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CONTEMPT OF COURT: THE MOST IMPORTANT “CONTEMPORARY CHALLENGE TO JUDGING”

SANFORD LEVINSON*

Both Chief Justice Rehnquist's and Judge Wilkinson's speeches, delivered as part of a program on "contemporary challenges to judging," are fascinating. Given the ceremonial occasion, the dedication of a new wing of the Washington and Lee Law School library housing the papers of Justice Lewis Powell, one might well have expected traditional encomia to the law and reiteration of conventional pieties about the strict separation between law and politics. Instead the audience was privileged to hear candid talk about the fragmentation—indeed, in Judge Wilkinson's word, the "polarization"—characteristic of the contemporary legal universe. A key aspect of this reality is an ever diminishing willingness to defer to judges as "oracles of the law," in part because of the almost universal recognition that law and politics are indeed inextricably intertwined.

Altogether typical of the contemporary mood is the remarkable statement by Yale Law School Dean Guido Calabresi, in a column explaining why he supported the nomination of Clarence Thomas to the United States Supreme Court. "I despise the current Supreme Court," Calabresi wrote, "and find its aggressive, willful, statist behavior disgusting. . . ."¹ What is so startling about Dean Calabresi's comment is not its sentiments, which are widely shared at least within the legal academy, but his willingness to say so publicly. Lest one think that only the "left"² speaks harshly of a conservative Court, one should be aware that denizens of the so-called New Right, throughout the 1980s, attacked Justice Brennan, among other liberal jurists, in terms suggesting that he simply had no respect for constitutional values and willfully subordinated the Constitution to his own pernicious political agenda. Indeed, Justice Scalia, in some of his dissents, seems to think little better of some of his own current colleagues.³

Many factors, of course, explain these developments. Law is only one aspect of our more general cultural surround, and legal fragmentation amply

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This essay is based on some distinctly informal comments delivered as part of a panel on "Contemporary Challenges to Judging" that took place on April 4, 1992, as part of the symposium celebrating the opening of the Lewis Powell wing of the library of the Washington and Lee Law School. I am grateful to the editors and staff of the *Washington and Lee Law Review* for the hospitality extended me on that occasion.

1. Guido Calabresi, *What Clarence Thomas Knows*, N.Y. TIMES, July 28, 1991, § 4, at 15.

2. Though it is far more accurate to describe Calabresi as a "centrist" rather than a "leftist," as evidenced by his support, however tepid, of the Thomas nomination.

3. See, e.g., his opinion in *Planned Parenthood of S.E. Penn. v. Casey*, 60 U.S.L.W. 4795, 4835 (U.S. June 29, 1992).

reflects the divisions present in the wider social order. "Reflecting larger fissures in society," Richard Posner has written, "the legal community is politically and culturally divided."⁴ Indeed, Posner suggests that "[n]ot since the Civil War have the legal profession, the judiciary, and the legislatures all been so diverse, politically and culturally."⁵ As the evocation of the Civil War reminds us, it is simply foolhardy to assume that there is anything magic about American constitutionalism that can necessarily save us from the most traumatic political catastrophes.

The most basic contemporary challenge to judging, then, is gaining the respect of the wider audience, particularly, of course, those who are dissatisfied with the particular outcomes of cases. Is there anything that Chief Justice Rehnquist or Antonin Scalia can do to overcome Dean Calabresi's contempt? One answer, of course, is to do what Justices Brennan and Marshall (ultimately) did, which was to resign. That is scarcely a very helpful answer, especially if their replacements would be appointed by presidents like Ronald Reagan or George Bush, neither of whom has exhibited the slightest interest in achieving a diversified (or, especially in the case of Bush, even a distinguished) Supreme Court.

Part of what accounts for the present unhappiness is precisely the widescale acceptance of the basic insights of Legal Realism, as accurately delineated by the Chief Justice. He describes the so-called "oracular theory of judging" by which "sound legal training in existing case law was all it took to discover the rule of decision applicable to the case at hand." Then comes perhaps the most important sentence of the entire talk: "The advent of the Legal Realist School disabused *us* of that notion" (emphasis added). What is crucial in this sentence is precisely the emphasized "us," for Rehnquist makes no effort to relight the flame of the "oracular theory." Indeed, he immediately goes on to say that "[f]ew," most certainly *not* including the Chief Justice, "would now argue against the proposition that judging involves creating law, at least to some extent."

What this means, among other things, is that it matters profoundly which particular persons are appointed to the judiciary. One can no longer cogently argue that some process of legal professionalism will be enough to "bleach out" the specific identity, including political commitments, brought to the bench by the judges. What this means, among other things, is that it is extremely unlikely that the resolution to fragmentation lies in adopting one or another of the various hermeneutic approaches—whether original intent, pragmatism, or whatever—proffered (or preferred) by legal academics. An announced adherence to one of these notably abstract theories of interpretation will have, I strongly suspect, no more than the slightest impact on the actual results reached in the cases presented to the Supreme Court

4. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 203 (1990).

5. *Id.* at 296. See also Sanford Levinson, *Strolling Down the Path of the Law (And Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1233-35 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

for decision. Far more important are the basic political and social sensibilities of the judges. As Felix Frankfurter pointed out many years ago, it is a "mischievous assumption that our judges embody pure reason."⁶ Instead, he wrote, "the nine Justices are molders of policy," and "the 'Constitution' which they 'interpret' is to a large measure the interpretation of *their own experience*, their 'judgment about practical matters,' their 'ideal pictures of the social order.'"⁷ As already suggested, I have no reason to think that Chief Justice Rehnquist would seriously disagree with the basic outline of this analysis, whatever our likely disagreements about who should actually be appointed to the judiciary.

Can anything more be said about the appointment process, though? Let me offer two suggestions, both of them predicated on accepting the basic outlines of Chief Justice Rehnquist's legal realism. The first relates to lifetime tenure on the Court. I think this is a practice whose time has gone and, indeed, that seriously disserves the nation in a number of important ways. One of them is that it, indeed, tends to freeze on the Court the "ideal pictures" of outdated, and perhaps electorally repudiated, governing coalitions. We certainly saw this during the pre-1937 period when conservative justices resolutely stood against legislative reforms sparked by the Depression and the New Deal. But liberals must recognize that some of their heroes (and, to be honest, my heroes as well), such as Justices Brennan and Marshall, may also have stayed too long at the fair, succeeding mainly in building up resentment on the part of their ideological opponents.

Moreover, lifetime tenure, coupled with explicitly ideological appointing, results in the perverse incentive to appoint young judges. The justice whose career sparked this symposium, Lewis Powell, was appointed to the Court when he was 63, and he served 16 years. It is, alas, simply unthinkable that any President today would appoint anyone that old, because 16 years is viewed as "too short." Instead we get, as the most egregious example (for a variety of reasons), Clarence Thomas, who may well be on the Court for over 35 years. But one of the ostensible attractions, at least to the appointment presidents, of Antonin Scalia, Anthony Kennedy, and David Souter as well was their relative youth and, thus, prospects for three decades of service to conservative political ideals, regardless of future developments in the wider political culture.

What, then, is the solution to lifetime tenure? It is, I believe, to appoint Supreme Court justices for single, non-renewable terms of 18 years.⁸ Why

6. Felix Frankfurter, Book Review, *New Republic*, April 23, 1924 (reviewing ANDREW A. BRUCE, *THE AMERICAN JUDGE* (1924)), reprinted in FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 150 (Philip B. Kurland ed., 1970).

7. Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 *HARV. L. REV.* 909 (1923), reprinted in, FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 6, at 119-20.

8. This suggestion was initially made about five years ago in a column in the *Wall Street Journal* that I unfortunately did not save.

18 years? The answer is simple: Eighteen is divisible by nine, so that a new appointment would be made every two years. This has the advantage, among other things, of preventing any single president from making a majority of full-term appointments, though a political party that did indeed capture three consecutive presidencies, and had sufficient ideological support in the Congress, could indeed name a majority of justices.

Once one accepts the basic insight of legal realism, it simply makes no sense to appoint justices for a lifetime. Any concerns about judicial independence can be allayed by paying full-salary pensions at the conclusion of the 18-year term. Nothing else should be necessary. Former justices could continue to serve the nation in a number of ways other than continued membership on the Supreme Court.

A second suggestion relates to the background sought in nominees for the Court. I offer it *not* as some kind of nostrum for our divisions, but rather simply as a corrective to what I think is an especially unfortunate aspect of the contemporary Supreme Court and at least one factor contributing to the contempt that many citizens feel for it. Notably absent on the current Supreme Court is anyone with an impressive electoral career prior to judicial appointment, or even a particularly impressive career of service at the highest levels of American politics. If we are, for better or worse, going to continue to count on the Supreme Court to display a necessary political wisdom in its decisions, then we should make a greater effort to appoint judges who have offered some evidence of possessing such wisdom.

Consider, for example, the members of the 1954 Supreme Court that handed down *Brown v. Board of Education*. The Chief Justice, Earl Warren, had been an immensely popular governor of what was then the third-largest state and a candidate for the Vice-Presidency on the Republican ticket in 1948. Indeed, he owed his appointment to his having been a legitimate candidate for the Presidency in 1952, a candidacy he abandoned in favor of Dwight Eisenhower. Other justices included three former senators (Hugo Black, Sherman Minton, and Harold Burton); two of the leading legal academics of their time (Felix Frankfurter and William O. Douglas, both of whom were also involved at the highest levels of the Roosevelt Administration during the New Deal); two former Solicitors General (Robert Jackson and Stanley Reed); and two former Attorneys General (Jackson and Tom Clark).

Compare the current Court. The blunt fact is that not a single one of its members had, before appointment, compiled a record of public service equal to *any* member of the 1954 Court. It is perhaps startling to realize that the current Justice closest in pre-appointment achievement to even the least distinguished member of the 1954 Court is the aforementioned Clarence Thomas, who had at least been head of an important federal agency prior to his appointment to the United States Court of Appeals. Only Justice O'Connor, among the current members of the Court, has ever experienced campaigning for (and being elected to) public office. And it is obvious to anyone observing her career that her particular vision of the Constitution has been profoundly affected by her service in the Arizona legislature.

It would be naive in the extreme to argue that contempt of court would be assuaged by the appointment of, say, former Governor of California George Dukemajian or Senator Orrin Hatch. (I leave it up to my readers to imagine analogues to the entire 1954 Court.)⁹ The country may, as Judge Wilkinson suggests, simply be too polarized to view any set of appointees as possessing sufficient political wisdom to make authoritative decisions in regard to the kind of issues we present the judiciary for resolution. But is a Supreme Court composed of relative nonentities, devoid of practical experience in the arts of political negotiation and compromise—and devoid as well of displays of political courage like that of Lewis Powell in regard to desegregation in Richmond—likely to command general public respect? The question answers itself.

Events since the early April 1992 gathering in Lexington have only underscored the extent to which some basic assumptions about American politics are being challenged. A man without significant political experience, reminiscent of a “man on horseback,” is currently leading the presumptive presidential candidates of the two major parties in a number of major states, and it is altogether thinkable as I edit these remarks (in late June) that the next President of the United States will be chosen by the House of Representatives (and the next Vice-President by the Senate). With the collapse of the Cold War, more calls for *perestroika* can be heard in our own country as well. There is simply no reason to believe that the waves of anger directed at the presidency and the Congress will not reach the judiciary as well. As noted at the outset, Dean Calabresi undoubtedly speaks for millions of Americans in his expression of contempt of court. We should address the underlying causes of this contempt. To pretend that it will simply go away or otherwise benignly tolerated (perhaps like the federal debt?) is irresponsible. The contemporary challenge facing judges is, indeed, a challenge facing all of us as citizens concerned about the future of our polity.

9. Nor do I want to argue that the Supreme Court is not well served by having *some* members who have judicial experience, particularly at the trial court level (which is sorely lacking in an otherwise judge-dominated court).

