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Remembering Degiacomo

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Robert DeGiacomo was a remarkable federal judge who began his career in Boston, Massachusetts after graduating from both Boston College and its law school. He served in the Marine Corps in the Pacific in World War II, as an Assistant City Attorney in Boston, and as Bar Counsel in Massachusetts from 1974 to 1979. From 1980 to 1986, he served as a United States Magistrate Judge in the District of Massachusetts, until leaving the bench for health reasons. After having recovered, Judge DeGiacomo resumed the bench in the District of New Mexico, serving from 1995 to 2002. Upon retirement, he moved to Vashon Island, Washington, outside of Seattle. Judge DeGiacomo passed away in March of 2007. The following are some recollections of him by Professor Kevin Washburn, a former federal prosecutor who appeared regularly before Judge DeGiacomo in New Mexico and grew to admire him greatly.

I. INTRODUCTION

United States Magistrate Judge Robert DeGiacomo passed away last spring. While I served at the U.S. Attorney’s Office in New Mexico, I appeared before Judge DeGiacomo twice a month for almost two years, at a time when I was a very young attorney and he was in the final decade of his remarkable life. Looking back on the fleeting moments I spent as a federal prosecutor in his courtroom, I have come to realize that they were the most enjoyable—and sometimes the most harrowing—experiences I ever had as a practicing lawyer.

In New Mexico, Judge DeGiacomo was perhaps best known for his aggressive work as a settlement mediator in civil cases. He also presided over the federal misdemeanor docket. In much of life’s work, there is a certain dull, though sometimes comforting, routine. The monotony can be magnified in the courtroom of a federal magistrate, where certain procedures that are not necessarily very interesting are nevertheless required by the Constitution and the Federal Rules of Criminal Procedure. Though Judge DeGiacomo was fifty years into his career by the time I knew him, he never succumbed to this monotony. Indeed, he rarely allowed it in his courtroom, even for a moment. He made the most mundane legal proceeding colorful and the most inconsequential case seem weighty. Though I have appeared before dozens of federal, state, and tribal judges since I came to know Judge DeGiacomo, I have never met another judge like him.

Lawyers love to tell war stories, and now and then a good one comes along. In two years, I almost never left an appearance before Judge DeGiacomo without a good story, a frightening, funny, astonishing, or touching event that happened in his courtroom. Around the U.S. Attorney’s Office, Judge DeGiacomo was “DeGiac” for short, and my experience was not unique. Almost anyone who had ever appeared before DeGiac had a story. And more often than not, Judge DeGiacomo made each one of them obtain their story the old-fashioned way. They earned it.

Indeed, despite the many felony rapes and homicides that I prosecuted in the U.S. Attorney’s Office, the petty offenses that I tried before Judge DeGiacomo have

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lodged most firmly in my memory. While some federal judges would have regarded the petty offense docket as a nuisance, Judge DeGiacomo treated it as an opportunity to change the lives of the people who came before him. Every other Wednesday, Judge DeGiacomo's federal courtroom was the stage for human tragedy, drama, and sometimes comedy. I learned small things, such as the particular idiosyncrasies of Judge DeGiacomo, but I also learned large lessons about life. Sometimes I even heard deep philosophical discussions about the nature of civilization. Judge DeGiacomo influenced me like no other judge, save the judge for whom I clerked, and perhaps like no other person of his generation.

II. INITIATION

I drew the "DeGiac docket" shortly after arriving at the U.S. Attorney's Office as a freshman prosecutor. New Mexico is the fifth largest state and the third largest federal judicial district in the United States. The District of New Mexico has three military bases, two top secret national security laboratories (Sandia and Los Alamos), numerous national parks and monuments, and millions of acres of federal forest lands and Indian reservations. The petty offense docket was a cornucopia of prosecutions from these federal lands, usually initiated by a citation from a uniformed federal law enforcement officer, such as a U.S. Forest Service Law Enforcement Officer, or a Military Police Officer, or a member of the National Park Service police force. As the most junior federal prosecutor in the District, I was assigned as "chief" (and sole member) of a "unit" of the office that we jokingly called the "Petty Offense Strike Force," which was responsible for prosecuting these many citations. The only staff that I supervised as "chief" were the military Judge Advocate General (JAG) officers, designated "Special Assistant U.S. Attorneys," who prosecuted the offenses from the Kirtland and Holloman military bases and the White Sands Missile Range. Together we worked with a wide range of federal and military police officers.

One of my very first cases before Judge DeGiacomo involved a forty-year-old man who routinely carried a black bag, known colloquially as a "fanny pack," around his waist. One day in late March, the man stopped in at the Internal Revenue Service building in Albuquerque to obtain tax forms. The trouble was that he had forgotten that his pack held a .32 caliber Beretta Tomcat semi-automatic pistol with eight rounds of ammunition.

An officer of the Federal Protective Service who was suspicious about the look of the fanny pack immediately approached the man and asked if he was carrying a firearm. Realizing his error, the man reluctantly produced the gun and offered to leave the premises immediately. The officer instead cited him for possession of a firearm in a federal building in violation of federal regulations, kept the gun as evidence, and then released him, ordering him to appear in federal court on the citation. The officer performed a brief follow-up investigation, found no criminal history, and concluded that the offense was indeed inadvertent.

When the time for court arrived, the defendant appeared without an attorney and talked briefly with me. As a new prosecutor, I had consulted colleagues around the office about the case. While carrying a firearm into a federal building can obviously be an extremely serious offense, carrying a concealed weapon was not itself a
punishable offense, and not particularly unusual in a western state like New Mexico. The defendant had apparently made a simple mistake, to which he had owned up. In those pre-9/11 days, it was not thought of as a serious offense and, at the suggestion of colleagues, I agreed to recommend a fine and unsupervised probation, but no jail time, if the defendant pleaded guilty. In the back of the courtroom before the hearing, the defendant accepted my proposed recommendation.

When the case was called, the defendant approached the podium to enter his guilty plea. I stood at my table and briefly laid out the government’s case and the plea deal. Though Judge DeGiacomo began the hearing that day by looking at me with deliberate, though not unpleasant, curiosity, his demeanor gradually changed as I explained my agreement with the defendant. By the end of my proffer, Judge DeGiacomo was glaring at me. Though he had politely waited for me to finish, it was clear that Judge DeGiacomo did not see the case the way I did. When I finished speaking, the judge responded so aggressively, and with such powerful indignation, that he seemed to rise over the top of the bench.

I tried to understand the torrent of anger that flowed from the bench, but I quickly began to lose focus on the proceeding. Judge DeGiacomo apparently felt that I was being far too lenient. As the judge spoke, I was transfixed, and then paralyzed. I began to fear not just for the particular case before the court, but for my job. I desperately wanted to be somewhere else. As Judge DeGiacomo went on, my mind left the courtroom and I began to daydream. I had forgotten all the details of the case and all about the defendant who stood only a few feet away from me. To this day, I do not remember a word of what Judge DeGiacomo said. I was too busy wondering why I had left a perfectly good job in Washington, D.C. to move to Albuquerque only to ruin my career.

Though I had been devastated by Judge DeGiacomo’s reaction to my proffer, the defendant had become even more alarmed. I was startled out of my unpleasant reverie by a jerky movement just a few feet away from me at the podium on the other side of the counsel table. It seems that the defendant had momentarily blacked out, collapsing over the podium and causing a bit of a stir in the courtroom. A courtroom deputy rushed up and helped the defendant to a seat.

The brief interruption had the effect of cutting short Judge DeGiacomo’s reprimand. And thus it rescued me from the dressing down I was receiving for the ridiculously lenient approach I had taken in the case. The event did not, however, change Judge DeGiacomo’s view of my recommendation. As the defendant collapsed himself, Judge DeGiacomo ordered defense counsel appointed (so that the court would be free to sentence the defendant to incarceration if the defendant was found guilty) and a continuance of the case. Judge DeGiacomo glared at me and shook his head in what appeared to reflect utter contempt.

The defendant then left the courtroom and the judge called the next case and resumed a strict but pleasant demeanor for the rest of that day’s docket. Apparently, all was forgiven. I had survived to fight another case.

Shortly thereafter, the defendant’s appointed attorney, the former Chief Public Defender for the State of New Mexico, contacted me wanting to know how to resolve the case. This was a reasonable question; defense attorneys often look to prosecutors for such guidance. The trouble was that I had no idea. My last effort had fallen woefully short. She indicated that she would ask for another continuance to
get more time to talk to her client and to find a solution. I told her that I would talk to colleagues and then get back to her. Truth be told, however, I did not trust them anymore either.

On the very next Wednesday docket, I had a case against a man who had discharged a firearm on federal land in the Santa Fe National Forest during a protest with several dozen other activists who were opposed to a federally permitted commercial logging operation. The man appeared without counsel, pleaded not guilty, and endeavored to explain himself to Judge DeGiacomo. He said that he took dramatic action because “6,000 trees were about to lose their lives” and he had a First Amendment right to protest the government’s permit. As he drove to the site of the protest, he said, animals had come to the side of the road as he drove past. He said that he believed that animals could communicate (and he apparently believed that they could also read his mind) and that they were supporting him in his stance against “tyrannical government actions.” The man indicated that he was an expert in firearm safety and discharged the firearm in such a way that he would not hurt anyone. He concluded by claiming that he had merely been engaged in free speech when he discharged his weapon. I had not offered this man any kind of deal, so I cringed and waited for the man to be demolished.

As Judge DeGiacomo responded, I saw a different side of the judge than I had seen during the previous docket. This time, the judge seemed to feel sorry for the defendant; he gently probed the man’s argument: “You said with your own mouth that you are trained in firearm safety; how could you discharge a firearm with dozens of other protestors present?” Instead of lecturing the defendant or the government, the judge this time was using a more subtle approach, attempting to get the man to see his own errors.

Perhaps alluding to the previous week’s case, Judge DeGiacomo then sharply offered an editorial comment, saying, “This state is rather free with firearms. That’s up to the state. I make no comment on that.” He gently chastised the defendant more and made a statement that I wished I had appreciated a little more clearly at the time: “I am very tempted to give you more than just a stern lecture.” The judge’s voice then grew more firm and he firmly rejected the first amendment argument, “lawlessness is not liberty; it is anarchy!” Judge DeGiacomo ultimately pronounced the defendant guilty, gave him a modest fine, and sent him on his way.

After the docket was concluded that day, Judge DeGiacomo invited me back to his chambers for a conversation, which he did several times during my tenure with him. On this occasion, he brought up firearms. He was troubled by the number of firearms in New Mexico and suggested that the U.S. Attorney’s Office should be working to get them off the streets. I was pleased that I seemed to have developed a rapport with the judge and that he would express his concerns to me. I told him that I would pass his concerns along to the U.S. Attorney.

Meanwhile, Judge DeGiacomo had reset the case of the man with the firearm in the Internal Revenue Service building for trial in two weeks. I feared that my rapport with the judge would evaporate the moment that case was called again. As I tried to determine how to proceed, I realized that the judge had met with me (perhaps purposely) to suggest to me a route out of the quagmire in which I had found myself. While a forfeiture action would normally require a different proceeding (and I was not sure that the federal petty offense charged would support forfeiture or that I
could convince the forfeiture attorneys in the office to bring a case for a single handgun), I was willing to raise it with defense counsel. When we next spoke, I offered to dismiss the charges entirely, but only on the condition that the defendant provide 40 hours of community service and relinquish any claims to the firearm, which was otherwise due to be returned to him.

Though the defendant was desperate not to have to appear again before Judge DeGiacomo, he was willing to comply with this "forfeiture by consent" and he took the deal. When the case was called, I told Judge DeGiacomo that this was the only way to get the firearm off the street and he agreed to dismiss the case on those terms. The firearm was turned over to the Bureau of Alcohol, Tobacco and Firearms, where it was destroyed. To Judge DeGiacomo, who seemed to be in a good mood that day, he had made a little progress. One handgun had been removed from the mean streets of Albuquerque.

I was also pleased. I had faced my first challenging case with Judge DeGiacomo and apparently passed the test. Though the record would show a dismissal of the charges, good work was accomplished. The case provided an important lesson to me. I learned that Judge DeGiacomo was much more concerned with reasonable outcomes than formal processes and that a judge could be a potent force even in the absence of any real sanctions. Indeed, I finished that case knowing that Judge DeGiacomo might be able to impose more misery in a twenty minute hearing than a defendant might feel in a day of incarceration. I soon came to realize that Judge DeGiacomo himself was a powerful instrument for justice and that this freed him from slavish devotion to the more traditional tools of criminal justice.

That case was also only one example of a broader judicial philosophy. Judge DeGiacomo performed his task well because he believed that each case was important and could be used to make a difference. He felt that law was the glue that held society together. Rules and regulations, no less than taxes, were the costs of civilized society. He once lectured a defendant in just this manner: "Following the rules is what allows two or more people to live together in society."

As a result, whether a person had allowed his dog to run off-leash in the Bandelier National Monument in violation of National Park Service regulations, or had carried a gun into a federal building, Judge DeGiacomo could make any defendant feel as though he had committed a grave offense. Time and again, a petty offense defendant would swagger into court thinking that he should not have been bothered about such a minor matter, only to walk out of court an hour later feeling shell-shocked, wondering how he could have underestimated the extent of his wrongdoing, and, momentarily at least, becoming a changed person.

Over the next two years, I learned a lot more about Judge DeGiacomo and developed a tremendous respect for the man. Though his philosophy about guns, for example, was different than many other judges out west, it was one I could respect. His view of guns was a view that he may well have brought with him from Massachusetts where his own career began. He had his own sense of justice on a range of other issues.
III. JUDGE DEGIACOMO AND NEW MEXICO

Judge DeGiacomo came to New Mexico late in life, after recovering from a serious illness that caused him to leave the bench in Boston. I have a sense that the judge loved New Mexico, and that New Mexico changed him. Judge DeGiacomo and his lovely wife, Jean, had a townhouse in Albuquerque and a much larger house in the high desert of Galisteo, outside Santa Fe. His home and his docket must have provided many contrasts between New Mexico and his home state of Massachusetts.

I once asked the judge what it was like working in the only majority-minority state in the United States and whether a life-long Bostonian felt out of touch with the people from the American Indian and Hispanic communities who frequently came before him in New Mexico. He did not answer the question directly, but instead told a story that he prefaced by saying that he had learned a lot about people during his service in the Marines. He mentioned a Hispanic marine from Los Angeles who served under him in the Battle for Guam. He said that one day the soldier, named Jimenez, had “stepped out in a direction I didn’t much like”—he spoke in euphemisms on occasion—and he said harshly, “What do you want, Jimenez? Sympathy?” Judge DeGiacomo then provided Jimenez’s response: “No, Lieutenant, just a little consideration.” After finishing the story, Judge DeGiacomo then smiled broadly with appreciation for the wisdom that Jimenez had given him that day: people share something more common and sometimes more important than our color or our creed; we all want to be respected and to be heard. It was a good lesson for a judge.

A key difference between New Mexico and Massachusetts was the history and culture. The European cultural influences in New Mexico were both much older than those in Massachusetts and, in some ways, much stronger and more exotic. Well before the English established their first permanent settlement on the East Coast at Plymouth, the Spanish had driven more than a thousand miles inland and established the City of Santa Fe. At the same time, the indigenous cultural influences are much more vibrant in New Mexico. The Apache, Navajo, and Pueblo Indian communities in New Mexico have never lost the vitality or cohesion that had characterized them before European contact. They have served a forceful political role in the area of modem-day New Mexico since ancient times and this ancient history sometimes made its way into Judge DeGiacomo’s courtroom.

In a case arising at the Salinas Pueblo Missions National Monument, for example, Judge DeGiacomo presided over the bench trial of a defendant charged with defacing a national monument. When instructed by a Park Ranger to remove himself from an ancient stone wall that was outside pedestrian boundaries, the intoxicated defendant acted out in anger, removing stones from the wall of a Catholic convent that had been built in 1620. Judge DeGiacomo rejected the defendant’s denials and found him guilty. At sentencing, the judge talked about the importance of history, and ordered the defendant to pay restitution to cover the costs of the archeologists that had been consulted to restore the stones to their proper locations.

In another case, unique to the New Mexico docket in a different way, a defendant had cut approximately 250 young cedar trees, called latillas when stripped of their bark and branches, from the Santa Fe National Forest to build what is known in New Mexico as a coyote fence. The Forest Service officer had charged the defendant with
“removal of a forest product without a permit” and had painstakingly built a case, taking numerous photos and dutifully cutting two-inch-thick disks from the hewn trunks of the cedar latillas and numbering them 1 through 250 with a large ink marker. The officer had also taken a photo of a coyote fence around the defendant’s house to show the judge how the latillas might be used.

The defendant appeared in court, represented by counsel, and presented several witnesses, none of whom challenged the factual basis for the case. Having failed to undermine the case factually, the defense offered a legal argument: since the defendant was “caught in the act” of cutting the trees and apprehended before he could leave the forest, the defense counsel moved for a judgment of acquittal. Since the regulation punished only removal of a forest product from the forest, the defense counsel argued that the defendant had not actually completed the offense. Judge DeGiacomo’s thundered response: “Counsel, these regulations are to be interpreted according to a doctrine that used to be known as ‘common sense.’ MOTION DENIED!”

Judging from the behavior of many of the defendants whose cases appeared on the misdemeanor docket, common sense was sometimes in short supply among the criminal element in New Mexico. Judge DeGiacomo’s wisdom was very practical and, in that sense, well-suited to judging. Though I never had the courage to cite Judge DeGiacomo’s “doctrine of common sense” back to him in the context of a case, the doctrine thereafter became a frequently invoked principle at the U.S. Attorney’s office, at least among those who received my semi-weekly update on petty offenses.

IV. THE WISDOM OF JUDGE DEGIACOMO

The pearls of wisdom offered to the public in Judge DeGiacomo’s courtroom ran the gamut. As a young man, still single, I learned a lot about marriage and family in that courtroom, and I often felt that I was receiving the collective wisdom of an older generation. With a nervous woman who first introduced a witness as her husband and then later called him her boyfriend, Judge DeGiacomo seized on the inconsistency and then lectured about the differences: “Which is it? Is he your boyfriend or your husband? There is a vast difference between a boyfriend and a husband. People may not recognize that anymore, but a husband has duties, legal responsibilities, and not just to you, but also to his children.”

As for the responsibilities of parenting, I once heard him lecture a defendant that “children are like sponges. They absorb everything. They do not know what is right or wrong; they learn it from their parents. Parents must hold themselves to a high standard and set a good example.” Judge DeGiacomo ended this short lecture in an unusually firm way: “He who hurts a child should have a millstone tied around his neck and be cast into the sea.”1

As a member of the Greatest Generation, Judge DeGiacomo could be unforgiving of self-absorbed members of a younger generation. I recall him chastising a twenty-year-old defendant and implicitly forcing him to stand for his entire generation:

“Young man, you come from a generation that has caused a great deal of grief to this society.”

V. JUDGE DEGIACOMO AND THE MILITARY

A large part of the docket included drunk-driving cases from Kirtland Air Force Base, which is located in Albuquerque. Perhaps because of Kirtland’s location in Albuquerque near a busy thoroughfare with a lot of bars and fast food restaurants, a surprising number of civilian drunk-drivers with no military business seem to make a wrong turn onto the road that leads to the base. When such a person finds himself face-to-face with a Military Police officer at a guard shack, he is arrested and tried in the only court with jurisdiction: the federal court. Almost as often, it is a young soldier who finds himself in such a predicament. Alcohol abuse and drunk driving represent a significant military problem.

Over and over in these cases, I heard Judge DeGiacomo lecture about the evils of drunk-driving, often using statistics to illustrate the point: “Over 16,000 innocent people died last year because of drunk driving.” It was not only a serious military problem, but a significant problem in New Mexico, which routinely ranks in the top five nationally in DUI-related fatalities per capita. It was also the only offense for which Judge DeGiacomo would routinely give jail time. Though he gave the lecture over and over, he had a way of treating each defendant as unique.

The judge’s service in the Marine Corps in World War II, though distant in time and separated by a long career from his judicial duties, was never very far from the surface of his judicial decision making. He sometimes invoked his own military service and clearly identified with soldiers, but he also held them to a higher standard. A significant part of Judge DeGiacomo’s docket involved cases from the Veterans Administration (VA) hospital, which produced everything from parking tickets and other traffic problems to disorderly conduct citations against mentally troubled veterans, some of whom abused alcohol or narcotics.

At their best, the VA police were well-intentioned and compassionate keepers of the peace. At their worst, they were more passionate than compassionate. They occasionally wielded authority clumsily and aggressively in the manner of the stereotypically over-aggressive and insecure suburban shopping mall security guard.

As a frequent visitor to the VA Hospital for his own medical care, Judge DeGiacomo was highly sympathetic to the medical staff there, but he also empathized with troubled war veterans and felt strongly about our nation’s responsibility to meet its obligation to them. To the consternation of the VA Police, justice in these cases often required Judge DeGiacomo not to penalize the offender, but to order the VA Hospital to provide better medical care or assistance to the patient. He sometimes required the VA police to report back on the progress in such circumstances. More than once, VA police officers considered the order from the bench and asked, “Can he do that?” My typical response was that we could

2. Stepping off the USS Enterprise aircraft carrier when it was docked in San Diego in 1999 for review by the Secretary of Defense, I saw a large billboard that recorded the number of days since the last sailor from the ship had been charged with shore-leave DUI (driving under the influence). It was a way to remind thousands of sailors of their responsibilities in civilian society and the serious consequences of alcohol abuse. I was told that it was viewed as a modest success when the number of days without a DUI reached into the double-digits.
challenge Judge DeGiacomo’s action or ignore it, but it would doubtless come up the next time the officer appeared. Since each of the officers wrote numerous citations each week and none were very interested in explaining why they had ignored the judge, the officers usually followed through with the judge’s directions.

Judge DeGiacomo’s sympathy for veterans did not always bode well for military defendants, however. One day a defendant appeared and sat in the back of the courtroom wearing a military blouse with a name tape and a Marine Corps pin, and a bright red ball cap on his head reading “USMC” in block letters. As he waited for his case to be called, he may have thought that he could play on the sympathies of the judge. However, the defendant had erred grievously. While he was waiting for his case to be called, his cell phone rang and he had to rush out to take the call.

The judge called his case soon after the man returned to the courtroom. As the defendant stepped up to the podium, he handed me his business card. Unfortunately for the defendant, he also forgot to remove his “USMC” ball cap. Though Judge DeGiacomo’s loyalty to the Marine Corps and fellow soldiers ran deep, he had far more allegiance to justice and courtroom decorum. After he finished dressing down the defendant for wearing a hat in the courtroom, Judge DeGiacomo asked me what the defendant had given me as he stepped to the podium. I said, “It is a business card, your honor. It has the defendant’s name, the slogan ‘Semper Fi’ and an emblem which appears to be the seal of the United States Marine Corps. It has a globe and.....” Abruptly, Judge DeGiacomo interrupted me, a highly unusual occurrence. His voice started softly but rose in volume and intensity as he spoke: “I am familiar with the seal of the Marine Corps, Mr. Washburn. IT IS TATTOOED ON MY RIGHT ARM.” Judge DeGiacomo then glared at the defendant, paused for a long moment, as though he was trying to figure out what to do, and then finally said, “Sir, you turn my stomach. Because of my deep feelings for the Marine Corps, I hereby recuse myself from this case.”

Judge DeGiacomo’s rulings were always just but they were also frequently idiosyncratic. Like any effective judge, he was not always entirely predictable. Aside from the drunk-driving cases, almost none of the offenses I prosecuted warranted jail terms. Most were inconsequential, but not all.

Perhaps the worst case I ever saw in Judge DeGiacomo’s courtroom was the case of a young man who, while highly intoxicated, had taken a wrong turn onto Kirtland Air Force base, blown through the guard gate without even stopping, and led Military Police patrol vehicles on a high speed chase around the base, mostly off-road, for several minutes. He was finally stopped after all but one of his tires had been flattened and his four-wheel-drive vehicle had collided with an eight-foot-high chain-link fence that surrounded a secure communications facility on the base. When the defendant was arrested, after causing several thousands of dollars of damage, he had no identification and he gave police a false identity, a fact that did not come to light until after his first court appearance. Indeed, the identity that he had given was that of his brother.

It was the kind of case that any prosecutor would love to present to a jury. It had a high speed chase, photos showing significant damage to public property, and a criminal defendant who had not only lied, but had also jeopardized his own brother in an effort to save himself. It also had great fact witnesses—military police officers
in starched uniforms. In Judge DeGiacomo’s courtroom, I had never seen such a bad actor.

When Judge DeGiacomo realized the gravity of the offense, he appointed an Assistant Federal Public Defender to represent the defendant, an unusual action and usually the prelude to a sentence of incarceration. Since the case arose on base, it was handled primarily by an Air Force JAG attorney who had been appointed as a Special Assistant U.S. Attorney. My job was only to supervise the Special Assistants.

At the conclusion of the case, which involved numerous hearings and ended with a guilty plea to the most serious offense charged, I was dumbfounded when Judge DeGiacomo declined to impose a jail sentence and imposed only probation. At the conclusion of sentencing, the Assistant Federal Public Defender glanced magnanimously in the government’s direction and the JAG attorney looked at me with disbelief, wide-eyed and dismayed.

I rarely intervened in a case presented by a JAG officer—I often felt that they could develop a better rapport with the judge than I could because of their common military experience. That day, however, I rose and objected to the judge’s light sentence. Though I had been impressed over and over by the judge’s ability to make the smallest offense seem serious, I was astonished that Judge DeGiacomo would let this defendant waltz away without a jail term after causing thousands of dollars in damage to public property and lying to both the police and the court. I argued as much and worked myself into a diatribe, becoming more and more righteous as I spoke. I concluded my argument by saying that if the court did not impose a jail term in this case, of all cases, the court might fairly be described as “all bark and no bite.” I then waited for the judge’s response. It was the bravest and most satisfying argument that I had ever made in court. It was also the dumbest, and I instantly started regretting my approach.

The judge fixed me with a long withering stare that seemed to stop time. And fury seemed to boil up inside of him as his face turned red. He then began speaking. As I endured the judge’s wrath, I found myself full circle, in much the same position I had occupied when I had first appeared before Judge DeGiacomo and prosecuted the man with the gun at the Internal Revenue Service building. Even though I had seen Judge DeGiacomo verbally manhandle defendants on a regular basis, I was not at all impervious to his scorn when it was directed at me.

My argument had been not only ineffective but also counterproductive, effectively transforming me into the person in that courtroom receiving public condemnation. I left Judge DeGiacomo’s courtroom that day feeling brave but badly bruised and beaten. I had no doubt that I had been correct, but after basking in the toasts from the grateful JAG attorneys at lunch, who felt that I had taken bullets for them, I started having second thoughts. Not only had I undermined the limited value that the proceeding might have had in reforming the defendant, but I may well have damaged my long-term relationship with the judge, rendering me less effective in his courtroom.

I saw Judge DeGiacomo the next day in the lobby of the courthouse before a felony plea hearing. Having slept fitfully the night before, I approached him and apologized for stepping over the line on the previous day. Judge DeGiacomo gave me a warm and gracious smile, acted as if he had not even thought twice about it,
and told me to forget about it. He told me that I had my role and he had his. He took nothing personally.

I learned important lessons in that experience. One was that it is far better to be an effective advocate than to seek the gratification that comes from making the righteous argument. It is rarely helpful to take on the judge. I also learned that Judge DeGiacomo was a masterful judge precisely because he understood his role so well.

VI. NO VICTIM HE

One of my last cases as an Assistant U.S. Attorney occurred long after a more junior prosecutor had relieved me as "chief of the petty strike force." I was assigned a case in which Judge DeGiacomo was the alleged victim. Although by then I had appeared before Judge DeGiacomo in literally hundreds of petty cases and had been in chambers with him for dozens of informal conversations, I got to know him in this case in a vastly different way than I had ever known him before.

In early 1999, a disgruntled former litigant named Muoio made a series of telephone calls to Judge DeGiacomo and another federal judge, then-Chief U.S. District Court Judge John E. Conway. In these phone calls, as well as a letter to each, Muoio threatened them for, in his words, failing to investigate perjury that had been committed by his opponents in the case that had concluded some years earlier.

Muoio sent a vaguely threatening letter and then, in a conversation recorded by the Federal Bureau of Investigation (FBI), telephoned Judge Conway in his chambers. He accused Chief Judge Conway of being corrupt and being part of a "criminal felony conspiracy" and repeatedly said, "I want justice." In a smug voice, Muoio also indicated that he had obtained the judge's home address, as well as the home address of Judge DeGiacomo and generally indicated that he intended to have justice. Muoio next called Judge DeGiacomo at his home number in the very early morning hours. When Judge DeGiacomo asked, "Where are you," Muoio responded by chuckling and saying, "I'm in Albuquerque." When DeGiacomo pressed him on his location, Muoio indicated that he was at a pay phone. When DeGiacomo asked him where he was staying, Muoio became evasive, saying "I'm staying at one of the 300 hotels in Albuquerque."

The U.S. Marshal set up a security detail for each judge and the FBI immediately began investigating the case and trying to capture the defendant. Muoio made another call and Judge Conway kept him on the phone long enough for the FBI to trace the call and arrest him at a pay phone, ending a frightening episode for these judges.

I prosecuted Muoio for obstruction of justice and mailing threatening communications on the theory that although Muoio's threats might have been vague, they seemed to involve an attempt to influence the judges in the exercise of their work.

All of the federal judges and federal public defenders in New Mexico recused themselves from the case. A senior federal district judge from Oklahoma, H. Dale Cook, was brought in to hear the case and an Assistant Federal Public Defender from Texas was appointed to represent Muoio. Muoio soon made it clear that he wanted a trial.

As a prosecutor, I had a difficult challenge before me. Judges are notoriously terrible witnesses and the star witnesses in the trial would be Judges Conway and
DeGiacomo. Both were formidable and often intimidating presences in the courtroom and I was concerned about how well they would come across to jurors. Since both judges were former military men, and neither seemed particularly fearful in their recorded conversations when Muoio called them (and the jurors would hear the tapes of those calls), I was unsure whether the jurors would be inclined to convict Muoio.

As trial loomed, I met with both judges to prepare each for his testimony and spent a long afternoon preparing Judge DeGiacomo to testify. As I met with him in his chambers, I put my greatest concern to him point blank: "Judge, is any juror likely to believe that you could possibly be influenced by the defendant’s action or that you have ever even known fear?"

Judge DeGiacomo responded in a low voice:

Oh, I have known fear, Mr. Washburn. I assure you that I have known fear. When I was in the Marines on Okinawa during World War II, I took my men on dangerous patrols. I was responsible for the safety of every soldier in my platoon. When we traversed the fields and jungles, we feared every second. When we heard a click in the distance, we couldn't be sure if it was the gentle sound of bamboo stalks lightly hitting each other in the breeze or the terrible sound of a Japanese sniper chambering a round in his rifle.

As Judge DeGiacomo answered my question, the hair on the back of my neck stood up.

The more time I spent with him that afternoon, the less I worried. Though he could be imperious, stern, and downright menacing on the bench, Judge DeGiacomo was a very gracious person and a terrific story teller, traits that I had occasionally appreciated during previous visits to chambers when I handled the petty offense docket.

When trial began a few days later, Robert DeGiacomo was sworn as a witness and sat down in the witness box. It must have been an unusual experience for him, but he did not miss a beat. He sat down in the witness box, turned to me, and said, "You may proceed, counsel."

Thus began the tug of war for control of the courtroom. Judge Cook cleared his throat, looked at Judge DeGiacomo, then at me, and said, "You may proceed, counsel." Judge DeGiacomo realized his error, smiled sheepishly at Judge Cook, and shrugged, but the die was cast. Judge Cook reacted graciously on this first occasion, but he had the responsibility to run the courtroom and it turned out that it would be difficult for Judge Cook to control Judge DeGiacomo’s natural instincts.

For the next two hours or so, Magistrate Judge DeGiacomo and Judge Cook competed over who would run the courtroom, with Judge Cook having to instruct the witness on more than one occasion. Moreover, the gracious and sensitive Judge DeGiacomo that I had prepared in chambers had given way quickly to the "courtroom DeGiacomo," who was imperious and accustomed to making judgments. I could not find a way to introduce the jurors to the gracious and human DeGiacomo that I knew existed.

The jurors, who had spent much more time with Judge Cook, tended to dislike the interloper who could not seem to stop himself from trying to wrest control of the courtroom from Judge Cook. During a break, the courtroom deputy clerk told me
that Judge DeGiacomo was speaking in such a thundering voice that it was bothering some of the jurors; the clerk asked me to move the microphone away from him. When I sat down at the end of my direct examination, my co-counsel leaned over and said, “The jury HATES him.”

Cross-examination did not help much. Judge DeGiacomo was impatient with defense counsel and combative in response to questions. He had angered Judge Cook so much that on one occasion when Judge DeGiacomo asked counsel for a moment to review a document that had been placed in front of him before answering the question, Judge Cook chastised Judge DeGiacomo for putting the question to defense counsel rather than the court.

By the time I finished my re-direct, I realized that I had failed to introduce the jurors to the person that they should have come to know. I also learned that I could guide Judge DeGiacomo no better when he was sitting in the witness box than when he was on the bench.

In contrast to Judge DeGiacomo, Chief Judge Conway testified very effectively. He not only avoided stepping on the toes of Judge Cook, but he showed a real human side, even tearing up a bit when I asked him about a reference the defendant had made on the phone about the judge’s wife. Nevertheless, when the jury went to deliberate, I was nervous.

The jury took only a little while to reach a verdict. After heated deliberations, the jury convicted on one count involving the threatening communication to Judge Conway and deadlocked on a count of obstruction of justice. On identical counts related to Judge DeGiacomo, the jury acquitted. Since the evidence was very similar as to the defendant’s intent and the substance of the defendant’s written communication, the jury’s verdict was difficult to understand. On the very same evidence and the same charge, how could the defendant be found guilty for the Conway count and acquitted on the DeGiacomo counts?3

I felt as though I had failed Judge DeGiacomo despite the fact that as a result of the then-prevailing Sentencing Guidelines, the ultimate sentence of 24 months in prison would have been no different whether the jury convicted on one count or four. Though I understood the result and had some sense of how it came out that way, it was a long walk to Judge DeGiacomo’s chambers to de-brief him. To his credit, it was an easy conversation. He took it in stride. If he was terribly disappointed, he was too gracious to let me see it. As I left, I told him that he was a great judge, but I doubted there was a defendant or attorney alive who could make him a great victim.4

3. The U.S. Attorney later received a letter from the Ph.D. who had served on the jury. It runs strongly counter to conventional wisdom for a prosecutor to leave a person with a Ph.D. on the jury, but this Ph.D. was the exception that proved the rule. In the letter, she complimented me for my presentation in the case and expressed frustration with the outcome. She was sorry that the jury had deadlocked on one of the counts that, she argued, should have resulted in a conviction.

4. I left the U.S. Attorney’s Office shortly after Muoio was sentenced, returning the next July to argue the appeal during the Tenth Circuit’s annual “opera docket” in Santa Fe. The Tenth Circuit affirmed the conviction in an unpublished ruling.
VII. JUDGE DEGIACOMO AT VASHON ISLAND

My wife, Libby, who was a legal staffer for New Mexico’s Senator Jeff Bingaman, later earned the friendship of Judge DeGiacomo and his wife when she worked to gain passage of a bill to fix a glitch in the magistrate judges’ retirement system that negatively affected Judge DeGiacomo’s federal pension.

Judge DeGiacomo retired from the bench in New Mexico in 2002. On a trip to the Northwest a couple of years after Libby and I had both left government service, Libby and I took our spirited son Cole, then two years old, on the ferry to visit the DeGiacomos at their home. The DeGiacomo home sat high atop a hill amid the lush rain forest landscape of Vashon Island, outside Seattle, with a 270-degree view overlooking Puget Sound. We spent a terrific afternoon there, but our two-year-old son had difficulty staying still.

It was an exciting day for Cole, with the ferry ride and the gracious and exotic house on top of the hill. As we approached the table for an early dinner, my wife Libby told Cole to take a seat next to her. In a mood to be stubborn, Cole balked and refused to sit down. When the rest of us were seated, Judge DeGiacomo fixed Cole in his gaze and said firmly, “Young man, your mother has asked you to sit down.” Cole hunched his shoulders, lowered his head, and walked slowly to the chair and sat. Throughout dinner, Cole kept his head down, furtively glancing up now and then to see if Judge DeGiacomo was watching him. He had never behaved quite as well before; nor has he since. Indeed, it was perhaps the most peaceful meal with our son that we have ever had.

On the ferry ride back to Seattle that evening, Libby turned to me and said, “Did you see that look that Judge DeGiacomo gave Cole to get him to sit down?” My mind flashed back to my first case with the judge and I shuddered and said, “I am familiar with it.”

That was the last time we saw Judge DeGiacomo.

VIII. CONCLUSION

On my last day handling petty offenses before Judge DeGiacomo, a defendant whose case was at the end of the docket received the usual “DeGiacomo treatment,” as I came to call it. The defendant showed sincere remorse, however, and because he also seemed poor, Judge DeGiacomo ultimately waived his fine and let him go with a stern lecture. Happy with the waiver of the fine and no doubt pleased to have survived the experience, the man said to the judge, “Thank you for your kindness.”

I cringed, because the judge often did not respond kindly to personal expressions of gratitude in the courtroom. That day, however, the judge surprised me. For the briefest moment, a trace of warmth crossed Judge DeGiacomo’s face. He nodded almost imperceptibly, and I thought for a moment that he might go soft and say, “You’re welcome.” The judge then caught himself and said firmly, but not unkindly, “It is known, sir, as the administration of justice.”

It was indeed.