

TRIBUTE

Lawyer, Judge, Solicitor General, Educator: A Tribute to Wade H. McCree, Jr.

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Wade H. McCree, Jr., who died in Detroit, Michigan on August 30, 1987, at the age of 67, will be remembered as a skillful lawyer, distinguished jurist, able Solicitor General of the United States of America, and eminent legal educator. Additionally, he will be remembered for his life-long dedication to public service and for his ability to inspire others to achieve. This tribute portrays an individual of stature, ability and intellect, whose gifts and skills were used for the betterment of others.

THE EARLY YEARS

Wade McCree was born in Des Moines, Iowa on July 3, 1920. His father, Wade McCree, Sr., operated the first Black-owned pharmacy in Iowa,¹ and was a federal narcotics inspector for the Food and Drug Administration. Wade McCree, Sr.'s work took his family to Hawaii, Chicago, and Boston.²

After the family moved to Boston, Wade McCree, Jr. attended the prestigious Boston Latin School, where he acquired a strong interest in poetry, ancient history, mythology, and language. Not surprisingly, his love of language is reflected in the finely crafted judicial opinions he wrote as an appellate judge and was evident in his legal scholarship.

After his graduation from Boston Latin, McCree, Jr. was accepted at Fisk University, and graduated summa cum laude³ and Phi Beta Kappa in 1941.⁴ He entered the Harvard Law School in the Fall of 1941, but found his law school education abruptly interrupted by his induction into the United States Army. He served four years of active duty during World War II,⁵ almost two years of which were spent in combat in the Mediterranean Theater. Always an avid student of language, Captain McCree became fluent in Italian while stationed in Italy.⁶

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1. N.Y. Times, Sept. 1, 1987, at B6, col. 1.

2. Washington Post, Sept. 1, 1987, at B4, col. 1.

3. Littlejohn and Hobson, *Black Lawyers, Law Practice, and Bar Associations - 1844 to 1970: A Michigan History*, 33 WAYNE L. REV. 1625, 1649 (1987).

4. *Id.* at 1651.

5. Griswold, *Wade H. McCree, Jr. - In Tribute*, 86 MICH. L. REV. 244 (1987).

6. Beale, *Wade H. McCree, Jr.* 86 MICH. L. REV. 217, 219 (1987). According to his friend and former law school classmate, William T. Coleman, McCree also was adept at singing and reciting

Upon his return from the war, McCree, Jr. married Dores McCrary, a student at Boston's Simmons College. He also completed his second and third years of law school in eighteen months by "attending classes around the calendar."⁷ In most instances, a person graduating twelfth in his class at Harvard Law School⁸ would have little difficulty obtaining employment. However, this was not the case with McCree. Although he graduated near the top of his class, McCree still was confronted with the invisible wall of racism as he sought employment in the corridors of Detroit's elite law firms. Years later, he related his early employment-seeking experiences in a commencement speech at the University of Colorado Law School:

I recall an invitation in response to my request for an interview with a prestigious firm in Detroit, but when I appeared at the office threshold, the invitation was hastily withdrawn as having been improvidently extended. I also recall that I had letters of introduction to a few law schools that had inquired of my dean about possible junior faculty people. These letters also availed me naught, although several years later, after I had become a federal judge, a few of the same law schools found me acceptable to teach as an adjunct faculty person.⁹

In 1948 McCree joined Beldsoe and Taylor, a Black law firm in Detroit. However, his stint in private practice was short. McCree's prodigious abilities became apparent early in his legal career. In 1952, Michigan Governor G. Mennen Williams appointed him to the Michigan Workmen's Compensation Commission where he served for two years, and in 1954, Wade H. McCree, Jr. became the first Black judge to serve on the Wayne County Circuit Court.¹⁰

THE JUDICIAL CAREER OF WADE MCCREE, JR.

Judge McCree served on both the state and federal bench with distinction. According to his colleagues and friends, Wade McCree was born to be a judge.¹¹ From the beginning, it was clear that Judge McCree possessed the skill, ability and character to excel.

Although his initial term of office on the Wayne County Circuit Court was by appointment, Judge McCree was required to run for election to retain his seat on the court.¹² Not only did he win the election, but Judge McCree became the first Black judge to win an election in Michigan history.¹³ His election success in 1955 laid to rest claims that a Black could not win county-wide elective office. It was also the first of two such successful popular elections.¹⁴

During Judge McCree's second term on the Wayne County Circuit Court, President John F. Kennedy appointed him to the United States District

poetry in German. W. Coleman, Remarks at the Memorial Proceedings for Wade H. McCree, Jr., at the University of Michigan Law School (Sept. 4, 1987).

7. W. McCree, Jr., Remarks at the University of Colorado Commencement (May, 1987) reprinted in 10 AMICUS 29 (1987).

8. Professor McCree's Students, *Wade H. McCree, Jr.: Student Perspectives*, 86 MICH L. REV. 259, 263 (1987).

9. McCree, Jr., *supra* note 7.

10. Littlejohn, *supra* note 3, at 1649.

11. Lively, *Wade H. McCree, Jr. Born to be a Judge*, 86 MICH L. REV. 249 (1987).

12. Littlejohn, *supra* note 3, at 1649.

13. *Id.*

14. *Id.*

Court for the Eastern District of Michigan. He was the third Black to be appointed to the federal bench.¹⁵

While on the district court, Judge McCree relished the intellectual stimulation provided by cases that involved federal civil procedure and federal jurisdiction. Judge McCree's interest in federal jurisdiction issues prompted Maurice Kelman, professor of law at Wayne State University, and former law clerk to Judge McCree, to remark that, "He was a technical judge in the Felix Frankfurter tradition."¹⁶

Judge McCree's early published opinions as a district court judge included the usual fare one would expect in the federal courts: petitions *in forma pauperis*, selective service cases, labor relations matters, and naturalization petitions. One of Judge McCree's first major opinions was handed down in *Gaetzi v. Carling Brewing Co.*,¹⁷ which involved a private antitrust suit between a beer distributor and its brewery for the wrongful termination of the distributorship. There, Judge McCree was asked to decide whether a newly-enacted federal four year statute of limitations would bar the plaintiff beer distributor's antitrust suit against the brewery.

The plaintiff argued that even if the applicable limitation period was four years instead of the six year limit provided under Michigan law, it had filed suit promptly once it had discovered the alleged antitrust conspiracy, which the defendant brewery had supposedly concealed.¹⁸ In response to the plaintiff's contention, Judge McCree wrote:

We are dealing with a federally-created right conjoined with a federal statute of limitations. In such a case the extension of limitations is governed by "federal equitable doctrine". (citation omitted) The contours of this doctrine in relation to private antitrust action unfortunately are by no means as precise as either of the parties insists.¹⁹

After an incisive analysis of the plaintiff's allegations, Judge McCree went on to hold that the plaintiff had failed to allege facts sufficient to establish concealment of the alleged conspiracy so as to toll the four year statute of limitations.²⁰ Judge McCree revisited the antitrust area in *Malta Manufacturing Co. v. Osten*,²¹ which involved not only a claim under the antitrust laws, but also the validity of a patent.

Judge McCree was elevated to the Sixth Circuit Court of Appeals by President Lyndon Baines Johnson and became the first Black appointed to the Sixth Circuit.²² Although Judge McCree wrote many opinions over his eleven years on the Court of Appeals, two of his opinions are ample evidence of his concern for civil rights and civil liberties.

15. The first Black federal judge was William H. Hastie, who was appointed by Franklin D. Roosevelt to the U.S. District Court of the Virgin Islands in 1937. *ENCYCLOPEDIA OF BLACK AMERICA* 422 (W. LOW & V. CLIFT ed 1981). The second Black to achieve that honor was James B. Parsons of Chicago, Illinois, who was appointed a few months before McCree. *See Littlejohn, supra* note 3, at 1649.

16. Conversation with Maurice Kelman, April 18, 1988.

17. 205 F. Supp. 615 (E.D. Mich. 1962).

18. *Id.* at 619.

19. *Id.* at 619-620.

20. *Id.* at 623.

21. 215 F. Supp. 114 (E.D. Mich. 1963).

22. Littlejohn, *supra* note 3, at 1651.

In *Davis v. School District of the City Pontiac Inc.*,²³ The Court of Appeals was asked to review District Court Judge Damon Keith's finding that the Pontiac Board of Education had created a pattern of racial segregation in the Pontiac, Michigan School District.²⁴ The appellant School board argued that there was insufficient evidence to support the district court's conclusion that the School Board was responsible for the racial imbalance in the Pontiac School System.

Writing for the majority, Judge McCree affirmed the district court's findings of purposeful segregation, citing among other things, a pattern of placing Black teachers and administrators exclusively in schools attended by Black children.²⁵ The Court of Appeals went on to hold that the district court "properly fulfilled its duty to require the eradication of the effects of the past unlawful discrimination" and affirmed the lower court's desegregation order.²⁶

Four years later, Judge McCree handed down an opinion that upheld a suit brought by a protester against certain police officers of the City of Louisville, Kentucky for violation of the protester's first amendment rights.²⁷ Former President Richard M. Nixon was scheduled to ride in a motorcade through Louisville, Kentucky. The police officers who were assigned to guard the President and monitor the crowd were instructed to "destroy any sign or poster that was detrimental or injurious to the President of the United States."²⁸

A protester in the crowd displayed a poster which read, "Lead us to hate and kill poverty, disease, and ignorance, not each other."²⁹ Two police officers at the scene decided that the protester's message was inflammatory and that it created rancor and resentment in the crowd which could impede the motorcade's progress, thus placing the President at risk.³⁰ After the protester refused to take the poster down, one of the officers took it from her and destroyed it. The district court found that the officers could not be held liable for violating Section 1983 of the Civil Rights Act³¹ because they had acted in good faith and that the destruction of the sign was "within the ambit of permissible discretion as it appeared at the time."³² On appeal Judge McCree, for the majority, wrote:

The record before us demonstrates that Miss Glasson, in displaying her placard which contained a constitutionally protected message, in a peaceful manner, from an appropriate place, was engaged in activity protected by the First Amendment and that destruction of the sign by Louisville police officers . . . deprived her of that right.

. . . A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas.³³

23. 443 F.2d 573 (6th Cir. 1971), *cert. denied*. 404 U.S. 913 (1971).

24. *Id.* at 575.

25. *Id.* at 576.

26. *Id.*

27. *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975), *cert. denied*, 423 U.S. 930 (1975).

28. *Id.* at 901.

29. *Id.*

30. *Id.* at 902.

31. 42 U.S.C. § 1983 (1982).

32. *Glasson*, 518 F.2d at 903.

33. *Id.* at 906.

After holding that the appellant's first amendment rights had been violated, Judge McCree rejected the contention that the police officers had acted in "good faith." The Court of Appeals reversed the district court and remanded the case for a determination of damages.³⁴

During his ten years on the Sixth Circuit, Judge McCree wrote many opinions with an eloquence and understanding of the law that demonstrated his deep commitment to his work.

THE SOLICITOR GENERAL

In 1977, Judge McCree was appointed by President Jimmy Carter to become the second Black Solicitor General of the United States. The first Black to hold the office of Solicitor General, Thurgood Marshall, was appointed by President Lyndon Johnson in 1965, and later became the first Black Supreme Court Justice.³⁵

It was certainly not without some hesitation that McCree accepted the prestigious honor. Just prior to his appointment, McCree had been sitting as a federal appellate judge - a position for which he enjoyed life tenure, and one at which he had excelled over the years. Nonetheless, he resigned his judicial office and assumed a position where he would serve at the pleasure of the President. Judge Horace W. Gilmore, a friend and colleague of McCree wrote:

Judge McCree often told me that he thought the Solicitor General's job was the best lawyer's job in the country. In saying this, he always emphasized that it was the best *lawyer's* job. He made no effort to compare it to the judiciary, and often longed to return to the bench.³⁶

However, Arthur John Keeffe, writing for the American Bar Association Journal, presented a different view: "Although McCree had not seriously considered leaving the judiciary, he was clearly becoming restless after more than twenty years behind the bench and thus receptive to overtures."³⁷

The Solicitor General is the advocate for the United States government in cases that come before the Supreme Court. As such, the office of the Solicitor General bestows considerable prestige and influence on its occupant. McCree believed that in contrast to the trial lawyer's role of persuading a judge or jury to accept a particular version of fact, the Solicitor General's role as appellate advocate was to persuade the Court to accept his theory of the law: "It can be more scholarly — you can argue the consistency, or the inherent justice, of your position. It can still be emotional, of course, but basically you're arguing interpretation, not facts."³⁸

It was not long after assuming his new position that McCree was confronted with one of the most controversial cases to come before the Supreme Court during the Carter years. The case of *Regents of the University of Cali-*

34. *Id.* at 912.

35. C. BARNES, *MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES* 106-107 (1978).

36. Gilmore, *Wade H. McCree, Jr.: A Compassionate and Great Judge*, 86 MICH. L. REV. 231, 243 n.41 (1987) (emphasis in original).

37. Keeffe, *The Solicitor General Talks to the Home Folks*, 64 A.B.A. J. 139 (1978). The quote comes from a short article reporting on Wade McCree's "delightful address" before the Michigan Prosecuting Attorney's Association and discusses McCree's thoughts at that time about the Solicitor General's position.

38. Lewin, *The Solicitor General*, 6 Student Lawyer, No. 9, (May, 1978).

*formia v. Bakke*³⁹ involved a white male who had applied for admission to medical school at the University of California at Davis and was subsequently rejected.

Alleging "reverse discrimination", Allan Bakke sued the University claiming that he had been unconstitutionally denied admission to the school on the account of his race and as a result of the University's policy of admitting lesser qualified Blacks pursuant to a special admissions program. "But for" the special admissions program, Bakke argued, he would have been admitted to the medical school.⁴⁰

The California Supreme Court held that the University's program abrogated the constitutional rights of non-minority applicants under the equal protection clause of the fourteenth amendment because it afforded preference on the basis of race to persons who, by the University's own standards, were not as qualified for the study of medicine as non-minority applicants who were denied admission.⁴¹ The University appealed and a writ of certiorari was granted by the United States Supreme Court.

Not only was the Court presented with a significant constitutional issue for its decision, but *Bakke* was a sensitive political issue as well. *Bakke* became the focal point of much of the controversy surrounding affirmative action programs that had been implemented during the early seventies.

After consultation with other government agencies, McCree, and Drew Days⁴² decided that the United States would participate in *Bakke*.⁴³ Although the United States does not participate in every case that comes before the Supreme Court, the Solicitor General has the option of filing a brief or appearing before the Supreme Court in almost any case where the government may have an interest.⁴⁴

The government's position in *Bakke* resulted from the input of many divergent and, at times, conflicting views on affirmative action. The Solicitor General's amicus curiae brief supported the use of race in admissions, but at the same time argued that the University of California's special admissions program was unconstitutional and that Bakke should be admitted.⁴⁵ Other officials in the Carter Administration and the Congressional Black Caucus criticized the brief as too tentative and hesitant on the issue of affirmative action.⁴⁶ Under much pressure, McCree had the brief revised. The government's final brief supported the use of race in affirmative action admissions programs, and asked the Supreme Court to remand the case to determine whether Bakke's rights had been violated.⁴⁷

Although the Court's decision in *Bakke* promised to have a substantial and specific impact on minorities applying to universities and to affirmative

39. 438 U.S. 265 (1978).

40. See *Bakke v. Regents of the Univ. of California*, 18 Cal.3d 34, 38 (1976).

41. *Id.* at 63.

42. Drew Days was Assistant Attorney General for Civil Rights. Days and McCree met with representatives of various federal agencies to work out a basic position for McCree's brief.

43. J. DREYFUSS & C. LAWRENCE III, *The Bakke Case: The Politics of Inequality* 162, 162-64. Dreyfuss and Lawrence present a comprehensive treatment of the legal, political, and social effects of the *Bakke* case.

44. *Id.* at 163.

45. *Id.* at 166.

46. See *id.* at 168-169.

47. *Id.* at 170-171.

action programs in general, McCree was the only Black who participated in the oral argument before the Supreme Court.⁴⁸ The defendant University chose not to have Black representation in the Supreme Court, despite the importance of the outcome for Blacks and other minorities.⁴⁹ Instead, Archibald Cox, the Harvard Law professor and former Solicitor General, presented the University's case before the Court.

The Supreme Court's decision in *Bakke* was comprised of several opinions which reflected the divergent viewpoints of the Justices. Ultimately, the Court decided that race could be used as a factor in special admissions programs, but ruled that Allan Bakke be allowed to attend medical school.⁵⁰

In an interview after the *Bakke* decision, McCree revealed his feelings about the role of the Solicitor General and *Bakke*: "My client is the United States, and Uncle Sam isn't anthropomorphic after all. He's the people and agencies that make up the government. There's frequently some disagreement among those people and agencies about what our stance should be; *Bakke* wasn't a unique case in that respect."⁵¹

In 1981, after arguing a number of cases before the Supreme Court, McCree resigned as Solicitor General to accept an appointment as the Lewis M. Simes Professor of Law at the University of Michigan Law School.⁵²

THE LEGAL EDUCATOR

It came as no surprise to those who knew him that Wade H. McCree, Jr. would excel as a law professor as he had as a lawyer, judge, and Solicitor General. He enthusiastically taught courses on constitutional law, constitutional litigation, and the legal profession.⁵³ Through the sheer force of his personality and intellect he quickly became a favorite of students .

In many ways, Professor McCree had been a "legal educator" long before he joined the law faculty at the University of Michigan. He had been a frequent lecturer at law schools throughout the United States and was a member of the law faculty for the Salzburg Seminar in American Studies in Austria in 1969.⁵⁴ As a judge, McCree served as a member of the Board of the National Judicial College at the University of Nevada-Reno.

Howard Boigon, a former law clerk of then Judge McCree, recalled: "He was a wonderful teacher and mentor. He taught me to appreciate the power and beauty of language, the wisdom of brevity, the necessity of precision He taught us about justice and the judicial system."⁵⁵ McCree's writing style had admirers from many quarters. Law school faculty have been known to

48. *Id.* at 190.

49. According to Dreyfuss and Lawrence, there were at least two Black lawyers who had the experience and competence to argue *Bakke* before the Supreme Court, but neither was approached. One was Nathaniel Colley, a prominent California attorney, who was recommended by minority organizations. The other was William Coleman, the former Secretary of Transportation of the Ford Administration. Both men were experienced, well-regarded attorneys, with impeccable credentials. *Id.* at 177.

50. *Bakke*, 438 U.S. 265, 266-67 (1978).

51. Lewin, *supra* note 38, at 37.

52. Littlejohn, *supra* note 3, at 1651.

53. Bollinger, *Wade H. McCree, Jr.*, 86 MICH. L. REV. 221, 221 (1987).

54. Littlejohn, *supra* note 3, at 1651.

55. Boigon, Memorial Service for Wade H. McCree, Jr., at the University of Michigan, September 4, 1987, reprinted in 32 LAW QUADRANGLE NOTES 5 (1987).

use McCree's judicial opinions as models for first-year law students.⁵⁶

McCree had very concrete ideas on the relationship between the legal scholar and the court in the development of the law. In *Partners in the Process: The Academy and the Courts*,⁵⁷ he wrote of the important role that legal academics play in the development of the law. McCree asserted that legal scholars filled a gap between judge-made law and legislative law. Judge-made law, in the common law tradition, produced only slow, marginal developments in the law that failed to meet the demand of the rapid technological and social changes in society. Legislatures, on the other hand, sometimes were unable or unwilling to pass laws to keep up with these rapid changes.⁵⁸ McCree recognized the contribution of legal scholarship to the development of the law in areas where courts and legislatures, for various reasons, feared to tread. To illustrate his point, McCree traced the history of products liability and discussed the profound impact that a law review article written by Dean William Prosser had on the development of products liability law.⁵⁹

In *Partners in the Process*, McCree appeared to reveal what may have been a reflection of his own judicial philosophy in his exposition on the proper role of the common law court:

A common law court moves cautiously from case to case, keeping its attention focused on the facts before it in a particular case and resisting, as much as possible, the temptation to speak or to write broadly, beyond the limits of the case that must be decided. It is a fascinating sort of modesty . . . that characterizes the reluctance of the common law judge to yield to the temptation to take the grand view of social problems and to resolve those problems in broad, sweeping declarations.⁶⁰

Although Professor McCree was a scholar in the truest sense, he will be remembered also as a mentor to his students. He gave students guidance and advice both inside and outside of the classroom with a gentleness that is certainly rare in the competitive, stressful environment of the law school. As a Black faculty member, he served in a special capacity as mentor to Black law students. He had been known to recommend books about Blacks in the law to young students and would take time to discuss the lives of such legendary lawyers as Charles Houston, William Hastie, and Thurgood Marshall, who championed the cause of civil rights.⁶¹

Professor McCree took an active interest in the careers of his students. When students requested recommendations from him for judicial clerkships, McCree would talk personally with the particular judges involved and often renewed old acquaintances in the process.⁶² He also offered counsel to students on the benefits of clerking for a particular judge. One student remarked:

He had a picture directory of federal judges He would flip through the pages, making a kind remark about each person, and commenting on how the student might, or might not, benefit from working for a particular judge.

56. Beale, *supra* note 6, at 218.

57. McCree, *Partners in the Process: The Academy and the Courts*, 37 WASH. & LEE L. REV. 1041 (1980).

58. *Id.* at 1048.

59. *Id.* at 1051-1052. The Article referred to was Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

60. McCree, *supra* note 57, at 1046 (footnote omitted).

61. Professor McCree's Students, *supra* note 8, at 264.

62. *Id.* at 261.

Many students believed he personally knew *every* federal judge (or one of their relatives), as well as every judge in Michigan.⁶³

Although he had immersed himself in his academic responsibilities, McCree did not retreat into the halls of academia. The Supreme Court appointed him a master in three cases. One of the cases, *California v. Texas*,⁶⁴ involved an estate tax dispute between states over the multi-billion dollar estate of Howard Hughes, which McCree helped to settle.⁶⁵ For law students, law clerks, Presidents, or the Supreme Court, his door was always open to those who needed him.

THE LEGACY OF WADE H. MCCREE, JR.

This brief tribute can hardly capture Wade H. McCree, Jr., or all of the contributions and accomplishments of a career that spanned over 40 years. It fails to mention or include the many cases he decided, the 30 honorary degrees he received (including an LLD from Harvard), the many speeches he gave and the civic and cultural activities that McCree was involved in during his life. It certainly does not capture the man who was a raconteur, poet and philosopher. Nor does it capture the man who was dearly loved and admired by his family and friends.

Despite his many God-given talents, he was a modest man who gladly shared his gifts with others rather than exploit them solely for his own gain. He helped students and law clerks discover the potential for excellence within themselves, while imparting a sense of fair play and justice. Indeed, it may be said that one of the many gifts for which he will be remembered was his ability to instill in people a desire to seek their potential and once having achieved it, to share with others less fortunate, the fruits borne of that achievement.

63. *Id.* at 261. McCree's gregarious, open manner was not reserved only for law students, judges and dignitaries. A former law clerk wrote, "He was as courteous to the elderly woman who cleaned his chambers as he would have been to the Chief Justice." Beale, *supra* note 6, at 219.

64. *California v. Texas*, 457 U.S. 164 (1982); See remarks by William T. Coleman, Secretary of Transportation, 1975-77, at the Memorial Proceedings for Wade H. McCree, Jr., at the University of Michigan Law School (Sept. 4, 1987).

65. Washington Post, Sept. 1, 1987, at B4, col. 1.