

*Review of Hon. David S. Tatel's*

## VISION: A MEMOIR OF BLINDNESS AND JUSTICE

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The National Association of College and University Attorneys presented Judge David Tatel with its Distinguished Service Award in 1993. His book *Vision: A Memoir of Blindness and Justice* demonstrates many reasons for that abundantly deserved honor. The book describes his important role in the history of the civil rights movement, including in higher education; his experience moving from private practice for educational institutions into the role of a federal appeals court judge; and most poignantly, his gradual coming to terms with his loss of his eyesight. Along the way he offers gems of advice, especially for younger lawyers. He also gives loving tribute to his parents; his wife, Edie; and their children and their families. NACUA members will find valuable all of these aspects of this readable memoir.

### 1. *Civil Rights and Education*

After growing up in a Washington, D.C., suburb, Judge Tatel earned his undergraduate degree at the University of Michigan, where President John F. Kennedy, Rev. Martin Luther King Jr., and the curriculum sparked his interest in political science, constitutional law, and government service. Judge Tatel reflects on “the important values that emerged in the sixties: equal justice under law, fairness, and the importance of challenging authority.”<sup>1</sup> Attending the University of Chicago Law School, Judge Tatel began his service to higher education with a part-time job in the university’s legal office. After graduation he explored teaching at the University of Michigan law school and then entered private practice at Sidley, Austin, Burgess & Smith (now Sidley Austin LLP), where he had been a summer associate.

Sidley initiated Judge Tatel’s career in civil rights and education law by inviting him to help write an *amicus curiae* brief in a major school desegregation case in the Illinois Supreme Court.<sup>2</sup> Sidley subsequently seconded Judge Tatel to the Chicago Riot Study Committee, a panel examining causes of urban unrest. Those experiences, coupled with Edie’s experience teaching in the Chicago public schools, “opened

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1 D. Tatel, *Vision: A Memoir of Blindness and Justice* 37 (Little Brown 2024).

2 *Tometz v. Bd. of Educ. of Waukegan City Sch. Dist.*, 39 Ill. 2d 593, 237 N.E.2d 498 (Ill. 1968).

my eyes to the real struggles, and real stakes, of the fight for equal educational opportunity. ... I now knew for sure that I wanted to practice civil rights law full-time. ... I wanted to devote all my energy to people who needed lawyers but couldn't afford them."<sup>3</sup>

Judge Tatel's conviction became reality through his appointment as the founding director of the Chicago Lawyers' Committee for Civil Rights Under Law, which he describes as not "just [getting] a job," but receiving "a mission."<sup>4</sup> Hankering to work on the national stage, Judge Tatel returned to Washington via Sidley's D.C. office. Two years later he became director of the National Lawyers' Committee. In 1974 Hogan & Hartson (now Hogan Lovells), "the first major firm to establish a separate practice group devoted exclusively to pro bono work,"<sup>5</sup> asked Judge Tatel to join its pro bono practice. With support from his Hogan colleagues, he concurrently served as General Counsel to the Legal Services Corporation, a private nonprofit corporation funded by the federal government to provide legal services for low-income individuals.

After President Jimmy Carter's inauguration in 1977, Judge Tatel became Director of the Office for Civil Rights (OCR) at the-then U.S. Department of Health, Education, and Welfare.<sup>6</sup> Focusing on desegregating educational institutions, OCR took on the legacy of legal segregation of North Carolina's university system. Unlike integrating public elementary and secondary schools, "[t]he only way to desegregate state higher education systems was to strengthen the Black schools to make them more attractive to white students, give financial incentives to white students to attend Black schools (and vice versa), and eliminate unnecessarily duplicated courses."<sup>7</sup> OCR was unable to reach an acceptable settlement with the university system, but President Ronald Reagan, who took office in 1981, "immediately agreed to a settlement far worse than what we in the Carter Administration had repeatedly rejected. ... The federal government failed the students of North Carolina. ..."<sup>8</sup> From that experience Judge Tatel learned the limitations of the power of the so-called nuclear option—termination of federal funding—that OCR wields.

Judge Tatel reinvigorated OCR's enforcement of disability and sex discrimination laws. He finalized the first set of regulations under section 504 of the Rehabilitation Act of 1973, prohibiting discrimination on the basis of handicap by recipients of federal financial assistance. Even while "downplay[ing his] own disability," Judge Tatel realized that "[t]his fight ... was my own."<sup>9</sup> Then as now, issues relating to sex discrimination in athletics under Title IX of the Education Amendments of 1972

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3 Tatel, *supra* note 1, at 56.

4 *Id.* at 59.

5 *Id.* at 74.

6 Congress subsequently divided the agency into the U.S. Department of Education and the U.S. Department of Health and Human Services.

7 Tatel, *supra* note 1, at 139.

8 *Id.* at 141.

9 *Id.* at 145.

were especially challenging. Title IX and the regulatory guidance promulgated during Judge Tatel's tenure at OCR "have dramatically altered the landscape of school sports" to improve opportunities for girls and women.<sup>10</sup>

After his service at OCR Judge Tatel returned to Hogan & Hartson to start its education practice. He had "found at OCR that many school districts wanted to desegregate their school systems but lacked the legal and technical know-how to make it happen. The expertise of a big D.C. law firm could definitely help. ... And we could help them with their other day-to-day legal problems, too. Based on my OCR experience, I thought we could also do the same for colleges and universities. ... It worked. The education group thrived" under Judge Tatel's leadership over the next fifteen years.<sup>11</sup>

## 2. *Judicial Career*

In 1993 President Clinton appointed Judge Tatel to the U.S. Court of Appeals for the District of Columbia Circuit, where Judge Tatel serve for thirty years. He emphasizes that he "was not a blind judge. ... [He] was a judge who happened to be blind."<sup>12</sup>

Judge Tatel offers extensive reflections on his judicial philosophy and experience as a judge. From the beginning of his service he had "a strong conviction ... that the most important job of the judge is to protect individual rights from ... 'the Leviathan of government.'"<sup>13</sup> At the same time he sought "a set of principles to guide my decision-making and to help separate my judicial obligation to faithfully apply the law from my personal views about right and wrong."<sup>14</sup> He found those models in Judge Learned Hand and Justice Lewis Powell, who "played it straight[;] ... strove to identify, and then ignore, their own predispositions[; and] believed in judicial restraint."<sup>15</sup> Judge Tatel describes himself as "a textualist long before the word became the clarion call of so-called legal conservatives."<sup>16</sup>

Writing before the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,<sup>17</sup> Judge Tatel defends the traditional standards of judicial review of decisions of federal administrative agencies. He explains that "'arbitrary and capricious review' and *Chevron* deference are important principles of judicial restraint that keep unelected judges from second-guessing agency decision-making."<sup>18</sup> He criticizes the "nondelegation doctrine," which "[i]n theory ... is about preserving Congress's

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10 *Id.* at 148.

11 *Id.* at 153–54.

12 *Id.* at 11.

13 *Id.* at 214 (quoting constitutional law professor Philip Kurland).

14 *Id.*

15 *Id.* at 216.

16 *Id.* at 91.

17 603 U.S. 369 (2024).

18 Tatel, *supra* note 1, at 255; see Administrative Procedure Act, 5 U.S.C. § 706(2)(A); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

power to legislate—and making sure executive branch agencies don’t take that power for themselves” but “[i]n practice ... is all about the Supreme Court’s own power, because by invoking the doctrine, the Court disregards Congress’s legislative choices in favor of its own.”<sup>19</sup> He observes that “if Congress can’t delegate the regulatory details to expert agencies, it won’t be able to regulate in those spaces at all.”<sup>20</sup> For similar reasons he objects to the recent “major questions” doctrine,<sup>21</sup> pointing out that the nondelegation and major questions doctrines both “purport to prioritize Congress’s authority while ultimately empowering the courts, which can use the two doctrines to override any congressional delegations they don’t like.”<sup>22</sup>

Judge Tatel observes that “[j]udges all wear the same black robes because it shouldn’t make any difference which judge hears your case.”<sup>23</sup> Yet the Supreme Court’s decisions in these administrative law cases, as well as other cases such as *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,<sup>24</sup> have reluctantly led Judge Tatel to support term limits for Supreme Court Justices, while recognizing that such a change could face constitutional challenge.

Perhaps to illustrate differences between judging and legislating, Judge Tatel describes in detail the operation of the court and his chambers, including the hiring of law clerks (his were dubbed “Tatel Tots”).<sup>25</sup> He found oral argument to be “the pinnacle of the appellate process”<sup>26</sup> and offers advice for appellate advocates:

Good lawyers know their case at least as well as the judges do. They know that when a judge asks a question, they should stop talking, think about the question, and answer it, preferably by starting with a simple yes or no. Good lawyers answer hypothetical questions rather than fight them. Above all, good lawyers understand that although their professional obligation is to represent their clients zealously, they are also officers of the court obligated to present their arguments accurately and honestly.<sup>27</sup>

Judge Tatel retired from the bench in 2024, during the term of President Joe Biden. Judge Tatel loved the job, “honestly say[ing] that I found something interesting in nearly every one of the thousands of cases I heard in my thirty years on the court.”<sup>28</sup> But he felt disappointed in the direction of American politics and the Supreme Court, and missed judicial colleagues who had retired or passed away. Harkening back to the origins of his own legal career, he calls on lawyers to

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19 Tatel, *supra* note 1, at 258; see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

20 Tatel, *supra* note 1, at 260.

21 See *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697 (2022).

22 Tatel, *supra* note 1, at 269.

23 *Id.* at 188.

24 600 U.S. 181 (2023).

25 Tatel, *supra* note 1, at 203.

26 *Id.* at 192.

27 *Id.* at 193.

28 *Id.* at 231.

“remember President Kennedy’s message so many years ago that lawyers have a special obligation to use their legal skills on behalf of those whose constitutional rights are threatened.”<sup>29</sup>

### 3. *Blindness*

Judge Tatel was born with sight, but began to lose his vision at the age of eight or nine. When he was fifteen, a doctor at the National Institutes of Health diagnosed the cause as retinitis pigmentosa, a rare, genetic eye disease. Judge Tatel movingly chronicles this “more private journey, from shame about my deteriorating vision, to denial about the effects of my blindness, and ultimately to acceptance and equanimity.”<sup>30</sup>

Judge Tatel met Edie—ironically, on a blind date—when he was a student at the University of Chicago Law School and she was studying for her master’s degree in education at Northwestern University. He soon anxiously confided his affliction to her, neither of them anticipating that eventually he would become legally blind. They married four months after their first date.

Gradually the reality of his loss of eyesight confronted Judge Tatel. He was, for example, exempted from the military draft because of legal blindness and could no longer drive. Nevertheless, for many years Judge Tatel attempted to “pass” as “normal.” At his initial interview at Hogan & Hartson in 1974, he admitted to a prospective employer for the first time that he might become totally blind. The partner asked simply, “What help will you need?” Judge Tatel recounts, “Those five simple words changed everything.”<sup>31</sup>

Despite this admission, Judge Tatel’s apparent normalcy—his ability to navigate the world without vision—amazed colleagues like me who are sighted. He traveled extensively for work and pleasure, and engaged in sports such as hiking, running three marathons, and skiing. One of the most touching moments in the book is the question from his son and ski guide, “What’s better than a father’s one hundred percent trust in his son?”<sup>32</sup>

Judge Tatel also compensated for his blindness in astounding ways. Perhaps because he was once sighted, he still “thinks visually.”<sup>33</sup> His memory developed so that he “could retain whole statutes and judicial opinions in my mind.”<sup>34</sup> He recounts, “Because I can’t see the words on the page, I often parse complex text by creating diagrams [of the sentences] in my head.”<sup>35</sup> Many of us sighted people would yearn for such mental capacity.

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29 *Id.* at 300.

30 *Id.* at 8–9.

31 *Id.* at 118.

32 At times Judge Tatel’s apparent normalcy led me and perhaps others temporarily to forget his blindness. Once, when we were preparing to file a brief, I asked him what color paper we should use. He diplomatically responded, “Elizabeth, you choose.”

33 *Id.* at 210.

34 *Id.* at 112.

35 *Id.* at 150.

A lover of science and technology, Judge Tatel also gives a tour of the various assistive devices that he used over the years, characterizing “[e]ach technological advance” as a combination of “the rigor of science with the magic of possibility.”<sup>36</sup> In addition to human readers, he has used a range of reading machines to absorb daily doses of legal authorities and news. After returning to Washington, he learned Braille and began to use a Braille computer to write.

Yet Judge Tatel deferred for years customary supports for the blind. It was not until age forty that he began to use a white mobility cane, at last “announc[ing] to the world that I was blind.”<sup>37</sup> And only at age seventy-six did he gain his beloved German shepherd guide dog, Vixen, giving both Judge Tatel and Edie more independence than was previously possible and an unexpected best friend to boot.

As his blindness became more obvious and public, Judge Tatel experienced not only the kindness of strangers, but also discrimination. He recounts an incident when a rideshare driver refused to accept him and Vixen as passengers. The experience was insulting and humiliating. As when Allegheny Airlines bumped consumer advocate Ralph Nader, the rideshare driver did not realize whom he had evicted. Judge Tatel filed a complaint with the ridesharing service and called the *Washington Post*, which soon ran a story headlined, “A Federal Judge Was Refused a Lyft Ride with His Guide Dog. He’s Not Alone.” For the moral of the story, Judge Tatel quotes the Old Testament: “Before the blind: thou shalt not place a stumbling block.”<sup>38</sup>

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Judge Tatel attributes his success to several fortunate circumstances: his parents’ support; his gradual loss of sight, culminating only after he was an adult with an established profession; his attraction to technology; and his family’s love and encouragement. Shirley Hufstедler, a former federal judge and Secretary of Education, added an insight into Judge Tatel’s character: “Because he can’t see people, he can see through them.”<sup>39</sup> Whatever the contributions to his success, Judge Tatel’s “yearn[ing] to be a civil rights lawyer and to use [his] legal skills to make the world a better place” is an inspiration for all lawyers. And his ultimate acceptance of his disability, coupled with his expansive curiosity and perseverance in pursuing his goals, make his life one to emulate, personally as well as professionally, for the blind and sighted alike.

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36 *Id.* at 324.

37 *Id.* at 168.

38 *Id.* at 128 (quoting Leviticus 19:14).

39 *Id.* at 112.