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## IN MEMORIAM: DAVID P. CURRIE (1936–2007)

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My correspondence file with David is rather slender. The first item (after we had been colleagues for more than twelve years) is a handwritten note from him following my remarks at the Annual Dinner of The University of Chicago Law School Alumni Association on April 19, 1979. I had become dean of the law school on January 1st and this was the first occasion at which I addressed the alumni. I had used my speech to express my concerns about the “anything goes” approach to legal scholarship and asked that legal scholars be fair and clear about where their own preferences come into play. Somewhat contrary to the evidence, I had stated that neither law nor its history can be infinitely manipulated to suit our own views.

It will surprise nobody that David rather liked these sentiments and thought that they “needed expressing.” Since David was no flatterer, his generous compliments about my talk (he thought it was “elegant” and had just the right mix of humor and serious stuff) were a great morale booster for the new dean about whom it could hardly be said that he knew what he was doing.

So, how did David and I communicate in the twelve years before I became dean and in the subsequent fourteen years before I left The University of Chicago for Stanford? First of all, of course, we communicated by following Chicago’s hallowed tradition of visiting one another in our offices. Since David, when at The Law School, was somewhat more sedentary than I, there were probably more visits from the

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fifth floor to the fourth than the other way around. Also, I needed his insights more than he needed mine.

Secondly, in that other great Chicago tradition, we read one another's manuscripts and critiqued them in the uninhibited and robust manner that was (and, I presume, is) the hallmark of The Law School. On the return of a draft, comments in the margin might say that an important and clever point one had made was "nonsense" or "indefensible." David's language was usually gentler than that but in substance no less devastating. The Law School, in its inimitable manner, was a *truly* "supportive environment": it took its faculty and students seriously and had high expectations for them. David certainly did.

Thirdly, as far as I can remember, David "took" at least two of my courses. He, the master teacher, never thought of himself as too good for sitting in on somebody else's class. One of these courses was on the history of the separation of powers in the founding period and the other on comparative constitutional law. His dedication to me of his book on German constitutional law read, in German, "Without you this book would never have been written."

That book, incidentally, used as its motto, a quotation from Thomas Mann's novel *Joseph in Egypt*: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."

The motto was a perfect expression of David's love of learning that did not shy away from doing the hard thing (like studying German and becoming fluent in it) so that he would not be a dilettante. The Thomas Mann quotation is also indicative of David's love for literature. He would always ask me for reading suggestions. And, of course, his curiosity made him travel widely and made him teach abroad. My correspondence file includes the occasional postcard.

Among David's areas of scholarship were conflicts and federal jurisdiction. I had little interest in conflicts but, as somebody teaching constitutional law, was, of course, concerned with federal jurisdiction. Our true common interest, however, was the work of his later years on the Constitution in the Supreme Court and in Congress and the comparison of United States and German constitutional law.

David's two volumes on the Constitution in the Supreme Court (1789–1888 and 1888–1986) have become every conscientious lawyer's main reference books when he or she wants to understand how a Supreme Court case related to the law of the land at the time of decision. David analyzed and criticized the justices' work from a lawyer's point of view. He strongly believed that judges have no more right to invent limitations not found in the Constitution than to disregard those put there by the Framers. At the time the first volume was published (1985), this was not any longer, to say the least, a widely shared view

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among teachers of constitutional law. His books were sustained critical accomplishments.

David, the subtle lawyer that he was, understood, of course, that there is no single lawyer's point of view and, more importantly, that when the Constitution emerged from Philadelphia it set forth only the great outlines of our system of government. Yet, there was something fearless and "fundamentalist" about David's approach that led him to question even generally accepted wisdom and, importantly, to do so against his own political preferences. David was the rare law professor whose legal opinions and political preferences frequently did not coincide. I remember occasions when I turned to David because my legal intuitions were not in accord with the consensus of the professoriate and I would ask him: "David, what is wrong with me?" Occasionally, he would comfort me by saying: "There is nothing wrong with *you*."

The second volume of his Supreme Court history sums up how David saw the Court's record of judicial review. A number of his judgments were hardly fashionable and he was not impressed by what the Court did and did not do to prevent other branches from exceeding their authority.

When Congress effectively reduced the Southern states to colonies after the Civil War, the judges lacked the audacity to intervene. When Congress in the 1930s assumed extensive powers the Constitution had apparently reserved to the states, the Court was intimidated into submission. When freedom of expression was endangered by popular hysteria during the First World War, the Court went along without a murmur; when the problem recurred after the Second World War, it protested cautiously and then withdrew from the field. The Justices dragged their feet in ordering desegregation in the face of popular opposition and ran from the opportunity to stand up for congressional prerogatives during the Vietnam War. Even favorable decisions of the Supreme Court failed to effectuate the voting rights of blacks until other branches of the federal government finally added their weight to the scale.<sup>1</sup>

David was also concerned that the Court on occasions so exercised its power of judicial review as to deprive the people of what seemed the legitimate fruits of the democratic process. One example he gave was the Court's use of the due process clause against congressional efforts to ameliorate social ills during the Great Depression.

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<sup>1</sup> David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 91–92 (Chicago 1990).

After completion of the magisterial Supreme Court project, it was, perhaps, a natural step for David to look at constitutional interpretation by the other branches, especially since, before 1800, nearly all of our constitutional law was made by Congress or the President. At the time of his death, David's vast historical undertaking had produced four volumes on the Constitution in Congress. The book on the Federalist Period is the most systematic and analytic treatment of the gloss that the early Congresses wrote on the Constitution. His subsequent volumes are more or less the *only* systematic treatment of the manner in which Congresses have expounded the Constitution. That some looked at his endeavor with bewilderment did not bother David. David was arguably the most "inner-directed" colleague and friend I have had.

After graduating from Harvard Law School, David clerked for Henry Friendly (he was Judge Friendly's first appellate law clerk) and then for Felix Frankfurter. Much later, I served with Judge Friendly on the Council of the American Law Institute. I recall a train ride, after a Council meeting, that Friendly and I shared to New York City, during which we talked, among other things, about David. It was my impression, recently confirmed by another Friendly clerk, that in the long list of exceptionally distinguished clerks whom Friendly was able to attract, David remained his favorite. And Friendly certainly was David's favorite federal judge about whom he said that he "loved him." In 1984, David wrote about Judge Friendly that in his integrity, his intelligence, his thoroughness, and his humanity Henry Friendly was the true embodiment of a judge.

In *his* integrity, intelligence, thoroughness, and humanity, for forty-five years, David was the true embodiment of a law teacher, law scholar, colleague, and friend. To the extent to which the lot of human beings allows, David became "all that he was meant to be" and our love for him will last.