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REFLECTIONS ON THE ROLE OF APPELLATE COURTS: A VIEW FROM THE SUPREME COURT*

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Not long ago, I sat on a panel with two distinguished law professors who were discussing the jurisprudence of the modern Supreme Court. One of the professors addressed what he labeled the three phases of the Rehnquist Court, describing its first phase as radical, its second as more moderate politically, and its third as rational or pragmatic. As a former law professor, I understand that analyzing the Supreme Court is part of a legal academic's job and that offering such classifications is a common feature of scholarly journals. But my reaction is that of a judge, and speaking as a judge, I can say only that the professor's assessment does not capture what the Court feels like internally. Rather than being concerned with various phases, we Justices think of ourselves as facing a set of difficult cases that we try our best to decide. Law professors may want to ascribe philosophical motivations to our opinions, but we see our job as simply to decide the cases before us.

Today, I will provide an overview of how I go about performing that job, from how I determine which petitions for certiorari merit the Court's attention to how I resolve those cases once they arrive. As I offer this sketch of my work at the Court, I will also periodically focus attention on the ways in which the Supreme Court is similar to and different from other appellate courts, including the federal courts of appeals and state supreme courts.

The United States Supreme Court receives about 7500 petitions for certiorari every year, which amounts to about 150

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* Justice Breyer addressed the delegates to the 2005 National Conference on Appellate Justice on the morning of November 5, 2005. This essay, which includes an edited transcript of the question-and-answer session that followed, is based on his speech.

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petitions per week. Eight of the nine Justices pool our law clerks so that each clerk assumes responsibility for writing a memo about approximately five petitions every week. Critics might say that I should read every petition and every response, rather than beginning with the law clerks' memos. I think, however, that having Justices read 8000 petitions per year would lead to some undesirable consequences. Consider, for example, handwritten pro se petitions, many of which are extremely difficult to decipher. It is tempting when reading such a petition to throw up one's hands and dismiss the petition as ridiculous. But not all of those petitions are ridiculous. Indeed, some pro se petitions raise important issues that the Supreme Court should resolve. Using the pool system, we have in fact located that needle in the haystack in part because a law clerk reviewing five petitions carefully is more likely to recognize the important issues they raise than is a judge merely skimming 150 petitions.

As I read those petitions I often bear in mind the words of Chief Justice Taft, who observed many years ago that the United States Supreme Court is not a court of error correction.[1] By this, Taft meant that the Supreme Court does not generally determine whether the lower courts have correctly disposed of a particular case. While this statement may sound a bit harsh, it is essential to remember that before petitions reach the Supreme Court the parties have previously had a trial and at least one appeal. Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one. If every lower court that has addressed a question arrives at the same answer, it is difficult to understand why the Supreme Court should weigh in on the matter. If, however, lower courts disagree about how to answer a particular legal question, the Supreme Court is considerably more likely to hear the case.

A lower court split, then, is a major part of what I look for when I review the stack of memos prepared by the clerks. Once I have narrowed the stack down to the petitions that present likely candidates for review at our Court, I try to decide whether

1. William Howard Taft, *The Jurisdiction of the Supreme Court under the Act of February 13, 1925*, 35 Yale L.J. 1, 2 (1925) ("The function of the Supreme Court is conceived to be, not the remedying of a particular litigant's wrong, but the consideration of cases whose decision involves principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court.").

I want to have a particular case discussed at Conference. Instead of relying solely on the law clerks' memos for this narrowed set of petitions, I examine the petition itself, read the opinions below, and discuss the case with my law clerks to determine whether there is a need for uniform federal law in this particular area. This system for sifting through the petitions is far more mechanical than many people suspect. Just as is true of justices on state supreme courts, we do not vote to hear cases simply because we think they raise interesting legal questions.

After we wade through roughly 8000 petitions for certiorari, the Supreme Court has in recent years opted to hear about eighty cases each Term. Although it sometimes seems as if every legal dispute in the United States culminates in a petition to the Supreme Court, this is not the case. In addition to those 8000 petitions, lower appeals courts decide tens of thousands of cases containing federal issues, and millions of lawsuits are filed in courts across the country each year. This means that the eighty cases that the Supreme Court hears annually represent the small tip of a vast iceberg. It also means that, rather than the Supreme Court of the United States deciding every important question of law, most determinative legal interpretations occur instead in the federal courts of appeals, in the state supreme courts, and in state appellate courts.

The Constitution establishes that courts have the power to decide cases and controversies. But that declaration provides limited illumination of the responsibilities of the modern Supreme Court Justice. Instead of seeking only to resolve a dispute between two parties, the Supreme Court is primarily interested in deciding questions of law. Our approach differs from that of the courts of appeals because we consider a case only if four of us are persuaded that it raises a legal issue that must be decided. Therefore, if the Court grants certiorari to hear a case, and we belatedly discover that the case has a jurisdictional problem that prevents us from reaching the critical question, we are disappointed. I know that everyone involved—the Justices, the attorneys, the parties, and the lower courts—is interested in having the matter resolved. This reality means that my job on the Supreme Court differs considerably from the job of an appeals court judge because a Supreme Court justice is not merely attempting to dispose of the cases before him. Rather, I

am trying to answer the important legal question that each case raises.

The United States Supreme Court is also similar to the state supreme courts in that all of our cases raise significant matters of law. The difference, I think, is that we on the United States Supreme Court confront a steady diet of federal constitutional cases. This workload also differs from my work as a judge on a federal court of appeals, where we intermittently considered constitutional questions, but nothing approaching the broad range of constitutional questions that reaches the Supreme Court. That wide range of constitutional issues is significant because it encourages each justice to develop a view of the Constitution as a whole, rather than seeing the document as merely a compilation of discrete provisions. Sometimes the justices' views of the Constitution are called theories, but I believe that they are better characterized as approaches. Admittedly, those distinct approaches can produce the occasional difference among the justices. But while those differences can be cast in dramatic terms, they are far less dramatic than most people believe because each of us views the Constitution as a coherent whole.

It is often difficult to be a judge, even in the best of circumstances. Today, I think that judges are in the midst of a particularly trying period, in part because we face increased attacks from elected officials of various political persuasions. I am not talking here about criticisms of judicial opinions. Everyone has a view regarding whether particular cases have been decided correctly, and it is appropriate in our democracy for people to express their viewpoints. But when the overwhelming majority of comments about appellate courts are negative, I am put in mind of Chief Justice John Marshall's justly celebrated warning: "The people made the constitution, and the people can unmake it."[2] Persistent attacks pose a problem because although the courts will weather thoughtful criticism of specific judicial opinions, courts cannot survive a constant deluge of negative comments intended to undermine popular support for the entire judiciary.

2. *Cohens v. Va.*, 19 U.S. 264, 389 (1821).

Federal judges are somewhat insulated against such criticism in part because we do not participate in judicial elections as many state judges must. I grew up in California when Earl Warren was the governor, and the state's judicial election system worked quite differently than the current systems do. When a judicial vacancy arose, Governor Warren would consult the bar, the bar would suggest possible candidates, and he would choose from among them. Governor Warren's selections garnered very little dissatisfaction, and indeed, there was hardly ever a contested judicial election. But today the world is different. In some states, judicial candidates find it necessary to accept campaign contributions amounting to millions of dollars. Much of that money, of course, comes from attorneys, and I think that we must be aware of the growing public perception that those attorneys are receiving a return on their investment.

Although we on the Supreme Court do not face the problems associated with judicial elections, we are, of course, judges. And so the dangers attendant to attacking the legitimacy of courts and judges affect us much as they affect other judges. Courts and judges must have public support if they are to receive the resources they need to fulfill their responsibilities. Because people know so little about judges and their work, we can seem mysterious. If people knew the truth, however, they would understand that the inside story is that there isn't much of one. In their secret rooms, judges attempt to figure out precisely what words ought to be in each opinion and place those words in a sensible order. That is not a particularly mysterious endeavor. Indeed, the process is largely public because an opinion, unlike a statute, explains the reasons it arrived at a particular decision.

The story inside that secret room, then, is revealed in any twelfth-grade civics textbook. Many teachers agree with me that our nation's failure to teach about the operation of our constitutional system, including the work of the courts, is one of today's most pressing problems. I find that heartening because Americans have come to understand that the judiciary does not exist to provide a prestigious position for lawyers. When students learn about civics and the operation of the courts, they understand that an independent judiciary exists not for the benefit of our lawyers but for the benefit of our citizens.

QUESTION: Thirty years ago, the Supreme Court was deciding 120 cases a year. If everyone else is doing more, how is it that the Supreme Court is doing less?

JUSTICE BREYER: Theories abound regarding why the Court hears fewer cases than it did thirty years ago. Some people suggest that the Court heard more cases in the 1980s because Congress passed major federal statutes in the two previous decades that spawned a great deal of litigation. Under this theory, lower courts offered divergent answers to the questions raised by those statutes, causing the Supreme Court to resolve many splits. Gradually, however, those questions received definitive answers and the number of cases involving those statutes diminished over time. Other people attribute the decline in the number of Supreme Court cases to the decline in cases involving the incorporation of the Bill of Rights. For some time, the Supreme Court annually heard a number of cases involving incorporation, but such cases have largely vanished from our docket.

While there may be some truth to those theories, I am uncertain precisely what accounts for the reduced number of cases in recent years. When we go into Conference, however, the Justices approach the petitions with an eye toward taking the cases, not with an eye toward keeping the workload down. Supreme Court practitioners might not believe that statement, as they contend that the Court denies cases exposing legitimate circuit splits. But attorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies among the lower courts because those discrepancies are not outcome determinative.

Whatever the explanation for the Court's current workload, I can report that I am not often left twiddling my thumbs. But I should note that the amount of work that accompanies eighty Supreme Court cases took me somewhat by surprise when I first joined the Court as a justice. Coming from the court of appeals, I wrote perhaps forty opinions every year. Although I now write far fewer opinions per year, this job is no easier. That is because many of the opinions that I wrote on the court of appeals had very low degrees of difficulty. Now, however, the

straightforward case is the exception rather than the rule, which is hardly surprising given that Supreme Court cases raise among the most vexing legal issues of our day. While the Court could capably handle hearing a few more cases a year, I do not think that it would be advisable to return to the days of the Court hearing 120 cases per year.

QUESTION: Justice Breyer, if public misperception or ignorance is a problem, why not televise the proceedings of the Court?

JUSTICE BREYER: There are times when I think it would be beneficial if the public could watch televised oral arguments. Some time ago, the Court heard a tough constitutional case dealing with term limits. I thought the case was terrific precisely because it was so difficult, featuring competing statements from American luminaries like James Madison, Thomas Jefferson, and Joseph Story. After grappling with their views regarding the underlying issue, we then had to attempt to understand the historical debate's implications for the present day. If that oral argument had been televised, it would have been a positive development because the public would have seen nine judges wrestling with an extremely knotty question.

Despite the potential benefits of televising the proceedings, I have three central concerns about introducing cameras into the Supreme Court. First, if we had television cameras in the courtroom, I fear that every court in the country would feel compelled to follow our lead, including courts that handle criminal cases. All of us have watched criminal cases on television, and one can quite easily imagine jurors expressing apprehension about being seen on television, or envision witnesses wondering how their neighbors will assess their testimony. And I would find it deeply disturbing if television cameras were to alter the proceedings in criminal courts.

A second risk of the Supreme Court admitting television cameras is that oral argument comprises only one small portion of an entire case. I fear that people might watch an oral argument and incorrectly believe that they are witnessing the process in its entirety. If a case before the Supreme Court is discussed in the newspaper, the reporters explain the issue with at least some understanding that legal briefs ground the argument. But when viewers watch television, they tend to

identify with the people on the screen and divide the world into binaries: There is a good lawyer and a bad lawyer, a good client and a bad client. I fear the public misunderstandings that could stem from such visceral identification.

The third concern about television is closely related to the second: As an appeals court, we decide matters that affect not only the two people on either side in the case before us, but millions of people who are not present in the courtroom. On the television screen, however, those millions are invisible. Viewers would see only the two people before us, and I worry that the public might misconstrue the fundamental nature of the appellate process.

Perhaps because I have an academic background, I suggest that those who are interested in televising the proceedings of the Supreme Court should conduct some social-science research. Independent groups of serious researchers could survey public attitudes about television and the effect that introducing cameras into Congress has had on those attitudes. I have been suggesting this research for quite some time, and nothing has happened yet, but I think it would be well worth collecting data before deciding to broadcast Supreme Court arguments.

The resistance to television at the Court is partly a product of the Justices knowing that we have inherited an institution that, through no credit of our own, is held in high esteem by the rest of the country. The Court has tremendous prestige, and the result of that prestige is that people who would otherwise be in the streets fighting one another submit their disputes to the rule of law. That is important for the stability of the United States, and we on the Court today deserve absolutely no credit for it. Our predecessors deserve the credit, and we, as the Court's trustees, are reluctant to make any administrative decision that would diminish the Court's reputation. That is why we offer such a conservative response to questions about matters like televising the Court's proceedings. We hesitate because we can see arguments against it, and we are reluctant to risk hurting our institution, no matter what the theory on the other side. That is why I recommend researching the issue and presenting the findings in a way that makes us feel comfortable about televising the Court's proceedings. No Justice wants to risk damaging that treasured institution.

QUESTION: You mentioned approaches. Is originalism an ideological approach, and do ideological approaches have any place in the Supreme Court?

JUSTICE BREYER: Most judges tend to approach a case, whether it is statutory or constitutional, by drawing upon six basic tools: (1) the text of the statute or constitutional provision; (2) the history of that text; (3) the tradition of that text; (4) the judicial precedents; (5) the purpose of the statute or the constitutional phrase; and (6) the consequences of deciding a case one way or another. While originalists emphasize the first four factors (text, history, tradition, and precedent), they do not believe that purpose and consequence are totally irrelevant to deciding cases. Justice Scalia, who is an originalist, would likely respond by contending that judges should emphasize the first four factors, and that those of us who are not originalists tend to overemphasize the last two factors. I plead guilty to focusing on the last two factors because I think that considering purposes and consequences is essential if we are to have a coherent law. But I do not ignore the first four factors; I, too, consider the text, the language, the history, the tradition, and the precedent.

That is the real nature of the debate over various judicial approaches. I believe that no single theory can provide answers to all of the questions that come before us as judges. Perhaps I have reached this conclusion because, unlike many judges, I am prepared to live with uncertainty and ambiguity. Critics do not like this approach because they want a bright-line rule and the guidance that a bright-line rule provides. While a bright-line rule often provides some guidance, when many cases come near the edges of the bright-line rule it can provide little or no guidance at all.

The argument, then, does not pit activism against non-activism. None of us wants judges substituting their subjective views for the views of the legislature or the requirements of the Constitution. Instead, the debate centers on the difficult task of how to decide the open-ended questions that come to the courts today. And I think that we are better off with an emphasis on purpose and consequences. We must recognize that here, as in many matters, we are dealing with a question of degree. This recognition does not render the discussion any less vital, but it reminds us that the discussion cannot hinge on absolutes.