

## Law

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### • Judges, Vampires and Immortality

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Since arguing a case before the 4th U.S. Circuit Court of Appeals several days prior to Halloween, I have been thinking a lot about judges, vampires and immortality. The time of year is certainly a reason for this, as is the argument I had, but the main source of the thoughts that continue to haunt me is the first case argued that day in Richmond, *Trademark Properties, Inc. v. A&E Television Networks*.

This was not your run-of-the-mill appeal, although the claim asserted is not the reason for today's article. The plaintiffs contended that they had approached the A&E Television Network with an idea which ultimately morphed into the reality series, "Flip This House," and that A&E agreed to split the series' net revenues down the middle with them. The plaintiffs sued after A&E said it would pay them nothing because it had never entered into such an agreement. A jury sided with the plaintiffs and returned a \$4 million-plus verdict, which A&E appealed.

As interesting as the case was, that's not what got me thinking about judges and the undead. The unusual part began soon after A&E's counsel stood at the lectern, launched into his reasons for reversal, and was interrupted with a question by one of the judges, who called him "Mr. Mukasey." I was only half-listening when this occurred because I was trying to prepare for my own argument, but when another judge later referred to him again by his name, I looked more closely and suddenly realized who Mr. Mukasey was. Michael Mukasey. As in the Michael Mukasey who replaced Alberto Gonzales as U.S. Attorney General. And who, prior to that stint, served on the U.S. District Court for the Southern District of New York for almost 18 years, six of them as chief judge.

At this point, I watched the argument with greater interest. This was the jurist who sentenced two people to life imprisonment for trying to blow up the United Nations, which is just one small example of the awesome power he wielded as a member of the federal judiciary. How many opportunities have you had to watch a former federal judge have to defend his position, just like the rest of us? How

many times have you seen a former federal judge really put himself out there by trying to overturn a jury verdict on sufficiency grounds? When's the last time you got to see a former federal judge squirm in the face of intense questioning?

I thought things would return to normal when the honorable rather than Honorable Michael Mukasey, Esquire, sat down, but they just got curiouser and curiouser when the plaintiffs' counsel began his argument by introducing himself to the panel as "Billy Wilkins." As in, more formally, William W. Wilkins, former U.S. District Judge of the District of South Carolina, the first Chair of the U.S. Sentencing Commission, and a member for 21 years, including four as chief judge, of the same court before which he was now appearing.

I've argued several cases before now-former Judge Wilkins, including one in which he came to my rescue to cut off the relentless questioning of his then-colleague, Judge J. Harvie Wilkinson III. And here he was, just like Mr. Mukasey. Just like one of us.

I've lost track of the number of appellate arguments I've watched over the years, but the only other former federal judge I recall seeing argue a case was Kenneth Starr, who had served on the U.S. Court of Appeals for the District of Columbia Circuit prior to pursuing other callings, including being the U.S. Solicitor General, a position that some refer to as the 10th Supreme Court justice. And in this case I saw two former judges, going toe-to-toe not only with each other, but also, when pressed with challenging questions, with the 4th Circuit judges themselves.

I've stopped asking myself since watching this argument why these two men would give up their judicial appointments to return to the private practice of law. Perhaps it was for the money, maybe they were bored, who knows.

Whatever their reasons were, one thing is certain. By relinquishing a lifetime position in which they answered to virtually no one, they stepped down from their mantle of immortality to become mere humans, who not only must be prepared to prove themselves daily and justify every single thing that they say, but who must also, like the rest of us, hope and/or pray that their targeted audience agrees with them.

I know what some of you judges out there are thinking. You're saying to yourselves, we're not immortal. We get reversed, our decisions can be overruled, and we dissent when we are outvoted by a majority.

To those judges, I have one thing to say in response: Please.

There is only one U.S. Supreme Court, whose 80-90 opinions each year represent an extremely limited check on the hundreds of thousands of decisions issued annually by the nation's federal and state appellate courts. And those decisions amount to an infinitesimally small colony when compared with the

grand universe of cases decided by the trial courts. The head vampires have only so much bite and sway over the minions who staff the land of the undead.

We can go back and forth about the constraints imposed on judges by the principle of law and the canons of judicial ethics, but for all intents and purposes, judges are basically immune creatures who are untethered by the rules which bind the mortals they used to be and left behind upon crossing over to the other side. No rational attorney would ever purposefully antagonize a judge out of fear of compromising the outcome of the case, but have you ever heard of a judge who was afraid of ticking off a lawyer?

Which leads me to the question I regret not asking former judges Mukasey and Wilkins since watching them endure the struggles that define our plight as lawyers: Once you have tasted immortality, can you ever truly go back?