

American University Washington College of Law

From the Selected Works of Jeffrey Lubbers

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A Tribute to Judge Patricia Wald

Jeffrey Lubbers, *American University Washington College of Law*

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Jeffrey S. Lubbers*

The world suffered a great loss on January 12, 2019, when Patricia Wald succumbed to cancer at the age of 90.

She was a pathbreaker in administrative law and in many other ways. Raised by a single mother in a working-class, Irish-immigrant family in Connecticut, she was the first member of her family to attend college. She rose to be the first woman to serve on the D.C. Circuit, as well as the first woman Chief Judge of that prestigious court. She also had an equally distinguished career after her tenure on the D.C. Circuit. Among those highlights, she served as the U.S. representative on the International Criminal Court for the Former Yugoslavia (ICTY), was appointed by President G.W. Bush to the President's Commission on Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction, and was appointed by President Obama to the Privacy and Civil Liberties Oversight Board and to the Council of the Administrative Conference of the U.S. She also won many awards, including the American Bar Association Medal and the Presidential Medal of Freedom in 2013, and was honored as a Senior Fellow of our Section. Although Judge Wald was a professed political liberal (she enthusiastically went door-to-door to support President Obama in 2008), she was admired by her conservative colleagues such as Judge Silberman, who recommended



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her for President George W. Bush's "Intelligence Commission," which he co-chaired.

Judge Wald penned more than 800 opinions on the D.C. Circuit. Approximately half were administrative law decisions, many of which are still influential today. But this just scratches the surface; she also wrote many influential concurring and dissenting opinions. One notable dissent concerned the court's upholding of the expulsion of a midshipman from the Naval Academy for homosexuality. She concluded her dissent by remarking: "For the government to penalize a person for acknowledging his sexual orientation runs deeply against our constitutional grain. It has, we believe, no precedent or place in our national traditions, which spring from a profound respect for the freedom to think and to be what one chooses and to announce it to the world." *Steffan v. Perry*, 41 F.3d 677, 721 (D.C. Cir. 1994) (en banc) (Wald, J. dissenting). This was two decades before Justice Kennedy opened his opinion in the gay marriage case by echoing those words: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

One of her most famous decisions, *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), is a good illustration of her willingness to decide cases counter to her politics when administrative law principles demanded it. As discussed in more detail elsewhere in this Issue (p. 18), *Sierra Club* involved challenges by environmentalists and utilities to a major Environmental

Protection Agency sulfur-dioxide emissions limitation for coal-fired power plants. Environmentalists not only contended that the emissions limitation was too low, but also that the rulemaking had been tainted by *ex parte* communications, including those made by representatives of the White House and Congress. The court upheld the rule.

As Judge David Tatel later remarked at the Portrait Presentation Ceremony for Judge Wald at the D.C. Circuit in 2003:

In the area of administrative law, for example, her 99-page, 540-footnote opinion in *Sierra Club v. Costle* set the gold standard for judicial review of the scientifically and technically complex administrative records that make up our court's standard fare. In *Farmworker Justice Fund v. Brock* [811 F.2d 613 (D.C. Cir. 1987)], she applied her usual careful analysis of agency action—in this case, agency inaction—and ordered the Labor Department to issue regulations setting fundamental health and sanitation standards for farmworkers. Judge Wald also tackled some of the most critical questions of executive power that this court has faced. She defined the scope of the presidential communications and deliberative process privileges, remaining, as she wrote, "ever mindful of the dangers involved in cloaking governmental operations in secrecy" while, as she also put it, "preserving the efficacy and quality of presidential decisionmaking."

Another side of Judge Wald was her willingness to participate in academia. A Westlaw search shows 99 law review articles authored by her. The earlier ones were mostly about administrative law, judging, and the D.C. Circuit. The later ones were mostly about the ICTY

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and human rights. But there was also a sprinkling of tributes to other judges and lawyers, commencement addresses, and articles about women in the law. All are worth reading, but here are 5 administrative law-related highlights:

- “*For the United States*”: *Government Lawyers in Court*, 61 LAW & CONTEMP. PROBS. 107 (1998);
- *Judicial Review in the Time of Cholera*, 49 ADMIN. L. REV. 659 (1997);
- *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221 (1996);
- *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621 (1994); and
- *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

On a personal level, Judge Wald was funny, self-deprecating, and demanding. She was especially helpful to young lawyers. When I was one in the mid-80s, the Federal Bar Association asked me to organize a special administrative law issue for their journal. I thought it might be a good idea to interview the newly installed Chief Judge of the D.C. Circuit. She took my call and readily agreed.

The first question I asked her was what she “would tell the law student or young lawyer about the field [of administrative law]?”

She replied as follows (which I relay to my administrative law students each year on the first day of class):

I would tell them that it is an immensely interesting field and in a sense a window on the world. I found since I came on the court that through the window of administrative law you learn a great deal about many facets of real and regulatory life. One day you may be reviewing a Social Security rule and the next day you’re reviewing an [EPA] rule on a toxic chemical or [health] standard on the workplace. Through the window

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of administrative law you get to see the entire gamut of what the government is doing and I think, in a small way, affect the lives of an enormous number of people.

So administrative law is really fifteen kinds of subject matter rolled into one. That’s why it is so interesting; no one administrative law case is like any other

administrative law case. In fact, one interesting aspect to me has been the relatively small amount of precedent in the field. Surely we have some overriding guidelines from *Vermont Yankee*, *Chevron*, [and] *Heckler v. Chaney*,¹ but administrative law is not the sort of field where you run to the law books and find another case and that tells you how to rule. Almost every situation is unique.

I ended by asking her, perhaps a bit impertinently: “What would you like people to say about you when you ... retire from public service?”

Her answer was typically modest: “Oh, the usual. That she worked very hard, she was a reasonably good administrator. She was a thoughtful and fair judge and she made some small contributions towards pushing the law forward as an effective means of solving human and social problems.” Jeffrey Lubbers, *Administrative Law as Seen from the DC Circuit: An Interview with Chief Judge Patricia M. Wald*, 34 FED. BAR N. & J. 15 (1987).

It seems clear that Pat Wald did not just “work very hard,” nor was she just “a reasonably good administrator,” who “made some small contributions towards pushing the law forward.” She was an inspiring leader of the legal profession, an admired Chief Judge of the second most important court in the U.S., an administrative law innovator, and a human-rights reformer who made huge and lasting contributions to the law. She will be sorely missed. ○

1 Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519 (1978); *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Heckler v. Chaney*, 470 U.S. 821 (1985).

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