

A CONSUMMATE GENTLEMAN AND A JUDGE'S JUDGE

*Ilya Shapiro**

The last day of our clerkship, all three of us were waiting to get sworn into the Fifth Circuit bar. As the hour grew late and we grew antsy, Judge E. Grady Jolly was still ensconced in his office. I went in and asked when we were doing the swearing-in. He cocked his head and replied, “We ain’t doin’ no ceremony because all o’ y’all failed the character and fitness requirement. You and Jeff for obvious reasons and Jeremy [a Mormon] for drinking Diet Coke.”

That was an appropriate concluding moment to an unforgettable year, one in which a great and wise man performed the duties of his high judicial office with humility and jocularly—and imparted important life lessons on three cocky young lawyers.

For me, it began with the most unusual job interview I’ve ever encountered. One day in the fall of my second year of law school, I got a call from Judge Jolly’s chambers, inquiring about my availability for a phone interview the next afternoon. The “interview” lasted about 10 minutes and comprised but two questions that would make a corporate human-relations officer blanche: (1) “Are you married?” and (2) “Are you Jewish?”

Let me explain. Most of the phone call consisted of Judge Jolly’s explanation of how he runs chambers and what he expects of his clerks. It became clear that he was making sure that I knew what I was getting myself into so it would be a good fit for both of us. Accordingly, he was wondering whether a single, northern guy would have qualms about life in Jackson, Mississippi—not because of politics or even culture, but just socially—and wanted

* Senior fellow in constitutional studies, Cato Institute; editor-in-chief, *Cato Supreme Court Review*; law clerk to Judge E. Grady Jolly, 2003–04.

to assuage them. He needn't have been concerned.¹ In any event, he gave me an offer, which I readily accepted.

Fast forward nearly two years. I went on a post-bar trip to Rome and the Amalfi Coast right before starting the clerkship, and sent Judge Jolly a postcard. On my first day of work, Judge walks into my cubby in the old chambers at the James O. Eastland Courthouse—built when clerks spent most of their time poring over voluminous legal texts in the capacious library—introduces himself (as if he needed any introduction), and asks, “So, did you hook up with any crazy Italian women?”

Now, I'm not frequently speechless, but I wasn't sure what the right answer was—and still don't know. Yet that interaction set the tone for the term: keep on your toes and don't take yourself too seriously.

Judge Jolly made clear from day one that we were there to help him “get the law right,” to follow constitutional, statutory, and common law wherever it may lead and not worry about anything else. His was not on a “teaching court” and he had no truck with pontification or disquisitions on this or that pet theory. He was there to decide cases and resolve legal disputes, period.

I recall that before one of my first oral-argument sittings, we got a bench memo from another judge—like the Supreme Court's cert. pool, many circuit judges share their clerks' summaries of the cases they hear together—that Judge Jolly found too verbose. “Ilya, this is 40 pages for what seems to be a simple case. Come back to me with no more than eight.”

And then there were several times that we received a draft opinion from another judge that Judge Jolly found too sprawling. “Boys, this is 50 pages of purple prose and needless factual background,” he would announce to our all-male cohort upon walking into the common area. “I don't want to see it till it's 12 pages of law.”

At one point in a draft opinion or memo calling for en banc rehearing, I had gotten a little purple in my own prose. Judge Jolly returned the document with several pages crossed out and the notation, “I'm not Jesse Jackson.”

¹ My social life during the clerkship year will have to be the subject of a different tribute, but note that the first-ever Shabbat service I ever attended was in Jackson, at Beth Israel, when I had nothing to do on a Friday night.

Some lessons were more wistful or metaphoric. For example, when one of us clerks was feeling particularly good about our efforts—or particularly bad—Judge Jolly would be quick to note that “the sun don’t shine on every dog’s behind every day.” And if one of us made a hash of some complicated case, Judge wouldn’t so much admonish us as give direction on how to rewrite a passage or redirect our research: “You gotta follow the big coon and not get lost on any rabbit trails.”²

One of those complex cases my year was *Mayo v. Hartford Life Insurance Co.*³ In *Mayo*, Wal-Mart had taken out life insurance on its employees and designated itself as the beneficiary. The estate of one these employees sued, alleging that Wal-Mart illegally benefited from his death and seeking to recover the funds that an insurer had paid the company under the policy. It seemed like a quixotic case, but millions of dollars were at stake because fewer than one percent of the 350,000 eligible employees opted out of a special death-benefit program that triggered the company-owned life insurance. Ultimately, Judge Jolly wrote for a unanimous panel that: (1) the law of Texas (where the deceased employee lived) governed the dispute; (2) under Texas law, an employer lacked an “insurable interest” in an ordinary employee; and (3) Wal-Mart had failed to establish that the applicable statute of limitations had run.⁴ It was a pithy opinion—just 11 pages in the federal reporter—but contained 18 footnotes and methodically traced insurable-interest law back to 1894. One non-party close to the case called the opinion “scholarly.”

The *Mayo* case shows that Judge Jolly is a judge’s judge instead of an ideologue. Although his reputation pegs him as a solid conservative, he readily admits that after he graduated Ole Miss law school in 1962, he had to leave the state for a couple of years because of what, for the Magnolia State, were certain liberal proclivities. Years later, two of his most famous opinions ruled against a Louisiana law requiring the teaching of creationism⁵

² Lest anybody consider that advice to be some sort of microaggression, let me assure you that the way one hunts raccoons is indeed to focus on their tracks and not get distracted by the similar ones produced by hares.

³ 354 F.3d 400 (5th Cir. 2004).

⁴ *Id.* at 402.

⁵ *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985), *aff’d*, 482 U.S. 578 (1987).

and enjoined the application of a Mississippi law that would've closed the state's only abortion clinic.⁶ The latter case was covered by the *New York Times*, one of the very few occasions that the work of this no-nonsense jurist received national attention.⁷

Moreover, a Republican appointee of his generation could've been expected to be a "law and order" type, and yet, like his friend, the late Justice Antonin Scalia, he has authored and joined many opinions reversing convictions where the government went beyond its constitutionally enumerated powers or violated the defendant's rights.

The long and the short of it is that Judge Jolly has always tried to just follow the law. He treats parties that come before him as they come, on the law's terms. His approach parallels something you could hear from a talking Kinky Friedman doll produced during the iconoclastic musician's quixotic 2006 Texas gubernatorial run: "I'm not pro-life, I'm not pro-choice. I'm pro-football." Except Judge Jolly isn't much into football either, though he does have plenty of other interests.

Indeed, the education that clerks received under Judge Jolly's tutelage isn't limited to legal practice. It didn't take long to find out that Judge liked Johnny Cash. I hadn't listened to too much of the Man in Black, to be honest, but thought I'd give it a try. He was pretty darn good—now one of my favorites—which is what I told Judge Jolly upon arriving in chambers one morning. Without missing a beat, Judge looked at me and says, "Well, you know, Ilya, I once shot a man in Reno just to watch him die."

Then I heard that Judge Jolly was part of some William Faulkner reading group or secret society or whatnot. I had wanted to read into Southern and especially Mississippi literature, so I picked up *The Sound and the Fury*. I found it incomprehensible and asked Judge for advice. "Oh, I never really understood it myself," he explained, "but Faulkner's a good writer to drink by." Taking my boss both seriously and literally, I made sure to have a

⁶ Jackson Women's Health Org. v. Currier, 760 F.3d 448 (5th Cir. 2014).

⁷ Campbell Robertson & Erik Eckholm, *Judges Block Abortion Curb in Mississippi*, N.Y. TIMES (July 29, 2014), <https://www.nytimes.com/2014/07/30/us/mississippi-abortion-clinic-federal-court-blocks-closing.html> [<https://perma.cc/N2QE-ZELA>].

“whiskey with William”—as well as a “beer with Bill”—at Faulkner’s grave in Oxford.

By a certain point in the year, my co-clerks and I had settled into a routine, though we did notice a big gap between argument sessions. This was a term when all of Judge Jolly’s sittings were in New Orleans, the seat of the Fifth Circuit, rather than at one of the law schools or other suitable locations in the court’s jurisdiction. We asked him if he could finagle a designation to hear cases someplace interesting, knowing that he’d been president of the Federal Judges Association—the judicial advocacy group—and could write his own ticket. A few weeks later, Judge Jolly came into the library and said, “Boys, I’ve found you another sitting as you’ve asked.” “Where?” we queried, with visions of San Francisco, Miami, Hawaii, maybe some other random place. Judge Jolly grinned and with a twinkle in his eye announced, “New Orleans.”

Judge Jolly’s mentorship continued far past the clerkship. Through emails and visits to Washington, he kept in touch with his “clerk family,” often signing his missives, “your personal judge.” It felt like a dispatch from home.

Four years ago, Judge Jolly officiated at my wedding. It was actually quite the hassle getting him licensed to do so in the District of Columbia; the marriage bureau requested letters from him *and from the chief circuit judge* attesting to his judicial bona fides. Having taken care of the paperwork—he now has that authority for life, in case anyone needs his services in D.C.—Judge proceeded to conduct a ceremony replete with personality and kindness, wit and wisdom.

And so you see, it was one of the great good fortunes of my life to have clerked for Judge Jolly. Almost everything I am professionally, from the way I look at the law, to how I manage my own associates, to knowing when to incorporate humor as a way to gain perspective, can be traced to the lessons I learned in his chambers. Judge Jolly was also an incredible personal mentor, showing how a gentleman-lawyer conducts himself.

In sum,⁸ Judge Jolly deserves all the accolades he’s getting in this fateful year when he celebrates 80 years of life and 35 years

⁸ The prototypical way a Jolly opinion concludes.

on the bench, and finally relinquishes his long-held title as senior-most active judge on the Fifth Circuit. Grady Jolly is an original—and a great American.