

## TRIBUTE TO HON. PATRICIA M. WALD

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Thank you, and welcome everyone; and a particularly warm welcome to Judge Wald. It is a great pleasure for me today to speak about Judge Wald. I first met Judge Wald back in 1980 when Jimmy Carter was President and I was applying for a clerkship. It may be hard to believe today, but back then the D.C. Circuit, where Judge Wald sat as a new judge, was considered a liberal court. Public interest lawyers used to fall all over themselves to get into the D.C. Circuit, which was very different from what happened later on. And judges there had an enormous amount of work to do. The regulatory state was then more robust than it is today, and the reign of the more extreme plain language ideas about how to read a statute had not taken hold<sup>1</sup>—*Chevron*<sup>2</sup> had not yet been decided. So for a court with a heavy docket of statutory and administrative law cases involving important public issues in which Congress had deliberated at length, and for which agencies had conducted significant hearings and conducted extensive deliberations, there was a lot of judging to do. Each case required careful review of the agency record and the legislative history.

By the time I started clerking in the fall of 1981, some of this had already started to change. Ronald Reagan was President, and later changes in the composition of the court were on the horizon. Some of the stalwart center judges of the court had taken senior status. There was a sense that things were changing, but at that time the basic work of the court really had not changed at all. We faced very complex cases from a wide range of agencies with immense and complex records.

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1. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted”); *Brogan v. United States*, 522 U.S. 398, 408 (1998) (“While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court’s jurisprudence. Courts may not create their own limits on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language . . . admits of no exception . . . we affirm . . .”).

2. *Chevron v. NRDC*, 467 U.S. 837 (1984).

From the very beginning, I deeply admired Judge Wald. She was a true judge. She approached every case with an open mind and a keen sense that the case affected real people who had real problems. She wanted to understand the complexity of every case. She wanted to understand the details of the legislative history. I have an image in my mind of books and books of hearings with little paper clips attached to the pages (we did not have Post-its). These marking were put in by Judge Wald as she went through the record and sought to understand what Congress or an agency was trying to accomplish. She became an expert on our most frequent party at the time, the Federal Regulatory Energy Commission. And Judge Wald really insisted on understanding all of this.

When Judge Wald was still a relatively new judge, she would sometimes talk about some of the aspects of the job that she did not like as much. She told us that outside chambers she was now limited to talking to people about the latest movies. Here was a person whom you could imagine had a lot to say about a lot of things. But, outside chambers virtually anything you talk about in Washington has to do with somebody's case so she was limited in what she could say. I think, though, that what bothered her most was when she saw poor advocacy in the court.

I remember one particular day in which a lawyer opened oral argument with the words, "It was a dark and stormy night." This was the kind of thing Judge Wald had no patience for, that sort of melodrama, those theatrics; they were not the kinds of things that mattered in cases. And she knew that what clients needed was top-quality legal reasoning and well-developed factual records, and not some melodrama. Similarly it would really bother her when a fancy partner argued a case who was clearly chosen to argue just because of the fanciness of the name, but who was unable to answer questions about the record.

For me, as a future social justice lawyer, these lessons were invaluable. I was taking mental notes all of the time about what truly mattered to courts. After I left my clerkship and went to do class action litigation at the Legal Aid Society, I would hear Judge Wald in my mind as I was thinking about the cases that I was putting together. I would think about her comments about what it takes to do effective advocacy. I would remember, for example, Judge Wald speaking to us about a case in which a lawyer—and this is of course now in 1981 or 1982—trying to pursue a due process argument based solely on *Goldberg v. Kelly*.<sup>3</sup> She would say, "Doesn't this law-

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3. 397 U.S. 254 (1970).

yer realize that the law has developed and that you have to be very attuned to the developments in the case law?" I also learned the importance of creating a powerful record. As a judge she could not fix the records; she could not change that. So while I learned a lot about how a judge looks at a case, I was also always learning about what it takes to be an effective advocate.

Judge Wald was also, as you can imagine, a role model for women clerks of the court. We made up about a third of the clerks, but we were all very aware that we were in what was, in fact, a fairly gendered profession and one that would continue to be gendered. I had grown up in a family of two parents who were pursuing careers, but for many of my co-clerks it was a very new experience to see a woman professional, and certainly one of Judge Wald's stature. People were interested in how she managed it all. One of the things I found very impressive was that unlike a lot of other pioneering women, Judge Wald did not focus on telling the women clerks on the court about how much easier we had it—although we certainly did have it easier in many ways. Instead, she was very sensitive to the things that were very hard for women in our day, in which women were expected to do it all and do it all easily. She listened and was a very sympathetic ear for the women clerks on the court.

Judge Wald was also a lot of fun. The highlight, I think, for the clerks our year was the time when we were out of town with Judge Wald, and we went to a bar and taught her how to play Pac-Man, which was the major videogame of the day. Judge Wald went around incognito; I do not know whose idea it was but we all decided that we would call her Marge so that nobody would know who she was. But she did learn how to play Pac-Man, and to us that said it all. Here was this brilliant, sophisticated judge, who was happy to learn a new game and play along with the ruse. So as one who has had the deep honor to clerk for Judge Wald, I want to thank the *New York University Annual Survey of American Law* for presenting this very fitting honor to this very distinguished and impressive lawyer and judge. Thank you.

