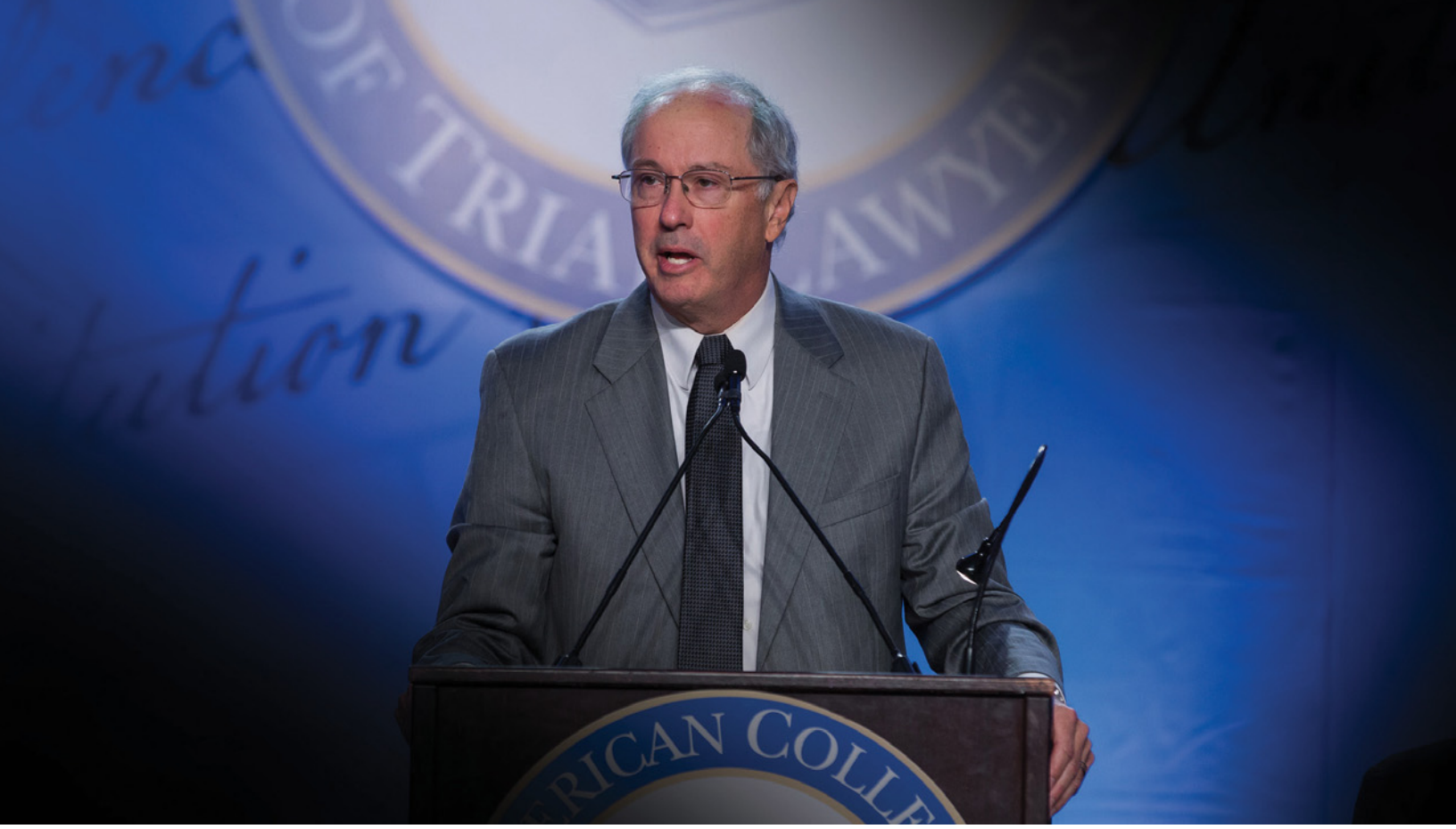
U.S. DISTRICT COURT JUDGE: AMERICAN EXPERIMENT GOES ON EVERY DAY IN FEDERAL COURTHOUSES

After a spirited introduction from Former Regent **Dennis Suplee**, the Honorable **Gerald Austin McHugh**, U.S. District Court Judge in the Eastern District of Pennsylvania, (who also gave the brilliant response on behalf of newly inducted Fellows in Montreal in 2003) made these remarks.



"Those of you from the Philadelphia legal community know that Dennis Suplee has mentored me like he has mentored so many of us. And so as I said when I first stood before this College [when providing the Inductee Response in 2003], we all stand on the shoulders of others, and that's certainly true here.

"When you take the bench after a long career as an active trial lawyer, because you know a great many lawyers who have actually tried significant cases, there's obviously a great deal of curiosity from former colleagues about what it like to make the transition to the bench.

"I've had those discussions. I frequently get into areas that are really the flip side of the same coin because people often say, 'It must be great to work on these big important cases.' And then the reverse side of the coin is, 'You must really be frustrated by all of the small matters that take up your docket and which you have to deal with.' So I decided that I would try to reflect a little bit on what makes a case important. That's a dangerous subject for a judge to raise because we know that every case is important and has to be, because it's certainly important to the litigants.

"I will tell you that the warm glow that surrounds one's affirmations and judgments quickly evaporates as soon as you begin ruling because the inherent part of being a judge, by definition, at least 50 percent of your audience goes away unhappy. Sometimes it's substantially more than that in a multiparty case. So respect for the rule of law really requires that whoever goes away disappointed believes that the judge has taken their case seriously."

CASES THAT GO BEYOND LITIGANT INTEREST

"To that extent, every case is important. But what I want to discuss today is its importance on a different level. What are those cases that occupy our federal courts that go beyond just the interest of the litigants, as important as those interests are? It's in that sense that I talk about what makes a case important.

"Coming to the bench as a tort lawyer who did so-called big cases, as Dennis mentioned, my perspective in taking the bench was that those cases are big-damage cases.

"Certainly among my friends that are in the commercial litigation bar, they handle those big cases. I will tell you that there's no doubt that the quality of the lawyering in those matters can be breathtaking.

"Whenever I have the chance, I make sure every law clerk is in the courtroom just to see and hear this quality of advocacy. If the first lawyer says, 'Oh, he must be right' and the second lawyer says, 'Oh she must be right' we go through the litany, they are all equally convincing.

"So I say to my law clerks that what you've seen here is really the Olympics of litigation where truly the perfor- ▷

mance among these great advocates is divided only by a thousandth of a second. But as engrossing as those cases are, and as important as they are to the litigants, and as much money is involved, I'm not always sure that those are the cases that are, in the broader sense, the most important cases that I find in the federal judiciary.

"I recently spent about 50 pages of judicial ink in a very complicated security fraud case. The issues were intellectually fascinating to be before the Third Circuit. Maybe they will or will not say something about the law. But as we drill down on the case we realize that really this case does not have much by way of broader significance other than to the litigants who were engaged in a very sophisticated trading strategy. Ironically, the trading strategy took advantage of the haplessness of other investors who left dividends on the table.

"So I was prompted, I will admit, to put a cheeky footnote in the opinion that said, 'The fight here is over the profits to be made from the sharing of the sheep.' It is clear those cases are truly important in terms of the economic stakes but I suggest that when you take the bench, and when you get out of the bubble, in my case, the bubble of big tort cases, and look at the day in and day out business of the federal courts, there are some remarkably important cases that are being handled under the radar.

"In coming on the bench, I had the good fortune to have clerked for the very court which I now sit where Judge Al Luongo, who was a very sensible, old-school judge who told me 'Always keep the focus on whether this is a case of principle or just a case of principal and interest.'

"I didn't know quite what he meant by that until later when I took the bench. And I also had the good fortune, just as I took the bench, to get a recommendation from David Hamilton who had been a trial judge in Indiana for fifteen years before going on the Circuit Court of Appeals. He told me to read an article called, 'Lessons From Small Cases.' It was about Richard Arnold who was briefly a trial judge and went on to a career as a Circuit Court Judge. Early on, Judge Arnold had a case called *Dodson v. Arkansas Activities Association*.

"Essentially, a claim was brought that challenged the fact that at that time when girls played basketball, it was half court, six on six, because they were too delicate to play a full court game. It was right after the Supreme Court had decided *Craig v. Boren*, the first gender discrimination case. And Judge Arnold, to everyone's great shock that set the Arkansas community on its ear, 'I don't think these girls are shrinking violets. They're going to play full court basketball.' No appeal was taken and the case is only rarely cited.

"As it happens, the author of the article that Judge Hamilton recommended was one of Judge Arnold's law clerks. She was also the law clerk who earlier was an Arkansas high school basketball player. And she pointed out that when he made that ruling, it opened a whole window for high school female athletes in the state of Arkansas to begin to compete on another level and to move on to national stages and national fronts where previously, they could never have had their say.

"What Dave Hamilton said is that I should read that case and think about how any small and any mundane dispute, something very important may be lurking, something we don't even realize. What's interesting about the case is if you read Judge Arnold's opinion, Title IX is raised which, of course, is now always invoked, but he actually decided the case on the Fourteenth Amendment.

"You soon realize that it is often in those cases that fly off the radar that there is a matter of potentially great importance. That message was first delivered in a case that was brought under the IDEA [Individuals with Disabilities Education Act] which has to do with the rights of students who need remedial education. As a judge, one rule of thumb is the more acronyms in the statute, the more painful the job is going to be.

The IDEA case involved "a young person who had the need for remedial education and did not get it. Her parents had brought a claim and remedial education was never provided. As it turns out, the school that was obligated to deliver that education was … a cyber charter school, which means it had no physical presence. So the case was a fight over a very small amount of money and, in fact the child had already gone on to another school and obtained an education.

"The defendants in this case, all governmental entities, some state and some local, said, well, this is really just about counsel fees. But by the time we drill down to the bottom of the case what we realized is, no. It's really about public education. If we're going to say we're going to have charter schools, is there somebody somewhere who stands behind them. And so in the midst of an incredibly arcane and obscure ruling that if the Commonwealth of Pennsylvania is going to say we fund charter schools and the charter school goes bankrupt, the Commonwealth must stand behind it.

"Another case came along shortly afterwards under the Americans with Disabilities Act case and we read the initial pleadings and it seemed very open and shut. It had a young man who worked for a health benefits company, and who experienced a kind of mental breakdown where he had violent impulses and was actually feeling an urge to commit violence against coworkers.

"It seemed fairly clear to the ADA that this kind of conduct is not protected, this case must be dismissed. As we delved into the facts, it turned out that on the day that this individual had this breakdown, what he had done was picked up the phone, called his supervisor, and said, 'I'm afraid. I want to hurt myself or I want to hurt you. Don't come see me alone, call the police and come to my assistance.'

"They did, and he was admitted to the mental health facility from which he called back and said, 'I do have coverage for treatment, right?' As it also turns out, he was terminated. So the issue became, where you have what on the surface appears to be just misconduct and an employer's right to defend themselves, is there a broader issue that really deals with workplace violence."

JURY'S ROLE IN AMERICAN EXPERIMENT

"Let me talk now not about the judicial end of the process, but rather about the jury end of the process. I've been fortunate during my time to be able to try a number of cases. And the very first case that I got to try was the kind of case that would ordinarily be considered just the bane of a federal district court judge. It was a prisoner civil rights case originally filed pro se. Many of us here, I think, volunteer on our local courts to handle these cases, and, if we're candid, there are a number of these cases that are in some ways a matter of sport. But as my colleague **Tom O'Neill** who is also a Fellow of this College, said to me when I took the bench, 'Jerry, look at all those cases carefully and look to see the ones that have merit.'

"Here we had a man who had been convicted of serious crimes and was in our state institution, Graterford, which is where people serve hard time. He had ended up in administrative segregation, which is, of course, a euphemism we now use for solitary confinement. In that prison when you are in administrative segregation, you get one hour a day outside your cell for recreation. But the practice was to shackle the inmate, feet and hands to a belt. The claimant's filing says this is a violation of due process. Now, it's the type of case that I thought would be hopeless given the background of the litigant, but one of our local Philadelphia firms stepped in and assigned him counsel.

"When looking at the files, I thought this will mostly be a training exercise for these young lawyers because the bias against the plaintiff and the burden that that individual must overcome as an outcast for this claim is truly insurmountable.

"We submitted two questions to the jury: number one, did the government have a legitimate interest under the Fourteenth Amendment in securing this man. Of course, the answer was yes, and the jury got it right.

"But on the second question, the jury said, 'We find that the degree of force and restraint used was excessive.' You could have knocked me over with a pin because, as I said from the outset the odds faced by this litigant coming into a court and trying to assert his rights as a convicted felon were daunting. And if we're candid, if you look at your average Eastern District of Pennsylvania jury, it is a heavily suburban, Caucasian rural jury that would have not an ounce of identification with this inmate.

"Yet those jurors took very seriously that principle of the Fourteenth Amendment of the Constitution. And when I talked to the jurors afterwards, they had taken their job very seriously and said, 'Judge, you told us the Constitution applies to everyone and we agreed that in this case it gave him those rights.'

"I thought that night of a phrase that is most often attributed to Fyodor Dostoyevsky, the Russian author, which is 'The degree of civilization of a society can be determined by the condition of its prisons.' When I went home that night I said to myself there is really something to be said for this magnificent system of justice we have. For this Constitution we have that truly can apply to everyone, and for the service of ordinary citizens who come forward and give their time and take a case like that so seriously.

"And so as much enjoyment as I get from the large and dramatic cases, and as much pleasure as there is in seeing the well-funded litigants who come before the federal district court, I have also learned that there are truly important things going on in our courtrooms every day that we and the bar might really not appreciate. When I took the bench, I said that I was really delighted to become a federal judge because it's a way to participate in the American experiment.

"And the American experiment is, can we as a group of people govern ourselves and can we be a nation which is not one of personal win but one of law? What I say to you is that experiment is going on every day inside our federal courthouses all around the United States. My eyes have been opened."

Stephen M. Grant, LSM
Toronto, Ontario ■