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My Colleague, Steve Williams: Gladly Would He Learn and Gladly Teach

The Honorable Douglas H. Ginsburg

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ANTONIN SCALIA
LAW SCHOOL

My Colleague, Steve Williams

Gladly Would He Learn and Gladly Teach

Steve Williams joined the DC Circuit in June of 1986. I joined the court five months later. I knew that Steve had been appointed by President Reagan but I had no idea when and he seemed such a natural as a judge that I thought he had been there for several years. This impression was dispelled only now, when I checked his Wikipedia page while writing this tribute.

Steve was also a natural academic, which was one of the reasons he was so well-suited to the bench. He was a professor of law at the University of Colorado for 17 years before donning the robe. His unbridled curiosity and intellectual rigor – qualities no longer associated with much of the legal academy – made him both a delight and a challenge as a colleague. Our colleague David Tatel so aptly said, well before Steve’s passing, “There is no one with whom I’d rather disagree.” Indeed, to disagree with Steve was to invite a conversation – invariably honest and respectful – that was sure to sharpen one’s own ideas, perhaps even to change them.

In keeping with good academic and judicial practice, Steve seems to have read all the opinions circulated by the other judges one week before their scheduled release. Does every judge do that? I know only that I read selectively. The probability that a case arising under, say, the Indian Gaming Regulatory Act, will resolve an issue of recurring significance in our caselaw is, to say the least, remote. Why then do I think Steve read them all? Because he often referred to some then-circulating opinion I had to admit to having passed over, which gave Steve the opportunity to describe the case – and if he doubted its wisdom – to do so in a light-hearted, half-amused fashion.

The benefit of having so astute and rigorous a colleague reading one’s opinions should be obvious. On at least two occasions I recall getting an email from Steve questioning some aspect of an opinion I had sent to the full court for its week of what is usually undisturbed repose. In each instance, Steve had spotted an oversight that neither of my two colleagues on the case nor any of our three law clerks had seen.

Steve always saw the humor in what he regarded as human folly. Folly included most of what appeared in the news of the day and in some judicial decisions with which he disagreed, including even some he was constrained to make. I recall one conference after oral argument in a regulatory case: Under the applicable standard of review, we were bound to bless any regulation that was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Steve began (and nearly ended) the conference by saying, “Well, nothing here but the ordinary lunacy.”

Conference with Steve was always a pleasure to which I looked forward, even when it meant first listening to some less than stellar oral arguments. After disposing of the cases, the three judges might linger for half an hour or more to discuss whatever came to mind. Perhaps it’s only because of my own lack of interest that I don’t recall Steve ever talking about sports, but most anything else – from foreign policy to a new play at the Shakespeare theatre – might come up. All our colleagues are polymaths of a sort, and I think we all delighted in our post-argument conferences with Steve.

As for the cases themselves, Steve and I sat together on about 450 cases over a period of 35 years. We disagreed 15 times; put otherwise, we agreed in almost 97% of those cases. Of the 15, two were en banc decisions from which I filed partial dissents and Steve jointed the decision of the court but

did not write separately. Ten were cases in which I joined the opinion of another judge and Steve dissented. Three were cases in which I wrote for the court and Steve dissented. Looking back, I see there is not a single case Steve wrote from which I dissented.

Steve may well have inherited a libertarian bent from his father, C. Dickerson Williams, a distinguished member of the New York bar. He had clerked for Chief Justice Taft, been a prosecutor in the Southern District of New York, and served as Solicitor General in the Department of Commerce. But per his obituary in the New York Times, he was best known for his First Amendment cases, in which he successfully defended writers and editors of the Communist Party newspaper charged with publishing an “obscene – and unpatriotic – poem” (1927), and William F. Buckley, Jr. and the national Review in “a libel suit brought by the Nobelist Linus C. Pauling, who objected to being described in the publication’s editorials as a fellow traveler” (1966).

Indeed, in each of the three cases I wrote and Steve dissented, he was taking the more liberty-protective position. First in chronological order is *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). Lt. Col. Oliver North had appealed a district court order holding him in contempt for refusing to comply with a grand jury subpoena. He argued the Independent Counsel convening the grand jury lacked the authority to do so. The IC was appointed under the Ethics in Government Act, 28 U.S.C. §§ 591-98, and, adding belt to braces, under the Attorney General’s delegation of his own authority. Both the court and Judge Williams, concurring in part, believed the AG had lawfully delegated his authority to the IC. Judge Ruth Bader Ginsburg and I, Steve’s co-panelists, did not reach the question whether the parallel appointment of the IC under the Ethics in Government Act was a violation of the Appointments Clause, because we did not see how an otherwise-lawful exercise of prosecutorial power would be tainted by a constitutionally suspect grant of the same authority. Hence North’s constitutional challenge to the statutory provision for the appointments of an IC, we held, was unripe for review; the IC had not then taken any action that he could not have taken if appointed only by the AG.

Steve “dissent[ed] from the court’s conclusion in that Counsel Walsh’s regulatory authority render[ed] North’s attack on the Ethics in Government Act unripe.” He noted that “North’s challenge to the Act is that it subjects him to coercive process by a man who is free to disregard constraints that would operate on a member of the executive branch.” *Id.* at 67-68. Although North did not in any way trace the challenged subpoena to this freedom from executive branch oversight, Steve thought the Appointments Clause teaching of *Buckley v. Valeo*, 424 U.S. 1 (1976), and of *Bowsher v. Synar*, 478 U.S. 714 (1986), required a strong presumption that the prosecutor’s decisions would be different but for his unlawful appointment: “in the context of a constitutional attack on tenure provisions, distorted conduct may be inferred automatically from faulty allegiances.” Steve’s view of the Appointments Clause coincides with the liberty-protective principle that those who exercise executive powers should be fully accountable to the public. Because under the Ethics Act the IC was removable only for cause, Steve maintained that degree of insulation from executive influence was enough to taint the IC’s actions.

Judge Ruth Bader Ginsburg and I did not read the precedent that way. “In *Bowsher*, [for example,] the constitutional claim was ‘ripe’ because the removal provision, by making the Comptroller General the servant of the Congress and not of the President, necessarily had an immediate and real impact on how he performed his duties.” Steve’s decision not to discuss the merits of the Appointments Clause challenge suggests judicial modesty that speaks to the same libertarian principle – with which I agree. Another judge might have addressed the merits, but Steve did not because they were beyond the

scope of the court's opinion. We both believed a counter-majoritarian court should not express an opinion that is not necessary to the disposition of an issue before it.

Second, Steve dissented from my opinion for the en banc court in *United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994). The case concerned the application of 18 U.S.C. § 924(c)(1), which imposed "a five-year term of imprisonment upon anyone who 'during and in relation to any crime of violence of drug trafficking crime . . . uses or carries a firearm.'" 36 F.3d at 108. The circuit previously had used an "open-ended test that takes account of numerous factors arguably relevant to whether a gun was used in relation to a drug trafficking offense." *Id.* The en banc court replaced that test with "a test that looks to two factors only: the proximity of the gun to the drugs involved in the underlying offense, and the accessibility of the gun to the defendant from the place where the drugs, drug paraphernalia, or drug proceeds are located." *Id.*

In his dissent, which was joined by Judges Silberman and Buckley, Steve viewed the court's new test as criminalizing mere possession of a weapon "with a contingent intent to use," or "with a floating intent to use." *Id.* at 121. He may have been concerned the court's rule would deter lawful possession of a firearm and chill exercise of a defendant's constitutional right to keep or carry a weapon. In any event, he thought the statutory terms "use" and "carry" should be read to reach only situations in which a defendant "actively exploits [the] existence" of a gun that is "immediately available" to him. *Id.* at 124-25. The court's test was clearer and it might well have chilled a drug dealer's lawful possession of a weapon. Of course, even a drug dealer does not forfeit his Second Amendment rights because he has committed an unrelated offense. Thus, Steve's position is more consistent with an expansive view of the Second Amendment, and an attendant desire to read statutes in a way that prevents chilling individual gun ownership.

Steve also expressed concern about a defendant not on notice that his conduct was criminal. At one point, he states, "we are at least confronting a statutory ambiguity that under the rule of lenity should be resolved in favor of the narrow construction." *Id.* The rule of lenity is a concept with excellent libertarian credentials: The state's power to prohibit individual conduct is presumptively invalid unless the individual is on notice his conduct is prohibited. The presumption in a case of statutory ambiguity goes to protecting the liberty of the individual against the government's exploitation of an ambiguous criminal law.

In the end, Steve's view, to say the least, prevailed: The circuit's 6-4 decision was reversed by a unanimous Supreme Court. *Bailey v. United States*, 516 U.S. 137 (1995). Justice O'Connor wrote, "Rather than requiring actual use, the District of Columbia Circuit would criminalize 'simpl[e] possession with a floating intent to use.' 36 F.3d, at 121 (Williams, J., dissenting). The shortcomings of this test are succinctly explained in Judge Williams' dissent"

I was particularly surprised that Justice Kennedy joined the Court's opinion. In my opinion for the circuit, I had noted that "Justice (then Judge) Kennedy wrote for the Ninth Circuit in the seminal opinion on § 924(c)(1)," a test that aligned perfectly with the D.C. Circuit's interpretation of that statute. The defendant in *United States v. Stewart*, 779 F.2d 538 (1985), had sold drugs from the trunk of his car, where he had also placed his gun, presumably so it would be readily available if needed during the course of a transaction. According to then-Judge Kennedy, "If the firearm is within the possession or control of a person who commits an underlying crime as defined by the statute, and the circumstances of the case show that the firearm facilitated or had a role in the crime, such as emboldening an actor

who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such display or discharge in fact occurred, then there is a violation of the statute.” *Id.* at 540. This is precisely the “simpl[e] possession with a floating intent to use” described by both Steve and the unanimous Supreme Court.

Third came *Friedman v. Sebelius*, 686 F.3d 813 (D.C. Cir. 2012), which deals with the “responsible corporate officer doctrine.” Three officers of the Purdue Frederick Company were suspended from participation in federal health care programs for 12 years following their misdemeanor conviction for misbranding a drug, to wit, OxyContin. The court held the Secretary’s interpretation of the statutory phrase “a criminal offense consisting of a misdemeanor relating to fraud” was unambiguously correct. The court held the key phrase “relating to fraud” created a distinction between categorical or generic fraud and a context-specific finding of fraud. *See also id.* at 820 (“Rather than referring only to generic misdemeanor offenses that share all the ‘core elements’ of fraud, the capacious phrase includes any criminal conduct that has a factual ‘connection with’ fraud.”). Because the Secretary could point to case-specific factors that suggested the officers actually committed a fraud, the court held their convictions did not require proving the elements of generic fraud. *Id.* at 824.

Judge Williams dissented in relevant part, arguing that “relating to” should not be given such a broad sweep. He believed that the context in which the phrase “relating to” was deployed required a narrower construction of the statute: “the linguistic potential of a crime or ‘misdemeanor relating to fraud’ is almost infinite.” *Id.* at 831. “Very troublingly, without such an effort at seeking the legal meaning of the disputed clause, we have a reading by the Secretary that offers none of the ‘precision and guidance [that] are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.’” *Id.* (quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). The difference in our views turned in part upon Judge William’s greater concern that government overreach could deprive individuals of their hard-earned human capital: “That failing is especially acute for an action that excludes appellants from pursuing careers in the pharmaceutical industry – where they’ve spent their lifetimes accumulating industry-specific human capital.” *Id.* I shared his concern but not his hope that the statute as worded could be given a narrower interpretation.

As I said, in each of these three cases, Steve’s dissent reflected a more liberal position that I thought was warranted by the law. In addition, I should say that there is not in any of Steve’s dissents a single rancorous word – as was once the norm in faculty lounges and workshops. A debate with Steve raises his opponent’s level of discourse.

Perhaps because we were both refugees from law faculties, Steve and I enjoyed, nay reveled in, the give and take of legal debate. The pleasure he got from the exchange of ideas, at first in conference and then in writing, was the reason Steve would never have retired while still able to engage. With his passing, all his colleagues on the bench have suffered a grievous loss.