

TRIBUTE TO HON. PATRICIA M. WALD

RICHARD REVESZ*

Welcome to this really special event for the law school community. Every year the *NYU Annual Survey of American Law*, which is an honorary student-edited journal, honors a distinguished jurist, scholar, political figure, or legal practitioner who has made a significant contribution to the legal field, by dedicating their forthcoming volume to that honoree. The *Survey* chooses the honoree. They have shown remarkable good judgment in making their choices; the last three honorees have been: Ron Dworkin on our faculty,¹ Justice Steven Breyer,² and [Professor] Anthony Amsterdam.³ And this year the *Annual Survey* has chosen to dedicate its sixty-sixth volume to the Honorable Patricia Wald, and we are delighted that they did.

Judge Patricia Wald is a remarkable individual. As you know, NYU law school is very focused on public service; public service plays a big role here. It is a big part of our institutional DNA, and it is hard to imagine anyone who has had a greater impact in public service than Judge Wald. First, in the not-for-profit sector, you hear a lot about that; then in the government as Assistant Attorney General for Legislative Affairs in the Carter Administration; then as a judge in the United States Court of Appeals for the District of Columbia Circuit. And, we also are a global law school and take great pride in Judge Wald's service on the International Criminal Tribunal for the Former Yugoslavia. There are not a lot of international judges there; there are very few people who have been judges in our federal system and also in the international system, and Judge Wald has done both of these. She is now on the Board of Directors of the Open Society Institute Justice Initiative.⁴ Judge Wald has

* Dean, New York University School of Law; Member, Counsel on Foreign Relations, 2008; Lawrence King Professor of Law, 2002; Faculty Director, Program on Environmental Regulation, 1996; Law Clerk, Justice Thurgood Marshall, United States Supreme Court; Law Clerk, Chief Judge Wilfred Feinberg, Second Circuit Court of Appeals; J.D., Yale Law School.

1. See Dedication to Ronald Dworkin, 63 ANN. SURV. AM. L. vii (2007).

2. See Dedication to Justice Stephen G. Breyer, 64 ANN. SURV. AM. L. iii (2008).

3. See Dedication to Prof. Anthony G. Amsterdam, 65 ANN. SURV. AM. L. iii (2009).

4. Open Society Justice Initiative Board Members (2009), <http://www.soros.org/initiatives/justice/about/members> (last visited Apr. 4, 2010).

been a role model for generations of public interest lawyers. She has played key roles in professional associations, national commissions, and legal reform efforts in the US and overseas. She has gotten scores of honorary degrees and has been recognized by countless organizations for her dedication, leadership, and inspiration as a champion of justice around the globe.

TRIBUTE TO HON. PATRICIA M. WALD

*HON. HARRY T. EDWARDS**

During the past forty-four years, my professional career has included time as a practicing attorney, law professor, Chairman of the Board of Amtrak, and federal appellate judge. During this time, I have never worked with anyone who is smarter than Patricia M. Wald, nor have I ever engaged with a more thoughtful, insightful, or humorous person.

I first came to know Judge Wald in 1979, when we were both being considered for appointments to the U.S. Court of Appeals for the D.C. Circuit, along with Abner Mikva and Ruth Bader Ginsburg. Judge Wald joined the court in 1979, and I followed a few months later in 1980. I then had the good fortune to work with Judge Wald for almost twenty years, until she retired from the court in 1999. During her stint on the D.C. Circuit, Judge Wald issued over 800 opinions and served as our Chief Judge between 1986 and 1991. She was revered as a great jurist by both her judicial colleagues and members of the bar. Why? Certainly Judge Wald's intellectual acuity, productivity, and unfailing commitment to her professional work can be cited. But Judge Wald's sterling reputation also has been built on her willingness to share her great gifts with the members of our profession—she is always open and engaging; tough-minded, but not haughty; probing, but never disagreeable in her inquiries; funny, but never offensive. You want to hear what Pat Wald has to say because it is bound to clear your head and improve your thinking, and often she is likely to make you laugh as well.

After retiring from the court, Judge Wald accepted an appointment to serve on the fourteen-member panel of judges of the International Criminal Tribunal in The Hague, where she spent two years hearing cases on wartime atrocities in the former Yugoslavia. This was not an easy assignment because the tribunal judges faced serious language barriers in their deliberations, and they initially

* Senior Circuit Judge, Chief Judge Emeritus, U.S. Court of Appeals for the D.C. Circuit; Visiting Professor of Law, New York University School of Law. B.S., Cornell 1962; J.D., Michigan 1965. Judge Edwards was a faculty member at the University of Michigan Law School from 1970 to 1975 and from 1977 to 1980, and at Harvard Law School from 1975 to 1977, earning tenure at both schools. During the past thirty years, he has continued to teach part-time, serving as an Adjunct Professor of Law at Michigan, Pennsylvania, Duke, Georgetown, and Harvard, and Visiting Professor of Law at NYU, where he has taught for the past twenty years.

worked with no uniform set of rules. Unsurprisingly, Judge Wald became a leader of the tribunal and helped to establish a standard for fairness and the rule of law. Upon her return to the United States, she served as a member and chair of the Open Society Institute's Justice Initiative Board and then was appointed a Member of the President's Commission on U.S. Intelligence Capabilities Regarding Weapons of Mass Destruction.

Last year, Judge Wald added a new role to her impressive resume: campaigning door-to-door for Barack Obama in his successful bid to become President. Her endorsement of Mr. Obama—which was issued in a powerful and pithy statement, entitled “Why This Older Woman is for Obama”—traveled around the world on Internet blogs. In her statement, Judge Wald, in her inimitable style, reported:

I have spent more than 40 years of my near-80 in public service as a federal judge, international judge, Justice Department official, and public interest lawyer. . . . [Now, with] a troop of wonderfully gritty older women, I [have] spent 8 days on the icy streets of Cedar Rapids, Iowa—with a return to the hustings in Delaware last week—campaigning for Senator Obama.¹

One of my law clerks last year was a young woman from Iowa. She was utterly astonished when she learned that Judge Wald had been campaigning door-to-door in Iowa, in bitter cold and snowy weather. When I later asked Pat about this, she admitted that it was “very cold,” but she explained that she wore a heavy coat, scarf, and some snow boots and then “had a ball” seeking votes for her candidate.

As I reflect on our many years together on the D.C. Circuit, some things about Judge Wald were obvious: She was a brilliant lawyer and jurist; she was lightning fast in her work; she had an incredible memory; she missed no nuance in an argument; she was an extraordinary (and tenacious) advocate of a position once she had analyzed competing arguments; she was fair-minded; and she was gracious on the bench. The problem for some appellate lawyers was that they could not handle Judge Wald's brilliance, coupled with her tenacity, iced with her graciousness. The net result was that Judge Wald nearly killed lawyers with her kindness. During oral arguments, Judge Wald was known to offer detailed analyses of the issues and then say to counsel, very politely: “I am not saying

1. Sam Graham-Felsen, Judge Patricia M. Wald: ‘Why this Older Woman is for Obama,’ Organizing for America, <http://my.barackobama.com/page/community/post/samgrahamfelsen/Cyfd> (Feb. 9, 2008) (quoting Patricia M. Wald).

that this view is the correct answer, but you might want to think about it.” In one case, counsel was so taken aback by Judge Wald’s gracious summary of the issues that he passed out and dropped to the floor before a packed courtroom. He was then carried out on a stretcher. The Deputy Marshal thought that Judge Wald had killed the attorney with her polite questions. Fortunately, the attorney recovered, but I am not sure that he ever appeared before Judge Wald again.

Judge Wald is also known for her sharp wit, a trait that was aptly put on display during the 1988 D.C. Circuit Judicial Conference. Judge Wald, who was then the Circuit Chief, introduced Justice Antonin Scalia who was our banquet speaker that year. Here are a few snippets from Judge Wald’s introduction of Justice Scalia:

CHIEF JUDGE WALD: We are very pleased that our former colleague and present Associate Justice of the United States Supreme Court Antonin Scalia has consented to share some remarks with us tonight. I am especially grateful—in light of what goes on [at the Supreme Court during] oral argument—to get a word in edgewise before he begins. As an old parochial school graduate myself, I’m not so naive as to buy that line on the PBS show that “the devil makes him do it.” In my days the nuns and a bar of soap were a match for the devil any time. . . . On the Circuit, we came to relish or to dread—depending on which side we were on—Nino’s sharp but friendly salvos in conference. His legendary Ninograms often set the stage for months of combat. In a burst of nostalgia I leafed through a few of the 1985–86 term opinions when we disagreed so amiably together. In one he accused me of “suck[ing the APA] dry of its content.”² I countered by charging him with perpetrating “rank judicial interference with a reasonable statutory interpretation”³ So intimidated was Congress by our jousting that they mooted the case by passing a new law. In another sentimental exchange [of opinions], Judge Scalia lamented that [one of the points made in my opinion] was “a promise kept to the ear but broken to the heart;” worse still, he accused me of “fragmenting a unitary claim”⁴ (He really knew how to hurt a girl!). Thus, we became friends Even his consistent reversals of our opinions now

2. *Gott v. Walters*, 756 F.2d 902, 910 n.8 (D.C. Cir. 1985).

3. *Id.* at 929 (Wald, J., dissenting).

4. *Beattie v. United States*, 756 F.2d 91, 120 (D.C. Cir. 1984) (Scalia, J., dissenting).

cannot entirely erase those fond memories Welcome Justice Scalia.

Justice Scalia then took the podium and said: “Thank you, Pat. That was really gutsy.”

Apart from her sense of humor, Judge Wald is a woman of great substance. I will only offer two examples from her extraordinary resume of work. Her ninety-nine-page, 540-footnote opinion in *Sierra Club v. Costle*,⁵ is a *tour de force*, surely one of the greatest administrative law opinions ever issued by the D.C. Circuit. And her article on judicial opinion writing, published by the *Chicago Law Review* in 1995, is a stunningly good discourse on the subject.⁶ The article is not just insightful; it is also fluid. Each time I read the piece I remain amazed at Judge Wald’s ability to decipher and describe all of the nuances of our work without trivializing or overstating any of it, and in a way that even uninitiated readers will understand what we do.

One of Judge Wald’s greatest accomplishments has been to achieve stardom as a mother, spouse, and professional. I often talk with my law clerks about the difficulties of raising a family in a two-career family when both the wife and husband are highly motivated to reach the highest ranks of professional success. That is no mean feat. Yet long before it was fashionable to even try, Pat and Bob Wald set off on a course to make it happen. After graduating from Yale Law School and then clerking for Judge Jerome Frank, Judge Wald worked at the Arnold & Porter law firm in Washington, D.C. She left the firm when she was eight months pregnant because she wanted to be with her husband who was in the Navy and stationed in Norfolk, Virginia. Judge Wald says that it was not difficult to leave the firm because she and her husband wanted to have more children—they have five—and she did not want to rush back to work. Asked if she enjoyed motherhood, Judge Wald said:

Yes, I really wanted to be a mother. I wanted to be the person who had responsibility for the children. I can’t say that every moment brought unmitigated joy, but being with the children when they were young was a priority well worth making. I’m glad I don’t have to look back and regret not having been there.

When asked how she reentered the legal profession after having five children, Judge Wald explained that:

5. 657 F.2d 298 (D.C. Cir. 1981).

6. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

2010]

TRIBUTE

5

When the youngest child started going to kindergarten so that all five of them were in school, I began working part-time in a series of jobs that allowed for a flexible schedule. I had a consultant's contract with the Justice Department, and I worked on the Kerner Commission Report, the Report on the Causes and Prevention of Violence, on the President's Commission on Crime in the District of Columbia, and I was co-director of the Ford Foundation's Drug Abuse Research Project. Then in 1968 I joined Neighborhood Legal Services as a litigating attorney. That was when I began taking on full-time responsibilities again.

Judge Wald's ascendancy in our professional ranks upon her return to practice is now history. No one has done it better.

I always have been inspired by Judge Wald. She has reigned as a model of the very best that the legal profession has to offer. And she has worn her crown with dignity and humility. It is an honor for me to pay tribute to my esteemed colleague and friend.

TRIBUTE TO HON. PATRICIA M. WALD

NANCY MORAWETZ*

Thank you, and welcome everyone; and a particularly warm welcome to Judge Wald. It is a great pleasure for me today to speak about Judge Wald. I first met Judge Wald back in 1980 when Jimmy Carter was President and I was applying for a clerkship. It may be hard to believe today, but back then the D.C. Circuit, where Judge Wald sat as a new judge, was considered a liberal court. Public interest lawyers used to fall all over themselves to get into the D.C. Circuit, which was very different from what happened later on. And judges there had an enormous amount of work to do. The regulatory state was then more robust than it is today, and the reign of the more extreme plain language ideas about how to read a statute had not taken hold¹—*Chevron*² had not yet been decided. So for a court with a heavy docket of statutory and administrative law cases involving important public issues in which Congress had deliberated at length, and for which agencies had conducted significant hearings and conducted extensive deliberations, there was a lot of judging to do. Each case required careful review of the agency record and the legislative history.

By the time I started clerking in the fall of 1981, some of this had already started to change. Ronald Reagan was President, and later changes in the composition of the court were on the horizon. Some of the stalwart center judges of the court had taken senior status. There was a sense that things were changing, but at that time the basic work of the court really had not changed at all. We faced very complex cases from a wide range of agencies with immense and complex records.

* Nancy Morawetz is a Professor of Clinical Law at New York University School of Law. She is a graduate of New York University School of Law, and she clerked for Judge Wald during 1981-82.

1. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (“We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted”); *Brogan v. United States*, 522 U.S. 398, 408 (1998) (“While *communis error facit jus* may be a sadly accurate description of reality, it is not the normative basis of this Court’s jurisprudence. Courts may not create their own limits on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread. Because the plain language . . . admits of no exception . . . we affirm . . .”).

2. *Chevron v. NRDC*, 467 U.S. 837 (1984).

From the very beginning, I deeply admired Judge Wald. She was a true judge. She approached every case with an open mind and a keen sense that the case affected real people who had real problems. She wanted to understand the complexity of every case. She wanted to understand the details of the legislative history. I have an image in my mind of books and books of hearings with little paper clips attached to the pages (we did not have Post-its). These marking were put in by Judge Wald as she went through the record and sought to understand what Congress or an agency was trying to accomplish. She became an expert on our most frequent party at the time, the Federal Regulatory Energy Commission. And Judge Wald really insisted on understanding all of this.

When Judge Wald was still a relatively new judge, she would sometimes talk about some of the aspects of the job that she did not like as much. She told us that outside chambers she was now limited to talking to people about the latest movies. Here was a person whom you could imagine had a lot to say about a lot of things. But, outside chambers virtually anything you talk about in Washington has to do with somebody's case so she was limited in what she could say. I think, though, that what bothered her most was when she saw poor advocacy in the court.

I remember one particular day in which a lawyer opened oral argument with the words, "It was a dark and stormy night." This was the kind of thing Judge Wald had no patience for, that sort of melodrama, those theatrics; they were not the kinds of things that mattered in cases. And she knew that what clients needed was top-quality legal reasoning and well-developed factual records, and not some melodrama. Similarly it would really bother her when a fancy partner argued a case who was clearly chosen to argue just because of the fanciness of the name, but who was unable to answer questions about the record.

For me, as a future social justice lawyer, these lessons were invaluable. I was taking mental notes all of the time about what truly mattered to courts. After I left my clerkship and went to do class action litigation at the Legal Aid Society, I would hear Judge Wald in my mind as I was thinking about the cases that I was putting together. I would think about her comments about what it takes to do effective advocacy. I would remember, for example, Judge Wald speaking to us about a case in which a lawyer—and this is of course now in 1981 or 1982—trying to pursue a due process argument based solely on *Goldberg v. Kelly*.³ She would say, "Doesn't this law-

3. 397 U.S. 254 (1970).

yer realize that the law has developed and that you have to be very attuned to the developments in the case law?" I also learned the importance of creating a powerful record. As a judge she could not fix the records; she could not change that. So while I learned a lot about how a judge looks at a case, I was also always learning about what it takes to be an effective advocate.

Judge Wald was also, as you can imagine, a role model for women clerks of the court. We made up about a third of the clerks, but we were all very aware that we were in what was, in fact, a fairly gendered profession and one that would continue to be gendered. I had grown up in a family of two parents who were pursuing careers, but for many of my co-clerks it was a very new experience to see a woman professional, and certainly one of Judge Wald's stature. People were interested in how she managed it all. One of the things I found very impressive was that unlike a lot of other pioneering women, Judge Wald did not focus on telling the women clerks on the court about how much easier we had it—although we certainly did have it easier in many ways. Instead, she was very sensitive to the things that were very hard for women in our day, in which women were expected to do it all and do it all easily. She listened and was a very sympathetic ear for the women clerks on the court.

Judge Wald was also a lot of fun. The highlight, I think, for the clerks our year was the time when we were out of town with Judge Wald, and we went to a bar and taught her how to play Pac-Man, which was the major videogame of the day. Judge Wald went around incognito; I do not know whose idea it was but we all decided that we would call her Marge so that nobody would know who she was. But she did learn how to play Pac-Man, and to us that said it all. Here was this brilliant, sophisticated judge, who was happy to learn a new game and play along with the ruse. So as one who has had the deep honor to clerk for Judge Wald, I want to thank the *New York University Annual Survey of American Law* for presenting this very fitting honor to this very distinguished and impressive lawyer and judge. Thank you.

TRIBUTE TO HON. PATRICIA M. WALD

*CYNTHIA ESTLUND**

It is a great honor for me to be part of this event honoring Judge Wald. I first met both Judge Wald and Nancy Morawetz—and it was a shock to me to realize this—on the day of my clerkship interview twenty-seven years ago. Nancy had the good fortune of attending the NYU School of Law where she had quite a few women law professors, even back in those days. I did not. During my entire law school career at Yale, I had had only one class that was taught—actually co-taught—by a woman professor. So I felt especially fortunate to clerk for Judge Wald. She was, and has continued to be, a role model par excellence, not to mention exceptionally entertaining company.

Since she graduated from law school, Judge Wald has had at least five careers and has accomplished more in each of them than most people accomplish in their entire adult lives. I am certainly including her ten-year career as a full-time mother, during which she produced five thriving, active, and, if we are to believe the stories we heard in chambers, quite mischievous children. But perhaps most remarkable has been Judge Wald's career since leaving the D.C. Circuit.

Those of us fortunate to land a good job with tenure have a tendency to settle in and hold on—I mean to cast no aspersions on Judge Edwards!—but Judge Wald has been more restless. The job of a federal appellate judge seems not to have been big enough to contain her boundless energy. She left the D.C. Circuit at a point in her life when many folks might simply move to Florida, take up golf, and start shuttling around among their ten grandchildren. But instead, Judge Wald moved to The Hague to serve as a U.S. judge on the International Criminal Tribunal for the former Yugoslavia. Nor has she slowed down since returning from The Hague. Judge Edwards stole one of my best stories here, but last winter I heard from another former clerk that she encountered Judge Wald on the snowy streets of Iowa while they were both campaigning for a candidate, who will remain nameless, but who recently moved into a really nice house on Pennsylvania Avenue. I think at that

* Catherine A. Rein Professor of Law, NYU School of Law. Professor Estlund clerked for Judge Patricia M. Wald on the U.S. Court of Appeals for the D.C. Circuit during 1983–84.

point Judge Wald was especially glad to be released from the obligations of nonpartisanship that constrained her as a judge.

So Judge Wald would have been a continuing source of inspiration and an extraordinary role model even apart from her being a woman. But the fact that she was a woman—one of the handful in her law school class and the first to be appointed to the D.C. Circuit—was especially important to some of us who worked for her.

I began clerking during the summer of 1983, just one year after Nancy had left, but things had already changed by then. The D.C. Circuit was barely clinging to its longstanding reputation as a relatively liberal court. I seem to remember that the t-shirts for the D.C. Circuit law clerks' softball team were emblazoned with a "0-9" win-loss record in recognition of the nine consecutive reversals the D.C. Circuit had suffered in the previous term of the Supreme Court.

But by 1983, as Judge Edwards has already recalled, the composition of the D.C. Circuit had changed suddenly and dramatically with the arrival of three new Reagan appointees: Judges Robert Bork, Antonin Scalia, and Kenneth Starr. Do any of those names ring a bell? Suddenly there were many more sharply divided panels and many more sharply worded dissents. On a court like this, even a review of the Federal Energy Regulatory Commission's decision on electricity rates and grids could stir up controversy. Even ministerial decisions within the court itself could stir up political passions. I am told that one day Judge Wald came back to the chambers from a conference fuming. She reported that one of her colleagues—I am quite sure it was not Judge Edwards—wanted to order the clerk of the court to stop sending the court's slip opinions to the federal prisons. It was at best a waste of money, he apparently thought, and probably an inducement to frivolous pro se litigation, but for Judge Wald this was about access to justice. Federal prisoners probably had a greater need for those opinions than most of us did. I think she might have won that little battle.

But there were many other battles over cases in those days. Many of them stemmed from Judge Wald's refusal to lose sight of the legitimate claims of the ordinary people who were behind even arcane administrative review petitions: the employees behind an NLRB decision that failed to remedy the consequences of egregious employer coercion, for example;¹ the retirees behind a pension benefit guarantee corporation's decisions denying insurance cover-

1. *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983).

age;² or the farm workers behind the Department of Labor's refusal to issue Field Sanitation Standards requiring employers to provide clean drinking water and toilets.³

There was never any question, in these cases or in any others, that the judge was committed to finding and following the law, and to tracing the technical commands of statutes and the factual complexities of voluminous records. But sometimes the most dedicated judge found room for, well, for judgment. Toward the end of her tenure she commented on what went into that judgment—she had quite a significant career in her extrajudicial writing as well. She was commenting on studies, including one by NYU [Law School]'s then-professor Richard Revesz, showing that judges' political predictions, or the party of the President who appointed them, tended to influence their decisions. This is what she said:

After almost 20 years on the D.C. Circuit . . . I register something of a ho-hum reaction to the notion that judges' personal philosophies enter into their decisionmaking when statute or precedent does not point their discretion in one direction or constrain it in another. Judges would be rudderless ships if we did not steer through uncharted and murky waters by some sense of conscience or some core of personal beliefs.⁴

Judges were guided, she thought, not just by conscious and personal values, but also by their experiences; and Judge Wald's experiences were not always the same as those of her fellow judges.

Judge Wald was once asked whether it made a difference in the legal system to have women judges. She acknowledged the maxim that "a wise man and a wise woman will come to the same conclusions . . ."⁵ She thought it a bit simplistic, however. Indeed, she said, "different wise women"—and there were a couple of wise women on the court at that time—"will come to different conclusions."⁶ But she went on to say:

Nearer the truth, I think, is that being a woman and being treated by society as a woman can be a vital element of a judge's experience. That experience in turn can subtly affect the lens through which she views issues and solutions. I can

2. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133 (D.C. Cir. 1984).

3. *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613 (D.C. Cir. 1987), *vacated as moot*, 817 F.2d 890 (1987).

4. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999).

5. Patricia M. Wald, *Six Not-So-Easy Pieces: One Woman Judge's Journey to the Bench and Beyond*, 36 U. TOL. L. REV. 979, 989 (2005).

6. *Id.*

think of a few cases where being a woman entered into my conscience, but I can think of just as many where having worked in a factory, having been a Legal Services lawyer and having been a government official who dealt with Congress affected my perspective just as much. A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.⁷

The experiences that Judge Wald brought to the bench as a woman, as a working class kid, as the mother of five children, and as a public interest lawyer, certainly enriched the law—in the US and now globally—as well as the lives of her colleagues on the bench, her law clerks, and the litigants and lawyers whose cases she decided. So I am just thrilled to be part of today's recognition of Judge Wald's extraordinary experience in life and in the law.

7. *Id.*

TRIBUTE TO HON. PATRICIA M. WALD

*KELLY ASKIN**

It is such a pleasure to join you here today to recognize Judge Patricia Wald and to celebrate a few of her achievements during a most remarkable career. She personifies everything I love about the law and how it can be a force for good in our world. And she exemplifies why we need more great women in positions of power on domestic and international courts. At the International Criminal Tribunal for the Former Yugoslavia, where she served as a judge after retiring from twenty years of service on the United States Court of Appeals for the D.C. Circuit, Judge Wald was regarded as a trailblazer. She works fast; she works hard; she works competently; and, quite simply, she works with an intellect far superior to most.

Upon arrival at the Yugoslav Tribunal in 1999, Judge Wald was assigned to Trial Chamber 1 to sit with fellow international judges from Portugal and Egypt. Awaiting her first cases, Judge Wald did what she always does: she prepared and then she prepared some more. Before stepping foot in the international courtroom, she had already gone a long way toward mastering the jurisprudence of the tribunal, as well as the history of the conflict and the court's establishment. She learned the rules of procedure and evidence, the elements of crimes, basic international law texts, and other materials needed to perform the unique and complex task assigned to the tribunal in providing justice to tens of thousands of victims of war crimes, crimes against humanity, and genocide committed in the former Yugoslavia. Assigned to sit on both the *Krstic* genocide trial¹ and *Omarska* camp persecution trial,² as well as on half a dozen appeals, Judge Wald soon gained a court-wide reputation for fairness, integrity, and efficiency.

With blurring speed and uncanny accuracy, Judge Wald pinpoints the most critical issues and makes decisive and sound decisions. These are wonderful qualities, unless, that is, you happen to be the poor soul who works for her. As but one example, I vividly recall an incident in the fifth week of a six-week consultancy I was doing with Judge Wald in The Hague. We had been working night

* Dr. Kelly Dawn Askin, B.S., J.D., Ph.D. (law) is senior legal officer for International Justice in the Open Society Justice Initiative.

1. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

2. Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment (Nov. 2, 2001).

and day and functioning on but a few hours of sleep while drafting the *Omarska* judgment after a year-and-a-half-long trial for five individuals accused of war crimes and crimes against humanity. When I walked into Judge Wald's office to hand her the draft, there was not a scrap of paper on her desk, the computer was off, and she had her hands clasped behind her back, pacing back and forth on the carpet. She grabbed the paper out of my hand with scarcely a word. And as I glanced back at her as I was leaving the office, mere seconds after entering, she was already turning over the first page and on to the second, concentration evident on her face.

Exhausted, I headed to the cafeteria, profoundly grateful for a break. I had some coffee and socialized with friends before gradually making my way back to my office, calculating that I still had a good couple of hours to recharge. As I walked into my office, the phone was ringing. My brain registered several emotions in rapid succession, and ended up, logically enough, on denial, since it should not be humanly possible to read, digest, and critique a 250-page document in forty-five minutes. But my gut knew it was the good judge calling. Without bothering to wait for the message, somewhat begrudgingly and a bit awestruck I walked back to her office wondering how, yet again, Judge Wald had managed to surprise me with her ability to work at such a high level of competency at such breathtaking speed.

At the Yugoslav Tribunal, Judge Wald served as a role model for many who were amazed at her accessibility, her pragmatism, and her eagerness to engage in detailed discussions and debate on a range of legal issues. She made her unique mark on an assortment of groundbreaking decisions, most notably the landmark *Krstic* judgment, which was the first time the Yugoslav Tribunal recognized genocide had occurred at Srebrenica for the systematic slaughter of over 7700 men and boys;³ the highly-regarded *Kupreškic* appeals chamber judgment, which acquitted three individuals who had been convicted by the trial chamber;⁴ and the *Kvočka* trial chamber judgment, which set out standards for liability under the enterprise theory of responsibility,⁵ and which recognized sexual violence as part of the persecution committed against women at *Omarska* prison camp.⁶

3. *Kvočka*, Case No. IT-98-30/1-T, ¶ 84.

4. *Prosecutor v. Kupreškic*, Case No. IT-95-16-A, Appeal from Judgment, ¶¶ 246, 304 (Oct. 23, 2001).

5. *Kvočka*, Case No. IT-98-30/1-T, ¶¶ 265–312.

6. *Id.* ¶¶ 98–109.

Since her retirement from the bench, Judge Wald has stayed in high demand and has thrown herself into a slew of good causes. As but a few examples: she has worked on amicus briefs for Guantanamo detainees; given advice on a rape case in Colorado; trained Iraqi judges on Iraq's High Tribunal; served on the Intelligence Commission on Weapons of Mass Destruction; the ASIL's [American Society of International Law] International Criminal Court Task Force; and, my personal favorite, she sits on the board of the Open Society Justice Initiative, where I head the international justice program.

In addition to our time together in The Hague, it has been a richly rewarding experience to travel with Pat Wald to places like Tanzania to assist the International Criminal Tribunal for Rwanda; to Cambodia to work on the Extraordinary Chambers in the Courts of Cambodia, which is trying Khmer Rouge leaders;⁷ and hopefully soon to the Democratic Republic of Congo to work on establishing a mobile court for gender justice. We co-taught a course on international courts at Yale Law School, where students lined up to hear from a legend whose pioneering cases they read in other courses at the law school.

It would be difficult to know Pat Wald and not have huge affection for her. Despite having risen from humble beginnings to sit on two of the highest domestic and international courts in the world, she is nonetheless without conceit, without presumption, and without guile. It would be impossible to know Pat Wald and not have enormous respect for her. She does not just have smarts, she has wisdom. More importantly, she has goodness and a deeply ingrained sense of right and wrong. It has been a special treat for me to share some holidays with Pat and Bob Wald, and to also have the opportunity to join them on family vacations at the beach with their five kids and numerous grandkids.

Brilliant but fun, pessimistic yet inspiring, Pat Wald's personal and professional life is lived to the fullest. Whether it has been work or pleasure, whether in a distinguished courtroom or a seedy pool hall, it has been discomfoting to know that somebody thirty-five years my senior can run circles around me. This wonderful and extraordinary woman is an important part of my life, for which I am deeply grateful. If we had more women like Pat Wald, women would rule the world, and the world would be better off for it.

7. PATRICIA M. WALD, *TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM* 19 (Open Society Institute 2009), *available at* http://www.soros.org/initiatives/justice/focus/international_justice.

TRIBUTE TO HON. PATRICIA M. WALD

DAVID TOLBERT*

It is a true honor for me today to pay tribute to a great judge, lawyer, and friend, Judge Patricia Wald. I must confess to feeling like a bit of an interloper on the *New York University Annual Survey of American Law* as although I suppose I am, *stricto sensu*, an American lawyer, I have spent the bulk of my career working outside the United States, working with international law or some kind of mixture of different legal systems. Thus, while I understand that Judge Wald is a great American lawyer and jurist, I know her as an international judge and lawyer *par excellence* (of course, an international lawyer must throw in the obligatory French or Latin phrase or two).

I vividly remember the first time I met Pat and Bob Wald as they arrived on a dull, cloudy Dutch day in the early hours of the morning in 1999. Pat was coming to Holland to fill out the judicial term of the retiring Gabrielle Kirk McDonald, the only American judge on the International Criminal Tribunal for the former Yugoslavia [ICTY]. McDonald was president of the tribunal at the time, and I was serving as her *chef de cabinet*. While Bob and Pat probably figured Gabby had asked me to meet them at some ungodly early hour, it was actually the other way around, for I knew about Pat Wald. I had read some of her opinions and knew that she was simply one of the top judges in the United States. I had told other judges and staff, who were a little nervous about a new American judge, particularly as McDonald was well regarded and respected, not to worry because this new judge was going to be an intellectual powerhouse and a great judicial mind. If I had any worries in this regard, they were quickly dissipated in the forty-five minute ride from the airport to The Hague, for Pat already knew the ICTY jurisprudence, knew the Geneva Conventions, and had keen insights into the *sui generis* procedure that the tribunal followed. I quickly realized that I actually had undersold her to my colleagues.

From there, Pat quickly became the leading judge on the then fourteen-member court. She was dealt a bad hand in terms of the

* Registrar, Special Tribunal for Lebanon; formerly, Jennings Randolph Senior Fellow, United States Institute of Peace; Assistant Secretary-General and Special Expert, United Nations Assistance to the Khmer Rouge Trials; Deputy Chief Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY); Deputy Registrar, ICTY; *Chef de Cabinet* to the President, ICTY; Executive Director, American Bar Association Central and European Law Initiative.

panel that she was assigned to—the only panel that worked more in French than English and with colleagues who lacked both her experience and intellect. Nonetheless, she quickly made her mark both in terms of her reputation and in terms of the jurisprudence that flowed from her pen. While Pat spent only two years at the ICTY, she is still spoken about as the best judge in the tribunal’s history. This is from grizzled prosecutors like Mark Harmon who has tried many of the most difficult cases at the ICTY. From time to time, when I was Deputy Prosecutor, Mark would stop me after a frustrating day in the trenches and say, “David, why can’t we have judges like Judge Wald?” I heard the same from defense counsel and court staff.

However, it was not simply her reputation for the way she handled herself in the courtroom for which she was so admired. She wrote some of the seminal judgments at the ICTY, which in many ways established important landmarks not just in the ICTY, but also for other international tribunals generally, and the International Criminal Court in particular. There were a number of such decisions, but I will mention two in particular that are illustrative of her great contributions. In the *Krstic*¹ case, Pat sat on a trial panel that rendered the first genocide verdict in the history of the ICTY. The case involved the massacre at Srebrenica where 8,000 men and boys were systematically killed over a few days in July 1995. While another judge read out the decision, those of us in the know were fully aware that the judgment was primarily of Judge Wald’s making. It was a groundbreaking and powerful decision. Although it was modified on appeal, it is her judgment that resonated with legal professionals and victims, and the factual findings were subsequently endorsed by the International Court of Justice.

A second decision worthy of special note was the *Kupreskic*² case. This case was perhaps not as significant factually as the *Krstic* case, but it was of great importance to the credibility of the ICTY. In that case, the Trial Chamber had convicted individuals of horrendous crimes but had, in essence, relied on the testimony of one eyewitness account. It was a difficult decision as the alleged crimes were appalling, but, as Judge Wald who was the presiding judge on appeal put it in the Appeals Chamber’s summary of its decision:

1. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001), *aff’d in part, set aside in part*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

2. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 775–84, 801–04 (Jan. 1, 2000), *aff’d in part, rev’d in part*, Case No. IT-95-16-A, Judgment, ¶¶ 218–23 (Oct. 23, 2001).

The Appeals Chamber was guided by two principles. First, “the function of this tribunal is to decide the guilt or innocence of the individual accused according to standards of procedure and evidence that commend themselves to all civilized nations.” Above all, “it has striven to follow the principle laid down by the First Chief Prosecutor at Nuremberg that we must ‘establish incredible events by credible evidence.’”³

Thus, Judge Wald found that such evidence was not enough to convict certain defendants. It was a tough decision because of the awful facts; but it was no doubt also awkward in terms of collegiality as, with only fourteen colleagues, she had overturned the decision of respected colleagues who did not take it well. Nonetheless—and I say this as a former prosecutor—it was the right decision, right in the law, and it sent a clear message that the ICTY was a court that would apply the highest international standards.

I mention these two cases, although there were many more, as illustrative of the great and lasting impact that Pat Wald has had on international justice. These early ICTY decisions were formative in the field of international criminal law, establishing norms that will guide the field for many years to come.

I am pleased to say that Pat has continued to keep a hand in international law. She has flown off to Arusha, Tanzania to train the ICTY and the International Criminal Tribunal for Rwanda [ICTR] appeals counsel; and when our appellate lawyers came back and debriefed me, they said that the best and toughest questions always came from Judge Wald. Moreover, Pat continues to help in any way that she can to promote the law and international justice. She has done so at my request a number of times and continues to do great work for the Open Society Justice Initiative, which she chaired for a number of years, among other groups.

It is really this generosity of spirit, even more than her great intellect and considerable legal skills that I find appealing. While her former clerks will all talk about how hard Pat works—I think the term “slave driver” may have been mentioned once or twice—they also speak of how much Pat has supported them and helped them, and I can attest to this as I have both seen it and experienced it.

It is her spirit, her modesty, and her commitment that I truly admire. In the recent presidential campaign, I know she personally

3. Press Release, Int’l Criminal Tribunal for the former Yugo., Appeals Judgment Rendered in the “Kupreskic & others” Case, P.I.S./629e (Oct. 23, 2001) (emphasis in original), *available at* <http://www.icty.org/sid/7944>.

went and knocked on many doors for Barack Obama, including eight days in freezing Iowa and many more days in other similarly inviting places. She did it without fanfare, and I only know the story because I got notes from a former ICTY staffer who had run into Judge Wald in places like Delaware.

In closing, I have seen Pat's skills up close recently. We have served on a Task Force of the American Society of International Law, looking at the question of what the relationship should be between the ICC and the United States. Somehow, Pat and I found ourselves outnumbered, but as I stewed, Pat skillfully was able to bring about a conclusion that carried the day—or should I say saved the day?—by achieving a consensus that seemed impossible when one looked at the ideological lineup. As part of that process, there was a question that emerged about double jeopardy and the ICC. Pat gave some ideas and referred to a case at the ICTY that set out the relevant principles, and I worked out the details with our staff person. However, when I looked back at the case, there was a dissent that summarized the principles perfectly. It was vintage Pat Wald: brief, rigorous, and to the point. More importantly, from a personal point of view, it was also quintessentially Pat, drawing no attention to herself and letting you figure it out for yourself.

In a world full of self-aggrandizement, self-promotion, and pomposity, it has been an inspiration to know someone of the caliber, both intellectually and personally, of Pat Wald. Many congratulations, Pat, on the receipt of this well-deserved honor.