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Edwin S. Cohen

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EDWIN S. COHEN

*Michael J. Graetz**

This is not the first time I have spoken to honor Edwin S. Cohen. I spoke at two of his retirements — at least — and in the Rotunda at both his 75th and 90th birthday celebrations. Each time, and on many other occasions over the years when I have spoken about tax law or policy in his presence, I would always steal a glance at Eddie, looking for that twinkle in his eyes, hoping to bring a smile to his face, or even an outright giggle. Today, I know I will still look, as I will for years to come, though I realize that I can no longer find his eyes, except in my own mind's eye. Eddie's absence is palpable; my heart is heavy.

On July 4, 1939, when Eddie Cohen was a twenty-four-year-old lawyer at Sullivan and Cromwell, the New York Yankee's legendary first baseman Lou Gehrig — who had contracted a fatal disease that cut short his remarkable baseball career and his life — stood before a packed Yankee Stadium and uttered the most famous sentence in sports history: “[T]oday, I consider myself the luckiest man on the face of the earth.” Even people who know little and care less about sports have heard about this. But no one remembers what Gehrig said next: *why* he considered himself the luckiest man on earth. He explained it: “Look at these grand men,” he said. “Which of you wouldn't consider it the highlight of his career just to associate with

* Justus S. Hotchkiss Professor of Law, Yale Law School. This tribute to Edwin S. Cohen reflects remarks made at a Memorial Service held at the University of Virginia School of Law on February 18, 2006. Professor Cohen's citrus grove memo is reported in EDWIN S. COHEN, *A LAWYER'S LIFE: DEEP IN THE HEART OF TAXES* 356 (1994). Some of the comments made here were also made in a somewhat different form by the author in a review of Professor Cohen's book published at 65 *TAX NOTES* 1045 (1994). The quotation of Tom Bergin is from Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 *V.A. L. REV.* 637, 645–46 (1968). I would like to thank John Langbein for providing the data regarding the changes in law firm size and locations.

them for even one day?” And then he talked about the people he had worked for as a Yankee: Jacob Ruppert, the Yankees’ owner, Ed Barrow, the general manager, and Miller Huggins and Joe McCarthy, the two managers he had played for. “Sure, I’m lucky,” Gehrig said.

This day, despite my sadness, I know I am the luckiest man on earth: Edwin S. Cohen was my teacher, my mentor, and for the last thirty-seven years, my friend. And although he and I have lived different lives, mine has been inextricably linked with his.

First, he was my teacher; although he makes it abundantly clear in his autobiography *A Lawyer’s Life: Deep in the Heart of Taxes* that I wasn’t much of a student, at least not in law school. And, as he emphasizes, I never really took a tax course from him. I had Tom White for basic tax — or baby tax, as it is often called — and although I was enrolled in Professor Cohen’s corporate tax course, I hadn’t been to many classes before he took off to become Assistant Secretary of the Treasury. But Eddie’s teaching was never limited to tax courses. He also taught Politics and the Law, Sports and the Law and Computers and the Law.

Luckily, in the spring of 1968 I enrolled in Eddie’s seminar, Computers and the Law. This was early in the age of computers, when punch cards were still needed to run them and programs to search documents for words and phrases were in their infancy. Along with Richard Bonnie and a couple of others, I completed a paper looking at sentencing disparities in the Virginia criminal code. But that was not important. What mattered was that I got to know Eddie Cohen. Eddie often held his classes at his home. I remember well first seeing his office, with its large windows overlooking the trees behind his house. We would sometimes find him there, pacing in circles trying to corner some problem or other. From time to time, we met in Eddie’s basement where he would serve us from his ever ready supply of Michelob on tap. I drank many beers from that tap in the years since. On my way home in Connecticut I pass the local Budweiser distributor every day, and I always think of Eddie.

In the summer of 1969, shortly after I graduated from law school, I joined the tax policy staff at the Treasury. There Eddie Cohen became my teacher, mentor and friend. I had a three-year tutorial in tax law, economics, monetary policy and politics. Eddie had insisted that the staff have one member right out of law school and, although he wasn’t crazy about the idea, Eddie’s deputy Jack Nolan offered me the job, after Richard Bonnie had turned him down. I quickly accepted.

Nothing is more important to a young lawyer than his or her teachers and early mentors. With a few assists, Edwin Cohen taught me what it meant to be a lawyer, how to live a life with the law. He was a short man with a towering intellect. He had unshakeable integrity, extraordinary creativity, an insistence on excellence and genuine intensity — an unwavering determination to succeed. In government that meant to get the best answer circumstances allowed, in practice to provide clients with the very best advice, and in teaching to convey to students both knowledge and the desire to pursue further learning. Eddie was a man of real character; he knew what he stood for, knew the lines he would and would not cross. He was a man apart. This law school is my alma mater; Eddie Cohen was my alma pater.

When we were together at the Treasury, I had countless opportunities to watch him pacing in circles, first to conquer a problem, then to dictate a memorandum describing his solution. Indeed, I have long thought that Eddie's mind worked the same way he paced. He would attack an issue by staking out the largest circle of ideas that might be relevant to its solution and then move, often slowly, through decreasing circles until he reached an answer. Having started as far out as he did, and having moved through all the alternatives, he could be confident that he had the best answer — something that those of us who move, without Eddie's patience, more linearly from a question to an answer can never be so sure of.

As his autobiography makes clear, Eddie Cohen believed deeply in the value of doing personal detailed research. In rereading his book in the last few weeks, while the not-quite-memoir of James Frey headlined the news, I could not help laughing when Eddie confessed that he had mistakenly thought he had written a headline in his college newspaper deliberately misspelling the name Keller as "Killer" and had misremembered winning a college tennis match he actually lost. I was shocked that Eddie's legendary memory had failed him, but not at all surprised that he had checked the newspaper archives to confirm even trivial claims before his book went to press. Daniel Halperin, now the Stanley S. Surrey Professor of Law at the Harvard Law School, reports that when he was Deputy Tax Legislative Counsel, he took draft regulations under section 501(c)(9) of the Code — a provision involving trusts that provide life, sickness or accident benefits for employees — into Eddie's office for his signature. Eddie asked Dan if he had read any of the trust agreements, and Dan admitted that he had not. Eddie then asked, "How can you write regulations governing these trusts without

reading the trust agreements?” Dan answered, “We talked to a lot of people who administer these trusts. They told me what the trusts say, and I believed them.” Eddie replied, “Bring me a trust agreement so I can read it.” Dan got him the document, and Eddie subsequently signed the regulations.

No matter how busy he was, no matter if he was dealing with a person of high status or low, Eddie was always the polite Virginia gentleman. He was a supremely nice man. He never thanked anyone less than a million, was always considerate of others, and took seriously Everymother’s admonition to say nothing at all if you have nothing nice to say.

Most importantly, Eddie and I never saw each other without laughing together. Edwin Cohen was a genuinely funny man. He had a remarkable sense of humor. He loved humor in any form, but most especially doggerel and the pun, which Noah Webster properly labeled a “low form of humor.” Most lawyers who resort to such stuff fail miserably, but Eddie’s work reminds me of Ogden Nash (Ogden Nash of the “Song for the Saddest Ides”: “Rush like lightning, or maybe glue, to the Dept. of Internal Revenue”). My personal favorite of Cohen’s works, naturally, is “The Unshaven Maven from New Haven,” a parody of Poe’s “The Raven,” but his “Ode to the Code” received both a wider audience and greater praise. My favorite anecdote from the Cohen oeuvre occurred in 1970, when, before he signed a proposed regulation dealing with some new rules that had been added to the tax law to benefit orange producers, Eddie came across the following definition of a citrus grove: “. . . a citrus grove is defined as one or more trees of the rue family, often thorny and bearing large fruit with hard, usually thick peel and pulpy flesh, such as the orange, grapefruit, lemon, lime, citron, tangelo and tangerine.”

Eddie approved publication of the regulation, but sent it back to the Commissioner of Internal Revenue with a cover memorandum saying that he had approved the regulation with misgivings about the definition of a “citrus grove” as “one or more trees of the rue family.” Eddie asked:

1. Can a grove consist of only one tree?
2. Did all these things grow on trees and none on bushes?
3. Did anyone at the IRS really know who is in the “rue family”?

The only one he knew, Eddie said, is Kanga Roo from “Winnie the Pooh.”

4. If the particular tree is not thorny, can the IRS agent tell

how often it should be thorny?

5. Would the Commissioner call a lemon or lime a “large fruit?”

Randolph Thrower, then the Commissioner, wrote back the next day saying, “Let it not be said that the Internal Revenue Service cannot see the grove for the tree.”

Eddie Cohen paid great heed to Mr. Jefferson’s inclusion in his list of fundamental rights the pursuit of happiness. Eddie always insisted that both work and play must be fun. An ascetic life was not for him.

And even when engaged in a busy law practice, Eddie found time for public service. He was a frequent witness before Congress, served on presidential task forces, and led the Tax Section of the American Bar Association. He was a great believer in the special value of collaborative enterprises. He helped found the Tax Forum, where New York City tax lawyers still come together to discuss papers on tax issues of the day, an experience that stimulated him many years later to create and lead the Virginia Tax Study Group. Both groups are still going strong. Eddie was a frequent contributor to projects of the American Law Institute, and shortly after he first joined the law school faculty, he led an effort to conform the Virginia income tax to the federal tax, simplifying the tax life of millions of Virginians. Much later, he was instrumental in the founding of the *Virginia Tax Review*.

Eddie’s major written work since his formal retirement was his autobiography: a charming collection of events and anecdotes that opens many windows on his remarkable life from its beginnings in Richmond through his career as a practicing lawyer, law professor and Assistant and Under Secretary of the Treasury. Eddie wanted his book to serve — along with his life itself — as a challenge to us all, to stimulate us to ask how we and those who follow might replicate, at least to some considerable degree, the marvelous life he lived in the law.

For the current generation of young lawyers, this is no easy task. Much has changed since Eddie crossed into the bar.

Take Eddie Cohen’s introduction to the practice of law. Between Tuesday July 7, 1936, and the following Friday morning, at the request of Norris Darrell, the partner in charge of tax work at Sullivan and Cromwell, Eddie read the 100 pages of relevant income, estate and gift tax law — The Revenue Act of 1936 — from beginning to end twice. The following week he read once all of the income tax regulations then in effect, a corpus of about 400 pages. While Eddie

himself frequently claimed to have become shorter in the interval since then, the Internal Revenue Code and the regulations have taken the opposite tack. The tax code is now more than a million words, four times longer than *War and Peace*, and considerably harder to parse. The regulations are nine times longer than the Code. No one can master this entire body of law. As a result, the surest path to success, or even survival, in the practice of tax law is to become more specialized. The typical tax lawyer's vision and experience have narrowed drastically since Eddie's day.

At the same time, law firms have become dramatically larger, and now are national and multinational entities. In the 1930s, when Eddie Cohen started practice at Sullivan and Cromwell, the large New York firms, which were the largest in the nation, had about 70 lawyers. Two decades later, only about 40 law firms had 50 or more lawyers. In 1995 there were 700 firms with 100 or more lawyers, employing 105,000 lawyers, 16.5% of all those in private practice. By the year 2000, the top 25 firms had 23,000 lawyers. Needless to add, all the partners don't even know each other, much less their young associates.

Until the 1970s large law firms were local. Today they are multinational. To take one example, the Jones Day firm in the 1970s had a main office in Cleveland and a small satellite in Washington D.C. Today, it has more than 2,200 lawyers and additional offices in Atlanta, Chicago, Columbus, Dallas, Houston, New York, Pittsburgh, and five California cities, along with foreign branches in a dozen cities in Europe, the Middle East, and Asia.

As my colleague John Langbein has pointed out, this trend toward megafirms creates its own momentum. Law firm finances make it profitable for partners to lever themselves against ever-larger numbers of associates. Partners pocket the spread between what they charge clients for the work of associates and the lesser amount they pay the associates (after overhead). But the associates must have some reasonable chance to become partners. This pressures the firms to make more partners, who then need to lever themselves against more associates, and on and on.

Law publications that rate law firms place great weight on per-partner compensation, and many partners themselves today feel they should earn as much as investment bankers. It is not surprising then that marketing concerns often have displaced in preeminence the desire to provide wise and prudent counsel. Nor is it surprising that many firms today give their young lawyers and even partners no more credit for participating in an ALI project or teaching a law school

course than for playing a round of golf. Associates now routinely work night and weekend hours, rather than as an uncommon response to a trial or to a deal closing, often at the expense of their family life.

These megafirms may serve their clients very well, but the idea of lawyers as officers of justice, with the responsibility to fashion and serve the public interest, becomes quite difficult to sustain in this environment. A young practicing lawyer who wants to emulate the life of Edwin Cohen has a hard row to hoe indeed.

Even public service of the sort Eddie Cohen loved so much has become much more partisan and less fulfilling. Eddie's book begins in April 1969, at a meeting with the president of the United States discussing tax reform proposals that ultimately would form the basis for the most important tax legislation enacted between 1954 and 1986. In 1969 political leadership on tax matters resided in the House Ways and Means Committee — principally in the person of its chairman, Wilbur Mills. The Ways and Means Committee also served as the House Democrats' "committee on committees," which controlled the committee assignments of all the Democratic members of the House — making it potentially very costly to cross Mr. Mills. The Ways and Means Committee had no subcommittees, further concentrating power in the chairman. Needless to add, the Ways and Means Committee's bill typically became the House bill, and greatly influenced the final legislative product.

The Assistant Treasury Secretary for Tax Policy — Eddie Cohen in 1969 — and the chief of staff of the Joint Committee on Taxation — then Larry Woodworth — were extremely powerful. In 1969 Eddie Cohen single-handedly was able to get the top income tax rate on earned income down from 70 to 50 percent. There were lobbyists twenty-five years ago, to be sure, but they were barred from the deliberations of the House, Senate, and Conference Committees. Lobbying techniques were far less sophisticated then; campaign fundraising was barely relevant; a "PAC" was six beers.

Subsequent to Ed Cohen's time at the Treasury, extensive reforms of congressional decision-making have occurred. Revisions of the congressional budget process have transferred important power to the budget committees and to the parties' leadership. The Ways and Means Committee was stripped of its power to appoint Democrats to other committees and was forced to appoint subcommittees.

Reforms such as these occasioned a major dispersion of power and an extraordinary expansion of staff. Tax specialists now hold positions as minority and majority staff to the taxwriting committees and to individual members, substantially diminishing the influence of

the staff of the Joint Committee on Taxation. That committee, which had only three persons serve as chief of staff in its first fifty years from 1926 to 1976, has had nine different staff chiefs during the twenty years since 1977, and now that George Yin has left, there will soon be a tenth.

In the executive branch, power has shifted away from the Treasury to the White House. And, in Congress, as power has become more diffuse, the leadership of both parties has responded to the high political status of tax legislation by becoming both more active and more partisan.

Advocates for the public interest in the 1970s insisted on opening up the then-closed process for enacting tax legislation. Contrary to the reformers' predictions, however, openness has contributed principally to more active surveillance and participation by those with special interests. The "reforms" in congressional practices served to strengthen, rather than weaken the sway of people advancing their own narrow financial interests.

Even public hearings, under the glare of C-SPAN's klieg lights, have become occasions for political posturing, rather than learning. In sharp contrast to Eddie's experiences in public hearings on tax reform in 1969, members of Congress today are fearful that if they ask the witness for help in understanding current law or a proposal for change, an obscure C-SPAN moment will be reincarnated in an opponent's vicious 30-second attack commercial. People who serve now, as Eddie did more than thirty years ago, in important government positions face a very different set of challenges — challenges that almost always make their government service considerably less pleasant and less rewarding than in Eddie's day.

Nor is it feasible now to practice law for thirty years, as Eddie did until 1965, and then join the Virginia law school faculty. Law schools have changed as much as law firms since the 1960s. Nearly thirty years ago, Thomas Bergin, a colleague of ours at this law school, described law professors as schizophrenics, compulsively torn between the need to train lawyers — what Bergin called Hessian training — and the demands of scholarship, the then relatively new requirement that law professors must publish to flourish. As Bergin put it:

By compelling true academics . . . to play out a Hessian-trainer role, and by compelling highly skilled Hessian-trainers to make believe they are legal scholars, the disease dilutes both scholarship and Hessian-training to the advantage of neither. . . . The result is that we have so little authentic

scholarship in our law schools that we are lucky not to be driven out of the academic herd. . . . As proof of the proposition that non-scholars are driven to produce vast tonnages of trivia each year in the name of scholarship, I refer [you] to that Forest Lawn of catalogues, the Index to Legal Periodicals.

No one has yet found a cure for the schizophrenia Bergin identified, but it is undeniable that in the university law schools of today — even those without longstanding scholarly traditions — a commitment to scholarship predominates. With few exceptions, the market for law professors is simply not a congenial place for those who would enter law teaching primarily to train lawyers. Substantial scholarly output is the *sine qua non* of success in the legal academy. And law faculties' hiring and tenure decisions now focus almost exclusively on questions of scholarly quality.

As legal scholarship has become less directly connected to cases and facts, the scholarly study of law has moved closer to pure social theory. The academy's demands for coherent — indeed complete — theoretical explanations of law and legal processes have led legal scholars to overdress local observations and marginal insights in regal theoretical garb.

As legal scholarship has become more abstract and as legal scholars have focused their energies in attempting to comprehend economics, sociology, literary theory, philosophy, history, or even physics, rather than studying cases or statutes or gathering facts as a means of understanding law, they have become more and more divorced from the practicing bar. This means that they share less and less in common with their students' futures. This trend has made university law schools less congenial places for the practical wisdom of teachers like Eddie Cohen.

As a consequence, it has become extremely difficult for people who would follow Eddie's example — to practice law for a long time and then leave to impart their knowledge and wisdom to law students by joining a law faculty — to find a place in the legal academy. Every law school I have served has benefited greatly from having on its faculty people who have spent much of their professional lives in the world of law practice and government service: Eddie Cohen here, Robert Thompson at the University of Southern California, and Burke Marshall at Yale, to name a few. Unfortunately, despite having enjoyed such teachers, mentors and role models ourselves, law faculties today often refuse to make such people available to their

students. These institutional changes make it very difficult indeed to emulate the professional career of Eddie Cohen.

Eddie Cohen, to be sure, also faced obstacles throughout his career. Anti-Semitism was commonplace in some of the paths he traveled, and every southerner faced adverse presumptions upon crossing the Mason-Dixon Line. But he was simply far too optimistic and upbeat to linger over such things.

And we should have no doubt about how Eddie would respond to my litany of changes in law practice, in the tax lawmaking process, and in law schools. "Of course things change," he would say, "they always have." Eddie would then insist that there is no reason to think that the law students and young lawyers of today will not find a way to create new and better opportunities that we cannot even foresee. The globalization of economic life, he would point out, will create opportunities for challenging, creative and personally rewarding legal careers that we can hardly imagine. And the coming generations of young lawyers will endeavor to foster institutional changes that will allow them to combine challenging private law careers with periods of rewarding public service, while enjoying their family lives. Eddie Cohen, you see, was an unflappable optimist.

Eddie's passions, his energy, his courage, and his sense of humor should inspire young lawyers to accept these challenges, to worry less about their security, to think less about the BMW payments, and instead to take some chances. Like his career itself, Eddie's optimism should stimulate the coming generation of lawyers to pursue similarly broad and fulfilling professional lives. To make it happen, however, they will have to be very clear about their goals and muster great energy and considerable courage. Serendipity is not likely to suffice. I also hope Eddie's life will serve to inspire people in positions of power at law firms and on law faculties to strive to ensure that the kind of rewarding multidimensional career that he so enjoyed will remain possible for the generations of lawyers who follow.

Until the last few years, when it became unmistakable that age, for the first time, was catching up with Eddie, I actually thought he might outlive me. I knew, of course, that he was a generation older; he was born ten days before my mother. And she has been gone for nearly a decade now. But Eddie Cohen was the hardest working retiree in America. He and the Energizer Bunny® were soulmates. He had said that he wanted to live until 2006 when the estate tax exemption increased to \$2 million, and he did. But I was sure he would make it until at least 2010 when the tax is scheduled to be repealed. Less than a week before he died, Eddie talked to me about

his being asked to serve in Senator George Allen's kitchen cabinet. The Senator will be hard pressed to find a replacement as knowledgeable or as wise.

Eddie Cohen and I shared many splendid professional and personal times together here in Charlottesville, in Washington, and fishing together off the dock of Helen's camp in Maine. As I have said, we never saw each other without laughing. Eddie lived a long and glorious life. He loved his work, whether he was serving his country in the Treasury, his clients in his office, or his students in his classroom. And he loved his supportive and nurturing family: his wife Helen and his three children, Ed, Wendy and Roger.

Not long after my mother died, one of my daughters, then age six, caught me in a moment of profound sadness. "Dad, why are you sad?" she asked.

"I was just thinking about your grandmother," I said.

"Oh," she said, "I've been thinking about her too."

"What are you thinking?" I asked.

"I am thinking of her in heaven having tea with Louie Armstrong," she said.

This, I realized instantly, is the best way to think about people who have passed. So now when I think of Edwin Cohen, I see him in heaven, swapping poems with Ogden Nash and taking tennis lessons once again from Don Budge.