

Tributes

A Tribute to Burke Marshall

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I close my eyes, and I see Burke Marshall, sitting near me—at his office, in the classroom, at his home. We had long conversations—on peace in the Middle East, on recent Supreme Court cases. But his main interest was the civil rights movement. He was a shy person. He never volunteered to talk about himself, but when I asked him, he would tell me his story. And you could sense where his heart was, where his thoughts were, and what his dreams were.

We taught a seminar together—and with our dear friend Joe Goldstein. Joe and Burke were very close friends, and had been since their days in the U.S. Army in World War II in Japan. Joe originally invited my involvement with their seminar—with the approval of Guido Calabresi and the Law School, of course.

Our seminar was entitled “The Limits of the Law.” In fact, it was about the limits of judging and courts. Burke had no great confidence in courts. He liked *some* judges very much, but he was quite pessimistic about the ability of courts to solve human problems. I disagreed.

We had long fights about basic doctrines—“separation of powers” was one of them. For me, separation of powers did not mean that the executive branch or the legislative branch could get away with violations of the Constitution or statutes. For Burke, separation of powers meant what it said. I do remember our great debates about judicial review of impeachment procedures. (This was fifteen years ago, years prior to the most recent impeachment proceedings.) My view was that the impeachment procedures

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were justiciable. I argued in favor of judicial review because due process bound the Senate. For Burke, the Senate was basically outside the reach of the judiciary. Both of us relied on “separation of powers.” It meant, of course, different things to each of us.

I didn’t know Burke in the fifties and sixties. He was then, I am sure, a great idealist. When I met him in the eighties and nineties, he was much more sober; at times pessimistic, but always realistic. For me, he was the personification of the reasonable person. I always thought—and I told him—that he would be an ideal Supreme Court Justice. He would smile and say, “Aharon, this is politics in this country.” And I understood.

Burke liked the Law School. It was his home. He liked teaching. He was an excellent teacher. With several sentences he would clarify a very complicated problem. He liked his students. He kept strong ties with many of them. He would tell me about their achievements (and failures).

But his heart, his heart was in the past: in the civil rights movement, in the streets of Alabama, in the pictures and songs of those days, in the drive for equality and social justice.

Burke is gone. But his spirit is with us. I do hope that his dream about equality and social justice will stay with all of us forever.