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Address of

FRANCIS BIDDLE

Attorney General of the United States

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in honor of

Mr. Justice Robert H. Jackson

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"I consider it no part of my duty", said Attorney General Jackson about a year ago, "to worship the Supreme Court or any of its Justices". That is a principle of general validity. Accordingly, Mr. Justice, I hasten to say that the spirit in which we gather here to-night is not the spirit of worship. It is, however, the spirit of devotion, a very different matter indeed. We are devoted to you for your clear mind and your warm heart, for your integrity, your courage, your wisdom, your artistry and your learning. We are devoted to you for great service rendered to the country and to the law; and for the even greater service you will render in the years to come. We are, in short, devoted to you as a friend, as a citizen, as a lawyer, as an official in positions of the highest trust and, finally, as a Justice of that Court which we all esteem but which, following your counsel, none of us permits himself to worship.

If we are not to worship the Court, it is clear that we must discuss it; and that is the alternative I intend to pursue. The subject has, to be sure, been vigorously preempted by the Justices themselves, writing prior to their appointments. But the last discussion of the Court by one of its present members is Mr. Justice Jackson's penetrating volume which happily was published over a year ago. That leaves the past term to feed the fires of further rumination; and it is of that term that I shall primarily speak.

The settlement of the constitutional crisis brought substantial unity on the Court with respect to the most explosive issues of the recent past - the proper role of the Court in relation to legislation and administration. The principle of this unity can be briefly stated:

The Constitution is to be read as the broad charter of Governmental organization and power it was intended to be, its general words and underlying conceptions adaptable to the needs of succeeding generations as the needs arise. That means, for the most part, liberal construction of those clauses which are vehicles of national power and narrow construction of those clauses which impose limitations upon Congress or which limit the power of the states without regard to national needs. But Governmental power is the instrument of a free people and a free people is one which maintains essential individual liberties at the core. Hence there is a point, however indefinite it may be, at which liberal construction stops and strict construction begins. That point is marked textually by the Bill of Rights and by those of its major provisions which are included in the Fourteenth Amendment as constituents of due process of law.

With respect to administrative agencies - instrumentalities indispensable in the modern world for getting things done - as with respect to legislation, the crucial insight is that so forcefully stated by Mr. Justice Stone: "Courts are not the only agency of government that must be assumed to have the capacity to govern". That means that judicial review performs its function when it vindicates the authority of the law and the decencies of fair procedure. Beyond this, the correction of errors of policy or of judgment is the business of the agencies which make them or of legislative reform.

Substantial unity on these difficult issues has the important consequence of appreciably removing the Court from the realm of political controversy, leaving a larger portion of its energies free to focus on the intricate legal problems which constitute the major work of the federal courts. The construction of the ever expanding corpus of federal statutory law and its application to the intricate diversities of contemporary experience, the jurisdiction of the federal

courts and their relationship to the courts of the states, the host of interstate adjustments which present federal questions - these are some of the abiding problems which assume an increased importance now that the great debate has come to an end.

There is, I know, an illusive simplicity in the statement of such generalizations. I do not press them for more than they are worth. Nor do I claim for the Court a capacity for unanimity which transcends its independence or the complexity of the problems which it must continually face. My point is only that there is a difference between disagreement that flows from the mortal clash of irreconcilable doctrines and that which derives from variant judgment in the application of principles and attitudes deriving from a common base. What is abidingly important in the revision of basic doctrine that began, it will be remembered, before any new appointments to the Court were made, is that the area of potential disagreement no longer embraces issues which can destroy the capacity of a free people to survive.

A number of decisions at the present term strikingly illustrate this shift in the locus of significant controversy, the redefinition that has occurred in the attributes that make cases close. A unanimous Court speaking through Mr. Justice Stone sustained the constitutionality of the Fair Labor Standards Act in both its substantive and its procedural provisions. Characterizing Hammer v. Dagenhart, the famous child labor case decided with bitter division in 1918, as "a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision", the Court declared that "such vitality, as a precedent, as it then had has long since been exhausted" and that it "should be and now is overruled". In the Appalachian

case and again in the case of the Denison River dam, the power of Congress under the commerce clause to develop and utilize the waterways of the country, of vital significance for flood control and electric power, was sustained in the broadest terms. In the Classic case, while the Court disagreed as to the applicability of existing statutes, there was unanimity of opinion that Congress may protect the franchise at Federal primaries as well as at general elections, notwithstanding the contrary implications of Newberry v. United States. A state statute regulating the fees of employment agencies was sustained without division on the Court; and with the announcement of the decision another famous dissent, that of Mr. Justice Stone in Ribnik v. McBride, became the law of the land. In a decision limiting the power of Federal courts to punish summarily for contempt there was once more disagreement as to the interpretation of the applicable statute but united disapproval of the historically untenable view, set forth in Toledo Newspaper Co. v. United States, that the contempt powers of the lower Federal courts are wholly unrestricted by the statute. In American Federation of Labor v. Swing, the decisions of the previous term according constitutional protection to peaceful picketing as the workman's freedom of speech were reaffirmed and broadened in a striking opinion by Mr. Justice Frankfurter. While Chief Justice Hughes and Mr. Justice Roberts dissented, their disagreement was as to the question presented not as to the way in which it should be resolved.

Issues such as these exemplify the area of substantial agreement to which I have referred. But if the area of disagreement has shifted, disagreement itself has survived. At the last term 164 cases were decided with written opinions. Dissents were recorded in 47; and reargruments were ordered in 13 cases, in 8 of which an equal division was made known.

The dissents were distributed as follows: Mr. Justice Roberts: 30; Chief Justice Hughes: 23; Mr. Justice Black: 15; Mr. Justice Douglas: 15; Mr. Justice McReynolds (until his retirement on February 1); 8; Mr. Justice Reed: 8; Mr. Justice Stone: 6; Mr. Justice Murphy: 6; Mr. Justice Frankfurter: 2.

A lawyer with only minimal curiosity, viewing these 55 cases capable of dividing the Court, challenges himself to define a new area of disagreement and, by this familiar alchemy, to forecast the future trend of the Court.

It is one of the vices of statistics that the phenomena which they measure they rarely explain. Hence we must beware in drawing inferences from the number and allocation of dissents. It is, however, interesting to observe that in 20 of the cases in question Chief Justice Hughes and Mr. Justice Roberts were joined in dissent. In two of these cases their views were shared by Justice Stone and in two others by Justice Reed; in none by any other of the present justices, though Chief Justice Hughes and Justice Stone joined in four cases without Justice Roberts, in one of which they were accompanied by Justice Reed. On the other hand in the 15 cases in which Justice Black and Justice Douglas were joined in dissent, they were joined by Mr. Justice Roberts in 2, by Mr. Justice Reed in 4, by Mr. Justice Frankfurter in 2 and by Mr. Justice Murphy in 6. This suggests a certain special congeniality of view on the part of Chief Justice Hughes and Justice Roberts on the one hand and of Justices Black and Douglas on the other, with Justices Stone, Reed, Frankfurter and Murphy occupying a more central position on the Court. And if we are to press the number of dissents for the ultimate statistical possibility, it might be suggested that Mr. Justice Frankfurter, who dissented only twice and in each case wrote a separate opinion, occupied the uniquely central position on the Court.

I hasten however to withdraw from this minor foray in the realm of statistics, the pitfalls of which are so clear. In the first place, the changes in the personnel of the Court which came after the close of the term, deprive this data of even its minimal significance. In the second place, if the decisions of the past term teach a lesson as to the direction of the Court, we must find it in an analysis of the cases rather than in the quantity of dissents. Accordingly, I turn to a few of the decisions which in such an analysis would play a uniquely important part.

The most striking of these is in many respects the Meadowmoor case decided with an opinion by Justice Frankfurter on the same day as the Swing case to which I have already referred. In both decisions the Court affirmed that peaceful picketing, even when it is an instrumentality of a secondary boycott, is within the freedom of speech and assembly protected by the 14th Amendment and cannot constitutionally be enjoined by a state equity court. In the Meadowmoor case, however, the injunction was sustained on the ground that violence and intimidation found to have occurred in the course of the picketing justified the state court in concluding "that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful"; and that, to the extent that this was so and continues to be so, picketing could constitutionally be enjoined.

In other words the majority held that peaceful picketing could be enjoined when by reason of the background there was support for the view that even peaceful picketing would give rise to a reasonable fear of violent coercion on the part of the parties adversely affected. Dissents were recorded by Justices Reed, Black and Douglas, all of whom agreed that even a background of violence

afforded no justification for enjoining peaceful picketing in the future; Justices Black and Douglas in addition challenged the findings, with respect to the extent of violence, made by the state court.

The closeness of the issue which divided the Court is evidenced by the fact that all the Justices agreed that a state court is free under the Fourteenth Amendment to enjoin violence itself; and that "disassociated acts of past violence" are not sufficient to justify an injunction against future peaceful picketing. The majority holds that an injunction "justified only by the violence that induced it and only so long as it counteracts a continuing intimidation" must be sustained, and it does so in deference to the serious consequences involved in permanently depriving a state of the power to deal in this way with coercion deriving from a background of "extensive violence." Justice Black, with whom Justice Douglas concurred, finds even this view "so general and sweeping in its implication that it opens up broad possibilities for invasion" of the right of freedom of speech.

It would be futile indeed to deny that the issue thus posed, however narrow, contains the seeds of real disagreement. In a sense, the issue is trapped in the vortex of opposed principles, both of them implicated in the liberal position dominant on the Court. The struggle over constitutional doctrine was in large part a struggle for freedom for the people of the states, in the exercise of the democratic process, to order their legal relationships without paralyzing constitutional restraint. This is one principle. The democratic process cannot function unless there is ample freedom to present and dramatize grievances and to discuss public problems in the ways which time and circumstance indicate to be effective; some elements in the legal order are themselves

essential constituents of democracy. This is the opposing principle. The importance of reconciling these competing principles can hardly be overstated, especially at the present time. It was after all the last war which first acutely projected into the Supreme Court the issue of freedom of speech; and history has a way of repeating itself, in spite of Max Beerbohm's icy observation that it is only historians who are repetitious. In any event, if there is any issue of basic significance with power to work deep division in the present Court, I suspect that it is this abiding problem of the place of the judiciary in a democracy, which now has its major vitality largely in the realm of civil rights.

While the Meadowmoor case thus presents a constitutional issue which is entitled to major rank in appraising the position of the Court, it is also a striking illustration of the shift in the realm of significant controversy to which I referred a while ago. For as I said before, the Swing case and to some extent the Meadowmoor case itself reaffirm and extend the rule that peaceful picketing is included within the protection of freedom of speech. Yet it is not so very long ago that constitutional controversy centered - not on the precise scope of the protection of peaceful picketing - but rather on the constitutionality of legislation enacted to accord to picketing and similar labor activities a minimal freedom from judicial restraint.

If the new Judges were divided on the vexatious constitutional issue posed by the Meadowmoor case, they were united on the issue of statutory construction presented by the Hutcheson case. In an opinion also by Mr. Justice Frankfurter, a majority held that an indictment, alleging that the officers of a labor union had by the conduct of a jurisdictional strike obstructed the flow of goods in interstate commerce, stated no offense under the Sherman Anti-trust

Act. It will be recalled that the Clayton Act, enacted in 1914, contains a broad provision exempting conventional labor union activity from the reach of the general condemnation contained in Section 1 of the Sherman Act. In the Duplex case and again in the Bedford Cut Stone Co. case, this exemption was subsequently held by the Court to be substantially restricted to labor activity by employees directed against their own employer. Grave criticism of these decisions led ultimately to the enactment of the Norris-La Guardia Act in 1932, imposing rigorous limitations on the power of Federal Courts to issue labor injunctions. The "public policy of the United States", as formulated in the Norris-La Guardia Act, was relied upon by the Court in the Hutcheson case as a legislative disapproval of the trend of decision under the Clayton Act and a restoration of the exemption contained in that Act to what was apparently its actual intent. Thus the Duplex and Bedford cases are now effectively overruled, though less in reliance on the proposition that they were wrong than on the proposition that they have been congressionally disapproved. Mr. Justice Stone thought the indictment insufficient even under the earlier cases and, therefore, in concurring, found no occasion to consider the impact of the Norris-La Guardia Act. Chief Justice Hughes and Justice Roberts dissented on the ground that the Norris-La Guardia Act was addressed only to the use of the injunction, leaving untouched the criminal provisions of the Sherman Act as qualified by the Clayton Act. The point of the dissent is that when the problem was presented to Congress, it chose to adopt the limited remedy of legislating against the injunction rather than the broader remedy of modifying the Sherman Act itself or the rule of the decisions interpreting the Clayton Act. The majority opinion, undeniably bold in attributing such "hospitable scope to Congressional purpose even when meticulous words are lacking", evidences the keen sensitivity of the

Court to the overtones of legislation furthering labor's rights. All the more striking in contrast, is the cautious approach to the constitutional issue in Justice Frankfurter's opinion in the Meadowmoor case.

The Meadowmoor decision was the only one at the present term, involving a constitutional issue, which ended with potentially significant division on the Court, though I note in passing that reargurments were ordered in the Bridges and Los Angeles Times contempt cases, which also involve issues of freedom of speech. In one case involving economic regulation a majority found a clear impairment by a state of the obligations of its own contract, Justices Black, Douglas and Murphy dissenting (Wood & Knowlton v. Lovett, No. 709, decided May 26), but it is difficult to perceive in this single instance the seed of large controversy in that previously crucial field.

For the most part disagreement centered on the interpretation of Federal statutes. Statutory interpretation is often enough a complex process which, as the Court has frequently pointed out, is not to be fettered by artificial "rules" of construction. The ultimate test of congressional intent states the point of the inquiry but hardly suggests the multiplicity of factors entitled to weight when language is ambiguous and intention vague. Hence issues of interpretation sometimes present an appropriate vehicle for bringing to bear upon the judicial process competing conceptions of what is desirable as well as competing versions of fact. But there is a distinction between the interpretation of legislation and the process of legislation itself; and the content of that distinction marks the distribution of power between legislature and court. So it is that decisions involving construction implicate the balance of political power and may have a significance comparable to constitutional adjudication in evidencing the temper of a Court.

One of the most interesting and important issues of this sort presented at the past term was that involved in the Classic case. As I said before, the decision in its constitutional phase makes clear that Congress has the power to protect the integrity of primaries to determine candidates for Federal office as well as to protect the general election itself. The decision also holds that the right of qualified electors to vote at the primary is an aspect of the right to choose representatives conferred by Article I, Section 2 - and thus a right secured by the Constitution - if either of two conditions is met (a) if, under the governing state law, the primary is an "integral part" of the electoral process; or (b) if as a matter of fact, the primary is decisive of the ultimate election. Precisely the same result would follow in senatorial primaries under the 17th Amendment. On these points I do not understand that any of the justices disagree. But the decision holds finally that Sections 19 and 20 of the Criminal Code which, in general terms, punish interference with the exercise of Federal rights, apply to interference with voting at a primary to the extent that the right to vote is thus secured by the Constitution of the United States. On this point Justices Douglas, Black and Murphy dissented.

You will recall that the statutes in question derive from the Enforcement Act of 1870 which was largely intended to protect the franchise, particularly that of the newly emancipated Negroes. But in 1894 Congress repealed most of the provisions of the statutes specifically regulating elections. Accordingly it was argued that even when the right to vote is secured by the Constitution it would be contrary to the intention of the repealers to hold that it continued to be protected by the general provisions of the civil rights statutes, which .

were not repealed. This argument was rejected by a divided Court in United States v. Mosley, 238 U. S. 383, in an opinion by Mr. Justice Holmes. The position of the majority in the Classic case, expressed in the opinion by Justice Stone, was that the rule of the Mosley case necessarily applies to voting at the primary as well as at the general election when "in one as in the other it is the same constitutional right which is infringed." The minority emphasize the fact that primaries did not come into general use until long after the enactment of the statute. They point to the criminal penalties provided by the statute, to the Congressional tradition of maintaining a large measure of state autonomy in the policing of elections and to the somewhat uneven application of the statute to primaries, if it applies only when the primary is decisive in fact or when the state law attributes to its results consequences which are restrictive of the general election. These considerations led them to reject the logical application of the Mosley case, which they did not seek to overrule, and to leave the issue to Congress for the exercise of its newly declared power.

It is difficult to believe that this disagreement as to construction derived from deeper differences as to the underlying desirability of enhancing the legal protections of the federal franchise. It is, therefore, fair to regard the decision as testing - insofar as a single decision can - the extent to which the application of statutes to situations beyond specific contemplation at the time of enactment - should be accomplished by the Courts or left to the process of amendatory legislation. Viewing the Classic case alone, one might be tempted to infer that Justices Black, Douglas and Murphy are the partisans of strict construction on the Court. But in two other cases at the same term, similar considerations were in the balance and the positions were strikingly reversed.

The question in Federal Trade Commission v. Bunte Brothers, (No. 85), was whether the jurisdiction of the Federal Trade Commission over "unfair methods of competition in [interstate] commerce" includes the power to prohibit an unfair practice in intra-state sales, barred to competitive vendors whose sales are interstate. The issue was, in substance, whether the jurisdictional formula includes the power to protect interstate commerce from the unfair competition of commerce wholly intrastate. The Commission had not previously asserted the power. In an opinion by Justice Frankfurter, stressing this fact, the Court held that an "inroad upon local conditions and local standards of such farreaching import . . . ought to await a clearer mandate from Congress". Justices Douglas, Black and Reed dissented in an opinion by Justice Black, urging that the Act, "an exercise by Congress of its commerce power, should be interpreted to protect interstate commerce, not to permit discrimination against it." With respect to the argument that the power had not been claimed, the minority answered: "Mere non-use does not subtract from power which has been granted."

There was a similar division in the Cooper case holding that the Government is not, within the meaning of Sec. 7 of the Sherman Act, a "person" who, when injured in person or property, may bring suit for treble damages. This time Justice Reed sided with the majority, Justice Murphy did not participate, but dissent was registered once more by Justices Black and Douglas in an opinion by Justice Black. While the majority thought that the statute distinguishes sharply between the remedies available to the Government and those available to private parties and adduced, to support this view, the fact that the Government had not previously brought an action for treble damages, the dissenters attributed controlling importance to the proprietary interest of the Government as the largest single purchaser in the United States and to the plausibility of supposing that

Congress did not intend to exclude it from remedies available to other purchasers injured by restraints of trade. Again the issue turned on strict or liberal construction of an existing statute which Congress has the power to amend.

You will not conclude from what I have said that I think these decisions inconsistent or that I would see the course of adjudication set in some more rigid mould. Were that my purpose I should not base my thesis upon a summary so inescapably brief. On the contrary, I put these illustrations to show that the Gilbertian dichotomy between liberals and conservatives hardly suffices for appraising the work of the present Court. The area of agreement on basic issues completely overshadows the area of actual or potential disagreement. If difference of opinion develops in the constitutional field typified by the Meadowmoor case, it will turn on the opposition of two principles, each of them liberal in any significant sense of the tradition that bears that name. Finally, the variant positions that have been taken with reference to the construction of particular statutes hardly suggest pervasive differences in values or technique. The significant point is rather that when close cases are examined by judges all of whom recognize what Justice Frankfurter has called the "importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment", disagreement is bound to occur. We would not have it otherwise, if we could - for it is the abiding indication of the sensitivity and the independence of the judicial process.