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Serving Justice: A Supreme Court Clerk's View

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BOOK REVIEW

Serving Justice: A Supreme Court Clerk's View. By J. Harvie Wilkinson, III,¹ New York: Charterhouse, 1974. Pp. 207.

Reviewed by Mack A. Player²

The gossip in me was titilated when I saw the cover of Professor J. Harvie Wilkinson's book *Serving Justice*. The former law clerk for Mr. Justice Powell perhaps was going to "kiss and tell" about what *really* went on behind the bench of the Supreme Court. As a former law clerk for a judge in the lower echelon of the federal judiciary, I was also interested in comparing notes on the decision-making process. Finally, as a professor, I had hoped to find some intellectual analysis relating to the Court, its history or its future. I was disappointed. There was no real gossip, no particular insight into the men who sit on our highest court, and, save repeated disclaimers that clerks do not have *that* much influence, there was little more than obvious comments on the dynamics by which great legal disputes are resolved. The book accurately did portray the excitement of law clerking. Perhaps I should not have expected more.

The first of three major chapters deals³ with the author's impressions of the role of a Supreme Court law clerk. Quite understandably a young man will be awed when he is dragged from the law school womb and thrust into the vortex of legal ideas. It is no doubt inspirational to be immediately a part of future legal history. Certainly, every human is flattered when his opinions are solicited and acted upon. The greater the person seeking the advice, the greater will be the feeling of pride. I, too, would be tempted to strut verbally if a world famous person called me by my first name and attended my wedding. And any mortal would reflect with nostalgia upon days of riding to work with a Supreme Court Justice discussing the passing arm of Sonny Jurgensen. Certainly, I would remember with fondness the day I was knocked on my backside by Mr. Justice White while playing basketball in the Supreme Court gym. But this is the stuff of cocktail party talk. Although justifiably felt, these thoughts are much better left unexpressed, for the expression can seldom impress the reader as much as the experience has impressed the writer. Relating these experiences under the

¹ Assistant Professor of Law, University of Virginia.

² Associate Professor of Law, University of Georgia.

³ J. WILKINSON, *SERVING JUSTICE*, ch. 2, at 10-68 (1974). The book consists of five chapters. The first and last are biographical dissertations on the author's acceptance and departure from the role of clerk. The substance of the book is contained in chapters entitled "The Clerk," "The Justice," and "The Court" in which the author discusses his impressions of each of these subjects.

guise of informing the reader of what he already knows or suspects — that justices of the Supreme Court are human beings — can appear pretentious and self-congratulatory.

Some of the author's observations are well worth noting, however. For example he believes in the importance of the short term law clerk system as a method of keeping the Court from being isolated. The new blood of the clerks links the Court with contemporary thought. Any move to a professional legal staff is viewed with distrust by Professor Wilkinson. Yet Mr. Wilkinson rues the minimal staff support for the Court.

Professor Wilkinson's observations about the quality of advocacy can most certainly be seconded by judges and law clerks:

The Supreme Court, like any other, must rely upon the efforts of the attorneys in a case. How well the Court ultimately performs will depend to a considerable extent upon how lawyers perform before it . . . I . . . researched cases for Justice Powell where the briefs were scanty, relevant precedents had been ignored, supporting data omitted, and the hard and critical questions avoided . . . The government may enjoy a formidable advantage over opponents, not necessarily because of the interests it represents, but because it petitions the Supreme Court in clear, straight forward terms . . . A meandering, turgid private effort matched against an easily digested government brief, in a Court with a great many matters to consider, may, for the private party, spell outright disaster.⁴

The second major segment of the book entitled "The Justice"⁵ was billed as a biographical insight into Mr. Justice Powell. It read more like a eulogy than a biography. Not only was the use of a past tense construction disconcerting, few true insights were provided save the broad, generalized conclusions that generally accompany a good man to his final resting place. We are told repeatedly that Lewis F. Powell, Jr. is a man of judgment, stature, and wisdom.

Finally, in the chapter entitled "The Court"⁶ the author launches a counterattack on those who supposedly are saying that the Burger Court is undercutting all of the creative activism of the Warren years. According to Professor Wilkinson:

Much more of the Warren legacy survived than was being destroyed. Not only was its work not being extinguished, the present Court was, in the main, working responsibly with that tradition, shaping and adapting it to new circumstances and problems.⁷

As examples of this conclusion the author examines three major develop-

⁴ *Id.* at 29-31.

⁵ *Id.*, ch. 3, at 69-123.

⁶ *Id.*, ch. 4, at 124-73.

⁷ *Id.* at 150.

ments of the Warren era: racial segregation, legislative reapportionment, and criminal procedure. In discussing racial segregation the author notes that we are in the second generation of decisions. No longer are courts confronting the "easy" issue of *de jure* segregation, but rather are faced with the more subtle issues of private prejudice. Although the Court has not renounced the role of "referee" in reapportionment decisions, the author feels it has indicated that it will not blow the final whistle so frequently. In the area of criminal procedure, according to Wilkinson, the Court is making delicate adjustments in the balance between society and individual without overruling a single Warren decision.

Finally, the author states yet another obvious proposition — that the Court cannot be simplistically divided into voting blocks. Justices are neither logrolling politicians nor mindless sheep following ideological shepherds. The author points out that the similarities in ideology between a Douglas and a Black, a kinship frequently admired, is perhaps greater than the similarities between a Burger and a Blackmun, derided in the liberal press as the "Minnesota Twins." To this extent, the work does present an informed, albeit unscholarly, defense of the work of the "Nixon Court."

In summary, this short book can be read in an evening if one desires. The three major divisions of the book, "The Clerk," "The Justice," and "The Court," would do nicely as three luncheon addresses before a local Chamber of Commerce, but, as literature, the book neither entertains nor significantly enlightens. It is probably too technical for all but the most sophisticated layman and too simplistic for all but the most unsophisticated professional.