. It reads: "Detroit Free Press, Metropolitan edition, Friday, June 29, 1962 front page article, under headline "Threaten to Impeach Top Court.""

The footnote was appended to the introductory paragraph of the decision which reads: "As we approach determination of the merits, following vacation by the Supreme Court of the judgment entered here June 6, 1960, each unmanageable member of the Court an arrogant and amply headlined threat of impeachment "if the senate districts are declared illegal." This threat should neither hasten nor slow the judicial process."

And later in this text goes on to state: "only an ignorant, a corrupt, or a dependent judge would cringe and pause before any such formidable threat. We choose instead to consider and execute the duty which has been cast here by the supremacy clause and the oath all judicial officers of Michigan have taken."

While the ostensible author of these words was Thomas Matthew Kavanagh, they were obviously penned by Eugene Black. Of that I am sure.

The reference to threat of impeachment was to some loose language on the State Senate floor as the legislature recessed in late June to await the decision and to be told how the August 1962 primary for senate would be held. I will not describe the details of the threat. Those of you interested can read it after we adjourn on the placard behind me.

Now what neither the Court's opinion nor Ted Sachs' account of it tells you of a headline two weeks later in the Sunday, July 15, 1962 newspapers which read: "Ex Justices Rip Threat to Impeach High Court" and "Ex Justices Charge 'Abuse' of Court."

Obviously threats of impeachment to intimidate, or being charitable, to dissuade judges, are not new to today's politics and defense by judges of colleagues or former colleagues is also not new.

The headlines were followed up by long accounts, which are also on the placard, of a statement issued by former Justices George Bushnell, Henry Butzel, George Edwards and John Voelker, condemning the threats as irresponsible and saying in part, in words pertinent today: "If the people disagree with constitutional interpretations, they have the power and right to change the Constitution. But attempts to influence the future decision of the Court by threats of reprisal constitutes a primitive form of retribution which we thought had disappeared from Anglo-American society many centuries ago."

What made the statement so significant was not that the four living former justices of the Court said what they said but that it was a bipartisan group that said it. Bushnell, Edwards and Voelker were of Democratic antecedents while Butzel was first appointed to the Court by a Republican governor.

The story of how the four then living former Supreme Court Justices, three Democrats and one Republican got together, as I know it, is this. Exploration of the papers of Swainson, Zolton Ferency, whose role I will describe in a moment, and the four ex-justices could add details.

John B. Swainson was governor in June 1962. His executive secretary was the best politician I have ever had the fun of working with, the late Zolton Ferency, sometimes called "the mad Hungarian." Zolton, always conscious of the importance of public sentiment and knowing how to motivate it, called me around the first of July and asked me to put together a statement and get the four former justices to sign it. Why he asked me, I'm not sure. We had been friends and political compatriots for a number of years.

He gave me neither a draft of such a statement or any identification that any of the four had a willingness to sign anything. Now in 1962, a request from the executive secretary of the governor to me was like the command of a general to say, a sergeant or maybe even immodestly, a lieutenant, but no closer.

I immediately know that such a statement required particularly the agreement of Justice Butzel, and was confident Justices Bushnell, Edwards and Voelker would likely go along for obvious reasons. But first I needed the statement - - words, phrases and paragraphs beyond my drafting skills. I immediately thought

of a neighbor of mine in Royal Oak, Paul Weber, former executive secretary to Governor Mennen Williams and then an executive of Michigan Consolidated Gas Company, to assist. I called Paul, he said to come over. I went to his house that evening and told him of my assignment. He turned out the draft statement overnight.

With the text in hand I then cogitated on how to approach Justice Butzel. At the time he was of Counsel to Butzel, Levin & Winston in the First National Building, the same building I was in. I consulted his son-in-law Erwin Simon, who took me into the Justice's office forthwith. Statesman that the ex-Justice was, as soon as I explained what I was about he agreed. A simple phone call to Justice Edwards, then Detroit Police Commissioner, brought him on board before he even saw the text of the statement. Again, as an aside, his leaving the Court to become Detroit Police Commissioner under the late Mayor Jerome Cavanagh, the current Justice Cavanagh's older brother, is also worthy of a lecture.

For Justice Bushnell, I asked his son George. As I recall, the former justice was out-of-town but George assured me I could count on him. And he came through.

That left John Voelker. It took me at least two days to locate him in the Upper Peninsula. I likely caught him coming back from some trout pond for refreshments. I was fully confident he would say "yes" when I told him what I wanted. To my surprise, and disappointment, all he said was "Please send me a copy of the statement and I will get back to you." I stifled my annoyance. He gave me his address. There was nothing I could do but package my request and the statement and mail it to him. No fax in those days.

Time was very important. The case had been argued in the Supreme Court on July 2 and the sitting Justices made it clear a decision would come quickly. As I said earlier there was the August primary coming up.

As an aside, in a recent conversation with Ted Souris he said that Voelker's likely reason for holding back was to give him an opportunity to talk to Eugene Black. They had been soulmates during Voelker's two years of service on the high court in the late 50's.

I sent the draft to Voelker around Monday or Tuesday, July 9<sup>th</sup> or 10<sup>th</sup> and respectfully asked him for a prompt response. I also sent the statement and my results to date to Zolton in Lansing telling him I was sailing in the Mackinac race that Friday and it was in his hands. I had done all I could do.

Ferency obviously did very well. The statement, with much commentary, appeared in Sunday's papers.

I personally learned of it from a WJR 6:00 AM broadcast that Sunday morning as I was crossing Saginaw Bay in a 27 foot sailboat skippered by the late Miles Jaffe who many of you knew.

While I am sure the threat of impeachment was fluff and it is unlikely the statement had any impact on how the case was decided, I am satisfied it created a public sentiment that was better accepting of this sea change in how state senators were to be elected in the future and likely stifled such outrageous threats for a long time in the future. The statement and the accompanying new stories also, in my view, are an example of lawyers and former judges properly defending sitting judges from harassment. Such defenses of judges do not arise spontaneously like Athena from the head of Zeus. They require imagination, skill, and hard work as you have heard.

Let me conclude by saying in all humility, of all my varied experiences as a lawyer and as a judge, putting together the statement and eventually seeing it in print is the one I am most proud of.

Thank you.