A Colleague's Tribute to Chief Judge J. Skelly Wright

By THE HONORABLE DAVID L. BAZELON*

To me, "Skelly Wright" is a name to conjure with. To say the words is to call forth fond memories and warm feelings. The man is my friend, my brother. Only incidentally is he my colleague. Nonetheless, today I write of *Judge* J. Skelly Wright—for eighteen years my confrere on the United States Court of Appeals for the District of Columbia.

Judge Wright's opinions range the spectrum of private and public law, illuminating whatever they touch. He has made significant contributions to legal doctrine in such diverse fields as racial equality, contracts, real property, administrative law, freedom of expression and criminal law. Any attempt at developing a list of his major opinions is doomed to failure. But, for me at least, four of Skelly's opinions epitomize the rest. In *Hobson v. Hansen*,[1] he displayed his commitment to eliminating the injustices of racial segregation by banning the so-called "track system" in Washington's public schools.[2] In *Williams v. Walker-Thomas Furniture Company*,[3] he demonstrated his interest in protecting the indigent by invalidating an unconscionable adhesion contract between an impoverished mother and a "cut-rate" store.[4] And, in *Edwards v. Habib*[5] and later in *Javins v. First National Realty Corporation*,[6] he exhibited his dedication to securing for the "have-

* Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

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1. 269 F. Supp. 401 (D.C. Cir. 1967).

2. The district court judges of our circuit were named defendants in this suit, since they appointed D.C. school board members at the time. I appointed Judge Wright from our circuit to hear the case.

3. 350 F.2d 445 (D.C. Cir. 1965).

4. As a member of the three-judge panel in the *Williams* case, I joined Judge Wright's opinion.

5. 397 F.2d 687 (D.C. Cir. 1968) (forbidding the retaliatory eviction of a tenant who complains to housing authorities).

6. 428 F.2d 1071 (D.C. Cir. 1970) (implying a warranty of habitability in all leases for urban dwelling units).

nots" of our cities decent (or at least safe and sanitary) places to live by forbidding retaliatory eviction and by reading into leases an implied warranty of habitability. The *idée fixe* of Skelly's opinions in these four cases—as in so much of his work—is compassion. Compassion and a sensitivity to the plight of the oppressed.

I would suppose that there are very few federal judges with whom I would agree as often as I have agreed with Skelly Wright. As of January 1980, Judge Wright had written the opinion for our court on 277 occasions. I dissented from only three of those opinions[7] (with two of the dissents coming during the ominous year of 1967, when Judge Wright apparently exhibited an uncommon tendency to fall from grace). Judge Wright, on the other hand, has dissented from only three of the 535 opinions that I have written for our court.[8] Skelly and I have even found agreement on the proper number of dissents to write from one another's opinions.

Several years ago, Judge Wright wrote a piece of this sort about me.[9] In it, he claimed to be "probably the only judge on any federal court of appeals who can call Judge David L. Bazelon conservative."[10] That may or may not be so. But his article did get me thinking about the differences, if any, in our respective philosophies. Since I care too much about Skelly Wright to write a piece about him that doesn't have something of substance in it, I will use this opportunity to reflect briefly upon what some "commentators" have said is an area of disagreement between us: the proper response of judges like the two of us to retrenchment by the Supreme Court on issues of great concern.

Judge Wright and I are members of an inferior federal court. Moreover, notwithstanding his critique of my record, it is fair to say that we are both examples of a species sometimes called "liberal, activist federal judges" during an era when the course of decisions by the Supreme Court has been contrary to what I would guess both of us would have liked. I know, at least, that often I have been disappointed. In diverse areas, we have seen the Supreme Court fail to extend, and in

7. Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967); Lollar v. United States 376 F.2d 243 (D.C. Cir. 1967).

8. Las Vegas Valley Broadcasting Co. v. FCC, 589 F.2d 594 (D.C. Cir. 1978), *cert. denied sub nom.* Western Communications, Inc. v. FCC, 441 U.S. 931 (1979); NRDC v. EPA, 512 F.2d 1351 (D.C. Cir. 1975); Alcoa Steamship Co. v. FMC, 348 F.2d 756 (D.C. Cir. 1965).

9. Wright, *A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of his Appointment*, 123 U. PA. L. REV. 250 (1974).

10. *Id.*

some cases cut back on, principles that we and other inferior federal judges had followed.

One example can be drawn from an area in which Judge Wright and I share a common interest, environmental law. A good case can be made that Judge Wright is one of the "inventors" of what we now call environmental law. His opinion for our court in *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*[11] was an heroic attempt to breathe life into the then newly-passed National Environmental Policy Act of 1969 (NEPA), and to use it to force the nuclear industry and its regulatory allies to acknowledge to the public the environmental hazards of nuclear energy. That attempt has now largely failed. The Supreme Court has cut back on the scope of NEPA,[12] and has made it clear that the "essentially procedural" mandate of NEPA cannot be used to force government to inform the public of the consequences of "the decision to develop nuclear energy."[13]

Even when the Supreme Court has nominally accepted doctrines pioneered in the inferior federal courts, the principle accepted by the Supreme Court has generally been a bit faded. An example of particular concern to me involves an affirmative "right to treatment" for persons involuntarily confined to mental hospitals.[14] The carefully circumscribed damage action recognized by the Supreme Court for such persons in *O'Connor v. Donaldson*[15] may acknowledge the moral wrong of confining nondangerous persons without treatment, but it will do nothing to improve the actual conditions in institutions for the "mentally ill."

Thus far, I have described a phenomenon: a series of Supreme Court decisions which have set aside, or cut back upon, some principles important to me and, again I would guess, to Skelly. But, where do he and I part company about this? In my view, we don't. Yet, some would say that we do disagree about the proper reaction to the trend I have described.

I continue to believe that it is the function of the courts to bring to the surface problems that other institutions in society have ignored.[16]

11. 449 F.2d 1109 (D.C. Cir. 1971).

12. *See, e.g.*, Kleppe v. Sierra Club, 427 U.S. 390, 415 (1976), *rev'g* Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975) (Wright, J., joined by Bazelon, C.J.).

13. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978), *rev'g* NRDC v. USNRC, 547 F.2d 633 (D.C. Cir. 1976) (Bazelon, C.J.).

14. *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (Bazelon, C.J.).

15. 422 U.S. 563 (1975).

16. *See* Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 673-74 (1971).

As Judge Wright has written of me, I am inclined "to ask questions, rather than to answer them."[17] It is true that in the present state of affairs, if an issue surfaces and gets to the Supreme Court, it may turn out differently from what some might hope. I certainly would not say that the Supreme Court never makes "bad law," at least as I see it. But that risk does not, in my view, lessen the need for a judge to expose a difficult problem and to declare what he believes the law ought to be. My approach is based on an assumption, or perhaps a better word is a "faith," that the courts can often contribute most when they bring submerged problems to the attention of the public. As the late Justice William O. Douglas once wrote: "The judiciary plays an important role in educating the people as well as in deciding cases."[18]

I could hardly be confident that mine is the right approach if a judge as sensitive and wise as Skelly Wright disagreed with me. Thus, it is disquieting that some have read his recent Biddle lecture at the Harvard Law School as articulating the view that judges like us must pull back in some areas if any of the judicial achievements of the last generation are to be preserved. If these "commentators" take the Biddle lecture to say that judges must be bound by principle and that they must not capriciously go about "making" law, I would, of course, agree with them. Judge Wright and I have long accepted—and lived by—that proposition. But if these "commentators" take the Biddle lecture to say that the courts must trade some areas of concern for others in an effort to husband resources, I think they are wrong. I don't read it that way at all. And, based upon first-hand knowledge of Skelly Wright and his career for almost two decades, I am reasonably confident that he, too, would reject that reading of his talk.

Skelly Wright, more than any judge I know, realizes that if the courts were to pull back even in only some areas, the lessened protection would inevitably implicate interests of the "have-nots" of our society. Neither he nor I could believe that we have reached the point that the child in a ghetto school demanding a decent education has become the "enemy" of the lonely, frightened and forgotten mental patient, because the two of them must compete for a court's limited ration of justice. It cannot be that in order to preserve one aspect of "equal justice under law," judges must trade off the claims of one group for redress of legitimate grievances against those of another. Equal justice is indivisible.

Skelly Wright has been through something like this before: an-

17. Wright, *supra* note 9, at 252.
18. W. DOUGLAS, WE THE JUDGES 443 (1956).

other time when the public grew tired, and angry, with the edicts of an "imperial judiciary." As a young federal district judge in the deep South, Skelly was one of those assigned the task of ending racial segregation in public schools with "all deliberate speed."[19] For over a year, FBI agents were assigned to watch over him 24 hours a day to protect him from certain segments of the public. We all need his kind of courage now.

After eighteen years, and only three dissents, I salute a most valued colleague, and a dear friend.

19. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).