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## Coffin's Court: A Colleague's View

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# COFFIN'S COURT: A COLLEAGUE'S VIEW

*The Honorable Levin Campbell*

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## COFFIN'S COURT: A COLLEAGUE'S VIEW

*The Honorable Levin Campbell\**

## I. JOINING THE COFFIN COURT

These reminiscences focus on the eleven years, from 1972 to 1983, that Frank M. Coffin of Maine was the Chief Judge of the United States Court of Appeals for the First Circuit. While Coffin's judicial career extended over more than forty years, I chose this period because it was a time when his influence over the court's work was at its peak, as well as because he himself later singled it out as a "judicial Garden of Eden,"<sup>1</sup> during which the First Circuit enjoyed its status as the last remaining three-judge federal court of appeals in the nation.

I was appointed from Massachusetts in 1972 to become one of the First Circuit Court's three active judges. By then, Judge Coffin had served on the court for six and a half years, together with former Chief Judge Bailey Aldrich from Massachusetts, and Judge Edward McEntee from Rhode Island. At age 65, Judge Aldrich had just resigned as an "active" judge—effectively disqualifying himself from further service as chief judge. But as a senior judge, he would still be able to hear cases and perform most other judicial functions, as he fully intended to do. In his place, Judge Coffin had become Chief, and I, taking Judge Aldrich's active judgeship slot, was the First Circuit's third regular judge.

The court I joined in 1972 was one of then eleven federal appellate courts from around the country created to hear and decide appeals from decisions of federal district courts and from certain administrative and other federal tribunals. Except for the relatively few cases the United States Supreme Court took for further review, we and our sister courts were the final arbiters of federal appeals within our respective jurisdictions. With just a trio of authorized judges—a single hearing panel—the First Circuit was the smallest federal appeals court anywhere. Our jurisdiction included appeals from the district courts of Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico.

My memory of initial meetings with Judge Coffin is of a courteous, slender, friendly man who displayed a kindly interest in helping me settle into my new judicial role. His quiet, unassuming manner and compact size would not have inspired Hollywood to select him to play the movie role of the stereotypical chief judge. Later in life, he playfully described judges who presented that kind of image. Regarding Judge John D. Clifford, for whom he had clerked at the beginning of his legal career, and whom he deeply loved and respected, he wrote: "[Clifford] was a massive man . . . . He was prognathous man incarnate . . . . He didn't walk. He lumbered. His gravelly voice rose from a very deep cavern within."<sup>2</sup> And after riding in an elevator with the legendary Learned Hand, Coffin

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\* Senior Circuit Judge, United States Court of Appeals for the First Circuit. For their helpful comments after reading a draft, I thank Susannah Barton Tobin and Professor Frank E. A. Sander. For his excellent research assistance, I thank Josh Podoll.

1. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 215 (2004).

2. 2 FRANK M. COFFIN, LIFE AND TIMES IN THE THREE BRANCHES 233 (2004) [hereinafter LIFE AND TIMES: VOLUME 2].

commented: “Like Judge Clifford, he was a man of bulk with great bushy eyebrows. They seemed to fill the elevator to capacity.”<sup>3</sup>

Coffin’s modest physique and appearance did not lend themselves to imagery like that. But what he lacked in bulk, he made up for in quiet leadership, kindness, good sense, and humor—qualities that drew people to him and quickly elicited respect. Some of his qualities might be associated with the quintessential Yankee—he was sensible, prudent, well-organized, a very hard worker—but certainly not a Yankee of the cold, self-righteous variety. Rather, one might imagine him at the country store, swapping tales (he was a good listener), telling jokes laced with his own special brand of absurdity, greeting neighbors, and inquiring about a friend who needed a helping hand. His leadership style was that of a consensus builder, a fact he himself recognized in his memoirs. Writing about chairing Harvard Law School’s Board of Student Advisors while at law school, he stated:

[T]he most significant contribution of my work for the Board lay in my year-long experience in participating, then exercising a consensus-producing leadership of peers in a collegial organization. I had wet my feet in this kind of work as a member, officer, then President of the Bates Student Council. Time and time again I was to find myself working on important matters in a group situation, then being elevated to a position of catalyst, planner, coordinator, leader. I look back with deep satisfaction on this kind of work in community affairs, in political party building, in service on Congressional and judicial committees, in creating new organizations. I like to think it has been a leadership not stemming from power but from the persistent stimulation of shared motivation and consensus.<sup>4</sup>

While in the above comment Judge Coffin related his consensus-building leadership to service on “judicial committees,” he displayed the same kind of leadership when serving as Chief Judge of the First Circuit—a role in which he had outstanding success. He later wrote enthusiastically about his eleven years spent as Chief Judge: “I willingly invested all my energies in the job,” he said, “taking pride in the part I was privileged to play in making our system of law and justice work as well as possible. I look back on my tenure with satisfaction and even affection.”<sup>5</sup> It is hard to imagine a position more suited to leadership of a consensus-building sort than that of chief judge. A chief judge, unlike a CEO or military leader, is first among equals. Selected by seniority of commission, he or she needs the cooperation of fellow-judges—the very sort of voluntary support Coffin excelled in nurturing.

Coffin went on to play to perfection the part of our chief judge. Under him, the First Circuit was a happy court; he provided sensible and effective leadership that left an imprint lasting for many years after he had ceased being its chief.

During his time as our chief, and indeed in the years immediately before that, the First Circuit’s appellate docket grew tremendously. For the tiny court as then constituted to keep deciding the mounting volume of cases with reasonable

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3. *Id.* at 239.

4. *Id.* at 222.

5. 3 FRANK M. COFFIN, LIFE AND TIMES IN THE THREE BRANCHES 97 (2010) [hereinafter LIFE AND TIMES: VOLUME 3].

promptness (which it continued to do), the small complement of judges and staff had to work hard. One of Judge Coffin's first efforts as chief judge was to write a lengthy letter to Judge McEntee and me, noting that since he had come onto the bench in 1965, the caseload had more than doubled "and that our big challenge was to preserve the quality of reflection while keeping up with the work."<sup>6</sup> The First Circuit's reputation within the legal community remained high throughout this period, and its affirmance rate by the Supreme Court was the highest in the Nation.<sup>7</sup> Throughout his chief judgeship, Coffin heard and participated in deciding substantially the same number of appeals as the rest of us—contrary to circuit court chiefs' more usual custom of taking fewer cases in order to compensate for the extra time devoted to administrative duties. Having Coffin as both a colleague and a chief judge during this time of growth and expansion was a boon to his fellow judges and those served by the court.

Coffin remained chief judge until 1983, at which time he relinquished that office and continued as a regular member of the court. Next in seniority, I became his successor as chief. His departure was crowned by a party hosted by family, friends, and clerks that featured a song sung by Judge Aldrich to the tune of "Mack the Knife":

Levin Campbell, Bailey Aldrich,  
Stephen Breyer, Hughie Bownes,  
All salute their parting Chief dear;  
May he long be back in town.<sup>8</sup>

Coffin could have stayed on longer, having been "grandfathered" from compliance with the seven-year term limit for chief judges Congress imposed in 1978.<sup>9</sup> However, he told me and Judge Breyer—our fourth judge, appointed in 1980—that, particularly in light of that legislation, he wanted to pass along the position of chief judge to others. Additionally, feeling the pressure of administrative duties caused by the court's growth, he wanted more time for judicial and other non-administrative tasks.<sup>10</sup> He expected me to serve for seven years, as I did until 1990. Judge Breyer, who followed me as chief, served for fewer years before leaving in 1994 to become a Justice of the Supreme Court.

Because the volume of appeals within the First Circuit grew steadily during the Coffin years, Congress authorized an increase of judges on the Court of Appeals to four in 1978, and to six in 1984. Congress also increased the number of judges on the district courts from which appeals to us came, reflecting a circuit-wide growth in caseload. The number of judges on the United States District Court for the District of Puerto Rico went from two to six, in response to a surge in that court's caseload following its creation in 1966 as Puerto Rico's first federal district court

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6. *Id.* at 99.

7. *See* THE SUPREME COURT DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Feb. 15, 2011) (forty-one percent of the First Circuit decisions that went to the Supreme Court from 1972 to 1983 were affirmed; the next highest circuit was the Second Circuit, at thirty-nine-point-eight percent affirmed).

8. LIFE AND TIMES: VOLUME 3, *supra* note 5, at 167.

9. *Id.* at 164.

10. *Id.* at 165, 169.

modeled on those in the nation's fifty states. Previously, Puerto Rico had had a special court system of its own related to the Island's colonial status—a system that had generated relatively few appeals to the First Circuit. But within several years, appeals from Puerto Rico's new District Court were second in number only to those from the District of Massachusetts. Meanwhile, judgeships in the Districts of Maine, New Hampshire, and Rhode Island all went from one to two. District court growth added logistical and oversight responsibilities to Judge Coffin's administrative plate.

As earlier said, administrative changes, as well as additional staff, were required to cope with the increase in the First Circuit's caseload and other responsibilities. Appeals lacking in merit or easy to decide, for example, needed to be identified and disposed of quickly, so as to leave time for the judges to wrestle with more difficult appeals. In 1978, Judge Coffin hired our Circuit's first staff attorney, soon to be followed by more. Their functions came to include screening and drafting memos and proposed opinions in cases not needing a hearing, as well as assisting with interlocutory matters. Judge Coffin, with the help of Dana Gallup, our clerk, and in consultation with the other judges, led in devising these remedies. Because the number of judges was small, and our relationships under Coffin were close, administrative changes in those days could be quickly considered and made, with a minimum of people to consult. A photograph entitled "The Smallest Active Court (in Judge Campbell's Cockpit)" shows graphically how small we were. It portrays Judge Coffin, Judge Bownes, and me on my sailboat in Boston Harbor, in the late 1970s.<sup>11</sup>

Coffin's later writings make it clear how much he valued, and would like to have retained, the then existing informality and intimacy of the small court. Writing in 1980, Coffin said, "I am by no means certain that the working relationships we have enjoyed on our court for at least the last decade and a half are typical of courts with three to five times as many judges [referring to other circuits around the country] . . . Congress has authorized a fourth judge, and I suspect that a few years hence we shall be a court of seven or more."<sup>12</sup> Writing a decade later, when the court had six judges, he reminisced about the agreeableness of sitting for his first fifteen years on the bench with a court "the same size as when it was created in 1891. There was no precedent created in which all of us did not participate."<sup>13</sup> He sadly compared this "judicial Garden of Eden" with the prospect of sitting with each colleague "only once or twice or even three times a year."<sup>14</sup>

I never realized the extent of Judge Coffin's concerns regarding growth until I read the above remarks, and others like them, in his subsequent writings. His liking for a small, intimate court was doubtless encouraged by values found in his home state of Maine, where the neighborliness of an older America lingered. He drew sustenance from the network of human relationships that, growing up, surrounded him in Lewiston and, in later years, throughout Maine, where he was well known and, in many circles, beloved. He disliked big, impersonal institutions

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11. *Id.* at 121.

12. FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 172 (1980).

13. *ON APPEAL*, *supra* note 1, at 215.

14. *Id.* at 216.

and bureaucracies. He wanted the time and opportunity to cultivate and maintain one-on-one human relationships. He feared what might happen as the First Circuit grew and its judges lost the personal ties that the small court he had served for a decade and a half afforded. Writing towards the end of his life, he expressed disappointment that, during his senior judge years, as a result of the court's growth, "[he] found [his] opportunities to sit with and know better [his] judicial brethren and sister were very seldom . . . [T]he kind of collegiality that stemmed from close and steady sitting in Boston and Puerto Rico, conferring, corresponding, and lunching together gradually diminished."<sup>15</sup>

But while Coffin preferred the intimate relationships of the First Circuit's halcyon years when still a three-judge court, his many accomplishments before he became a judge, as well as thereafter, showed how well he could also perform on a larger stage. His career prior to his appointment to the First Circuit is a story of extraordinary advancement and success not only in Maine but at Harvard, in Washington, and in Europe. He had attended Bates College, a small, liberal arts college of national repute, located in the same town of Lewiston in which he grew up. His academic record there was brilliant, and he was president of the student council and a champion college debater on a team that achieved statewide prominence. His greatest success, one of the few he was always happy to talk about, was his marriage to another Bates student, Ruth Ulrich, his companion and closest friend throughout life. They were already married when, upon his return from naval service in the Pacific during World War II, he attended Harvard Law School. Grades near the very top of his class resulted in his appointment to the Law School's Board of Student Advisors, of which he soon became chairman. He graduated from Harvard Law School cum laude.

Coffin returned to Maine to clerk for the state's sole federal district judge, Judge John D. Clifford, and, notwithstanding a job offer from a prestigious Boston firm, elected to practice law in Lewiston. His reputation and law practice grew rapidly; he also served in municipal government posts and taught a course in Evidence at the Portland University Law School (since absorbed into the University of Maine School of Law). An accomplished and, when called for, humorous speaker, he was often invited to address local gatherings. Several years later, he accepted an invitation to become the principal trial partner of a leading Portland law firm.

At this juncture, most people might have thought he was busy enough if not far too busy. Coffin, however, now joined with others to lead a highly successful movement to reinvigorate Maine's Democratic Party. This eventually led to his own election as Congressman from Maine; and after that to a demanding career in Washington and later in Paris, leading federal agencies that channeled and administered economic aid to foreign countries.

This mix of academic achievement, military service, solo and firm legal practice, politics, legislative office, and national and international governmental decision-making—all occurring while Coffin was still in his forties—provided an exceptionally broad and varied background that enriched his perception and judgment later in life when serving as a federal appellate judge. The overseas work

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15. LIFE AND TIMES: VOLUME 3, *supra* note 5, at 174.

deepened and informed his later understanding of Puerto Rico, an important part of the First Circuit with a Spanish and civil law, rather than English common law, background. Many of the First Circuit's cases, moreover, involved issues pertaining to government, legislation, and administrative law, as to which Coffin's previous occupations were relevant.

I scarcely realized when I was first appointed to the First Circuit Court how vast and wide-ranging my new senior partner's previous experience had been. Looking back now on his good sense, human as well as legal judgment, and all-round competence, I can see how this background contributed to the insight and skills Judge Coffin brought to bear.

## II. MORE ABOUT THE CIRCUIT COURTS AND THE FIRST CIRCUIT OF THE '70S

In the 1970s, the First Circuit could still smugly take pride in its complete lack of need for the en banc hearings to which other circuits resorted when questions arose that divided their judges and could not be resolved by a single three-judge panel. We three active judges were usually both the hearing panel and the "banc"; as a practical matter, we controlled our circuit's precedent without need for further hearings, unlike the multiple panels of other circuits. Once a New York lawyer, whose appeal we had just decided against his client, demanded an en banc as a matter of right, and remained incredulous and scornful when we pointed out that the panel of Coffin, McEntee, and Campbell had spoken, leaving no other "banc" for him to address.

Many aspects of our court's unique sense of smallness survived the appointment of our fourth judge, Judge Breyer in 1980, and continued well into, and beyond, the appointments of Judge Juan Torruella from Puerto Rico in 1984 and Judge Bruce Selya from Rhode Island in 1986, which doubled our number of judges. Growth, however, had its consequences, even if not immediately apparent. Court enlargement inevitably meant, as Judge Coffin pointed out in his writings, fewer opportunities in a given period for the same judges to sit together. And new screening procedures and a growing staff further altered the court's institutional culture. More staff improved efficiency by taking on responsibilities formerly handled by judges, but at the cost of spreading around, and to a degree bureaucratizing, those responsibilities. En banc procedures and hearings now had to be established; and it became routine for a losing appellant to petition, if in most instances unsuccessfully, for en banc review. The time on panels spent by a given judge with a particular colleague was halved. On the bright side, the collegial style characterizing the Coffin years continued. Relative to other circuits, the First Circuit remained the smallest, and, one might assume, the least bureaucratic. Still, with today's six active judges, a clerk's office with twenty-nine employees, and some twenty-three staff attorneys, the court has become a very different institution from the one with three judges, a clerk, and some three or four assistants over which Coffin assumed leadership in 1972.

Originally—when in 1891 the Evarts Act first created the present national arrangement of circuit courts of appeals (using the label "circuit" although judges no longer rode circuit)—each of the newly-created circuits was given a single hearing panel of three judges. But population growth and other factors caused



caseloads to rise, so that by the time Judge Coffin became Chief Judge in 1972, Congress had added more appellate judgeships to every circuit court, excepting only the First Circuit. In all circuits, the hearing panels remained at three judges, but with more judges available, more panels could be created and more cases heard. By 1972, the largest circuit court of appeals, the Fifth Circuit, had fifteen authorized judges, a size deemed so unwieldy that in 1980 the Fifth Circuit was split into two parts, with a new Eleventh Circuit created from part of the old Fifth. A similar split never took place of the Ninth Circuit, which in 1972 had thirteen judgeships, and today has the astonishing number of twenty-nine authorized judgeships. Nearby circuit courts in the Northeast, the Second and Third Circuits, had nine authorized judgeships each in 1972.

The First Circuit remained with but three authorized judges until 1978. Through the late 1960s and into the first years of the 1970s, its caseload was easily handled by a single panel—as was apparently true before that, since, as early as in 1918, a Senate Report gave the First Circuit’s low caseload as a reason for adding Puerto Rico to it (the other reason were the already-established lines of communication between Boston and Puerto Rico).<sup>16</sup>

By the mid-’70s, however, the caseload of the First Circuit was trending upwards at what soon became an alarming rate.<sup>17</sup> The yearly increase continued into the ’80s, and our once-comfortable court of three judges soon became, much as Judge Coffin had foreseen, a court of six judges.

### III. ABOUT COLLEAGUES AND FACILITIES ON THE COFFIN COURT

As said, when I joined the First Circuit, my colleagues besides Chief Judge Coffin were Judge McEntee and Senior Judge Aldrich. Thereafter, Judge McEntee was succeeded by Judge Bownes, and in 1980 our fourth judge was Judge Breyer. Let me say a word about each, and about our remarkable clerk, Dana Gallup.

Judge Aldrich had come to the First Circuit in 1959 after serving for some years on the Massachusetts federal district court bench. Before that he had been a trial partner with the venerable Boston law firm of Choate, Hall & Stewart. From the day he joined the First Circuit, Judge Coffin had the highest regard for Judge Aldrich. He was impressed with Judge Aldrich’s combination of brightness and judicial and legal experience. Judge Coffin came to regard him as his mentor during his own early years on the First Circuit bench.

Tall and crane-like in appearance, with a penchant for wearing bow-ties, Judge

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16. *H.R. Doc. No. 1182*, 63d Cong., 2d Sess. (1914) (“Porto [sic] Rico is attached to the first circuit, because there is less business pending there than in any other circuit court of appeals, and because there are established lines of communication between Porto [sic] Rico and our North Atlantic seaports.”).

17. When Judge Coffin joined the Court in 1965, there were 210 new filings. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 1965 99, 158 (1966). In 1972, when he became chief, there were 421 filings. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS: 1975 1 (1975). By 1983, when he stepped down, this number had grown to 1,008. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE PERIOD ENDING DECEMBER 31, 1984 3 (1984). By 2010, that number had almost doubled again to 1,715 new filings. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2010 21 (2010).

Aldrich was quick and bright, with a wry, sometimes even boyish sense of humor. A former *Harvard Law Review* editor (a post which in his day meant being at the very top of one's class), he had himself, by all accounts, been a superb trial and appellate advocate. Judge Aldrich was good-natured with his colleagues and went out of his way to be helpful to them, as I quickly discovered. But when sitting on the bench, he did not hesitate to speak sharply to attorneys he thought unprepared or whose argument he found weak. He expected lawyers to prepare well and to be able to stand up to, and not be thrown off by, heavy judicial fire. If a lawyer responded convincingly, Aldrich was not above changing direction, even apologizing if persuaded he was wrong, but woe to the lawyer who tried to make up by flattery or evasion.

Judge Aldrich's courtroom style was more aggressive than Judge Coffin's. Except in rare circumstances, where an attorney was rude or blatantly incompetent, Judge Coffin tended to be low key. In the fifteen or twenty minutes typically given each side (in some instances reduced to ten and very occasionally increased to a half hour), attorneys were expected to come quickly to the point, and to be ready to answer questions from the bench. Judge Coffin wrote many years later that, since his own early years on the court, the "pace and temper of argument have picked up" and that there is now an "unarticulated consensus that being a 'hot' court, i.e., a court that is well-prepared, constantly peppers the lawyers with hard questions and eagerly joins in vigorous debate, is the model of choice."<sup>18</sup> Judge Coffin accepted this approach only to a point. He felt that "the heat can be overdone."<sup>19</sup> Judge Coffin's questions, politely put, were to the point, and he did not hesitate to follow up with further questions. But he listened to the attorney's response and took care to allow the attorney time to argue along lines of his or her choosing.

Returning to Judge Aldrich, he delighted in Admiralty cases, of which the court still received some, notwithstanding Boston's decline as a major port. An experienced sailor and navigator, Judge Aldrich was especially well acquainted with Admiralty procedure and law. Aldrich also liked patent cases, but appeals from these were soon diverted from all federal appellate courts, including ours, to the Federal Circuit in Washington, D.C. Judge Aldrich's opinions were written in his own terse, unforgettable style. Unlike the amalgams of judge and law clerk input, which make up many—perhaps most—judges' written opinions today, Judge Aldrich's could have been written from beginning to end by no one but himself.

Judge Aldrich was deeply committed to serving the court. As soon as the opportunity arose, he unselfishly elected to take senior status—an option for judges eligible to retire as an alternative to simply staying on in active status or ceasing all judicial work. By so doing, he surrendered his position as chief judge and the prestige and status linked to being an active judge. In return, he could hear and decide cases on a reduced schedule, and the First Circuit obtained the benefit of a vacancy filled by appointment of a new full-time judge. Judge Aldrich continued to come to his chambers in the Boston courthouse, sat frequently on the Court of Appeals (thereby enlarging its ability to cope with the growing caseload), and—to help district judges—sometimes tried cases in the district court. Until in his

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18. LIFE AND TIMES: VOLUME 3, *supra* note 5, at 28.

19. *Id.*

nineties, Judge Aldrich voluntarily continued to perform judicial duties.

Judge Aldrich's guidance was an enormous help to me during the period after I first joined the court. I had been a state trial judge and, for less than a year, a federal district judge, but I had much to learn about my new job on the First Circuit. Judge Aldrich's office was just down the hall from mine, and I dropped by on many occasions when in need of advice. When interlocutory issues arose during these early years—such as a party's request for bail pending appeal or for an injunction pending appeal—he would often join me, and the two of us would hear the attorneys informally in my chambers and then telephone and decide the matter in consultation with Chief Judge Coffin. Judge Aldrich declined, however, to continue to involve himself in the administration of the First Circuit. This reticence did not extend to offering occasional unsolicited views about judicial matters—if he read one of our opinions in which he had not participated, and which he thought violated canons of good writing or circuit policy, he might circulate a memorandum saying so. I remember one such memo, condemning an opinion as overstocked with would-be legal scholarship serving no purpose other than to sound “scholarly.”

Judge Edward McEntee, the third active judge who had served with Judge Coffin since 1965, was a large, gray-haired, avuncular man. He was kind and friendly, but did not talk a great deal. We discovered that he had a fund of funny stories. This came to light in Puerto Rico when, at a meeting of a bar group, he was asked to say a few words while we waited for the guest speaker. His remarks were a succession of hilarious stories, each funnier than the one before. He explained that in earlier days before becoming a judge, he had had the duty of “warming up” audiences at political rallies until the governor or other heavyweight showed up to give the main address.

Judge Coffin later described McEntee as having had “a broad, earthy, people-oriented experience, a serious dedication to his judicial mission, an openness to [helpful and worthwhile] suggestions,” and “an instinct for fairness”—as well as a “quiet integrity.”<sup>20</sup> Judge Coffin liked Judge McEntee and it was clear his liking was reciprocated. Because his date of appointment preceded that of Coffin, McEntee would in normal course have become chief judge after Judge Aldrich, but he declined the position—a sensible action, as it turned out, given his precarious health, but not something a less thoughtful and selfless man would necessarily have done.

Sadly, his health deteriorated, and he resigned in 1976 and died several years later. He was replaced by Judge Hugh Bownes, who had for some years been New Hampshire's sole federal district judge. This was still the period when some of the federal districts within the First Circuit, each coterminous with a single state, had but one district judge. Judge Edward Gignoux was the sole federal district judge from the District of Maine, and Judge Bownes the sole district judge from the District of New Hampshire. Rhode Island similarly had Judge Raymond Pettine as its sole active district judge, although with Judge Edward William Day still available as a senior judge. With a single federal judge per state, I could not help sometimes imagining these each as fiefdoms, with Gignoux, Bownes, and Pettine

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20. *Id.* at 30.

the lords (Not that there was any resemblance in duties or style to the medieval analogy!). The District of Massachusetts, with the largest caseload, had four district judgeships, and Puerto Rico, at this time, but two.

Judge Bownes, when he joined our court, brought with him a vast amount of energy and good humor. His career had included legal practice and a considerable participation, prior to going on the bench, in New Hampshire municipal government (he was once the Mayor of Laconia) and Democratic politics. During World War II he had been a marine, had been wounded and nearly died during the invasion of Guam, and had received the Silver Star for heroism. I found it fascinating that he took a kinder view than many judges towards Vietnam draftees seeking, on grounds of conscientious objection, to avoid military service.

Because there were so few of us during the 1960s and 1970s, the judges of the Court of Appeals and the district judges within the First Circuit knew each other well. During this era, it was not uncommon for a so-called three-judge district court to be convened, a court containing at least one First Circuit judge, in addition to district judges.<sup>21</sup> Such occasions brought judges from both courts together. Additionally, we would sometimes ask one of the district judges to sit briefly with the First Circuit, replacing one of the regular appellate judges. Besides supplying emergency assistance, sitting by designation was a good way for the district judges to see the world from the perspective of those who (as some put it) “graded their papers” or, as others said, “came down from the hills to shoot the wounded.” In fact, as Judge Coffin believed, that was not a bad idea. Seeing the process from the other court’s perspective helped make its actions less offensive. Relations between the district judges and the judges of the Coffin Court were cordial, a fact in part attributable to Judge Coffin’s popularity and courtesy, as well in general to our closer personal relations.

In 1980, our court received a fourth judge—Stephen Breyer. A professor of law at Harvard with much Washington experience, he was counsel to the Senate Judiciary Committee before his appointment. A Cambridge resident like Judge Aldrich and myself, his permanent courthouse chambers were in Boston. Judge Breyer brought considerable ability (and, like Judge Coffin, a fine sense of humor) to the court. Proficient and easy to work with, he was especially expert in Administrative and Anti-Trust Law and had participated extensively in legislative drafting. He biked to the courthouse daily. He was lithe, well-conditioned and active, and possessed a good teacher’s finely tuned rhetoric and a very quick mind.

A final member of the Coffin Court needs mention—our extraordinary clerk, Dana Gallup. He was the glue that held us all together. One could daily find Mr. Gallup (in working relations, we referred to him as “Mr.”; he called us each “Judge,” though first names were used when off duty) standing at the clerk’s office counter in the Boston Courthouse where he regularly spoke with attorneys having matters before the court. Tall, with graying hair and strong, rugged features, he knew every lawyer and every pro-se litigant, and served all with dignity and

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21. At that time, a three-judge district court was required in all cases seeking to declare acts of the state or federal legislatures unconstitutional. *See* 28 U.S.C. §§ 2281–82 (repealed 1976). Today, such courts are only necessary when “an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.” 28 U.S.C. § 2284 (2006).

kindness. Gallup was the First Circuit's trusted go-between. We judges could not deal directly with lawyers and parties having cases before us. Mr. Gallup was the essential connector in all matters where advice and communication were needed. He explained to counsel what motions might be appropriate, how to write them, and how to interpret the court's sometimes opaque orders (which he likely wrote), exercising diplomacy and skill in what he told the parties as to their case's scheduling and posture, and in what he reported back to us, while preserving both the appearance and fact of fairness and propriety. Dana Gallup was himself a capable lawyer; he had begun working for the court when still in law school, following his return from military service. Being married with a family, he stayed with the court rather than going into the practice of law as had his father. As assistant clerk, he understudied Clerk Roger A. Stinchfield, a legendary predecessor appointed in the 1920s. Mr. Gallup became clerk when the latter's health failed. Gallup was by then expert in all that he needed to know about the procedural side of federal appellate practice. He drafted, in consultation with the writing judge, our court's orders at the time opinions were issued. He was as much trusted by members of the bar as by the judges of the court. He and Chief Judge Coffin worked closely together.

During the Coffin Court years, we were the only circuit left that had yet to fill the recently created position of circuit executive. Because Chief Judge Coffin and the rest of us were so highly pleased with the services of Mr. Gallup as our clerk and believed that—at least until the court was larger—the administration of the First Circuit did not need supplementation at the top, we declined to bring in someone senior to him. Washington for some years was reluctant to endorse the appointment of court clerks as circuit executives—a reluctance that ended in the early '80s, allowing us finally to appoint Mr. Gallup to this position.

Dana Gallup was indeed a paragon—someone with every qualification our court could have sought in its most senior clerk—and fortunately, there he was before our eyes, leaving us with no need to look further.

#### IV. WHERE THE JUDGES WORKED

In 1965, when first appointed, Judge Coffin established his chambers in the federal courthouse in Portland, Maine, and bought a home in South Portland. He drove during the first week of each month to Boston (except during the summer and during the February sitting in Puerto Rico), staying in a Boston hotel for a few nights and working those days at the Boston Courthouse where appeals were each day argued before a panel of three judges. The visits to Boston were the times when the judges were all together, not only to hear the scheduled appeals but (except for Senior Judge Aldrich) to discuss and decide administrative matters and anything else that needed their collective presence.

The Boston courtroom, unlike the rest of the court's quarters, was spacious and even elegant with its portraits of former judges, soon to be supplemented by Gardiner Cox's exceptional portrait of Judge Aldrich and, later, by Judge Coffin's fine portrait painted by Marion Miller. During hearings, Judge Coffin presided, sitting in the middle between Judge McEntee and me. Sometimes the panel included Judge Aldrich and omitted one of us. In such a situation, if Chief Judge

Coffin was not on the panel, the next most senior active judge would preside (as a senior judge, Judge Aldrich could not preside). Clerk Dana Gallup sat at a desk in front of the bench, and there was usually a younger assistant, often a night law student, who called out for all to rise when the judges entered and took their seats. We usually heard five or six cases during a single day, ending at lunch-time or, on occasion, hearing one or two appeals after lunch. The panel and any other appellate judge available in the courthouse would have lunch together, usually at a non-fancy nearby restaurant.

For judges like Coffin and McEntee (and later Judge Bownes), whose working chambers were out of state, Boston provided tiny rooms, sparsely furnished, as “visiting” chambers. These were barely sufficient to fit the judge, an occasional secretary, and a law clerk. Judge Aldrich, Judge Breyer, and I, being Massachusetts residents, commuted daily from our homes to what were our principal chambers at the Boston Courthouse. Judge Aldrich had a surprisingly large office, but his law clerk and secretary had less space than desirable. My own chambers had a relatively small office, a small secretarial space, and a book-lined larger room barely sufficient for my two, later three, law clerks. Judge Aldrich, some time after I came aboard, offered me his office, a kind offer I refused because it seemed unthinkable to accept.

That courthouse, soon to be named the McCormick Courthouse after the Speaker of the House and located between Congress and Devonshire Streets, was nothing like today’s spacious and modern Moakley Courthouse, located on Boston Harbor. Originally designed to house all federal officers, judges and agencies in Boston—at a time when the entire federal entourage was a fraction of what it is today—the accommodations in the McCormick Courthouse for the Court of Appeals and the Massachusetts District Court were spare and somewhat cramped. But the lack of grandiosity seemed acceptable at the time. We judges and our frugal clerk, Dana Gallup, had been brought up in post-depression years and had lived through a World War. Moreover, as New Englanders, we were from a tradition that did not value show. Times and values would soon change but, so long as the space was sufficient for the work at hand, we found nothing out of line about these sparse accommodations.

#### V. FUNCTIONING OF THE JUDGES

The monthly assignment of particular judges and cases to panels, and the distribution of records and briefs to judges in advance of hearings, were left to the Clerk’s Office. To avoid partiality or any appearance of partiality, judges did not determine which cases they would hear. During any month that Judge Aldrich was sitting, some of the three-judge panels would include him and omit one of the active judges. After lawyers had argued all the day’s cases before the assigned panel, the judges would confer privately in the courtroom lobby, with Judge Coffin (or, if he was away, the most senior active judge) presiding.

We would discuss the cases just heard in order, with each judge being asked for his opinion and comments. Often the panel members would vote to affirm the decision below; less often the consensus was for reversal or remand; occasionally differing views as to outcome would be expressed; and sometimes, if the case was

complex, the judges would indicate uncertainty as to outcome, leaving it to the writing judge to embody his own conclusions in the draft opinion which members of the panel would later review to determine whether or not they agreed. It was always understood, even when a judge voted to affirm or reverse, that votes at this stage were tentative and could be modified later on when the draft was circulated.

Chief Judge Coffin made the final writing assignments after all cases for the month had been heard and discussed. He engaged in the assignment process with great deliberation, balancing each judge's workload so that no one would be conspicuously overloaded, and also taking into account what case or cases he believed a particular judge might find interesting, or even fun, to write. He was delighted when a judge was well satisfied with his assignment—a maritime case being found for Judge Aldrich, for example. Occasionally, cases would come along where Judge Coffin felt it right for him, as the chief judge, to write the opinion—for example, a seminal Boston school-busing case where the court wished to indicate its attention and unanimity. But these cases were few and far between. Judge Coffin often assigned important and interesting cases to others rather than keeping them for himself. And, of course, in the few instances where the panel seemed divided, the writing assignment usually went to a judge who was in the majority.

In retrospect, I realize how much Coffin's fairness and care in the assignment process were key ingredients for the happy and collegial court we were. Judge Coffin's visible and painstaking efforts when assigning cases to be fair to and considerate of judges on the panel—keeping in mind, at the same time, the court's overall interests—contributed significantly to morale and to our respect for him. His efforts were reciprocated by the judges' eagerness to cooperate with him whenever mutual tasks needed to be done.

After the cases were assigned, the members of the court split up and, if not from Massachusetts, went back to their home districts. I would lose no time in telling my law clerks what cases we were to write, and I would relay to them our tentative decisions and any comments from the judges' conference relevant to cases we had a part in. Other cases, from earlier sittings, would, of course, be already in the pipeline in various stages of completion. Priorities had to be set so that our chambers' production line was as efficient as possible. Often cases that were not too complex and were to be affirmed were targeted for a speedy draft.

Different judges' chambers handled the writing of draft opinions differently. Judge Coffin's books make clear that, in writing his drafts, he valued and enjoyed his law clerks' collaboration. I would typically discuss the draft in detail with one of my law clerks, and, unless a further legal research memo was required, would ask for a proposed draft opinion from the clerk. I then most often rewrote that draft in its entirety, although sometimes, in less complex cases, utilized more or less in full as the circulated draft if I thought it sufficient. Judge Aldrich worked differently—writing a first draft himself, and then asking his clerk to provide citations and criticism. In the end, however composed, a draft was produced with which the writing judge was satisfied, and circulated to the writer's two colleagues.

In today's computerized world, drafts can be worked on back and forth from a judge's computer and one or more clerks' computers, leaving a judge's secretary with little to do in that realm. In those earlier days, our secretaries would take

charge of typing the finished product and would mail the draft to the other judges along with the writing judge's letter of transmittal. Usually, the letter would contain few comments, but sometimes—if the opinion deviated from what had earlier been discussed or the judges had yet to agree on the result even tentatively—the letter of transmittal might contain a fairly lengthy explanation or apologia for the draft.

In a day or two the other two judges would receive the draft and letter—today's near instantaneous delivery had yet to be possible. In many instances, their responses would be a quick letter saying "I am pleased to concur," sometimes accompanied by small suggestions for spelling or word changes, sometimes with more ambitious changes to suggest. It was generally assumed the writing judge had stylistic liberty. Judges did not bicker over matters of style or ways of putting things that did not involve issues of substance. But, substantively, the opinion was regarded as that of the entire panel. Hence if, beyond matters of expression deemed relatively unimportant, the opinion struck a panel member's nerve, either because it seemed incorrect in its statements of the facts or law, had an improper tone, or otherwise conveyed the wrong message, the non-writing judges would say so in their replies. If the changes were small, or at least acceptable, the writing judge would usually welcome the corrections, would write back he had made them, and would attach a copy of the revised opinion, after which all would happily sign off. But more extensive and serious criticisms might result in considerable correspondence in which each of the three judges took a position.<sup>22</sup> Quite often, agreement was eventually reached. In rare instances, one of the judges would write a dissenting opinion or, if the disagreement was with the reasoning but not the result, a concurrence.

Our small court had little difficulty agreeing on most occasions, but we had some dissents and concurrences.<sup>23</sup> Quite often, even if one judge disagreed with aspects of the writing judge's opinion, he would not write separately unless persuaded that there was good reason to do so and that a separate opinion would not do harm rather than good. A court of appeals, unlike the Supreme Court, does not choose its cases; they come in a continuous flood, and small or even sometimes large differences of opinion concerning a particular issue are often not usefully preserved in the published decisions of the court. It is desirable for the court's precedent to provide clear guidance as to how the court interprets the law; hence in many situations acceptance by the entire panel of the majority's view may be preferable to a disagreeing judge's writing separately and perhaps muddying the

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22. See, e.g., The Levin Campbell Papers (on file with the Harvard Law School Library, Box 3) (extensive correspondence among Chief Judge Coffin, Judge Campbell, and Judge McEntee, in which Chief Judge Coffin allayed both other judges' concerns over a difficult torts case, and created consensus, leading to a unanimous *per curiam* opinion).

23. LexisNexis shows only seventy-two concurrences and seventy-five dissents over the eleven years of the Coffin Court. By Judge, the number of dissents was: Campbell (28), Coffin (19), Bownes (14), Aldrich (7), Breyer (5), McEntee (2). Dissents by Coffin Court Judges, LEXISNEXIS, [www.lexisnexis.com](http://www.lexisnexis.com) (select First Circuit database for date range 1/1/1972-12/31/1983; then search Dissent by (insert name of judge) for each judge). The number of concurrences was: Campbell (37), Aldrich (15), Coffin (9), Bownes (5), Breyer (4), McEntee (2). Concurrences by Coffin Court Judges, LEXISNEXIS, [www.lexisnexis.com](http://www.lexisnexis.com) (select First Circuit database for date range 1/1/1972-12/31/1983; then search Concur by (insert name of judge) for each judge).



message. Sometimes, of course, the divisive issue may be one that some day will come before the Supreme Court or, at least, before other circuit courts. In such instances, it may be useful for a disagreeing judge to preserve his views in a published dissent or separate opinion.

There was no rancor in the judges' dealings with each other on the Coffin Court. Judge Coffin set an example of courtesy and understanding in his interactions with the rest of us. This does not mean that in discussions concerning cases under advisement, he, or any of us, abandoned fundamental positions that we believed were valid. But Coffin and the rest of us were willing to listen to our colleagues and often to reconsider views in light of theirs; and Coffin encouraged the exploration of alternative approaches, changes to language, and the avoidance of unessential divisive issues as a way of achieving unanimity. Coffin's approach was to assume for as long as reasonably possible that the panel could find common ground, and, if necessary, to stake out the common ground himself.

In one case, for instance, Judge Coffin faced what appeared to be an intractable disagreement between myself and Judge McEntee over a difficult choice of law analysis.<sup>24</sup> His first reaction was to "spen[d] considerable time agonizing over [the] good exchange of memos."<sup>25</sup> He then proceeded to suggest that Judge McEntee and I were "comparing how many angels can stand on the head of each of two pins,"<sup>26</sup> and proposed a slightly modified analysis. Still unsatisfied with the choice of law analysis, I circulated a memo, telling Judges Coffin and McEntee that I planned to write a separate concurring opinion. In response, Judge Coffin rewrote a portion of Judge McEntee's opinion, confining the previous disagreement to a footnote. He accompanied this revision with a memorandum that read:

[I]t seems to me . . . that it would be rather silly to have a split opinion on a case where we agree on the result and don't disagree very much as to approach . . . . I don't want to brush under the rug any strong conviction which either of you have but felt that the case might be looked upon as significant by some courts and that our differences could be reflected in a footnote such as I recommend.<sup>27</sup>

Both Judge McEntee and I accepted this approach and, in a memo sent to myself and Judge Coffin, Judge McEntee remarked: "Thank you both again for your outstanding efforts in this case. I suggest that this truly collegial opinion be designated 'Per Curiam.'"<sup>28</sup>

I should add that the memos we exchanged were seldom couched in excited argumentative style but most often were careful, moderate, and "legal" in tone. And we made efforts to improve, as we saw it, a colleague's draft in the interest of

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24. The Levin Campbell Papers, Memorandum from Judge McEntee to Judge Campbell, cc Chief Judge Coffin (Apr. 18, 1975) (on file with the Harvard Law School Library, Box 3).

25. The Levin Campbell Papers, Memorandum from Chief Judge Coffin to Judges Campbell and McEntee (Apr. 25, 1975) (on file with the Harvard Law School Library, Box 3).

26. *Id.*

27. The Levin Campbell Papers, Memorandum from Chief Judge Coffin to Judges Campbell and McEntee (May 16, 1975) (on file with the Harvard Law School Library, Box 3).

28. The Levin Campbell Papers, Memorandum from Judge McEntee to Chief Judge Coffin and Judge Campbell (May 22, 1975) (on file with the Harvard Law School Library, Box 3).

achieving a better product, quite apart from a different bottom-line outcome<sup>29</sup>—an approach Coffin later would write was most likely when panel members knew one another well and were truly “collegial.” This collegial, consensus-building approach, while part of our daily working environment on the Coffin Court, was even more remarkable to the visiting judges who sometimes joined our panels. Thus, Judge Frank Murray of the District of Massachusetts, after witnessing a lengthy exchange of memoranda between Judge Coffin and myself on a complex government hiring discrimination case—which ended in a unanimous opinion—wrote: “I think that the benefits of collegiality were most ably demonstrated by the process you and Lee have moved toward resolution of the sticky application of the prima-facie case point to the above captioned case.”<sup>30</sup>

The First Circuit judges of that time almost never discussed orally opinions in progress, either in person or on the telephone. Views about what to say when deciding a particular case were exchanged by written memos and letters. Quite often, if a judge wished to have certain language changed, he would propose the actual new language, perhaps accompanied by a modest disclaimer along the lines that “I am sending you this changed language just to show you what I have in mind—feel free to use your own language if you are willing to go along.”<sup>31</sup> By spelling out the solution to a particular concern, we made it much easier for the writer to know what we had in mind. The danger of this approach—that the writer’s pride of authorship would be wounded—was lessened by knowing each other well and by leaving the wording to him.

Judge Coffin wrote in his memoirs that he could not:

[O]veremphasize the positive effect that the tiny size of our court had on our general unanimity . . . . This meant that we sat together most of the time, reasoned together, sometimes gaining a point, sometimes losing. And we were always open with each other. We never tried, in cases of disagreement by one colleague, to persuade a colleague privately to side with oneself. All memos went to both colleagues.<sup>32</sup>

Judge Coffin went on that it “was not surprising that many opinions could be redrafted slightly to avoid our colleague’s problem, without sacrificing basic principle . . . . In short, collegiality was at its zenith.”<sup>33</sup>

Judge Coffin discusses in his memoirs whether he had a “judicial philosophy,” by which I suspect he meant some overarching concept by which to decide cases. He wrote that he initially regretted the lack of such a philosophy, but concluded

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29. See, e.g., The Levin Campbell Papers, Memorandum from Chief Judge Coffin to Judge Aldrich, cc Judge Campbell (July 13, 1977) (on file with the Harvard Law School Library, Box 3) (“I have three kinds of suggestions . . . . All are submitted with the goal of making an already brilliant and important analysis as invulnerable as possible to criticism of those who would want to be critical.”).

30. The Levin Campbell Papers, Memorandum from Judge Murray to Chief Judge Coffin, cc Judge Campbell (Nov. 24, 1981) (on file with the Harvard Law School Library, Box 21).

31. See, e.g., The Levin Campbell Papers, Memorandum from Chief Judge Coffin to Judge Campbell, cc Judge Bownes (July 24, 1979) (on file with the Harvard Law School Library, Box 10) (Judge Coffin wrote: “I return the ribbon to you so you may make the couple of corrections suggested by Hugh.” Handwritten after “corrections” was “—if you want to—”).

32. LIFE AND TIMES: VOLUME 3, *supra* note 5, at 123-24.

33. *Id.* at 124.

that “no one theory fitted all” and, in general, disclaimed having any one-size-fits-all approach.<sup>34</sup> He agreed with Learned Hand’s view of judges as “jobbists,”<sup>35</sup> meaning, he wrote, that a judge must understand the facts in a given case; know the pertinent law; “keep an eye cocked on the purpose of sensible policy;” “try to forward that policy without doing violence to what has been understood in the past;” and “make clear the reasons for the decision.”<sup>36</sup> In the period from his appointment in 1965 until he stepped down as chief judge in 1983, Judge Coffin himself wrote 1,765 opinions, and, of course, thereafter, many more. My impression is that the above “jobbist” formulation best describes his overall approach in those opinions and it probably also reasonably describes that of his colleagues on the court.

I can remember no discussion among First Circuit judges that showed a strong political or ideological turn. None of us were of a nature, I think, to approach questions in a rigidly ideological way. One might say that Judge Coffin seemed content with constitutional interpretations such as those of Justice Brennan, who was our circuit justice and a good friend of Judge Coffin’s, and of the Warren Court majority in general. But, like the rest of us, he studied each case on its own merits and endeavored fairly to follow precedent, regardless of personal preference. And of course many, if not most, of our cases involved issues other than ones giving rise to the sort of constitutional or statutory questions that could lead to political or ideological division. We received from time to time cases presenting hot button issues of constitutional interpretation; but if these were not largely controlled already by existing Supreme Court rulings, one could reasonably predict they were headed for the Supreme Court, where the final word would be spoken.

Except for Judge Aldrich and me, the judges of that era were Democrats. Judge Aldrich and I, by contrast, both came from moderate Republican backgrounds. Judge Coffin, Judge Bownes, and I had served in the armed forces, and all of us had lived through World War II, leaving us, I think, far less prone than people are today to disparage another’s politics or question his patriotism. That said, in cases where there was room for choice, I more often tended to what might be described as more conservative positions on criminal and some social matters than Judge Coffin and probably my other colleagues as well. Still, in most situations, we were not uncomfortable with one another’s views and, regardless of any personal beliefs, undertook to interpret the law in a lawyerly way, even when the outcome was not personally to our liking. Legal realism or the more modern school of critical legal studies were certainly not our cups of tea.

## VI. GOING TO PUERTO RICO

Our court’s annual February sitting in Puerto Rico deserves mention. It was important for at least two reasons: first, because it allowed us to get to know Puerto Rico with a colonial background rooted, before the turn of the Century, in Spanish rule, and a unique legal and cultural history very different from that of mainland United States (and, not being a state, a different political status from the other parts

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34. *Id.* at 40.

35. *Id.*

36. *Id.*

of the First Circuit). Second, during our seven or eight days in Puerto Rico, the judges, our clerk Dana Gallup, and our wives, had an opportunity to get to know one another on a personal level better than at any other time, thus promoting the collegiality which was the Coffin hallmark.

Along with our wives, all three active judges, together with Mr. Gallup and his wife, flew from Boston to San Juan for a February sitting there. Judge Aldrich did not come. It was not the practice in the 1970s to bring our law clerks to Puerto Rico—why, I don't quite know. Judge Coffin wanted us all to stay at the same hotel; so, to accommodate Dana Gallup's smaller expense allowance, we all opted to stay at the less fashionable Dutch Inn rather than the grander San Juan Hilton. This way we operated socially as one group, attending almost all functions and dinners together from arrival (usually Friday night) until the court session ended the following Thursday. Togetherness of this sort worked when the court was small and when Coffin was our leader; subsequently, the new judges coming to Puerto Rico elected to stay at different hotels, interest in a common agenda having faded. I should mention that in the '70s and thereafter, Coffin (like his successors later on) often persuaded a federal judge from outside the First Circuit to join our panel in Puerto Rico to help us manage the ever-growing caseload. These judges generally joined our little social group, along with their wives, adding much to the collegiality of the Puerto Rican visits.

Chief Judge Coffin was deeply interested in the politics and culture of Puerto Rico. He made and maintained close friendships with several members of the Puerto Rican judiciary, besides coming to know, as did all of us, the federal district judges there. My wife Eleanor and I shared the Coffins' interest in Puerto Rico and were pleased to be included in the Coffins' circle of Puerto Rican friends. A ritual during our visit to Puerto Rico was a dinner reception hosted by the Puerto Rico chapter of the Federal Bar Association. After our four days of hearing appeals in San Juan, the Coffins and ourselves made a practice of visiting and often travelling around the Island with particular Puerto Rican friends who introduced us to interesting places, and discoursed about the politics, history, art, and many other aspects of life in Puerto Rico. These outings gave us an appreciation of the charm of the island and its people, as well as of the many problems.

To hear the appeals, we used a courtroom and antechamber provided by the Chief Judge of the District Court next to his own office. To set up the hearings, Mr. Gallup—who declined to use taxis or more expensive transportation—early each morning took a local bus from our hotel to the federal courthouse in San Juan, then located in an historic Spanish-style building on the harbor of the old city. The judges arrived an hour or so later, usually driven by United States Marshals. At the beginning of the week, a large crowd of attorneys would come to the courtroom to be sworn in to the bar of the First Circuit. Thereafter, the arguments would proceed much the same as in Boston, usually by local attorneys, although occasionally by attorneys from mainland United States. The language was English, in which the local attorneys were, for the most part, admirably fluent.

At lunchtime, we judges would go to a nearby restaurant, and later in the afternoon, after we discussed the day's cases, we would return to our hotel, connect with our wives, and engage in some joint social plan for dinner, often followed, in the case of the judges, by a late-night reading of tomorrow's cases. We were often

invited to dine with the Puerto Rico District Court's Chief Judge Toledo and his wife, and with one or another of the district judges, and sometimes with justices of the Puerto Rico Supreme Court. One of the district judges, Juan Torruella, later joined us on the First Circuit. The Puerto Rican federal district judges—as is true to this day—were excellent lawyers and totally bilingual. The latter ability was as essential as it was remarkable. While their first language was Spanish, the federal court proceedings they ran, including all pleadings, briefs, arguments, and testimony, as well as their opinions, were necessarily in English.

When I first went to Puerto Rico in 1973, all appeals from within that jurisdiction were ordinarily heard in the First Circuit's single yearly sitting in San Juan—a practice that must have begun soon after World War II when, thanks to improved air travel, a regular sitting by the Boston Court in Puerto Rico became feasible. The number of appeals, small at first, was just beginning to increase in the early 1970s. In 1973, the list was large enough to keep our panel busy for three days. In subsequent years, spurred by the popularity of Puerto Rico's own district court, the numbers kept rising. Toward the end of the 1970s, after being worn down by a list so long we had to sit mornings and afternoons of each day, we began placing Puerto Rican appeals on the Boston list for hearing there. The court continued, however, to come to Puerto Rico for at least one annual session, in order to keep in touch with the judges and the bar there.

For Judge and Ruth Coffin, and for Eleanor and me, these annual visits, with the chance to work in a place we greatly enjoyed and to renew acquaintanceship with Puerto Rican friends, remained a particular pleasure and a unique opportunity.

## VII. COLLEGIALLY

Collegiality, as experienced by the judges on the Coffin Court, was very much a fact during the period in question, not just a theory. Never having been on another multi-judge court, I took for granted our agreeably close and collaborative way of working together, perhaps thinking it more typical of the relationships on courts like ours than, in fact, was necessarily so. Now, looking back, the consensus-building leadership of Judge Coffin was plainly a major contributor to the court's positive and friendly culture, as were the cooperative responses of the other judges. We greatly enjoyed working with Judge Coffin and with one another.

At the time, I lacked any nuanced view of why, beyond obvious reasons, collegiality might be especially important on a multi-judge court like ours. Later, when reading Coffin's two books, *The Ways of a Judge* and *On Appeal*, I discovered—as was true of so many other significant matters—that he had thought deeply about the subject. He saw collegiality as not simply an agreeable quality but as one that, on a three-judge court, required serious cultivation for professional reasons.

Judge Coffin viewed collegiality as essential to the quality of the work put out by the federal courts of appeals. It affects, he wrote, “the flavor, quality, and—at their best—the wisdom of appellate opinions.”<sup>37</sup> The reason three judges were placed on appellate panels, he believed, was to engage all three minds, not just that

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37. THE WAYS OF A JUDGE, *supra* note 12, at 172.

of the writing judge, in arriving at the court's written decisions. Having three judges blended multiple talents so as to produce a result better than any one judge could produce. Coffin saw, as he wrote, a vast difference between arriving at a "yes" or "no" on a particular opinion through majority vote, and "working up an opinion on a close case so that three or more judges of different sensitivities, values, and backgrounds can join not only in the result, but in the rationale, tone, nuances, and reservations."<sup>38</sup>

An important, indeed essential, component of the kind of collegiality he describes is the opportunity of the three judges to know one another well, to have worked together continuously. He called this "intimacy beyond affection."<sup>39</sup> There must be "a deep . . . selective knowledge of one another."<sup>40</sup> It is particularly in this respect that the smallness of a court works in its favor. No other institution (than an appellate court) "reaches this level of intimate, equal, permanent, independent, and single-minded collegiality."<sup>41</sup> Among the elements of true collegiality are lack of envy, pettiness, and enmity among the three judges; openness (meaning "an absence of dissimulation, maneuvering, or exploitation"). Attempts to convince must be based on "words," not "ganging up" or "secret two-way deals," and despite closeness, "one thing that is never asked or given in the context of judicial duties is a favor."<sup>42</sup>

Coffin concedes that the collegiality of an appeals court has drawbacks. An appellate judge must surrender the autonomy of a trial judge. He or she may even have to subordinate personal views to achieve a harmony of the whole, although Coffin recognized that there are times when that should not be done—and need not, in proper circumstances, spell an end to collegiality.<sup>43</sup> He also recognized that what he says of collegiality on courts of appeal may well be inapplicable to the different responsibilities of the nine-member Supreme Court of the United States.<sup>44</sup>

As previously noted, Coffin believed that the collegiality of the federal circuit courts of appeals was seriously endangered by their growing size. While their panels remain at three, the composition of each panel becomes subject to constant turnover when the number of judges on the same court becomes very large. Coffin pointed out in 1994 that, beyond the First Circuit with its six judges, "all other twelve federal courts of appeal have ten or more active judges and up to ten senior judges."<sup>45</sup> In a court of ten judges sitting in panels of three "there are no fewer than thirty-six different panels on which an individual judge can sit."<sup>46</sup> Judges might theoretically sit with each colleague once a year, although that seems unlikely in practice. Ordinarily, "[a] federal appellate judge ends up sitting several times a

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38. *Id.* at 59.

39. *Id.* at 172.

40. *Id.*

41. *Id.* at 171.

42. *Id.* at 172–73.

43. ON APPEAL, *supra* note 1, at 224–29 (discussing the role of separate opinions on collegiality in courts).

44. Compare *id.* at 224–25, with NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) (describing often embittered relationships between four intractable but gifted and influential Justices of the Supreme Court).

45. ON APPEAL, *supra* note 1, at 215.

46. *Id.* at 216.

year with the same colleagues, once a year with some, and not at all with others.”<sup>47</sup>

Coffin saw such fragmented relationships as undermining the collegiality he believed essential—judges never got to know one another’s “strengths, biases and foibles,” and they lacked motivation to establish the most harmonious relationships, to cater to particular habits and tasks.”<sup>48</sup> Each sitting at such a court “approaches the convening of a panel of polite strangers.”<sup>49</sup>

Judge Coffin was aware of the dilemma inherent in his analysis. That dilemma stemmed from the difficulty of creating courts big enough to handle the nation’s judicial business without, at the same time, increasing the number of their judges to a figure incompatible with preserving collegial relationships between individual judges. Coffin feared that collegiality could soon be “an endangered species,” but voiced the “fervent hope” that “the qualities associated with smallness may endure even though smallness itself may not . . . .”<sup>50</sup>

Certainly the Coffin Court, which I have portrayed here, was our nation’s final experiment with a federal appellate tribunal of the small size Coffin viewed as ideal. That court was indeed truly collegial. Judge Coffin’s outstanding leadership and other favorable factors including its size made it so. One might even say it justified Coffin’s enthusiastic view of the merits of such a small, collegial body. Whether its collegiality resulted in judicial products superior to those from some larger, less congenial court is, of course, another question—one that I am scarcely in a position to assess. Nor does there seem any easy way to make the objective evaluation required to answer such a question. What can be said with confidence is that many of the Coffin Court’s best practices, well described by Coffin in his writings, remain models today. Even on multi-judge behemoths, collegial interactions are often practiced and are encouraged. And the legacy of Judge Frank Coffin lives on. Most any judge, lawyer, or litigant would welcome a man of his extraordinary caliber to the appellate bench. It is hard to imagine a judge who better portrayed the qualities and standards all would wish exemplified on our courts.

There remains to be mentioned one further ingredient of collegiality that was a hallmark of the Coffin Court—namely, humor. Frank Coffin himself had extraordinary wit, as well as a great liking for fun.<sup>51</sup> All of us on the Coffin Court enjoyed and responded to this quality in him, and on occasion reciprocated—like Judge Aldrich, when he sang an ode to Judge Coffin to the tune of “Mack the Knife.”<sup>52</sup> Humor—in particular, the kind with the capacity not to take oneself too seriously—is a useful solvent when judges, or any group, work together closely. Humor in no small measure helped make the enterprise I call the Coffin Court truly collegial.

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47. *Id.*

48. *Id.*

49. *Id.*

50. THE WAYS OF A JUDGE, *supra* note 12, at 172.

51. *See, e.g.*, LIFE AND TIMES: VOLUME 3, *supra* note 5, at 109 (telling of Judge Coffin’s introduction of the “head table” at a court event: Judge Coffin, after taking the microphone, lifted the table cloth, reported on the table’s surface, looked under, reported on its legs, and announced he had introduced the head table).

52. *Id.* at 167.