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Tribute to the Honorable Rex E. Lee Solicitor General of the United States 1981-85

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There is a tendency for many, if not most, lawyers to assume that appellate lawyers lead a monastic professional life. I suspect this stems from law school moot courts, where the student receives an assignment, trundles off to the library, reads everything available relating to the issue to be briefed, and then writes a brief. To be sure, there are exchanges between students who are working on the same brief, but usually each one has his or her own discrete legal question to analyze, which makes those debates more fun than serious, or the competitive tone of the exercise dampens extensive collaboration. Thus, for most lawyers, at least as they come out of law school, being an appellate lawyer means leading a largely solitary life: thinking hard about a legal issue or two, writing a cogent brief, and appearing occasionally in court to deliver an oral argument.

Real life is very different. As I learned during the fifteen years I practiced law with Rex E. Lee, being an appellate lawyer and, in particular, being a Supreme Court lawyer is virtually never a cloistered experience. To the contrary, almost every case comes laden with existing lawyers, some of whom have been working on their case for years. Indeed, they view it as “their” case, and the clients usually are loathe to jettison their existing lawyers, assuming (often correctly) that their knowledge of the record and expertise in the subject matter will materially improve the presentation of the case on appeal or before the Supreme Court. Thus, it is not enough to be, as Rex was, arguably the best oral advocate before the Supreme Court in the country, or to have the most experience before that Court. It is also necessary to be able to deal effectively with other lawyers and their egos while ensuring that the best interests of the client are served. To achieve those potentially conflicting goals requires extraordinary people skills, which was one of Rex Lee’s greatest, but probably lesser-known qualities that made him a special appellate lawyer. Because of those skills, Rex was the consummate lawyer’s lawyer.

Rex’s skill in working with other lawyers was well developed by the time I first met him in 1981, when he was the

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Solicitor General of the United States. One of the first rules he imposed on his Assistants was their duty to discuss their edits of briefs with the lawyers in the Divisions of the Justice Department, the United States Attorneys offices, or the federal agencies. Rex always described these government agencies as his “clients” while he was the Solicitor General, and he insisted that his lawyers work with the lawyers for his clients and not simply rewrite briefs, file them, and send a copy of the filed brief to the lawyer after the fact. Also, whenever an Assistant was inclined to make a recommendation concerning an appeal that was different from the recommendation of another lawyer in the federal government, it was the duty of the Assistant to speak with that lawyer and explain the basis for the recommendation. I am not sure what the practice was prior to Rex assuming the position, but it was clear that after, we were going to be lawyers’ lawyers and not autocrats. Rex’s solicitousness to lawyers outside of the Solicitor General’s office may be explained by his prior position as Assistant Attorney General in charge of the Civil Division.

During the three years I was in the Solicitor General’s office, I had the pleasure of sitting in on about two dozen meetings between Rex and one or more of his “client agencies” about an array of legal issues, ranging from the exclusionary rule to affirmative action. Actually, one of the better-kept secrets inside the beltway is how relatively easy it is for both private and government lawyers to meet with the Solicitor General on appellate issues. What fascinated me about these meetings when Rex conducted them was how genuinely attentive he was to the arguments that each participant offered. Not surprisingly, most of the meetings involved agencies with conflicting views about the best way to resolve a particular issue or the best course to follow in litigation. These debates could involve matters of both deep intellectual and emotional divisiveness. Partly because Rex had extraordinary intellectual skills, he was able to listen carefully, understand the arguments, ask probing questions, and ensure that everyone felt that he or she had been fully heard. Then he would work on devising a solution that promoted the federal government’s best interests while protecting the Solicitor General’s special relationship with the Supreme Court. I never left a meeting in his office where the participants felt “cheated”

by the process. They may have disagreed with Rex's final disposition of the problem, but they always expressed the view that his approach was fair, and that they understood what he intended to do and why.

I suppose the most contentious example of this process was the Memphis Firefighters case.²¹ There the Civil Rights Division and the Equal Employment Opportunity Commission had very different legal theories for supporting the argument that seniority rather than race would be the guiding principle in deciding layoffs. Ultimately, the brief for the United States was an inelegant presentation of two fundamentally different theories of statutory interpretation, but both argued for the same result and both received about equal treatment in the brief. At the end of the day, Rex successfully brokered a persuasive submission to the Supreme Court, and the United States' position prevailed in that case. His ability to work with an army of lawyers during that process and still end up with a work product that promoted the federal government's interest in the case was a testament to his consummate skills as a lawyer's lawyer.

Of course, life as a lawyer's lawyer is a bit easier as the Solicitor General than it is as a private practitioner. The Solicitor General, after all, does have the "hole card." Nothing can be filed in the Supreme Court on behalf of the federal government that he does not personally approve; no case can be brought by the federal government to the Supreme Court without his express approval. That power goes a long way toward making most meetings collegial. Nothing is likely to be gained by trying to bully the person who ultimately has the power to make the final decision as to how and whether to proceed.

Although it was probably a small shock to Rex when he entered private practice and lost that institutional advantage, I developed far more respect and admiration for Rex's ability to work with large and small groups of lawyers during the ten years we practiced law privately than I did during his tenure as Solicitor General. It was actually private practice that best showcased Rex's remarkable skill at galvanizing opinions around a particular legal theory and his success in putting forward the very best arguments, even when other lawyers had very different ideas about how best to present a particular

21. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

argument. Rex had an uncanny knack for recasting a co-counsel's observations, which may have seemed either unhelpful or worse, into a formulation that actually improved an argument. Of course, if someone had a better argument, Rex was always quick to see that and to accept suggestions graciously.

I cannot discuss specifics without revealing attorney-client information, but my favorite memory of Rex's skills in this area arose in a very large and important energy case where the firm represented more than thirty separate companies, each of which had at least a couple of lawyers from other law firms. This was a body that generally wrote its briefs by committee. One law firm would be responsible for preparing the first draft, but then the revisions were discussed at length among all of the lawyers representing all of the members of the group. Each company had a vote and sometimes edits would be decided by votes. Frankly, if there is a hell for appellate lawyers, it probably would look a lot like the conference room for some of those meetings. The only person with the personal stature and interpersonal skills to effectively guide that group through the process of obtaining Supreme Court review and ultimately Supreme Court success was Rex. I still have very vivid memories of sitting at meetings for what seemed like days and making little or no progress, and then watching Rex enter the room and bring a meeting of the minds that just five minutes earlier had seemed impossible.

What set Rex apart? First, he did have more appellate experience than almost anyone else in the profession. At the time he passed away, Rex had argued fifty-nine cases in the Supreme Court and had briefed many more cases in that Court. Everyone, including his co-counsel, trusted his judgment. Rex had argued more cases and won more cases than anyone else in the room could ever hope to handle, which made it hard to question his judgment in close cases. Second, Rex never acted like a dictator. He always respected other points of view and always took the time to explain why he favored a particular argument or preferred not to include an argument. Third, Rex was smarter than almost everyone else in the room. He was able to articulate concisely and plainly his rationale. Even if his explanation did not completely convince everyone else, it was always clear that Rex had considered all the alternatives and that his proposed course was the product of a careful reasoning.

What could be the downside to concurring with the opinion of the smartest, most-experienced Supreme Court lawyer in America, who just happened to be the nicest person as well? There was none and that was why Rex succeeded in ways that no one else could.

That said, it is worth revisiting my initial observations. Appellate practice is not a monastic life. For lawyers like me who lack Rex's experience and grace, the process can be quite frustrating. A month does not go by that I do not think about Rex and wish he were available to resolve a difference of opinion among co-counsel about how best to present an argument. But at least I had the opportunity to watch and to learn from him what it takes to be a successful appellate counsel. Thus, for those who aspire to be appellate lawyers, do so with your eyes open. Being able to research, write and present oral arguments is necessary, but it is not sufficient to ensure great success. To be really accomplished, a young lawyer must leave the library and learn how to be respectful and responsive to the needs and desires of co-counsel and clients. They will almost always be involved, and when they are, they will always have ideas and opinions. Rex Lee learned that at an early age and taught those of us who were fortunate enough to work with him what it takes to be a lawyer's lawyer. On behalf of all who were touched by Rex, I thank him for that education.

FRANCIS X. BEYTAGH*

I first became acquainted with Rex Lee when we both served as law clerks on the United States Supreme Court during its 1963–64 Term. Rex worked with recently appointed Justice Byron White, and I with Chief Justice Earl Warren. A recent graduate of the University of Chicago's fine law school, Rex

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