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Tribute to Judge Betty Binns Fletcher

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TRIBUTE TO JUDGE BETTY BINNS FLETCHER

Judge William A. Fletcher*

Thank you very much for the invitation to introduce this wonderful symposium honoring my mother, Judge Betty Binns Fletcher.

Let me begin by thanking my mother. Without her I would not be here. I realize that everyone can, and should, thank their mother for being here—that is, for their very existence. But I mean my thanks not only in that way. I mean also that without her I really would not be here—at this podium, speaking to you as a judge on the Ninth Circuit.

Many of you know the outlines of the story. When President Clinton nominated me to the Ninth Circuit in the spring of 1995, we all thought it would be a wonderful thing to have a mother and a son on the same court. We did not dream that having two members of the same family as judicial colleagues would pose a problem. After all, Morris Arnold, nominated by the first President Bush, had just joined his brother, Richard, as a judge on the Eighth Circuit. And the Hand cousins, Learned and Augustus, had sat together for years on the Second Circuit. Which reminds me of a saying about the Hands. You first have to know that Learned's nickname was "B." The saying went: "Quote 'B'"—that is, Learned—"but follow Gus." If you wonder how that should be applied on the Ninth Circuit, it is "Quote 'B'"—that is, Betty—"and follow her, too."

But the Republicans were not to be easily shamed into doing the right thing. They had celebrated the fact that Morris Arnold had joined his brother on the bench. But now, claiming that an ancient anti-nepotism statute (which predated the Hands on the Second Circuit) forbade family members sitting on the same court, they stalled my nomination. This went on for several years. I said "years." Mom—I hope you don't mind me calling her "Mom"—broke the stalemate. In return for my confirmation, she agreed to take senior status, thereby freeing up her seat for a new appointment to be filled by President Clinton, but with a person acceptable to the Republican then-Senator from Washington.

The Republicans got themselves a deal, but it was not quite as good a

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deal as they thought. Most judges who take senior status relax a little. They sit part time, they don't do capital cases, they don't sit outside their home city, they don't do screening or motions, or some combination of the above. In other words, they are less than full-time judges. Mom, as I do not need to tell you—and if the Republicans had asked, as someone might have told them—was not likely to follow that path.

Mom has now been on senior status for ten years. For all of those years, she has carried a full load of argued cases, she has done capital cases, she has traveled to hear cases in other cities, and she has done screening and motions. Further, Mom calls cases en banc (and gets her cases called en banc) with some regularity. She would hardly be doing her job if she did not decide cases that get called en banc. And, as if doing her job in the Ninth Circuit is not enough, she has sat by designation on other circuits, taking her sense of justice to other parts of the country that may be in need of same. Finally, and there will be more on this point in a moment, she has had a distinguished record of reversals by the United States Supreme Court.

If I could come close to fooling myself when I was confirmed, I have no illusions now. Left to her own devices, Mom would not have taken senior status ten years ago. She would not have taken senior status last week. She would be an active status judge today, junior only to the Chief Judge and one other judge. I am the beneficiary of her sacrifice, and I want to say here, "Thank you."

As most of you know, Mom is a proud graduate of the University of Washington School of Law. She started law school at Stanford, where she was an undergraduate, during the War. For some of you in the audience, I mean the Second World War. Stanford's law school had emptied out as its young men went off to war. So it invited undergraduates, including women, to take classes. Mom's father, himself a lawyer, loved to tell the story of his Betty coming home for Christmas, getting off the train in Tacoma, saying "Daddy, I got an A in Torts." I don't know if this is a true story. But I do know that he loved to tell it.

Mom and Dad were married early in the war. Dad flew anti-submarine blimps out of Lakehurst, New Jersey, so they were together for the duration. They had two children, my sister Susan and me, before the war ended. They had two more, my sister Kathy and my brother Paul, after they returned to the Northwest. With four children at home and nothing else to do, Mom decided to go back to law school. Her parents rented out their house and moved in with us. Dad and Granddad went to work every morning. Grandmom stayed home and took care of us kids. And Mom made the long commute to Seattle every day from Lakewood, south of Tacoma, on old (even then it was old) Highway 99.

Mom graduated number one in her class and could not find a job. Finally, Charles Horowitz of the old Preston firm (now, after many name changes, K & L Gates) took a chance on her. He knew she would be a good lawyer. The chance he took was that he could persuade his partners, and his clients, that she would be. Some of you in the audience know Mom from her days in practice. You can testify that it did not take long for everybody to know that she would be, and soon was, a superb lawyer. I remember Bill Dwyer, later a federal judge himself, speaking at Mom's swearing in as a judge on the Ninth Circuit. He recounted a case they had worked on together through most of the night. They were all exhausted. Mom, who had been working in another room, came in—in Bill's words (and I remember them exactly) "fresh as a daisy, ready to go another round." When Charles Horowitz left the firm to take the bench, he bequeathed his clients to Mom, including our native son William O. Douglas. I don't think I am violating the attorney-client privilege when I say that Mom has always said that Justice Douglas, who could be demanding in his role as a Justice, was a wonderful client.

When President Carter came to the White House, he changed the system of choosing judges for the federal courts of appeals. Previously, senators had taken the initiative in choosing federal judges for their own states, subject to the President's potential veto. President Carter reversed the presumption for court of appeals judges. Through what he called "merit selection panels," his White House took the initiative in choosing court of appeals judges, subject to the senators' potential veto. At first blush, this would seem to be a change that would have benefitted Mom. But the kicker was that under the old system Senator Magnuson was already prepared to propose her name to the President. Now she had to go through the new "merit selection panel." "Merit," phooey! She had had it wired. Fortunately, President Carter's idea of merit matched Senator Magnuson's. And we have been blessed with Judge Betty Binns Fletcher as a judge on the Court of Appeals for the Ninth Circuit for the past thirty years.

No judge knows, or can know, beforehand precisely what kind of a job he or she is taking. What is it like to be an appellate judge? Perhaps I can best sum it up with a line from Matthew Arnold's famous poem, "Dover Beach." Justice Rehnquist, later Chief Justice, once quoted from "Dover Beach" (in the *Northern Pipeline*¹ case if you want to know), but he quoted from the line about the "darkling plain . . . where ignorant

1. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982) (Rehnquist, J., concurring).

armies clash by night.”² He said that this was Justice White’s view of the judicial process; it is possible, however, that he was also describing his own. But I am thinking of another line, one that describes the cases that keep coming in, like waves on a beach.

A full-time judge will hear perhaps 250 argued cases in a year, perhaps 300 or 400 screening cases, another 200 or so Certificates of Appealability in habeas cases, and perhaps 200 or 300 motions. In everything except the argued cases, the judges do their job out of the public view. In all of these cases, argued and otherwise, the judges see a trail of human misery. Some of it is inflicted by the criminal defendants whose appeals we hear. Some of it has previously been inflicted on the criminal defendants by their families. Some of it is inflicted by our harsh sentencing laws, which on average imprison our citizens eight times longer than do those of Western Europe for comparable crimes.³ Some of it is inflicted by our immigration laws that are designed to keep economic refugees out of the country (unless they can get an H-1B visa). Some of it, particularly in the bankruptcy cases, is inflicted by a bad economy. Some of it is entirely self-inflicted. But, however caused, we see a lot of misery. This is true by definition. Happy people tend not to file lawsuits.

About a month ago, Mom was in my chambers in San Francisco talking to one of my former clerks. She said, and her words struck me, “This job breaks your heart.”

In “Dover Beach,” Matthew Arnold is looking out at the ocean:

Listen! you hear the grating roar
Of pebbles which the waves draw back, and fling,
At their return, up the high strand,
Begin, and cease, and then again begin,
With tremulous cadence slow, and bring
The eternal note of sadness in.⁴

The only way in which this does not capture our reality is that our cases—our waves on the beach—do not come with a “cadence slow.” They come quickly, one after the other, in rapid and unremitting succession, but always bringing “the eternal note of sadness in.”

That is the nature of the job, dealing with these cases of human

2. MATTHEW ARNOLD, *Dover Beach*, in THE POEMS OF MATTHEW ARNOLD 253, 255 (Miriam Allot ed., 2d ed. Longmans 1979) (1867).

3. James E. Felman, *The State of the Sentencing Union: A Call for Fundamental Reexamination*, 20 FED. SENT’G REP. 337, 337 (2008).

4. ARNOLD, *supra* note 2, at 255.

unhappiness, one after another, applying the law and trying to do justice. How does Mom do the job? Until I had sat on the court with her, I had only the vaguest idea.

First, let me describe the job that is invisible to the general public—which, in terms of hours spent, is most of it. Here are some, but only some, parts of this invisible job.

Screening cases are perhaps the most difficult. These are supposed to be the easiest cases, and we have diverted them to what we call screening for quick processing, but the job is not easy. The staff attorneys present the cases to three judges sitting at a table (or sometimes appearing by video), without the parties' lawyers present. We listen to the staff attorneys' presentations, skim the briefs or record excerpts, ask questions, and decide the cases—sometimes as many as ten an hour. This could be the very definition of hell. It is boring, and you have to pay attention.

We live in fear of making a mistake. It is easy to pay attention between 9 a.m. and 10 a.m. Usually we break for lunch; sometimes we keep hearing cases even as we eat. At about 3 p.m. they bring us cookies. I think this is in lieu of a pay raise. Between 3 p.m. and 4 p.m., we struggle to stay focused.

Mom is one of the best screeners among us, perhaps the very best. Indeed, the staff attorneys who present screening cases have a phrase specially reserved for her. I won't say that she terrifies the staff attorneys. But I will say that they come before her particularly well prepared. Their term is that they are "Fletcher-ready," meaning they are ready for any question—and I mean any question—about the case they are presenting.

Another part of the invisible job is processing PFRs (petitions for rehearing) and PFREBs (petitions for rehearing en banc). As I don't need to tell the former clerks in this room, Mom pays attention to all of them. She is one of the few judges on the Ninth Circuit who will take the trouble, in a case that has been decided by an unpublished memorandum disposition, to write to the panel because something in the PFR or PFREB has caught her eye, and she thinks the panel may have made a mistake.

Another part is making and defending against en banc calls. Nothing in our job description says that we have to call each other's cases en banc. Some judges on the Ninth Circuit never, or virtually never, do so. Some of them don't do so based on principle. Essentially, the principle is that if the panel made a mistake, let the Supreme Court correct it (as that Court has occasionally been willing to do). But there is another factor at work, which for some people may rise to the level of principle. Writing

memos in support of en banc calls is hard work. Again, as I do not need to tell the former clerks in the room, Mom has never been afraid of hard work, or of calling cases en banc.

Defending against en banc calls is a slightly different proposition. Here, the judge whose decision is being called en banc in one sense does not have a choice. If another judge calls her case en banc, she has to respond. In another sense, however, perhaps the judge has (or at an earlier point, had) a choice. There are lots of ways to duck hard questions. Sometimes a judge decides a potentially avoidable hard question knowing that an en banc call is likely to follow. Mom is fearless. If she thinks a hard question needs to be answered, she will answer it. And if the right answer, in her view, is one that will provoke an en banc call, her attitude is, in the French phrase, “tant pis”—which, roughly translated, means “damn the torpedoes, full speed ahead.”

Second, what about the publicly visible part of the job—the published opinions. So much to say and so little time to say it. Fortunately, most of the rest of the day will be devoted to this topic, so I will not undertake anything like a systematic survey of her opinions. I will touch on only three.

About a month ago, I asked Mom to send me a list of some of her favorite opinions. She did, accompanied by the following wry comment: “No surprise—my favorite opinions were often reversed by the Supreme Court.” To some extent, this is a typical comment by a trial judge or intermediate appellate judge. None of us likes to get reversed, and we all remember Justice Jackson’s famous comment about the Supreme Court in *Brown v. Allen*, “We are not final because we are infallible, but infallible only because we are final.”⁵ My old boss, Judge Stanley Weigel of the federal district court in San Francisco, had a stock line. He loved to say, “I just got affirmed by the Ninth Circuit, but I still think I’m right.”

But there is something more than stubbornness and pride of authorship in Mom’s comment. Over the past thirty years, the Supreme Court has moved to the right, dragging some of the lower courts along with it. The important point is not only that the Supreme Court has reversed lower court decisions with which it disagrees. It is also that the Supreme Court has reversed lower court decisions that were based on earlier Supreme Court decisions with which the current Supreme Court now disagrees.

I will start with an opinion from the good old days, or at least the

5. 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

relatively good old days, *Johnson v. Transportation Agency*⁶ decided by the Ninth Circuit in 1984. The Transportation Agency had a voluntary affirmative action plan that gave some preference in hiring to women and minorities who were underrepresented in its work force. Diane Joyce, a current employee of the agency, applied for a position as road dispatcher, a so-called “skilled craft” position. Along with six others, she qualified for the position by scoring above 70 on an oral examination given by a two-person board. She scored 72.5, fourth among the seven. Another current employee, Paul Johnson, scored 75, tied for second. The seven applicants were given a second oral examination, now by a differently composed board. The second board unanimously recommended Joyce. The agency’s affirmative action coordinator then recommended Joyce. After the Director appointed Joyce, Paul Johnson sued under Title VII, alleging illegal reverse discrimination.

Mom wrote an opinion, joined by the late Judge Ferguson (whom we loved and miss), upholding the Director’s decision. She wrote:

Statistics contained in the plan show that not one of the Agency’s 238 skilled craft workers was a woman. . . . A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation. The promotion of Joyce was a lawful attempt to remedy the conspicuous imbalance.⁷

After Joyce’s appointment as road dispatcher, 237 of the skilled craft positions were filled by men. The 238th was filled by Joyce. I may not be the most objective observer, but I find Mom’s opinion utterly persuasive.

Here comes the good part. The Supreme Court affirmed. Justice Brennan wrote for the Court:

The [Director’s] decision . . . was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency’s work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.⁸

6. 748 F.2d 1308 (9th Cir. 1984), *amended by* 770 F.2d 752 (9th Cir. 1985).

7. *Johnson*, 770 F.2d at 758.

8. *Johnson v. Transp. Agency*, 480 U.S. 616, 642 (1987).

Justice Scalia dissented, joined by Chief Justice Rehnquist. With what were to become two of his trademarks—sarcasm and insistence on text, as he understands that text—Justice Scalia wrote, “With a clarity which, had it not proved so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII . . . declares:” And then he quoted Title VII.⁹

If you don’t mind a little singing¹⁰—“Those were the days my friend. We thought they’d never end. We’d sing and dance forever and a day.”¹¹ But the truth is, we knew they would end. Indeed, we knew they were already ending. The Supreme Court affirmed Mom’s opinion in 1987. Justice Scalia had been appointed and Justice Rehnquist had been elevated to Chief Justice the year before. Justice Brennan would soon retire. We could see the conservative majority coming.

There is a passage from Milton’s *Paradise Lost* that captures the moment, one of Wordsworth’s favorite passages. Lucifer has been cast out of heaven. He is now flying toward Eden. He is still far away, but he is coming:

As when far off at sea a fleet descried
Hangs in the clouds, by equinoctial winds
Close sailing from Bengala
So seemed
Far off, the flying fiend.¹²

The next opinion, *Thompson v. Calderon*,¹³ is a particular sore point. This was a capital case. Thomas Thompson and David Leitch were both involved, in some way, with the stabbing death of Ginger Fleishli. There was evidence from which a jury could have concluded that either Thompson or Leitch killed her. The two men were tried separately. The prosecutor tried Thompson first. His theory was that Thompson raped her and then killed her to cover up the rape. The rape is what made Thompson eligible for the death penalty. Thompson contended that they had had consensual sex. The prosecutor presented two jailhouse snitches who testified in support of the prosecutor’s theory. The jury convicted Thompson and sentenced him to death.

Then the prosecutor tried Leitch. Now the prosecutor contended that Leitch, rather than Thompson, killed Fleishli. Now the prosecutor’s

9. *Id.* at 657 (Scalia, J., dissenting).

10. These lines were sung, though not very well.

11. MARY HOPKIN, *THOSE WERE THE DAYS* (Apple 1968).

12. JOHN MILTON, *PARADISE LOST* 63 (Philip Pullman ed., Oxford Univ. Press 2005) (1667).

13. 120 F.3d 1045 (9th Cir. 1997) (en banc).

theory was that Leitch killed her because she was interfering with his attempted reconciliation with his ex-wife. He argued to the jury that Leitch is “*the only one with any motive* for her death.”¹⁴ He presented four jailhouse snitches to support this theory of the case. The jury returned a verdict of second degree murder.

Obviously, the two theories of the case are incompatible. Yet the prosecutor pursued them both, and got convictions under both.

A three-judge panel of the Ninth Circuit denied habeas corpus to Thompson. Because of administrative errors in two separate chambers, no one made an en banc call. The mandate issued. Just before Thompson was scheduled to be executed, the three-judge panel denied a motion to recall the mandate. The full court then voted to take the case en banc. The en banc court recalled the mandate. Mom wrote the opinion. She wrote that there were “extraordinary” circumstances justifying the recall, including the administrative errors that led to the failure to call the case en banc, and “the grave questions that exist regarding Thompson’s innocence of any capital offense, the likelihood that the [three-judge] panel’s decision is erroneous, and the consequences that would flow from allowing an erroneous decision to go unreviewed.”¹⁵ On the merits, Mom wrote for the court that the prosecutor had acted improperly and that Thompson’s counsel had provided ineffective assistance.

Here is where it gets bad. We are now in 1998, eleven years after the Supreme Court’s affirmance in the *Johnson* case. The Supreme Court reversed five-to-four, in an opinion by Justice Kennedy. He wrote that recalling the mandate was a “grave abuse of discretion.”¹⁶ Not just an abuse of discretion. A *grave* abuse of discretion. Those are strong words.

In my view the Supreme Court lost its sense of perspective. To state the matter more plainly, the justices in the majority lost their temper. The Court, of course, had had previous run-ins with the Ninth Circuit in death penalty cases. The most famous of these was the Robert Alton Harris case.¹⁷ And it would have more afterwards. But the *Thompson* case stands out.

14. *Id.* at 1056 (emphasis in original).

15. *Id.* at 1051.

16. *Calderon v. Thompson*, 523 U.S. 538, 542 (1998).

17. In *Pulley v. Harris*, 465 U.S. 37 (1984), the Supreme Court reversed the Ninth Circuit’s grant of habeas corpus. The Court later vacated several last-minute stays of execution. The Court’s last order went so far as to forbid the entry of further stays. *Vasquez v. Harris*, 503 U.S. 1000 (1992); see John T. Noonan, Op-Ed., *Should State Executions Run on Schedule?*, N.Y. TIMES, Apr. 27, 1992, at A17.

Death penalty cases are among the most difficult that any judge is asked to decide. Of all cases, these should be the ones where our judgment is brought to bear with calm deliberation, and where we seek above all to ensure that we do not execute someone who is innocent, or, more narrowly, as in the *Thompson* case, innocent of a capital crime. In my view, the Ninth Circuit en banc panel in the *Thompson* case met that high standard. I regret to say that I think that the Supreme Court did not.

Finally, a save-the-whales case. Most of you do not know that as a young man Mom's maternal grandfather shipped out from his hometown of Mattapoisett, Massachusetts, for a two-year whaling voyage. I won't engage in deep psychological analysis, but it occurs to me to ask whether Mom may be atoning for Grandpa Hammond's whaling days.¹⁸

A year ago, Mom wrote a careful, forty-five-page opinion affirming the district court's preliminary injunction against the Navy conducting exercises using sonar in a manner that caused serious damage to whales, *Natural Resources Defense Council, Inc. v. Winter*.¹⁹ She specifically noted the district court's "narrowly tailored mitigation measures which provide that the Navy's . . . exercises may proceed as planned if conducted under circumstances that provide satisfactory safeguards for the protection of the environment."²⁰

Here it comes again. The Supreme Court reversed, in a five-to-four opinion written by Chief Justice Roberts. His opinion begins: "'To be prepared for war is one of the most effectual means of preserving peace.' So said George Washington in his first Annual Address to Congress, 218 years ago. One of the most important ways the Navy prepares for war is through integrated training exercises at sea."²¹ You get the idea. In the French phrase, "On s'en fiche"—which, roughly translated, means "Damn the whales, full speed ahead."

I have chosen these three opinions, partly to show Mom's judicial craft, partly to show her deep sense of humane justice, and partly to show the different jurisprudential climate between the first, decided in 1984, and the last, decided in 2008. I have left out her other 700 or so published opinions. In all of these opinions, Mom has tried not only to do justice in the case before her, but also to shape the law to do justice in the cases that will come after. It is by these opinions that the world will judge her. But I ask you to remember the thousands and thousands of

18. THOMAS W. HAMMOND, ON BOARD A WHALER (1901).

19. 518 F.3d 658 (9th Cir. 2008).

20. *Id.* at 703.

21. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. ___, 129 S. Ct. 365, 370 (2008).

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invisible cases—remembered only by the parties—that Mom has also decided.

It takes stamina to fight for law, and for real justice, in the waves of cases that bring the “eternal note of sadness in,” day after day, week after week, year after year. More than that, it takes courage. Courage to follow the law as one sees it, and to try to do justice in this messy, unhappy world.

There is an old Quaker saying, “Speak truth to power,” reminding us of our obligation to speak truth to those who rule us. There is also a reciprocal obligation. Power should speak truth to us. An appellate judge is both powerless and powerful. She is told what to do by the Supreme Court, and she tells others what to do. In both roles, she needs to speak truth. For thirty years, Judge Betty Binns Fletcher has spoken the truth—clearly, eloquently, and always fearlessly.