

## THE JUDGE

H. JEFFERSON POWELL\*

Almost every workday afternoon that we were in Morganton, around five thirty or quarter to six, the Judge would appear at my door. It was my door because of the happenstance that it was mine you came to first when you entered the library/clerks' area from the rest of the chambers. He would begin talking, and in a few moments we would be joined by Gary LeClair and Steve Tobin, my fellow clerks. Sometimes the Judge talked about a case on which he was working. More often, though, he told us stories. Some were funny stories, the sort for which his father, Senator Sam J. Ervin, Jr., was famous. Indeed, there was the occasional overlap (dutifully noted by the Judge with a "Dad tells the story . . ."), and *Humor of a Country Lawyer*, the Senator's marvelous collection of yarns, gives one something of the flavor of the Judge's afternoon conversations.<sup>1</sup>

The thread connecting the Judge's stories was not so much humor, however, but a certain stance or perspective toward the law. The stories were full of individual people—litigants, police officers, lawyers, jurors, judges—caught up in the legal process in one fashion or another. Humanity being what it is, many of these encounters had a humorous angle; others underscored the law's connections with conflict and violence. In every case, I eventually realized, at least part of the story's point turned on the way that the individual's unique personality shaped his or her involvement with the processes, institutions, and principles of the law. That was, the stories implied, as true of judges as of those who appeared before them.

After half an hour or forty-five minutes, the Judge would tell us to go home, and, saying goodnight to all, he would leave. Of course, it wasn't always possible to obey him—we suspected that he was over-generous in evaluating how long our work took given our apprentice legal skills—but, if I left soon after him, I knew that I would see him, or rather a sign of him, once more that evening. The

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1. See SAM J. ERVIN, JR., *HUMOR OF A COUNTRY LAWYER* (1983).

street out to my apartment went past the home of the Judge's parents, and I learned that it was his habit to stop by on his way home and visit with his mother and father for a few minutes.

A high percentage of the appeals that came before the Judge in those days were "screens"—appeals taken by unrepresented prisoners in federal habeas corpus and § 1983 civil rights actions. The name came, or so I understood, from the way in which the Court of Appeals handled them. Before the appeal documents were reviewed by the judges who would decide the case, each screen was analyzed by the law clerks working for the court itself. The clerks wrote brief memoranda on the legal issues and prepared draft *per curiam* opinions embodying their recommendations. Invariably the recommendation was to affirm the prisoner's defeat below, and nearly as inevitably the Court accepted the recommendation and issued the *per curiam* as its opinion without hearing oral argument. The process could seem brusque or off-hand, but its merits were clear. Although a few of the prisoners were experienced jailhouse lawyers, their complaints and briefs were usually long-winded and poorly structured—tedious reading at best. Furthermore, the vast majority of the appeals were, according to any competent attorney's view, without merit under controlling federal law.

In Judge Ervin's chambers, the screens went to the Judge and the other cases went first to the clerks. We had, it seemed to us, the fun part of the job: handling cases that (for the most part) were reasonably clearly presented, with (for the most part) reasonably competent briefs from both sides. Some of our cases really had only one conceivable outcome, to be sure, but many involved complicated issues of law and fact with no self-evident resolution. Gary, Steve, and I spent endless hours arguing over them as we wrote memoranda discussing the cases assigned to us. Meanwhile, the Judge, in addition to all his other work (including, of course, reading the briefs and record in each of the cases we worked on plus our memos), methodically read through each of the screens. We finally asked him whether it wouldn't make more sense for us to review them, particularly in light of the fact that they were almost always without merit. Thanks but no thanks was the answer. It was so hard to find the occasional valid claim in the screens, he explained, that he felt better about doing them himself. The point, he somehow communicated, was not lack of trust in us, but a sense that it was his responsibility, not ours, to make sure that each prisoner had been heard.

No one who clerked for Sam J. Ervin, III, could possibly have

doubted the seriousness with which he took both his job and the law that it was his job to administer. The law mattered deeply to him, but not, I think, primarily out of some abstract devotion to the “Rule of Law” or to the institutions of government. The law matters because it is about people. Through its processes, individuals are helped or hurt, treated justly or unjustly, heard or dismissed without regard. Judge Ervin taught me that we understand the role of the law and our place as lawyers only when we keep in view the humanity of all those whom the law touches, including (of course) ourselves. Rather than being an irrelevance or a distraction from the lawyer’s task, the profoundly human qualities of affection, respect, and compassion are the basis of true greatness in the law, the sort of greatness that is also a form of humility, involving the recognition that legal office is an opportunity for service. Judge Ervin taught this lesson by living it, wisely and well.

