FOURTH EDITION

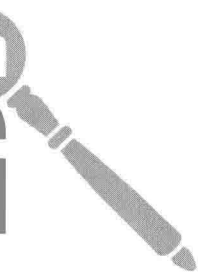
JUDGES on JUDGING

VIEWS FROM THE BENCH

COLLECTED AND EDITED BY
DAVID M. O'BRIEN

FOURTH EDITION

JUDGES on JUDGING



VIEWS FROM THE BENCH

COLLECTED AND EDITED BY

DAVID M. O'BRIEN

University of Virginia

SAGE | CQPRESS

Los Angeles | London | New Delhi
Singapore | Washington DC

Los Angeles | London | New Delhi
Singapore | Washington DC

FOR INFORMATION:

CQ Press
An Imprint of SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
3 Church Street
#10-04 Samsung Hub
Singapore 049483

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Judges on judging : views from the bench / [collected and edited by] David M. O'Brien. — 4th ed.

p. cm.
Includes bibliographical references.

ISBN 978-1-4522-2783-2 (pbk.)

1. Judges—United States. 2. Judicial process—United States. 3. Political questions and judicial power—United States. I. O'Brien, David M.

KF8775.A75J82 2013
347.73'14—dc23 2012023288

This book is printed on acid-free paper.

Acquisitions Editor: Charisse Kiino
Production Editor: Libby Larson
Copy Editor: Barbara Corrigan
Typesetter: C&M Digitals (P) Ltd.
Proofreader: Bonnie Moore
Cover Designer: Gail Buschman
Marketing Manager: Jonathon Mason
Permissions Editor: Adele Hutchinson

SFI label applies to text stock

12 13 14 15 16 10 9 8 7 6 5 4 3 2 1

FOURTH EDITION

JUDGES on JUDGING

CQ Press, an imprint of SAGE, is the leading publisher of books, directories, periodicals, and electronic products on American government and international affairs, with an expanding list in journalism. CQ Press consistently ranks among the top commercial publishers in terms of quality, as evidenced by the numerous awards its products have won over the years. CQ Press owes its existence to Nelson Poynter, former publisher of the *St. Petersburg Times,* and his wife Henrietta, with whom he founded Congressional Quarterly in 1945. Poynter established CQ with the mission of promoting democracy through education and in 1975 founded the Modern Media Institute, renamed The Poynter Institute for Media Studies after his death. The Poynter Institute (*www.poynter.org*) is a nonprofit organization dedicated to training journalists and media leaders.

In 2008, CQ Press was acquired by SAGE, a leading international publisher of journals, books, and electronic media for academic, educational, and professional markets. Since 1965, SAGE has helped inform and educate a global community of scholars, practitioners, researchers, and students spanning a wide range of subject areas, including business, humanities, social sciences, and science, technology, and medicine. A privately owned corporation, SAGE has offices in Los Angeles, London, New Delhi, and Singapore, in addition to the Washington DC office of CQ Press.

Preface

The First Edition of this collection of judges' speeches and writings originated while I was working as a judicial fellow in the office of the administrative assistant to the chief justice at the Supreme Court of the United States. I remain grateful for the opportunities that Chief Justice Warren E. Burger and his administrative assistant, Mark Cannon, afforded me, along with the support of Edward Artinian and of reviewers and colleagues, particularly Henry J. Abraham. That first edition received the American Bar Association's Certificate of Merit for contributing to the public's understanding of law and courts. Like the first edition, subsequent editions have been well received and used in a range of courses. Those who teach and study judicial processes and judicial policymaking have found the breadth of coverage useful in presenting the contrasting views and experiences of state and federal judges, especially the differing experiences of trial and appellate court judges, as well as those who have served or are serving on the Supreme Court. Others find the chapters presenting competing judicial philosophies and approaches to interpreting the Constitution and Bill of Rights especially useful in courses on constitutional law, jurisprudence, and judicial politics. University of California, Berkeley law school professor Martin Shapiro's comment on an earlier edition perhaps expressed it best: "imagine the fun of teaching a course in which you ask students to compare opinions of particular judges with their off-the-bench writings on judging. What a great supplement to a regular constitutional law course."

In this fourth edition, the introductory essays have been thoroughly revised and updated. They highlight from a historical perspective the increasing frequency of and controversies over current judges' and justices' off-the-bench commentaries. Several new chapters have been added. Two chapters present excerpts from classic works by Justices Joseph Story and William O. Douglas. Three other new chapters include excerpts from contemporary justices and judges: one by Justice David H. Souter on constitutional interpretation and another by Justice Clarence Thomas, along with one by federal appellate court judge Jeffrey S. Sutton on developments in state courts and constitutional law. This fourth edition, like the

third, includes two appendices: Article 3 of the U.S. Constitution, establishing the basis for the federal courts, and Alexander Hamilton's *Federalist* No. 78 on the role of the federal judiciary and the power of constitutional interpretation. This edition incurred still more debts. I appreciate the permission to incorporate new materials and the suggestions over the years of the following reviewers: Elizabeth Beaumont, University of Minnesota; Christopher Bonneau, University of Pittsburgh; Russell Fowler, University of Tennessee at Chattanooga; Banks Miller, Ohio State University; Patrick Schmidt, Southern Methodist University; Kim Seckler, New Mexico State University; James Todd, University of Arizona; Michael C. Tolley, Northwestern University; and Mark Petracca of the University of California, Irvine. I also appreciate the support and work of Charisse Kiino at CQ Press.

As with earlier editions, I hope students will find these revisions and new additions useful in understanding judicial processes as well as the work and problems confronting courts. It is also hoped that the collection will continue to engage them in the contemporary and enduring debates about competing judicial philosophies and approaches to constitutional interpretation, judging, and the role of courts in a democracy.

David M. O'Brien
March 2012

Contents

Introduction

Justices and judges appear to be more outspoken and in more venues than ever before. All nine on the Roberts Court (2005–) participated in a C-SPAN special, *The Supreme Court: Home to America's Highest Court*[1] and granted interviews to journalists for books on the Court.[2] Chief Justice John G. Roberts gave a prime-time interview to ABC's *Nightline,* Justice Ruth Bader Ginsburg to CBS's Mike Wallace; Justices Antonin Scalia and Stephen G. Breyer engaged in an off-the-bench debate about the Court's use of foreign judicial decisions and law, and eight justices agreed to interviews on the art of legal advocacy.[3] They also have not been shy about speaking out about controversial matters, including cases that have come before or are likely to come before the Court. Justice Scalia, for instance, defended his refusal to recuse himself from a case involving his hunting companion, Vice President Dick Cheney, who headed an energy task force for President George W. Bush, responding, "For Pete's sake, if you can't trust your Supreme Court justice more than that, get a life. . . . I think the proudest thing I have done on the bench is not allowed myself to be chased off that case."[4] That was not the first time. On another occasion Justice Scalia criticized the ruling of the Court of Appeals for the Ninth Circuit holding that the phrase "one nation, under God" in the Pledge of Allegiance violated the First Amendment. That decision was a mistaken attempt, in his words, to "exclude God from the public forums and from political life."[5] When the Supreme Court later granted review of that decision, Michael A. Newdow, who had brought the suit *Elk Grove Unified School District v. Newdow* (2004), asked that Justice Scalia recuse himself from the case and forced him not to participate in the decision because of his off-the-bench remarks. Justice Scalia has also been outspoken about the direction of the Court and abortion,[6] among other controversial matters.[7] He is not the only one.[8] Justice Ginsburg ventured, "I do not believe the Court's overruling *Roe v. Wade*—which I don't think will happen—will prevent women of means from accessing an abortion. It will have a devastating impact on poor women" and that if it were up to her the Court would "go back to the day when the Supreme Court said the death penalty can't be applied

with an even hand."[9] While some on the current Court—like Justices Clarence Thomas and Samuel A. Alito—tend to be more reticent about speaking out, except before law schools or small groups of students, they are not above the fray. Justice Thomas, for example, complained publicly that the Roberts Court was making too many "really hard calls" that should be left to elected officials.[10]

The American public nonetheless understands little about the courts and the judicial process. To a reporter's question of whether the average American understands the judicial process, former congressman and later Federal Court of Appeals judge Abner J. Mikva responded, "No. In a sense [people] know less about the courts than they do about the Congress. They may have a lot of mistaken views about Congress, but the problem with the courts is that they are so mysterious. I worry about that a great deal. Some of my colleagues on the bench think that is why the judicial branch is given a great deal of respect, that it isn't as well known as the other two branches. I hate to think that we're only beloved in ignorance."[11] Indeed, as retired justice Sandra Day O'Connor pointed out in a 2011 talk at the University of Florida, polls reveal that two-thirds of the public can name at least one of the judges on the Fox television show *American Idol,* but less than half can name even one justice on the Supreme Court.[12]

Whatever mystery surrounds the judiciary may stem in part from what Judge Jerome Frank called "the cult of the robe"[13] and Justice Felix Frankfurter felicitously described as "judicial lockjaw."[14] A tradition of judicial lockjaw evolved originally because of a number of institutional, political, and historical considerations. Article 3 of the Constitution, which vests the judicial power in one Supreme Court and in such lower federal courts that Congress may establish, provides that the judiciary shall decide only actual cases or controversies. From the earliest days, federal courts have therefore refused to render advisory opinions or advice on abstract and hypothetical issues.[15] Intimately related to the view that advisory opinions would violate the principle of separation of powers and compromise judicial independence, justices and judges contend that they should not offer off-the-bench commentaries about their decisions and opinions. As Justice William J. Brennan Jr. once recounted,

> A great Chief Justice [Arthur T. Vanderbilt] of my home State [New Jersey] was asked by a reporter to tell him what was meant by a passage in an opinion which has excited much lay comment. Replied the Chief Justice, "Sir, we write opinions, we don't explain them." This wasn't arrogance—it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment or comment from the judges who write or join them.[16]

Explanations of judicial opinions have also been thought to be ill advised for more prudential reasons: Justice Hugo L. Black, among others, felt that off-the-bench remarks might prejudge issues that could come before the courts,[17] and Justice Harlan F. Stone counseled that such public discussions might actually invite litigation.[18]

Judicial opinions, whether those of trial or appellate judges, of course do not purport to describe the decision-making process. They are intended to justify the decision in a particular case, and they therefore reveal merely the surface of the judicial process. As Justice Frankfurter once noted, "the compromises that an opinion may embody, the collaborative effort that it may represent, the inarticulate considerations that may have influenced the grounds on which the case went off, the shifts in position that may precede final adjudication—these and like factors cannot, contemporaneously at all events, be brought to the surface."[19]

The constraints of judges' "self-denying ordinance,"[20] by which Justice Benjamin N. Cardozo abided throughout his tenure on the high bench, further inhibit disclosures about the deliberative and decision-making processes. Justices' revelations inevitably prove modest given the institutional and political realities of judicial decision making. Unlike legislative decisions, judicial decisions, particularly in the Supreme Court and multijudge appellate courts, are collegial and reached in an atmosphere that Justice Lewis F. Powell Jr. has described as one of "the last citadels of jealously preserved individualism."[21] Off-the-bench remarks about the deliberative process are therefore controlled by self-imposed standards of propriety that appear necessary to preserving the confidentiality—institutionally and personally—required of life-tenured judges who must sit together and collegially decide cases. For as Chief Justice Earl Warren recollected, "when you are going to serve on a court of that kind for the rest of your productive days, you accustom yourself to the institution like you do to the institution of marriage, and you realize that you can't be in a brawl every day and still get any satisfaction out of life."[22]

The lessons of history have also inclined members of the judiciary to refrain from voicing their views not only on matters pertaining to the judicial process and law but also on politics more generally. During the founding period, judges in fact engaged in intensely partisan debates about differing views of constitutional principles. Chief Justice John Jay ran for the governorship of New York but did not campaign, as did Justice William Cushing in running for that office in Massachusetts; and Justice Samuel Chase campaigned for the election of John Adams as president.[23] By the late 1840s and 1850s, however, there emerged considerable opposition to judges'—specifically Justice John McLean's—active participation in partisan politics.[24] Yet throughout the late nineteenth and twentieth

centuries, justices and judges continued to undertake some extrajudicial roles and activities, such as arbitrating boundary disputes and heading special commissions. Charles Evans Hughes resigned from the bench to run for the presidency against Woodrow Wilson in 1916, and Chief Justice William Howard Taft advised the Republican Party on a range of matters; Justices Frankfurter and Louis D. Brandeis had long, close relationships with President Franklin Roosevelt. Members of the Court have also, in extraordinary circumstances, accepted extrajudicial assignments; notably, Justice Owen J. Roberts headed a presidential commission to investigate Pearl Harbor, and Justice Robert H. Jackson served as chief prosecutor of Nazi leaders at the Nuremberg trials. Chief Justice Earl Warren reluctantly headed an investigation of the assassination of President John F. Kennedy. More recently, as constitutionally required, Chief Justice William H. Rehnquist presided over the Senate's impeachment trial of Democratic president Bill Clinton.

During the early part of the nineteenth century, the principal forum for judges' pronouncements on judicial and political issues was provided by Congress's requirement that justices of the Supreme Court travel to the various circuits and sit on cases as well as deliver charges to grand juries there. Although most members of the Court confined their grand jury charges to discussions of their views of constitutional principles or newly enacted legislation, others used the occasion to issue political broadsides and thus enter into the heated debates raging between Federalists and Jeffersonian Republicans. This practice culminated in 1805 in the impeachment and trial of Justice Samuel Chase for "disregarding the duties and dignity of his judicial character." Specifically, the eighth article of impeachment charged the justice with "pervert[ing] his official right and duty to address the grand jury . . . on matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, . . . a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the supreme court of the United States."[25]

Despite these institutional, political, and historical considerations, off-the-bench commentaries are the norm. To be sure, there have been some especially reclusive judges: Chief Justices Roger B. Taney, Morrison R. Waite, Edward D. White, and Harlan Fiske Stone, as well as Justices Cardozo and Thurgood Marshall, rarely ventured forth after they assumed their seats on the bench. Among contemporary justices, Justice David H. Souter notably continued that tradition. Yet even those judges—like Justice Frankfurter—professing judicial lockjaw nevertheless have often publicly addressed a wide range of judicial and extrajudicial matters.[26]

Indeed, in spite of the tradition of judicial lockjaw, which appears increasingly honored more often in rhetoric than in practice, justices and

judges long have been outspoken. The historical difference is that justices and judges appear to be more candid publicly and willing to publicly address major legal and political controversies.

A typical, nonobjectionable, and still prevalent form of off-the-bench commentary may be found in various justices' and judges' works on the Constitution and public law. Among his numerous treatises, Justice Joseph Story's *Commentaries on the Constitution of the United States*[27] became a classic; it was required reading for generations of lawyers, judges, and court watchers.[28] Justices James Wilson[29] and Henry Baldwin[30] also wrote major works in the early nineteenth century, as did Justices Samuel Miller[31] and Benjamin Curtis[32] in the latter part of the century. In the twentieth century, comparable works tend to place the Court in a more political context and to emphasize individual justices' avowed judicial and political philosophies. Justice Robert Jackson's two books[33] are representative of justices' and judges' recognition of the expressly political role of courts in our system of free government.[34] Justices Hugo Black,[35] William O. Douglas,[36] and Wiley Rutledge[37] and Chief Justice Rehnquist wrote several books.[38] Justices Scalia and Breyer have also advanced their respective judicial philosophies in books.[39] Justice O'Connor published a collection of her speeches and essays in *The Majesty of the Law*[40] and an autobiography of her life prior to joining the Court. Likewise, Justice Thomas wrote an autobiography of his early life,[41] and Justice Sonia Sotomayor agreed to write a book about her life before becoming the third woman and first Latina to serve on the Court.

While justices and judges, like other political actors, reserve their most personal observations for private correspondence, they communicate their views and insights in numerous and diverse forums: from university and law school commencements to celebrations, annual meetings of law-related organizations, and bar association conventions; in newspaper, magazine, and broadcast interviews; and in articles and books. Occasionally, judges have written to members of Congress and testified before Congress on pressing issues confronting the courts and the country.[42]

The topics addressed by justices and judges are no less numerous and diverse; they range from rather rare comments about specific decisions to more frequent observations about the operation of the judiciary and the administration of justice. Despite the self-imposed credo that members of the bench "should not talk about contemporaneous decisions,"[43] judges have occasionally sought to clarify, explain, or defend their rulings. Chief Justice John Marshall, writing to a newspaper under the pseudonym "A Friend to the Union," defended his landmark decision in *McCulloch v. Maryland* (1819),[44] and in 1979 five justices sought to explain their ruling in a controversial case involving public access to judicial proceedings.[45]

More typically, judges who publicly address matters of public law—such as the constitutional protection afforded private property,[46] the meaning of the First Amendment,[47] or the evolution of administrative law and regulatory politics[48]—do so from a historical and doctrinal perspective.[49]

There are, to be sure, some matters, such as judicial administration and legislation affecting the courts, on which, as Judge Irving Kaufman observed, "judges must speak out."[50] Indeed, in recent years not only the chief justice, who has responsibility for overseeing the federal judiciary, but an increasing number of state and federal judges have voiced their views on rising caseloads, the "bureaucratic justice," evolving federal-state court relations, the operation of different aspects of the judicial process, and the administration of justice more generally. Chief Justice Warren E. Burger, for instance, began an annual practice of issuing a year-end report on the federal judiciary to highlight judicial reforms and the impact on the judiciary of pending legislation. And Chief Justices Rehnquist and Roberts continued that practice.

The value of off-the-bench commentaries depends on what they reveal about how judges think and what they think is important in understanding the judicial process. Their value in part turns on the relationship between judges' rhetoric and the reality of the judicial process and behavior. Judges, like other political actors, are neither always in the best position to describe their role nor possessed of the critical detachment necessary to assess their presuppositions and the ways in which their policy orientations affect their decisions and the judicial process. Moreover, the tradition of judicial lockjaw and the operation of the judicial system provide judges with fewer opportunities than those of other political actors to explain their decision-making role. Judges' descriptions of the deliberative process, for example, tend to be rather inhibited and formal in emphasizing the rule-bound nature of the process. Their explanations are therefore only partial, and they must be supplemented with what we learn from social science, history, and philosophy. What judges say remains nonetheless crucial for understanding the judicial process and the role of courts in American politics. This is so precisely because the Constitution structures the political process, and judges occupy a unique position and vantage point within our system of governance. Off-the-bench commentaries may thus prove instructive about the governmental process, public policy, and enduring political principles.

As justices' and judges' off-the-bench commentaries have increasingly broken with the tradition of judicial lockjaw, debate about judges' off-the-bench communications has, ironically, in turn grown and intensified. That is in part because some judges, such as Court of Appeals for the Seventh Circuit judges Richard A. Posner and Frank H. Easterbrook, are prolific in