

BRIEF CASES

Charles Wyzanski

BY HARVEY SILVERGLATE

When the Honorable Charles Edward Wyzanski Jr. died last month, of a cerebral hemorrhage, the eulogies poured forth, even from those who had despised him, who had feared him, or who had envied him during his eventful lifetime.

Wyzanski, who was appointed to the US District Court in Boston in 1941 by Franklin Roosevelt, had been the enfant terrible of the American legal establishment even before he became a judge. And when he died, at the age of 80, his brilliance was recounted by even the man who replaced him as chief judge of the federal district court in Boston when Wyzanski assumed senior (or semiretired) status, in 1971 — Chief Judge Andrew Caffrey. Caffrey was reported to be so hostile to his unpredictable, independent, and somewhat obstreperous predecessor that he would not allow Wyzanski to sit in that court by special permission — an honor usually accorded senior judges. "Judge Wyzanski was a very brilliant man and in the courtroom he held counsel to a very high standard of performance," said Caffrey in an interview in *Massachusetts Lawyers Weekly*, the local newspaper of the legal profession, following Wyzanski's death. Caffrey was noticeably reticent about commenting on why Wyzanski was invited to sit by special permission in courts all around the country, including higher appellate courts, but was never found sitting in his old stomping grounds — Caffrey's court in Boston. It was a purely personal decision, he told the interviewer. Wyzanski, said Caffrey, "had his own reasons." Obviously, Caffrey had decided to put to rest his old feud with Wyzanski.

Others who commented in the month after Wyzanski's death pointed to his fabled literary sophistication, along with his biting wit and his erudition, citing his ability to quote the classics, usually in the original ancient tongue, at the drop of a hat. (He once sent my wife a postcard from Greece, and, naturally, it was written in Greek. I never learned whether it was of the ancient or modern variety, for neither my wife nor I, as Wyzanski well knew, could read a word of Greek.) His unparalleled skills as a raconteur were duly noted. Others talked about how exacting his standards were and how mercilessly he

dealt with lawyers who were unprepared in his courtroom. Still others recalled that Wyzanski had had a soft spot for young attorneys just starting out. Finally, there were the expected reminiscences of Wyzanski's personal crusade against government corruption, starting in the early 1960s when he presided over the corruption trial of Thomas Worcester (a state official) and subsequently demanded a wide-ranging investigation of public corruption — an investigation that he got, much to the chagrin of the officeholders whose shenanigans were brought to light.

Indeed, it was inevitable that upon Judge Wyzanski's death the stories and anecdotes, rather than other, more substantive commentary, would predominate. This is not to say, however, that the anecdotes do not, to some extent, reveal the man.

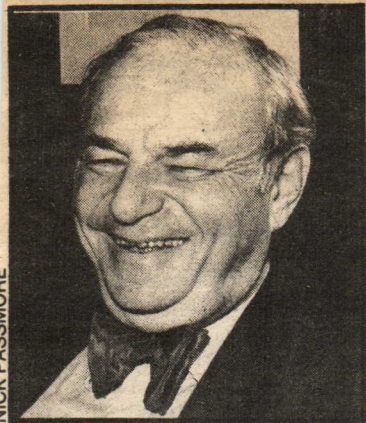
Take, for example, my first experience in federal court. Fate decreed that I was to make my first oral presentation, in a rather complex constitutional case, in front of Judge Wyzanski. He had, it became apparent rather early in the argument, read and mastered every legal case I had cited in my brief. He was relentless (I thought at the time a bit heartless as well, but the passage of time has since softened that perception) in his questioning.

When it was all over court was adjourned, and everyone left the courtroom except me. I sat there staring into space, wiping the sweat from my brow, wondering why I had chosen the law as my profession. Suddenly, Wyzanski walked back into the courtroom; he peered down at me with an owlish expression that soon turned impish. "This is the first time you've appeared before me, isn't it, Mr. Silverglate?" he asked. Fearing that I was about to receive another onslaught, I responded, weakly, "Yes, Your Honor." "Well," he said, wheeling around to leave the courtroom, "it was quite an experience, wasn't it?"

Perhaps more revealing was a later case in which Wyzanski appointed me to represent an indigent young man who'd been indicted for taking a stolen automobile across state lines. Although it appeared that he might have committed a technical federal offense, it was obvious that the United States attorney was making a mountain out of a molehill in charging the fellow (hence the expression "making a federal case out of it"). Wyzanski made it plain to me from the bench that if the defendant were to plead guilty, he would not send him to prison but place him on probation.

But when I interviewed the defendant, it became clear to me that he had a technical defense to this technical charge. Consequently, I had the defendant plead not guilty. Wyzanski was taken aback, and he asked if I knew what I was doing. Why, he wondered, was I advising the defendant to fight such a hopeless case when the judge wanted to do him a favor and inflict no penalty more serious than probation? I told Wyzanski that I was the lawyer and that I had advised the

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A conscientious objector

Wyzanski

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defendant to plead not guilty.

Wyzanski, perturbed by my attitude, startled me and the entire courtroom by announcing that he was removing me as counsel in the case. I retorted that once Wyzanski had appointed me as counsel, only my client — the defendant — had the power to dismiss me. Wyzanski smiled, pointed an outstretched index finger up toward the ceiling, and bellowed, "Mr. Silvergate, I appointed you, and I'm dismissing you. The Lord giveth, and the Lord taketh away. Marshals — remove Mr. Silvergate." Thereupon, two burly deputy United States marshals took me by my arms and escorted me to the door.

When I got back to my office, I composed a motion asking the judge to reinstate me as counsel and to step down from hearing the case. I returned to the courthouse and filed the motion in open court. At that point I was informed that during the 40 minutes or so that I'd been gone, the judge had appointed a new attorney who'd promptly taken the judge's advice and had the defendant enter a plea of guilty.

I was infuriated, and then and there I made a verbal motion that the plea of guilty be vacated

classified a conscientious objector. Rather, he was what became known as a "selective conscientious objector." Wyzanski ruled in an eloquent opinion that, given the nature of the Vietnam War, it would be unconstitutional to distinguish this young man's scruples from those of other men of draft age whose opposition to war took a broader form. Years later the Supreme Court ruled otherwise in another case. (On the other hand, this same judge refused to declare the draft unconstitutional by virtue of its selection of men, and not women, for military service. He wrote an opinion that demonstrated a rather old-fashioned view of the role of women in society.)

In another case Wyzanski, ever the maverick, declared the Vietnam War unconstitutional on the grounds that it had not been declared by Congress. This was an issue that other courts and other judges refused to touch. It was obvious to everyone who cared to study the situation even superficially that the conflict in Indochina was indeed a war and that the president had neither sought nor received from Congress a declaration of war. The Constitution states, with the utmost clarity, that no war may be waged without a congressional declaration. Presidents, unlike European kings and dictators, simply do not have the power to commit, on their own, the nation's blood and treasure to such foreign adventures.

Yet it took a Charles Wyzanski to say what nearly every public official knew but refused to act upon because of the possible consequences. Almost every other judge faced with the question of the legality of the war managed to sidestep the issue with one or another technical or procedural device. Wyzanski was straightforward, unequivocal, and not at all evasive in his duty to enforce the Constitution, despite the subsequent calls for his resignation. Of course, because of

and that Wyzanski reinstate me and remove himself from the case. To everyone's surprise, he did indeed vacate the defendant's guilty plea, and he did agree to step down. He did not, however, reinstate me. He was willing to undo the injustice that he had, in a well-meaning fit of pique, inadvertently inflicted on the hapless defendant, and he was willing to pay the penalty of stepping down for his indiscretion. He was not, however, willing to go so far as to reinstate me. If he was to suffer exile for his display of arrogance, then I was to suffer the same penalty. It was typical of Wyzanski to see to it that, in the end, justice would be done, despite his occasional proclivity to shoot from the hip.

It was anecdotes such as these that dominated the eulogies about this remarkable jurist.

Yet there was precious little said about the most important trait of Judge Wyzanski — his visceral and unswerving love of and respect for liberty. He lived his life precisely as he wanted to, always following his own dictates as well as whims, and his work as a judge paralleled the rules that governed his life. He insisted not only on clean government but on government that, in the words of one Supreme Court justice, "turned square corners" with its citizens, and, in the words of another justice, let people have that most precious right, the right to be left alone.

Some of Wyzanski's more important cases, as well as some lesser-known ones, illustrate the courage and intelligence that guided his judicial career. For example, during the height of the Vietnam War, my law firm represented a young man who declared himself a conscientious objector to what he considered an illegal and immoral war. He was not opposed to "war in any form," which was and remains the legal requirement for being

higher courts evading the issue. Wyzanski's ruling lost the force of law.

In yet another case, I remember representing a young, very frightened man who had absented himself without official leave from his military unit and had been apprehended in Massachusetts by the military police. He claimed that he was about to be sent to Vietnam and that he did not want to kill or be killed by people he did not see any reason to fight. He contacted me and had me file a petition for a writ of habeas corpus with the federal court — a petition that, if successful, would have ordered him released from both custody and military service.

By chance, the case was assigned to Wyzanski. When it came time for a court hearing, we learned that the military was in the process of spiriting the young man out of Massachusetts. This was an old trick. When the military learned that Wyzanski had drawn a case involving claims by a GI of violation of constitutional rights, it frequently transferred that GI to another federal-court jurisdiction — or to a military base abroad — in the hope that the case would be moved out of Massachusetts to a judge more sympathetic to, or cowed by, the military. When Wyzanski was informed that the petitioner was on the road and already in Connecticut, he roared from the bench that the military had exactly two hours to produce the young man in his court. Failure to do so, he warned, breaking into his famous Cheshire-cat grin, would result in incarceration of the officers responsible for this affront to civilian justice. Needless to say, Wyzanski's order was obeyed.

Were Wyzanski sitting on the bench today, he doubtless would have something to say about the drug-law-enforcement mania

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Wyzanski

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currently gripping the nation. He managed to put drug cases into perspective, recognizing, as he did, the amount of hypocrisy, corruption, and human misery engendered by our society's efforts to control with the criminal law that which is plainly uncontrollable by any force. Once, after having yet another in an endless string of marijuana cases brought before him, he ordered that none of the assistant US attorneys in Boston be allowed to prosecute marijuana users before him unless the prosecutors were willing to file affidavits with the court swearing that they themselves did not smoke marijuana. Wyzanski was not, of course, seeking to invade the privacy of these prosecutors. (Indeed, he no doubt was aghast at the proposals running rampant today, in both government and private industry, that just about everyone be forced to urinate into a bottle as a condition for getting or holding a job.) He made clear his reasons for this unusual order. "Hypocrisy begins at home," he bellowed at the federal prosecutors. The US attorney's office reacted, predictably, by seeking — successfully — to have the court of appeals reverse Wyzanski's order. Wyzanski himself, however, refused from that point forward to sit on such cases. He was, in his own way, a selective conscientious objector.

He was a genuine eccentric, what we would call an original, and he believed in making society safe for eccentrics and dissidents. He read widely and deeply, and he respected the rights of others to read what they wished, including literature deemed by some to be dangerous or dirty. He was a powerful friend of the First Amendment. He could always be counted on to enforce the Bill of

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Now, with repression and in-
 tolerance on the rise, and with
 constitutional freedoms more en-
 dangered than they've been at
 any time since, perhaps, the
 incarceration of Japanese-
 Americans during World War II
 or the postwar tirades of Joseph
 McCarthy, Charles Wyzanski
 will be sorely missed. He will be
 missed not because he was the
 nicest fellow in the world. In-
 deed, sometimes he was not a
 nice fellow at all. At times he
 relished torturing some human
 being who was not as smart as he
 was who managed to find
 himself or herself in Wyzanski's
 court. (Normally the victim was
 an unprepared lawyer, however,
 so Wyzanski's attacks were
 somewhat justified. Amnesty In-
 ternational never lodged a
 protest.) He could also be im-
 petuous and abusive from the
 bench. He reminded many ob-
 servers of the late justice William
 O. Douglas — brilliant, devoted
 utterly to freedom of the human
 mind and spirit, but enormously
 egotistical, eccentric, and some-
 times personally abusive to those
 around him. In addition
 Wyzanski was slightly mad — a
 characteristic that endeared him
 to most of those who were lucky
 enough to know him.

We probably will not see the
 likes of Charles Wyzanski again
 in our lifetime. It is to be hoped
 that many of those now paying
 lip service to so many facets of
 this true Renaissance man will
 also remember that he was an
 unswerving and courageous
 friend of human liberty, and
 perhaps they will try, in some
 measure, to honor his memory by
 seeking to emulate that side of
 the man. □

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