

VI
*REMARKS AT TUESDAY
AFTERNOON SESSION—
FRIENDLY MEDAL*

By The Honorable Harry T. Edwards
*Senior Circuit Judge and former Chief Judge of the
U.S. Court of Appeals for the D.C. Circuit*

By The Honorable Patricia M. Wald
*Member of the Privacy and Civil Liberties Oversight Board,
former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit,
and ALI Council Emeritus*

*The Tuesday afternoon session
of The American Law Institute convened in the Ritz-Carlton Ballroom,
Washington, DC, on May 17, 2016.
President Roberta Cooper Ramo presided.*

President Ramo: It is a joy to be here this afternoon for the presentation of the Friendly Medal. As you know, what we try to do in cases of honoring people is to invite those who know them best to talk about them. So let me begin by asking Paul Friedman, our Secretary, to introduce the judge who will present the Friendly Medal. Paul?

Judge Paul L. Friedman: I've been instructed by many, but particularly by Judge Edwards, to be brief. His full biography or fuller biography is in the Program, but I'm really delighted to introduce my friend Harry Edwards, who, as you know, is a judge on the U.S. Court of Appeals for the District of Columbia Circuit, has been for the last 36 years, and was the Chief Judge, a very distinguished Chief Judge, when I first joined the district court in 1994.

But I'm particularly pleased to welcome Judge Edwards to this podium today because of the reason he's here, which is to honor his longtime professional and personal colleague and friend, Judge Patricia Wald. Harry. (*Applause*)

Judge Harry T. Edwards: The Henry J. Friendly Medal is a fitting tribute to one of the greatest jurists in American history. And the Medal is appropriately *reserved for those who can be described as truly distinguished in the tradition of Judge Friendly and the ALI*. Patricia M. Wald easily meets the standard.

I have been a member of the legal profession for just over 50 years. And I have had the good fortune to work with some extraordinary practitioners, academics, and judges. I have known Judge Wald as a colleague and friend for over 35 years, and I can honestly say that I have never worked with anyone better. During her time on the D.C. Circuit, Judge Wald issued over 800 opinions and served as our Chief Judge between 1986 and 1991. She was acclaimed as a *great jurist* by both her judicial colleagues and members of the bar. And she was (and still is) revered as a member of our profession because of her willingness to share her great gifts with others.

Judge Wald modeled excellence in all of her work on the D.C. Circuit. She was always open and engaging; tough-minded, but not

haughty; probing, but never disagreeable in her inquiries; and funny, but never offensive. My colleagues and I always wanted to hear what Judge Wald had to say because it was bound to clear your head and improve your thinking; and, often, she was likely to make you laugh as well.

She was lightning fast in her work, but she never short-changed the parties in her preparations; she had an incredible memory; she missed no nuance in an argument; she had an awe-inspiring ability to reach coherent and sound judgments after analyzing case records and reflecting on the competing arguments in a case; and she was eminently fair.

Unlike one of her former judicial colleagues—a short, bald, African American, male—(laughter) Judge Wald was always patient when questioning counsel during oral arguments. (Laughter) Often, to assist an attorney, Judge Wald would give a detailed analysis of the issues in the case being heard, proffer her tentative conclusion, and then say to counsel, very politely, “I am not saying that this is the correct answer, but you might want to think about it.” As you can imagine, Judge Wald’s mastery of the case was sometimes very disconcerting to counsel. In one case, an attorney was so taken aback by Judge Wald’s gracious summary of the issues that he passed out and dropped to the floor before a packed courtroom. He was then carried out on a stretcher. The Deputy Marshal thought that Judge Wald had killed the attorney with her polite questions. (Laughter)

Judge Wald never had any interest in being a legal academic; but, make no mistake about it, she was a *great* judicial scholar by any measure. She was an artist in crafting opinions. If you need an example, look at her opinion in *Sierra Club v. Costle* [657 F.2d 298 (D.C. Cir. 1981)]. It is a *tour de force*—in examining the authority of the President to control and supervise executive policymaking; in cabining the grounds upon which an administrative rulemaking can be overturned on a claim that Congress unduly pressured the agency; and in crafting one of the greatest administrative law opinions ever issued in the D.C. Circuit.

She was uniquely adroit in reflecting on the judicial enterprise. If you need an example, look at her wonderfully insightful article, entitled “The Rhetoric of Results and the Results of Rhetoric: Judicial Writings,” published in the *Chicago Law Review* in 1995 [62 U. CHI. L. REV. 1371], explaining both why judges write and the constraints on judicial rhetoric.

And she was masterful in calling out injustices that she perceived in cases that she heard, but without ever straying beyond the strictures of appellate decision making. If you need an example, look at her brilliant dissenting opinion in *Steffan v. Perry* [41 F.3d 677 (1994)], which involved a challenge to the military’s then-established policy of discharging any person who acknowledged his or her homosexual orientation. In the conclusion to her dissent, Judge Wald said:

For the government to penalize a person for acknowledging his sexual orientation runs deeply against our constitutional grain. It has . . . no precedent or place in our national traditions, which spring from a profound respect for the freedom to think and to be what one chooses and to announce it to the world. The majority’s [opinion] cannot disguise the injustice that lies at the heart of this case. In years to come, we will look back with dismay at these unconstitutional attempts to enforce silence upon individuals of homosexual orientation, in the military and out. Pragmatism should not be allowed to trump principle or the soul of a nation will wither.

In my view, Judge Wald’s accomplishments as a jurist, without more, would make her a worthy recipient of the Henry J. Friendly Medal. But there is so much more. What makes Judge Wald so very special is the extraordinary range and consistent high quality of her work over the past 65 years, made possible by her unparalleled talents, her selfless commitment to the public good, and her innate goodness and integrity. She is someone who has really made a difference in the world.

Judge Wald's path to prominence was challenging. She was raised by her single-parent mother, who worked in a factory to support her daughter and make sure that she was the first one in the family to attend college. Judge Wald won a scholarship to Connecticut College for Women, graduated Phi Beta Kappa, and finished first in her class. She then attended Yale Law School, where she was one of only 11 women in her class. After graduating from Yale and then clerking for Judge Jerome Frank, Judge Wald briefly worked at Arnold & Porter in Washington, D.C. She left the firm when she was eight months pregnant because she wanted to be with her husband, who was in the Navy and stationed in Norfolk, Virginia, and raise a family.

When asked how she reentered the legal profession after 10 years at home raising five children, Judge Wald explained that

[w]hen the youngest child started going to kindergarten so that all five of them were in school, I began working part-time in a series of jobs that allowed for a flexible schedule. I had a consultant's contract with the Justice Department, and I worked on the Kerner Commission Report, the Report on the Causes and Prevention of Violence, on the President's Commission on Crime in the District of Columbia, and I was co-director of the Ford Foundation's Drug Abuse Research Project. Then in 1968 I joined Neighborhood Legal Services as a litigating attorney. That was when I began taking on full-time responsibilities again.

(Laughter) I should add that, in 1964, before Judge Wald returned to full-time employment, she also coauthored a book, *Bail in the United States*, which helped to reform the nation's bail system. How many stay-at-home parents can manage a schedule of this sort?

I asked one of Judge Wald's daughters how she felt when her mother decided to go back to work full-time. She said that, at first, she resented it because she felt it was an imposition. But she explained that, as she got older, she came to understand the importance of her mother's career. And she felt great pride when she heard other women say that "*Pat Wald was my role model.*" Women and minorities who have

been stymied in their attempts to advance in professional pursuits often remind us that “if you can’t see it, you can’t be it.” Judge Wald’s stunning accomplishments, both when she was at home and when she returned to work full-time, made her an inspiration to women who sought to follow in her footsteps in their family lives and professional careers.

The truth is that Judge Wald has been a role model for more than just women because she has done so much good for so many in her professional pursuits. In 1971, after stints at the Department of Justice Office of Criminal Justice and as an attorney in the Neighborhood Legal Services Program, she joined the Center for Law and Social Policy, one of only two public interest firms in existence at the time. She worked on cases primarily involving children, mental health, and disability rights. By 1977, Judge Wald was so well known and greatly respected for her public interest work that she was appointed Assistant Attorney General for Legislative Affairs at the Department of Justice.

In 1979, President Jimmy Carter nominated Judge Wald to fill a newly created seat on the D.C. Circuit, and she became the first woman ever to sit on our court. When she later served as Chief Judge, she did a terrific job in establishing strong internal operating procedures that are still in effect today at the court.

When Judge Wald retired from the court in 1999, some naive folks thought that she would relax, read a lot of books and see old movies (her hobbies), spend time with her kids and grandchildren (which she likes to do), and, as her daughter said, hang out with “some of her younger women friends” sipping some good wine. However, those of us who know Patricia Wald well, and have had the honor and pleasure of working with her, knew that retirement was not in the cards. Patricia Wald is always full steam ahead. So, unsurprisingly, she accepted an appointment to serve on the International Criminal Tribunal in The Hague. It was a very challenging assignment because of language differences among the judges and the failure of other judges to appreciate the rule-of-law principles that are common to us.

Unsurprisingly, Judge Wald quickly assumed an important leadership role on the court and performed sterling work.

When she returned from The Hague, Judge Wald became the board chair of the Open Society Justice Initiative. In 2004, she was appointed to be a member of the President's Commission on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction. In 2006, she worked with the Inter-American Commission on Human Rights to address the crack-cocaine disparity as the most egregious example of mandatory-minimum sentencing in our criminal-justice system. In 2010, she agreed to serve on The Constitution Project's Guantanamo Task Force. In August 2012, she was confirmed by the Senate to serve as a member of the Privacy and Civil Liberties Oversight Board. And last, but not least, Judge Wald has been a faithful member of the ALI since 1973, serving variously on the Council for 31 years, on the Executive Committee for 15 years, as an officer for several years, and now as Adviser on the Model Penal Code: Sentencing and Principles of the Law, Election Administration projects.

When someone like Judge Wald—who has served society selflessly and with extraordinary distinction—receives the public recognition and acclaim that she is due, we know that justice has been served. So how nice it was, in November 2013, when Judge Wald was awarded the Presidential Medal of Freedom. It was a beautiful occasion, and President Obama's words were such a fitting tribute to Judge Wald. He said that the Medal of Freedom

goes to men and women who have dedicated their own lives to enriching ours. [The] honorees have been blessed with extraordinary talent, but what sets them apart is their gift for sharing that talent with the world.

No better words could be spoken about Patricia Wald. And it is only fitting that Judge Wald will now receive the Henry J. Friendly Medal.

Before I close, let me tell you one last tale about our honoree. Some of you may recall that during her confirmation hearings before

the Senate in 1979, Judge Wald was attacked for having written a law review article about children's rights. I am told that the Rev. Bob Jones testified against Judge Wald and called her an "instrument of the Devil." After the hearing was over and Judge Wald was leaving with her family, Rev. Jones asked Judge Wald's son Tom what he thought about his mother being an instrument of the devil. Tom replied, "well, she sometimes burns the lamb chops, but I don't think she is an instrument of the devil." (*Laughter*) Fortunately, Judge Wald, we are sure that you have richly earned the Henry J. Friendly Medal whether or not you burned the lamb chops. (*Applause*)

(Judge Patricia M. Wald received the Henry J. Friendly Medal.)

Judge Patricia M. Wald (Ret.): It's a great honor indeed to be a recipient of the ALI's Henry Friendly award, but it's especially gratifying to have such an honor formally bestowed by my longtime friend and colleague on the D.C. Circuit, Harry Edwards. Harry and I spent over 20 years of lively discourse on that court in the decades of the '80s and '90s as the court reconfigured itself several times over with 13 new judges, a reconstituting all hearty institutions, including the ALI, must do to survive. In that vein I note that when Ruth Ginsburg and I came aboard the Council in 1980, 36 years ago, we were the only women on it—Shirley Hufstедler having recently stepped down. But now we have 23 active and nine emeriti women Council members, and this prestigious award has been bestowed on two others, Justice Sandra Day O'Connor and Linda Greenhouse. Our wondrous President is also a woman, as you probably have noted. (*Laughter*) Nobody can doubt that the ALI's welcoming of a more diversely gendered leadership has contributed mightily to its growth and ability to confront the burning legal issues of the last three decades.

One has only to look at the agenda of this Annual Meeting to validate that conclusion—criminal-sentencing revision, sexual assault, election law, foreign relations—and more. Oliver Wendell Holmes once said, "I think that, as life is action and passion, it is required of a man" (I add a woman too) "that he [or she] should share the passion

and action of his [or her] time at peril of being judged not to have lived.” That caution applies to institutions as well as individuals, and it includes not just the ALI but the judiciary as well, and for the next few minutes I will share a few thoughts with you about the challenges of a perennially changing world to our courts.

In that respect let me draw from my own six decades’ experience, first as a law clerk, later as an advocate and a judge. I have to mention that in all of these roles I had only the briefest of personal contact with Judge Friendly himself, and I will confess that I am pretty certain, after perusing the list of his 70 high-achieving clerks who went on to become justices, judges, professors, statesmen and -women (there were two women among the 70) that it is highly unlikely I would ever have met the entrance requirements let alone survived basic training for inclusion in that high-flying group.

I did, however, have the good fortune to meet and occasionally talk briefly with Judge Friendly at ALI Council meetings in the early ’80s, so I can attest to his unparalleled intellect and pungent wit, conspicuous even in an arena his biographer, David Dorsen [in *Henry Friendly: Greatest Judge of His Era* (2012)] referred to as “an elite organization made up of professors, judges, and private practitioners,” “the pace of whose meetings . . . exasperated him” so that he was not sure they were always “a good use of his time.” (He might indeed have changed his mind if he could have seen us plummeting through 100-page drafts in an hour or so during the past few days.) That’s not this morning, but the rest of the time. (*Laughter*) However, his actions belied his words for he did contribute mightily to several of the ALI’s most important projects dealing with federal- and state-court jurisdiction, conflict of laws, corporate responsibility, international jurisdiction, and a pre-arraignment code. He was, as several of his clerks have attested, a strict taskmaster, something I had reason to discover as a brand-new judge serving with Judge Friendly on a Harvard Law School moot court final along with Nate Jones, also at the time what we referred to as a “baby judge” from the Sixth Circuit. The student advocate, to his everlasting sorrow, failed to pick up a jurisdictional ambiguity in the case, which was, of course, noted instantaneously by

Judge Friendly, the presiding judge. As a result, the advocate never came close to making his main substantive arguments, and Nate and I never got to ask any questions at all. (*Laughter*) Judge Friendly later apologized for the takeover, but the student, as well as Nate and I, probably learned more about the indispensability of comprehensive attention to detail—a hallmark of Judge Friendly’s judicial approach—than any of us would have had the argument followed more traditional lines. But that experience only cemented any doubt on my part that I could ever have been a successful Friendly clerk, despite my great admiration for his opinions as gems of craftsmanship, penned in most cases entirely by his own hand in less than an hour. He was indubitably a judge of all seasons, certainly the ones he worked in (1959 to 1986), and an unchallenged paragon of judicial restraint, which over the years has apparently become one of the most, if not the most, coveted quality of judging.

A few years before Judge Friendly took the robes in 1959, however, I had also clerked (the only woman clerk then) on the Second Circuit for Jerome Frank during what some judicial historians have called its “golden age.” Its then six judges included the two Hands, Learned and his cousin Augustus, Tom Swan, Charles Clark, Jerry Frank, and Harrie Chase. The judge I clerked for, Jerry Frank, was from a different planet than Judge Friendly in style, in experience, and in some respects in philosophical orientation toward the judicial role itself. Clerking for Jerry Frank has been compared to grabbing the tail of a comet and hanging on for dear life.

His interests outside the law were unbounded, ranging from psychiatry to the language of the Hopi Indians; his acquaintances and prolific writing correspondents (no Twitter or e-mail in those days) reached back into his service in the Roosevelt Administration and into all branches of academia, not just the law, but it also included his old New Deal buddies, several of whom became the founding fathers of what are now major national law firms. A primary duty of a Frank clerk, in contrast to what I read and heard about Judge Friendly’s clerks, was to try and keep discussions of the fascinating—but not always directly relevant—topics, which consumed his attention within

reasonable limits in the final drafts of his opinions. (*Laughter*) Unlike Judge Friendly, he did not write all first drafts himself; he did for the ones he cared most about, but even then, he conducted lively back-and-forths over days and weeks with the clerk (judges had only one clerk then), which resulted more than once in his changing his mind, or at least his approach, to a desired result. More often, of course, this ongoing dialogue changed the clerk's mind.

Yet his judicial instincts for getting the case right—result as well as law-wise—in the end were finely tuned, even if not initially consummated in a brilliant first draft. In one case we wrestled days or weeks over whether notice by way of publication in the back pages of a New York newspaper concerning a significant bankruptcy claim of the City of New York against the New York, New Haven and Hartford Railway Co. was sufficient due process. Despite precedent, which convinced his colleagues on the bench and I'm sorry to say this law clerk, that it was, the judge dissented on fundamental due-process grounds, and a majority of the Supreme Court ultimately agreed with him. Judge Frank did dissent far more frequently than the rest of the court, usually on the underdog's side. He pushed for more rights for criminal defendants long before *Gideon* [*v. Wainwright*, 372 U.S. 335 (1963)], and he pushed against administrative-agency intransigence toward disadvantaged supplicants. He railed against too big, too rapid resort to summary judgment, when facts or their interpretation were ambiguous, a fight that's going on to this day. He questioned eyewitness testimony—validation of that skepticism has grown exponentially over the years, as Harry knows. And he pleaded with the Supreme Court to review the imposition of the death penalty in the Rosenberg appeal. No one then or now would likely have accused him of judicial restraint or even incrementalism. But his best friend on the court was Learned Hand, who agreed with him in a surprising number of cases. And, in my view, he was a very good judge, a fine role model for his clerks, and the federal judiciary benefited greatly from his presence on it.

All of that leads me to a modest but worrisome conclusion: The judiciary today—state and federal—from the Supreme Court on down

through the lower courts—is called upon continually to make and revise an ever-expanding, but in some fields still embryonic, body of law. As a result, few would challenge today the proposition that the Supreme Court has come (whether designedly or not) to play a central role in policymaking—on issues involving the most taxing social and economic—even technological—issues of an increasingly complex modern world. But before the High Court lays down the law of the land, lower-court judges have to set the stage, make the findings, listen to the experts, analyze the arguments, set parameters for the advocates, rule on the credibility of the witnesses, analogize from old precedent to newly invented technology and newly discovered scientific truths. It's true, of course, that courts at all levels must continue to draw fine lines between the constitutional prerogatives of Congress and the courts, but too often Congress declines or defers to legislate for political reasons, and when it does act, it often falls short of dealing comprehensively with complex problems. Gaps and ambiguities are regularly left for the courts to fill in. When that happens, few who have served on an appellate or a trial court would deny that a judge's prior life and experience and extrajudicial knowledge enter, implicitly—sometimes even explicitly—into the decisional process. This is most likely to happen in novel and controversial but very important cases. But even in familiar disputes, it can play a background role. Judge Frank, for instance, used to refer to being caught up as a possible suspect at an early stage of the famous Leopold and Loeb murder case on the basis of his ownership of a pair of glasses similar to those found on the notorious crime site. He told us this brief brush with the criminal-justice system colored his later approach toward the treatment of suspects. In my own case, the several summers working on a manufacturing assembly line I thought gave me a special interest in, and hopefully a better insight into, the dozens of NLRB cases that came before the D.C. Circuit involving employer–employee relationships played out on the factory floor.

Our courts, like our other major institutions, have to move forward with the times and developments in virtually all areas of national life. To do so, they need to draw on the diverse backgrounds of judges

with different experiences. Courts nowadays need not just the Friendly model of a good judge but the Frank model as well. We don't want nine Judge Friendlys or nine Judge Franks on our courts. But we do want some of both to provide a kind of microcosm of the outside world in which their decisions have to operate.

We need diversity on our courts, not just racial, gender, or ethnic diversity, but diversity of experience, outlook, and even temperament. My 20 years on the D.C. Circuit serving with a total of 25 different judges validates that thesis, and I hope Harry would agree with me. Just as the ALI has moved in the past 30 years from any characterization of it as an "elite organization" to one actively searching for qualified members in all places—solo practitioners, young comers, corporate in-house counsel, government lawyers, criminal-defense lawyers, and public-interest advocates—so the judiciary must as well capture the diversity of our nation's best legal leaders. That is why I do worry that in picking judges at all levels we have come to focus perhaps too singularly on a particular paradigm of experience (prosecutor or academic) or a particular educational background (Ivy League) or even a particular temperament or quality such as judicial restraint, a concept that seems to have morphed beyond an agreed-upon standard of respect and appropriate deference for the prerogatives of the other two branches, into a kind of proxy for Solomonic splitting of the baby in all cases, striving always for the middle ground, the "good judge" perceived as one who votes for one side of an issue as many times as the other side, and who prioritizes reconciliation above merits in virtually all cases, and suppresses any and all expressions of outrage at long-standing legal injustices, refusing to undo or even criticize outdated precedents that keep the law out of step with developments in other fields of knowledge.

Having spent the last four years working on intelligence oversight, I have encountered a surprising number of these outdated legal doctrines, originated in the technology of long ago, which defy the logic of modern-day research and technological innovation, yet remain firmly embedded in our legal precedent. To keep our judiciary relevant, we will always need the sensitive, albeit sensible, questioners and the

advocates of needed change among our judges, just as much as we need their opposites—the moderates and the restrainers. Every new judge subtly changes the perception and the dynamics of a court, and six or seven or nine “same as-es” do not add up to a great judicial institution. In truth, the parts of Judge Friendly’s jurisprudence and craft I admire most are those areas where he did strike out and, with caution but determination, formulate new criteria for decisionmaking and new legal approaches to time old as well as brand-new dilemmas. After studying his case record, his biographer opines that Judge Friendly did not feel bound by the views or arguments of opposing counsel but carefully scrutinized the facts himself and rearranged them so as to arrive at what he felt was the most practical and commonsense solution to the underlying problem. But by that mode he did lay down principles that did in fact change or expand the law. I cite his famous article, “Some Kind of Hearing” [123 U. PA. L. REV. 1267 (1975)], which has become a canon in administrative due process. He did, it is true, eschew too simple or radical changes, and he had no apparent agenda, but he did keep his sights riveted to those changes that would make the law fundamentally better—and there were plenty of those to attract his attention over his 27 years on the court. He believed as well that courts should consider statutory language “in context” and in his chronicler’s words, he strove “to fulfill the legislators’ purposes along with the underlying needs of the nation.” He cited legislative history in 105 of his opinions. I applaud his careful but influential forays into changing the law for the better.

I have been privileged to have had a great run—in my professional as well as my personal life. Much of that was due to the most supportive partner that any woman could possibly have and to those tolerant children, who grew up in a four-career household. I have worked in the government, in the executive branch and with Congress; on the courts, here and abroad; in legal services and public-interest law; and a short turn in private practice. In all of that, my judicial service—here and at the International Court at The Hague—were the best part. That was largely because the courts were peopled by strong—but certainly not always moderate or even tightly restrained—

intellects. It was the struggles and often the dissents that breathed life into decisions aimed at governing a heterogeneous world out there. An old friend and renowned district-court judge Charlie Wyzanski used to say, “He who is only is not even.” That goes for a court as well. While we justly honor the Henry Friendlys, we should also welcome as well the restless and perennially dissatisfied judges like my old boss, straining to push the law forward and to bring to judicial deliberations new experiences and viewpoints. It is in that spirit that I thank the ALI again for this remarkable and deeply appreciated honor. (*Applause*)

President Ramo: Let me say that I also especially want to thank the Chair of our Awards Committee, Brock Hornby, and the whole Committee, who was so enthusiastic, as the Council was, Pat. And thank you for those really important remarks.