



REMARKS ON HENRY FRIENDLY

ON THE
AWARD OF THE HENRY FRIENDLY MEDAL
TO JUSTICE SANDRA DAY O'CONNOR

Pierre N. Leval

PRESIDENT RAMO CALLED ME a couple of days ago with a problem. Young people today (and this includes youngsters up to the age of 50) apparently do not know who Henry Friendly was or why the American Law Institute awards a medal in his name. Would I address those questions tonight?

At first I was astonished by Roberta's proposition. Friendly was revered as a god in the federal courts from 1958 to his death in 1986.

In every area of the law on which he wrote, during a quarter century on the Second Circuit, his were the seminal and clarifying opinions to which everyone looked as providing and explaining the standards.

Most of us who earn our keep by judging can expect to be deservedly forgotten *within* weeks after we kick the bucket or hang up the robe and move to Florida. But for one whose judgments played

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such a huge role, it is quite surprising – and depressing – that the memory of him has so rapidly faded. Later, a brief exploration why this might be so.

I begin by recounting, for any who don't know, what some purple-robed eminences of the law have said about Friendly.

Judge Posner, citing Friendly's "photographic memory combined with his analytical power, energy, speed, and work ethic," called him "the most powerful legal reasoner in American legal history."¹

Herbert Wechsler, who guided the ALI for decades, and who was not given to scattering praises with reckless abandon, wrote with special reference to Friendly's prolific writings, and his immensely valuable ALI work, "Only the genius that Henry Friendly was could produce scholarly material of this quality and volume [N]one of us, of whatever age or station, will see his equal or his like again."²

Harvard's great Professor Paul Freund speaking of Friendly's student days described him as a "legend in his own time," whose attainments were "part of the lore of [Harvard] University."³ (This referred to Friendly's arrival at the college at age 16, his dazzling of the History faculty, which sought to keep him for their own, and his entry instead to the Law School where he had what is believed to be the highest average ever attained.)

For Felix Frankfurter, he was "the best judge now writing opinions on the American scene."⁴

For Charles Wyzanski – "the best judge now sitting in any court in the United States."⁵

¹ Richard Posner, email message dated Oct. 11, 2011 to the author, referring to Posner's undertaking to write a Foreword for David M. Dorsen's soon to be published biography of Henry Friendly (on file with author).

² Herbert Wechsler, Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly 20-21 (1986) (transcript available in 805 F.2d LXXXI).

³ Paul Freund, *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1715, 1715 (1986).

⁴ *Id.* at 1720.

⁵ Letter from Charles E. Wyzanski, District Judge, U.S. District Court for the

Remarks on Henry Friendly

Judge John Minor Wisdom, in whose name this Institute also makes a distinguished award, said, “except for the giants (Holmes, Brandeis, and Cardozo) and possibly Learned Hand, no federal appellate judge has commanded more respect”⁶

Justice Thurgood Marshall, commenting on the conventional Second Circuit wisdom that one should, “Quote Learned, but follow Gus,” said that for him the rule will always be, “Quote Friendly, and follow Friendly.”⁷

When Justice Brandeis had Friendly as his clerk in 1928, recommended by then Professor Frankfurter, Frankfurter called the Justice to ask how Friendly was doing. Brandeis answered, “Don’t you ever send me another such man as Friendly. If I have another man like him, I would not have to do a lick of work myself.”⁸

And a superb biography of Friendly by David Dorsen, soon to be published by the Harvard University Press, proclaims him the greatest judge of his time.

To those of us who had the privilege of clerking for him, his genius was all the more astonishing – because we saw the ease and speed with which he produced his great opinions.⁹ He carried virtually all of law in his head. What is more, in his head he saw clearly the junctions, intersections, overlaps, and disputed territories of the seamless web. And his mind worked with the speed of computer circuitry – that is, on the computer’s good days.

When it came to writing an opinion, Friendly would sit himself at a writing table surrounded by the briefs and appendices. Having

District of Massachusetts, to Michael Boudin (Feb. 19, 1985) (on file with author).

⁶ John Minor Wisdom, *Views of a Friendly Observer*, 133 U. PA. L. REV. 63, 63 (1984).

⁷ Thurgood Marshall, Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly 8 (1986) (transcript available in 805 F.2d LXXXI).

⁸ *Id.* at 7.

⁹ See generally Pierre N. Leval, Remarks at the Extraordinary Session of the Court of Appeals for the Second Circuit in Memoriam of Judge Henry J. Friendly 16-17 (1986) (transcript available in 805 F.2d LXXXI).

quickly read through these, he knew them cold. He would sit with a pad of lined paper and begin to write by hand. As he sat down to the task, the entire opinion had already been organized and written in his head. He would write, single spacing, from the left hand edge of the page to the right, leaving no room at all for modifications. He would write at approximately the same speed as if he were copying an existing text. Indeed, he was.

He often quoted from Learned Hand. When he did, he would rise from the table, walk over to the bookshelf, and grab the volume that he knew contained the Hand opinion. Sometimes, he needed to check the index for the page; more often not. The interruption of rising to get the volume from the shelf was, indeed, unnecessary. He could have done it all from memory, leaving at most tiny corrections for his clerk.

When he needed citations for a point, it was done the same way. He would rise, pluck from the shelf the volume that he knew contained the opinion in which he had squirreled away a string cite on this point, and would copy it into the new opinion.

In this fashion, he regularly produced, as rapidly written first drafts, perfect final opinions. Apart from the occasional addition of a few certs denied, no changes were needed. For many opinions, the clerks had practically no role. New research was rarely needed – unnecessary, as it was all in his head. Their only significant offices for Friendly were two: to keep him in touch with what the great professors were thinking in the law schools, and occasionally to challenge some part of Friendly's analysis.

When a clerk did that, it took the judge only a second to know whether he liked the critique or not. If not, he rebuffed it brusquely. But if he liked it, receiving a valid contradiction from his clerk gave him immense pleasure. He instantly understood its merits and set about to fix the problem. He glowed with delight and pride in his clerk.

So why has this greatest of judges slid into obscurity barely a quarter century past his death?

A few possible reasons. One, I suppose, is fetishistic and misguided adherence among judges and law clerks to the supposed

Remarks on Henry Friendly

principle of citing authorities in reverse chronological order.¹⁰ While everyone had looked to Friendly's opinions for guidance, the cases that came to be cited first for the vibrant propositions Friendly had authored were the most recent in the line of opinions that mechanically, and sometimes uncomprehendingly, cited his. Within a few years, the Friendly opinions dropped off the page.

In addition, some of Friendly's most admirable qualities as a judge have contributed to obscuring his reputation.

Friendly was not a flashy judge; not a headline grabber; not one to look for the quotable one liner. He shunned rhetorical flourishes designed to make rulings look more obvious, indisputable, or necessary than they are. He presented the questions in their full complexity. His opinions made difficult reading – often requiring intense concentration to understand. And their complexity made them difficult to explain to non-lawyers.

Nor was he a judge (in today's mold) who sought opportunities to discard governing precedent in favor of results more to his liking. He was constantly engaged in explaining, rationalizing, and improving the state of the law as a living, functioning organism, whose rules have purposes, limits, and interactions with other rules – all of which must be understood to make them function effectively. Not glamorous, but immensely useful.

A final reason for Friendly's puzzling obscurity today was his powerful inclination toward moderation. He was not interested in intellectually pure, but extreme and impractical, solutions. He was always attuned to the practical consequences of rules of law, and of the tendency of abstract principles to push beyond their utility. He was keenly aware of the value of precedent and of how ill-suited courts and judges are to chart the course for society, except when profound injustices require correction. (He was no doubt influenced in this regard by his brilliant pre-judicial career in the practical world of business affairs, as a leading partner of a major law firm

¹⁰ Bluebook Rule 1.04 in fact provides that “[i]f one authority is considerably more helpful or authoritative than the other authorities cited within a signal, it should precede the others.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 56 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).

and as general counsel and an officer of a major business corporation.)¹¹

His rulings were not destined to make headlines – nor to be extolled in editorials. They were, nonetheless, the finest exemplars of the judicial craft.

And so, at his death, twenty-five years ago, inspired and led by Michael Boudin, who had been Friendly’s best and favorite law clerk – like a son to the judge – the Friendly clerks planned and endowed the Henry Friendly Medal to be awarded from time to time by the American Law Institute for outstanding contributions to the law in Judge Friendly’s great tradition.

A part of the purpose, presciently identified in Michael’s letter to Rod Perkins proposing the gift, was “to remind the legal community . . . of Judge Friendly’s own great contributions to the law.”¹² That is what Roberta asked me to do tonight.

It is not my office to sing the praises of the person who receives this honor named for Henry Friendly. That privilege belongs to others. I will, however, allow myself a tiny trespass. Justice O’Connor, your practical wisdom, your sage reluctance to break the molds and toss over precedent, your appreciation of the enormous value of modesty, moderation, and compromise in judging, make you a particularly wonderful and gratifying choice to be honored by the American Law Institute in Henry Friendly’s name.



¹¹ Judge Friendly was a founder and leading partner of Cleary Gottlieb Steen & Hamilton, originally named Cleary Gottlieb Friendly & Cox. In the latter part of his prejudicial career, simultaneous with his law practice, he served as General Counsel and an officer of Pan American Airways.

¹² Letter from Michael Boudin to Roswell B. Perkins, President, American Law Institute (Dec. 2, 1986) (on file with author).