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# EUGENE GRESSMAN: FRIEND OF THE COURT

JAMES DICKSON PHILLIPS, JR.†

As the world knows only too well, there is and always has been a wide range of quality amongst lawyers. There are lawyers and lawyers. The worst, to our eternal sorrow, are sore afflictions on society. The noblest and best, to our eternal credit, adorn it.

There is a reverent term within the profession for our very best. They are the “lawyers’ lawyers.”

The lawyers’ lawyer is one to whom other lawyers go for help when they are in overly deep or uncharted legal waters. On whom judges know they can rely for impeccably fair and truly helpful advocacy as counsel in difficult cases and for broader help in works of general scholarship. Most distinctively, these are the lawyers that courts occasionally seek out to serve as friend of the court—*amicus curiae* in the ancient jargon—when high advocacy is needed.

As practitioner, author, and professor, Gene Gressman has been in all these respects one of the premier lawyers’ lawyers of our time. Countless lawyers have sought him out as guide and comforter on their way to the Supreme Court—both in specific cases as associated counsel and as co-author of the acknowledged “bible” on *How to Get There in Decent Order*. Courts—preeminently the Supreme Court of the United States—have come to know that his work, whether as counsel or author, is entitled to that ultimate respect that in the legal profession is only earned by demonstrated, sustained integrity and intellectual power. A fortunate set of students has profited, since his turn to full-time law teaching, from the quiet brilliance of his legal scholarship and the gentle civility and dignity of his manner.

Fortunate indeed is the bar, or the court, or the law school blessed with the presence of one of these. Fortunate, therefore, was the United States Court of Appeals for the Fourth Circuit when Gene Gressman moved his official residence to Chapel Hill within its geographical borders. Quick to recognize and capitalize on the serendipitous event, our court has since enlisted Professor Gressman’s great talent for both general and particular services. Those services have been rendered with the consummate quality that was expectable, with unhesitating acceptance of the court’s request for assistance, and, characteristically, essentially *pro bono*.

In December 1982 he accepted the court’s invitation to act as Chairman of its standing committee on local rules. Under his chairmanship, that committee has produced an eminently practical, interrelated set of general rules, local rules, and internal operating procedures that we believe is a model of its kind.

Twice since coming within reach of the court’s writ Professor Gressman

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† Judge, United States Court of Appeals for the Fourth Circuit.

has accepted requests from the court to serve as its amicus curiae. In both, important issues were raised in appeals in which, by procedural quirks, there was only one party-in-interest, the appellant. Because the issues were important and adversarial presentation not otherwise to be had, Professor Gressman was requested to defend, as amicus, the judgment appealed. For lawyers at least, the cases may be interesting enough to describe. They well illustrate the kind of task to which lawyers of Professor Gressman's stature may be called by courts.

In *United States v. Brainer*<sup>1</sup> an able and respected United States District Judge had held unconstitutional the federal Speedy Trial Act of 1972<sup>2</sup> and on that basis refused to apply it to dismiss an indictment. In the district court the local United States Attorney had boldly asserted the unconstitutionality of the Act, taking a litigation position at odds with the normal Justice Department responsibility to defend rather than attack the constitutionality of acts of Congress. Predictably, on the defendant's appeal from his conviction, higher authority in the Justice Department had resumed the normal posture. Reversing its litigation position below, the government on appeal joined with defendant in challenging the district court's unconstitutionality ruling, while maintaining that the Act did not, however, mandate final dismissal and that the conviction should stand.

Confronted with so momentous a ruling and no party willing to defend it on appeal, the court turned to Professor Gressman to defend the district court ruling and thereby ensure an adversary presentation of the constitutional issue.<sup>3</sup>

In *White v. Raymark Industries, Inc.*<sup>4</sup> a United States District Judge, applying a local court rule, had imposed on a personal injury defendant a civil penalty in an amount reflecting the cost of assembling a petit jury to try a case that defendant belatedly agreed to settle only on trial date. The defendant appealed, asserting that the district court lacked power to adopt and enforce such a rule. Again, the peculiar circumstances of the appeal produced no party interested in defending the district court order. The plaintiff of course was entirely disinterested in what was essentially a dispute between defendant and the court.

Again the issue, though not as momentous as that in *Brainer*, was one of great importance in the administration of justice. And it was by no means an open and shut question. Indeed, the Third Circuit, sitting en banc, had only recently divided closely in consideration of a nearly identical issue in *Eash v. Riggins Trucking, Inc.*<sup>5</sup>

Again, to ensure adversarial presentation, the court called on Professor Gressman to defend the district court's ruling and its local rule.<sup>6</sup>

In the interest of suspense (possibly felt only by the lawyers' lawyers reading this), I have not given the results of these two cases. That of course is beside

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1. 691 F.2d 691 (4th Cir. 1982).

2. See 18 U.S.C. §§ 3161-3174 (1982).

3. See *Brainer*, 691 F.2d at 692 n.5.

4. 783 F.2d 1175 (4th Cir. 1986).

5. 757 F.2d 557 (3d Cir. 1985) (en banc).

6. See *White*, 783 F.2d at 1176 n.2.

the point of this tribute, and any suspense felt can be relieved by reading the interesting opinions. I will only say that, as every good lawyer knows, you win some and you lose some on equally excellent performances, and add that it is the happy lot of invited amici never really to lose.

For all these reasons and others of a more personal nature, I am happy to join in these tributes to Gene Gressman, a most excellent lawyers' lawyer.

