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Tribute to the Honorable J. Skelly Wright

William J. Brennan, Jr.†

J. Skelly Wright, my close and dear friend of over 30 years, was a remarkable man. The brilliant achievements he crowded one upon another in almost 40 years on the federal bench richly earned him his national reputation as one of the outstanding jurists of the nation's history. His lasting impact in shaping the development of the law of civil rights and liberties has vastly enriched us all.

It is of course true that some of his most notable decisions were greeted with harsh and bitter invective. The charge was that he was an "activist judge," exceeding his proper role. This, of course, is not an unfamiliar charge. But since our beginnings, lively, even acrimonious, debate about the proper role of judges in a democratic society has been with us. The judge who believes that the judicial power should be made creative and vigorously effective is labeled "activist." The judge inclined to question the propriety of judicial intervention to redress even the most egregious failures of democracy is labeled "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,

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however, such labels are used merely to express disapproval of a particular judge's 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," from the judge for whom the guiding 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, and Skelly Wright was one, believe that the judicial process demands a good deal more of them than that. Because constitutions, statutes and precedents rarely speak unambiguously, a just choice between competing alternatives has to be made to decide concrete cases. Skelly Wright would argue that in such cases "the judge's role necessarily is a 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."¹

Skelly Wright emphatically affirmed that he was not a Jobbist in the area of equal rights for the disadvantaged. In his Biddle Lecture at Harvard Law School, he assured us "in the area of equal rights for disadvantaged minorities I remain an uncompromising activist."² For he steadfastly adhered to the principle 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 preeminence."³

Skelly Wright urged unceasingly that the equality principle "is the rock upon which our constitution rests," and that "the noblest mission of the judiciary" is to foster the development of that principle.⁴ He warned against any view that was insensitive to the legitimate claims of the powerless and would not give full and proper effect to their constitutional right to equal treatment. "Much of what I have sought to do on the bench," he said, "has been aimed at combating this risk."⁵ Not, he went on, that there had not been some glory days for the equality principle. He rejoiced that modern constitutional jurisprudence was abandoning the

1. O'Meara, *Natural Law and Everyday Law*, 5 NAT'L L. FORUM 83, 96-97 (1960) (footnotes omitted).

2. Francis Biddle Memorial Lecture by Chief Judge Wright, Harvard Law School (Oct. 16, 1979), reprinted in 15 HARV. C.R.-C.L. L. REV. 1 (1980).

3. *Report of the Committee on Comparative Jurisprudence and Legal Philosophy 1964 PROC. A.B.A. SEC. OF INT'L & COMP. L.* 175, 198.

4. Wright, *Equality and the Rule of Law: Riding the New Wave of Constitutional Scholarship* (unpublished address; place of delivery unknown) (on file at *Yale Law Journal*).

5. *Id.*

Framers' narrow use of the word "men" to exclude blacks, women and the poor. Skelly Wright's plea was that the equality principle be even further expanded. "In the future," he said, "I pray that we will see the equality principle take on even further meaning, that it will evolve to encourage still broader participation in governmental affairs and social life."⁶ His vision was of rulers and the ruled united by a sense of their common humanity. In this vision, the essence of the relationship between state and citizen is the relationship between one human being and another, each entitled to his fair share of society's riches. By opening a window to his own struggles in exercising authority, Skelly Wright gave us a richer sense of why the law and judges had the responsibility to bring this about. As he demonstrated, judges cannot console themselves with the belief that reliance on formal rules alone, without compassion, can ever be sufficient to be faithful to the vision.

Skelly Wright was a quiet, modest man, more embarrassed than happy with praise. He was a man of principle, and a wholly compassionate complete human being who never lost sight of the human dimensions of the great problems that confront society. We are a better America because Skelly Wright lived. We will miss his person, his inspiration, and the gay spirit that endeared him to us all.

6. *Id.*

