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RESPONSE TO COMMENTS

ARCHIBALD COX

There are just two points that I shall address. First, I think that Professors Tushnet and Brubaker both pointed to a confusion for which I am at least, for tonight, partly responsible. When I referred to the word “activism,” I did use it to embrace two quite different meanings.

One meaning is that of overruling majoritarian decisions—lack of deference, if you will. The second meaning involves changing the law from that written in the books, from that discoverable by reading what Judge Learned Hand used to call “these books about us.” I associate the two because the more a judge substitutes his judgment, or a Court substitutes its judgment, for that of the legislature, the larger the judge’s role and the more active the judge’s role in the total pattern of government.

Second, the more courts depart from the law in the books and precedent to writing new rules, again, the more they enlarge their roles as individuals in the government. What brings these events together in my mind is that both tend to raise questions about the judges’ legitimacy. Specifically, each in its own way raises the question whether judges are exceeding their function and thus in danger of losing legitimacy. And, as I have said many times, that is a very important consideration in my mind, because it is only that which will make the courts Madison’s bulwark against oppression.

In addition, I cannot resist saying just a word about the boy who killed his parents who is said to have pleaded for mercy on the ground that he was an orphan. I don’t think that was the plea of this little boy. I think the plea of this little boy was: While I killed my parents, and now you’ve got the gun, please don’t go around shooting all the sisters, cousins, uncles, and aunts. I know the cause of killing people; I think what we should do is to stop doing it.

In other words, it seems to me that maybe those who defend some, if not all, of the decisions of the Warren Court are not the most persuasive voices calling for a low judicial profile and judicial restraint in the future. But, on the other hand, they are entitled to say: “Don’t you go in your own way.” Indeed, Professor Morgan came back pretty close to this position in the end.

Lastly, I want to emphasize, lest we forget, how well the Court has endured the passage of these 200 years. I spent so many days

sitting in the Supreme Court building before the Court, wondering how those men—and now, those men and that woman—manage to function at all with the range of extraordinarily difficult problems that they deal with day after day. Really, the fact that they function at all is an extraordinary tribute to both the institution and the Justices who sit, and have sat, upon it.