



# Hon. Karen Nelson Moore

## U.S. Circuit Judge for the Sixth Circuit Court of Appeals

by Prof. Jonathan L. Entin



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In retrospect, it seems natural that Karen Nelson Moore became a federal judge. A brilliant student in college and law school, she held two prestigious clerkships, practiced with a top law firm, and was a distinguished law professor before her appointment to the bench in 1995.

### Background

Judge Moore's long connection to Harvard University began with her undergraduate studies. She attended Radcliffe College, where she was president of her class. Elected to Phi Beta Kappa, she graduated *magna cum laude* and wrote her honors thesis in economics on tax incentives for investment in real estate. She stayed on to attend Harvard Law School, again graduating *magna cum laude*. Among her accomplishments were serving as an editor of the *Harvard Law Review* and as an instructor in Harvard's international tax program.

After law school, she clerked first for Judge Malcolm R. Wilkey of the U.S. Court of Appeals for the District of Columbia Circuit and then for Supreme Court Justice Harry A. Blackmun. She was the first woman to clerk for each of them and is grateful to them for the experiences and opportunities they provided. She views them as her professional mentors. After her clerkships, she practiced with Jones Day Reavis & Pogue.

### Professor Moore

In 1977, Moore joined the faculty of Case Western Reserve University School of Law. Five years later, she became the school's first tenured female professor. In 1994, she was appointed the inaugural Arthur E. Petersilge Professor of Law, the first woman to hold an endowed chair at the law school.

Professor Moore set an extraordinary standard. She was an inspiring teacher who received the Student Bar Association's first Teacher of the Year Award and subsequently was honored with the law alumni association's Distinguished Teacher Award. She taught a wide range of courses, including civil procedure, federal income tax, complex litigation, conflict of laws,



and international aspects of U.S. income tax. She also created a Supreme Court Seminar in which students analyzed the record and briefs in pending cases, then wrote draft opinions. In addition, she was the first coordinator of the law school's judicial externship program. In that role, she arranged placements and also taught a series of classes to introduce students to the duties and obligations of working with judges.

A productive scholar, Professor Moore wrote about a variety of topics in litigation, procedure, and taxation. Among her articles were pieces on foreign tax credits, sham transactions, judicial disqualification, due process, preclusion, and jurisdictional issues.<sup>1</sup>

Her academic work led to wider professional recognition. She served on the American Bar Association's Standing Committee on Judicial Selection, Tenure, and Compensation for several years and has been a member of the American Law Institute since 1984 as well as a fellow of the American Bar Foundation since 1991. In addition, she held a number of significant positions in the Association of American Law Schools (AALS), chairing the Civil Procedure section and a national workshop on the subject. Professor Moore also chaired the organizing committee for the AALS' annual workshop for new law teachers

and served on its special committee on tenure and the tenuring process.

Junior faculty might at first have been more than a little overwhelmed by her formidable intelligence and remarkable achievements, but she was a wonderful colleague. Always willing to exchange ideas and to read drafts, she consistently had incisive questions and suggestions. Moreover, she had a sharp wit. I can attest personally to both of these points: I gratefully acknowledged her support in several articles and still remember the day, shortly after I had published an op-ed column criticizing the Ohio Supreme Court's reasoning in a high-profile case, that she greeted me by asking whether I was planning to seek admission on motion to the Ohio bar anytime soon.

### The Harvard Connection

As noted above, Judge Moore holds two degrees from Harvard University. But her connection to the nation's oldest institution of higher education goes well beyond that. She taught as a visiting professor at Harvard Law School in 1990-91 and has held several significant offices at Harvard. She served as a trustee of Radcliffe College for four years and as a director of the Radcliffe Alumnae Association for three. She also has been a director and later was vice president of the Harvard Alumni Association. Most notably, she is currently completing her term as president of Harvard's Board of Overseers. The overseers play a significant role in the governance of the university. They focus on Harvard's strategic direction and advise the administration on numerous subjects. Much of their work involves oversight of the quality and direction of the university's schools and programs.

### Judge Moore

After 18 years as a law professor, Karen Nelson Moore was appointed to the Sixth Circuit in 1995. For her, judicial service offers the intellectual challenges of academic life while having direct practical significance. After all, many cases pose novel and difficult questions. But a judge must resolve those questions in the context of an actual dispute involving real litigants whose lives and fortunes will be affected by the court's decision. As one former law clerk describes her approach, "Judge Moore always [takes] great care to review and understand a case." A second former clerk says that she is "passionate about reaching the right result."

Judge Moore herself refers to *Souter v. Jones*,<sup>2</sup> a habeas corpus case, to illustrate how complex legal issues intersect with the lives of real people. The case involved Larry Pat Souter, a Michigan man who was convicted of second-degree murder in the death of a woman he had met at a bar in August 1979. About an hour after the bar closed, the woman's body was found on the side of a state highway. Souter went to trial more than a dozen years later, although that lengthy delay was not at issue in the federal habeas case. The prosecution relied heavily on expert testimony that the woman's injuries were

consistent with having been struck by a whiskey bottle that Souter admittedly had discarded along the highway not too far from where the body was found. A forensic pathologist who initially had advised the police testified for the defense, reiterating his view that the woman had died as a result of being struck by a passing motor vehicle. The state courts upheld Souter's conviction. Several years later, Souter submitted affidavits from two of the medical experts who had testified for the prosecution at trial. Those experts no longer believed that the whiskey bottle could have inflicted the injuries incurred by the woman.

Souter subsequently filed a habeas petition in federal district court, but the filing came outside the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA).<sup>3</sup> The district court dismissed the petition as untimely. On appeal, the Sixth Circuit had to address two complicated jurisdictional issues: whether the petition was timely and, if not, whether the doctrine of equitable tolling allowed the habeas court to consider the merits of the petition. The timeliness issue encompassed a logically prior question: whether Souter had waived the timeliness issue by not objecting to the magistrate judge's conclusion that the petition was not timely. Souter might not have filed an objection because the magistrate judge went on to find that equitable tolling allowed the district court to address the merits of his actual-innocence claim. Judge Moore's opinion for a unanimous panel concluded that this failure to object was not a jurisdictional bar.<sup>4</sup> Nevertheless, careful analysis of the procedural history of the case showed that Souter's petition was in fact untimely.<sup>5</sup>

This conclusion required the court to consider whether the doctrine of equitable tolling was available for a credible claim of actual innocence based on newly discovered evidence. AEDPA generally prohibits the filing of a second or successive habeas petition,<sup>6</sup> but the law specifically allows a successive habeas petition based on a claim of actual innocence.<sup>7</sup> The provision embodying this exception does not, however, specify whether the actual-innocence claim must be filed within the one-year deadline. Judge Moore concluded that this was "a rare and extraordinary case" in which the newly discovered evidence "does raise sufficient doubt about [Souter's] guilt and ... undermine[s] confidence in the result of his trial."<sup>8</sup> Accordingly, the doctrine of equitable tolling was available to allow Souter to assert his otherwise untimely actual-innocence claim.<sup>9</sup>

Recounting the story of this case, Judge Moore notes with considerable satisfaction that, as a result of press reports of this ruling, a local woman came forward to report that her father had been involved in a hit-and-run accident on the state highway where the woman's body was found on the evening in question and that a side mirror on his vehicle had broken off for reasons that her father refused to explain. This evidence confirmed what the original defense expert and the recanting prosecution experts concluded: that the woman had been hit by

a passing car. As a result, the prosecution confessed error, Souter's conviction was vacated, and he was unconditionally released after 13 years of wrongful imprisonment.<sup>10</sup>

In many ways, *Souter v. Jones* captures Judge Moore's essence: careful attention to detail in order to get the correct result. As another of her former clerks explains, the judge is "both intellectually rigorous and incredibly collegial." She "absorbs information in a way that allows her to grasp the issues" and welcomes "frequent back and forth to make sure that she gets to the right conclusion." ☉

## Endnotes

<sup>1</sup>*E.g.*, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534 (1981); *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, 35 HASTINGS L.J. 829 (1984); *The Foreign Tax Credit for Foreign Taxes Paid in Lieu of Income Taxes: An Evaluation of the Rationale and a Reform Proposal*, 7 AM. J. TAX POL'Y 207 (1988); *The Sham Transaction Doctrine: An Outmoded and Unnecessary Approach to Combating Tax Avoidance*, 41 FLA. L. REV. 659 (1989); *The Supplemental Jurisdiction Statute: An Important But Controversial Supplement to Federal Jurisdiction*, 41 EMORY L.J. 31 (1992).

## Allen Profile continued from page 51

Judge Allen held her circuit judgeship for 25 years, finally retiring in 1959, but not before writing many successful books on the law and gaining attention as a possible nominee for the U.S. Supreme Court numerous times.<sup>18</sup> ☉

## Endnotes

<sup>1</sup>NATIONAL PARK SERVICE, *Judge Florence Allen Biography*, [www.nps.gov/romo/judge\\_florence\\_allen\\_biography.htm](http://www.nps.gov/romo/judge_florence_allen_biography.htm) (last visited May 14, 2016).

<sup>2</sup>UTAH HISTORY TO GO, *Florence Ellinwood Allen*, [historytogo.utah.gov/people/utahns\\_of\\_achievement/florenceellinwoodallen.html](http://historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html) (last visited May 14, 2016).

<sup>3</sup>OHIO HISTORY CENTRAL, *Florence E. Allen*, [www.ohiohistorycentral.org/w/Florence\\_E.\\_Allen](http://www.ohiohistorycentral.org/w/Florence_E._Allen) (last visited May 14, 2016).

<sup>4</sup>THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, *Florence Ellinwood Allen*, [www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp](http://www.supremecourt.ohio.gov/SCO/formerjustices/bios/allen.asp) (last visited May 14, 2016).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>OHIO HISTORY CENTRAL, *Florence E. Allen*, [www.ohiohistorycentral.org/w/Florence\\_E.\\_Allen](http://www.ohiohistorycentral.org/w/Florence_E._Allen) (last visited May 14, 2016).

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>*19th Amendment to the U.S. Constitution: Women's Right to Vote (1920)*, [www.ourdocuments.gov](http://www.ourdocuments.gov), [www.ourdocuments.gov/doc.php?flash=true&doc=63](http://www.ourdocuments.gov/doc.php?flash=true&doc=63) (last visited May 14, 2016).

<sup>11</sup>*Id.*

<sup>12</sup>OHIO HISTORY CENTRAL, *Florence E. Allen*, [www.ohiohistorycentral.org/w/Florence\\_E.\\_Allen](http://www.ohiohistorycentral.org/w/Florence_E._Allen) (last visited May 14, 2016).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>UTAH HISTORY TO GO, *Florence Ellinwood Allen*, [historytogo.utah.gov/people/utahns\\_of\\_achievement/florenceellinwoodallen.html](http://historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html)

<sup>395</sup>F.3d 577 (6th Cir. 2005).

<sup>28</sup>U.S.C. § 2244(d)(1)(D).

<sup>395</sup>F.3d at 585–86.

<sup>5</sup>*Id.*

<sup>28</sup>U.S.C. § 2244(b)(1).

<sup>28</sup>U.S.C. § 2244(b)(2)(B).

<sup>395</sup>F.3d at 590.

<sup>9</sup>*Id.* at 602.

<sup>104</sup>Larry Pat Souter," National Registry of Exonerations, U. MICH. L. SCH. (June 2012), [www.law.umich.edu/special/exoneration/pages/casetail.aspx?caseid=3656](http://www.law.umich.edu/special/exoneration/pages/casetail.aspx?caseid=3656) (last visited Mar. 23, 2016); see also *Souter v. Jones*, No. 1:02-CV-67 (W.D. Mich. Sept. 20, 2005) (magistrate judge's report and recommendation); John Agar, *Murder Suspect Was "Done Wrong"; Attorney General Says Larry Souter Never Should Have Been Brought to Trial*, GRAND RAPIDS PRESS, July 6, 2005, at A1.



Circuit Judge Florence Ellinwood Allen at the first Sixth Circuit Judicial Conference in 1941. (Photograph provided by the Library & Archives of the U.S. Court of Appeals for the Sixth Circuit.)

[historytogo.utah.gov/people/utahns\\_of\\_achievement/florenceellinwoodallen.html](http://historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html) (last visited May 14, 2016).

<sup>16</sup>*Id.*

<sup>17</sup>Squire Patton Boggs, *Female Judges of the Sixth Circuit Court of Appeals: The Role of a HotPlate in Sixth Circuit History*, SIXTH CIRCUIT APPELLATE BLOG (Mar. 9, 2012), available at [www.sixthcircuitappellateblog.com/news-and-analysis/the-women-of-the-sixth-circuit-court-of-appeals-at-the-forefront](http://www.sixthcircuitappellateblog.com/news-and-analysis/the-women-of-the-sixth-circuit-court-of-appeals-at-the-forefront) (last visited May 14, 2016).

<sup>18</sup>*Florence Ellinwood Allen*, UTAH HISTORY TO GO, [historytogo.utah.gov/people/utahns\\_of\\_achievement/florenceellinwoodallen.html](http://historytogo.utah.gov/people/utahns_of_achievement/florenceellinwoodallen.html) (last visited May 14, 2016).