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TRIBUTE

TO A FRIEND: THE HONORABLE WILL GARWOOD

HONORABLE EMILIO M. GARZA*

William Lockhart Garwood died on July 14, 2011. For those of us who knew him, his death came as a shock. Although most of us on the Fifth Circuit knew that Will was scheduled for a bypass procedure, no one had the slightest thought he would not pull through his surgery. Although most of us were informed by phone of his passing, the shock and grief was so overwhelming that there was what one judge described as "an eerie silence" for several days among the members of the court after his death. We had lost an irreplaceable colleague who, as Robby George put it, "exemplified judicial statesmanship in its noblest and most inspiring form." We were saddened by the realization that Will Garwood would no longer be on the court, and that we would no longer enjoy the immense pleasure of his company.

Although Will was inauspiciously born in Houston, Texas in 1931, the remainder of his life was anything but inauspicious. He was a graduate of Princeton and the Woodrow Wilson School of Public and International Affairs. He attended the University of Texas School of Law and graduated first in his class. Although he was not one to pass up a chance of enjoying a beer at Scholz Garten in Austin during his law school experience, he was bright and industrious, was elected as the Associate Editor of the Texas

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Law Review, and ultimately awarded honorary memberships in the Order of the Coif and Chancellors (Grand Chancellor). After graduation, he served as a law clerk to another famous Fifth Circuit judge, John R. Brown of Houston, and, later served with the United States Army JAG Corps at the Pentagon where he was assigned to the Defense Appellate Division. When he returned to Texas in 1959, he joined the firm of Graves, Dougherty, & Gee in Austin, where he practiced with his father, Judge W. St. John Garwood—who had recently retired from the Supreme Court of Texas and joined the firm in an "of counsel" role. For the next twenty years, Will had a general civil practice as an appellate counsel. But in 1979, the direction of Will's career would change dramatically. First, Governor Bill Clements appointed him to the Supreme Court of Texas, becoming both the first Republican since Reconstruction and the only son of a former justice to serve on that court. That he was not elected to another term was a huge loss for the State of Texas, but it was an enormous gain for the U.S. Court of Appeals for the Fifth Circuit in New Orleans, to which he was appointed in 1981 by then-President Ronald Reagan. He served thirty years on the Fifth Circuit and gained the reputation to which Robby George alluded.

The court quickly realized Will's legal prowess. In what had to be Will's first en banc session, not yet one year on the court, he dissented in *Scott v. Moore*.[1] The appeal presented certain ticklish legal issues, including "the scope of relief available under 42 U.S.C. § 1985(3) [of the Ku Klux Klan Act], the extent of congressional power to enact a civil remedy for wholly private infringement of constitutional rights, and the relationship between section 1985(3) and the labor relations laws."[2] The case arose from the brutal beating of the employees of A. A. Cross Construction Company with iron rods and wooden boards at a Port Arthur worksite by union members who disagreed with the company for hiring both union and nonunion workers.[3] The union members overturned the trailer that served as Cross's construction site office, and they destroyed or vandalized the company's tools and equipment.[4]

The en banc majority held the anti-injunction provisions of the Norris-LaGuardia Act did not deprive the District Court of jurisdiction to enjoin violence, and that Congress intended 42 U.S.C. § 1985(3) to provide a

1. Scott v. Moore, 680 F.2d 979, 1022–25 (Former 5th Cir. 1982) (en banc) (Garwood, J., dissenting), *rev'd*, 463 U.S. 825 (1983).

2. *Id.* at 982.

3. *Id.* at 982–84.

4. *Id.* at 984.

remedy for private conspiracies directed at *nonracial* classes.[5] The en banc majority specifically determined that § 1985(3) could encompass a conspiracy designed to deprive nonunion workers of the First Amendment right to free association where the conspiracy did not occur in conjunction with legitimate union activity and was perpetrated by force and violence.[6] The majority held that the Commerce Clause empowered Congress to reach the private conspiracy involved in the case before them.[7] Finally, the en banc court held this case did not involve a labor union participating or interested in a labor dispute within the meaning of 29 U.S.C. § 113(c), and thus the clear-proof standard of 29 U.S.C. § 106 was inapplicable.[8] A detailed dissent, written by two of the most senior and distinguished members of the court, Alvin Rubin and Jerre Williams, disputed each of these holdings.[9] To say the least, this was an extremely important case with huge legal ramifications. Nonetheless, Will weighed in. Will concurred in Parts II A and II E of the main dissent, but wrote a separate dissent in which no other member of the court joined. Will concentrated on two issues.[10] He wrote that:

> [T]he phrase "the equal protection of the laws" in the first clause of section 1985(3), repeating verbatim the concluding words of Section 1 of the Fourteenth Amendment, would seem to refer to rights that the United States Constitution protects only against deprivation by some kind of state action or inaction. This is not to say that a private conspiracy cannot deprive a party of the equal protection of the laws; but the object of the conspiracy must be to, "directly or indirectly," in some manner bring about a situation where the *protection of the law* is unequally afforded or applied to the victim. I believe this construction accords with the wording of the Ku Klux Klan Act, with its title ("An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other

5. *Id.* at 985–86.

6. *Id.* at 996 ("But where, as here, there is no campaign to organize employees and force or violence is used to stake out one group's territorial claim and to deprive other workers and their employer of the right to freely associate with one another, a section 1985(3) action will lie.").

7. *Id.* ("On the particular facts before us, we hold that the Commerce Clause empowers Congress to reach defendants' conduct and do not reach the Fourteenth Amendment issue.").

8. "[T]hese unions were not participating in a 'labor dispute' as that language is employed in section 113(c) because their activity does not fall within the abuses that Congress intended to prevent." *Id.* at 999–1001. "Since the violence at the Alligator Bayou construction site did not occur in conjunction with a labor dispute, the clear-proof standard of section 106 is not applicable." *Id.* at 1001.

9. *Id.* at 1004–22 (Rubin, J. & Williams, J., dissenting).

10. *Id.* at 1022–25 (Garwood, J., dissenting) (focusing on the underlying purpose of § 1985(3) and the lack of congressional authority, as well as the lack of evidence that Congress intended to use the Commerce Clause to derive the authority to enforce the Act against private enterprise).

> Purposes"), and with both the operative intent and the constitutional understanding of those in the Forty-Second Congress who supported the Cook-Willard limiting amendment.[11]

He would go on for several pages distinguishing cases, explaining the purpose of the statute and tethering the animus required by the statute in some manner to race (or perhaps some other analogous immutable class characteristic).[12]

Interestingly, Will was already concerned with what was at that time the unbridled use of the Commerce Clause to expand congressional legislation. He wrote:

> [T]he majority errs in its reliance on the [C]ommerce [C]lause as a source of congressional power to enact the Ku Klux Klan Act, so as to reach purely private conspiracies directed by purely private ends unrelated to rights protected by the United States Constitution. Such reliance at least indirectly undermines the majority's reading of congressional intent concerning the scope of section 1985(3). At the very least, reliance on the [C]ommerce [C]lause bespeaks a serious doubt as to the existence of any other source of congressional power sufficient to support the Ku Klux Klan Act as interpreted by the majority. We are cited to no legislative history, or other contemporary evidence, that Congress intended to invoke its power under the [C]ommerce [C]lause, and it is beyond dispute that congressional power under this clause was then considered far more limited than it is today. Accordingly, since Congress did not purport to act under the [C]ommerce [C]lause and yet considered it was acting constitutionally, a strong inference arises that Congress did not intend the Ku Klux Klan Act to have the broad reach ascribed to it by the majority.[13]

Will more importantly asserted that:

> [W]e are cited to no decision of the Supreme Court that has sustained under the [C]ommerce [C]lause an act of Congress not by its terms directed at interstate or foreign commerce, or matters affecting them, or expressly stated to be enacted pursuant to the power to regulate commerce. To do so when the legislative history, and other contemporary evidence, plainly indicate that Congress was relying on other constitutional sources of power, seems to me to be a most serious error. To regulate only conduct in or affecting interstate commerce is quite a different proposition from regulating conduct irrespective of its relation to interstate commerce.[14]

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11. *Id.* at 1022 (Garwood, J., dissenting).
12. *Id.* at 1022–25 (Garwood, J., dissenting).
13. *Id.* at 1025 (Garwood, J., dissenting).
14. *Id.* (Garwood, J., dissenting).

The Supreme Court of the United States agreed with Will, stating:

> [N]o convincing support in the legislative history for the proposition that the provision was intended to reach conspiracies motivated by bias towards others on account of their *economic* views, status, or activities. Such a construction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended when it passed the provisions in 1871.[15]

The Court concluded "[e]conomic and commercial conflicts . . . are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property."[16] The Court's holding was extremely similar to Will's dissent.

From that very promising start, Will's judicial reputation for exacting legal work grew in a court environment that included such notable judges as John Wisdom, John Brown (Will's first boss), Irving Goldberg, Alvin Rubin, and Al Tate. When I came on board in 1991, Will had already served ten years, and it was immediately clear to me that one always wanted Will Garwood on one's side in any en banc conference. He was intellectually strong, his logic was rigorously principled, and he did not brook flimsy analyses lightly, especially when they conflicted with his point of view. In the early 1990s, when Chief Judges Clark and Politz presided, en banc conferences to a novice appellate judge like myself seemed more like a "free for all" than an organized discussion of the issues. Yes, there was some organization to our conferences: we went around the conference table, and everyone took their turn and was heard on the pertinent issues before the court. However, one misstep by any judge would invite a vigorous counterpoint. Judge Williams who served with Will on the court in the 1980s and early 1990s, and who was a Professor of Law at the University of Texas, was known to have said that the only thing worse than an en banc conference was a law school faculty meeting. If Will disagreed with your point of view, you knew that you would face an uphill battle trying to convince your colleagues. His reputation at conference was legendary.

In his thirty years on the court, Will would author numerous notable decisions,[17] but his reputation would be solidified by two extraordinary

15. United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 837 (1983).

16. *Id.* at 839.

17. *See* Rice v. Harken Exp. Co., 250 F.3d 264, 265–72 (5th Cir. 2001) (holding that the 1990 Oil Pollution Act does not cover oil discharge affecting ground water and is not implicated by general allegations that navigable surface water will be affected by remote, gradual, and natural seepage from oil contaminated ground water); S. Christian Leadership Conference v. Louisiana

cases: *United States v. Lopez*,[18] in which, for the first time in recent judicial history, a court of appeals held that a congressional act was invalid as beyond the power of Congress under the Commerce Clause; and *United States v. Emerson*,[19] in which, a court of appeals first articulated the Second Amendment protects individual Americans' right to keep and bear arms. Neither case was without controversy.

I am sure that Alfonso Lopez, a twelfth-grade student at Edison High School in San Antonio, did not understand the legal ramifications of carrying a concealed .38 caliber handgun to school.[20] "Lopez was charged in a one-count indictment with violating 18 U.S.C. § 922(q), which [made] it illegal to possess a firearm in a school zone."[21] He pled not guilty and "moved to dismiss the indictment on the ground that section 922(q) 'is unconstitutional, as it is beyond the power of Congress to legislate control over [] public schools.'"[22] Lopez further contended that "section 922(q) 'does not appear to have been enacted in furtherance of any of those enumerated powers' of the federal government."[23] The district court held otherwise, "[C]oncluding that section 922(q) 'is a constitutional exercise of Congress' well-defined power to regulate activities in an[d] affecting commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce.'"[24]

In his opening paragraph, Will highlighted the importance and rarity of this case:

Supreme Court, 252 F.3d 781, 783–95 (5th Cir. 2001) (finding a Louisiana Supreme Court rule imposing strict qualifying standards for indigent parties seeking law school clinic representation and prohibiting law students from representing clients solicited by someone associated with the clinic does not violate First Amendment freedoms of speech or association.); Zenor v. El Paso Healthcare Sys. Ltd., 176 F.3d 847, 850–67 (5th Cir. 1999) (determining exclusion for current illegal drug users in Americans with Disabilities Act includes an employee who completed rehabilitation program and was not currently using drugs, but used drugs until time of entering rehabilitation program); Graham v. Collins, 950 F.2d 1009, 1011–34 (5th Cir. 1992) (en banc) (articulating the Texas death penalty statute adequately allowed for consideration of mitigating factors relevant to whether defendant would represent a continuing threat to society; affirmed by the Supreme Court), *aff'd* 506 U.S. 461 (1993); Leckelt v. Bd. of Comm'rs of Hosp. Dist. No. 1, 909 F.2d 820, 821–33 (5th Cir. 1990) (holding hospital did not violate Louisiana civil rights statute prohibiting discrimination, equal protection, or privacy rights of employee discharged for refusing to submit to AIDS test).

18. United States v. Lopez, 2 F.3d. 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

19. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

20. *See Lopez*, 2 F.3d at 1345 ("On March 10, 1992, defendant-appellant Alfonso Lopez, Jr., then a twelfth-grade student attending Edison High School in San Antonio, Texas, arrived at school carrying a concealed .38 caliber handgun.").

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* (alteration in original).

> The United States Constitution establishes a national government of limited and enumerated powers. As James Madison put it in *The Federalist Papers*, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Madison's understanding was confirmed by the Tenth Amendment. It is easy to lose sight of all this in a day when Congress appropriates trillion-dollar budgets and regulates myriad aspects of economic and social life. Nevertheless, there are occasions on which we are reminded of this fundamental postulate of our constitutional order. This case presents such an occasion.[25]

What Will did in the twenty-three pages that followed was a primer of the judicial thought, exactness, thoroughness, and attention to detail which typified his opinion writing. He first analyzed the language of the Gun-Free School Zones Act of 1990, specifically section 922(q).[26] Then, step by step, he placed section 922(q) in its proper constitutional context, abutting the Commerce Clause and the Tenth Amendment, thereby demarcating the division of authority between federal and state governments.[27] Lopez was charged with possession of a firearm in a school, which Will determined did not in itself contain the commerce nexus required to authorize Congress to act, at least without the appropriate findings.[28] He disagreed with the Government's argument that section 922(q) is no different from any number of other federal firearms crimes, like section 922(g).[29] Will pointed out that section 922(g) made it "unlawful for felons and some other classes of persons to 'possess [a firearm] in or affecting commerce.'"[30] That is, a commerce nexus was specifically an element of the crime under section 922(g), but not so in section 922(q).[31] He went on to outline federal firearm legislation beginning with the National Firearm Act of 1934 and extending to the Crime Control Act of 1990, including the Gun-Free School Zones Act of that same year of which the new section 922(q) was a part.[32] He determined the scope of these statutes, pinpointing the commerce nexus

25. *Id.* (internal citations omitted) (quoting THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961)).

26. *Id.* at 1345–46.

27. *Id.* at 1346–47.

28. *Id.* at 1347–48.

29. *Id.*

30. *Id.* at 1347 (alteration in original).

31. *Id.* at 1347–48.

32. *Id.* at 1348–60.

or congressional finding underlying each.[33] After this exhausting and extensive analysis of gun legislation, he concluded that neither the Crime Control Act of 1990 nor the Gun-Free School Zones Act of 1990 made any mention as to the impact upon commerce with regard to firearms in schools; moreover, the House Report did not mention the Gun-Free Zones Act and there was no formal legislative history from the Senate.[34] Will quoted the Deputy Chief Counsel from the Bureau of Alcohol, Tobacco and Firearms who testified:

> Finally, we would note that the source of constitutional authority to enact the legislation is not manifest on the face of the bill. By contrast, when Congress first enacted the prohibitions against possession of firearms by felons, mental incompetents[,] and others, the legislation contained specific findings relating to the Commerce Clause and the other constitutional bases, and the unlawful acts specifically included a commerce element.[35]

Will's analysis was not over. He thoroughly analyzed the case law to determine whether the possession of a firearm in a school zone came within a class of activities that the Government could regulate under the Commerce Clause.[36] He carefully delineated between those cases that "exert[] *a substantial economic effect on interstate commerce*" and those that did not.[37] He concluded:

> Both the management of education, and the general control of simple firearms possession by ordinary citizens, have traditionally been a state responsibility, and section 922(q) indisputably represents a singular incursion by the Federal Government into territory long occupied by the States. In such a situation where we are faced with competing constitutional concerns, the importance of Congressional findings is surely enhanced.[38]

The court finally held:

> [S]ection 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause. Whether with adequate Congressional findings or legislative history, national legislation of similar scope could be sustained, we leave for another day. Here we merely hold that Congress has not done what is necessary to locate section 922(q) within the Commerce Clause. And, we expressly do not resolve the question

33. *Id.*
34. *Id.* at 1359–60.
35. *Id.* at 1360 (citation omitted) (quotation marks omitted).
36. *Id.* at 1360–64.
37. *Id.* at 1361 (quoting Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
38. *Id.* at 1364.

> whether section 922(q) can ever be constitutionally applied. Conceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce. Here, in fact, the parties stipulated that a BATF agent was prepared to testify that Lopez's gun had been manufactured outside the State of Texas. Lopez's conviction must still be reversed, however, because his indictment did not allege *any* connection to interstate commerce. An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective.[39]

The attention to detail in this opinion was not only impressive, but also necessary given the numerous cases where the courts found the congressional exercise of power was within the Commerce Clause.[40]

Two years later the Supreme Court affirmed Will's courageous opinion, agreeing with his concern about the expansive nature of the Commerce Clause:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.[41]

United States v. Emerson[42] was no less controversial. By indictment, the government charged Dr. Timothy Joe Emerson with violating 18 U.S.C. §922(g)(8)(C)(ii), which makes it unlawful for any person to use or possess a firearm while subject to a court order prohibiting the use, attempted use, or threatened use of physical force against an intimate partner or child.[43] The district court held Section 922(g)(8)(C)(ii) unconstitutional on its face under the Second Amendment.[44] On appeal to the Fifth Circuit, the

39. *Id.* at 1367–68 (internal citations omitted).

40. *See generally* United States v. Lopez, 514 U.S. 549, 552–63 (1995) (reviewing Commerce Clause jurisprudence).

41. *Id.* at 567–68 (1995) (internal citations omitted).

42. United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

43. *Id.* at 211–13.

44. United States v. Emerson, 46 F. Supp. 2d 598, 611 (N.D. Tex. 1999), *rev'd*, 270 F.3d 203 (5th Cir. 2001).

panel had to choose between three Second Amendment interpretation models: The first model did not apply the Second Amendment to individuals, "[R]ather, it merely recognizes the right of a state to arm its militia."[45] The second model recognized "some limited species of individual right."[46] However, this individual right to *bear* arms could "only be exercised by members of a functioning, organized state militia" who bear arms while engaging in organized military activities.[47] Lastly, the third model recognized the "right of individuals to keep and bear arms."[48] Will had to address first Supreme Court precedent set forth in *United States v. Miller*.[49] The Government had asserted that *Miller* supported the "collective rights or sophisticated collective rights approach to the Second Amendment":

> *Miller* suggest[ed] that the militia, the assurance of whose continuation and the rendering possible of whose effectiveness *Miller* says were purposes of the Second Amendment, referred to the generality of the civilian male inhabitants throughout their lives from teenage years until old age and to their personally keeping their own arms, and not merely to individuals during the time (if any) they might be actively engaged in actual military service or only to those who were members of special or select units.[50]

Will addressed the Government's argument and concluded that *Miller* did not support either approach; nor, for that matter, did he assume *Miller* accepted the individual rights view.[51] *Miller* simply did not resolve the issue. Will concluded that:

> [T]he Supreme Court decided *Miller* on the basis of the Government's second argument—that a "shotgun having a barrel of less than eighteen inches in length" as stated in the National Firearms Act is not (or cannot merely be assumed to be) one of the "Arms" which the Second Amendment prohibits infringement of the right of the people to keep and bear—and *not* on the basis of the government's *first* argument (that the Second Amendment protects the right of the people to keep and bear *no* character of "arms" when not borne in actual, active service in the militia or some other military organization provided for by law).[52]

45. *Emerson*, 270 F.3d at 218.
46. *Id.* at 219.
47. *Id.*
48. *Id.* at 220.
49. *See id.* at 221–27 (discussing *United States v. Miller*, 307 U.S. 174 (1939)).
50. *Id.* at 226.
51. *Id.*
52. *Id.* at 224.

Will laid the foundation for his eventual holding with a historical analysis of the enactment and words of the Second Amendment,[53] "mindful that almost all our sister circuits have rejected any individual rights view of the Second Amendment."[54] He parsed out every relevant phrase of the Second Amendment to determine its meaning to the founders, including "People," "Bear Arms," "Keep . . . Arms," and determined the effect of the preamble on the substantive guarantee.[55] To determine whether the Second Amendment was an individual right, he then went through an exhaustive history discussing the impact of the Federal Convention of 1787 and the Anti-Federalist's fears regarding the maintenance by the federal government of a standing army on the future Second Amendment.[56] He explained how the debate between the Federalists and Anti-Federalists over the ratification of the Constitution eventually led to the proposal of the Second Amendment, guaranteeing the federal government would not intrude on the people's pre-existing right to bear arms.[57] In his very thorough and attentive style, he went through legislative history, the political discourse in newspapers, and correspondence between the participants leading to the enactment of the Second Amendment.[58] Post-ratification, he cited the 19th Century commentaries for their understanding that the Second Amendment recognized an individual right to possess and carry firearms.[59]

"The history we have recounted," Will wrote, "speaks for itself":

> The Anti-Federalists desired a bill of rights, express provision for increased state power over the militia, and a meaningful express limitation of the power of the federal government to maintain a standing army. These issues were somewhat interrelated. The prospect of federal power to render the militia useless and to maintain a large standing army combined with the absence of any specific guarantees of individual liberty frightened Anti-Federalists . . . .
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> . . . .
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> Given the political dynamic of the day, the wording of the Second Amendment is exactly what would have been expected. The Federalists had no qualms with recognizing the individual right of all Americans to keep and

53. *See id.* at 227–64 (providing a detailed history of the Second Amendment).
54. *Id.* at 227.
55. *Id.* at 227–37.
56. *Id.* at 237–40.
57. *Id.* at 240.
58. *Id.* at 240–55.
59. *Id.* at 255–56.

> bear arms. In fact, as we have documented, one of the Federalists' favorite 1787–88 talking points on the standing army and federal power over the militia issues was to remind the Anti-Federalists that the American people were armed and hence could not possibly be placed in danger by a federal standing army or federal control over the militia. The Second Amendment's preamble represents a successful attempt, by the Federalists, to further pacify moderate Anti-Federalists without actually conceding any additional ground, i.e. without limiting the power of the federal government to maintain a standing army or increasing the power of the states over the militia.[60]

Will concluded "the history of the Second Amendment reinforces the plain meaning of its text, namely that it protects individual Americans in their right to keep and bear arms whether or not they are a member of a select militia or performing active military service or training."[61] Not surprisingly, seven years later, in *District of Columbia v. Heller*,[62] the Supreme Court generally adopted the same analysis.[63]

Few attorneys get to know federal judges outside the courtroom. Yet for many judges like Will, the courtroom is not necessarily the most important part of their lives. Will was a loving husband, father, and grandfather who adored his grandchildren. He was kind and gentle—a true Texas gentleman. He enjoyed life and he enjoyed people. He was an active hunter and a voracious reader. He also enjoyed food, company, and the occasional drink. You could always count on him to be at Galatoire's the Sunday evening before his sittings in New Orleans. His meal usually started with Glenlivet and water. There were stories to tell, people to greet, and judges to catch up with. He usually ordered lamb chops; though occasionally, he would order trout almondine. You could always count on a big table full of people when Will was present. His gravelly Texas accent commanded our attention. His eyebrows, like Rip Van Winkle's beard, had not been cut in many years and attracted some attention much like Clarence Darrow's cigars. As an appellate attorney in Austin, he had seen much of Texas' legal history unfold before his eyes. He remembered every detail, revealing much of the character of Texas lawyers with whom he was either associated or faced in opposition.

I had previously been familiar with one such tale. Will had been hired by my former law firm to file a motion for rehearing in the Supreme Court of Texas, a motion that is rarely granted. This time, it was. He

60. *Id.* at 259.
61. *Id.* at 260.
62. District of Columbia v. Heller, 554 U.S. 570 (2008).
63. *See id.* at 570–636 (analyzing the Second Amendment).

prepared for rehearing, but the same lawyer whose writ application had previously been denied insisted that he argue the case before the supreme court. Not surprisingly, the lawyer lost the case. Will chuckled at this story as he told it, not so much because he believed he could have done better (he could), but simply because he knew the foibles of lawyers. This individual was his friend. Will was surprised, but delighted that I had known about it.

Will was a pipe smoker, and he loved his pipe. If you were downwind of him, you could smell the aroma of his blend before you knew Will was actually there. His tales about hunting and getting caught by the police with a fellow Princeton undergraduate who would later become the Secretary of State were legendary and captivating. At court retreats, court dinners, or simply at lunches, he would toss out lines from Rudyard Kipling's *Gunga Din*, *Fuzzy-Wuzzy*, *The Young British Soldier*, or *Tommy*.[64]

> Yes, makin' mock o' uniforms that guard you while you sleep
> Is cheaper than them uniforms, an' they're starvation cheap.[65]

One of his favorite poems by poet Robert Service was called "The Shooting of Dan McGrew," which he would relish in reciting:

> A bunch of the boys were whooping it up in the Malamute saloon;
> The kid that handles the music-box was hitting a jag-time tune;
> Back of the bar, in a solo game, sat Dangerous Dan McGrew,
> And watching his luck was his light-o'-love, the lady that's known as Lou.
> When out of the night, which was fifty below, and into the din and the glare,
> There stumbled a miner fresh from the creeks, dog-dirty, and loaded for bear.[66]

His smile was infectious, and he delighted in entertaining the table.

You could always call upon Will for help. I asked him to read my special concurrence in *Causeway Medical Suite v. Ieyoub*.[67] For obvious reasons, he suggested that I did not need to file it, advice that I did not

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64. *See generally* RUDYARD KIPLING, *Fuzzy-Wuzzy*, *in* BARRACK-ROOM BALLADS AND OTHER VERSES 96 (Jefferson Press 1909); RUDYARD KIPLING, *Gunga Din*, *in* BARRACK-ROOM BALLADS AND OTHER VERSES 106 (Jefferson Press 1909); RUDYARD KIPLING, *The Young British Soldier*, *in* BARRACK-ROOM BALLADS AND OTHER VERSES 127 (Jefferson Press 1909); RUDYARD KIPLING, *Tommy*, *in* BARRACK-ROOM BALLADS AND OTHER VERSES 92 (Jefferson Press 1909).

65. RUDYARD KIPLING, *Tommy*, *in* BARRACK-ROOM BALLADS AND OTHER VERSES 92, 93 (Jefferson Press 1909).

66. ROBERT SERVICE, *The Shooting of Dan McGrew*, *in* BEST TALES OF THE YUKON 57, 57 (Running Press 1983).

67. *See* Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1113–24 (5th Cir. 1997) ("For the second time in my judicial career, I am forced to follow a Supreme Court opinion I believe to be inimical to the Constitution."), *overruled by* Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).

heed. He was always attentive to his colleagues. In 1997, I gave Will a print entitled Texas Independence by G. Harvey of Fredericksburg, Texas depicting an early 20th century scene of downtown Austin, to commemorate his senior status. He wrote back several days later:

> What a pleasant surprise late yesterday afternoon when UPS brought an imposing package, which ultimately revealed the splendid Texas Independence Day print. This wonderful work will go so well in my chambers. You are too kind, and I can't tell you how much I really appreciate it, and equally the spirit behind it, which means a lot to me.[68]

Will was like that to everyone. He was such a considerate friend and I—no, we—will miss him dearly.

68. Letter from William Garwood, United States Circuit Judge, to Emilio Garza, United States Circuit Judge (Aug. 18, 1997) (on file with *St. Mary's Law Journal*).