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

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In the death of Rex E. Lee, the legal profession lost—and will now enshrine—a great role model. He was ever willing to subordinate his financial and other self-interest when it was necessary to serve the more important needs of his family, his Church, his school, his university, his profession, and his country. That is—or ought to be—the hallmark of a leader in a profession founded and justified to serve the public interest ahead of private advantage.

Rex E. Lee was unforgettable. In his legal practice, in the government community, in legal education, and in community and religious leadership, his influence was and remains a powerful incentive for professionalism, responsibility, and personal goodness. I count my association with Rex E. Lee as one of the most satisfying of my life. I honor his memory and commend his example to all.

RODNEY K. SMITH\*

#### I. INTRODUCTION

The memory of my first class session in law school has stayed with me; I can still picture our first instructor confidently striding to the lectern. Instruction at the newly formed J. Reuben Clark Law School at Brigham Young University began uniquely. As an introduction to the law, we focused on a series of equal protection cases. In that process, we began to sense the manner in which the law develops and the enigmatic majesty of constitutional law. We were taught by a single instructor during that first week: Dean Rex E. Lee.

Dean Lee exuded a faith in the profession and the Constitution. We finished that first week of law school with a strengthened appreciation for our legal system. Because he

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accepted an opportunity to serve as assistant attorney general in charge of the Civil Division of the United States Department of Justice for two of my three years at BYU, I never had another formal class from Rex. By accepting that opportunity to serve, however, Rex taught by example the importance of service. After graduating from law school and entering legal education professionally, I came to know Dean Lee better and he continued to tutor me. Indeed, even in my final meeting with Rex, just a few weeks prior to his death, he remained the consummate teacher.

As I have reflected on what I have learned from Rex, in preparation for the writing this tribute, I have come to see him much more clearly as a man of faith. While he shared much substantive knowledge with me over the years, it is his example as a man of faith that has had a lasting impact on my life. I have come to see five pillars of faith<sup>24</sup> prominently displayed in Rex's life: faith in the legal profession, faith in the United States Constitution, faith in education, faith in family, and faith in God. I am deeply grateful for Rex's commitment to live a life of faith and the positive influence that his life has had on my own.

## II. FAITH IN THE PROFESSION

It was clear from my first week in law school that Dean Lee had a commitment to the profession. My own father, with whom I practiced for four years, taught the same lesson. Their faith was not a blind faith. Both Rex and my father refused to ignore weaknesses in our profession, including commercialization and selfishness on the part of both lawyers and clients, but they were unyielding in their faith in the law.

My father, who was a great lawyer, tried to steer me away from a life in the law. He said repeatedly that I should only enter the profession if I felt called to it. He emphasized that it is simply too hard otherwise. While in graduate school at the University of Virginia, I became convinced that my professional life would be most meaningful if I became a lawyer. In that spirit, I entered law school. The feelings of that call were intensified during my first week of instruction at the feet of

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24. I am confident that there were more pillars to Rex's faith, but these five appeared most evident in my interactions with him.

Dean Lee. He had the same deep commitment that my father had to the law. As we worked our way through some difficult equal protection cases and observed the development of a jurisprudence of equality, Rex made it clear that the law is a difficult taskmaster. After that first week, I knew that I had entered a profession that demanded and deserved my very best, intellectually and in terms of personal integrity.

In my first teaching assignment, at the University of North Dakota, I had the opportunity to take a group of seminar students to Washington, D.C., to hear arguments before the United States Supreme Court. Dean Lee was then serving as Solicitor General and was arguing a case before the Court. I called Rex to see if he could meet with us after his argument. In characteristic fashion, Rex was willing to take time from his busy schedule to meet with my students. In that hour with my class, Rex offered a few introductory remarks then spent the remainder of the time answering questions. I cannot remember the questions that were asked, but I do recall the feelings that attended that meeting. Rex demonstrated the intellectual clarity that characterized his practice before the Supreme Court, but he also conveyed a sense of respect for the Court, the Constitution, and the profession. My students left thrilled yet humbled by their meeting with Rex. They sensed, as I had during the course of my first week in law school, that the profession deserved the best they had to offer. They knew then, as never before, that they too were called to serve as stewards of the law and the legal profession. They better understood that the law is more than ideology; it is a process that can work well only when those serving as advocates are respectful, thoroughly prepared, and humbled by their responsibility to the rule of law and the system that secures it.

Given that Rex was ever respectful, always prepared, and humbled by the responsibility that was his as a steward of the law, it is little wonder that he developed deep friendships that transcended the issues in any given case. Rex's relationship with Justice Harry Blackmun is illustrative. Rex spent a good deal of energy during his service as Solicitor General in an effort to overturn *Roe v. Wade*,<sup>25</sup> a decision recognizing a woman's right to choose an abortion. Justice Blackmun considered his opinion

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25. 410 U.S. 113 (1973).

for the majority in *Roe v. Wade* to be a highlight in his illustrious judicial career<sup>26</sup> and understood that Rex was committed to limiting that decision. Nevertheless, Rex and Justice Blackmun respected each other. Indeed, they were friends.

At the close of a particularly difficult and discouraging day during his initial battle with cancer, Rex received a call from Justice Blackmun. Rex described the experience as follows:

Once, just minutes after I received a dose of one of the chemotherapy drugs that always wiped me out, my nurse put through a call from Justice Harry A. Blackmun of the United States Supreme Court. Later she told me that as I spoke on the phone, she had said to herself, “This guy’s a real performer.” I wouldn’t have thought of my reaction in quite those terms, although I realized that my professional life did involve, in a sense, performing before Justice Blackmun and his associates. I probably did perk up a little when he called. But more to the point was that I was grateful to hear from a friend who cared about me. His concern lifted my spirits, as did the concern of so many others.<sup>27</sup>

Rex’s respect for and friendship with Justice Blackmun teaches a lesson in professionalism: Strong advocacy needs to be tempered by respect and civility. As our profession is increasingly tarnished by incivility and a lack of respect for the law, our legal system, and other lawyers, we can learn much from the examples of Rex Lee and Justice Blackmun.

During my final meeting with Rex, a luncheon at a law review conference at BYU, I sat on Rex’s immediate left and Walter Dellinger, who was then serving as Solicitor General of the United States, sat to the right of Rex. Even though Rex and

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26. In a highly personal way, Justice Blackman evidenced the depth of his commitment to abortion rights and his fear that those rights would be undercut in his opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

In one sense, the Court’s approach is worlds apart from that of the Chief Justice and Justice Scalia. And yet, in another sense, the distance between the two approaches is short—the distance is but a single vote. I am 83 years old, I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the [abortion] issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.

505 U.S. 833, 943 (1992) (Blackmun, J., dissenting in part).

27. Rex Lee & Janet Lee, *Marathon of Faith* 83-84 (1996).

Walter rarely agreed on political matters, as they talked their mutual respect and deep commitment to the independent role of the Office of the Solicitor General was evident. It was a grand moment for me. I was permitted to listen to two of this generation's finest lawyers converse in a manner that increased my own faith in the profession. I left aspiring anew to be a better steward of the law and the legal profession.

### III. FAITH IN THE UNITED STATES CONSTITUTION

From my first week in law school, it was clear to me that Dean Lee had a deep faith in the principles of the United States Constitution. He had a great respect for our constitutional structures of government, the rights secured in the Bill of Rights, and the assurance of equality and due process in the Fifth and Fourteenth Amendments.<sup>28</sup> At that time, I naively assumed that all lawyers shared a similar depth of commitment to the constitutional principles that provide the foundation of our legal system. With time, I have been saddened to learn that many lawyers do not. As I have wrestled to better understand the principles that undergird our constitutional system, I am increasingly thankful for Dean Lee's early influence on my thinking.

Dean Lee was deeply committed to the principle of due process. During my third year of law school, I and other members of a journal editorial board scheduled a meeting with Dean Lee to discuss our perceived need for additional resources. He met with us, listened carefully as we articulated every reason that supported our claim, and then asked thoughtful questions. After coming to a complete understanding of our position, Dean Lee articulated very specifically why he would not be able to provide the additional resources we requested. As we left the

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28. When he was completing his service as assistant attorney general of the Civil Division, Rex summarized his devotion to the Constitution:

My experience here has illumined my appreciation . . . for our constitutional protection of individual rights, and [my] concern for intricate problems arising out of the separation of powers. Our constitutional system is deeply rooted and highly resilient, but no system of government in which ultimate power and authority are vested in the people can endure without the continuing involvement of citizens to whom good government is important.

Rex E. Lee, *A Lawyer Whose Client is the United States*, Ensign 53 (June 1976).

meeting, one of the other editors remarked, “Wasn’t that a great meeting?” I recall that I replied, “It was not so great. We did not get one thing we asked for.” Today, I believe that it was a great meeting. It was my first real introduction to due process at work. Even though we did not prevail, we left knowing our position had been understood and considered by one who valued justice and fairness. Since that time, in my family and while serving three times as a dean, I have drawn deeply on the lessons of due process learned in that short meeting.

I was not surprised, therefore, to learn later that Rex, who was then serving as President of Brigham Young University, had been asked by the National Collegiate Athletic Association (NCAA) to chair a select committee formed for the purpose of reviewing and ultimately revising the rules of the NCAA to ensure due process for individuals and institutions charged with infractions or violations of the Association’s rules.<sup>29</sup> In my later service as a member of the Infractions Appeals Committee of the NCAA—a committee formed based on the recommendations in the Lee Committee’s report—I sensed that Rex would have been proud of the manner in which his commitment to due process is today being realized in the workings of the NCAA.

Rex Lee’s commitment to the Constitution ran much deeper than due process. He also had strong feelings about the Bill of Rights and our constitutional structure. I recall an occasion when Rex and I vigorously discussed the constitutionality of the legislative veto. As one who had worked in Congress and had seen excesses on the part of administrative agencies, I supported some form of legislative veto. Rex, on the other hand, was a strong supporter of the executive branch. While I was not fully persuaded by Rex’s argument, I once again felt a certain awe as I witnessed the depth of his thinking and the sincerity of his commitment to constitutional principles.

Near the end of his life, Rex was asked to speak at a small lunch gathering at the law review conference previously noted. He was very ill; his son wheeled him into the room, and he needed oxygen. He also struggled to write, as I observed from the scribbled notes for his short address. Rex was no longer the

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29. See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association’s Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9, 17-19 (2000).

runner I had known while in law school, but his mind was quick and his wit evident. In that final meeting, he addressed a constitutional topic that surprised me. In a reflective mood, he spoke of the one change to the Constitution he would make, if he had power to do so. Rex argued that the President should be limited to a single six-year term, so that the executive branch could be freed in some measure from omnipresent political pressures, therefore permitting the President to exercise more leadership. I am not sure whether Rex was right, but I still smile when I think of how his commitment to the Constitution remained vibrant to the end of his life.

#### IV. FAITH IN EDUCATION

Rex Lee could have had a very lucrative law practice. Early in his career, however, he turned his professional energy to education, when he was asked to serve as the founding Dean of the J. Reuben Clark Law School at Brigham Young University. Rex's commitment to education and BYU continued, despite the financial allure of returning to the full-time practice of law. After stepping down from service as founding dean, Rex was able to serve as Solicitor General and engage in a more active legal practice, but his professional priority continued to be education and BYU. He was soon asked to serve as President of BYU. He knew that this new commitment would severely limit his legal practice, although he subsequently noted that, "In addition to all that went on at the university, I . . . argued nine cases before the United States Supreme Court (which was my idea of a hobby during my years as president)."<sup>30</sup>

Given his faith in education, particularly in the form that was offered at BYU, which combined religious and secular learning, Rex found his service as President to be "absorbing, interesting, and exciting."<sup>31</sup> Reflecting on his service as President, Rex observed that he, "enjoyed finding new challenges and opportunities each day when I came to work. As my colleagues and I worked on issues and initiatives that we hoped would benefit the university, I enjoyed a resurgence in my

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30. Lee & Lee, *supra* n. 27, at 137.

31. *Id.* at 119.



energy level that I had not experienced since before my battle with cancer two years earlier.”<sup>32</sup>

President Lee’s service to BYU and higher education was enhanced greatly by the fact that he was able to share the experience with his family, particularly his wife, Janet. In his words:

There were many things that helped to make the BYU presidency such a wonderful job. For me, probably the most prominent was the fact that unlike other responsibilities in the past, this was one that Janet and I truly shared. The law school deanship offered some opportunities in that respect, but not anything like being president. The other attractive features mostly had to do with relationships with people, the students, the faculty, the alumni and other friends of the university, and members of the board of trustees. Among the things that made it a challenge were the breadth of responsibilities and the inflexibility with which the work of that office must be carried out.<sup>33</sup>

Thus, while Rex clearly found joy in his service in education, his commitment to education remained firmly centered on the people he served with and those whom he served. President Lee’s service was demanding, both in terms of time and energy, but he relished the opportunity to use the position to touch lives and to draw closer to his family, by involving them in his service.

#### V. FAITH IN FAMILY

In this tribute, I will not dwell on Rex’s faith in his family. Anyone who knew him understood the depth of Rex’s devotion to his family. For those who may not have known this side of Rex, I would like to share a couple of experiences that demonstrate his commitment to his family. His wife, Janet, relates the first:

When Rex and I were first married, we would often say to each other, “I like us,” which signaled to the other the great joy we felt in being together. Once, after I had held

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32. *Id.*

33. *Id.* at 141.

Rex's head most of the day while he vomited [during the course of his cancer treatments], I helped him brush his teeth, change his pajamas, and get back into bed. As he laid his bald, pale head on an equally white pillow, he turned to me and said, "I like us." That moment had as much meaning for me as any we had ever shared.<sup>34</sup>

The second is also told by Janet:

On Monday, March eleventh, we knew that Rex's earthly life was coming to a close. Our seven children joined me in his hospital room as we spoke of favorite shared experiences, of our love for him, and of our faith in God. The last outpouring of our hearts paid tribute to our husband and father. Then, as efficiently and purposefully as he had lived his life, surrounded by our eternal family and with his hand in mine, Rex left mortality. As I held him close, I was filled with appreciation for the life we had shared. I felt his spirit soar as I whispered words of love and gratitude. I knew he was free from his pain, and I could feel his joy. Unexpectedly, the sharing of his triumph subdued my personal sadness as I said, "I am so happy for you, Sweetheart."

Together we had run many miles, loving life, raising our children, confronting illness, expressing our love for each other and for our Savior, and preparing for the day that we knew would come too soon. As I walked out of the hospital that afternoon, his words filled my heart: "Just be happy, Janet."<sup>35</sup>

Rex knew what was for him a simple truth—that his faith in God was closely connected to his love for his family.

## VI. FAITH IN GOD

Actuating all facets of Rex's life was his faith in God. His commitment to the highest values of the legal profession, the Constitution, education, and his family were all fueled by the depth of his faith in God. That faith enabled him to pour boundless energy into every task he was given. Rex's well-lived life offered strong evidence of his faith. His faith was central to all that he did, and, while he willingly shared his faith with those

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34. *Id.* at 89.

35. *Id.* at 184.

who wanted to know more, he never sought to impose it on another.

Rex's abiding faith in God grew as he matured. Rex often turned to prayer and leaned heavily on his very personal relationship with God. Later, in the midst of a great trial, he recorded that:

The prospect of my dying occurred to me frequently during my months at NIH, and I did ultimately come to reconcile myself to that possibility. I did not want to, of course, for at least two reasons. First, the thought of death scared me. I have absolute faith in the existence of God and a hereafter, but I was not at all comfortable with the prospect of leaving this mortal existence just yet. But my much stronger reason was my concern for Janet and our children. . . .

Each night when I would pray, the principal thing I would pray for was to live. There were many days and nights when that did not seem like much of a prospect, but when I would plead with the Lord for my life, I would inevitably hear the words of President Bateman's blessing—"The Lord has other things for you to do on this earth." And throughout my darkest days, when my body was so weak that I could barely move, and when I was wracked with fever and pain, those words would give me the confidence I needed, despite their seeming incongruence with my situation at the time.<sup>36</sup>

Rex's faith influenced all that he did, and he drew strength from it throughout his life, both professionally and personally.

## VII. CONCLUSION

My dean, Rex E. Lee, was a man of great faith. That faith manifested itself in many ways during his earthly life. Five areas of Rex's faith—his faith in the legal profession, in the United States Constitution, in education, in family, and in God—have touched my life. It is never easy to share such personal matters in a public context, particularly in the pages of a law journal. I have shared them, however, for two reasons: First, I want readers to better understand Rex Lee, as I knew him. Second, I want to acknowledge that Rex was one of three living human

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36. *Id.* at 75.

beings I have known, after whom I have most earnestly endeavored to model my own professional life. I know that I am indebted in significant ways to Rex for the example of his life well lived. While I have fallen short in following that example, I am better for having tried.