

SYMPOSIUM

J. SKELLY WRIGHT: A CLERK'S PERSPECTIVE OF THE JUDGE

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For the clerks, Judge Wright's reputation preceded him. For the vast majority, he was their number one choice for a clerkship, for he not only sat on what was then the second most powerful court in the land, but he also was considered a giant of a jurist. He was known as one of the most liberal judges in the country—this was when the term “liberal” was used approvingly and was something of a badge of honor—and he was known as someone who consistently and courageously strove to achieve justice.

When we first met him (for some, when we were interviewed; for others, the first day we began clerking), and as we spent the year in chambers with him, we came to appreciate that his reputation was well deserved but that there was a lot more to this man that was not so well known.

Let's start with his sense of justice: Judge Wright's sense of justice was strong and deeply rooted. For the law students and practitioners, I will resort to the now tried-and-true starting point for any legal discussion—the dictionary definition of the term: “Justice’ – noun – 1. Maintenance of legal, social, or moral principles by the exercise of *authority or power*; assignment of deserved reward or punishment; giving of due desserts . . . [and] the quality of . . . integrity, impartiality, fairness.”¹ By the way, the prevalence of dictionary discussions in Supreme (and lower)

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1. 1 SHORTER OXFORD ENGLISH DICTIONARY 1481 (6th ed. 2007) (emphasis added).

Court decisions post-dated my tenure with the Judge—45 years ago, we would rarely, if ever, have thought to consult a dictionary to determine what a word meant.

In any event, the Judge didn't see himself, or present himself, as an *authority figure* or a *powerful person*; on the contrary, those who knew him found him quiet, shy, soft-spoken and frequently unassuming (if not awkward) in public, especially in social settings. But the rest of the definition—"assignment of deserved reward or punishment" and "integrity and fairness"—is spot on!

Judge Wright was, in today's parlance, a "result-oriented" judge. Justice Brennan once drew the distinction between "the judge who sees his role as guided by the principle that justice and righteousness is the source and the substance and the ultimate end of the law from the judge for whom the principle is that courts don't sit to administer justice, but to administer the law."² Justice Brennan confirmed that: "Skelly Wright has never doubted his proper role. . . . He is proud that he is accounted among judges who understand that the discretion given them in exercising judgment allows, indeed requires, more than the mechanical application of the law."³

Judge Wright thought the law should conform to what was right. In 1982, he described his judicial approach as follows:

I want to do what's right. When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done—and then you look at the law to see whether or not you can do it. . . . I am less patient than other judges with law that won't permit what I conceive to be fair.⁴

The beneficiaries of this approach were usually those needing the protection of the courts. Judge Wright frequently invoked a passage from a Justice Black opinion: "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-

2. William J. Brennan, Jr., Address at the J. Skelly Wright Portrait Presentation Ceremony (Oct. 25, 1985), *available at* <http://dchs.org/usca/skellywrightportraitceremony.pdf>.

3. *Id.*

4. LIVA BAKER, THE SECOND BATTLE OF NEW ORLEANS: THE HUNDRED-YEAR STRUGGLE TO INTEGRATE THE SCHOOLS 493 (1996).

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conforming victims of prejudice and public excitement.”⁵

This played out most clearly in the area of race relations. The Judge credited Thurgood Marshall with introducing him to “the harsh realities of racism” and persuading him that “if the law did not prohibit racial discrimination, then the law was wrong.”⁶ And he was not about to apply “wrong law.” One clerk remembers that the Judge would sometimes say that if the Supreme Court got the case they were then working on, it would likely reverse because the law favored the other side; but then the Judge was going to do what he thought was the right thing regardless, and in any event, he would say, the Court did not (and could not) take every case.⁷

Another story came from a clerk who worked with the Judge on the last of the three-judge court decisions in the SCRAP case (this began as a standing case and ended on the adequacy of the Environmental Impact Statement prepared by the ICC for a rate increase).⁸ The Judge told the clerk that they were likely to lose one of their allies after two remands from the Supreme Court. Judge Wright said his wavering colleague thought the Supreme Court was trying to tell them something. Judge Wright then looked at the clerk and said: “Well, I am trying to tell *them* something too.”⁹

The Judge also had a well deserved reputation for courage—standing up to, and facing down, “the full force and power of the entire state of Louisiana”¹⁰ as a district court judge in the late 1950s and early 1960s.¹¹ Additionally, the Judge wrote many opinions during his tenure on the circuit court that sparked considerable controversy, caused outrage, led to gnashing of teeth, and produced repeated exclamations!¹² The clerk who

5. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

6. *History of the Federal Judiciary, Biographies: J. Skelly Wright*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/tu_bush_bio_wright.html (last visited Feb. 21, 2015).

7. This information came from an oral statement by Walter Kamiat.

8. *Students Challenging Regulatory Agency Procedures v. United States*, 346 F. Supp. 189 (D.D.C. 1972).

9. Email from Michael Harper, Professor of Law, Boston University School of Law, to author (Sept. 5, 2014) (on file with author).

10. JACK BASS, UNLIKELY HEROES 135 (1981).

11. Randall Kennedy, *Judge J. Skelly Wright and the Racial Desegregation of Louisiana*, 61 LOY. L. REV. 57 (2015).

12. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977); *Javins v.*

worked on a case involving the reopening of the undamaged reactor at Three Mile Island¹³ tells how the Judge's intense concern about the potential dangers of nuclear power plants led him to a conclusion that was *not* supportable under the National Environmental Policy Act case law.¹⁴ But the Judge insisted, and distinguished the problematic case law by saying that: "None of these cases, of course, presents the holocaust potential of an errant nuclear reactor."¹⁵ His zeal convinced Judge McGowan to join his opinion, but Judge Wilkey wrote a screaming dissent, complete with italics and capital letters, urging the Supreme Court to grant cert.¹⁶ The case was duly heard by the Court, and Judge Wright was reversed 9–0.

This was, regrettably, not an infrequent occurrence. After a bit of digging, I found the following. Judge Wright wrote roughly 450 majority opinions on the Court of Appeals (along with about eighty dissents and eighty concurrences). The Supreme Court heard twenty-five of these majority opinions. Three were affirmed and twenty-one were reversed, vacated, or affirmed on other grounds. To be sure, this is not a great record, but he did get their attention.

In any event, the story of one case from the Court of Appeals, which was not disturbed by the Supreme Court¹⁷ and appears decades later in casebooks on judicial review of agency rulemaking decisions, captures the Judge Wright we knew. The same tenacity—some might say aggressiveness—described above came to the fore in an industry challenge to EPA's effort to force

First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

13. *People Against Nuclear Energy v. U.S. Nuclear Regulatory Comm'n*, 678 F.2d 222 (D.C. Cir. 1982), *rev'd sub nom. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

14. The petitioners urged the D.C. Circuit to order that an environmental assessment be made before reopening the plant because their apprehensions about the risks of nuclear power, in view of the near meltdown of the other reactor, were causing them acute anxiety. *Id.* at 226-27. Under the case law, the fears of neighbors regarding the dangers that would result from a nearby facility were not sufficient to require an environmental assessment. *Id.* at 229.

15. *Id.* at 229.

16. Email from Carol Lee, Special Counsel, Taconic Capital Advisors, to author (Apr. 16, 2014) (on file with author).

17. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

the removal of lead from gasoline.¹⁸ The Judge was certain that lead in gasoline posed a danger to the public health, but the evidence was sketchy, and he was on a panel with two judges whose predilections were to accept the industry's skepticism about the EPA's science. After dissenting to the panel decision remanding to the agency,¹⁹ the clerk tells how the Judge "took up the fight, which he loved. He lobbied the court to hear the case *en banc* and lined up the votes of Leventhal and McGowan to win over the *en banc* court. . . . His dissent became the majority opinion," to which there was, not surprisingly, a very strong objection.²⁰

As Bill Monroe, the NBC News Correspondent who had been dear friends with the Wrights since Bill was a cub reporter in New Orleans covering the lead-up to, and the aftermath of, the desegregation decisions said, "[T]here has never been anything playful or casually combative about his activism. This is a serious man. There is, in his decisions, something stern. There is something fierce."²¹

But while Judge Wright had no hesitation in writing contentious or confrontational decisions, he seemed to want to avoid confrontation in his personal life. For example, one of his clerks usually arrived at the court by motorcycle, complete with soiled blue jeans, boots, and a well-worn black leather jacket. He did not keep a change of clothes in chambers, and on at least two occasions went into the courtroom for oral arguments in his traveling attire. The judge was clearly upset—he was a stickler for proper decorum. But he did not confront the clerk. After the first incident, he grumbled something about proper dress to the co-clerk. After the second episode, he talked to Martha Scallon, his long time judicial assistant as they are now called—she had been his secretary in New Orleans, and she moved to D.C. when he was appointed to the D.C. Circuit—and she confronted the

18. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976).

19. In his dissent, the Judge included a long piece on the science and then relied heavily on deference to agency discretion in such matters. *Ethyl Corp. v. EPA*, 5 *Env'tl. L. Rep. (Env'tl. Law Inst.)* 20,096, 20,119-145 (D.C. Cir. 1975) (Wright, J., dissenting), available at <http://elr.info/sites/default/files/litigation/5.20096.htm>.

20. Email from Greg Diskant, Partner, Patterson Belknap, to author (Sept. 12, 2014) (on file with author).

21. Bill Monroe, Address at the J. Skelly Wright Portrait Presentation Ceremony (Oct. 25, 1985), available at <http://dcchs.org/usca/skellywrightportraitceremony.pdf>.

clerk and informed him in no uncertain terms of the do's and don'ts of courtroom dress. The judge never had to say a word to the offending clerk.

He also left to Martha the task of telling each new law clerk how the judge wanted a bench memo written, what the proper form for an opinion was, how to refer to court personnel, etc. She often typed, and always reviewed, every draft before it went to the judge—sometimes returning it to the clerk (before showing it to the Judge) to make sure the clerk had fully considered a (sometimes obscure) opinion written earlier by the Judge that was directly (or more likely indirectly) on point. She must have committed all of his opinions to memory, or so it seemed to the newbie clerks. And that was only part of her formidable mind dedicated to the service of the Judge.

One of the clerks unabashedly told me:

No account of the Judge . . . is complete without Martha Scallon . . . Martha was intelligent, hard working, efficient, and fiercely loyal to the Judge. Before starting our clerkships, we were advised by our predecessors that, above all else, we had to pass muster with Martha. Among other things, she did not take kindly to clerks who took long lunch breaks (which was even five minutes past one hour) or who didn't arrive punctually in the morning (which was even five minutes after 9:00 a.m.).²²

Another of the clerks, now a judge himself, responded to my request for memories of the Judge with this comment:

There is one dimension of my year in chambers that I wanted to emphasize . . . and that is Judge Wright's kindness toward Martha Scallon. . . . When I interviewed for the job, the Judge made a point of telling me that Martha was the best in the entire courthouse at what she did. All during the year, I was struck by his including her in all that we did—lunchtime outings, drinks at his home, and general bull sessions. I could not help but notice that his manner with Martha was not only that of a gentleman, but also stood in contrast to the treatment other judges accorded their chamber colleagues. I have now been a judge for 15 years, and I have never seen a better relationship between a judge and a judicial assistant

22. Email from Carol Lee, *supra* note 16.

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than that which existed between the Judge and Martha. In particular, I am always astonished to witness judges—especially those who like to style themselves champions of the people—who are dismissive and even derisory toward the individual people in their juridical orbit.²³

This speaks not only to Judge Wright's loyalty but also to his insistence on dignity for all persons.

Or, it may have been that this very important man was somewhat intimidated by Martha. A clerk reported that

Martha was dead set against getting word processing for the chambers. I think she felt that she was perfectly capable of producing the Judge's opinions and correspondence with a typewriter. Eventually (perhaps belatedly), the Judge realized that the time had come for his chambers to get word processing. The Judge waited until the summer, when Martha, like clockwork, took a month-long vacation.²⁴ While she was gone, he asked his next-door chambers neighbor Judge Wald what system she was using, and ordered exactly the same thing, which was delivered during Martha's absence. Martha was faced with a *fait accompli* on her return,²⁵

and, I suspect, knew better than to tell the Judge he had spent money on something he didn't need.

Of course, if the Judge was dependent on Martha, that was true in spades for his relationship with his wife. Helen Wright was a force to be reckoned with. He called her "Sugah" and attributed her occasional temper to the fact that she was a redhead. So many of the clerks remember her with such fondness even though she was only infrequently in Chambers. She was his rock, for sure!

I mentioned our lunchtime outings earlier and they offer a glimpse into another aspect of the Judge: his frugality! Lunch together—the Judge, the law clerks, and Martha—was a regular

23. Email from Keith Ellison, Judge, U.S. Dist. Court for the S. Dist. of Tex., to author (Aug. 14, 2014) (on file with author).

24. Each year, she drove from D.C. to Wisconsin, where she had grown up, and visited her family and then drove from Wisconsin to New Orleans, where she had lived, worked, and had many friends.

25. Email from Carol Lee, *supra* note 16.

feature of life in chambers—at least once, often twice or three times a week. His favorite place was across the street at the cafeteria of the Federal Trade Commission, until the Department of Labor (across the other street) opened a cafeteria. These were places where you went through a cafeteria line and bussed your own tray. Now, the dining room of the Superior Court was closer than either of these and the food was certainly better, but it was a tad more expensive (just a tad), and one of the clerks suspected that “[t]he Judge probably thought that the tablecloths and padded chairs were too posh.”²⁶

Something I remember vividly about those lunches was that in inclement weather, the Judge would wear his wrinkled raincoat. One of the clerks described what followed exceedingly well: The Judge, he said:

[W]as not exactly a clothes horse. My favorite garment of his was his battered raincoat. We’d go out to lunch at the FTC cafeteria across the street (and, when it opened, the Labor Department cafeteria)—and when we entered, the Judge would ignore the coatrack and crumble his raincoat into a ball and stuff it on the hat rack above. He thought that was faster and that hanging it up was a waste of time.²⁷

I think that the Judge once explained to me that, crumbled up like that, no one would be tempted to take that coat. A practical streak as well.

One of the clerks recounted another story about life on the cheap:

When we were asked to help organize a Wright clerks’ reunion during our year, we were told that the Judge would be extremely unhappy if the amount we charged per person exceeded some extremely low sum. I no longer remember what it was, but it was probably under twenty-five dollars. To do a catered dinner and pay for a gift on that budget, we rented a room in the Capitol Children’s Museum (located in an out-of-the-way corner of Capitol Hill), used a fledgling (though very good) caterer, managed to find enough adult-sized chairs, and scattered cut flowers on the tables rather than buying formal centerpieces to brighten up the room

26. Email from Carol Lee, *supra* note 16.

27. Email from Greg Diskant, *supra* note 20.

decorated with children's finger paintings.²⁸

What was the Judge like with the clerks? The Judge was a serious man and absolutely professional. Never, did he ever ask any of the clerks to do anything for him that was personal in nature—no driving him anywhere, picking up his cleaning, or even getting his lunch. And this was at a time when some of his colleagues sometimes treated their clerks like household help.

Within chambers, we would usually prepare bench memos before oral argument, though he used to read most of the briefs himself. We might discuss the cases with him before argument, but we had a pretty clear idea where he was leaning. We attended the oral argument but rarely, if ever, did he send any notes to us, and I cannot recall ever sending any notes to him, during the argument. After the conference, he would return to chambers and tell us if we would be drafting an opinion (or a dissent).

As one of the clerks put it: “The Judge was the one who made the decisions, although he delegated a great deal of the execution to his law clerks.”²⁹ We did the drafting; he did the reviewing, occasionally editing to insert a gem of a phrase or sentence that made it all hang together, especially in those cases that he really cared about.

But while our relations with the Judge were serious and professional, there were the many light moments, where we would see the twinkle in his eye. And he was not reluctant to give advice to these “young people.” One year, both of the clerks were bachelors, and he was concerned about their ability to take care of themselves. One of the clerks told me he said to them:

Cooking is easy. You want to cook a chicken, just take the chicken and put it in the oven. You want some peas with the chicken? Take a can of peas and put it in the oven, right there with the chicken. But be careful! Pop a hole in the top of the can, or it will explode.³⁰

This clerk reported that he never tried this particular recipe, but he always remembered it.

28. Email from Carol Lee, *supra* note 16.

29. Email from Carol Lee, *supra* note 16.

30. Email from Greg Diskant, *supra* note 20.

Another clerk remembered another aspect of the Judge:

I had taken the bar the summer before my clerkship and (with the Judge's permission) got the Washington State Supreme Court to enter an order authorizing Judge Wright to administer the oath to me. So we set up a time and . . . my wife came into chambers with a camera for this big event. He was, as ever, humble and down to business. He looked at the papers and the oath. I was expecting to be asked to raise my right hand and all of that. He just asked: "did you read this stuff? You agree with it?" Then said, quietly, "ok" and signed it. Hilarious. Not much to take a photo of. But classic low key style.³¹

Another story is from a clerk who recounted how he had taken to swimming a mile before work every morning. He said that

[T]he routine made me feel wonderful—until about 11:00 a.m., when I would become awfully sleepy. One day, inevitably, I just fell asleep at the desk. An hour later, I awoke to find a glass of water, a little cupcake, and a scribbled note from the Judge. "Glad to see you took a nap. Always a good idea—I do the same. Best, though, not to tell Martha. She wouldn't understand."³²

There were many other relaxed cordial conversations in chambers, complete with storytelling. One of the clerks sent this comment:

I clerked for the Judge in 1983-1984. At that stage in his life, his thoughts seemed to me to be turning to the past, to thinking about where he had been and how he had gotten there. Especially if it was getting to be mid-afternoon or later when I would go into his office to discuss a case or an opinion, the Judge, after having taken care of the business at hand, would urge me to have a seat and would begin talking.

He would mention something about Helen, who was clearly the love of his life, or he would talk about some other current events or personalities around the court. But before long, he

31. Email from Kevin Hamilton, Partner, Perkins Coie, to author (Apr. 14, 2014) (on file with author).

32. Email from Curt Hessler, Adjunct Professor, UCLA School of Law, to author (Sept. 28, 2014) (on file with author).

would move the conversation to events much earlier in his professional life. He liked to talk of the investigations of the Long machine that he took part in as a very young lawyer He would explain that, while Huey Long was corrupt, he was never out for money. But after Huey was gone, the more ordinary varieties of corruption set in. Judge Wright would tell me that the particular place where money changed hands was in the men's room of a hotel in New Orleans, where those who wanted something from the machine were told to leave their money. He would talk about some of the characters involved, and about how he and his colleagues had traced their tracks and their relationships, which led to a series of prosecutions. He was very proud of his role as a young prosecutor, and these early, formative experiences were of great importance to him.

He would also talk about his two arguments before the Supreme Court in the late 1940s. One of the cases was a Fourth Amendment case that is best known for Justice Jackson's still-cited caution against relying for the protection of Fourth Amendment rights on police officers, who are "engaged in the often competitive enterprise of ferreting out crime."³³

Judge Wright won *Johnson*, but the other case, which he lost, seemed to be more significant to him personally. It was the Willie Francis case.³⁴ Willie Francis had been sentenced to death, the State had tried to electrocute him, but the electrocution had failed to kill him.³⁵ The State wanted to try again, but Francis claimed that doing so would violate the Due Process Clause, which (he claimed) incorporated the Double Jeopardy Clause and the Eighth Amendment.³⁶ The Judge represented Francis in the Supreme Court, and he lost the case by a 5–4 margin.³⁷ Judge Wright remained adamant that Francis's claims were sound, and each time he would tell the story, he would shake his head and say "poor Willie Francis."

I wish I had paid closer attention or taken notes at the time

33. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

34. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

35. *Id.* at 460.

36. *Id.* at 461.

37. *See id.* at 466.

on some of the other stories Judge Wright told me. What strikes me now is that, while Judge Wright seemed to enjoy recalling those early days in New Orleans and his work as a young lawyer, he stopped at the point where he became a judge. I don't think he ever discussed with me his own heroic and difficult days in New Orleans when he and Helen were subject to such terrible treatment as he worked to integrate the public schools.³⁸

This is something a number of clerks have commented on. Judge Wright's time in New Orleans after ordering the integration of the city schools was very difficult. That's an understatement. The New York Times Obituary described it as follows: "Judge Wright was shunned by old friends. A cross was burned on the lawn of his home. Telephone threats against his life became so numerous that police guards were assigned to protect him."³⁹

Curiously, Judge Wright, who was a gifted storyteller, didn't talk about those times, at least with his clerks or with his colleagues on the D.C. Circuit—so far as I can tell. This is pure speculation, but did the history teacher in him think this was not a teachable moment; did this humble man think that what had happened to him was of little or no interest to anyone else; or was it too painful to relive again and again in the telling? I wish I had asked him that question.

Let me close with this observation. Judge Wright was a truly gentle man (in the Platonic sense), a very modest and self-effacing person, especially for someone who was such a good, kind, decent, compassionate person who made such a difference and had such a huge impact on the people around him. For his clerks, he was a boss, a teacher, a mentor, an advisor, a father figure, and a friend.

When we talk about this modest man, it brings to mind the Judge's "hanging"—the term used affectionately for the presentation of a judge's portrait to the full court on which he has served. That day, there were several remarks, including from: Justice Brennan who was a close friend; Bill Monroe, whom I

38. Email from Jim Feldman, Lecturer in Law, Univ. of Pa. Law Sch., to author (Oct. 8, 2014) (on file with author).

39. Marjorie Hunter, *Judge J. Skelly Wright, Segregation Foe, Dies at 77*, N.Y. TIMES, Aug. 8, 1988, at D10.

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have mentioned; and Abe Sofaer, the then senior former law clerk. After the portrait was unveiled—a task given to Carol Lee, another contributor to this Tribute, and me—and the court accepted it to be hung in the courtroom along with portraits of other judges with whom he served and their predecessors, there was an opportunity for the Judge to make remarks. Typically, these can go on for some time, thanking everyone and commenting on all the comments and offering some commentary of his or her own.

When given the opportunity, Judge Wright said:

After hearing what I have heard this afternoon, I can first express my appreciation for all the kind words and the kind thoughts. These are my friends speaking for me, and I appreciate their doing so.

But since they are so eloquent and since I am less so, even though I had a few remarks prepared to make, I decided to quit when I was ahead. Which is right now. Thank you very much.⁴⁰

Yes, he was, in Justice Brennan's words: "a quiet, modest man, more embarrassed than happy with praise."⁴¹ If given the chance, he might even have shied away from this Tribute. I, for one, am honored to contribute.

40. J. Skelly Wright, Address at the J. Skelly Wright Portrait Presentation Ceremony (Oct. 25, 1985), *available at* <http://dcchs.org/usca/skellywrightportraitceremony.pdf>.

41. Brennan, *supra* note 2.