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Kenneth M. Rosen

University of Alabama - School of Law, krosen@law.ua.edu

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SERVING THE PUBLIC WITH A PEN

*Kenneth M. Rosen**

When the Senate confirmed Edward Earl Carnes to a seat on the United States Court of Appeals for the Eleventh Circuit on September 9, 1992,¹ he already was a public servant. Indeed, since graduating law school, Chief Judge Carnes' commitment to service has been continuous. Over the course of decades, he only has held two positions: attorney for the Office of the Alabama Attorney General and federal circuit judge.² That service merits special recognition as Chief Judge Carnes reaches twenty-five years on the bench.³

While it is difficult to summarize and to characterize a quarter of a century of any professional activity for many individuals, for Chief Judge Carnes the task is more straightforward. Above all, Chief Judge Carnes has honorably served the nation as a brilliant scribe, seeking to communicate the meaning of the law clearly and precisely and doing so with a noticeable flair. Chief Judge Carnes' reputation as a superb writer is well-known. Indeed, he might be known as well as "the writer Judge Carnes" as simply Chief Judge Carnes. The strength of the specific identification of Chief Judge Carnes as a writer is illustrated by an anecdote shared by his Eleventh Circuit colleague, Judge Julie Carnes.

Judge Julie Carnes is renowned in her own right for her service to the bar, having served for decades as a federal district court judge before her elevation to the Eleventh Circuit.⁴ At her Eleventh Circuit investiture, she related tales of confusion related to the two judges named Carnes.⁵ More specifically, she noted years of being complimented "for witty and beautifully written opinions that were actually written by Judge Ed

* Professor of Law, the University of Alabama School of Law. After graduating from Yale Law School in 1994, I served as a law clerk for the Honorable Ed Carnes.

1. See *Carnes, Edward Earl*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/carnes-edward-earl> (last visited Feb. 13, 2018).

2. See *Hon. Ed Carnes*, U.S. CT. APPEALS FOR ELEVENTH CIR., <http://www.ca11.uscourts.gov/judges/hon-ed-carnes> (last visited Feb. 13, 2018).

3. Chief Judge Carnes began serving as the Eleventh Circuit's leader on August 1, 2013. *Id.*

4. See *Carnes, Julie E.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/carnes-julie-e> (last visited Feb. 13, 2018).

5. See Luther D. Thomas, *The Investiture of Judge Julie E. Carnes*, 11TH CIR. HIST. NEWS, Winter 2015, at 5, 7.

Carnes.”⁶ Apparently, correcting the errors became tiresome, leading her eventually “just to respond, ‘Thank you. I try real hard.’”⁷ Judge Julie Carnes’ comments reflect the persistent attention to the quality of Chief Judge Carnes’ opinions.

Such quality is no accident. It results from hours of meticulous writing and editing that I can attest routinely occurs in his chambers, having served as one of Chief Judge Carnes’ former law clerks. Another of his former clerks, Emily Tidmore, on the occasion of Chief Judge Carnes taking on the chief judgeship of the Eleventh Circuit, usefully compared his crafting of opinions to lawyers who act like fine architects in the way identified by Scottish author Sir Walter Scott.⁸ As she noted, the author previously “observed that ‘[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.’”⁹

As part of that quotation suggests, excellent writing starts with the study of other skilled writers. Chief Judge Carnes studiously analyzes the drafting and editing techniques of others, both famed and less well-known. He reveals that research in his talks to others. For example, to their great benefit, Chief Judge Carnes regularly speaks to first-year students at the University of Alabama School of Law about effective writing and editing.¹⁰ During his visits, he shares examples of writing from not only himself and lawyers and statesmen, such as former Presidents Thomas Jefferson and Abraham Lincoln and Justice Oliver Wendell Holmes, Jr., but he also adds work by writers from other milieus; some are the words of well-known scribes, such as Friedrich Nietzsche and Mark Twain, but others come from places like the heartfelt correspondence by the soldier, Sullivan Ballou, to his wife.¹¹ Chief Judge Carnes’ presentation makes certain facets of excellent writing, and inherently the aspirations for his own writing, clear.

First, the purpose of writing is to clearly communicate ideas, so word choice and technique should serve that aim. Chief Judge Carnes is particularly fond of metaphors and their ability to clarify and to emphasize a writer’s point to the reader. For instance, Chief Judge Carnes has noted a letter from Justice Holmes to Sir Frederick Pollock, where the Justice explained,

6. *Id.*

7. *Id.*

8. See Emily J. Tidmore, *Judge Carnes Becomes Chief Judge Carnes*, 74 ALA. LAW. 373, 373 (2013).

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

10. See, e.g., Ed Carnes, Chief Judge, U.S. Court of Appeals for the Eleventh Circuit, *Effective Writing and Editing: Thomas Jefferson, Hank Williams, and Others* (Feb. 20, 2017).

11. See *id.*

I wax impatient sometimes to think how much time it takes to do a little fragment of what one would like to do and dreams of. Life is like an artichoke; each day, week, month, year, gives you one little bit which you nibble off—but precious little compared with what you throw away.¹²

While reading these lines, one can almost taste the artichoke and regret the parts thrown away while contemplating the fragmented and limited nature of life.

Chief Judge Carnes relays matters in an equally vivid fashion, making his views clear with metaphors in his own opinions. For instance, in reviewing the actions of the National Labor Relations Board in a case on the possible effects of intimidation on a union election, he explained,

The Board relied heavily upon the fact that Spears did not actually sustain any physical injury from Brown's misconduct, surmising that the incident did not involve a "severe risk of injury." That is somewhat akin to civilians telling a soldier that combat could not have been too bad because he survived it.¹³

The opinion's prospective value is evident. The need for more sophisticated analysis of what constitutes severe injury risk is emblazoned on the page.

Chief Judge Carnes conveys his points using the image of soldiers with equal clarity in criminal law cases. In one involving a felon's appeal of a failed motion to suppress evidence, the question arose whether a battered wife retained the ability to consent to entry to her home after departing the premises; the Judge clearly stated:

To say that Mrs. Backus abandoned her home is like saying that Dolley Madison abandoned hers when she fled the White House the day before the British troops set it ablaze. There is a difference between voluntarily giving up your home and being forced to flee from it in fear for your life and the life of your child. The law should take account of that difference. Failure to do so would condone and reward violent, abusive behavior.¹⁴

No uncertainty could exist about the chief judge's view of the proper way to dispose of such motions.

12. See *id.* (citing Letter from Oliver Wendell Holmes, Jr. to Frederick Pollock (Jan. 17, 1887)), in 1 HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932, at 29, 30 (Mark DeWolfe Howe ed.) (1942)).

13. Associated Rubber Co. v. NLRB, 296 F.3d 1055, 1063 (11th Cir. 2002).

14. United States v. Backus, 349 F.3d 1298, 1304 (11th Cir. 2003).

Second, Chief Judge Carnes always make clear that good writing is the result of hard work. Accordingly, he emphasizes editing in his presentations. Chief Judge Carnes reveals the importance of editing to audiences by meticulously going through different versions of written work, rather than relying solely on the polished, final versions.¹⁵ Those who have seen Chief Judge Carnes speak over the years will be familiar with his special enthusiasm for studying research on the drafts of President Abraham Lincoln for well-known works, such as the First Inaugural Address and Gettysburg Address.¹⁶

In conveying his lessons about superior writing, Chief Judge Carnes always utilizes good humor and wit as he does in his opinions. Such humor and wit sometimes reaches beyond the legal community to the general public. For example, CBS covered Chief Judge Carnes' use of a Jim Croce song in one of his opinions.¹⁷ In that case, involving § 1983 claims by an individual found in a daughter's closet by a mother, who also was a correctional officer, the Judge started his opinion citing the song and added a twist of his own:

In one of his ballads, Jim Croce warned that there are four things that you just don't do: "You don't tug on Superman's cape/ You don't spit into the wind/ You don't pull the mask off that old Lone Ranger/ And you don't mess around with Jim." He could have added a fifth warning to that list: "And you don't let a pistol-packing mother catch you naked in her daughter's closet."¹⁸

For those who think that judges' opinions are never read, Chief Judge Carnes' writing talents show that they are if creatively crafted.

Given Chief Judge Carnes' talents as a writer, it is appropriate to pay tribute to his twenty-five years on the bench with a collection of essays. Because so many University of Alabama School of Law students receive writing insights from Chief Judge Carnes during law school with his visits or after graduation as his law clerks, it is especially meaningful to publish these essays in the *Alabama Law Review*. The essays' authors come from various parts of the legal profession. From the world of public service are contributions from former Chief Judge Joel Dubina, Chief Judge Carnes' long-time colleague on the Eleventh Circuit, and from Alabama Attorney General Steve Marshall and Solicitor General Andrew Brasher, who serve

15. See *supra* note 10.

16. *Id.*

17. *Judge Quotes Jim Croce Song in Appeals Ruling*, CBS TAMPA BAY, July 7, 2012, 7:56 AM, <http://tampa.cbslocal.com/2012/07/07/judge-quotes-jim-croce-song-in-appeals-ruling/>.

18. *Butler v. Sheriff of Palm Beach Cty.*, 685 F.3d 1261, 1262–63 (11th Cir. 2012) (footnote omitted).

critical roles in the office where Chief Judge Carnes worked for many years before becoming a federal judge. Additional essays come from two former law clerks. University of Alabama School of Law professor Paul Horwitz comes from the world of academia and Brian Lea, an associate at Jones Day, comes from the world of private practice. While these essays are published as final work products, neither I nor the *Alabama Law Review* suggest that they might not engender additional, constructive editorial comments from Chief Judge Carnes.

