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MERTON C. BERNSTEIN: EXEMPLAR OF PUBLIC SERVICE

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It should not have surprised anyone who knew him that Professor Merton C. Bernstein would run for the United States Senate in 1992, or that he would run the kind of race that he did. In a decidedly populist campaign, Mert refused to accept individual contributions of more than \$100, eschewing conventional candidates' willingness to indenture themselves to large contributors.¹ Those of us who know Mert recognized in his campaign the spiritual echo of the great and principled legislators who were his mentors in Washington four decades ago. Mert has walked ably in their footsteps for many years and, by his example, he has passed their values along to succeeding generations of lawyers and public servants.

I met Merton Bernstein in the early 1960s, when he arrived on the faculty of the Yale Law School after more than a decade as a government lawyer in Washington, D.C. Fresh from his years as a legislative assistant and staff counsel on Capitol Hill, Mert provided his students with a direct link to the "real world" of government. He knew intimately the complexities of drafting and implementing major pieces of legislation, and he understood well the subtle and often obscure channels through which governmental power is exercised. His experience in government set him apart from other faculty members of the era (and, indeed, of this one), many of whom were absorbed primarily in questions of theory and process. In contrast to them, Mert emphasized that *facts* counted, *information* counted, and the *details of legislation* counted. I can recall few other teachers who taught the law with such a keen understanding of the ways in which ambitious ideas become (or fail to become) public policy.

In teaching us the ways of Washington, Merton Bernstein also passed along his idealism and his faith in the ability of government to improve the lives of ordinary people. Widely seen among my classmates as a "New Deal lawyer," Mert was in fact a lawyer who had come of age profession-

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1. Mert came in third in a field of 14 in the Democratic primary. Mert and two other candidates for the Democratic nomination lost to Geri Rothman-Serot, who lost the general election to Senator Christopher Bond. See, e.g., Tim Curran, *Wheat, Rothman-Serot Frontrunners in Demo Race for Danforth Seat*, ROLL CALL, July 8, 1993, available in LEXIS, Nexis Library, ROLLCL File.

ally during the 1950s—an era that we now view, perhaps simplistically, as a complacent and even uneventful one. After a brief stint as a private lawyer, the young Bernstein, only a year out of Columbia Law School, went to work in 1949 as an attorney with the National Labor Relations Board—the springboard that would launch his remarkable career. Over the next few years, Mert worked in the office of the Solicitor of the Department of Labor, and as counsel to the U.S. Senate Subcommittee on Labor. He then became a legislative assistant to Senator Wayne L. Morse of Oregon, a curmudgeonly—but strikingly prescient—populist who championed many causes well before they became truly popular.² Later, he became special counsel to the Subcommittee on Labor, the powerful subcommittee that Senator John F. Kennedy chaired.

During his decade of service in Washington, Merton Bernstein contributed to the passage of several pieces of landmark social legislation. The legislators whom Mert served, and who served in turn as his mentors, were impressive, almost heroic figures. At a time when the work of politicians was not yet dominated by television cameras, natural orators such as Senator Morse and Senator Hubert H. Humphrey could (and would) speak knowledgeably, off the cuff, for hours at a time on the great issues of the day. In addition to their intellectual depth, these men were also distinguished by their deep convictions, by their political staying power, and by their willingness to stand firmly against the prevailing political winds. Their tenacity and idealism obviously rubbed off on Mert, whose work and teaching have always exemplified these same qualities.

2. *Sic transit gloria*: I have been startled, and reminded of my advancing years, by successive waves of law clerks who were entirely unfamiliar with the name of Wayne Lyman Morse. When I was in law school, Senator Morse was well-known for his blunt manner and for his outspoken support of trade unionism and civil rights. He later secured his place in history with his early opposition to American military involvement in Vietnam: on August 7, 1964, he and Ernest Gruening of Alaska were the only Senators to vote against the Gulf of Tonkin Resolution, which Morse (with perspicacity) called a “pre-dated declaration of war.” On his death, Morse was described as a populist in the tradition of George W. Morris, Robert M. La Follette and William Jennings Bryan. See Alden Whitman, *Wayne Morse Dies: A Senator 24 Years*, N.Y. TIMES, July 23, 1974, at A1, A40. As an editorial put it, Morse was too much the maverick to be a reliable party man, too much the gadfly to be a hero of the Senate Establishment, too much the independent to be predictable even in his proved liberalism. He was a superb public servant—not in spite of these attributes but because of them. . . . He did not disparage the party system as such; he just gave principle a higher priority than party or, for that matter, than the views of his constituents.

Believing with Edmund Burke that a representative’s first loyalty is to his own judgment, he took counsel with himself and had the courage to act on it. *The Senate’s Loss*, N.Y. TIMES, July 23, 1974, at A34. Oregon’s Republican Governor, Tom McCall, called Morse “an honest man . . . our most eloquent petitioner.” *Morse Funeral Held in Oregon; McCarthy, Hatfield Praise Him*, N.Y. TIMES, July 27, 1974, at A32.

With his hands-on experience as a government lawyer, and his passion for using the law as a tool for social change, Merton Bernstein was an unusual character on the Yale Law School faculty in the early 1960s. In those days, student and faculty activism had not yet reshaped law school curricula to introduce the terms “public interest law,” “clinical education,” “social welfare law,” “pro bono,” and “legal services to the poor” to the lexicon of American legal education. Mert brought to Yale a wealth of experience in public policy that helped bridge the gap between politics and the academy, introducing his students to the legislative underpinnings of the welfare state. For his students, young men and women raised in complacent times but not yet acquainted with the cynicism of more recent generations, Mert was an inspiration and a model. For us, he was living, articulate proof that lawyers could go to Washington and do good there—that the terms “public service” and “public interest” had real meaning.

It is not surprising, in light of his formative experiences in Washington, that Mert’s academic specialty should be social legislation, and Social Security and pensions in particular. In this field, Mert has distinguished himself as no other, with literally scores of publications to his name and a towering reputation developed over forty years of continuous work.³ Among these publications, of course, is *The Future of Private Pensions*,⁴ which was hailed upon publication as one of the greatest contributions to the literature on insurance.⁵ His work on the Social Security system (much of it with his wife, Joan Brodshaug Bernstein, as co-author)⁶ marks him as the leading authority on the subject and surely the leading exponent of the Social Security system when it has been under assault. In addition to his prolific writing in academic periodicals, Mert has appeared innumerable times before government committees and professional associations, he has served as a consultant to many governmental agencies and private foundations, and he has shared his knowledge of social insurance and pension law in countless television and radio programs. In these ways, he has used his expertise to serve not only the officials who frame national policies but also the practitioners who implement those policies and the

3. In addition to his three books, Merton Bernstein has published more than fifty articles, comments and reviews on subjects relating to his specialty of social insurance.

4. MERTON C. BERNSTEIN, *THE FUTURE OF PRIVATE PENSIONS* (1964).

5. See Karen W. Ferguson, *Mert Bernstein: Pension Pioneer*, 71 WASH. U. L.Q. 999 (1994).

6. See, e.g., MERTON C. BERNSTEIN & JOAN B. BERNSTEIN, *SOCIAL SECURITY: THE SYSTEM THAT WORKS* (1988).

people whom they serve.

Despite his distinction in his chosen fields, Mert has not confined himself to a mere corner of the legal world. As an arbitrator, he has handled more than 600 cases in both the private and public sectors, working by appointment of the American Arbitration Association, the Federal Mediation and Conciliation Service, and the National Mediation Board, and as the “permanent” arbitrator under several labor-management collective bargaining agreements. As a citizen, he has complemented his academic writing on social insurance with essays and op-ed pieces on issues as diverse as deficit reduction, the federal court system, defense spending, and political action committees, and he has written scores of letters to editors of major newspapers and journals. Mert’s commitment to the greater good is perhaps epitomized by his own bid for the Senate in 1992, which embodied the virtues that he encourages our jaded electorate to demand of its public servants.

For those of us who were his students, Mert’s distinctive contribution has been to cultivate in us the values of public service that his mentors cultivated in him. Indeed, Mert’s entire career stands as an example of public service in its noblest form. He has devoted himself to the difficult, and rarely glamorous, tasks of fashioning legislation, publishing articles, and mediating disputes, offering his expertise and energies in the service of the great causes of his day. He has demonstrated, over the course of his career, a remarkable selflessness and idealism, unsullied by the cynicism about government and politics that have become so widespread in recent years. Not least of all, he has maintained an enormously productive and stimulating career over a span of more than four decades. Since the early 1950s, Mert has slowed down not at all. Indeed, if he had his way he would eagerly have been off to represent the citizens of Missouri for at least six years in the United States Senate. It is perhaps fitting that the author of a 1965 article entitled *The Case Against Early Retirement*⁷ should illustrate his own point with such force.

I am honored to have had the opportunity to contribute to this salute to my former teacher, Professor Merton C. Bernstein. Although he retires from academic life this year, there is one thing about which we may all be sure: with Merton Bernstein, his retirement merely heralds the beginning of some new stage in his illustrious career—which he will surely spring

7. See Merton C. Bernstein, *The Case Against Early Retirement*, 4 INDUS. REL. 29 (1965), reprinted in G.D. NASH, *ISSUES IN AMERICAN ECONOMIC HISTORY* (1972).

upon us when we least expect it. Public service runs too thick in his veins for him to do anything else.

