

**SENIOR JUDGE DAVID B. SENTELLE**  
U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT



*Rainbows,  
Elephants,  
and  
Muskrats*

BY ANDREW S. OLDHAM



PORTRAIT: ALAMY.COM. INSET: THE AUTHOR WITH JUDGE SENTELLE, COURTESY ANDREW OLDHAM.

**I**n the summer of 1987, David B. Sentelle found himself surrounded by 17,000 mostly naked hippies. If anything could distract a man from a U.S. Senate confirmation proceeding, surely that’s it.

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**President Ronald Reagan nominated Judge Sentelle** to the United States Court of Appeals for the D.C. Circuit in February 1987 and appointed him in September 1987. The intervening summer — while Judge Sentelle’s appellate nomination was pending — was his last

summer as a federal district judge for the Western District of North Carolina. And it was also the summer when thousands of Rainbow People descended upon North Carolina’s Nantahala National Forest. The Forest Service described the Rainbow People as an “informally organized, non-commercial organization with a national membership of about 20,000.”<sup>2</sup> Or, in Judge Sentelle’s words, “hippies.”

The Rainbow People said they were peacefully, safely, and lovingly meeting in the forest for some undetermined period of time. The state of

North Carolina, by contrast, said the Rainbow Gathering was an unsanitary, dangerous, and unlawful assembly that threatened the peace and dignity of the state for some undetermined period of time. Because this is America, that disagreement culminated in a lawsuit. And because God has a sense of humor, the resulting motion for a temporary restraining order landed in Judge Sentelle’s lap.

Judge Sentelle’s book on this episode, entitled *Judge Dave and the Rainbow People*,<sup>3</sup> is impossible to summarize. And the story is one that Judge Sentelle

has told many times over the years. So I won't dwell on it — except to say that it encapsulates some of Judge Sentelle's greatness. It's wise: For example, Judge Sentelle explains how to balance competing values like liberty and the rule of law. It's thoughtful: For example, Judge Sentelle wrestles with how he — a skeptic of institutional-reform litigation — “took over and operated a hippie reunion.” It's beautifully written, with a combination of lucidity and western-North Carolina folksiness: For example, “[l]et me follow that thought for a moment much the way a beagle follows a rabbit trail — that is, meandering and wandering about without really knowing where the trail is going to end.” And it's chock-full of riotously funny anecdotes involving, for example, his law clerks — who toured the Rainbow Gathering with “Judge Dave” — and six Hare Krishnas in saffron robes charging through the Nantahala National Forest with an elephant.

Amazingly, Judge Sentelle mediated a settlement of the Rainbow dispute. That's a testament to his brilliance, creativity, and grace. And perhaps more amazingly, the whole affair did nothing to distract from or derail his D.C. Circuit confirmation proceedings. That's a testament to a bygone era before Twitter, TikTok, and Twitch.

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**Since his elevation to the D.C. Circuit**, Judge Sentelle has had an enormous impact on the nation. He's written canonical decisions on the First Amendment, executive power, national security, standing, and, of course, administrative law. It would take many, many volumes of *Judicature* to give fair treatment to Judge Sentelle's jurisprudence. Instead of trying to do all that in a single essay, I'll just note a few greatest hits.

**That led to a legal holding that only Judge Sentelle could pen: “To find [the FTC's] interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.”**

For starters, his most-cited decision is a securities-fraud case called *Kowal v. MCI Communications Corp.* (1994).<sup>4</sup> That's remarkable because Congress remade the entire legal landscape in the Private Securities Litigation Reform Act the very next year, and yet *Kowal* still has more than 6,000 citing references. His fifth most-cited decision is *Cobell v. Norton* (2001),<sup>5</sup> which involved one of the largest class actions in American history. And his 14th

most-cited opinion is *Noel Canning v. NLRB* (2013),<sup>6</sup> which involved the Constitution's Recess Appointments Clause, and the Supreme Court of the United States affirmed Judge Sentelle's judgment.<sup>7</sup>

One of my personal favorite Sentelle opinions, however, is less well known and less widely cited. It's called *American Bar Association v. Federal Trade Commission* (2005).<sup>8</sup> The question presented was whether Congress delegated to the Federal Trade Commission (FTC) the power to regulate the practice of law. In holding no, Judge Sentelle quoted in full the legal text adopted by Congress to demarcate the FTC's relevant powers. He included that text in a 3,031-word footnote, which my co-clerks and I had to cite check. (Yikes.) Then he noted that nothing in those 3,031 words came close to empowering the FTC to regulate law. That led to a legal holding that only Judge Sentelle could pen: “To find [the FTC's] interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence.”<sup>9</sup> Judge Sentelle obviously has a way with words. I suppose that's why I often find myself quoting him rather than attempting to match him.

Judge Sentelle's impact on the law far transcends his judicial decisions, of course. He has published widely outside of the Federal Reporter — not just in the aforementioned Rainbow tale, but also in numerous law reviews and in a series of pseudonymously authored crime fiction stories. He ►

has taught at law schools all over the country. He was a founder and the president (for more than two decades) of the Edward Bennett Williams Inn of the American Inns of Court, one of Washington's most prestigious associations of white-collar prosecutors and defense attorneys. And let's not forget Judge Sentelle's tireless efforts as (take a deep breath) the presiding judge of the Special Division for the Purpose of Appointing Independent Counsels (from 1992 to 2006), as chair of the U.S. Judicial Conference's Executive Committee (from 2010 to 2013), and as a judge of the United States Foreign Intelligence Surveillance Court of Review (from 2018 to present and presiding judge since 2020). Add to all that his stint as chief judge of the D.C. Circuit (from 2008 to 2013), and he has left an indelible imprint on our country's second-highest court. As Professor Nielson pointed out, once you realize how much Judge Sentelle has done, said, and written, you'll notice his name everywhere.<sup>10</sup>

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Just as important, however, is Judge Sentelle's impact on the people around him. He is deeply admired at every level of the judiciary — from the justices on the Supreme Court, to his colleagues on the D.C. Circuit, to the district judges on trial courts around the country. His longtime secretary, Annette Huskey Mains, and his longtime career clerk, George Morris, have been a second family to him, and he to them. And perhaps nothing is more telling of his greatness than the way he is regarded by the D.C. Circuit's staff — from the clerk's office to the custodial crew. He knows and adores every one of them, and they adore him in return.

Then, of course, there are his law clerks — who've been affectionately

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dubbed "Sentellettubbies."<sup>11</sup> The Sentelle clerk family includes a sitting Supreme Court justice, lots of inferior-court judges, an ambassador to the European Union, and too many executive-branch officials to count. It also includes a multitude of law-firm leaders, state officials, and academics. It's an incredibly diverse crew. Obviously only a couple of his clerks got to tour the Rainbow camp. But there are at least four things that unite the rest of us.

The first is our universally shared experience of standing outside the court with our beloved judge while he smoked a cigar after lunch. Judge Sentelle strikes an unforgettable image during cigar time — standing there in his cowboy hat, one of his signature belt buckles,<sup>12</sup> and (of course) his Lucchese cowboy boots. It's quite a sight to see in downtown Washington, D.C., where the judge is surrounded by lawyers and law clerks in dark grey and navy suits. But it's an image that's both authentic to Judge Sentelle's roots in the mountains of North Carolina and a reminder of his brilliance. He once explained that, back when he was a trial lawyer in Asheville and Charlotte, he worked very hard not to lose his accent

or his boots because they allowed him to talk to juries in ways that big-city lawyers couldn't: "I could say to a jury, 'The U.S. attorney has made our witness out to be a liar. Well maybe he is a liar, but my ole Daddy used to tell me a blind hog finds an acorn every now and then. And this blind hog has found an acorn on this and let me tell you why.'" Decades after he moved from the bar to the bench, Judge Sentelle can still do and say things in ways that big-city lawyers can't.

The second thing all Sentellettubbies remember is listening to the judge's stories. He's an incredible storyteller — and not just about the Rainbow People. That should be unsurprising given his prodigious skills as a trial lawyer. He talks about muskrat trapping in Hominy Valley. He reminisces about cases he worked on, lawyers he knew, trips he took, and various tomfoolery that befell him. He does hilarious impersonations of various public figures. And he often intersperses all of this with lyrics from Johnny Cash.

One of my favorite Sentelle stories is about the late Chief Justice William Rehnquist. Judge Sentelle deeply loved the late Chief Justice, with whom he often played poker. And as Judge Sentelle tells the story, the Chief Justice once visited a family member (perhaps one of his daughters, though that detail was relatively unimportant) in some small-town church (perhaps in the South, though that detail, too, was relatively unimportant). And the pastor stood up and said something to the effect of, "We have a very important guest with us today, all the way from Washington, D.C., Bill Rehnquist." The late Chief then stood up and delivered a sermon to the congregation. After the service, at the church potluck, an elderly woman asked the late Chief what he did in the nation's capital. And

the Chief replied: “I’m a government lawyer, ma’am.” I can never figure out which part of that story I love more — the beauty of the Chief’s humility or the way Judge Sentelle’s eyes twinkle when he talks about it.

The third thing that unites all Sentelle clerks is the way he mentors us. Judge Sentelle has done everything there is to do in our profession. As one Sentelle clerk told me, Judge Sentelle had an “unmatched breadth of experience before joining the D.C. Circuit, spanning civil litigation, criminal prosecution and defense, and service as a trial judge in both the state and federal systems.” So when one of us calls The Boss (as many Sentelle clerks affectionately call him) and asks for career advice, he is uncommonly situated to provide wisdom. Add to that the fact that he loves us like his children, and it’s impossible to imagine a better mentor.

The fourth and final thing that every Sentelletubby remembers is the way he approaches the job of judging. Obviously, he’s brilliant. He’s wise. He’s a beautiful writer. He understands and appreciates the majesty of the law and the way it affects all Americans, whatever their station in our republic. And (my personal favorite) he has an almost supernatural effect on oral argument. He’s often quiet, respectfully listening to the advocates. And then, right at the pivotal moment of the argument, he interjects and puts his finger on the *precise* flex point of the case. Both during my clerkship and after it, I’ve seen his piercing questions completely change the arc of an argument and the outcome of an appeal. And he

does it all in his patented, small-town, mountain-country way. As one Sentelle clerk told me: “While Judge Sentelle could initially be mistaken for a country lawyer lost inside the Beltway with his deep accent, cowboy hat, and Western boots, advocates learned the hard way if they tried to dodge his probing questions at oral argument.” I once saw an attorney try to evade The Boss, prompting him to chuckle and say: “Counsel, that’s not even good nonsense.” Or as Justice Clarence Thomas remembered: “Dave hid his astounding intellect behind a thick Southern drawl and a bottomless well of colloquialisms. I mentioned to him after we finished listening to a set of oral arguments that one lawyer’s argument had contained an internal inconsistency. ‘Yep,’ Dave said, ‘he met himself coming back.’”<sup>13</sup> Devastating.

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I often tell my law clerks that if I could give them half the experiences Judge Sentelle gave me, teach them half as much as Judge Sentelle taught me, and inspire them half as much as Judge Sentelle inspired me, that would be a successful year. I also tell myself that if I could be half the judge, mentor, and man that Judge Sentelle is, that would be a successful life. I doubt that I’ll ever give my clerks a tour of a hippie camp. And I know that I’ll never leave the imprint on our nation that Judge Sentelle has. But he’s an inspiration all the same.



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Supreme Court of the United States and to Judge David B. Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit.

<sup>1</sup> I am grateful to my own law clerks, Rachel Daley and Thomas Vaseliou, as well as my intern, Candace Cravey, for their assistance on this article. All errors of course remain my own.

<sup>2</sup> David B. Sentelle, *Judge Dave and the Rainbow People*, 3 GREEN BAG 2d 61, 62 (1999).

<sup>3</sup> DAVID B. SENTELLE, *JUDGE DAVE AND THE RAINBOW PEOPLE* (2002). In addition to the now out-of-print book edition, a serialized version of his account was published in the *Green Bag*. See Sentelle, *supra* note 2; Sentelle, *Judge Dave and the Rainbow People, Part II*, 3 GREEN BAG 2d 179 (2000); Sentelle, *Judge Dave and the Rainbow People, Part III*, 3 GREEN BAG 2d 285 (2000); Sentelle, *Judge Dave and the Rainbow People, Part IV*, 3 GREEN BAG 2d 405 (2000).

<sup>4</sup> 16 F.3d 1271 (D.C. Cir. 1994).

<sup>5</sup> 240 F.3d 1081 (D.C. Cir. 2001).

<sup>6</sup> 705 F.3d 490 (D.C. Cir. 2013).

<sup>7</sup> See *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

<sup>8</sup> 430 F.3d 457 (D.C. Cir. 2005).

<sup>9</sup> *Id.* at 469.

<sup>10</sup> Aaron L. Nielson, *D.C. Circuit Review – Reviewed: Judge Sentelle . . . Everywhere*, YALE J. REG.: NOTICE & COMMENT (Apr. 28, 2018), <https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-judge-sentelle-everywhere/>.

<sup>11</sup> Underneath Their Robes, *The Young Turks of the Legal Establishment: Supreme Court Clerks, OT 2002 and OT 2003*, [https://underneaththeir-ropes.blogs.com/main/2004/10/the\\_young\\_turks.html](https://underneaththeir-ropes.blogs.com/main/2004/10/the_young_turks.html).

<sup>12</sup> One Sentelle clerk told me: “I recall one day after lunch, chatting about a time I took a road trip with my mom across Texas. I mentioned that we really enjoyed Laredo — hardly the most decorated or on-the-map city in Texas. Judge Sentelle looked down at his belly, adjusted it a little bit, and brandished his (very large and very fantastic) belt buckle, remarking ‘I got this buckle from Nuevo Laredo, right across the river from Laredo.’ It was classic Judge Sentelle.”

<sup>13</sup> CLARENCE THOMAS, *MY GRANDFATHER’S SON* 204–05 (2007).