

Justice John Paul Stevens (Ret.)

FEDERAL BAR COUNCIL
ANNUAL LAW DAY DINNER

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It is an honor to be with you tonight to celebrate the career of Judge Learned Hand. As I was preparing my remarks, my good friend Lewis Liman sent me a copy of Justice Sam Alito's remarks on this occasion last year. His perceptive comments about Learned Hand prompted a redraft, and provide me an excuse to express my admiration for Sam's talk and his work as a justice. Sometimes, when justices use unnecessarily strong language in their opinions, readers may infer that they do not like or respect one another. Nothing could be further from the truth. While I am still convinced that Sam was quite wrong in his writing about the Second Amendment, it might interest you to know that if I were still an active justice I would have joined his

powerful dissent in the recent case holding that the intentional infliction of severe emotional harm is constitutionally protected speech. The case did not involve a cartoon about a public figure like Jerry Falwell. It involved a verbal assault on private citizens attending the funeral of their son - a Marine corporal killed in Iraq. To borrow Sam's phrase, the First Amendment does not transform solemn occasions like funerals into "free-fire zones."

When Jimmy Byrnes retired from the Supreme Court in October 1942 after only one Term, Learned Hand and Wiley Rutledge were leading contenders for his seat. Hand was, and no doubt still is, the best qualified federal judge never appointed to the Court. In 1942, Hand was 70 years old, whereas Rutledge was only 48. Their differing life expectancies may well have motivated President Roosevelt's choice of Rutledge. Ironically, Rutledge died in 1949 while Hand remained active on

the Second Circuit. Despite my respect and admiration for Judge Hand, given the fact that Rutledge later hired me as a law clerk, I must acknowledge that I am grateful the President made the choice that he did.

Learned Hand not only wrote excellent opinions as a district and circuit judge, but also gave memorable speeches. His famous expressions of concern about being governed by platonic guardians suggest that he would have been an admirer of Justice Scalia's views about substantive due process, while his statement that there "is no surer way to misread any document than to read it literally" could have been made by Justice Breyer. I have two other favorite Hand lines: In 1930 he wrote: "No doubt one may quote history to support any cause, as the devil quotes scripture." Nine years later, he said: "Life is made up of a series of judgments on insufficient data, and if we waited to run down all our doubts, it would flow past us."

The flow of my life began in Chicago in the 1920's when milk was sold in glass bottles that were delivered to homes by retail deliverymen who picked up the empty bottles a day or two later. Over the years paper containers have replaced glass bottles and chain store sales have replaced the convenience of home deliveries. The genius of the free market has brought about those changes despite private agreements and federal laws that impeded the rate of change. Two of those laws, the Robinson-Patman Amendment to Section 2 of the Clayton Act and Section 5 of the Federal Trade Commission Act, did, however, provide many antitrust lawyers with interesting work and substantial fees. I was one of them.

Because Judge Hand was the quintessentially excellent federal judge, I think it appropriate at a dinner in his honor to pay tribute to two other fine federal judges as well. Both obtained national prominence as lawyers before they were appointed to

the Supreme Court. Neither has received the acclaim that his judicial service merits. And I encountered both early in my career. As a law clerk, I heard Tom Clark make his successful argument in the Supreme Court Paramount Pictures antitrust case in the 1947 Term. As an occasional practitioner in Judge LaBuy's Chicago courtroom in the early 1950s, I followed John Harlan's ultimately unsuccessful defense of DuPont's ownership interest in General Motors. Tonight I will share memories of Tom Clark and comment on differences between John Harlan's approach to law and views that the current holder of his seat — Justice Scalia — has recently expressed.

My first contact with Justice Clark came during my only oral argument in the Supreme Court, where I represented the Bowman Dairy Company — then the largest dairy in Chicago — in a Robinson-Patman Act case. Clark wrote the majority opinion reversing the District Court's holding that Bowman's chain store discounts were justified by lower costs of delivery.

While I lost the case, I did convince Justice Harlan that the Government's position in the protracted litigation did not make much sense.

My second contact with Justice Clark was a consequence of the Bowman Dairy's decision to sell its assets to the Dean Foods Company in 1965. While the Federal Trade Commission pondered whether the proposed transaction would violate section 7 of the Clayton Act, and therefore be an unfair method of competition, the parties decided to close their deal. The Commission asked the court of appeals for the 7th circuit to enjoin the closing. The court granted a temporary restraining order, expedited the oral argument, then held that it did not have the power to grant injunctive relief. A few hours after the court vacated the TRO, the parties closed.

Solicitor General Thurgood Marshall then entered the case. He filed an emergency application with Tom Clark, then the Circuit Justice for the Seventh Circuit, asking him to order maintenance of

the status quo pending the full Court's decision on whether the All Writs Act provided the court of appeals with jurisdiction to grant relief. Tom scheduled a hearing in his chambers that Saturday to discuss the matter, and the Solicitor General prevailed. In due course, and over a persuasive dissent joined by Justice Harlan, the majority endorsed the Government's position. The Seventh Circuit's reading of the All Writs Act - which I still believe to be correct - had a life span of just five days.

Tom retired from the Supreme Court in 1967 when his son, Ramsey Clark, became the Attorney General. As a retired Justice, I think Tom did almost as much judicial work as when he was active. I appeared before him as trial counsel for Charley Finley in litigation in the District Court in San Francisco that arose out of the Athletics' move from Kansas City to Oakland. He impressed me then as an extremely competent jurist with excellent taste in

bow ties. That respect grew into friendship when I was thereafter his colleague on the court of appeals.

When I joined the Seventh Circuit in 1970, and when Bob Sprecher joined us the next year, the work load kept the court's eight active judges busy during the entire calendar year. Then two highly publicized cases created a judicial emergency of sorts for four of us. The first of those cases, *United States v. Dellinger* - popularly known as the "conspiracy seven case" - arose out of demonstrations in Chicago's Grant Park during the 1968 Democratic Convention. The trial dragged on for months, during which District Judge Julius Hoffman issued several highly controversial rulings. Because of the size of the record and the importance of the case, the three judges on the panel did not participate in any other cases while they were working on that case. Then, a federal grand jury indicted a fourth active Judge on our court, Otto

Kerner, for conduct that had occurred while he was Governor of Illinois. He disqualified himself from further work as a judge and ultimately resigned. As a result, our roster of active judges was cut in half, and it was necessary to invite other federal judges to sit with us in an effort to stay current with our work. Tom Clark was such a frequent visitor that we regarded him as a colleague. I shall never forget his selfless and invaluable contribution to our work during that difficult period.

When a new justice joins the Supreme Court, he or she must take two oaths - the constitutional oath that is normally administered in the Conference room and a statutory oath that is administered in a public ceremony in open court. When I took the first oath, Tom was the only person present besides active justices. Except for Byron White, whom I had met at Pearl Harbor during World War II, Tom was my oldest friend present at that ceremony.

As an active Justice, Tom wrote many significant opinions. I shall comment on two. The first was his separate concurrence in the steel seizure case. Declining to opine whether a President's take-over of steel mills during a national emergency was unconstitutional in the abstract, he observed that Congress had enacted legislation authorizing such action in certain situations and ruled narrowly that the President's failure to invoke those statutory remedies doomed the seizures. The case exemplifies a justice applying the law impartially to rule against the president who appointed him. President Truman's adverse reaction to the case - and particularly to Tom's vote - highlights the importance of an independent judiciary. The incident is not as dramatic as the Court's decision ordering President Nixon to surrender tapes that ultimately led to his resignation. But it is important to remember that this kind of judicial action by justices like Tom

Clark gives the public the trust in judges that is the backbone of the rule of law.

Perhaps Tom's most significant opinion was in *Mapp v. Ohio* in 1961. *Mapp* held that the exclusionary rule is an essential ingredient of the Fourth Amendment that is binding on the States. Tom's opinion persuaded Justice Black to change the position he had taken 12 years earlier in *Wolf v. Colorado*. As Black explained, he did so because the interrelationship between the Fourth and Fifth Amendments mandated exclusion of illegally seized evidence in federal cases, and both of those amendments are of vital importance in our constitutional scheme of liberty. Neither Clark nor Black said anything about "incorporating" either amendment in the 14th Amendment.

My respect and admiration for John Harlan dates back to our time in private practice, when he was the master craftsman from New York trying the *DuPont* antitrust case in Chicago shortly before I, as a

Chicago journeyman, represented the Foster Wheeler Corporation in depositions in New York in the electrical equipment price-fixing cases. I am sure his time in practice enhanced his judgment on the bench, first as a Second Circuit judge, and then as the Justice who succeeded Justice Jackson in 1954. The most gratifying praise I have received as a judge is flattering comparisons of our work.

About a year ago, I received a friendly letter from a former clerk for Justice Harlan that commented on the similarity of our views. That letter reminded me of the Justice Department's reaction to Senator Percy's recommendation of Joel Flaum to fill a vacancy on the Court of Appeals for the Seventh Circuit. During the consideration of that proposal, Joel made the mistake of mentioning Harlan and Stevens as two justices whose approach to the law was similar to his. That response delayed and almost killed the nomination, but a heroic rebuttal by Senator Percy ultimately persuaded the

executive branch that Joel's exceptional qualifications outweighed that deficiency.

Justice Harlan and I shared a common law approach to implied causes of action and an interpretation of the word "liberty" as used in the Fourteenth Amendment. In 1953 I accepted a pro bono assignment to challenge the constitutionality of a new Illinois statute mandating a "cooling off period" before filing a divorce case. We convinced the Illinois Supreme Court that the law violated a state constitutional requirement that every wrong have a remedy. I think Justice Harlan's views about implied causes of action were consistent with that familiar constitutional adage.

Justice Harlan wrote an especially thoughtful concurring opinion in the *Bivens* case, which found federal jurisdiction — despite the absence of a statute expressly creating a damages remedy — over a plaintiff's claim that federal agents had violated his Fourth Amendment rights. In 1980, in *Carlson v.*

Green, we relied on *Bivens* to support our holding that prisoners could bring similar actions against corrections officers for violations of the Eighth Amendment. But then in a five-to-four decision in *Correctional Services Corp. v. Malesko*, ten years ago, the majority held that the *Bivens* remedy was not available against a private corporation operating a halfway house under contract with the Bureau of Prisons. Justice Scalia wrote a two paragraph concurrence characterizing *Bivens* - and implicitly Justice Harlan's approach to the issue - as "a relic of the heady days in which this Court assumed common-law powers to create causes of action." My dissent relied heavily on "the thoughtful opinions of Justice Harlan." I feel sure that he shared my view that the "heady days" of respect for common law remedies included two centuries of our jurisprudence.

Justice Harlan's discussion of "liberty" as used in the Fourteenth Amendment makes his separate

writing in *Poe v. Ullman* in 1961 one of the Court's greatest opinions. He began his analysis of Connecticut's prohibition on contraceptives by identifying views of due process that the Court had rejected: that it was just a guarantee of procedural fairness and that it applied against the States only and precisely those restraints that had been applicable to the federal government prior to its enactment. In the consistent view of the Court, he wrote, the term "due process" has always "been a broader concept than the first view and more flexible than the second."

He then explained

"that through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the

traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."

The Connecticut statute, he went on to conclude, grossly offended a concept of privacy that is at the very essence of constitutional liberty.

Against this background, it is clear to me that Justice Harlan would have dissented in two recent cases. The first, McDonald against the City of Chicago, decided that the Second Amendment right to keep and bear arms is enforceable against States. The main opinion supporting that judgment - unlike Justice Thomas's scholarly concurrence - rejected the plaintiff's submission that the Privileges or Immunities Clause made the right enforceable. Instead, it relied squarely on the Due Process Clause and, specifically, substantive due process. Justice Scalia made this clear in the following question at oral argument:

"[W]hy are you asking us to overrule . . . 140 years of prior law, . . . when you can reach your result under substantive due [process] [W]hat you argue is . . . contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have - even I have acquiesced in it."

Justice Scalia's basic point, I suppose, was that if a 140-year old rule of law is having no adverse effect on society, why not apply a rule of repose that allows an imperfectly reasoned opinion to rest in peace? I think it likely that Justice Harlan would have agreed with such an approach, and I feel rather confident that that approach would have led him to conclude that a constitutional amendment that was adopted to protect the States' right to determine how best to regulate their militias, and which for over 140 years had imposed no impediment to state regulation of firearms, should not be changed by federal judges.

The second case is *NASA v. Nelson*, which held that agency background checks did not violate any

constitutionally protected employee interest in privacy. If I were still on the Court, I would have joined Justice Alito's excellent majority opinion without hesitation. Justice Scalia and Justice Thomas refused to do so because, as Justice Scalia argued, the case should have been

"easily resolved on the simple ground that the Due Process Clause does not 'guarante[e] certain (unspecified) liberties'; rather, it 'merely guarantees certain procedures as a prerequisite to deprivation of liberty.' . . . Respondents make no claim that the State has deprived them of liberty without the requisite procedures, and their due process claim must therefore fail."

Justice Harlan specifically and correctly buried that argument years ago. I congratulate Justice Alito and Chief Justice Roberts for their refusal to resuscitate it now.

Thank you for your attention.