

answer—there are no norms or historical precedent dictating that associates justices can, or should, approach a disabled chief justice and urge him to resign. Granted, the fact that Chief Justice Rehnquist’s own colleagues did not know the extent of his illness meant that they did not have the relevant information necessary to make such an overture. Even if they had, however, they faced several hurdles in doing so. Because none of them had a formal administrative role, they faced a coordination problem in deciding to act, especially if they did not all agree that action was warranted. Moreover, even if the associate justices were willing to discuss the chief justice’s disability with him, they lack the institutional levers to give the chief justice a necessary push. Unlike Chief Justices Taft and Burger, the associate justices cannot schedule cases for reargument or suspend the “rule of four” in order to divest an ailing chief justice of his vote. Without such institutional norms and powers, the associate justices do not have the wherewithal to make a chief justice candidly and objectively assess his own disability.

For all this, one might still ask whether judicial disability is that pressing of a concern. To be sure, as Atkinson aptly demonstrates, history is filled with examples of disabled justices. David Garrow has argued that the

problem of “mental decrepitude” occurred more frequently during the 20th century than the 19th and that it remains “a persistently recurring problem that merits serious attention.” Yet, as Ward Farnsworth has observed, the periods of time in the 20th century during which justices worked while suffering from some degree of mental deterioration constituted at most two percent of the aggregate service time of all the justices during that century. Farnsworth further contends that the effects of disability are mitigated by the presence of the other justices, as well as by the presence of a justice’s law clerks, “who generally can keep a chambers running without a drop-off in quality remotely commensurate with the justice’s drop-off in functionality.”

We are inclined to side with those who view mental and physical deterioration among the justices as a matter of concern. Even were we to accept the arguments of those who maintain that the problem is not significant, however, we believe that the chief justice presents a different case. The reason why we should be concerned about the variation in retirement rates between the associate and chief justices, and about the corresponding increase in the likelihood that a chief justice will continue to serve while disabled, has to do with the unique powers of the center chair. . . . ■

Remarks of Dean Kearney

Investiture of the Hon. James A. Wynn, Jr.

On April 12, 2011, there was a formal investiture, in Raleigh, N.C., of the Hon. James A. Wynn, Jr., as a judge of the United States Court of Appeals for the Fourth Circuit. Judge Wynn, L’79, previously served as a judge of the North Carolina Court of Appeals and on the North Carolina Supreme Court. The following are the remarks of Dean Joseph D. Kearney before the Fourth Circuit en banc and a large assemblage of other judges, members of the bar and community, and Judge Wynn’s family and friends.

Thank you, Chief Judge Traxler, and May It Please the Court. I am qualified to bring but *thanks* and *greetings* to this event. For, while I have been dean of Marquette University Law School for going-on eight years, I can claim no credit for Judge Wynn’s accomplishments. I was a barely tenured faculty member when I first met him at Marquette. He and I had a public discussion then concerning the best modes of judicial selection: I was young, but wise enough not to make it a

debate. My poor powers of oratory are no match for Judge Wynn’s. In all events, the thanks are to Judge Wynn, not simply for the invitation to speak today but for always remembering us at Marquette, in active ways, whether



Hon. James A. Wynn, Jr.

Photo: North Carolina Bar Association



Dean Kearney speaks at Judge Wynn's investiture.

it has been delivering our distinguished Hallows Lecture, judging a moot-court final, speaking at commencement, or simply attending this past fall the dedication of Eckstein Hall, our new home to which Chief Judge Traxler has graciously referred. Judge Wynn, we are so grateful for your continued association with us. Those are the thanks.

The greetings come from a variety of places. Some of them are from Wisconsin. To be sure, there are several Wisconsinites with me today: Judge Diane Sykes, a Marquette lawyer who serves on the U.S. Court of Appeals for the Seventh Circuit; my colleague, Professor Michael McChrystal, who was on the staff when Judge Wynn was a student; and two other Marquette lawyers, Judge Wynn's classmates, Dan Dennehy and John Rothstein. Also with us is Joseph Yana, another classmate and, indeed, the person who sat next to the judge in their first-year classes (the judge was surprised, having always been last in the alphabet with the "Wy" last name, to find names after his, beginning Y and Z, once he arrived to the upper Midwest). Commissioner Yana was a prolific note taker but with a doctor's handwriting, while Judge Wynn was a decent typist and decipherer (journalism school at UNC, after all), so together they produced some fine class outlines. I speak as well for Reuben Daniels, head of the EEOC office in Charlotte, a North Carolinian who preceded Judge Wynn at Marquette Law School by a year; Florence Johnson Raines, of our class of 1991; and Chuck Svoboda, a Marquette trustee and North Carolinian—all of whom also are here today.

Other greetings come from folks back home. They include Judge William Griesbach, U.S. District Judge in Wisconsin and another of Judge Wynn's classmates, and indeed the entire Marquette community.

But I am presumptuous enough to bring greetings from the past. For I have brought Judge Wynn's student file with me: I would say that I do this by the power vested in me as dean, but I may be about to violate the FERPA law concerning educational

privacy. Fortunately, Judge Wynn's expertise to date has been in state law (although, Judge, I need to get a word with you later about this licensee/invitee matter that Chief Justice Frye was describing).

In the file, one finds, duly listed on Judge Wynn's application, the names of his parents and brothers and sisters, as for some reason we then required. I am not so bold as to speak for them.

Yet I do regard myself as entitled to speak for those who contributed to the file. I thus bring greetings not only from my predecessor, the late Dean Robert Boden, and his colleague, the late Associate Dean Chuck Mentkowski, who would be so proud of Jim Wynn, but also from those from the North Carolina of the past, Judge Wynn's native state—those, more specifically, whose letters of recommendation in the mid-1970s made the case for the admission of James Andrew Wynn, Jr., to Marquette Law School. And here I refer to Daniel T. Earnhardt, still with us, and Andrew M. Scott and Olin T. Mouzon, late UNC professors who speak of Judge Wynn and to us across the decades. I conclude where Professor Scott concluded his letter of recommendation, some 35 years ago. I cannot improve upon his words, written at Chapel Hill on 27 February 1976: "Jim Wynn has a good mind and a clear one. He writes well and is a frank and likeable person. He is strongly motivated and works hard. He has come a long way—and wants to go further. I recommend him to you strongly and confidently."

So, Judge Wynn, from across the country, across the decades, and perhaps across an even greater divide than space and time, I bring you greetings—and congratulations. ■