

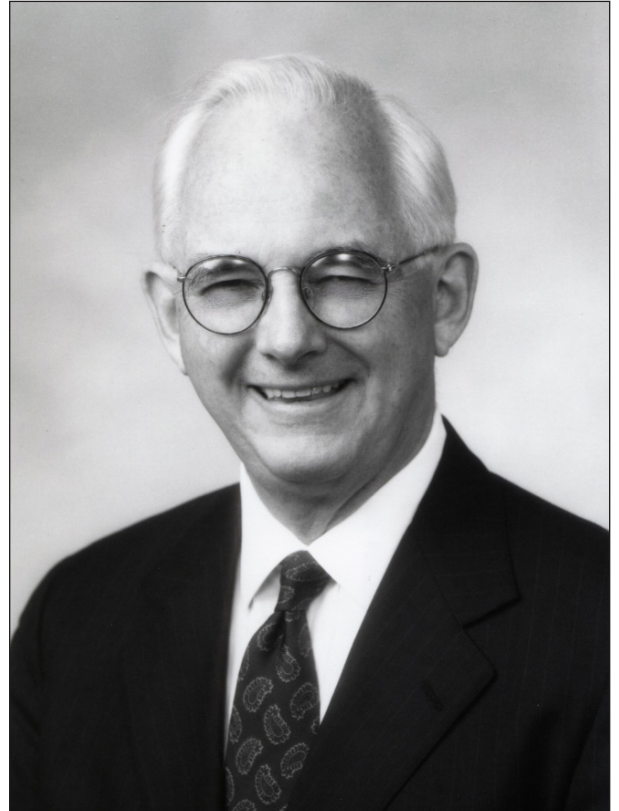
## Judicial Remembrance

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HON. JEFFREY S. SUTTON

### Hon. David A. Nelson U.S. Court of Appeals for the Sixth Circuit

JUDGE DAVID NELSON, who sat on the Sixth Circuit Court of Appeals from 1985 through 2006, passed away on Oct. 1, 2010. Judge Nelson was a longtime supporter of the Cincinnati/Northern Kentucky Chapter of the Federal Bar Association, and he, along with his wife, Mary, faithfully attended numerous FBA events over many years. A memorial service in honor of Judge Nelson was held in Cincinnati in mid-October. The judge was then eulogized and remembered by many, including Circuit Court, District Court, and Bankruptcy Court judges; former law clerks; court personnel; and Judge Nelson's three children: Claudia, a professor at Texas A&M University; Caleb, a law school professor at the University of Virginia; and Fred, a private practitioner and former state court judge. Judge Jeffrey S. Sutton, who assumed Judge Nelson's seat on the Sixth Circuit when Judge Nelson took senior status, delivered a eulogy as part of the memorial service. *The Federal Lawyer* is grateful to Judge Sutton, who has permitted his remarks in honor of Judge Nelson to be reprinted here.



#### **Eulogy for the Honorable David Aldrich Nelson— October 11, 2010**

My name is Jeff Sutton, and, until a few years ago, I was Judge Nelson's colleague on the Sixth Circuit.

Dave and I first met in 1998. Calling it a meeting, however, is something of an overstatement, as we never shook hands or even had a conversation, unless you can call an oral argument at 100 East Fifth Street a conversation. Call it what you will, this initial meeting with Judge Nelson did not end well, as I lost what seemed like an eminently winnable

case 2-1. Perhaps it would have softened the blow had I known then that I would have an opportunity to speak at the funeral of the author of that majority opinion, something not many losing litigants get to do. Talk about having the last word—what you might call the advocate's revenge.

But this will not be the last word about our friend and my remarks hardly fall into the category of revenge.

The losing advocate and the winning judge eventually became colleagues and friends on the Sixth Circuit, and I now have the signal honor of occupying, though hardly filling, the Nelson seat on our court. From the day Judge Nelson swore me in as a judge until two weeks before he died, he could not have done more to welcome me to the court or more to help me along the way. It has been 10 days since he died and, as with many of you, I have spent a lot of time thinking about him—often, I must confess, without the sadness usually associated with the death of a dear friend but with many warm thoughts,

even occasional smiles, as I think about this remarkable human being and judge.

### Opinions

If you miss Dave, read his opinions. So many of his personal and judicial virtues are on full display: his learned and inspired voice, his honest heart, his attention to detail, his bracing wit, and his unique combination of brilliance and decency. At his best, who was better? I don't know. The Nelsons have reprinted a few lines from some of his opinions, but, in typical Nelson fashion, they have included just a few examples rather than the many that could be collected. I thought about reading from more of his opinions today, but if I start down that road this would be a very long service indeed.

Dave prized brevity. And he perhaps would have agreed that there is no time like a funeral for checking your watch. So I will not read from his opinions but will make you each an offer instead. Write or e-mail me after November 1, and my chambers will provide you with 20 or so of his most memorable opinions as well as a few of his extra-judicial writings. You can savor them for yourself and enjoy his company once more.

Since I truly want you to take me up on this offer, let me provide a brief promo, a teaser if you will, about the profits to be earned and the entertainment to be had by reading his work. In his opinion in the Ohio motto case, about the validity of Ohio's motto ("With God All Things Are Possible"), he saw fit to offer a long string citation of Ohio's other state symbols—its state animal, its state flower, its state song, and so forth. He could not resist pointing out two things about the Ohio Revised Code's description of the "official animal of the state." One was that the animal was "the white-tailed deer." The other was that, in "[n]aming the white-tailed deer as the official animal of the state," Ohio was "not reliev[ing] the division of wildlife of its duty to manage the deer population and its distribution." Appreciating the oddity of simultaneously naming the deer as our state animal, then authorizing Ohioans to kill it, Judge Nelson dropped this sly footnote: "Was it [Oscar] Wilde who said that all men kill the thing they love?" *ACLU v. Cap. Square*, 243 F.3d 289, 306 n.17 (2001). Priceless.

One true blessing in my life is that, as a young judge, I had the opportunity to get to know Dave and that he took such a benevolent interest in my career. For a rookie like me, Dave set an impeccable example. Sometimes, indeed, it was a maddeningly impeccable example, as the only way to follow it usually involved more work—more editing of an opinion, more thought, or, worst of all, more of something I didn't have the capacity to provide. "Good enough for government work" was not a phrase that appeared in Judge Nelson's vocabulary.

### Diligence and Industry

At least two things will always stick with me when it comes to his example. The first was his remarkable diligence and industry in handling all cases. The judicial oath requires judges to "administer justice without respect to persons, and do equal right to the poor and to the rich." Dave took this duty seriously. As anyone who worked with him will confirm, it never mattered whether an appeal was filed by an inmate representing himself or by a corporation represented by the best lawyer that money could buy.

### Evenhandedness

The other abiding example was the evenhandedness he brought to the job. Judges are much in the news these days, and one of the central concerns sometimes raised about them—whether in confirmation fights at the federal level or in elections at the state level—is whether they rely on neutral principles in deciding cases or merely impose their own policy views under the cover of judging. Dave set a sterling example in this respect. Even a casual review of his decisions shows a man hard at work in identifying legitimate grounds for his decision and striving to explain to the parties, particularly the losing party, why the court was ruling the way it was. He had been a player before becoming a referee, and he understood the importance of treating the parties fairly and doing his best to explain why he had to allocate disappointment to one side over the other.

I can think of some difficult cases in which he seemed so concerned about letting his own policy preferences get the best of him that he used them as a tiebreaker—yet it was a tiebreaker that ran in the opposite direction of his private views. Now that is neutrality—neutrality with a vengeance and a kind of neutrality that ought to be the model for every judge.

### A Gentleman

In his personal habits, Judge Nelson was old school: a gentleman in the best sense of the word. He was unfailingly courteous, respected everyone, and scrupulously followed the Golden Rule. He knew that words are actions, and he was careful never to use his considerable talents with language to put others in an awkward or uncomfortable position. I doubt that anyone on the court ever thought his dissents took unreasonable positions or were unreasonably expressed.

After he retired a few years ago, I started sending him all of my published opinions in three or four installments a year. I thought he might want to keep an eye on the work product of the Nelson seat, and I always wanted to know what he thought of my opinions. Usually within a week of each installment, what he referred to as the "library" of reading materials, he would send me a note about the opinions, usually mentioning one or two by name and with commen-

tary. He sent the last letter two weeks before he died.

### **Don't Take Yourself Too Seriously.**

Even though Dave took the duties of judging seriously, he never took himself too seriously. That is not as easy as it sounds. Giving someone a robe, calling him “your honor,” then asking him to judge other people’s affairs are not the kinds of things that invariably bring out the best in a person. Yet, through it all, he remained a deeply modest individual, one who did not have a self-promotional bone in his body. Just think: Here is a truly learned man—number one at Hamilton College, a Fulbright Scholar and honours graduate of Cambridge University, a star at Harvard Law School—who could have put his considerable talents to writing books and articles for all to see and all to admire. Instead, he chose to hide some of the best legal prose you will ever read in a place where few people will find it: our *Federal Reporters*, otherwise known as the F.2ds and F.3ds.

Upon his retirement from the court, his assistant, Linda Brinson, and I (and others, I suspect), urged him to save some or all of his papers. He refused and destroyed them all. He could not imagine why anyone would have an interest in them, and he feared the risks to the court and his colleagues of keeping them.

He truly was a modest individual with none of the customary reasons for being modest. In this respect, the individual and the judge were one, as he was never too sure he was right and defied the kinds of labels sometimes imposed on judges. If, as Learned Hand once remarked, “[t]he spirit of liberty is the spirit which is not too sure that it is right,” Learned Hand, *The Spirit of Liberty: Papers and Addresses* 144 (Irving Dillard ed., 1959), Judge Nelson embodied that spirit, making him one of liberty’s ideal messengers and interpreters.

Dave of course had one pride he could not conceal: his family. But surely that is a pardonable offense. He and Mary had a remarkable union. If it is true that we are known by our fruits, Mary and Dave have done exceedingly well. The oldest, Fred, also was the valedictorian at Hamilton College—how many parent-child combinations can say that?—and he too has served as a judge, here in the Common Pleas Court of Hamilton County. Claudia may be the most prolific Nelson of all: she has penned several books in her capacity as a professor of English at Texas A&M University. And Caleb is a professor of law at the University of Virginia and, in my view, is the best legal scholar of his generation. Dave had considerable pride in each of his children and in his treasured grandchildren.

### **Technology**

Because Dave enjoyed a good story, even at his own expense, I do not think he would mind my acknowledging one conspicuous failing in his life: his losing battle with technology. The stories are legion of

his frequent and failed encounters with the computer, which he mysteriously called the “electronic gingus.” I and others were constantly urging him to learn how to use e-mail, and he was constantly putting us off. A few years ago, he relented and traveled to Texas to take a computer course provided for federal judges. It did not go well. At the outset, the instructor asked the class to “hit any key” to light up the screen of the computer. Judge Nelson fumbled around the computer for a few minutes, prompting the instructor to ask what was wrong. Try as he might, he explained, he could not find a key with the label —“hit any key.” Things went downhill from there. Later that morning, the instructor called Dave’s assistant, Linda, to see if she was missing anything. “I keep telling him what to do,” the teacher explained, “and he just looks at me as if I am speaking a foreign language.” She was, it turns out.

The problem did not end with the “electronic gingus.” One day, several years ago, Dave went back to the office kitchen with the apparent goal of heating up some coffee in a newfangled machine that has come to be known as a microwave oven. Every few seconds or so, the clerk would hear the judge say “Go,” then there would be silence followed by some odd noises around the microwave. The cycle repeated itself a few times, after which the judge came into the clerk’s office to explain his frustration with trying to get the microwave to work. For reasons that history may never record or, for that matter, understand, the judge thought that a light used to signal that the microwave was plugged in was, in fact, a microphone and that the way to make the microwave work was to say “go” into it. God humbles us all, even Dave Nelson.

In this area, as in so many others, I should acknowledge that Judge Nelson was exceedingly grateful for the devoted work of his assistant, Linda Brinson, his secretaries, and his law clerks. The same goes for the legions of other court employees with whom he worked and whose milestones—birthdays, retirements, awards—he faithfully celebrated. Although I doubt he ever had a lunch with the members of the IT department to talk about the latest in printing technology, I am sure he knew them by name.

### **Conclusion**

In conclusion, let me briefly add two things. For the first seven years of my tenure on the court, I frequently asked myself what Judge Nelson would do with a case, particularly a difficult case. Thankfully, I no longer have to ask that question. After reading so many of his opinions and after having had so many conversations with this wonderful mentor, I have a good sense of what he would do. And as many an advocate may wish to know, there is a very good chance I will do it.

There is no finer sign of a life well lived than when the eulogized becomes the eulogizer—when the best

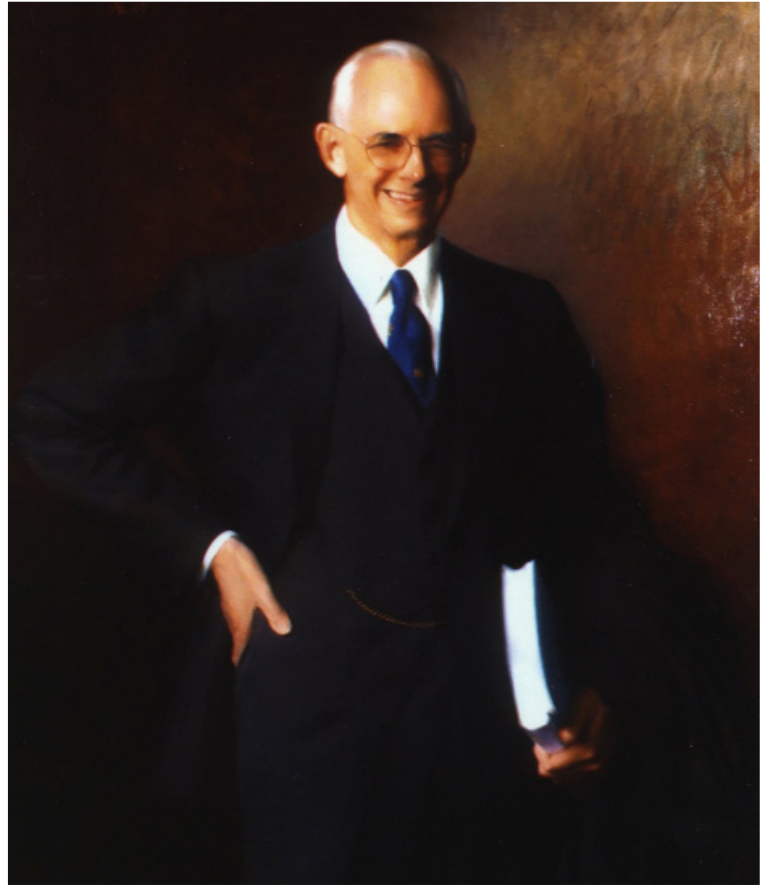
words to describe the deceased are the very words they used in life to laud and measure the successes of others.

In Dave's opinions, articles, letters, and conversations, here are some of the things he said in extolling the virtues of other judges.

- He spoke of one judge by saying that he was "a graceful and urbane writer." The same surely can be said of Judge Nelson.
- He said of another judge that he wrote "Olympian prose." Check.
- At his retirement from our court, he applauded judges who do not "take themselves too seriously." Check.
- In a letter to a colleague, he wrote that one should "adhere scrupulously to the golden rule of dissenting; if you had written the majority opinions in these cases, there is no way you could take offense at the dissents." Check.
- He wrote of one justice that he had a remarkable "cultivation of mind, breadth of knowledge, [and] power of analysis." Check.
- The best judges, he said, are characterized by "diligence" and "industry," particularly when it comes to the roll-up-your-sleeves task of probing and understanding the record. Check.
- And, of one justice, he said that he was "one of nature's true gentlemen." Double check.

I can even tell you from experience how Dave would have responded to this eulogy. "Jeff," he would have said, "if there was just a touch of hyperbole" in your remarks, "I never noticed it."

I think we would all agree that no hyperbole is needed to describe the personal and public virtues of this irreplaceable, but never forgotten, friend. Thank God for the Honorable David Aldrich Nelson. **TFL**



*Hon. Jeffrey S. Sutton sits on the U.S. Court of Appeals for the Sixth Circuit.*

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## SOME SAMPLES FROM JUDGE NELSON'S OPINIONS

### ***United States v. Oswald*, 783 F.2d 663 (1986):**

"Frye checked Oswald in at a Ramada Inn, taking it upon himself to give Oswald a false name. [Footnote:] Frye's *modus operandi* calls to mind that of Stanley Featherstonehaugh Ukridge, the protagonist of *He Rather Enjoyed It*, by P.G. Wodehouse: "Fortunately, I had given him a false name." "Why?" "Just an ordinary business precaution," explained Ukridge."

### ***ACLU v. City of Birmingham, Michigan*, 791 F.2d 1561 (1986) (dissent):**

[The court seems to have adopted] "a 'St. Nicholas too' test—a city can get by with displaying a creche if it throws in a sleigh full of toys and a Santa Claus, too.

The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley, or Tribe are we to find answers to constitutional questions such as these?"

### ***Parker v. Kentucky Board of Dentistry*, 818 F.2d 504 (1987) (dissent):**

"What Roberto Unger has called 'the standard disenchanting view of legislative politics' may tempt judges who enjoy life tenure to assume that they are better situated to discern the public interest than those who must answer to the public at election time.



I do not share that assumption or the ‘standard’ disenchantment with representative government. Even if I thought the courts uniquely qualified to determine what is in the public interest, however, I doubt that I could be shaken in my belief that the public interest itself requires courts to recognize that there is a very broad range of matters on which legislatures must be accorded the right to be wrong.”

***Acuff-Rose Music Inc. v. Campbell*, 972 F.2d 1429 (1992) (dissent; conclusion adopted by U.S. Supreme Court):**

“Under anyone’s definition, it seems to me, the 2 Live Crew song [that allegedly infringed upon the copyright in Roy Orbison’s song ‘Oh, Pretty Woman’] is a quintessential parody. ...

“Consider the plot ... of the original work. A lonely man with a strangely nasal voice sees a pretty woman (name unknown) walking down the street. The man speculates on whether the woman is lonely too. Apostrophizing her in his mind, he urges her to stop and talk and give him a smile and say she will stay with him and be his that night. The woman walks on by, and the man resigns himself to going home alone. Before he leaves, however, he sees the woman walking back to him. End of story.

“This little vignette is intended, I think, to be sort of sweet. While it is certainly suggestive, it is also, by the standards of its time, ‘romantic’ rather than indelicate. ...

“The parody by 2 Live Crew is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses. ...

“The 2 Live Crew ‘Pretty Woman’ is hopelessly vulgar, to be sure, but we ought not let that fact conceal what may be the song’s most significant message—for here the vulgarity, to paraphrase Marshall McLuhan, is the message. The original work may not seem vulgar, at first blush, but the 2 Live Crew group are telling us, knowingly or unknowingly, that vulgar is precisely what ‘Oh, Pretty Woman’ is. Whether we agree or disagree, this perception is not one we ought to suppress.”

***United States v. Lanier*, 73 F.3d 1380 (1996) (dissenting in part):**

“If the jury got its facts right, [the complaining witness in a criminal case against a Tennessee state judge] was literally (and humiliatingly) deprived of her liberty while locked in the defendant’s foul embraces. We must take it as given that [she] was restrained not only by the defendant’s hands on her throat, but by the defendant’s none-too-subtle suggestion that her daughter would be taken away from her if she resisted. ...

“It is true that the Supreme Court has not had occasion to decide explicitly whether Section 242

criminalizes a deprivation of liberty resulting from lust, but this does not suggest to me that lower courts are somehow estopped to apply Section 242 in this context. It would be passing strange, I think, if judges could acquire by prescription a right to make sex slaves of litigants or prospective litigants. ... It is also true that in recent years other public officials and employees may have engaged in deviant behavior similar to the defendant’s without having been prosecuted. I do not recall any such person having been accused of forcing a woman to choose between her virtue and her child. But if other public officials have escaped prosecution for using the power of public office to subjugate women in the way defendant Lanier is supposed to have done, I question whether it follows that the prosecution of defendant Lanier was improper. Perhaps the impropriety lies in the failure to prosecute the others.”

***ACLU of Ohio v. Capitol Square Review & Advisory Board*, 243 F.3d 289 (2001) (full Sixth Circuit, en banc):**

“The question before us is not whether a reasonable person could be irritated by any or all of this. Much of what government does is irritating to someone. For example, the substantive content of the forms distributed by the Ohio Department of Taxation—particularly the line on the income tax form that says ‘AMOUNT YOU OWE’—is likely to be more irritating to more Ohioans than any motto imprinted on the Tax Department’s stationery. This hardly makes the income tax unconstitutional.”

***Mece v. Gonzales*, 415 F.3d 562 (2005):**

“The petitioner’s story is a dramatic one, and our government’s handling of the subsequent asylum request has a certain fascination of its own. ... [T]he immigration judge appears to have been offended that Mr. Mece ‘actually came out in his application and said that [the Socialists who took over Albania in 1997] were Communist or neo-Communist.’ ... [But the] jackboot, the rubber truncheon and the rifle butt can be equally painful, we should imagine, whether employed by ‘Neo-Communists’ bent on silencing their political opponents or ‘Socialists’ acting with the same objective. The poor soul on the receiving end can be pardoned, perhaps, if he has difficulty distinguishing one brand of oppressor from the other.”