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REMARK

REMARKS OF THE HONORABLE JOHN M. WALKER, JR.[†] UPON RECEIVING THE LEARNED HAND MEDAL AT THE LAW DAY DINNER, MAY 1, 2002^{††}

Two generations ago, in the midst of another war, Judge Learned Hand memorably spoke of the spirit of liberty.¹ I think it is fitting tonight, in these trying times, on the occasion of Law Day, to pause and to reflect upon our precious liberty under law and how it has endured. My brief message tonight is not complicated. Our liberty endures because it has always been, and must continue to be, tempered by a wise restraint.

Learned Hand gave eloquent expression to the idea of restraint. I will say a few words about that and about the circumstances in which he made his remarks. I will also touch upon three types of restraint in the law.

The first restraint is the restraint on liberty itself—we are not free, for example, to harm others. The second restraint is the restraint on governmental power that is spelled out in the

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^{††} This Article is based on remarks made by the Judge Walker upon receiving the Learned Hand Medal at the Law Day Dinner on May 1, 2002.

¹ Learned Hand, *The Spirit of Liberty Speech* (May 1, 1944), in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 189–91 (Alfred A. Knopf ed., 3d ed. 1960).

Constitution. The third restraint is judicial restraint. It is a self-imposed restraint and it is of particular importance on this day, Law Day, and to this audience composed of accomplished judges and lawyers. I believe this third restraint to be the most critical of the three because it is the most vulnerable to abuse and because it is so essential to the well-being of the republic.

Let me begin with a few words about Judge Learned Hand, in whose name this award is given, and about the moment in time at which he spoke of the spirit of liberty. Judge Hand is widely considered to have been one of the four greatest judges of the first half of the twentieth century. The other three, Oliver Wendell Holmes, Benjamin Cardozo, and Louis Brandeis were all Supreme Court Justices. Judge Hand's career was here in the Second Circuit.

Learned Hand became a federal judge in 1909 and served for fifty-two years, first on the district court and then on the court of appeals.² He made his mark as a great judge, not with a few grand decisions, but because his passion for the law was felt in every case and because he wrote his opinions with an almost poetic clarity. Judge Henry Friendly, who sat with Learned Hand in his last years, remembered the "great way in which [Hand] dealt with a multitude of little cases, covering almost every subject in the legal lexicon. Repeatedly he would make the tiniest glow-worm illumine a whole field."³

Learned Hand's reputation as a judge shone brightly; however, for most of his career it was largely confined to those within the profession, particularly the bench and bar of the Second Circuit. All that changed in May 1944 when Learned Hand delivered his speech on the spirit of liberty.

The occasion was a patriotic naturalization ceremony in Central Park for over 150,000 immigrants. It was attended by hundreds of thousands of people, most of whom came to enjoy a sunny Sunday in the park.⁴ Hand's brief speech, 519 words, was widely publicized and Judge Hand became nationally known and

² See Leonard P. Moore, *Learned Hand: An Appreciation*, 29 BROOK. L. REV. 2, 3 (1962).

³ Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOK. L. REV. 6, 13 (1962), reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 315 (1967).

⁴ For an account of Learned Hand's speech, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 547-52 (Alfred A. Knopf ed. 1994).

admired for it.⁵

Learned Hand's message on that spring day fifty-eight years ago was that the spirit of liberty lies in the hearts of the men and women of America and that, at its essence, American liberty under law was a spirit of restraint—restraint on individuals and on government alike.⁶ He made it clear, and I quote, that the spirit of liberty “is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow.”⁷

This was a lesson that Judge Hand, and his listeners, knew all too well. Fascism had conquered Europe; communism had seized Russia; and Japanese militarism had subjugated the Far East.

For Learned Hand, the ideological certainty of totalitarianism was the antithesis of the spirit of liberty. As he put it, “A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.”⁸ For Judge Hand, the spirit of liberty was instead, at its core, “the spirit which is not too sure that it is right.”⁹ Even at a time when America was flush with patriotic fervor, his message was one of restraint.

The idea that liberty must be restrained so that it may endure was, of course, not new to Learned Hand. It is the very bedrock of our society of laws. It is the first of the three restraints I am speaking about. Montesquieu explained the paradox that we are only free when we accept the constraints of the law. “Liberty is the right to do everything the laws permit; [for] if one citizen could do what [the laws] forbid, he would no longer have liberty because the others would likewise have this same power.”¹⁰ Constraints on individual liberty were needed to prevent harm to others—to have a society.¹¹ Liberty unchecked

⁵ See *id.* at 548.

⁶ See *id.* at 548–49.

⁷ Hand, *supra* note 1, at 190.

⁸ *Id.*

⁹ *Id.*

¹⁰ MONTESQUIEU, *THE SPIRIT OF THE LAWS*, pt. 2, bk. 11, ch. 3, at 155 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

¹¹ See *id.*; James Hart, *The State and Human Freedom*, in *ASPECTS OF LIBERTY*, 33, 37–38 (Milton R. Konvitz & Clinton Rossiter eds., 1958).

would be anarchy.¹²

But if liberty had to be constrained by government to endure, what was to prevent government itself from becoming in Hand's terms—"the ruthless, the unbridled will"¹³ that was the very antithesis of liberty?

It was not enough that the preservation of liberty be entrusted to the people. Tyranny is not the exclusive province of kings. It was the experience of the ancients that democracy unchecked also led to tyranny. Plato observed in the *Republic* that democracy passes into despotism.¹⁴ As James Madison noted in *Federalist Number 10*, even the supporters of republican government feared that the rule of the majority is "too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."¹⁵ The greatest and most justified fear in the minds of the Framers was the tyranny of the majority, which leads me to the second type of restraint I wish to speak about.

The question was how to have majoritarian rule, on the one hand, but not majoritarian intemperance and oppression, on the other. The Framers responded to this dilemma by formulating, in Alexander Hamilton's phrase, a new "science of politics."¹⁶ Central to the Framers' idea of the necessary restraint on majoritarian rule was that majority power had to be diffused and separated among the various branches of the government. It was Montesquieu, forty years earlier, who realized that the way to check power was with power.¹⁷ He believed that an overreaching ambition in one branch of government would be countered by ambition in another branch, and a balance thereby achieved.¹⁸ Through such a separation of powers, a democracy

¹² See MONTESQUIEU, *supra* note 10; 16A AM. JUR. 2D *Constitutional Law* § 563 (1998).

¹³ Hand, *supra* note 1, at 190.

¹⁴ See PLATO'S *REPUBLIC* 210-11 (G.M.A. Grube trans., Hackett Publishing Co. 1974).

¹⁵ THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶ THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁷ MONTESQUIEU, *supra* note 10, pt. 2, bk. 11, ch. 4, at 155; *see also id.* pt. 2, bk. 11, ch. 6, at 157.

¹⁸ See MONTESQUIEU, *supra* note 10, pt. 2, bk. 11, ch. 6. For an additional discussion of balance among the branches, *see* THE FEDERALIST NO. 51, at 321-24

would endure, contrary to all prior experience, and it would endure even if ran by ordinary people with less than lofty motives.¹⁹

It was the genius of the Framers to adopt Montesquieu's principle of separation of powers and to adapt it to the peculiar circumstances of America. The Federal Constitution would divide the power among the different branches, and the legislative, executive, and judicial branches would each bear a different relationship to the popular majority, with the judiciary not at all subject to the majority will. The branches would also exercise different and often conflicting powers. In addition, a bill of rights would protect individuals against governmental oppression.

The Framers and the ratifying assemblies gave us a body of law and rules in the Constitution that were full of checks and restraints on power. But only time would tell whether these restraints—the second type of restraint on which liberty depends—would work.

This brings me to the third restraint. The success of this experimental system of laws would depend on how well, over time, the judiciary would function in the real, as opposed to the theoretical world. In addition to the new experiment of checks and balances, another “great improvement” in the science of politics, in Hamilton's phrase, was an independent judiciary—one in which judges held office during good behavior, and could not be removed except by impeachment, and thus did not owe allegiance to the people.²⁰

Over the past two centuries, the judiciary, unelected and life-tenured, has proven itself to be uniquely capable of resisting the pressures of public opinion. Starting with *Marbury v. Madison*²¹ in 1803 and the great decisions of the Marshall Court, the courts have fulfilled their promise to be the ultimate protector against the tyranny of the majority. When the popular majority, whether state or federal, enacts measures that violate the tenets of the Constitution, the judiciary can strike them down. The judiciary has turned out to be the ultimate guardian of individual liberty.

(James Madison) (Clinton Rossiter ed., 1961).

¹⁹ See MONTESQUIEU, *supra* note 10, pt. 2, bk. 11, chs. 2, 4.

²⁰ THE FEDERALIST NO. 9, *supra* note 15, at 72.

²¹ 5 U.S. (1 Cranch) 137 (1803).

All of this gives rise to an obvious question: Who will guard the guardians? Who or what is to stop the "politically insulated" branch of government, which is endowed with the power to override the majority, from itself becoming a source of tyranny under a counter-majoritarian banner? What is there to prevent judges from abandoning their role as adjudicators and becoming unelected legislators seeking to enact their own vision of the public good, accountable to no one in the system of checks and balances?

Who, then, will guard the guardians? Indeed, who can? Owing to its adjudicatory role, the judiciary simply cannot do its assigned job if it is subject to political constraints like the other branches. It must be independent of the other branches. So if the judiciary is to be restrained, it has to restrain itself—and this it must do. The costs of not doing it are simply too great. Let me explain why I think so.

In our country, the law commands respect and obedience because it is seen and felt as emanating from the people. We are taught this as children. This is true of constitutional law as well as statutory law. If the laws govern our behavior, it is because, as a people, we have consented to such laws and to such government. We renew this consent with every election. The consent of the governed cloaks the law with a moral authority. It leads the people to respect the law. It explains, in great measure, why the law is obeyed and why, when the law is applied in courts and judgments are rendered, those judgments are willingly, if not always happily, followed. Alexis de Tocqueville spoke of the American people's affection for the law, because it is their law and they know that if they do not like it, there are ways to change it.²² This respect and affection for the law is indispensable to the judicial function; but it is exceedingly fragile.

Judicial lawmaking—by which I mean the making of judge-made rules that fall outside the parameters of the meaning of statutes and constitutional provisions, fairly determined—does not have the moral authority that comes with the consent of the governed. It is not accounted for in the constitutional system of checks and balances because the Framers never expected judges

²² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, pt. 2, ch. 6, at 241 (J.P. Mayer ed. & George Lawrence trans., Perennial Library 1988) (1835).

to legislate; rather they expected them to adjudicate.

So, when judges overstep their role and interpret the Constitution broadly or stretch the meaning of statutes to favor a policy outcome, they act outside of the very laws that they must uphold. The result goes beyond creating uncertainty and unpredictability in the law, although that is certainly one result. Judicial overreaching erodes public respect, confidence, and affection for the law; it weakens the law's moral authority; it politicizes the judiciary; and, if it happens enough, it threatens to undermine the legitimacy of the judicial function itself.

These are not abstract concerns. The effect of the public's increasingly held view that the law is just politics by other means is on display every day. Judicial vacancies go unfilled. Nomination hearings are political battlefields. Opposition research is done on the backgrounds of judicial nominees. The reputations of good men and women are unfairly maligned. For these reasons, those most qualified for judicial office are becoming less interested in taking the job. After one recent set of contentious hearings, one of my Second Circuit colleagues stated flatly that he would never agree to be nominated for the Supreme Court.

So, in addition to the first two restraints upon which liberty depends, which I have already spoken of—the denial of freedom to harm others and the checks on the political branches—I add this third one: judicial restraint. I believe it poses the greatest challenge because it relies not on external rules but on the integrity of the judge and because it is so important.

Judicial restraint does not depend on ambition checking ambition, as in the separation of powers. It depends on the judge's own devotion to the law. It is this devotion to the law that must restrain ambition. Judicial restraint compels us to accept the political compromises inherent in the legislative process, the inability of the legislature to legislate at all in some areas, and the other frustrations of an imperfect system, as we follow the path of the law. For those of us, as judges and lawyers, who walk this path, the spirit of liberty is, as it was for Judge Hand, a spirit of restraint.

We are the trustees and caretakers of the Constitution and the laws that are so essential to our liberty. It is easy to forget this in the details of our daily tasks: the checking and re-checking of the facts and all the other minutiae of a brief or

opinion; the painstaking search for the exact words to say what we mean and no more; and the sometimes awkward groping in the dark as we struggle to ascertain the law and how it should apply. Yet it is through these humble efforts and modest virtues that we each do our part in preserving the legacy of the law that began with the Framers—and the liberty it protects.

Through his tireless and often thankless labors in the law over a lifetime, Judge Hand transmitted this legacy to his successors; however, he did more than that. Judge Hand and the great judges of our circuit who followed him, Henry Friendly, Edward Weinfeld, and others have made it an honor and privilege to serve on the bench and bar of the Second Circuit. Though few can expect to reach the heights of a Hand or a Friendly or a Weinfeld, all of us can do our best to transmit their legacy unblemished to our successors. In this way, as lawyers and judges, we may do our part to make it possible for the spirit of liberty, thus constrained, to thrive and do its noble work.