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William J. Brennan Jr.

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By JUSTICE WILLIAM J. BRENNAN, JR.*

I must reveal at the outset my total bias for Chief Judge J. Skelly Wright, my warm, close friend for some eighteen years. I take great pride that every list of the outstanding judges of our time includes his name. He presides over what a newsmagazine very recently labelled—and accurately—"[t]he second most important court in the nation"[1]—the United States Court of Appeals for the District of Columbia Circuit.

Lively, even acrimonious, debate about the proper role of judges in a democratic society is ever with us. The judge who believes that the judicial power should be made creative and vigorously effective is labelled "activist." The judge inclined to question the propriety of judicial intervention to redress even the most egregious failures of democracy is labelled "neutralist" or "passivist." The labels are not synonymous with "conservative" or "liberal"; where yesterday "activist" was pinned on liberals, today it's on conservatives. As often as not, however, such labels are used merely to express disapproval of a judge's particular decisions. If useful at all, the labels may be more serviceable to distinguish the judge who sees his role as guided by the principle that "justice or righteousness is the source, the substance and the ultimate end of the law," and the judge for whom the principle is that "courts do not sit to administer justice, but to administer the law." Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view. Holmes' imaginary Society of Jobbists is limited to judges who hold a tight rein on humanitarian impulse and compassionate action, stoically doing their best to discover and apply already existing rules. But judges acting on the former view believe that the judicial process demands a good deal more of them than that. Because constitutions, statutes and precedent rarely speak unambiguously, a just choice between competing alternatives has to be made to decide concrete cases. A distinguished law dean has gone to the heart of the problem in saying ". . . the judge's role necessarily is a

* Associate Justice, United States Supreme Court.

1. NEWSWEEK, Dec. 17, 1979, at 99.

creative one—he must legislate; there is no help for it . . . when the critical moment comes and he must say yea or nay, he is on his own; he has nothing to rely on but his own intellect, experience and conscience."[2]

Chief Judge Wright has emphatically affirmed that he is not a Jobbist in the area of equal rights for the disadvantaged. In his Francis Biddle Lecture at Harvard he assured us "[In] the area of equal rights for disadvantaged minorities . . . I remain an uncompromising 'activist'."[3] In that area, in other words, he is of that school which believes that law "constitutes . . . a recognition of human beings as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence . . . jurisprudence [which in a scientific age] asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted . . . Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice."[4] Thus, for him in that area a legal concept is most worthwhile when it becomes relevant to the homely experiences of individual human beings.

But he has a different view of the role of the judge in reviewing administrative agency cases. His court, says the newsmagazine article, is the federal system's second most important because "[it] decide[s] if Federal regulatory agencies" that "proclaim rules governing Americans' air, health, food and job[s] have themselves followed the law."[5] In that role, Chief Judge Wright said in his Biddle Lecture "I believe the judges *should* retrench from their disposition to act as the final arbiters of the public good. We should, I think, be more reluctant than we have been to fault the other agencies of government and, also, more hesitant about filling the void when, in our judgment, the elected branches of government should have acted and failed. . . . We tend to forget that, once upon a time, it was not self-evident that judges had *any* business overseeing the work of departments or other agencies of government, except only as it was charged that constitutional rights had been violated. I am now wondering out loud why that is not the right

2. O'Meara, *Natural Law and Everyday Law*, 5 NATURAL LAW FORUM 83, 96-97 (1960) (footnotes omitted).

3. Francis Biddle Lecture by Chief Judge Wright, Harvard Law School (Oct. 16, 1979), *reprinted in* 15 HARV. C.R.-C.L. L. REV.—(1980).

4. ABA REPORT ON NEW TRENDS IN COMPARATIVE JURISPRUDENCE AND LEGAL PHILOSOPHY 506 (1964).

5. NEWSWEEK, Dec. 17, 1979, at 99.

rule; why courts should do no more than keep administrators within constitutional bounds."[6]

I don't think this marks Chief Judge Wright a Jobbist to that extent. Rather, I see it as further evidence of a quality so evident in his work of thirty years on the federal bench: the belief that what the law provides is a method for seeking wisdom, not wisdom itself.

Chief Judge Wright is a quiet, modest man, more embarrassed than happy with praise. That makes only the more fitting the dedication of this issue of the Hastings Constitutional Law Quarterly in his honor, in Learned Hand's words to "Acclaim one who—all unaware of his deserts—has so richly earned our gratitude."

6. Francis Biddle Lecture by Chief Judge Wright, Harvard Law School (Oct. 16, 1979), *reprinted in* 15 HARV. C.R.-C.L. L. REV.—(1980).