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1976-1977]

THIRD CIRCUIT REVIEW

Dedication

THE VILLANOVA LAW REVIEW *humbly dedicates the Third Circuit Review to*
JOHN BIGGS, JR.

John Biggs came on the Court of Appeals at the age of forty-one only a few months before Hugo Black — whose judicial philosophy, like his, was based on humanitarian liberalism — became the first of five appointments in two years by President Roosevelt to the Supreme Court. John Biggs' jurisprudential views were warmly received by the new justices. That is evident in the disposition of nineteen Third Circuit decisions reviewed by the Supreme Court during his first decade on the Court of Appeals. John Biggs dissented from his colleagues in every one of those nineteen cases. The Supreme Court followed Judge Biggs' results, if not always his reasons, in every one of those nineteen cases, and reversed his colleagues in all of them. During the same period, judgments in twenty cases in which Judge Biggs wrote the court's opinion were affirmed by the Supreme Court, and only nine were reversed. This has to be one of the more important contributions for one judge in one decade.

Judge Biggs continued throughout his judicial career to play a noteworthy role in shaping the contours of our modern federal jurisprudence during times of deeply troublesome and controversial change. His tracks appear on many important Supreme Court decisions. Notable among them is the seminal case of *United States v. White*¹ in which the Supreme Court adopted his dissent at Circuit² and held that a union official incriminated by union books and records in his possession could not invoke the privilege against self-incrimination as a reason for refusing to respond to a grand jury subpoena that he produce the books and records. Judge Biggs' sensible reasoning, adopted by the Supreme Court, was that the books and records were not the official's "private books and papers," but the property of the union as an entity. *White* has been reaffirmed again and again. And one of the most celebrated and important of the free speech and assembly decisions, *Hague v. CIO*,³ enjoining

1. 322 U.S. 694 (1944).

2. See *United States v. White*, 137 F.2d 24, 26 (3d Cir. 1943) (Biggs, J., dissenting).

3. 307 U.S. 496 (1939).

Mayor Hague's police from banning peaceful labor union meetings and the distribution of union literature, sustained Judge Biggs' holding for the Court of Appeals that district courts had jurisdiction to enjoin official interference with such constitutional rights, a point much in doubt at the time.⁴ Judge Biggs inimitable literary style surfaced in his opinion in that case. Commenting upon the lawless actions of the Mayor and his police, Biggs drily remarked, "Mayor Hague and his associates, reversing the usual procedure, troubled the waters in order to fish in them."

Speaking of Judge Biggs' literary style, we all know that he has been a novelist, playwright, and textbook author. Someone has rightly said that when President Roosevelt put him on the bench, America won a great judge but lost a great novelist. I suspect that John thought he could safely leave the literary laurels to F. Scott Fitzgerald, his Princeton roommate. And of course we know that he is a raconteur of rare ability with a keen sense of humor.

Judge Biggs has contributed so much to so many fields of developing and newly emerging law that it is difficult to say which contribution was the most significant. But I am sure we would all agree that his contribution to evolving jurisprudence governing the determination of the criminal responsibility of the mentally ill is one standout. For over a century since 1843, criminal responsibility of the mentally ill has been determined in American courts, and still is in some states, under the so-called M'Naghten "right-wrong test" formulated by the British courts. Under that test an insane or mentally ill or mentally diseased accused might be convicted if the jury could find that he knew the difference between right and wrong, although the jury might also conclude that he was helpless, because of his condition, to exercise the self-control that would stop him from committing the crime.

We pride ourselves that we are a civilized society. But the morality of holding such unfortunates criminally culpable much troubled Judge Biggs. He is a most compassionate human being, with a genuine interest in every individual and his problems. His judicial twin and close friend, Judge Maris, also a giant among the judges of our history, has said, "The appealing situation of a distressed individual enmeshed in a hard case never leaves him unmoved. This trait of his character motivated his great interest in psychiatry and the law, particularly in the mentally ill offender." As early as 1954, his book on this subject, *The Guilty Mind*, earned him the distinguished Isaac Ray Award conferred by the American Psychiatric Association upon the doctor or lawyer contributing most

4. *Hague v. CIO*, 101 F.2d 774 (3d Cir. 1939).

to the development of forensic psychiatry. That book was a goad for all judges. Its theme, in Judge Biggs' words, was that "we judges have spent too little time in the adopting of techniques for improving the human race as distinguished from punishing it."

Judge Biggs set about exploring for new techniques and his prodigious research culminated in 1961 in his notable opinion in the *Currens* case.⁵ That opinion devastatingly exposed the M'Naghten Rules as obsolete relics traceable to an ancient book published almost 400 years ago at a time in which belief in witch-craft and demonology, even among well educated men, was widespread. The stark fact was, he concluded, that tested by the exacting standards of modern behavioral psychology, the M'Naghten Rules were utterly unworkable and simply wrong. Worse, they produced barbaric and morally reprehensible results. He proposed their complete discard and the substitution of a test that required that the jury acquit if satisfied that at the time of the commission of the criminal act, the accused, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law he was charged with violating.

From my official vantage point, Judge Biggs' warning to the Supreme Court not to get involved with this subject was a notable contribution of that notable opinion. He clothed his message in words gentle as feathers. "We think," he wrote, "that perhaps the Supreme Court has withheld the granting of certiorari in [these] cases, and has not laid down a rule for the federal courts in respect to the criminal responsibility of the mentally ill because it desires to treat the Circuits as it does the states, as laboratories for the development of substantive law." The message, however, was loud and clear. The science of psychiatry has made tremendous strides, enough to expose the inhumanity of the M'Naghten Rules, but the progress of that science has not yet reached a point where its learning would justify constitutionalizing — or even adopting as a matter of the Court's supervisory power — any particular formulation. Our respect for Judge Biggs and his scholarship in this field has led us to this date to refuse to review any of the several cases that have sought to engage us in the controversy. The time may come when Supreme Court intervention is unavoidable but, thanks in part to the work of Judge Biggs, we know that the time is not yet.

Some great judges are very poor judicial administrators. Some not-so-great judges are superb judicial administrators. Judge Biggs is the rare great judge who is also a brilliant judicial administrator. The judges and lawyers of the Third Circuit saw this daily over the

5. *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961).

twenty-six years that he led this Circuit. Judge Maris epitomized that stewardship when he said:

In the Third Circuit Chief Judge Biggs has provided superb leadership which has knit our judges, Circuit and District, into a team working together harmoniously to dispatch the tremendous load of litigation with which our courts have been flooded in recent years. The secret of his successful leadership is his unvarying practice, before a decision is made, of giving unlimited time to patient and understanding consultation with each of the judges concerned about each problem which arises. Although as Chief Judge of the Circuit he has full statutory authority to act on his own responsibility in many matters, it is his practice never, except in the direst emergency, to do so until after he has had a full discussion with all those concerned.

I could not more fully concur. As Circuit Justice during nine of the years Judge Biggs was Chief Judge, I saw several instances of his skill at work. This is not because as Circuit Justice I have any administrative authority or duties. It is not fully understood, I think, that the Circuit Justice has neither. I had the opportunity to see for myself because Judge Biggs went out of his way to keep me informed of administrative problems of consequence that arose and, in two critical matters, as I recall, involved me in their solutions. He was often in Washington, for appearances before Congressional Committees or on business of the Judicial Conference, and never failed, however busy, to telephone or stop into my chambers for a chat to bring me up to date. At his invitation, I also attended meetings of his Court sitting as the Circuit Council, usually when such sessions convened at Atlantic City following Circuit Conferences, but on occasion also in Philadelphia. I had more than a little experience with judicial administration when I sat on the courts of New Jersey, and I must say watching him preside was watching a master at work.

And he matched his great Circuit performance with an equally brilliant performance as member of the Judicial Conference of the United States. Again I cannot excel Judge Maris' appraisal of his contribution:

There is also another side of Chief Judge Biggs character which is perhaps the most important from the public standpoint. I refer to his tremendous interest in and work for the improvement of the administration of justice in the federal courts. . . . As chairman of two of the principal committees of the Judicial Conference, the Committee on Court Administration and the Committee on Supporting Personnel of the Court (on the

latter incidentally Judge Maris was Judge Biggs' strong right arm for many years) he has initiated and secured Conference support year by year for a long series of proposals designed to promote the better administration of justice in the federal courts and by his masterly presentation of those proposals at the Congressional Committee hearings he has almost single-handedly secured the enactment of a great many of them.

His activities have made him probably the best known and beloved of federal judges to his fellow federal judges. Judicial salaries, pensions for judges' widows, and adequate staff, may strike you as mundane matters not justifying engaging the enormous effort and attention of a great judge. But Judge Biggs, although motivated by his always sympathetic concern for the plight of fellow judges, was also motivated by the conviction that able lawyers could be attracted to federal judgeships only by favorable working conditions. He had tremendous success in persuading congressional committees to that point of view, and this as much as any other thing, accounts for today's high quality of the federal courts. That has been a contribution to the public interest of a magnitude impossible to exaggerate. It is why Chief Justice Warren was to say of him, "Because of his great help to me in the work of the Judicial Conference and his constructive achievements in that body, I first think of Judge Biggs as a one-man ministry of justice, and I honor him particularly for his tireless and continuous efforts to improve the administration of the federal courts." It was why Chief Justice Burger wrote Judge Biggs: "If there were some judicial counterpart of the Congressional Medal of Honor you would find my list for one of the first to be given."

William J. Brennan, Jr.
Associate Justice
Supreme Court of the United States