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A TRIBUTE TO D. DORTCH WARRINER

The Editorial Board and Staff of the University of Richmond Law Review respectfully dedicate this issue to the memory of D. Dortch Warriner, 1929-1986. Before his untimely death, Judge Warriner had served as United States District Judge for the Eastern District of Virginia for nearly twelve years. Judge Warriner received his legal education at the University of Virginia School of Law, graduating in 1957. He practiced law in Emporia, Virginia, before his nomination to the federal bench. In the following essay, delivered by Judge Warriner as a speech at the T.C. Williams School of Law on March 19, 1985, he stated his views on the role of the judiciary in our society. This essay, together with the tributes of his colleagues, serves as a tribute to the Judge's memory.

OF LAWS, MEN, AND JUDGES*

*D. Dortch Warriner***

In the year 1774, during the period when our nation was in gestation, the patriot John Adams, with the eagerness of an expectant father, proclaimed in his hometown newspaper, *The Boston Globe*, that the great undertaking of creating the republic would result in a new kind of government: "A government of laws, and not of

* This essay was originally delivered by Judge Warriner as a speech on March 19, 1985, at the T.C. Williams School of Law, University of Richmond. Copyright 1985 by D. Dortch Warriner, all rights reserved.

** Judge, United States District Court for the Eastern District of Virginia, 1974-86; B.A., 1951, University of North Carolina; LL.B., 1957, University of Virginia.

men.”

I can almost hear you inwardly groan at once again being addressed in terms of this familiar old saw. But this old saw was a radical, indeed, revolutionary idea in 1774. While I don't claim I am privy to new or riveting insights on the subject, I do proclaim the continuing and *essential* nature of the concept of the rule of law. And I remind you, that was radical and revolutionary in 1774. At the time of the American Revolution, the familiar form was a government of men, such as a monarchy headed by a king or queen enjoying absolute power. The monarch was, properly speaking, a despot or a tyrant. The relationship between the people and the government depended almost entirely upon the nature of the person who happened to be their ruler.

The ruler may have been a benevolent tyrant, that is, one who used his power to do good and to achieve justice. The archetype in the Anglo-Saxon heritage is, of course, King Arthur. On the other hand, the ruler might have been a vicious tyrant, that is, one who used his power in a cruel and oppressive manner. The modern model for this type would be Josef Stalin. The people's livelihood, or lifestyle—at least insofar as it was affected by their government—in either case depended upon the disposition of the person who ruled.

To the early Greeks such a government, headed by a despot with absolute power, was not considered an evil. To the contrary, the Greeks considered such a government to be the best and most sensible attainable. In *The Iliad*, Homer wrote, “A multitude of rules is not a good thing. Let there be one ruler, one kind.” Plato envisioned a government of “philosopher kings” wielding absolute power.

One reason why the early Greeks espoused a government of *men*, entrusted with absolute power, was the tremendous potential in such a government for the attainment of a good and just society. Indeed, the despot would be chosen, by man or by the gods, *because* of his goodness, wisdom, and decency. These qualities of goodness, wisdom, and decency, combined with the despot's absolute power, would, according to Plato, produce a just and contented society.

However, when we depend on despots for justice—even though such despots be good people with good judgment—we necessarily must submit ourselves to injustice, to bad despots with bad judg-

ment or, even worse, to good despots with bad judgment.

More important, under a despotism we speak in vain when we speak of the rights of man. There *are* no rights under a tyrant. At best, in a tyrant's court, the quest is for justice.

But the justice sought in a tyrant's court is not defined by recourse to laws or by a concept of rights. A tyrant's justice is defined by the *tyrant's* notion of what justice should be. There is no externally imposed certainty; there are no inviolable standards; there are no individual rights. Rights, properly so called, exist only when we seek to apply the law. For in the law there is certainty; in the law there is an appeal, beyond the judge's sense of justice, to his bounden duty to apply the law. Under law the nature of the human being who happens to sit on the bench recedes in importance. The nature of the law itself becomes paramount.

The American colonists knew all too well the dangers of a government of men. Our forefathers were the subjects of a king; they were the beneficiaries and they were the victims of his tyranny. Our forefathers knew the dangers of tyranny because they could see them, they could hear them, they could touch them. They knew that absolute power, no matter in whom entrusted, was inherently and inevitably dangerous. As John Adams wrote to Thomas Jefferson: "The fundamental article of my political creed is that despotism, or unlimited sovereignty, or absolute power, is the same in a majority of a popular assembly, an aristocratical council, or oligarchical junto, and a single emperor."

With full knowledge of the inherent, *inevitable* evils of absolute power entrusted to any one person or group of persons, the framers of our Constitution set about deliberately to construct a government not of men but of laws. In a government of laws, absolute power rests not with tyrants, be they few or many. In a government of laws, absolute power rests not even in the law itself. In a government of laws, absolute power rests ultimately and over time with the people.

Our government of laws was ingeniously crafted to disperse governmental power in such a way that no single governmental entity or combination of governmental entities could ever enjoy absolute power and thus impose upon the great body of the people a tyranny.

May I remind you from your freshman civics class that to this end the powers of government were divided between the states and

the central government. The federal system was not formed for convenience or even for efficiency; it was formed deliberately to disperse power. The powers of the central government itself were distributed among three co-equal branches of government—the executive, the legislative, and the judicial. An intricate and overlapping system of checks and balances among the coordinate branches of the federal government was written into our supreme law, the Constitution. The Constitution was made difficult to amend by transient majorities. *One* of these three branches of *one* of these governmental entities is the subject of this speech—the federal judiciary.

The Supreme Court decided in 1803, in *Marbury v. Madison*, that courts have the power and the authority to declare acts of Congress unconstitutional. *Marbury v. Madison* established the courts' power to make authoritative determinations of constitutional law. The exercise of this power has come to be known as judicial review. So much is elementary and, in an ordered society, exemplary. But even at that early date Chief Justice Marshall recognized the mischief which judicial review might give rise to. He asked, "Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government?"

Armed with the power of judicial review, the federal judiciary, in a given case or controversy, is permitted, indeed required, to review any act of the other two branches of the federal government and any act of the state governments to determine whether the act accords with the Constitution of the United States. This power of judicial review extends to the acts of the Congress, the President, every officer and agency of the executive branch, every state governor, every state legislature, every state officer and agency, every political subdivision of each state, and to large numbers of private persons and corporations.

I mention the nature and the extent of the power of judicial review to emphasize how *immense* is the power vested in the federal courts. The enormity of the power of the federal courts should impress upon us all the need for close, continuous, and *suspicious* scrutiny to determine whether the federal judicial power is being exercised properly—that is, whether the exercise of the federal judicial power comports with the requirement that ours be a government of laws and not of men.

Recognizing that, under the rule of law, the law as adopted by the people provides the standard for review, let us examine our faithfulness to this standard.

A current biography of a former Chief Justice of the United States and a recent newspaper interview with a sitting justice set forth, quite candidly, a composite standard for judges to follow. This standard is and has been followed by many on the federal bench in recent decades.

Describing the former Chief Justice's jurisprudential approach, his biographer, a distinguished professor of law just up Interstate 64 from here, observed with admiration and approbation that the Chief Justice "equated judicial lawmaking with neither the dictates of reason, as embodied in established precedent or doctrine, nor the demands imposed by an institutional theory of the judge's role, nor the alleged 'command' of the constitutional text, but rather with his own reconstruction of the ethical structure of the Constitution." The Chief Justice's biographer noted that this method of judging had been equated with "'dispensing law . . . without any sensed limits of power except what was seen as the good of society.'"

In the recent newspaper interview, the sitting Justice told the reporter: "I think we are there to try to do justice to [the litigants]." The interviewer continued: The Justice "believes he is there to *do* justice, not merely to oblige its doctrinal demands Unencumbered by precedent, [the Justice] votes instead in accordance with his sense of fairness."

Such judicial activists premise their analysis on the assumption that law is a fluid mix of established principles and changing social values. They believe that judges should, in making their interpretation of the Constitution, transcend the traditional professional limits of text and debate record and recognize the importance of intuitive abstract values such as fairness and equality and liberty and autonomy. Professor White at the University of Virginia has recently written: "Judges have not been and cannot be confined, in their interpretations of the Constitution, to the explicit words of the constitutional text or to the original intentions of the framers [T]he dimensions of moral reasoning of a court opinion is its crucial source of legitimacy, and that dimension cannot be reduced to 'professional' techniques of interpretation."

To summarize, the standard attributed to these two Justices is

that federal judges, and more particularly the Justices of the Supreme Court, have a mission. That mission is to do justice as they see it. Justice is to be achieved through their individual and collective sense of fairness, compassion, decency, goodness, and mercy. They are not to be confined by what are sometimes known as technicalities or by pre-existing acceptance of what is just. Their role is to be the people's guardian; they are there to light the way, to emblazen the path for truth and justice. Necessarily then, they cannot be restrained by old-fashioned traditions, by history, by reason, by acts of Congress, or even, in an extreme case, by the Constitution itself. Their preeminent mission to do justice must come first.

How glorious it all sounds. Indeed, how glorious it is! The vision is of the kind, wise, and benevolent judge as our guardian, our grandfather, always there to right the wrong and to uphold the weak. The idea is based upon goodness and decency; it is permeated with equality and fraternity.

But we cannot help but be reminded of the sirens' song: though forewarned, Ulysses could not resist that haunting call. All of us—judges, lawyers, citizens—also find it difficult, well nigh impossible, to resist such a haunting call: the call to do justice. But resist we must if we are to maintain our liberty. Resist we must if the genius of the American Revolution is to be preserved.

George Washington, in his farewell address, issued this emphatic warning:

If in the opinion of the People, the distribution of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Every time a judge uses his or her office, not to determine and apply the law, but instead to enforce his or her ideas of fairness or justice, that judge is guilty of usurpation and of tyranny; that judge, as President Washington realized, destroys some of our freedom.

An astute political observer, Harry Downs, of Atlanta recently wrote in *Judicature* magazine, the journal of the American Judicature Society:

If a Republic is a society which entrusts the powers of government to representatives elected and responsible to the people, then judicial law-making is the very antithesis of republican government.

. . .

The basic premise of republican government is not that a people will always be governed *best*, but that they will be governed *as they then think best*. Consent of the governed is, therefore, a fundamental premise of republican government. Judges, when acting *within* the Constitution, affirm the principle of consent, since the Constitution was adopted by the people acting through representative bodies, and its enforcement implements that consent. When they act outside the Constitution, however, judges make law through a process that does not depend on—or even seek—that consent. Hence the practice of judicial law-making violates a first premise of republicanism: consent of the governed.

Perhaps not as basic to our understanding of the republic as the consent of the governed, but clearly fundamental to our own peculiar system in this country, is the doctrine of separation of powers. The framers, though well aware of the tradition of judge-made common law, allocated to the Congress *all* legislative authority. When Congress adopts legislation we may conclude that the competing interests and attempts at compromise and conciliation have eventuated and have been reconciled in a particular manner. When courts venture to reinterpret and even rewrite legislation they are effectively destroying the bargain reached in Congress. If the compromising parties can be denied the benefits of their bargains, they lose all incentive to achieve consensus in the first place.

You may argue that a court would never venture to rewrite legislation. Yet the Supreme Court obviously did that in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). Let me share with you the views of Justice Blackmun in his concurring opinion:

While I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent, . . . concerning the extent to which the legislative history of Title VII clearly supports the result the court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the court today

Id. at 209 (citation omitted).

In *Weber* the court deliberately misconstrued the Act to hold that it was not unlawful to discriminate against an individual with respect to his employment if the victim of the discrimination is a white male and the discrimination is part of a private program to improve minority opportunities. The plain language of the statute and the intent of Congress as reflected in the legislative history were both flatly contrary to the *Weber* holding.

Another aspect of the invasion of our principle of separation of powers is viewed when the void of congressional inaction is filled by judicial legislation. *Roe v. Wade* and *Doe v. Bolton* are both clear examples of the judicial filling of what was perceived as a legislative void. A political-minded Congress that perceives a means whereby it can avoid cracking the tough nuts will more and more pass them on to the courts. This shifting of law-making responsibility, whether it be conscious or unconscious, is reflected in the fact that most of the truly far-reaching and fundamental changes in our laws, with which you are familiar, were enunciated by the Supreme Court of the United States rather than the Congress of the United States.

Another of our fundamental concepts is that a government must protect minority rights. A judiciary that has refrained from law-making and has not laid waste its prestige in activists' pursuits, a judiciary which is perceived as being "above politics" enhances its ability to facilitate the orderly resolution of conflict between majority rule and minority rights.

Consistent with the idea that we are governed by the consent of the governed, but containing a slightly different twist on that idea, is the idea that the legislative process should be responsive to the electorate. Judicial legislation, of course, lacks appropriate responsiveness to the popular will. Judicial legislation is bereft of the benefits of hearings, open floor debates, consultations with constituents, lobbying by various groups. Judges are not free to investigate any matters that require attention. They must decide only cases or controversies brought before them by litigants. The judges do not seek out and question witnesses. They must be content to hear the witnesses brought forward by the parties and listen to the evidence elicited through the questions asked by counsel. Generally speaking judges are not empowered to reach compromises between competing interests. They must decide the case one way or

the other. Having made a bad decision as to what the law is, judges cannot simply correct it at the next session. They must await an open violation and the initiation of litigation before they can act to reverse an erroneous decision.

Professor White, the judicial activist apologist, is aware of this problem, and his solution is extraordinary:

I believe that the American public has a meaningful device to signify its collective disapproval of . . . a court decision [T]he public can simply not abide by the decision. Decisions of the court require implementation; they can be subverted by the implementers or those affected by the decision A judgment by segments of the public that [refuses to] follow a court's decision is the equivalent of a judgment . . . [to] . . . vote a legislator out of office.

As we readily recognize, that way lies anarchy and that way lies the destruction of all minority rights. Where will minorities go to school if the majority simply refuse to obey school attendance or busing orders? Where will they eat or sleep if restaurateurs or motel keepers simply refuse accommodations?

Paul Brest, a leading spokesman for an activist interpretation of the Constitution, said:

Many scholars and judges reject the major premise, that constitutional interpretation should depend chiefly on the intent of those who framed and adopted such a provision [W]hatever the framers' expectations may have been, broad Constitutional guarantees require the court to discern, articulate, and apply values that are widely and deeply held by our society.

It would appear impossible to describe an issue more apt for *legislative* treatment than one that is "widely and deeply held by our society." If it indeed be widely and deeply held by our society we could assuredly expect legislators to respond and in so doing reach a balance with other widely and deeply held values. Legislators are equipped and intended for this specific task. Judges are neither equipped nor intended to discern, articulate, and apply values. They are equipped and intended to discern, articulate, and apply the law.

A contrasting view was expressed by Justice Harlan in *Oregon v. Mitchell*, 400 U.S. 112, 203 (1970):

When the Court disregards the express intent and understanding of the framers, it has invaded the realm of the political process to which the amending power was committed, and it has violated the constitutional structure which it is its highest duty to protect.

The ugly spectre of so-called "substantive due process" is again being seen about the land. Thought to be dead and buried, it has been resurrected by the activist judges to be used against acts of the state which the judges believe to be wrong. Once it was the liberals who decried substantive due process when it gored their ox. Now they gore with alacrity. In 1963 in *Ferguson v. Skrupa*, 372 U.S. 726, 731, substantive due process was at its nadir. The Court referred to:

our abandonment of the "vague contours" of the due process clause to nullify laws which a majority of the Court believed to be economically unwise. We have returned to the original constitutional principle that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who are elected to pass laws.

In the twenty-odd years since 1963 when the Court announced its abandonment of the vague contours of the due process clause, we have seen repeatedly, to the point of the commonplace, the Court discerning finely etched laws in those vague contours.

It may be argued that we cannot turn back the clock but in 1938 in *Erie Railway v. Tompkins*, the Court turned back the clock of the 1842 holding in *Swift v. Tyson*. Justice Brandeis in *Erie* branded the *Swift v. Tyson* doctrine as an "unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."

Addressing a judge's resort to his "individual sense of justice," Cardozo wrote, "That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law."

Our system is committed to equal justice *under* law, not to Justices above the law. Judges are not authorized to revise the Constitution in the interest of "justice."

Alexander Hamilton agrees:

Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding . . . and no presumption, or even knowledge, of their sentiments, can warrant their representatives, in a departure from it, prior to such act.

The Federalist No. 78 (A. Hamilton).

Let us examine again Professor White, an advocate of judicial activism, as he confesses its attributes, quoting from his biography of Chief Justice Warren:

Warren had based his purported usurpation of legislative prerogatives on an interpretation of the Constitution that was neither faithful to its literal text nor consistent with the context in which it had been framed. He had substituted homolies for doctrinal analysis.

In none of the leading activist Warren Court decisions was a constitutional mandate obvious. *Brown v. Board of Education* reversed a long-established precedent on the basis of social science evidence. *Baker v. Carr* found a judicial power to review the political judgments of legislators when none had previously existed. When one divorces Warren's opinions from their ethical premises, they evaporate They are individual examples of [Warren's own] beliefs leading to judgments.

Justice Douglas and Chief Justice Warren were at one in their guideline to constitutional interpretation. Douglas frankly avowed that in constitutional adjudication "the gut reaction of a judge . . . was the main ingredient of his decision." White placed Warren's method in somewhat more elegant terms. What Douglas had referred to as a "gut reaction" White called "the ethical imperatives that guided Warren as a judge." He concluded, however, that these "ethical imperatives" reflected Warren's personal morality.

Justice Story in his commentaries on the Constitution of the United States commented:

Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is pro tanto the establishment of a new Constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator

Now I do not mean to suggest that judges who disregard the law and the Constitution to do what they believe is decent, wise, good, and just are by their nature evil persons. Quite the contrary is true. Evil or bad persons are fairly easy to spot and are as easily struck down. Persons who are appointed to the bench are almost always persons of good character and decent behavior.

But the tyrant need not be an evil man or have an evil purpose to be a precursor of evil. Indeed as I mentioned earlier, one of the most dangerous of tyrants is the good man with bad judgment. As Sophocles noted, "How dreadful it is when the right judge judges wrong!" We accept unintended evil from good persons much more readily, and unsuspectingly, than from overtly evil persons.

C.S Lewis, the late Christian philosopher, wrote:

The modern state exists not to protect our rights but to *do us good or make us good*—any way to *do something* to us or make us *something*. Hence the new name "leaders" for those who were once "rulers." We are less their subjects than their wards, pupils, or domestic animals. There is nothing left of which we can say to them, "Mind your own business." Our whole lives *are* their business.

At another point, Lewis said:

Of all the tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busy-bodies.

When we think of the government as the final source of protection from the evils of men, we must remember that it was the government that killed both Christ and Socrates, two of the freest and grandest minds of Western civilization.

The good judge's tyranny, even though it be benevolent, comes from the displacement of the people's law. Every time the judge substitutes his own ideas of decency and fairness for those of the people as embodied in their law, the judge necessarily demonstrates his own, perhaps unconscious, mistrust and disrespect for the people and for their law.

Thomas Jefferson correctly observed that:

Men by their constitutions are naturally divided into two parties: (1) Those who fear and distrust the people and wish to draw all powers

from them into the hands of the higher classes. (2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise, depository of the public interests. In every country these two parties exist; and in every one where they are free to think, speak, and write, they will declare themselves.

If we are to be a government of laws and not of men, if we are to remain free and are to continue to promote our liberty, we must renew our trust in the people and manifest our confidence in and respect for their judgment as embodied in their law. Though they may not be the most wise, they surely are the most reliable and safe repository of power.

We must not subscribe to the view that America needs a secular savior, whether in the form of a president, or in the form of a Supreme Court, or in the form of any federal judge.

Jefferson wrote that "the tree of liberty must be refreshed from time to time with the blood of patriots and tyrants." Now, I am prompt to interject that I do not think that Jefferson should be taken literally. I do not advocate the assassination of judges. Such a program could easily get out of hand and shorten my own term on the bench!

But civil and constitutional applications of Jefferson's axiom in the present context can be seen all around us. For instance, a decade ago there were demands for the impeachment of a president believed to have put himself above the law. A decade before that, there were efforts to mount an impeachment of a Chief Justice whom some believed had disregarded the law.

Today, there are bills in Congress pursuant to article III, section 2, of the Constitution, to remove jurisdiction from the federal courts in areas where it is believed judges have been guilty of tyranny—that is, guilty of attempts to do justice in accordance with their own political or philosophical ideology.

There are also movements in the Congress and in state legislatures for amendments to the Constitution effectively to repeal certain decisions of the Supreme Court which are thought to have rent the fabric of the law. More drastically, a substantial number of the states have called for a Constitutional Convention.

While I do not have occasion to advocate a position on any of these issues, I do state to you my firm belief that these various

movements are the people's direct response to what is perceived as decades of judicial tyranny. They are the people's response to a government that has tended toward a government of men and not of laws. The people are demanding an end to this tendency toward tyranny and a resurrection of a government of laws.

So prevalent is our current notion that judges are, and should be, our guardians, that persons who expound the fundamental necessity of a government of laws, and oppose a government of men, are considered by many today to be radical and revolutionary. Paradoxically, the issue has come full circle.

It is fitting that during the decade following our independence bicentennial and preceding the bicentennial of the adoption of our Constitution, we should again take up the cause of revolutionary patriots and again demand a government of laws. It is only under a government of laws that our individual rights may be enjoyed, our personal liberties preserved, and America remain the land of the free.