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A TRIBUTE TO CHIEF JUSTICE ALBERT WILKINS BARNEY

Chief Justice Franklin S. Billings, Jr.*

Albert Wilkins Barney first took the bench in 1950 as the Municipal Judge in his hometown of St. Johnsbury, Vermont. From that day to his retirement from active judging on December 31, 1982, he has devoted over thirty-two years of service as a judge to the State of Vermont.

He served as Municipal Judge from 1950 to early in 1952 when he was appointed to the Superior Court Bench. During the period 1951 to 1952 he also served as a member of the Vermont House of Representatives.

After serving for seven years on the Superior Court, he was elected to the Vermont Supreme Court in 1959. In 1974 he became Chief Justice of the Supreme Court and served as Chief until his recent retirement. Today, while he enjoys a quiet retirement, he continues to serve the judiciary through his active participation on the Supreme Court's Standing Advisory Committee on Bar Admissions and Continuing Legal Competence and he sits with the Supreme Court from time to time.

In view of these long years of service, my task in drafting this tribute to Albert W. Barney is indeed simplified. His contributions over the years to effective justice administration and to the rule of law speak for themselves. But the style with which he made those contributions will be equally cherished by all those with whom he worked.

Chief Justice Barney approached the obligations of his high office with respect and consideration for all—for his colleagues, for his staff and, above all, for the Vermont citizen who was affected by his work. The impact of his administrative and judicial opinions

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on the lives of the common citizen was his first concern and this concern informed the common-sense approach he applied to the problems of his day.

I recall, as the Supreme Court considered alternative ways to deal with its increasing caseload, that he insisted that all appeals were of importance to the citizen who filed them. It was his approach to treat even the simplest pro se case with care, gently questioning and guiding the legally naive petitioner during oral argument in order to understand better how the law ought to be applied. Chief Justice Barney never forgot that his was an office of public trust and that he was a servant of the citizen.

He propounded this view of judicial office to all who served in the Judiciary. He worked long and hard to make effective justice service available to all Vermonters. And it was during his tenure that the Judicial Department achieved so much success in disposing of civil and criminal cases without undue delay. As Chairman of the National Conference of Chief Justices, he carried his message of effective judicial service to all of this nation's state courts.

I was honored to serve with him on the Supreme Court for over eight years. During that time, I always found him to be a congenial, thoughtful and generous colleague, always willing—despite the pressure under which we work—to assist or confer with the other Justices. He often rose above the individual differences of opinion among the Court to find the common ground. He well understood the institutional responsibilities of the Court, recognizing that the Court itself, not its individual members, was responsible for providing legal guidance to Vermont.

In his twenty-four years of service on the Supreme Court, he authored several hundred opinions, some obvious landmarks in Vermont law. In the May, 1982 case of *State v. Ludlow Supermarkets, Inc.*,[1] his view of the limited powers of the state and federal governments is forcefully stated. In that case the court found that Sunday closing laws were not based on a proper exercise of constitutional power and the statute was declared unconstitutional. Specifically, the challenged statute was found to violate Chapter I, Article 7 of the Vermont Constitution.

Chief Justice Barney's philosophy of government characterizes the rights of citizens as paramount to the interests of the govern-

1. 141 Vt. 261, 448 A.2d 791 (1982).

ment. Sovereignty in our system of government remains with the people. It is his view, therefore, that the people are master and not the government. Writing for the court in that case he said:

> Since the citizens have long since chosen to be governed through a limited grant of authority to each branch of government, it is their right, and this Court's duty, to see that any legislative action prohibiting as a crime otherwise lawful activity is bottomed on the proper exercise of a constitutional power assigned to the legislative branch.[2]

In *Ludlow*, Chief Justice Barney's studied sense of judicial restraint in reviewing enactments of the legislature was overcome by the challenge based on state, as distinct from federal, constitutional grounds. The Barney Court's recognition and application of distinct state constitutional standards has been cited as a major development in the jurisprudence of the separate fifty states.

The application of state constitutional standards, he noted, means,

> a state court reviewing state legislation is in a very different posture from the United States Supreme Court when it undertakes the parallel task. Rather than disposing of a case on the premise that its impact will presumably affect more than fifty varying jurisdictions, a state court reaches its result in the legal climate of the single jurisdiction with which it is associated, if federal proscriptions are not transgressed.[3]

The Barney Court went on to develop further the importance of separate Vermont state constitutional standards in *State v. Badger*[4] where Justice Hill for the court wrote that because the Vermont Constitution is the fundamental charter of our state, "it is this Court's duty to enforce the constitution"[5] of the state as an "independent authority, and Vermont's fundamental law."[6]

The style of Chief Justice Barney's appellate contributions was guided by his strongly held position that an opinion should not go into unnecessary grounds. He felt that "law review notes" had no place in the appellate case law of the state. He strove for

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2. *Id.* at 264, 448 A.2d at 793.
3. *Id.* at 268, 448 A.2d at 795.
4. 141 Vt. 430, 450 A.2d 336 (1982).
5. *Id.* at 448, 450 A.2d at 347.
6. *Id.* at 449, 450 A.2d at 347.

simplicity in the rule of law. That kind of style is demonstrated in his straightforward definition of the criminal defense of necessity that he outlined in *State v. Warshow*[7] where he wrote:

> In the various definitions and examples recited as incorporating the concept of necessity, certain fundamental requirements stand out:
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> (1) there must be a situation of emergency arising without fault on the part of the actor concerned;
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> (2) this emergency must be so imminent and compelling as to raise a reasonable expectation of harm, either directly to the actor or upon those he was protecting;
>
> (3) this emergency must present no reasonable opportunity to avoid the injury without doing the criminal act; and
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> (4) the injury impending from the emergency must be of sufficient seriousness to outmeasure the criminal wrong.[8]

His style also was to use citations sparingly where the law was clear. As an example, in *Devost v. New Hampshire Electric Coop., Inc.*,[9] he cited but one case, and that not on the merits.

Perhaps the most important opinion for Vermont law submitted by Chief Justice Barney was the majority opinion in *State v. Dunkerley*[10] where the court found that Vermont's Assistant Judges ruling on questions of law in a criminal case violated due process under the federal constitution. He led the court to that result despite the argument that the issue should be left to the United States Supreme Court.

He wrote:

> It is sometimes tempting to leave such unwelcome issues to be decided first by the United States Supreme Court, but fidelity to judicial duty to resolve such controversies when they are brought legally before us by litigants dictates what we rule.[11]

Notwithstanding the complexity of the issues of this case or its substantive impact on Vermont practice, the Chief Justice characteristically used but five citations in the whole of the opinion.

He is a complex man with an acute sensitivity to others. These

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7. 138 Vt. 22, 410 A.2d 1000 (1980).
8. *Id.* at 24, 410 A.2d at 1001-02.
9. 134 Vt. 15, 349 A.2d 896 (1975).
10. 134 Vt. 523, 365 A.2d 131 (1976).
11. *Id.* at 526, 365 A.2d at 132.

attributes can lead a jurist to much pain in the decisionmaking process. Al Barney, however, recognized his duty to decide and fully understood the role of the judiciary in providing guidance for how men and women are to conduct themselves and their business affairs. His legacy will serve Vermont well for years to come.