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RALPH S. SPRITZER: APPELLATE ADVOCATE

HONORABLE OSCAR H. DAVIS†

My continuous friendship with Ralph Spritzer goes back to the early 1950s when we served together in the United States Department of Justice. For some years (1953-1961), we were both members of the Office of the Solicitor General, and he succeeded me as Deputy Solicitor General when I became a judge in 1962. It was in the Justice Department that I knew him very well as an advocate before the Supreme Court of the United States, and (recognizing that Ralph is a consummate lawyer in very many ways) I devote this tribute specially to memorialize his enormous talents as an appellate advocate, particularly in the highest tribunal. The hallmarks of Ralph Spritzer's oral arguments are elegance, quiet persuasiveness, and clarity. Not for him a succession of hammer-blows or the mounting of crescendo on crescendo. His is a highly literate argument, truly stylish in delivery and content, garnished by wit and restraint, but never artificial or mannered. His words and sentences weave a seamless web, rather than jumping from photoslide to photoslide. He reasons powerfully and convincingly, his eye and his voice always on the crucial points of his particular case—not condescending to bombast, overgeneralities, or Janus-faced

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“rules.” His prime appeal is normally to the intellect, but a current of feeling flows beneath. Above all, at the end of his argument, the Justices or judges always know exactly what is the core of the case, and the precise reasons Ralph Spritzer proffers why his client should prevail. Judges truly understand his arguments and are left in no quandary as to his position. Twenty-five years of listening to appellate arguments have convinced me that this is a rare gift, always to be valued as forensic gold. No advocate can persuade in every case, but the final tribute, and it’s a high one, I pay to Ralph is that, when he did not persuade, he always left the judges deeply troubled.

RALPH SPRITZER AS A SUPREME COURT ADVOCATE

DANIEL M. FRIEDMAN†

I first met Ralph Spritzer in the spring of 1951, when we both joined the Appellate Section of the Antitrust Division in the Department of Justice. He arrived there a couple of weeks before I, so he had the advantage of a very small private office while I was one of three inhabitants of a much larger office. At that time I was a novice in appellate work. Ralph Spritzer, however, already was an experienced appellate advocate because of his work from 1947 to 1951 in the Office of Alien Property in the Department of Justice. In 1951, he made his first oral arguments before the Supreme Court in *Zittman v. McGrath*, 341 U.S. 446 (1951) and *McCloskey v. McGrath*, 341 U.S. 475 (1951).

Ralph Spritzer spent three years in the Appellate Section of the Antitrust Division, the last two as Assistant Chief. While in that Section, he argued a number of important cases before both the Supreme Court and the courts of appeals. One of those was *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954), a major government antitrust case in which the district court had held that United Shoe Machinery Corporation had monopolized the shoe manufacturing machinery industry, in violation of section 2 of the Sherman Act. United Shoe Machinery appealed directly to the Supreme Court, and three counsel argued for the company. Ralph Spritzer presented the government’s position so convincingly and effectively that shortly thereafter the Supreme Court affirmed per curiam in an order that stated that the Court was “satisfied that the findings are justified by the evi-

† Circuit Judge, United States Court of Appeals for the Federal Circuit; formerly, Chief Judge, United States Court of Claims.

dence and support the decree," 347 U.S. at 521.

In 1954, Ralph Spritzer was invited to and did join the staff of the Solicitor General. That was a small (only eight lawyers at the time) and distinguished office, the principal function of which was to represent the interests of the United States before the Supreme Court. He stayed in that office for almost fifteen years, until he left in 1968 to accept appointment as a professor at the University of Pennsylvania Law School.

During that period, he became widely known as an outstanding Supreme Court advocate and practitioner. Throughout his career with the government, Ralph Spritzer argued more than fifty cases in the Supreme Court and reviewed and revised the briefs in several hundred. His arguments involved cases in diverse fields of law, including trade regulation, railroad and utility regulation, criminal, civil rights, tax, and banking.

Ralph Spritzer was (and is) a superb oral advocate. He had a commanding presence in the courtroom and delivered his argument in a stylish prose not often heard. He was clear and convincing, forthright in answering questions (no matter how difficult), and had an excellent sense of strategy. Indeed, on occasion, it seemed that he had almost hypnotized the Court, which frequently permitted him to argue at length without peppering him with the questions that it frequently puts to most advocates.

Mr. Spritzer also played a vital role in the preparation of the government's Supreme Court merits briefs in several hundred cases (that he did not argue) and also in the preparation of many petitions for certiorari, jurisdictional statements, etc. Many of these cases involved some of the major constitutional issues of the time. Among the merits briefs in which he had a major role were a number of landmark cases (that he did not argue), particularly in the field of civil rights. These included *Peterson v. Greenville*, 373 U.S. 244 (1963), and companion cases (holding unconstitutional the exclusion of Negroes from restaurants when it appears that the practice was officially encouraged); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding the constitutionality of "public accommodations" provisions of the Civil Rights Act of 1964); *Evans v. Newton*, 382 U.S. 296 (1966) (holding invalid provisions of a trust limiting use of a park to whites only); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (sustaining the constitutionality of provisions of the Voting Rights Act of 1965); and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding unconstitutional a State poll tax).

Ralph Spritzer's briefs were always extremely well crafted. They

were thoroughly researched, clearly and effectively written, and convincingly argued.

In September 1961, Ralph Spritzer left the Office of the Solicitor General briefly to serve as General Counsel of the Federal Power Commission. Seven months later he returned to the Office as the First Assistant, following the appointment of the prior First Assistant, Oscar H. Davis, as a judge of the United States Court of Claims. The First Assistant is the top staff position in the Office, just below the Solicitor General. In the six years that Ralph Spritzer spent in that position he ran the Office, handling legal and administrative duties with great skill. His leadership and guidance played an important role in the outstanding functioning of the Office in those years.

An indication of his skill and persuasive power as an advocate is shown by the following handwritten note Justice Frankfurter sent to him following his successful argument of a difficult criminal contempt case, *Brown v. United States*, 356 U.S. 148 (1958):

Not seldom, I used to tell men in my Cambridge days, do lawyers lose cases; rarely does a lawyer win one. Now that *Stefana Brown v. U.S.* is a matter of history, I want to tell you that you won that case by your brief and argument on the reargument.

Justice Frankfurter applied the highest standards of excellence in judging Supreme Court advocacy and did not offer praise lightly. His note is the clearest evidence of Ralph Spritzer's outstanding abilities as a Supreme Court advocate.

A MAN FOR ALL SEASONS

FRANK I. GOODMAN†

I have known, worked under, worked beside, admired, and prized Ralph Spritzer for over twenty-five years. My friendship with him has been one of the joys of my professional life.

I met Ralph in January, 1962 when, as General Counsel of the Federal Power Commission (the agency now known as the Federal Energy Regulatory Commission), he hired me as his assistant. He had come to the Commission a few months earlier from the Solicitor Gen-

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eral's Office, after a decade of briefing and arguing cases on behalf of the government in the Supreme Court.

The Power Commission was in a period of transition, if not of crisis. The Supreme Court had held it responsible for regulating the rates of thousands of independent producers of natural gas,¹ a task for which its traditional ratemaking techniques, designed for the company-by-company regulation of a handful of giant pipelines, were spectacularly unsuited. Ultimately, the Commission's solution would be to establish a set of price ceilings for each producing area.² In 1961, however, the first area rate proceeding was still four years from completion, and the Commission, its docket swollen with individual producer filings, had come to be regarded as "the outstanding example in the federal government of the breakdown of the administrative process."³ Newly-elected President Kennedy had responded by appointing Joseph Swidler (highly respected former director of the Tennessee Valley Authority) Chairman of the Commission; and Swidler, in turn, had brought in Ralph as his legal arm.

Ralph's remarkable qualities of mind and character were evident to me from the start: his lucidity of thought and expression, maturity of judgment, steadiness of temperament, warmth and easiness of manner. An extraordinarily quick study, he had mastered the arcane complexities of natural gas and electric power regulation with a speed that amazed the veterans of the legal staff. He was able to grasp the essentials of a problem straightaway, without becoming enmeshed in trivial detail. His judgment, careful and deliberate, was deflected neither by impulse nor by indecision. He collaborated beautifully with his staff. At the weekly meetings of the Commission, Ralph's legal advice on a long list of agenda items was delivered with the poise and authority of a veteran appellate advocate and was received by the Commissioners with conspicuous deference. No small thanks to his efforts, the Commission during his tenure made notable progress in gaining control of its caseload.

That tenure, however, was short-lived. In mid-1962, he accepted Archibald Cox's invitation to return to the Solicitor General's Office as First Assistant (in effect, chief of staff), succeeding Oscar Davis in that prestigious post. A few months later, I, too, joined the office.

Then as now, the Solicitor General and his staff handled the bulk

¹ *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954).

² *Permian Basin Area Rate Cases*, 390 U.S. 747, 759-62 (1968).

³ SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 54 (Comm. Print 1960) (Landis Report).

of the government's litigation before the Supreme Court. During the three-year period in which Cox and Spritzer worked together (1962-1965), the staff of nine lawyers included, at one time or another, two men who would later become federal appellate judges; five who would become law professors at Harvard, Chicago, Stanford, Berkeley, and Pennsylvania; and three who would have distinguished careers at the private bar, mainly in the District of Columbia. Yet, I suspect that virtually every member of this talented group would acknowledge Ralph Spritzer to have been the ablest appellate advocate of them all, both in oral argument and in the writing of briefs.

Ralph's powers of reasoning and analysis would alone have placed him in the highest rank of appellate lawyers. What separated him, however, from nearly everyone else even in this rarefied category were his extraordinary powers of presentation—his sense of pace, his feeling for the shape and structure of an argument, and, above all, a prose style of unsurpassed elegance—spacious, flowing, beautifully rounded, luminously clear. Arguments that in the hands of other lawyers might have seemed strained or barely plausible became utterly convincing in his. "Is it clear? Does it march? Does it persuade?" These were the questions he regularly posed when seeking a colleague's opinion on one of his drafts. Rarely were the answers in doubt. In sum, Ralph Spritzer on appeal was Joe DiMaggio in the outfield—a performer of matchless grace, making the hard cases look easy and raising the easy ones to the level of art.

Ralph's career before the Supreme Court began in 1951, when, as an attorney in the Alien Property Division of the Justice Department, he argued three cases with mixed results (winning, losing, splitting). A year later he moved to the Solicitor General's Office. From that point until his departure for the Federal Power Commission in 1961, he appeared before the Supreme Court on twenty-four occasions in a wide variety of cases (criminal, admiralty, tax, antitrust, trade regulation, railroad rates, trucking regulation, patents, immigration, labor, eminent domain). In all but five instances, he prevailed. During his second tour of duty in the Office, as First Assistant (1962-1968), he made another seventeen Supreme Court appearances, involving twenty-one cases (criminal, civil rights, antitrust, unfair trade, transportation regulation, banking regulation, railroad rates, pipeline rates). Only once was he unsuccessful.

The most memorable of Spritzer's efforts was in the field of civil rights—the widely publicized "Sit-In" cases of 1964.⁴ Argued on the

⁴ *Bouie v. Columbia*, 378 U.S. 347 (1964); *Bell v. Maryland*, 378 U.S. 226

first day of the 1963 Term but not decided until the last, these four consolidated cases—one from Maryland, two from South Carolina, and one from Florida—divided the Court, sometimes acrimoniously, for most of the session.⁵ They involved convictions under state criminal trespass laws of blacks who had been refused service in southern restaurants or lunch counters and then remained on the premises after being asked to leave. A potential issue in all these cases was whether a state's use of its nonracial trespass law to enforce a private owner's racially discriminatory policy is unconstitutional state action under the equal protection clause. Fifteen years earlier, in *Shelley v. Kraemer*,⁶ the Court had held that judicial enforcement of racial restrictions in a private deed did violate equal protection,⁷ and the principle of that decision could arguably be extended to the sit-in cases as well.

Spritzer, however, was convinced that the Court was not prepared to take this step. He feared that unless offered a more moderate basis for decision, the Court might very well *affirm* the sit-in convictions, thereby breaking the momentum of the civil rights movement. He was mindful, moreover, that legislation then before the Congress, prohibiting racial discrimination in places of public accommodation, could very well make it unnecessary for the Court to confront the broad state action issue at all. Archibald Cox may have had similar thoughts, for he authorized and signed an amicus brief (to which Spritzer contributed significantly) urging reversal of the sit-in convictions on narrow grounds—*i.e.*, that all three trespass statutes violated the due process clause by giving petitioners inadequate notice of the criminality of their conduct.⁸

(1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Barr v. Columbia*, 378 U.S. 146 (1964). In addition to these four cases, *Griffin v. Maryland*, 378 U.S. 130 (1964), a case originally presented in the 1963 term and held over for reargument the following year, involved a sit-in demonstration at an amusement park.

⁵ For a fascinating behind-the-scenes account of the Court's deliberations in these cases, see B. SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 508-25 (1983).

⁶ 334 U.S. 1 (1948).

⁷ *Id.* at 20.

⁸ The South Carolina statute prohibited *entry* onto private property after notice of exclusion but said nothing about *remaining* on the premises after lawful entry and subsequent notice to leave. See *Bouie v. Columbia*, 378 U.S. 347, 349 n.1 (1964). The lack-of-warning argument was more difficult in the Maryland cases (where the statute made it a notice to leave), see *Griffin v. Maryland*, 378 U.S. 130, 133 n.2 (1964), and even more difficult in the Florida case, because a manager was expressly empowered to remove a guest for any of several specified reasons, see *Robinson v. Florida*, 378 U.S. 153, 154 n.1 (1964). In the latter case, the lack-of-notice argument was that the petitioners had not been informed of the manager's reason for requesting them to leave and therefore they did not know whether this request was authorized or their heedlessness of it prohibited by the state.

Spritzer made this argument to a seemingly skeptical Court on the first day of the 1962 Term.⁹ At its conference a few days later, the Court voted (by margins of seven-to-two and eight-to-one) to reverse the two South Carolina convictions on the grounds urged by Spritzer. In the Maryland and Florida cases, however, it rejected both this rationale and the broader state-action grounds advanced by the petitioners, voting five-to-four to affirm the convictions.¹⁰ Nevertheless, before finalizing that decision the Court (over vigorous dissent by four Justices) issued an order inviting the Solicitor General to file a brief "expressing the views of the United States" on the broader constitutional issues.¹¹ To request a second brief from a nonparty on a matter it had chosen not to address the first time around was unusual, if not unprecedented. The invitation may have reflected the esteem in which Cox and Spritzer were held by the Court; or it may have been a device for postponing decision in the hope that Congress would moot the issue through legislation.¹² Whatever the reason, the Court's invitation evoked an eloquent and powerful supplemental brief—co-authored by Cox, Spritzer, and Louis F. Clairborne—advancing a richer, more complex state-action rationale than the somewhat mechanical reasoning of *Shelley v. Kraemer*.¹³ The brief conceded that enforcement of a neutral trespass law in support of a property owner's private decision to exclude blacks would not be unconstitutional state action. In these cases, however—so ran the argument—the discriminatory policies of the restaurant owners were not in any real sense "private" decisions; they were integral elements of a community-wide system of racial segregation established by a combination of governmental and nongovernmental action. The state's antecedent role in generating the owners' discrimination, plus its role in regulating and licensing their operations, plus its post-facto action in arresting and prosecuting the violators—all added up to state-involved discrimination in violation of the equal protection clause even if none of the elements, standing alone, sufficed. For safety's sake, the brief put forward an alternative "narrow" basis for reversal in the Florida case: a state administrative regulation requiring racially separate toilet facilities in restaurants and lunch counters serving members of both races made such bi-racial service more expensive, thus encouraging, and implicating the state in, the owner's act of

⁹ A transcript of this argument can be found in 59 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 554-72 (P. Kurland & G. Kasper eds. 1975) [hereinafter LANDMARK BRIEFS].

¹⁰ See B. SCHWARTZ, *supra* note 5, at 509-12.

¹¹ 375 U.S. 918 (1963).

¹² See B. SCHWARTZ, *supra* note 5, at 512.

¹³ See LANDMARK BRIEFS, *supra* note 8, at 367-534.

discrimination.

The broad argument changed no minds. The Court reversed the convictions for criminal trespass in the South Carolina cases on the narrow due-process grounds originally argued by Spritzer;¹⁴ unanimously reversed the Florida conviction on the basis of the toilet ordinance noted in the government's supplemental brief;¹⁵ and reversed the Maryland conviction on yet another narrow ground,¹⁶ argued neither by the government nor by the petitioner. In all but the Florida case, three (dissenting) Justices would have affirmed the convictions; three would have reversed on broad grounds; and the other three, holding the balance of decision, were content to reverse on narrow grounds.

Failure to obtain a favorable decision on the broad state-action issue should not be allowed to obscure Spritzer's achievement in these cases. His realistic assessment of the chances for such a holding led to the advocacy of narrow grounds; this advocacy proved effective in three of the four cases, enabling the Court to avoid what would have been a negative decision on the merits of the state-action question; and the result was to preserve the momentum of the civil rights movement until Congress could lay the public accommodations issue to rest in its 1964 legislation.

In 1968, Ralph left the Solicitor General's Office to join the Penn faculty, and five years later I became, for the third time, his colleague. In the years that followed, many a day was enlivened by a trip to his office in the Sansom Street corridor to talk over the issues and events of the world, the School, and the sports arena (not necessarily in that order). Puffing away at his pipe, watering away at his plants, writing away in the neat script with which he had so often performed his editorial alchemy on draft briefs of mine—in whatever posture I found him, he was always up for a good conversation. His characteristic reticence in large social gatherings completely disappeared in these smaller settings—though even here his rhetoric was often restrained by what I used to call "Spritzerian understatement" ("I am not altogether convinced that the Ayatollah Khomeini always has the best interests of the United States at heart"). He could be witty as well as wise—quick and

¹⁴ *Bouie v. Columbia*, 378 U.S. 347, 363 (1964); *Barr v. Columbia*, 378 U.S. 146, 151 (1963).

¹⁵ *Robinson v. Florida*, 378 U.S. 153, 156-57 (1964).

¹⁶ *Bell v. Maryland*, 378 U.S. 226, 241-42 (1964). The basis for vacating the state court judgment in this case was that, subsequent to the convictions, the state of Maryland and the City of Baltimore had enacted public accommodation laws making it unlawful to deny service on account of race. In such circumstances, it was considered appropriate to give the state court below an opportunity to decide whether the convictions should be dismissed. *Id.* at 228.

hearty with a laugh, deft with a needle or barb when a suitably pompous target presented itself.

Ralph himself is the opposite of pompous; to call him modest would be Spritzerian understatement. He is painfully allergic to praise; the slightest hint of it brings color to his cheeks and an abrupt change of subject. (Long before now, he will have left off reading the tributes in this volume.) It was a memorable occasion, therefore, when, during his last days at Penn, he swallowed his obvious embarrassment and allowed me to see a copy of a letter in which Justice Brennan (whom he greatly admires) had referred to him as "the finest advocate to argue before our Court in my years here."¹⁷ Such reluctance to share so mighty a compliment with so close a friend merely underscores his habitual aversion to kudos.

To his colleagues, he was always available with a helping hand and a sympathetic ear. Although the proverbial shirt off one's back is a phrase (and perhaps a phenomenon) no longer in fashion, it describes Ralph Spritzer to a tee (assuming, of course, one has a taste for turtle-necks). At a time when many legal academics are reaping handsome rewards for their services as litigators and consultants, Spritzer, though possessing saleable litigation skills of the highest order, has been content for the most part to handle appeals on a court-appointive basis.

A superb colleague, he was an equally superb teacher, one of the most effective and popular in the School. In the classroom, as in the courtroom, flamboyance and showmanship were not his style, yet by all reports the students loved him. They appreciated the clarity and coherence of his presentation; his mastery of the subject matter (antitrust and criminal procedure); the balance he struck between depth of analysis and breadth of coverage, between conceptual and practical matters, between the interests of the public and the rights of the accused. They valued his fair-mindedness and sensitivity. They reciprocated the respect and affection he so clearly had for them. Nor was Ralph's devotion to students confined to the classroom. For many years he served as faculty advisor to the Keedy Cup Competition, Penn's moot court program. He handled applications for judicial clerkships. He directed the Indigent Prisoner Litigation Program, in which students, under supervision, represented prisoners in actual cases.

In sum, one could not hope for a more delightful companion, a wiser counselor, a more helpful and generous colleague, a more sympathetic and reliable friend. Ralph left Penn a year and a half ago. I have

¹⁷ Letter from Justice William J. Brennan to Professor Alan Matheson (February 15, 1985).