North Dakota Law Review

Volume 51 | Number 3 Article 6

1974

Book Reviews

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BOOK REVIEWS

SERVING JUSTICE—A SUPREME COURT CLERK'S VIEW. By J. Harvie Wilkinson III. New York: Charterhouse, 1974. Pp. 207. $7.95.

Still within the first year of my clerkship for a Federal District Judge, my interests were aroused by J. Harvie Wilkinson's book *Serving Justice*. My initial hopes were for a book describing the nebulous position of a law clerk. After a reading, I became at least partially satisfied. During the 1971 and 1972 terms of the Supreme Court, Wilkinson served as law clerk to Justice Lewis F. Powell, Jr. This book is a reflection upon that experience.

Wilkinson does a fine job in exploring the interworkings of a Supreme Court staff. Between the personal evaluations of the Burger Court and the "Justice," Lewis Powell, evolves a refreshing diary of a Court term. One gains immeasurably from the author's vivid recollections of his year with the Supreme Court.

From the beginning we are reminded that there is no court like the Supreme Court.

> The Supreme Court, I was convinced, is the most fascinating branch of American Government. Lacking an elective mandate, the Court is perenially vulnerable; I have often wondered how it managed to survive. Beethoven's Fourth Symphony is a beautiful and serene piece between the more boisterous themes of the Third and Fifth. Schumann even called the symphony "a slender Greek maiden between two Norse giants." That image might aptly describe the place in government of the United States Supreme Court.[1]

In lawyerlike style, the book is divided into chapters entitled simply—"The Acceptance," "The Clerk," "The Justice," "The Court" and "The Departure."

"The Acceptance" describes the selection process and the background necessary for consideration as a Supreme Court law clerk. Both are extensive and impressive. For Mr. Wilkinson, the position was described as an "incredible longshot";[2] however, the odds were cut significantly when an old family friend was appointed Associate Justice of the Supreme Court. Acknowledging the fortuitousness invloved in becoming a law clerk, the author states:

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1. J. WILKINSON III, SERVING JUSTICE 151 (1974).
2. *Id.* at 1.

> The clerks I knew did not generally regard themselves as some ordained group; most, in fact, acknowledged the large element of breaks and good fortune that led to their appointments.[3]

Some of the most authoritative comments by the author are contained in his chapter "The Clerk." He does a credible job impressing upon the reader not only the role of these silent figures behind the bench but revealing the profile of the traditional court family.

> The size of the personal staff of an Associate Justice of the Supreme Court is typically quite small. During my term as a clerk most chambers consisted of six persons: The Justice himself, a personal secretary, a messenger and three law-clerks.[4]

A feeling of unity, and of compactness arises out of such an arrangement as does "the feeling of being harnessed together . . .to accomplish the arduous job of research and analysis. . . ."[5] At times Wilkinson lapses into pages of subjective comment on cases, the court and the system, but the realization that he stood behind the decision makers makes his comments, at the very least, intriguing. Without a doubt, clerking affords one a dramatic overview of the legal system and most explicitly the lawyers participating. The former clerk's comments draw further credibility from the fact that "relationships between Justices and clerks are generally cordial, and the Supreme Court is remarkable in the extent to which it takes law clerks into trust."[6]

Wilkinson also observed that a Justice relies on his clerks, "not only for legal work but for personal compatibility, without which a year together in a small and independent chambers might be grim."[7] Concluding such a chapter, the reader is impressed with a feeling of the responsibility of the clerks' role, the latitude and limits of their office, and the faithfulness and loyalty of their service.

I applaud Wilkinson's revealing characterization of the position. Certainly anyone with interest in the interworkings of the Court will gain valuable insight. The only omission, like so many writers before, is that Wilkinson fails to shed any further light on the probative question: What influence does the law clerk exert? Perhaps the question is unanswerable.

As for the chapter on "The Justice," Wilkinson assures us that Mr. Powell, distinguished in practice, has carried his expertise and

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3. *Id.* at 38.
4. *Id.* at 14.
5. *Id.* at 15.
6. *Id.* at 40.
7. *Id.* at 53.

dedication onto the Supreme Court. With an obvious tinge of loyalty, the author sets out a positive profile of the man's public and private life. We find little adverse comment as one might expect of a close aide. Once again, the greatest contribution is the humanization of the individual.

> What I admired was his calm, a quality of quiet and reflection that underlay his judgment, a philosophic turn of mind that almost never lapsed into resignation or indifference.[8]

The immense responsibilities and "deistic"[9] powers seem in good hands. The chapter is personal, and contains observations and comments of a close confidant of the Justice. Despite the absence of criticism, it is entertaining. After a reading, one would ask how Senator Fred Harris could have voted against such a man, or better yet, understand how everyone else voted for him.

In a discussion of "The Court" and its place in the American System, the emphasis is on the Burger Court, as opposed to the Warren Court. The author attempts to ease the fears of those expecting an abrupt end to a legacy of reform. Instead of comparing the two courts, Wilkinson contrasts, and concludes simply that you can't analyze the new Court independently of its predecessor. There's definitely been a change, but:

> Much more of the Warren legacy survived than was being destroyed. Not only was its work not being extinguished, the present Court was, in the main, working responsibly with [the] tradition [of the Warren Court], shaping and adapting it to new circumstances and problems.[10]

The chapter gives a historical perspective of the accomplishments of Earl Warren and the beginnings of Warren Burger. The author asks us to judge by performance.

> I think it unfair to be thinking of the Burger Court solely in terms of what it had or had not done to the Warren legacy. As years pass the new Court will stamp its own unique mark on the great constitutional issues.[11]

Of significance is Wilkinson's disclaimer of the Nixon influence. "The place of personal independence within the Supreme Court has somehow escaped those who see the Nixon Justices in lockstep."[12]

What follows is an appraisal of the newest Justices and their initial effect on the direction of the Court. While recognizing the change in tempo of the Court, perhaps attributable to a different ju-

8. *Id.* at 76.
9. *Id.* at 73.
10. *Id.* at 50.
11. *Id.* at 148.
12. *Id.* at 156.

dicial philosophy, the author plays down bloc voting and stereotyping. He proposes that more time may be needed to determine the effect of the Nixon appointees, a period of adaptation. There appears optimism in the evaluation.

> The philosophies of the newest appointees have not as yet fully matured. Such things take years of knowledge, reflection, and case experience at the Supreme Court level. As time passes, differences between the newest Justices may increase, and distinctive constitutional approaches can be expected to emerge.[13]

What a Justice does is unpredictable. We are left with the hope that personal independence characterizes the present Court as notably as it has in the past.

The concluding chapter, entitled "The Departure," is as terse as the departure itself. The message is that experiences such as this never really end, and Mr. Wilkinson will continue to reflect on this one, as conveyed by his parting comments.

At a time when the Court has so affirmatively exerted itself so as to have affected even the most unconcerned citizen, the book is timely. We periodically need reminders of the human element behind the "landmark decisions." *Serving Justice* is such a reminder.

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PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE. Edited by Reed Dickerson. Chicago: American Bar Association, 1973. Pp. 351. $7.95.

THE DANCE OF LEGISLATION. By Erick Redman. New York: Simon and Schurster, 1973. Pp. 319. $7.95 (hard cover), $2.95 (paperback).

These are two excellent books about a subject which, unfortunately, gets what attention it does in North Dakota only about three months every two years when the legislature meets. The subject deserves much more.

Both books deal with federal legislation, but there are comparisons that can be made to state and local levels. Dickerson is a nationally recognized expert on legislative drafting. His book is actually of the non-book genre. It consists of edited versions of 19 addresses given at the National Conference on Federal Legislative Drafting in

13. *Id.* at 172.

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the Executive Branch sponsored in 1971 by the American Bar Association. As such, it contains innumerable hints and discussions on the technical aspects of drafting federal laws.

Redman's book, on the other hand, deals specifically with one piece of legislation—The National Health Service Corps—from its beginning as the ideas of a Seattle physician to its passage in the waning hours of the 91st Congress and the literal last-minute signature by President Nixon which made it law. Redman was an assistant to Sen. Warren Magnuson,[1] the bill's sponsor, during much of the 91st Congress. He has since been a Rhodes Scholar, taught writing at Harvard College, and graduated from Harvard Law School.

Unless they were political science majors, most lawyers probably have not had any courses on or dealings with the legislative process since "how a bill becomes a law" type of lessons in grade school or high school civics. Law school legislation courses, unfortunately, usually dwell more on judicial review of legislation, and the constitutional or technical deficiences which cause court cases. I say unfortunately because this aspect of legislation is only the tip of the legislative process iceberg.

Redman's well written book takes the reader through the entire legislative process, including the ups and downs a measure encounters in committees, the political realities of the committee process, the importance of getting a bill assigned to the "right" committee, the legislative rules labyrinth, the importance of witnesses for and against the measure, the influence individuals can and cannot wield, how the bureaucracy and the executive branch enter into the legislative arena both overtly and covertly, the amount of attention and effort that is needed to get a major piece of legislation safely through any legislative body and signed by the executive, and a general look at Congress and its procedures. The book's pace is definitely up beat, and its clear, concise prose catches the true spirit of the legislative process.

The book is an invaluable primer on the legislative process in general, and will give readers a good understanding of a state legislative process as well, a process that may not be as large in scale, but is similar in operation. After reading Redman's book, for example, a North Dakota reader could appreciate the maneuvers and feigning that accompanied the rise and fall of the 19-year-old drinking issue in the 1975 North Dakota Legislature.

A bill to allow 19-year-old drinking in North Dakota was introduced in the House of Representatives with bi-partisan support. However, the sponsor didn't bargain on a clever rascal who announced

1. Senior senator from the state of Washington.

he was sponsoring a resolution referring the 19-year-old drinking question to a vote of the people at the next statewide election.

There was a collective sigh of relief in the legislature as legislators saw a chance to get out of one of those nasty situations where you catch a considerable amount of heat no matter which way you vote. Support for the 19-year-old drinking bill faded quickly, and its sponsor withdrew the measure. Then the legislator who was going to sponsor the resolution said that since there was no longer any bill, he didn't see any real need for a resolution either. Now that's legislative dancing of the first order!

One of Redman's chief talents, his clear and concise writing style, could solve about 75 per cent of the problems described in Dickerson's book. Leon Jaworski, who was then president-elect of the American Bar Association, and who was soon to gain national fame by doing something other than giving talks on legislative drafting, noted that, "It is hard to put a price tag on badly constructed legislation. How can we measure the cost of litigating the uncertainties of meaning that are brought about by a language that is ambiguous or needlessly vague?"[2] He was actually being charitable in terming some legislative language, which is most often attorney-crafted language, as just vague or ambiguous. Often, it seems attorneys follow a caveat lector theory.

Dr. Rudolph Flesch, the readability expert, spent one chapter of his excellent little book, *The Art of Readable Writing,* on the need to keep sentences short and readable. He said a typical magazine article now runs less than 20 words per sentence, and that an ad-lib radio discussion on foreign affairs about the same.

> When we try to imitate dialogue or conversation on paper, we naturally stick to short sentences and our average may run to 15 or even ten words per sentence. But as soon as we get the itch to appear more serious and dignified, up it goes and we get more and more Victorian; and when we yield to the temptation of pompousness, we get downright monstrous and write sentences no man has ever said aloud.[3]

After noting the problems of academicians and political pundits in this regard, he zeros in on lawyers.

> But there is one profession that thinks it can't live without long sentences: the lawyers. They maintain that all possible qualifications of an idea have to be put into a single sentence or legal documents would be no good.[4]

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2. Jaworski, *The American Bar Association's Concern with Legislative Drafting,* in PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE 5 (R. Dickerson ed. 1973).

3. R. FLESCH, THE ART OF READABLE WRITING 122 (1969).

4. *Id.* at 124.

Flesch quotes a Harvard law professor and Judge Cardozo on the dangers of long legalistic sentences, but acknowledges that they persist. He picks on an easy topic, the Internal Revenue Code, and cites a 440-word monster sentence to illustrate his argument. Flesch should be penalized for picking on too easy a subject. What IRS section is understandable?

You don't need to go to the IRS Code to find examples of lawyers and their interminable sentences, qualifying everything before a period shows up through an assortment of trusty legal phrases such as "provided," "provided that," "except," "whereas," "herein," etc.

In the North Dakota Century Code, you can turn to almost any section and find sentences 15-25 lines long, containing from 100-250 words. And, you don't have to single out the Century Code as a sentence sinner. A quick perusal of law review articles, appellate briefs, law school class papers, and correspondence from and between attorneys will yield much the same thing. The problem exists on a state level as much as in the federal arena.

Other speakers in the Dickerson book sound a similar theme. Rep. Wilbur Mills—who also gained a measure of national prominence after, but not because of, this address on legislation—notes the need for tax laws, and presumably of legislation in general, to be written "in a style targeted toward understanding, not obfuscation."[5] He urges law schools to teach at least the fundamentals of legislative drafting.

Speaking from the view of the bench, Judge Harold Leventhal of the U. S. Court of Appeals, District of Columbia, complains of excess verbiage and says draftsmen should have as a motto, "Less is more."[6]

Other speakers cover the gamut of drafting problems, ranging from who is the better drafter, a professional draftsman or a person familiar with the subject matter (the former, says editor Dickerson) to when the draftsman should be brought into a discussion of probable legislation (as soon as possible, according to many of the speakers).

The Dickerson book is full of discussions of the nitty-gritty problems of draftsmanship, and as such its usefulness is probably limited to those deeply interested in the field. However, taken as a pair, the Redman and Dickerson books provide a complete picture of the legislative process, and could be used as such by students of legislation as well as by attorneys who either draft legislation for individual clients or represent clients before legislative committees.

As Mr. George Murphy, Legislative Counsel of California, says

5. Martin, Mills & Litell, *How the Problem Looks to the Legislative Branch: Congressional practices that Affect Executive Responsibility*, in *supra* note 1, at 15.

6. Leventhal, *How the Problem Looks to the Court*, in *supra* note 1, at 28.

in the book, "The drafting of legislation is treated as legal work of the highest order."[7] It should be. State laws affect all North Dakotans. The state is fortunate to have several attorneys working for the Legislative Council who are skilled as professional legislative draftsmen. However, they don't draft all the laws. It should be incumbent upon every North Dakota attorney to keep his or her legislative drafting skills, as well as general writing skills, honed and up-to-date.

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7. Murphy & Vaughn, *How Two States Meet the Problem*, in *supra* note 1, at 100.

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