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Mr. Chief Justice Stone

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MR. CHIEF JUSTICE STONE*

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The custom of this Bar for almost a century was to lament the passing of a Justice by wearing the badge of mourning during the term. It is well that the practice has been altered for the man in whose memory we are assembled was no believer in such outward signs. He warmed both hands robustly before the fire of life but when it sank—though suddenly—we may be certain he was ready to depart. His counsel for today would be to think not on his death but on his work. His hope would be no more than that the effort and the product of his years may yield for us, whose work is yet undone, some signal of the path we wish to follow, some token of our duty.

Such title as I have to speak about the meaning of this useful life is held in common with a score of others. He took us from the classroom, as you know, acting with that special faith in youth and in the schools that somehow is maintained upon this Court. We held a perch beneath the rafters of his chambers usually for but a single term. Though jointly we bear witness to the full span of his judicial service, each of us knows nothing but a fragment of the whole, fragments that inevitably differ with all the changes in the issues and the emphases of more than twenty-one exciting years.

If all could be heard, the seniors of our number would speak of the time of the novitiate, when fresh from teaching, practice and the Cabinet he took his seat upon this Bench. These were the terms of first impressions, of initial soundings in the sea of controversy that constitutes the business of the Court. Others would tell of terms when this was over, the bearings taken and directions settled upon many of the major issues of the time. This was the period when the name of Stone was so often joined with those of Holmes and Brandeis or later, of Cardozo, in the great triumvirates that gave warning of the storm approaching before the lightning

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was seen by others or the thunder generally heard. A third group would dwell upon the years of crisis, the direction of the nation's polity hinging on the trend of the decisions, conflict within the Court no less acute or less portentous than the challenge to the very institution mounting swiftly to a climax in another place upon this hill. Still other voices would describe the time of the judicial readjustment, the unfolding of what the Justice called "the historic shift of emphasis in constitutional interpretation" that began before the Great Debate was through. This was for him the period of the prophetic realization, the dissents of former years delivered now as judgments on so many basic questions, the whole a triumph of persistent conviction that has its parallel in the lives of few judges, its analogue in the stories of few men.

Finally, there are among us some who know the years of service as Chief Justice, judicial labor no less heavy for the addition of administrative duties, the challenge of the great responsibility sharpened by the awful fact of war. Change in the contentious areas of constitutional controversy was by this time clearly delineated. So too was it made plain that controversy itself had not been ended by the change; that here, as elsewhere, no solutions can be final and definitive—for all give birth to new issues rising from the ashes of the old; that powerful forces and high values, pursuing their persistent competition, ever generate fresh dilemmas to challenge the wisdom of this Court.

Within these changing settings, different themes stand forth throughout the years. The largest point in the beginning had to do, of course, with insular experimentation, the power of a state's democracy to fashion changes in the legal order by laying on the enterprise within its borders restraints or taxes deemed by it—but not by many others—to advance the commonweal. The point, thereafter, has to do with matters far from insular, the power of the men who represent the full constituency to marshal the resources of the nation in ways they think constructive—though many men in every state believe the measures baneful and their purpose even worse. The point in other contexts is concerned with the policing of our federalism, assessing the authority of one state to force its will on men or institutions centered within other borders or engaged in commerce among many states—

their standing with the local legislature little more than that of strangers in the gates. Another point, in many ways the most perplexing, centers in the differences that mark controls upon the ways of men in getting and in spending and those that touch affairs of conscience or expression, involving an assault upon the final bulwark of the single human spirit facing other men, his country and his God.

On such great themes as these, the Justice, as occasion offered, brought to bear his full creative power, knowing that to men of law there are no deeper problems, certain of the title and the duty of this Court to fashion from our basic Charter answers that will stand against the cries of faction and the test of time; certain also that no answer stands merely on the ground of its authority, that what maintains a judgment in the end is its appeal to reason for support.

This is, of course, to point to what for us could not but be the highest moments, the days in which the Justice shaped, whether for the Court or in dissent, opinions drawing on the final sanction—the instrument "intended," as he often liked to quote, "to endure for ages to come, and consequently, to be adapted to the various crises in human affairs." His insight was that both the Constitution and this Court are "instruments of government," that government is an intensely practical activity, its problems centered in the areas of deepest conflict in the interests and affairs of men, its measures born far less of changing theories than of changing facts. He had, therefore, the firm conviction that the basic law must stand above the normal reaches of the conflict and the pressures; that when it speaks to problems of such practical dimension it must direct itself to actuality and cannot rest on vague or flimsy formulae so often scattered in the books. It shocked him always to discover how much there was in the decisions or opinions offered as authority in argument before this Court that did not satisfy these crucial standards; and nothing pleased him more than the belief that he had made sound principles articulate in working over some such area of barren ground. He sought throughout, within the great tradition of this Court, to show that the inherited Document has few absolutes to limit democratic action, that those it has are in the fields where only absolutes—or something very close to them—will keep

the action democratic or will preserve those final decencies on which Americans have always been prepared to stake their title to survive.

Men whose fashion is to press their power to the utmost, and they are always many, will never understand how much there was of self-subordination in this great work; the talent and the passion—not to speak of craft—so often given to sustaining measures that the Justice, had their merits been for him, would certainly have held pernicious; the strength of the conviction that, except within the narrow limits where the Constitution speaks most firmly or the highest values stand, the antidote for legislative error must be found not in this Court but at the polls. An age which ever tends to specialize its interests does well to ponder and to honor this capacity for disinterested judging, this ability to etch a standard of adjudication that sustains the governmental structure—whatever party has its transient dominance, whatever claims to power or advantage win political acceptance for the time.

And even in the reaches where the Justice thought the Constitution posed a bar to legislation—a field in which he did not hesitate to stand alone—the men or doctrines or activities he deemed entitled to protection would not often have achieved a shred of his approval, were the issue what he thought was good or useful rather than the right of other men to do or hold or urge what in their wisdom and in God's broad grace they deemed desirable, however much their fellows disapproved. I say an age which seems progressively to specialize its interests can do no better than to contemplate this man whose greatest work inhered so largely in affirming the power or the right of others, be they officials or the victims of officials, to do or to maintain what in his private view he would have thought quite base or wrong.

Not all men who viewed their duty thus would find the work congenial—despite the dignity and honor that attaches to the highest court. In this case, though, I think the mission was completely sympathetic. The reason is, in part, that one who viewed all power as a public trust, its only satisfactions in the chance to render service, was devoted necessarily to abstract and ideal ends. The deeper reason is that Justice Stone was of that small group who really have the democratic spirit—to use a term that has been much

abused and never more than at this time. I use it, let me add, in none of those strange senses that distort the minds of men today, nor even in the sense in which democracy is taken to bespeak benevolent compassion. I mean no more and certainly no less than the hard faith that other men, both in and out of office, however much we disapprove their natures or their works, have rights that are entitled to respect; that to define these rights, to cherish and support them is the very heart of the enduring quest for liberty and justice under law.

The quality of which I speak is that which more than sixty years ago a Massachusetts judge named Holmes declared "the deepest cause we have to love our country,—that instinct, that spark that makes the American unable to meet his fellow man otherwise than simply as a man. . . ." This, indeed, if nothing else, we know who shared, however briefly, the democracy of Justice Stone's own workshop. I dread to think, even at this distance, how often our youthful discourse must have seemed to overlook the fact that the Justice rather than his law clerk was the man a President had chosen and a Senate had confirmed. The dread is softened by the thought that no man found transgression less in such presumption, no man had less pride of place or was more genuinely eager to hear stated any relevant idea.

To speak of self-denial in Justice Stone's conception of judicial duty is not, of course, to mean that he believed the judge's task mechanical or even marginal—and least of all the task of judges of this Court. Needless to say, the "shift in emphasis in constitutional interpretation," to use his words again, involved the most creative adjudication, premised on the view that, as he said, "judicial interpretations of the Constitution, since they were beyond legislative correction, could not be taken as the last word," but were "open to reconsideration, in the light of new experience and greater knowledge and wisdom."

The spirit was the same—though the limits and desiderata somewhat different—in the areas that are not beyond the pale of legislative correction, the normal work of law administration that yields the largest quantity of grist for this Court's mill. No one could more firmly hold an issue closed because a valid statute gave the final answer. But no one would more candidly conclude, when all was

weighed, that Congress left the issue open, or shrink less from the view that in such case judicial choice is free and must be made on what amount to legislative grounds. He said that recognition of these truths gave "high distinction" to the work of Justice Brandeis. No recognition ever has been clearer than his own. Within the limits that he set himself, his conscious purpose was to practice what he called the "creative art by which familiar legal doctrines have been molded to the needs of a later day," the "process," as he put it, "which throughout the history of the law, has in varying degrees served to renew its vitality and to continue its capacity for growth."

To state such principles is not, of course, to give the measure of their application. The art of which he spoke, like other arts, achieves its greatness in the judgment of the artist, the instinct or the talent that knows where and how to draw the lines between competing values, to find results that have the quality of median proportion that men, wherever reason has its dominance, perceive as the constituent of justice. This is, I think, the final standard that the country used in placing such consummate confidence in Justice Stone's judicial work; it found his judgment true. There are no better words in which to give the spirit of this sentiment than those that Ezra Thayer used of Gray of Harvard: he was a "rock of trust." Men had the sense that in his hands a balance had been struck between the polar claims of states and nation, government and enterprise, groups and individuals, progress and tradition.

I have a final word that is concerned less with the Justice or the Chief who gave us access to his chambers than with the man who gave us entry to his home. Young lawyers have a tendency to view the law as all-absorbing, forgetting that the richness of a life inheres as much in range of interest and appreciation as in the rule of service and devotion to the daily task. On this point too his law clerks could not but note with awe the Justice's example. For while no other interest could compete with his judicial duty, he managed somehow to dispatch his work without exhausting either time or energy. Somehow within the framework of this busy life he found the moments to devote to living: the house and study Mrs. Stone and he designed with scrupulous attention to detail; music and the arts, including most dis-

criminate collecting; Amherst, the Folger library and later the Gallery and Smithsonian; evenings of the widest reading; visitors of grand and humble station, received with equal grace; the garden as a place to work as well as linger; long and, if a weaker man may say so, brisk walks each day, with small regard to weather; a joy in talk and growing things and company and knowledge; a taste for wine when it is good; an abiding interest in affairs of scholarship and education; a helpful word to other men who sought advice or lacked encouragement.

Somehow, I know not how, all this was fused with his judicial labor; the life we had the privilege of witnessing was "simple, natural and untroubled"—to borrow words the Justice used in speaking of the birthplace of the President who gave him his original commission. In a phrenetic age, he was unruffled and unhurried. His household had the calm of a New England landscape. He prized the things that make up a developed civilization. He loved the things that in the end we have law for.

Most of our number saw him last when in the spring of 1945 he and Mrs. Stone dined with his law clerks at the close of twenty years of service on this Court. There was a moment in the evening when some lines were read from the first law lecture given at Columbia College, that of James Kent in 1794. The passage began:

> The events which are rapidly crowding the present era, are to be deemed among the most solemn, and the most important in their consequences, of any which have hitherto been displayed in the history of mankind. Great Revolutions are taking place in the European World, in Government, in Policy and in morals and a new turn will be given to the habits of thinking, and probably the destination of human society. But amidst the universal passion for novelty, which threatens to overturn everything which bears the stamp of time and experience, we in this country ought to be extremely careful, not to pass along unconscious of the labours of the Patriots who effected our Revolution; nor let the admirable Fabric of our Constitutions, and the all pervading Freedom of our Common Law, be left unheeded or despised.

The passage from Kent's lecture ended:

> I am most thoroughly, most deeply persuaded, that we are favoured with the best Political Institutions, *take them for all in all,* of any People that ever were united in the Bonds of

> Civil Society. The goodness of these Institutions will brighten on free investigation, and faithful experiment, and be respected according as they are understood.

It seemed to me that, as the words were read, the twelfth Chief Justice, once the third Kent Professor of Law in Columbia University, smiled with interest and approval. I know that many thought, as I did, of the miracle by which ideas project themselves across the chasm of the years, the thoughts enduring as their applications change. In our mind's eye we saw a Chief Justice yet unborn surrounded by his law clerks born much later; and we knew that when their discourse touched the great men of the past who had sustained their country's institutions, it would include high tribute to the work of Harlan Stone.