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Judicial Conservatives and Supreme Court

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I was given the title "Judicial Conservatives and the Supreme Court." I think that is a rather appropriate title in that we must draw a distinction between judicial conservatives and the Supreme Court, judicial conservatives on the Supreme Court, and conservatives on the Supreme Court. DeToqueville said that every question in the United States sooner or later is framed as a legal question and comes before the Supreme Court. I think that speaks something of the Court's power and its influence in our society. Frankfurter has said that the Supreme Court's power is neither of the purse nor of the sword, but moral suasion. Now what does that mean? It means that the Supreme Court does not have an army or navy and cannot collect taxes. It means, therefore, that the Supreme Court must enjoy the confidence not only of its citizenry, but the confidence of its co-equal branches of government. The Court relies on the Congress to finance it; it relies on the executive to enforce its judgment. To the extent it reflects the tacit understanding that exists between the competing forces of a free society—that is, the tacit understanding between the executive, legislature, and judiciary—it can be effective. To the extent it fails to reflect this tacit understanding, to the extent it operates as a power independent, it runs into the danger of severely compromising its position in our society.

In the past, particularly under Chief Justice Warren, we have heard the terms "judicial activist" and "judicial conservative." The question is what do those words mean? Normally when you think of a conservative, you think of one who is slow to move, or who believes that we should be very careful of how we move. When you think of an activist, you think about action, about striking out and reaching to new areas and new places of concern.

Under the Warren Court, judicial activists have been generally regarded as being liberal in protecting the rights of minorities, the rights of accused criminals, and the rights of persons who are attempting to

† This article is based on excerpts from a speech delivered by Ronald R. Davenport to the members of the Musmanno Chapter of Delta Theta Phi Fraternity and the law school community on November 9, 1971. Ronald R. Davenport is Dean of the Duquesne University School of Law.

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exercise their constitutional rights under the first amendment. Judicial conservatives, on the other hand, have been thought of as urging a kind of go-slow attitude in opposition to the protection of rights of the accused criminals, more concerned about protecting society from pressures which are tearing it apart: more concerned about those individuals who challenge society and abuse it; timid in their approach to the Court's relationship to the other branches of government; deferential to the legislature, to the executive; deferential to the rights of the individual states to experiment with their own forms of government. In general, judicial conservatism has been painted as a kind of recognition of the limited nature of the Supreme Court's function in our society. A Court that recognizes that the Congress legislates and the executive enforces the law is one that acts merely to serve as a check in the check and balance system. In short, judicial conservatives see the Court as a check against the possible abuses of congressional or executive power.

I think the terms "judicial activist" and "judicial conservative" are misused. Is it really conservative to say that the Court has the right to pick and choose those aspects of the constitution which it will, in its discretion, apply to the state? Is it liberal, on the other hand, to say that a constitution was meant to protect individual rights within the states? Is it liberal to say that the natural law philosophy of picking and choosing among consitutional rights which are to be applied to the states is a bad philosophy and aggrandizes unto the Court more power than the constitution intended? Is it liberal to say that the federal constitution should mean the same in the federal court as it means in the state court? Or that the federal standard, in terms of the interpretation of a right, should be as applicable in the state court as it is in the federal court? Is it conservative to say that the constitution can mean something else in the state court than it means in the federal court? That in fact the individual states are free to experiment with the rights of individual citizens?

I think that a persuasive case can be made that in fact the so-called "judicial activists" really view the Supreme Court's power, its role *vis-a-vis* other branches of government, in a limited way. The activists would have the constitution serve to define that role, whereas those who have been referred to as "judicial conservatives" would give to the Court the power under its own volition to determine that role independent of what the constitution says. In terms of the Supreme Court's

power vis-a-vis its coordinate branches of government then, the "judicial activist" can really be called conservative and the "judicial conservative" can really be called liberal.

As some of you may know, recently I was approached by the judiciary committee of the American Bar Association and asked what kind of criteria it should use in making a determination of competence for the Supreme Court. This procedure came about as a result of the decision by Attorney General Mitchell to avoid the stresses and strains of nomination fights that surrounded Carswell and Haynesworth. The procedure has been greatly criticized by those who maintain the constitution says nothing about obtaining the approval of the American Bar Association in choosing Supreme Court Justices. In addition, the procedure has been criticized by some groups in labor and in the civil rights movement who say the American Bar Association committee is not reflective of the Bar as a whole; that it is corporate and establishment in character.

In the past, the President has made nominations to the Supreme Court and the ABA has passed on those nominations only after the names were made public. Of course, the ABA committee vote would be "qualified" or "supremely qualified" or words to that effect. The practical purpose behind the Attorney General's use of the pre-screening device of the ABA Judiciary Committee was to save the administration from embarassment in discovering the Committee's opinion after the nominations had been made public. In one sense, such a strategy makes a great deal of sense. First, and most obviously, one obtains prior approval, so to speak, of those persons, and one has a public and private indication of the Bar's evaluation of their competence to serve on the Supreme Court. I would also assume that the procedure has some political benefit, in that the names of individuals under consideration would be made public, and any skeletons in the closets of the nominees would probably manifest themselves before a formal nomination was made.

On the other hand, there is the question to what extent the President should defer to the judgment of the American Bar Association's Judiciary Committee, a highly selective group, which can be legitimately criticized as not being representative of the various currents of Bar opinion. In addition, the procedure seems grossly unfair to the potential nominees, given the controversy that has surrounded the most recent Supreme Court nominations. A nominee can look forward to his

entire background being microscoped by high school students, law students, members of the ABA Judiciary Committee, members of the Senate Judiciary Committee, newspaper reporters, and the press, both nationally and in his particular community. Every aspect of his life is held up to a microscope—as well it should be.

It seems unfair that a man who subsequently is not nominated has to undergo this kind of pressure and inspection, with statements being made about his competence or lack of it—repeated references to every mistake which he may or may not have made in the past, every speech, every article that he has ever written, every friend that he has ever had. It seems unfair that a man should have to undergo this kind of exposure, this kind of public inspection without the attendant benefit of an actual nomination.

On balance, I believe the Attorney General's decision not to have a prior screening of the nominee before the ABA's Judiciary Committee is a wise one. The Attorney General's ostensible basis for this decision is the fact that the names were subsequently made public. I think that is not the best reason for his decision. I am confident that the Justice Department anticipated the names would be made public and the investigation would not be conducted in secrecy. Nevertheless, I think it is a wise decision to eliminate prior screening because it has the effect of protecting the integrity of the Presidency, the integrity of the potential nominee, and the integrity of the ABA Judiciary Committee.

In response to the question of what the ABA's Judiciary Committee should look for in making the determination whether or not a man is competent or qualified to serve on the U.S. Supreme Court, I suggested the following: first, the man or woman must have intellectual competence—by that I mean the ability to deal in an understanding way with complex legal questions which come before the Court; the ability not only to understand the legal question as it is framed, but also to understand the impact of a decision one way or the other on the law. In short, he should understand what a particular decision is likely to lead to in the future.

Secondly, I suggested that a man must be personally honest. By honesty I mean that he should have a mind open to new ideas or new ways of looking at old ideas. It does not mean freedom from ideas or freedom from prejudices. All of us have our own prejudices and preferences. Hopefully, none of us are free from ideas—we have areas of concerns and experiences and these are important. But the question

is to what extent do we maintain open minds? To what extent do we hear people who march to the tune of a different drummer? To what extent do we maintain an open mind to understand the problem as perceived by other people? To what extent can we listen and can we learn? It is unnecessary that we agree with those people who disagree with us. But it is necessary that we understand what concerns them, and it occurs to me, therefore, that personal honesty, is absolutely essential for a Supreme Court justice.

In defense of this particular criteria, I pointed out to the inquirer, that it did not really matter whether or not a man were a liberal or a conservative. In my judgment, that is an irrelevant question. It is likely, of course, that a liberal president is going to appoint liberals to the Court, and a conservative president is likely to appoint conservatives to the Court, but that is not the question.

To make my point, I use as an example Mr. Justice Harlan. Mr. Justice Harlan is the Wall Street lawyer, the same man whose grandfather served on the Supreme Court. He was patrician in his background and patrician in his bearing. On those complex questions affecting our society, his philosophy had a decidedly conservative bent. Yet, despite that, Mr. Justice Harlan was a respected and greatly admired Supreme Court justice because of his honesty.

Mr. Justice Harlan, even when he dissented in a particular opinion, would accept that opinion, if it commanded a majority of the Court as being the law of the land. His recent opinion in *Cohen v. California*,[1] I think, is an excellent example of his ability to distinguish between personal feelings and the question of whether or not the activity engaged in by an individual was constitutionally protected. In that case, Cohen was accused of violating the California breach of the peace statute for wearing an expletive on his jacket in a Los Angeles courthouse corridor where women and children were present. In reversing Mr. Cohen's conviction, Mr. Justice Harlan said in part:

> Surely the state has no right to cleanse the public debate to the point where it is grammaticially palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment alone. For, while the particular four letter word being litigated here is perhaps more distasteful than most others of its genre, it

1. 403 U.S. 15 (1971).

> is nevertheless often true that one man's vulgarity is another's lyric.[2]

I think Mr. Justice Harlan's honesty and integrity can also be amply demonstrated by a careful examination of his opinions in the area of criminal rights, first amendment rights, or in the area of governmental power. From a reading of these cases it becomes clear that his mind was always open to new ideas and that he always listened.

As a third criteria I suggested that a man serving on the Supreme Court must have some understanding of the complex forces at work in our society. More particularly, he must appreciate the pressures and strains on our society, put forward by management, by unions, by students, by blacks, by poor whites, by the disaffected, and by those people who feel that society is too permissive. In short, one might say, by all competing forces that are now at work. By understanding I do not necessarily mean agreement, nor do I assume that because a man was a corporate lawyer or a civil rights lawyer that he will be unable to make unbiased judgments on a particular question presented to the Court.

A justice should have an appreciation for the alienation that some people feel—the insecurity that is felt by others. Toffler in his book *Future Shock*[3] has written that we live in a time where change is constant, where principles and ideals that once were immutable are now disposable—what was current today is passé tomorrow. This makes life difficult and quite often confusing. Those of us who were educated primarily in the 1950's are beset by the children of television of the 1960's and the 1970's and we don't really understand. We are more comfortable in the days of the button-down shirts and the crewcut and the football heroes on Saturday afternoons. We neither understand nor appreciate the alienation felt by young people, or the insecurity felt by ethnic communities. We see persons marching in an anti-Vietnam demonstration protesting the war, we see them marching peacefully in three button suits. We see in the same crowd long haired hippies marching under a Vietcong flag and we become confused. We lump those persons who are genuinely concerned with the problem of the war with those who use the war as an excuse to engage in excesses. It occurs to me that you can be concerned about the war without giving comfort to the North Vietnamese.

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2. *Id.* at 25.
3. TOFFLER, FUTURE SHOCK (1971).

We must—that is those persons who hold positions of responsibility, particularly the courts—draw a distinction between those who are concerned, and those who use the concerns of the American society to act out their own frustrations. I believe that Justice Harlan exhibited this kind of sensitivity on the Court. Again to return to his opinion in *Cohen*,[4] he distinguishes between the emotional nature of the word used (or rather painted on) Cohen's jacket and the likely response of passers-by. (I would add here parenthetically that Mr. Justices Burger and Blackman both dissented on the ground that Mr. Cohen's actions constituted not speech but conduct and could therefore be punished under California criminal laws.) Reasonable men can and will differ in a democratic society, and its strength is that they do differ. But the measure of any society is not how it treats those persons whom it admires, but how it treats those whom it despises. The test of any democratic system is not how it treats those who sing its praises, but those who criticize. It is not how it responds to its heroes, but how it treats its enemies.

Finally, in response to the ABA inquiry, I said that to be on the Supreme Court it is not necessary that one be a lawyer. I believe it was Mr. Justice Black who said that a thoughtful, disciplined philosopher who understood the problems of our society could function effectively on the Court. The Court is more than just a place where laws are interpreted or administered. It is a place where clearly a man strongly grounded in philosophy or political science could add to and give insight into the policy questions the Court confronts.

The Supreme Court, to be effective in my view, must stand as a bastion against popular passion. In the past, the Supreme Court has at times failed to do this. It failed, for example, when the Japanese were placed in relocation centers during the Second World War. It failed when men were being attacked and pilloried for being associated with allegedly communist causes, or accused of being communist and had their constitutional rights abrogated by the Smith Act. But when it truly performs its highest function, when it truly works in our society, as I have said before, it serves to protect the friendless.

The Congress stands for re-election every two or six years and therefore will reflect almost immediately the popular passions of our time. The executive branch of government stands for re-election through the President every four years and, therefore, will also reflect popular

4. 403 U.S. at 20-22.

passions. The Supreme Court, however, is appointed for life. It can, when it is effective, serve as a protection against hasty reaction to a particular problem. It can serve to give to society what Professor Bickel of Yale has referred to as "the sober second thought." It can serve as a leader who must both lead and educate. The Court has a responsibility to be the conscience of this country. While it should be aware of popular passion and cross-currents in our society, it should not necessarily be swayed by them. We need individuals on the Court who not only have the intellectual competence and personal honesty but open mindedness, and the ability to listen and to learn. No man on the Court should attempt to make the constitution mean what he thinks it should mean. No man on the Court should be in the position to engraft his socio-economic or political philosophy on the populace at large.

Whether we are Democrats or Republicans, corporation lawyers or civil rights lawyers, lawyers for the establishment or lawyers against the establishment will be clearly reflected in how we perceive problems and that is to be expected. However, a distinction should be drawn between the person who is influenced by his background and one who is dominated by that background.

The Supreme Court is a unique institution. It is probably the most influential and powerful court in the entire western civilization. It has so existed because of the confidence it maintains with the people. It can only maintain that confidence as long as it recognizes its role both to lead and to educate. The Court must reflect, yet provide insight into the needs and aspirations of the people. Professor Bickel in his book, *The Least Dangerous Branch*, said the following:

> If what is meant is that the Court is restricted to deciding an existing national consensus; that it is to enforce as law only the most widely shared values . . . this would charge the Court with a function to which it is, of all our institutions, least suited. Surely the political institutions are more fitted than the Court to find and express an existing consensus. . . . The Court is a leader of opinion not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.[5]

President Nixon has had a unique opportunity to nominate four men for the court. That a moderate-to-conservative President should attempt to nominate moderate-to-conservative men is not surprising.

5. BICKEL, THE LEAST DANGEROUS BRANCH 239 (1962).

In fact, it is probably desirable. The point about which lawyers and citizens alike can be concerned is the placing on the court not men of moderation, but men who would radically change the direction and focus of the court—men who would hold back from protecting the rights of individual citizens, even the most despicable. It may rightfully fear men who under the guise of conservatism would attempt to engraft their economic, political, or social philosophy on the populace at large. Men who, on the one hand, would understate the Supreme Court's role by giving undue deference to the executive, to the legislature, and would, on the other hand, overstate the Supreme Court's role by attempting to redraft the constitution to reflect their views. This is a danger which the Court now faces. This is the opportunity that the President now has.

On the one hand, he may appoint a moderate-to-conservative man who will not strike out in new directions. On the other hand, he may appoint an aggressive, allegedly conservative man, who perhaps is more reactionary than conservative—one who would use the constitution as a shield for the activities of the zealot, the excessive patriot, the indifference of a government official, the overaggressiveness of the police —and call them lawful. A Court so dominated, a Court so reflective, a Court so aggressive can reap untold problems for the future.