

*Ward*



## Office of the Attorney General

Washington, D. C. 20530

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### MEMORANDUM

TO : Kenneth W. Starr  
Counselor to the Attorney General

FROM : John Roberts *JR*  
Special Assistant to the Attorney General

SUBJECT : Judge Nixon's Opinions

I have read ten opinions written by Judge Nixon, chosen at random from among his earlier cases. One characteristic of Judge Nixon's jurisprudence which causes some concern is his propensity to reach out and decide complicated questions of law which he admits need not be decided. In Martin v. Texaco, Inc., 304 F.Supp. 498 (1969), Judge Nixon was confronted with a suit alleging intentional interference with a contract. The Judge decided that, because of the Statute of Frauds, no contract existed, and that therefore no action could be maintained for wrongful interference. Instead of ending the matter at that point, however, Judge Nixon assumed that a contract did in fact exist, and went on to rule that the defendant was entitled to summary judgment because its actions did not constitute wrongful interference.

Although this sort of alternative reasoning is a typical strategy employed by District Court judges anxious to avoid reversal on appeal, in other opinions Judge Nixon's propensity to "assume arguendo" and reach for alternative bases of decision has caused some difficulty. An outrageous example is Ingalls Shipbuilding Corp. v. Neuman, 322 F.Supp. 1229 (1970). The case involved the question whether plaintiffs were children of decedent under the Longshoremen and Harbor Workers Compensation Act, which defined "child" to include someone in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, or an acknowledged illegitimate child dependent upon the deceased. Judge Nixon began by persuasively reasoning that the issue of the paternity of the decedent had not been raised during the administrative proceedings, and that therefore the employer could not raise it in the District Court. Not satisfied to let matters rest there, Judge Nixon assumed that the paternity issue was properly raised, and concluded that the record revealed that the decedent was the father of

the two children. This was unfortunate because in deciding this question Judge Nixon was forced to deal with close and complicated questions of state law. In particular, it was necessary to overcome a strong legal presumption in the case that the children were not decedents of the deceased. Judge Nixon also made suspect factual conclusions based on the administrative record, after he himself had concluded that the issue of paternity was not raised at the administrative hearing. It clearly would have been the better part of judicial valor to rest decision on the conclusion that the issue was not raised during the administrative hearing.

In the same case, Judge Nixon determined that the illegitimate children were dependent upon the decedent, so as to come within the statute. As Judge Nixon recognized, this made it unnecessary to address the constitutional question whether it violated equal protection to require illegitimate children to prove dependency, whereas legitimate children were not required to do so. Nonetheless, analyzing Supreme Court cases, Judge Nixon went on to determine that there was no equal protection violation. After all of this, Judge Nixon also determined that, even if the children were not dependent acknowledged illegitimate children of the decedent, they fell within the statute because the decedent had stood in loco parentis with regard to the children under the terms of the statute.

Another example of Judge Nixon reaching out to opine on unnecessary matters is found in Kitchens v. State, 290 F.Supp. 856 (1968). A habeas corpus petitioner appeared before Judge Nixon, did not request counsel, and did not object to proceeding without counsel. Nonetheless, Judge Nixon sua sponte raised the question whether petitioner was entitled to be represented by counsel. He surveyed applicable cases and purported to devise general rules concerning when counsel is required in habeas corpus cases. Such general rules should not be determined in the context of a case in which the issue is raised sua sponte and there is no controversy concerning the matter.

On the other side of the ledger, Akin Mobile Homes, Inc. v. Secretary of HUD, 354 F.Supp. 1036 (1972), is a particularly concise and persuasive treatment of a complicated jurisdictional issue concerning the concurrent jurisdiction of the District Courts and the Court of Claims.