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TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

DEAN TREVOR MORRISON

Good evening and welcome. I want to thank all of you for coming here this evening to join N.Y.U. School of Law in this tribute to Judge Diane Wood. Each year, the N.Y.U. Annual Survey of American Law dedicates its forthcoming issue to an individual who has made a significant contribution to the legal field. We have had the honor over the years of featuring Supreme Court Justices Scalia and Breyer, Judge Posner of the Seventh Circuit, Judge Wald of the D.C. Circuit, as well as leading academics including Anthony Amsterdam, Arthur Miller, and the late Derrick Bell and Ronald Dworkin.

This is an exciting moment for me, as it is my first year as dean, and so it is my first opportunity to introduce an Annual Survey dedicatee. It is also my first opportunity to say the word "dedicatee." I really could not be more pleased to provide this particular introduction to a truly spectacular judge, scholar, teacher, and friend of the Law School. I would like to thank our students at the Annual Survey who have chosen to dedicate the seventy-first volume to Judge Diane Wood, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit and a Senior Lecturer at the University of Chicago Law School. I am delighted the Annual Survey has chosen to recognize her significant accomplishments and, in doing so, to have brought together such a remarkable group of friends, family, and colleagues to celebrate her extraordinary career. I especially want to welcome Judge Wood's husband, Dr. Robert Sufit, and her son, David Hutchinson, who are here. Welcome to both of you. We are delighted to have you.

The legal community has been profoundly influenced by Judge Wood's decisions, her scholarship, teaching, and leadership over many years. I think this is clear to everyone who is here tonight, including her former students and clerks as well as her colleagues from academia and from the bench.

Judge Wood earned her B.A. from the University of Texas at Austin in 1971 and her J.D. from the University of Texas School of Law in 1975, where she was an editor of the *Texas Law Review* and graduated with High Honors and Order of the Coif. She joined the University of Chicago Law School faculty in 1981, becoming the third woman ever hired as a law professor at that school. This kind

of trailblazing was by that point not new for Judge Wood. By then, she had already served as a law clerk to Justice Blackmun, which made her among the first women ever to clerk at the Supreme Court. While she has held many roles at the University of Chicago, from Associate Dean to Harold Jay and Marianne F. Green Professor of International Legal Studies to Senior Lecturer, her role as an insightful scholar and dedicated mentor has remained constant.

We at N.Y.U. can testify to that fact firsthand, because Judge Wood has participated in many events here over the years. She gave our Madison Lecture on the classic question of whether courts should interpret the Constitution from an originalist or a dynamic approach. And she participated in our Reuben International Law Symposium, which focused on how U.S. courts balance domestic regulatory interests and the need for international cooperation in the context of transnational litigation. Judge Wood also delivered our Geordie Symposium Lecture on the art of decision making on a multimember court. Her ability to thoughtfully consider all factors before writing a separate opinion, whether a concurrence or a dissent, is one of her hallmarks featured in those remarks. All of these connecting points between N.Y.U. and Judge Wood reflect our basic commitment that every excellent legal mind is fundamentally a member of the N.Y.U. Law faculty; some of them just do not know it yet.

Judge Wood is known widely for her ability to deal tactfully and effectively with others—including sometimes prickly and outspoken colleagues—not by giving up her own views but by looking for common ground. She has built a reputation for crafting thoughtful legal opinions that persuade judges from a variety of viewpoints, conservative and liberal alike, to support her well-reasoned interpretation of the law and adjudication of the facts. Judge Wood commands respect not through combativeness, grandstanding, or intimidation, but through sheer force of intellect, and it is that intellect we recognize tonight. Her career in academia and on the bench has been characterized by the strength of her convictions and character, and therefore it is only fitting that our students decided to make her work the centerpiece of their most recent volume.

TREVOR MORRISON
Dean, N.Y.U. School of Law
Eric M. and Laurie B. Roth Professor of Law
N.Y.U. School of Law

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

YAEL TZIPORI

Every year, the student editors at the Annual Survey nominate an outstanding contributor to American legal scholarship, and we honor that person at a dedication ceremony held at the law school. We invite colleagues and friends to speak about the dedicatee, and we formally dedicate our upcoming volume to her. The dedication has been a tradition of the Annual Survey since the publication of our first volume in 1942.

My small role in this ceremony is to offer a brief overview of the qualities and qualifications of Judge Diane Wood that led our student committee to nominate her as the dedicatee of our 71st volume. I will leave any profound insights into the importance of her work and her career to the dedicators on stage, who are far more capable of doing so than I.

Judge Wood was an early, and favorite, nominee among the students who brainstormed potential candidates for the dedication. She has the standout credentials of being an esteemed judge on a prestigious federal appellate court, a former clerk for Justice Harry Blackmun of the Supreme Court, a highly regarded faculty member at one of the top law schools in this country, and a leading contributor in numerous fields of legal scholarship, including antitrust law, constitutional law, and international trade and business.

Our decision to nominate Judge Wood was made even more gratifying by the fact that we were able to dedicate our 71st volume to a woman who contributes so much to American law, as the Annual Survey had dedicated a volume to only one female legal scholar in the past sixteen years. After our nomination became final, we were thrilled to learn that in October Judge Wood became the first woman to serve as Chief Judge of the Seventh Circuit.

As the only student speaking at today's ceremony, I felt the need to express some sense of what we—as students—can learn from Judge Wood's example as we embark on our own careers. While reading about her, I was inspired by lessons others have drawn from Judge Wood's work and from her character.

From her judicial career: that it's possible to articulately and resolutely stick to your principles, even when you hold a minority

position. And that sometimes, in seeking areas of common ground, you can persuade the majority to join your side.

From those who have debated issues with her: that it is possible to disagree without being disagreeable.

From Judge Wood herself, in an interview published on the University of Chicago Law School website: that the integrity of the position you hold can require you to call things as you see them, even if expressing your true opinion comes at a cost.[1]

And from those who have worked with her: that listening to others and thoughtfully considering what they have to say is an effective way to garner consensus and be a successful leader.

So, if it isn't already clear, I was inspired by Judge Wood in a very short amount of time and by means of a very limited connection. I am so grateful for the opportunity to hear more from all of you on stage who know her so well.

Judge Wood, thank you for the honor of joining us here today. Everyone at the Annual Survey is grateful that you took the time to travel to New York and be a part of this tradition.

YAEL TZIPORI
Editor-in-Chief
N.Y.U. Annual Survey of American Law

1. Meredith Heagney, *Madam Chief Judge*, THE RECORD (ALUMNI MAGAZINE) (Fall 2013), http://www.law.uchicago.edu/alumni/magazine/fall13/wood.

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

ELEANOR FOX

Diane has been a dear friend for thirty years, and it is my honor to add to the chorus and to congratulate Diane and her family—Rob, Katy, Jane and David. And congratulations to the Annual Survey for the selection of the best honoree you could possibly choose.

Diane is a renaissance person and has contributed to so many fields in her scholarship, in her jurisprudence, and in arts and humanities. In considering her contributions to law, I will limit my remarks to antitrust and competition policy, while honoring her also for her broader contributions including her constitutional jurisprudence, her international jurisprudence, and her sensitivities to inequalities, discrimination, and the human condition. But first, a personal note:

Diane and I share a legal specialty—antitrust law and policy. This is only one small piece of the human being that is Diane, but it is what brought us together.

Diane and I both liked to teach in London and Paris in the University of San Diego summer law programs. On one or two occasions we shared a course—she took the front end and I took the back end or vice versa. We would cherish a few days of overlap, and I remember fondly the time we all met at the Louvre. All of Diane's children were there, and I remember sharing some moments with all of them, in particular David, before some great works of art. It never occurred to me that they would not be artistic and musical like their mother, and of course they are, among the myriad other things they do.

I am one of the countless admirers of Diane on the bench. I am always taken with the clarity and humanity of her decisions—how she cuts through the legalisms and does what is wise and just in down-to-earth prose. She argues eloquently and tenaciously for good policy. Her opinions read like stories about real human beings, which of course they are, but which other jurists obscure.

Diane has made enormous contributions to the very conception of competition law in a world of low barriers to trade, countless transborder transactions and transborder harms, and more than a hundred national laws. She helped formulate and lead the debate

of antitrust governance from the start. In the late 1980s and early 1990s, in the wake of a merger movement and strong winds of globalization, she and a British colleague, Richard Whish, were commissioned by the Organization for Economic Cooperation and Development to study the growing body of transnational merger antitrust cases and to make recommendations. She and Richard produced a seminal study[1] concluding with recommendations for cooperation that the OECD adopted. The OECD guidelines became one of the central documents for cooperation of competition authorities.

In the early 1990s, the antitrust community robustly debated whether the world needs a global antitrust regime. Diane gave many speeches and wrote many articles about the future of antitrust in a globalized world. I have just reread her Fordham International Competition Conference paper of 1991, *International Competition Policy in a Diverse World: Can One Size Fit All?*[2] and I am struck with her wisdom and prescience—the timelessness of her words. The answer is, she said, one size could fit all, "but the fit might not be very comfortable. Both because local conditions demand differential application of traditional antitrust rules, including in my view some that have fallen into disuse in the United States, and because different countries may simply wish to pursue additional policy goals, we are likely for some time to come to live with diversity of competition policy. The challenge in years to come will be to find the common elements and to build on them, without losing sight of the differences in perspective and culture that inevitably exist."[3]

Not everyone agreed with Diane in 1991. (I may have been the Don Quixote of her *Impossible Dream*, from the 1992 Chicago Law Forum.)[4] Almost everyone agrees with Diane today.

Meanwhile, Diane was deputized by the Department of Justice Antitrust Division to create international antitrust guidelines. The guidelines were adopted several years later and were so sound and

1. Diane P. Wood & Richard P. Whish, MERGER CASES IN THE REAL WORLD: A STUDY OF MERGER CONTROL PROCEDURES, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [OECD] (1994).

2. Diane P. Wood, *International Competition Policy in a Diverse World: Can One Size Fit All?*, *in* EC & U.S. COMPETITION LAW & POLICY: FORDHAM CORPORATE LAW 1991 71 (Barry Hawk ed., 1992).

3. *Id.* at 85.

4. Diane P. Wood, *The Impossible Dream: Real International Antitrust*,1992 U. CHI LEGAL F. 277, 278–79 (1992).

prescient when written that they are still a guiding document today.[5]

By 1993 when Diane became Deputy Assistant Attorney General for the Antitrust Division of the Department of Justice, the global merger movement was joined by what seemed to be a global cartel movement. Diane was Deputy AAG when these changes were happening and when insularity of competition authorities around the world made it easy to overlook global restraints or to be helpless before them. Diane traveled around the world, not only as an inimitable substantive goodwill ambassador, but on a mission to introduce positive comity into antitrust law and policy—meaning that nations would help one another in their enforcement, especially in pursuing violations that occur on the soil of one nation and hurt consumers in another. She pioneered bilateral mutual assistance agreements to facilitate information exchanges subject to confidentiality. I would not be surprised if she created the now-household antitrust concept of positive comity. Diane's ideas and efforts laid the groundwork for the intense cooperation among competition authorities of the world today.

Since Diane joined the Seventh Circuit bench she has written remarkable decisions over the widest possible range of cases. Her antitrust jurisprudence (as all else) is remarkable and influential, the product of an unusually wise, thorough, caring, and clear-minded scholar and judge. She has rescued more than one case from the jaws of laissez-faire and myopia. In one, pushing against the tide of the ideological conviction that if a restraint is vertical it must be free-rider justified and efficient, she affirmed an FTC decision against Toys "R" Us for bullying its suppliers to keep "hot toys" out of the hands (and boxes) of the discount warehouse stores.[6] In another, leaning against the tide of neo-isolationist conviction that "foreign" restraints are presumptively beyond the reach of the Sherman Act, she wrote the opinion for her court declaring that U.S. potash buyers stated a cause of action against Canadian and Russian export cartelists who made their first price-fixed sale on foreign soil, foreseeing that a significant portion was destined for the U.S. market.[7] She rejected the cramped claim that the U.S. harm was not direct and therefore failed the "direct, substantial, and reasonably foreseeable effect" requirement of the Foreign Trade Antitrust

5. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (1995), http://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations.

6. Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937–938 (7th Cir. 2000).

7. Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845, 861 (7th Cir. 2012).

Improvements Act.[8] Appreciating the larger canvas of antitrust coherence in the world and mindful that export cartels risk falling through an enforcement gap, she said: "It is the U.S. authorities or private plaintiffs who have the incentive—and the right—to complain about overcharges paid as the result of the potash cartel, and whose interests will be sacrificed if the law is interpreted not to permit this kind of case."[9]

Diane, you judge as you live—with respect, conviction, commitment, and passion. I am thrilled to see this honor bestowed on you. Congratulations, with love, Eleanor.

ELEANOR FOX
Walter J. Derenberg Professor of Trade Regulation
N.Y.U. School of Law

8. *Id.* at 856.
9. *Id.* at 860.

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

SAMUEL ESTREICHER & OSCAR G. CHASE

We are delighted to take part in this well-deserved tribute to Chief Judge Diane Wood of the U.S. Court of Appeals for the Seventh Circuit, and we thank the N.Y.U. Annual Survey of American Law and its Board for inviting us to do so.

To date, Chief Judge Diane Wood is the Learned Hand of her generation—the court of appeals judge who, by reason of her personal and intellectual qualities and her judicial performance, is widely recognized as someone who would and should grace the Supreme Court.

Chief Judge Wood consistently demonstrates that rare combination of keen analytical power, the ability and willingness to listen carefully to others, and the insistence that the case be decided on the merits, as free as possible from political or other extraneous considerations. All persons, and certainly all judges, have prior intuitions about legal issues. We are not newborn tabula rasa; of necessity, we see the world, including the law, from the vantage of the shaping influences of our lives. The hard part for judges is standing aside from those influences and approaching the merits, even in controversial, hard cases, without prejudice, and with an open mind and ability to listen. Not many fit that bill. Judge Wood is at the top of our list and that of close observers of the U.S. court system. Moreover, she enjoys—and puts to effective use—a capacity to perform judicial duties as part of the "team" that is the reality of the life of an appellate judge.[1]

Few judges are so persuasive across political and ideological lines that they can take issue with the members of a panel majority—a panel that can include intellectually confident colleagues—and manage to persuade the entire court of appeals en banc to unanimously adopt a different approach. Today's honoree has done so on several occasions.[2] Chief Judge Wood, by the example

1. She has described both the challenges and rewards of this relationship in *When to Hold, When to Fold & When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445 (2012).

2. *See, e.g.*, Bloch v. Frischoltz, 587 F.3d 772 (7th Cir. 2009) (en banc), *rev'g* 533 F.3d 562 (7th Cir. 2008) (Wood, J., dissenting); Bayo v. Chertoff, 593 F.3d 495 (7th Cir. 2010) (en banc) (Wood, J.), *rev'g* 535 F.3d 749 (7th Cir. 2008).

of her temperament and the quality of her reasoning and judgment, can thus break down political and ideological rigidities and bring her court closer to the collegial, professional ideal. We share our colleague Richard Epstein's observation that she has the "ideal judicial temperament."[3]

We have directed the N.Y.U. Appellate Judges Seminars for nearly two-and-a-half decades. This program is one of the centerpieces of IJA: Each summer approximately forty new appellate judges, including U.S. courts of appeals, state supreme, and state intermediate appeals courts come to N.Y.U. for a week-long discussion of many facets of judging, including ethics, collegiality, workload, statutory interpretation, and opinion writing. A recurring topic for the annual program is the "Craft of Judging," a session involving an experienced judge conveying to relatively new appellate judges the indefinable ingredients of craft, principle, and effectiveness in judicial decision making. Chief Judge Wood is invariably one of the few people we turn to for this segment of the program, and she has taken part in no fewer than ten summers' programs. We are grateful to her and hope she will similarly honor us in many future programs. To our mind, she is model of what a judge should be.

We are proud of N.Y.U.'s relationship with Chief Judge Diane Wood, and applaud the Annual Survey for dedicating its 2015 volume to her. There is no more fitting dedicatee.

SAMUEL ESTREICHER
Dwight D. Opperman Professor of Law, N.Y.U. School of Law

OSCAR G. CHASE
Russel D. Niles Professor of Law, N.Y.U. School of Law

3. Jeffrey Rosen, *Good Wood*, THE NEW REPUBLIC, May 20, 2009, http://www.newrepublic.com/article/politics/good-wood.

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

GEOFFREY R. STONE

When invited to speak at today's event, I was instructed quite firmly that I was to limit myself to seven minutes. Seven minutes! I assume this is a very small journal. By my calculation, seven minutes represents one minute for every five years that Judge Wood and I have known one another, or, more precisely, approximately one second per month.

I can recall quite clearly when I first met Judge Wood. She was then a rather anxious applicant for a position on the faculty of the University of Chicago Law School. Thinking back on that meeting calls to mind an incident involving another of my favorite judges—Oliver Wendell Holmes.

At the time, Holmes was a very old man, nearing ninety years of age, in the autumn of his very long and very distinguished career. On that particular occasion, Holmes was on a train headed north from Washington. He was deeply engrossed in reading a legal brief when the conductor knocked on the door to his compartment. Recognizing Holmes, the conductor respectfully asked for his ticket.

Holmes looked in his coat pocket—no ticket. He looked in his vest pocket—no ticket. He reached into his trouser pocket—no ticket. Growing ever more frantic, Holmes began rummaging desperately through his briefcase—but still, no ticket.

At this point, the conductor, trying to calm Holmes, said "Never mind, Mr. Justice. It's really not a problem. When you find the ticket, just mail it to the company." To which Holmes exploded "You dolt! I don't give a damn about your ticket, I just want to know where the hell I'm supposed to be going."

This story is arguably appropriate this afternoon, because when I first met Diane Wood as a would-be Assistant Professor of Law, she, too, had no idea where the hell she was "supposed to be going." But, somehow or other, as we can see today, she managed to get there.

One of the great pleasures of my service as Dean of the University of Chicago Law School was the opportunity to work closely with Diane for the three years she served as my associate dean. During those years, Diane was my closest colleague, my wisest advisor, my

most discreet confidant, and perhaps most important, my constant friend.

One of the great privileges of my deanship was the opportunity to recommend Diane for appointment as the Harold J. and Marion F. Green Professor in International Legal Studies. This was a privilege not only because it was an honor Diane richly deserved, but also because she was the first woman ever appointed to a named professorship in the history of the University of Chicago Law School.

Diane has disappointed me in one very important way, however. I always thought, and always hoped, that Diane would become Dean of the University of Chicago Law School. Indeed, on several occasions over the years I tried to entice her to take on that responsibility, but always she demurred. It never occurred to me that she would instead go on to become a judge.

She is now, of course, one of the most distinguished and most respected judges in the United States. Even our colleagues from the University of Chicago Law School who serve with her on the Seventh Circuit—Richard Posner and Frank Easterbrook, two men who like almost nothing—wax eloquent when they speak of Judge Wood, even though they often disagree with her.

I have, of course, followed Judge Wood's career on the bench over the past two decades quite closely. She has been, and continues to be, an extraordinary jurist. She is careful, precise, intellectually honest, principled, courageous, forthright, and fair. She has a great eye for the essential balance between doctrine and good sense. It is what makes her such a brilliant judge.

I will briefly mention just three of Judge Wood's opinions to illustrate the nature of her commitment to the rule of law. In one case, decided in 1997, plaintiffs filed an action under the Fair Housing Act asserting that the defendants had used racially discriminatory advertisements for an upscale apartment house to drive African Americans away from the building.[1]

The defendants won at trial. After carefully reviewing the record, Judge Wood ordered a new trial because, in her words, the judgment below was "the product of errors that riddled the trial from start to finish."[2] The trial judge, she observed, consistently allowed "defense counsel to treat the plaintiffs' lawyer in a sexist and demeaning way."[3]

1. Tyus v. Urban Search Management, 102 F.3d 256 (7th Cir. 1996).
2. *Id.* at 261.
3. *Id.*

In a rather direct manner, Judge Wood declared that "we have nothing good to say about the tone of this trial. . . . Personal attacks on counsel and remarks that disparage others on the basis of sex or race have no place in the courtrooms of this Circuit."[4]

In 2002, Judge Wood filed a dissenting opinion in an important abortion case involving the constitutionality of an Indiana law that required a woman seeking an abortion to be informed in person of the state's "warnings" about the procedure, rather than allowing her to read the information in a printed brochure or on a website.[5] The effect of the law was to require a woman to make two separate trips to the clinic or hospital in order to have an abortion.

Although the majority upheld the statute, Judge Wood wrote a powerful and persuasive opinion arguing that the "in person," two-visit requirement served no "legitimate interests in maternal health or in protecting potential life," and was designed in practical effect to make it more difficult for a woman to exercise her constitutional right to terminate an unwanted pregnancy.[6] That being so, she concluded, the challenged statute posed an "undue burden" on the rights of the woman and was therefore unconstitutional.[7] In this she was, in my judgment, absolutely correct.

In 2008, Judge Wood again wrote a compelling dissenting opinion in a case involving a condominium association rule that prevented a Jewish resident from displaying a mezuzah on the doorpost of her unit.[8] The majority argued that the challenged rule did not discriminate against the plaintiff on account of her religion because the rule was a neutral policy that banned all images or figurines on doorposts.[9]

Judge Wood pointed out that the rule was not, in fact, "neutral once it is examined beyond its face."[10] This was so, she said, because the rule as applied to doorposts was "immaterial to all other residents, and . . . its sole force and purpose was," in fact, "to discriminate against the Jewish owners."[11]

As an analogy, Judge Wood noted that a similar situation would arise if a rule forbade "women to wear headscarves in the common

4. *Id.*

5. A Woman's Choice-East Side Women's Clinc v. Newman, 305 F.3d 684 (7th Cir. 2002) (Wood, J., dissenting).

6. *Id.* at 716 (Wood, J., dissenting).

7. *Id.*

8. Bloch v. Frischolz, 533 F.3d 562 (7th Cir. 2008) (Wood, J., dissenting).

9. *Id.* at 564.

10. *Id.* at 573 (Wood, J., dissenting).

11. *Id.*

areas of the condominium: no one but observant Islamic women would be under a religious duty to do so," and it would therefore be reasonable to infer "that such a rule intentionally discriminates against persons of one religion even though it appears facially neutral."[12]

As I said, Judge Wood brings not only great intellect to her role, but good sense as well.

I am delighted to have this opportunity to say to my friend Diane on the occasion of this celebration of her extraordinary achievements: mazel tov!

GEOFFREY R. STONE
Edward H. Levi Distinguished Service Professor of Law
University of Chicago Law School

12. *Id.*

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

LANCE LIEBMAN

We should think of Judge Wood in terms of four "I's." One is "intellectual" because she is a very high-class, intellectual person. That is true in her opinions, and it is true in her vast academic and judicial writings. I came prepared to talk about her Madison Lecture, but I think I will you spare that, as it has already been said tonight. But intellectual is the first word.

The second word is "interpersonal." Judge Wood has a high level of willingness and ability to deal with human beings, to fit them together. I think her ability to achieve unanimity in the Seventh Circuit has been somewhat exaggerated based on two experiences in however many years. But she is terrific with people.

The third, I would call "institutional," and it is an ability to function within the units, the institutions that we collectively need to accomplish things. And it has been my great happiness to work with Judge Wood in my time at the American Law Institute (ALI), a complicated institution and one with a lot of tension at the high end. For instance, my boss is Roberta Ramo, who was the first woman to be president of the American Bar Association and is now president of the ALI. Roberta is a lawyer in Albuquerque. We have fierce fights on the telephone about which is the worst-governed state. And Roberta, no matter what I say about the horrors of Albany and New York, comes back with stories about New Mexico that are unbelievable. Now, sometimes Chicago gets in this game and the state of Illinois; Massachusetts has three recent speakers of their lower house in prison.

But to be serious, at the ALI, Diane has been a tremendous help and support, and made a very complicated institution work better. The selection of the new director, naturally done by a committee chaired by Diane, is the latest way she has contributed. Some of you have read about how she was the one called in to fix the American Academy of Arts and Sciences when they crashed, and this takes a lot of effort, and a lot of ability, and a huge amount of energy.

The fourth word is "international." Judge Wood was early to address international law as a legal intellectual in this country; she was early to realize how international the world of the law is becom-

ing. The increase in international legal discourse over the years since I was in law school has been amazing.

I remember when I was a young Harvard teacher, I had been there a few years but I had not been out of the country. Somebody called me and said, "There's going to be a meeting in Birmingham." And I said, "Alabama or England?" And they said, "England." So I said I would come. And then, because we had little kids at the time, I had to fly just before the meeting overnight, to Heathrow, and then get a bus or a train to Birmingham. So I had been up all night. And I thought I did great at this meeting, I really thought I did great. Nowadays, the photos would have been circulated half an hour after the meeting ended, but it was two months later I got a picture in the mail. There were all these very important people around a table, and my head was on the table fast asleep. That is a true story.

The other thing about that trip was, I was at lunch with some of my colleagues from Harvard Law, who were international like Professors von Mehron and Baxter, and I said, "I have got to go down to the bank and get my passport out of the safe deposit box." They looked at me like I was an idiot, you know; their passports were always ready, they were going to go to the airport this afternoon on short notice.

Anyway, Diane's international involvement has been tremendous. I say that now at a very interesting moment. Some of you may not know that the European Law Institute recently opened. It is modeled on the American Law Institute's organization and bylaws. They just had their first annual meeting and that is just one of a hundred signs of what Diane has known for a long time. Her intellectual work on antitrust law, trade law, and procedural issues in the international context have been tremendous.

So let me say that I think a terrific choice was made to honor Diane. As my final words, I just want to disagree with what Yael Tzipori said, when she said no women have been chosen as dedicatee in the past 16 years. That was a careful calculation when in a five-year period the winners were Judith Kaye, Hillary Clinton, Sandra O'Connor, Ruth Ginsberg, and Janet Reno. Diane is walking in impressive shoes, and she fills them completely.

LANCE LIEBMAN
William S. Beinecke Professor of Law, Columbia Law School

TRIBUTE TO CHIEF JUDGE DIANE P. WOOD

ROSS E. DAVIES

Practically from the start of her service on the U.S. Court of Appeals for the Seventh Circuit in 1995, Judge Diane Wood (Chief Judge Wood since last autumn) has been justly recognized as an extraordinarily able, effective, influential, and just judge—a great public servant. Unfortunately much of what I could add to the public record about her qualities and accomplishments is stuff of the sort that law clerks are not supposed to gab about, not that the line between proper silence and prissy, pointless secrecy is easy to draw. Bennett Boskey put it well a few years ago in some remarks about *The Brethren*[1] and other behind-the-curtain books: "[T]he claims of history, journalism and biography strongly press against principles of privacy, confidentiality and ethics. There is not always a simple answer to questions of how much should be published how soon."[2] The claims of privacy, confidentiality, and ethics are, however, weighty when the subject is a judge who is still active on the bench, and perhaps especially so when she is blessed, like it or not, with rather close and constant attention from a respectful bar. And so I feel bound to keep my mouth shut.

But there are limits to proper silence, or at least to my capacity for it, and I would like to think that what follows qualifies as both an illuminating anecdote about Judge Wood and an ethical act of post-clerkship storytelling. The story is about something insignificant in itself, but it sheds light on something significant about the judge. I should also be clear up front about one matter. There is a reason for the scarcity of direct quotes: my memory is not that good. I am, however, quite confident that I have the gist of her words and deeds right. I was there, and they made an impression.

There was one small hiccup in the otherwise smooth beginning of Judge Wood's judgeship. Her commission—that piece of paper signed by the President and the Attorney General of the United

1. Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (1979).

2. Bennett Boskey, *Justice Reed and His Family of Law Clerks*, 69 Ky. L.J. 869, 871 n.4 (1980–81); *see also* Code of Conduct for Judicial Employees, Canon 3D (2013); Fed. Judicial Ctr., Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks 5-9 (2d ed. 2011).

States, with the appropriate seal—disappeared. It had made the trip from Washington, D.C. to the U.S. courthouse in Chicago safely in a cardboard tube. But someone involved in the repairing or cleaning or arranging of her new chambers exercised some poor judgment, and the tube was discarded with the commission still inside.

This was an irritant but not a disaster. Indeed, in *Marbury v. Madison*, after ruling that the President's signing of a commission—not any delivery of the commission thereafter—is the moment at which an appointment to office is complete,[3] the Supreme Court explained why the signature requirement obviated worries about missing commissions:

> If [an original commission] was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original.[4]

Some fifty years later, in *United States v. Le Baron*, the Court did seemingly add the affixing of the seal to the commission as a prerequisite for appointment.[5] But as best I can tell there have been no more constitutional additions since then. And no one has ever said that a federal judge must receive that piece of paper—let alone preserve, protect, or defend it—in order to keep her job. Nor has any scholar written a long and learned article about the constitutional status of missing commissions and the judges who miss them, which is surprising but does suggest that any concern about the status of a judge who receives a commission and then is deprived of it is truly trivial.

Thus Judge Wood was still a judge, but it would have been better for her to have that commission, framed and hanging on the wall. A commission is not quite a robe when it comes to the most noticeable of judicial equipment, but it is surely the most significant of what Chief Justice Marshall in *Marbury* called the "evidences of office" of a presidential appointee.[6]

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3. 5 U.S. (1 Cranch) 137, 157 (1803).

4. *Id.* at 160–61.

5. 60 U.S. 73, 78 (1856) ("When a person has been nominated to an office by the President, confirmed by the Senate, and his commission has been signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete.").

6. 5 U.S. (1 Cranch) at 155.

So being the not-shy and not-retiring character that she is, Judge Wood telephoned the White House for a replacement. I do not know what happened next. The replacement commissions process is something of a mystery, and I have been unable to plumb it. But I have filed a "We the People" petition, since that seems like the friendly and democratic way to go about finding out.[7]

In any event the bureaucratic black box did work. Eventually, a replacement commission arrived in Judge Wood's chambers in a replacement cardboard tube. This time she secreted the tube on a high shelf in her small private office behind a row of books, while the patching up, painting, and cleaning of her chambers went on.

In due course the time came when she could move pictures and books out of boxes and permanently onto walls and bookshelves. When I showed up to start my clerkship with her in the early summer of 1997, the replacement commission was flat on the desk in her office. It was pretty cool, though it had one odd feature. At the bottom, very close to the edge of the paper, was the tiny word "Duplicate" in etched cursive, just above some even tinier block lettering, "Bureau of Engraving and Printing." I must emphasize how small, close together, and close to the bottom edge those words were, because that closeness made it obvious that they were fine print intended to be read by the recipient and then covered by a picture frame or matting. There wasn't even enough paper below "Duplicate" and "Bureau of Engraving and Printing" for a frame or mat to hold onto the paper and keep it flat.

This paper shortage was, alas, a second hiccup with the commission, because Judge Wood was not overjoyed by the prospect of covering up the "Duplicate." Here I will offer a bit of unimaginative reconstruction:

Diane Wood (DW): I am glad to have the commission, of course, but I am at a loss as to how I ought to put it on the wall.

Ross Davies (RD): What do you mean?

I am sure my actual words were more numerous, and cloyingly worshipful and deferential, but I have blocked that out entirely. If I had been at my best I might have said something like "four thumb-

7. *See* Ross Davies, *"We The People" Petition*, PRAWFSBLAWG (Feb. 26, 2014, 9:05 PM), http://prawfsblawg.blogs.com/prawfblawg/2014/02/we-the-people-petition.html. The petition itself is no longer available "because it failed to meet the signature threshold." *Please Disclose the Process for Issuing Replacement Commissions to Federal Judges*, WE THE PEOPLE, https://petitions.whitehouse.gov/petition/please-disclose-process-issuing-replacement-commissions-federal-judges/GBZr1cLQ (last visited Mar. 3, 2015).

tacks ought to do it," but I was not that strong. Assume for the rest of this dialogue that I am a toadying novice law clerk.

DW: I mean this is a duplicate commission and I want to display it so that the word "Duplicate" is visible. I do not want to conceal it.

RD: Because you don't want people to think you are hiding something?

DW: No. That would be silly. It's because I do not want it to appear to be something other than what it is. I want to be accurate.

Pause.

DW: But I doubt it will look right in a frame. I don't know if they can even frame it properly to show the "Duplicate."

RD: True.

Another pause.

DW: Enough. It will look odd but be right. We'll see.

That was the end of it. It did not occur to anyone in her chambers, I think, to ask the Bureau of Engraving and Printing to provide a commission with "Duplicate" moved up inside the frameable space. Implicit in the production and distribution of commissions with the "Duplicate" down low was an assumption by the Bureau (which is very big and very experienced in the commissions business) that everyone mats or frames over the "Duplicate." A few weeks later Judge Wood's commission was framed and on the wall with the "Duplicate" on display.

She was correct. Her commission—her "Duplicate" commission—is funny looking. In fact it has a special kind of funny-lookingness, because it looks odd at any distance, for different reasons. From across the room: why is it off-center, lopsided on the vertical axis, with the main text too close to the frame at the top and too far away at the bottom? At arm's length: why is there a smudge or tear—or are there two of them—at the bottom? Up close: why is there tiny, half-concealed text down at the edge of the frame? If you look more closely still—for some of us, reading glasses will be necessary—you can see the word "Duplicate" and below it most of the words "Bureau of Engraving and Printing," although they are partly cut off, or at least in the shadow of the frame, because the framing people needed to take that much in order to make the paper fit behind the frame properly.

I do not want to overstate the peculiarity of Judge Wood's commission. It is still obviously what it is: a record from the President of the United States of an appointment to high office, in an ancient

form, essentially unchanged since the founding of our country. Nor do I want to overstate the weightiness of the moment when she decided "Duplicate" should be exposed. It was not a big deal, it happened quickly but unhurriedly, and she obviously felt the right and wrong of it was easy. Nevertheless in its presentation on the wall of her chambers, the commission reflects the character of the holder, and uniquely so, to the best of my knowledge, although of course I cannot be sure of that.

But this ugly duckling is really a thing of beauty. What we have here is probably the homeliest commission in the federal judiciary, and the handsomest use of a commission to exemplify two important attributes of a good judge: the ability to see things as they are (rather than as we might wish them to be), and a tendency to act on that insight (even when the results are less than pretty and there is an enticingly easy way out).

By now the point of this little story—of this parable of the good judge—is both easy to see and impossible to express in just a few words. And to say more would spoil it. So I will not insult your intelligence or try your patience, but I will close with one related observation. Judge Wood's little exercise in openness also creates a nice symmetry of judicial symbolism. On the one hand there are her judicial robes, which identify the judge, but also, to some extent, conceal and constrain. On the other hand there is the "Duplicate" commission, which is also an "evidence[ ] of office,"[8] and which offers the judge a choice between concealment and disclosure. But concealment to what end? to look better? to be neater? to paper (or frame) over a messiness in government administration? to avoid the risk that some not-quite-perfectly informed observer might misunderstand the meaning of "Duplicate" in this context? or disclosure to what end? to share what can reasonably be shared? to hide only what must be hidden? to honor the democratic default rule of openness? These are small, perhaps practically insignificant choices, but it is by them, as well as by her truly judicial acts—decisions and opinions in cases, treatment of counsel in court, and so on—that we know her.

There are other stories I think I could tell—about her unorthodox approach to the clerkship interview, about the history of the set of *U.S. Reports* on the shelves in her chambers, about the occasional role of languages in oral argument, to name a few—but space and time are limited here, and so they will have to wait until next time. My expectation is that there will indeed be plenty of next

8. *Marbury*, 5 U.S. (1 Cranch) at 155.

times to celebrate Judge Wood, because she has been a judge for only about two decades, and all signs are that she has several more in front her. And that is a very good thing.

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