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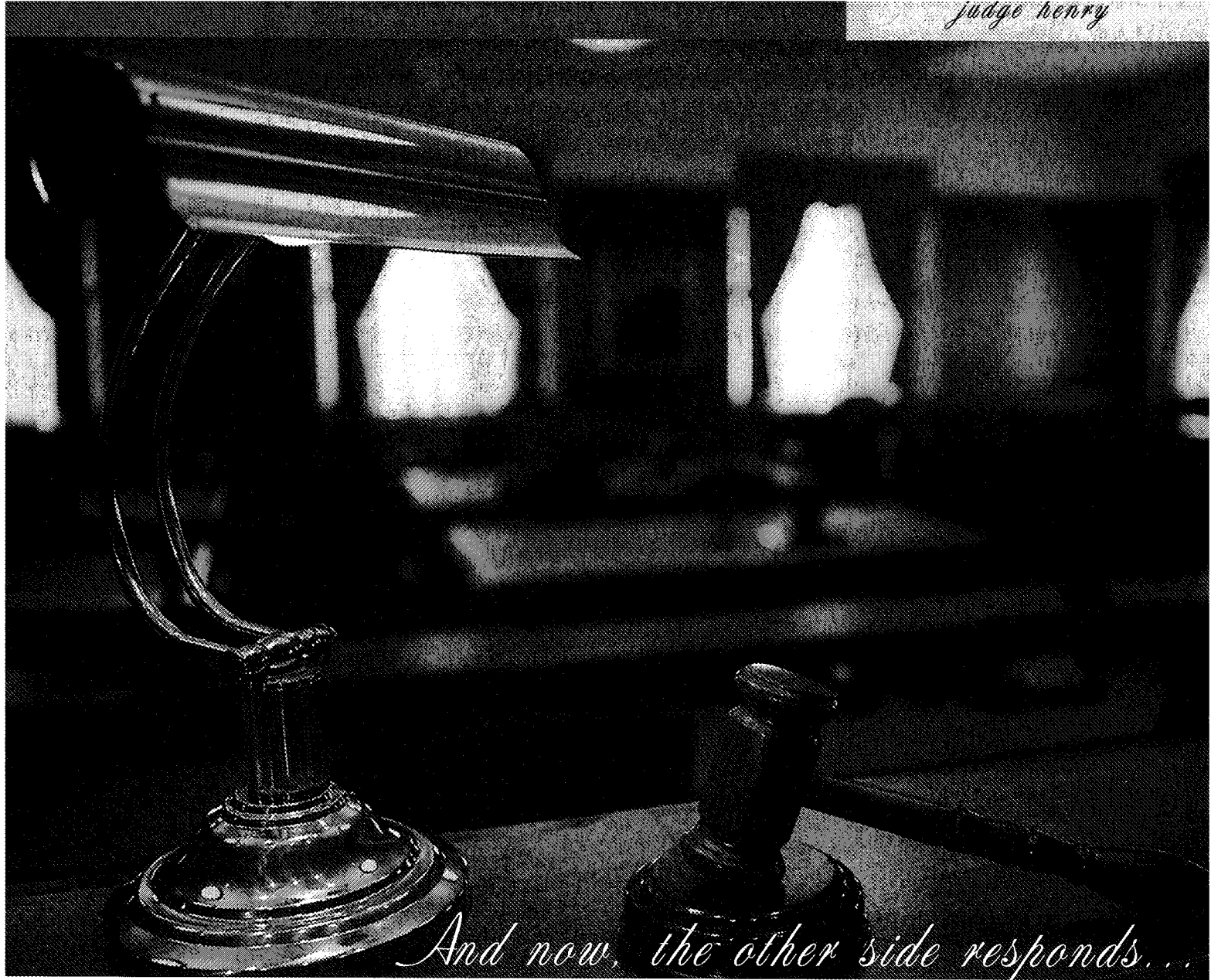
Robert H. Henry

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And now, the other side responds...

Debate Between Judge Lee R. West and Judge Robert H. Henry

Remarks By Robert H. Henry

Circuit Judge, United States Court of Appeals for the Tenth Circuit

Perhaps I should just rest on the evidence of appellate judicial quality just presented by former Appellate Judge Griffin Bell. But then Judge West would just make me explain his speech to him, so I had better go ahead with my remarks. I did notice Judge West taking notes during Dean Kathleen Sullivan's wonderful remarks. One hesitates to imagine how Judge West will

use those notes. However, Dean, I can tell you from experience that in the rare case that he uses them successfully, it will not be with attribution.

Judge West and I have debated before. Our debate appeared, without our knowledge, in the Fifth Circuit District Judges newsletter. I was, of course, overwhelmingly successful in that contest. I granted rehearing

in this timorous *tete a tete* in hopes that this time Judge West might stick to the facts—the law, typically, exceeding his reach and grasp. However, as usual, he has gone for his (as he calls them) “ad hominy” attacks, cheap shots, and jokes recycled from Milton Beryl’s “deleted for advanced age stack.” (Most of Lee’s jokes were first recorded on the walls of the older Neanderthal caves of

Europe.)

The most appropriate response to what we just heard is two numerals and a letter: 12(b)(6). Someone explain that one to Judge West. But, against my better judgment, and in all judicial humility (hmm—what a concept!) I shall respond to the dirty deprecations of the judge, regrettably with a few earthy comments of my own. It is, alas, all that he understands.

In our last “debate,” to use a charitable descriptive, I *routed* Judge West. True, a few sniveling sycophants with scheduled settlement conferences before Judge West blandished about

diatribe with a reference to “science” and its quest to locate the center of the universe. Such a reference from this judge is itself bordering on the hysterical. When Judge West thinks of Daubert he is thinking of Daubert “Georgie” Orwell, who runs a bait house and clipped wing quail farm down in his old stomping grounds of Antlers, Oklahoma, in a part of the State non-pejoratively termed by the locals as “Little Dixie.” Daubert Orwell is an old friend of Judge West’s, and a plaintiff in Oklahoma State Senator Frank “Chopper” Shurden’s lawsuits to reinstate the cock-fighting recently prohibited by initiative

Judge West went on to try to invoke the words of distinguished lawyers, judges, and even a poet to his cause. He claims that fellow quail hunter and noted Oklahoma trial lawyer Duke Logan referred to the rarification of appellate air. But here is what Duke Logan really said of Judge’s West’s recent effort to invade the province of appellate judges—by writing a so-called “book.” Lawyer Logan wrote Judge West the following letter, and I have obtained a copy from the FBI’s voluminous “West” file. In the letter, Logan is criticizing Judge West for suggesting to Logan that he would get a favorable review from

FAST FACT

From April 1, 2001 to March 31, 2002, the U.S. Courts of Appeals commenced 56,534 cases and terminated 57,607 cases. Of this, the Tenth Circuit commenced 2,688 cases and terminated 2,630 cases.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. Courts of Appeals—Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2002, available at <http://www.uscourts.gov/caseload2002/tables/b00mar02.pdf> (Mar. 31, 2002).

his performance. They will lose anyway. And they will learn that compared to a settlement conference with Judge West, trial by ordeal has its benefits—at least someone *wins* in trial by ordeal.

Today Judge West began by insulting his audience, and once again taking an attempted humorous pot shot at our Attorney General, John Ashcroft. The AG himself is kinder; in fact, I understand that Judge West’s name has appeared on his prayer list three more times than have the names of Nadine Strossen and Jacques Chirac.

Judge West began his dangling

petition in Oklahoma. Daubert says that after they take over, the second thing the Commies do—after they take the guns—is outlaw cockfighting. But at least old Daubert is for the lottery—anything, he says, to level the playing field.

Back to Judge West’s science. Lee thinks that being any kind of a gatekeeper is beneath his status. He always gets his head caught in those “bob whar” fences when he is out groundshooting clipped quail, so he has his clerks do all that gatekeeping stuff. That’s why he occasionally gets it right.

After the hysterical reference to the very concept of science,

the conservative local newspaper, *The Daily Oklahoman*:

Dear Lee Roy:

You may carve this in your desktop as a permanent reminder that I will purchase no more Sunday *Daily Oklahomans* in anticipation of reading some reaction to “the book.” But for your recent gift of used dog boots, I would say this weekly outpouring of my money has now exceeded the value of our friendship.

Before departing the subject for all time, did you ever, in a clear light, seriously perceive that a lifetime of not-so-subtle verbal abuse and vitriolic amateur journalistic

In the one year period ending March 31, 2002, the U.S. Courts of Appeals terminated a total of 28,899 cases on the merits—23,170 affirmed/enforced, 2,343 dismissed, 2,364 reversed, 727 remanded, and 295 other. The Tenth Circuit itself was responsible for terminating 1,405 cases on the merits—1,111 affirmed/enforced, 132 dismissed, 129 reversed, 31 remanded, and 2 other.

Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2002, U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending March 31, 2002, available at <http://www.uscourts.gov/caseload2002/tables/b05mar02.pdf> (Mar. 31, 2002).

criticism would even produce an acknowledgment of your existence, much less provoke a favorable book review?

As my sainted mother often said, “If you act ugly, you will be treated ugly, and, indeed become ugly.” God knows you are ugly.

As ever,

J Duke

P.S. – You might sanction the paperboy.

Other critics were equally non-praiseworthy of Lee’s non-literary effort. Oklahoma City trial attorney Bob Milsten said, “*The Life of Lee West* is the kind of a book if you put it down—you can’t pick it up again.” Cowboy, dogtrainer, and radio D.J. Rex Tackett said, “This book is a crime against nature—what a waste of trees.” And Marine Corps buddy T.C. Smith observed in a note to Judge West, “You need to change the cover photo—Nobody recognizes you with your mouth closed.”

Lee also misquoted Oliver Wendell Holmes, Jr., in his principal remarks today. Now, Justice Holmes, like most appellate judges, would repeat or reuse a particularly prescient phrase down the line. This is true with one of his most famous phrases, first used, not in the

famous *Buck v. Bell* opinion, but upon hearing of Judge West’s birth in the 1930s: “Three generations of imbeciles is enough.”

Although most people naturally sympathize with my efforts to dispose of Judge West’s bunkery, they do not know that he did in fact start our feud. As the sitting Chief Judge (and sitting is the part of judging he does best) when I was appointed, he did, as he likes to brag, misuse his powers here to locate me in temporary chambers with no windows, underneath the U.S. Marshal’s gymnasium and weight room (“shhekung!, shhekung!”), and in a room with no bathroom during my time of diverticular difficulty. It is an established truth that he spoke at my swearing-in ceremony with words titled “Defamatory remarks.” He then with gustatory self-bulimious congratulation intones that he was the first judge that I ever reversed.

In my defense, I would say that I have tried to affirm Judge West just out of geographical generosity, but I have never been able to convince one of my colleagues. In appellate judging as in the tango, it takes [at least] two. Judge West’s “reversed and remanded” reputation simply precedes him like a celebrity

motorcade. His opinions change course more than Henry Hudson did, and, like Hudson, one feels left adrift on the bay after reading them.

In a last ditch effort (or what Lee calls a “latrine” effort) to rehabilitate his flagging argument, Lee seeks to evoke my own words in the epilogue of his book, which was hilariously titled “Law and Laughter”—as if Lee West would know anything about either of those subjects. He once again misconstrues my remarks. I did not “damn him with faint praise.” I “fainted him with damn praise.” I mean what can you say about a guy whose Little Dixie Diphthongs allow him to make the excremental expletive into five syllables? (That’s about as far as I could go with that one in public—in my chambers we refer to this as an “excrement deleted” concept.)

And speaking of the excremental expletive, do you all recall the one word that makes 500 Southeastern Oklahomans push back their chairs and invoke the expletive? It is “BINGO.”

I want to recall something I said in the last debate (and unlike Lee’s performance today, you did get a few new things from me). In my antepenultimate paragraph

(and that word does not refer to a relative, Lee), I said:

Finally, I would also note that Judge West is getting a little bit bad on his memory lately—in fact, so much so that he even forgets his bird dogs names. But, with Southeastern Oklahoma cleverness, he finally figured out an ingenious solution—he named his last pair with phrases so familiar to him that he could never forget them. And it is a beautiful sight indeed to watch Abuse of Discretion and Clearly Erroneous running quail in the field.

I do want to say that I must admit to surprise at how well Lee West's book has done. It has sold a whopping 376 copies. The records reflect that 370 copies have been shipped to an office at 4th and Robinson in OKC, the locale of Judge West's chambers. An additional 3 copies were purchased by lawyer Duke Logan, for, as he termed it, "outhouse readin'" (Duke has the only remaining 3 holer on ancestral West land). And an additional 2 copies went to the FBI counter-terrorism initiative. The other

single copy is unexplained: it was mailed to something called PETA.

So, better luck next time Lee, old pal. I note that in a truly desperate effort to better me in civilized debate you scheduled this final round for us in Florida, the only jurisdiction in which you think you can prevail. But regardless of the evaluations we receive today, with or without dimpled chads, let me just remind you that an appellate court will be the final arbiter.

In closing, let me say that I realize this debate has not completely addressed the ancient metaphysical question posed. But I thought it would be best to prevail on this topic by simply letting Lee West have full vent on presenting his side of it. I may, regrettably, be a dull knife, but you can still gut catfish with a dull knife. I also admit that it is unfair to clothe the entire federal trial bench in what Lee West terms his "jury prudence," but with what we appellate judges and wannabe appellate judges have to put up with these days, we must be excused for an occasional cheap shot. Finally, to those of you who have not figured it out, I think you must say that I won even if

it is because of a time-honored appellate tactic—I have subtly changed the question: appellate judges are to be evaluated under this debate topic individually, and not in packs or panels. And with this standard, even assuming the truth of all the nastiness Judge West has spewed forth today, I must admit, with all judicial humility, that I am still the better man. It is, and I have spoken to you before on this subject, purely a matter of 12(b)(6).

One final warning to you good people. Judge West will, with his typical shamelessness, probably attempt to hock a few volumes to you lawyers here who might have settlement conferences scheduled in Oklahoma. I beg of you, do not purchase and thereby pander. The evil you would do would live long after you. You see, there are rumors of a sequel

Judge Robert H. Henry is a Circuit Judge for the United States Court of Appeals for the Tenth Circuit. Judge Henry received his Bachelor of Arts degree from the University of Oklahoma, 1974, and his Juris Doctor from the University of Oklahoma College of Law, 1976. Prior to his appointment to the federal bench, Judge Henry's distinguished career included private practice in Shawnee, Oklahoma, for 10 years; serving as a State Representative in the Oklahoma House of Representatives; serving as the Attorney General for the State of Oklahoma; and as Dean and Professor of Law at the Oklahoma City University School of Law. Judge Henry was nominated by President William J. Clinton as a Circuit Judge to the United States Court of Appeals for the Tenth Circuit, and received his commission on May 9, 1994.