

## TRIBUTE TO HON. PATRICIA M. WALD

*CYNTHIA ESTLUND\**

It is a great honor for me to be part of this event honoring Judge Wald. I first met both Judge Wald and Nancy Morawetz—and it was a shock to me to realize this—on the day of my clerkship interview twenty-seven years ago. Nancy had the good fortune of attending the NYU School of Law where she had quite a few women law professors, even back in those days. I did not. During my entire law school career at Yale, I had had only one class that was taught—actually co-taught—by a woman professor. So I felt especially fortunate to clerk for Judge Wald. She was, and has continued to be, a role model par excellence, not to mention exceptionally entertaining company.

Since she graduated from law school, Judge Wald has had at least five careers and has accomplished more in each of them than most people accomplish in their entire adult lives. I am certainly including her ten-year career as a full-time mother, during which she produced five thriving, active, and, if we are to believe the stories we heard in chambers, quite mischievous children. But perhaps most remarkable has been Judge Wald's career since leaving the D.C. Circuit.

Those of us fortunate to land a good job with tenure have a tendency to settle in and hold on—I mean to cast no aspersions on Judge Edwards!—but Judge Wald has been more restless. The job of a federal appellate judge seems not to have been big enough to contain her boundless energy. She left the D.C. Circuit at a point in her life when many folks might simply move to Florida, take up golf, and start shuttling around among their ten grandchildren. But instead, Judge Wald moved to The Hague to serve as a U.S. judge on the International Criminal Tribunal for the former Yugoslavia. Nor has she slowed down since returning from The Hague. Judge Edwards stole one of my best stories here, but last winter I heard from another former clerk that she encountered Judge Wald on the snowy streets of Iowa while they were both campaigning for a candidate, who will remain nameless, but who recently moved into a really nice house on Pennsylvania Avenue. I think at that

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point Judge Wald was especially glad to be released from the obligations of nonpartisanship that constrained her as a judge.

So Judge Wald would have been a continuing source of inspiration and an extraordinary role model even apart from her being a woman. But the fact that she was a woman—one of the handful in her law school class and the first to be appointed to the D.C. Circuit—was especially important to some of us who worked for her.

I began clerking during the summer of 1983, just one year after Nancy had left, but things had already changed by then. The D.C. Circuit was barely clinging to its longstanding reputation as a relatively liberal court. I seem to remember that the t-shirts for the D.C. Circuit law clerks' softball team were emblazoned with a "0-9" win-loss record in recognition of the nine consecutive reversals the D.C. Circuit had suffered in the previous term of the Supreme Court.

But by 1983, as Judge Edwards has already recalled, the composition of the D.C. Circuit had changed suddenly and dramatically with the arrival of three new Reagan appointees: Judges Robert Bork, Antonin Scalia, and Kenneth Starr. Do any of those names ring a bell? Suddenly there were many more sharply divided panels and many more sharply worded dissents. On a court like this, even a review of the Federal Energy Regulatory Commission's decision on electricity rates and grids could stir up controversy. Even ministerial decisions within the court itself could stir up political passions. I am told that one day Judge Wald came back to the chambers from a conference fuming. She reported that one of her colleagues—I am quite sure it was not Judge Edwards—wanted to order the clerk of the court to stop sending the court's slip opinions to the federal prisons. It was at best a waste of money, he apparently thought, and probably an inducement to frivolous pro se litigation, but for Judge Wald this was about access to justice. Federal prisoners probably had a greater need for those opinions than most of us did. I think she might have won that little battle.

But there were many other battles over cases in those days. Many of them stemmed from Judge Wald's refusal to lose sight of the legitimate claims of the ordinary people who were behind even arcane administrative review petitions: the employees behind an NLRB decision that failed to remedy the consequences of egregious employer coercion, for example;<sup>1</sup> the retirees behind a pension benefit guarantee corporation's decisions denying insurance cover-

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1. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

age;<sup>2</sup> or the farm workers behind the Department of Labor's refusal to issue Field Sanitation Standards requiring employers to provide clean drinking water and toilets.<sup>3</sup>

There was never any question, in these cases or in any others, that the judge was committed to finding and following the law, and to tracing the technical commands of statutes and the factual complexities of voluminous records. But sometimes the most dedicated judge found room for, well, for judgment. Toward the end of her tenure she commented on what went into that judgment—she had quite a significant career in her extrajudicial writing as well. She was commenting on studies, including one by NYU [Law School]'s then-professor Richard Revesz, showing that judges' political predictions, or the party of the President who appointed them, tended to influence their decisions. This is what she said:

After almost 20 years on the D.C. Circuit . . . I register something of a ho-hum reaction to the notion that judges' personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another. Judges would be rudderless ships if we did not steer through uncharted and murky waters by some sense of conscience or some core of personal beliefs.<sup>4</sup>

Judges were guided, she thought, not just by conscious and personal values, but also by their experiences; and Judge Wald's experiences were not always the same as those of her fellow judges.

Judge Wald was once asked whether it made a difference in the legal system to have women judges. She acknowledged the maxim that "a wise man and a wise woman will come to the same conclusions . . . ."<sup>5</sup> She thought it a bit simplistic, however. Indeed, she said, "different wise women"—and there were a couple of wise women on the court at that time—"will come to different conclusions."<sup>6</sup> But she went on to say:

Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions. I can

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2. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

3. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (1987).

4. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

5. Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 989 (2005).

6. *Id.*

think of a few cases where being a woman entered into my conscience, but I can think of just as many where having worked in a factory, having been a Legal Services lawyer and having been a government official who dealt with Congress affected my perspective just as much. A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.<sup>7</sup>

The experiences that Judge Wald brought to the bench as a woman, as a working class kid, as the mother of five children, and as a public interest lawyer, certainly enriched the law—in the US and now globally—as well as the lives of her colleagues on the bench, her law clerks, and the litigants and lawyers whose cases she decided. So I am just thrilled to be part of today's recognition of Judge Wald's extraordinary experience in life and in the law.

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7. *Id.*