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James R. Browning

James R. Browning, Judge for the United States Court of Appeals for the Ninth Circuit from 1961-2012

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DEDICATION

REMARKS AT THE DEDICATION OF WALTER LYNDON POPE MEMORIAL LIBRARY, UNIVERSITY OF MONTANA LAW SCHOOL June 9, 1979

Judge James R. Browning*

It is altogether fitting that Walter L. Pope should be memorialized at this law school, and that his memorial should be a library reserved for those with a special love for the law.

As we all know, this law school brought Walter Pope to Missoula from Nebraska to teach, and he served as a member of the faculty, full and part time, for over 30 years. During those years he also practiced law, served in the Montana Legislature,¹ and represented the United States as a Special Assistant to the Attorney General. But as Rusty Smith put it, he “was not a lawyer teaching, but a teacher who practiced law.” And during the 20 years that followed, although he served as a United States Circuit Judge and as the Chief Judge of the Circuit, Judge Pope still remained a teacher to all around him.

* The Honorable James R. Browning served on the United States Court of Appeals for the Ninth Circuit from 1961 until his death in 2012. There, he served as the Chief Judge from 1976 until 1988 and assumed senior status in 2000. Judge Browning was appointed to the seat on the Ninth Circuit vacated by Judge Walter Pope. Judge Pope taught Judge Browning when he was a student at the University of Montana School of Law. Judge Browning originally delivered these remarks at the University of Montana School of Law’s dedication of the Walter Lyndon Pope Memorial Library in 1979. On March 20, 2019, the Law School rededicated the newly renovated Pope Memorial Library in honor of Judge Pope.

1. Federal Judicial Center, *Walter Lyndon Pope*, FJC.gov, <https://perma.cc/S99S-Z344> (last visited Apr. 22, 2019).

Walter Pope was a teacher all of his life because he never ceased to be a student. He never lost the curiosity, the enthusiasm, the joy, the dreams of a mind newly absorbed in learning.

If by some magic we could put Walter Pope's spirit in his library, young law students would flock here to be with one of their own.

Walter Pope became Judge Pope when he was 60—in years, that is; in spirit, perhaps 21. Listen to his own description of his state of mind a year after his appointment:

I was not only the recipient of a great honor, but through membership on this Court I have been given work which, though more arduous than I had anticipated, is yet so challenging that every moment of my experience there has been one of pleasure and excitement . . . I have to pinch myself to make sure it really happened.

This joy in the law never diminished. A day or so ago I reread Judge Pope's last opinion, written when he was over 80, filed three weeks before his death.² His words reflect, as another has said, "a man who knows the law, and rejoices in it."

Judge Pope exemplified another quality with which the young are often credited—perhaps somewhat more often than entirely justified by the facts—a principled commitment to the protection of the rights of the individual. Throughout his judicial career he worked hard and effectively in the cause of personal freedom. His last opinion ordered that a hearing be held to determine whether a convicted defendant had intelligently and understandingly waived his constitutional rights at trial.³ He once wrote, "I find great satisfaction in the thought that generally speaking the courts are alert to protect the rights of the most insignificant defendant. The general concept of due process is that the end never justifies the means. I would not want to live under any different system."

One of his best-known opinions was that in *Parker v. Lester*,⁴ which struck down as unconstitutional a Coast Guard security program under which seamen could be and were barred from employment as security risks on the basis of allegations of secret informers. Judge Pope wrote the opinion in *Parker v. Lester* in 1955. This country was still in the grasp of the fear of Russian and Communism that prevailed during the post-war period—the era of McCarthyism. It is now hard to appreciate the pervasiveness and virulence of the repressive atmosphere of that period. Innocent men and women were driven from employment in government and in private business on the basis of charges about their attitudes and associations from persons whose identities and reliability were not known even to the

2. *Fernandez v. Meier*, 408 F.2d 974 (9th Cir. 1969).

3. *Id.* at 977.

4. *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955).

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government agency or private employer. *Parker v. Lester* involved the constitutionality of such a system. Judge Pope stated the question presented in these words: “The question is, is this system of secret informers, whisperers and talebearers of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process?”⁵

When you put the question like that, the answer is hardly in doubt, and Judge Pope got it right.

He pointed out that under the Coast Guard’s regulations a seaman need not be informed of the basis for a finding that he was a security risk if disclosure of the allegations might reveal the identity of the informer. Under such a system, Judge Pope pointed out, a seaman might be barred from his chosen vocation without notice of the reason or an opportunity for hearing, contrary to traditional notions of due process.⁶

Judge Pope challenged the FBI’s insistence that its sources of information would be lost unless their anonymity was maintained. As Judge Pope said, “The Federal Bureau of Investigation has shown no signs of collapsing because proof of guilt must be furnished by witnesses who must appear for confrontation and cross-examination in open court.”⁷

Judge Pope recognized that requiring notice of adverse information and an opportunity to refute it might deter some people from passing information to authorities:

But surely it is better that these agencies suffer some handicap than that citizens of a freedom-loving country shall be denied that which has always been considered their birthright. Indeed, it may well be that in the long run nothing but beneficial results will come from a loosening of such talebearing . . . The objective of perpetuating a doubtful system of secret informers, likely to bear upon the innocent as well as upon the guilty, and carrying so high a degree of unfairness to the merchant seaman involved, cannot justify an abandonment here of the ancient standards of due process.

Furthermore, in considering the public interest in the preservation of a system under which unidentified informers are encouraged to make unchallengeable statements about their neighbors, it is not amiss to bear in mind whether or not we must look forward to a day when substantially everyone will have to contemplate the possibility that his neighbors are being encouraged to make reports to the FBI about what he says, what he reads, and what meetings he attends.⁸

Today it is difficult to appreciate the courage and steadfastness to principle the writing of this opinion required in 1955 when we were then still in

5. *Id.* at 719.

6. *Id.* at 717.

7. *Id.* at 724 n.17.

8. *Id.* at 720–21.

the Cold War, and fear of Communism abroad and of subversion at home was still running deep. The FBI was not to be criticized, threats to security were not to be tolerated.

But Judge Pope's opinion in *Parker v. Lester* rang a bell. Surprisingly, happily, the response to his courageous stand was overwhelmingly favorable.

The wisdom and importance of Judge Pope's opinion were recognized by newspapers from coast to coast—from the *New York Times* and the *Washington Post* in the East to the *Los Angeles Times* and the *San Francisco Chronicle* in the West. One editor wrote, "The Ninth Circuit Court of Appeals has sounded a tocsin."⁹ And another: "This opinion must be hailed by all who believe in and would live by the American tradition." And still another: "It is a good opinion . . . It is destined to be quoted often in months and years to come, as we come to consider still other encroachments by the men of zeal."

One of the nation's leading jurists wrote: "Your opinion in *Parker* is a classic and shapes the law for all the future." Another: "Your opinion in the *Parker* case was the best opinion written in any case on any of the United States Courts of Appeals during my time on the bench." And still another: "It is one of the most important blows that has been struck at the faceless informer system. I cannot think of any other judicial decision that might be even a runner-up to this one."

But the words of praise that would have pleased Judge Pope the best are in this letter, written after his death, addressed to Mrs. Pope:

March 28, 1969

Dear Mrs. Pope:

Please accept my sympathy for your loss in the recent death of your husband, Judge Pope. The S.F. Chronicle carried an obituary which included mention of his legal career and brought home to me in a very personal way that it was not just a judge that had affected my life long ago, but someone else's loved husband and father.

I felt I had to write you briefly and offer the little comfort I have.

In 1951 my career as a young marine engineer was ended abruptly by the U.S. Coast Guard screening procedure. My injured innocence is of no matter, for I managed to make a new life for myself ashore, married in 1953, and adopted by wife's two children for my own.

Nevertheless, in 1956, after all my appeals had been rejected and I had despaired of disproving the false charges against me, a good judge spoke out from the bench and upheld the Constitution and the laws of this land—rectifying a mistake, for many of us.

9. *Faceless Informers Again*, WASH. POST, Nov. 4, 1955, at 20.

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I still carry the seamen's identification document card that was issued to me at that time. It is different from the usual "Validated" document carried by most seamen, for it was stamped in red ink:

VALIDATED: Issued pursuant to decree of DC ND Cal. 7/12/56 and to be given same effect as all other documents issued without such order.

Two years ago, I returned to the sea again after my children had grown, and for other reasons as well, sail part of the year now. My address is different than it shows on this document, and the last time I presented it when signing on the articles of a vessel, was advised to get another one—without the special mark. I'm going to postpone such a move as long as possible, for I want it to continue to remind me—that stamp—that it wasn't just a District Court that restored me my liberty to work where I choose, but a man among men—Walter L. Pope.

With hope for your comfort, and the others who survive, may God bless you all.

Respectfully.

During those years of fear and repression Judge Pope pleaded earnestly and eloquently off the bench as well as on for the preservation of individual rights. The titles of his major addresses reflect his text: "Our Historic Freedoms—Where do They Stand Today?";¹⁰ "The Rediscovery of the Bill of Rights";¹¹ "The Divine Right of Majorities"; "A Bill of No Rights."¹²

Judge Pope's theme in all of these public addresses was simple: the individual freedom we so rightly prize was in danger, not from foes abroad, but from our own people, gripped by fear and hysteria induced by international tensions. Judge Pope said in one of his addresses:

We were born free and lived in freedom, but we became possessed by fear. It was not fear of military attacks from abroad. It was fear of our own people—of the man down the street who we suddenly suspected was conspiring with 57 card-carrying Communists in the State Department . . . Today we have a new fangled treason. . . we call it subversion. We don't imprison for it; we just make a man unemployable—an outcast—an untouchable. . . Lenin is quoted as having said, "We will build Communism with non-communist hands." I wonder if he could have been reading the Seventh Chapter of the Book of Judges and the passage ending with the words: "And all the host ran and cried and fled." You recall the story. How Gideon, with only three hundred men, stood outside the Camp of the Midianites, who were "like grasshoppers for multitude," and at the beginning of the middle watch in the night the men of Gideon "blew the trumpets and brake the pitchers and held the lamps in their left hands and the trumpets in their right hands to

10. WALTER L. POPE, OUR HISTORIC FREEDOMS: WHERE DO THEY STAND TODAY? 105 CONG. REC. 9521 (1959).

11. Walter L. Pope, *The Rediscovery of the Bill of Rights*, 71 J. MO. B. 148 (2015).

12. See *Montana's Lawyers Hear Address by Appeals Court Judge*, THE MONTANA STANDARD, June 14, 1958 <https://perma.cc/H93U-J3CG>.

blow withal,” and they shouted, “And all the host ran, and cried and fled. And the Lord set every man’s sword against his fellow, even throughout all the host.”

I am wondering if the American people will be fatuous enough to follow the lead of the hysterical apostles of fear?

Is it possible that fear would have bred fear, and distrust distrust? Would that be freedom? Could it be said of us that we “ran and cried and fled”?¹³

Judge Pope deplored the then-current “assault upon the Supreme Court, which,” he said, “is in essence an assault upon the Bill of Rights.” He applauded the Court’s decisions reaffirming and enforcing the rights guaranteed to individuals by the Constitution. Because of those decisions, he said, “The American people could begin to climb up out of the sewers of fear in which they have been hiding, and breathe once more the fresh air of freedom. The Court is doing what it is meant for: protecting our liberties.”¹⁴

Judge Pope wrote many outstanding opinions, reflecting his eloquence, his wisdom, and his mastery of the law. Searching through his files, as I did, you are struck by the frequency with which his work drew unstinting praise from his brother judges from all parts of the nation—not the most sympathetic critics. “Your opinions are so beautifully developed and so clear and persuasive,” one wrote. “I only wish I could aspire to such work of art and justice.” Another: “This is a splendid opinion. Superb.” Still another: “A masterful job in a difficult area.” And another; “You have made exceedingly clear that which to me was exceedingly obscure.” And still another: “Your dissent was devastating, and left nothing whatever of the majority opinion.” And another: “The Supreme Court could well have adopted your dissent *verbatim*. It was a gem, and I congratulate you.”

The Walter Lyndon Pope Memorial Library is dedicated to a man who loved the law and used it well—who never lost the high spirit, keen mind, and warm heart of youth. If among the young men and women who pass this way a few are moved to live a life in the law as he lived it, they will be blessed, and so will we.

13. 105 CONG. REC. at 9521–23.

14. *Id.* at 9523.