THE JUDICIARY AND CONSTITUTIONAL POLITICS

VIEWS FROM THE BENCH

COLLECTED AND EDITED BY
MARK W. CANNON
AND
DAVID M. O'BRIEN

FOREWORD BY
WARREN E. BURGER
CHIEF JUSTICE OF THE UNITED STATES

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With Introductions by David M. O'Brien

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Foreword

This collection seeks to introduce students and the general public to the judicial process and the role of the judiciary in our increasingly complex and litigious society. An understanding of the history, dynamics, and role of the judiciary is particularly important as we approach the celebration of the bicentennial of the United States Constitution.

Most people know, or think they know, what the President and Congress are expected to do under our Constitution. Far fewer have a clear idea of what goes on in the courts generally and in the Supreme Court of the United States in particular. Even though hundreds of thousands of visitors a year have gone through the Supreme Court building and its museum exhibits, and perhaps have observed oral arguments briefly, for most it has remained a remote, austere "marble temple" housing nine seldom-seen jurists who periodically issue pronouncements on the law of the land.

This is not because the justices prefer remoteness, but chiefly because they are engrossed in the confining task of reviewing cases and writing opinions. It is surely not because they do not want people to understand the judicial function in our system; unfortunately there are relatively few people qualified to interpret and explain the Court's role in terms widely understood, and even fewer who undertake to address the public on the subject. Happily this is changing, and this book will make a contribution to that change.

Courts, like the other branches of government, belong to the American people; they serve the individual and the public interest through legal processes slowly and carefully evolved over centuries. An independent judiciary need not be a mysterious area of government or appear to be an occult priesthood. Indeed, of all branches of the government, it can be seen as the most open; all its hearings are public, and all its decisions are promptly made public. No one may address arguments to the Court except in public sessions of the Court and by printed briefs available to public examination. Justices who disagree with the majority have their dissenting views printed with the Court opinion.

It has been said that, except for its decision conferences, the Supreme Court literally operates "in a goldfish bowl." Like all institutions, it consists of flesh-and-blood mortals with individual personalities, the normal human traits; their lives and activities are available to any person diligent enough to inquire.

This collection is noteworthy in providing "a view from the bench," a unique opportunity for students and citizens alike to read what a diverse and representative group of leading state and federal judges think and to under-

Preface

To a reporter's question, "Does the average American understand the judicial process?" former congressman and now 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."[1] Courts and the judicial process are generally open and accessible, though particular aspects are closed or open only to professional observers. Whatever mystery surrounds the judiciary undoubtedly stems from what Judge Jerome Frank calls "the cult of the robe"[2] and Justice Felix Frankfurter felicitously describes as "judicial lockjaw."[3]

The "tradition" of judicial lockjaw, honored more often in rhetoric than in practice, evolved because of a number of institutional, political, and historical considerations. Article III of the Constitution, which vests the judicial power in one Supreme Court and in such lower federal courts as 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.[4] 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 on their decisions and opinions. As Justice William Brennan once recounted:

> A great Chief Justice 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 jucidiary 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.[5]

Explanations of judicial opinions have also been thought to be ill advised for more prudential reasons: Justice Hugo Black, among others, felt that off-the-bench remarks might prejudge issues that could come before the courts;[6] and Justice Harlan Stone counseled that such public discussions might actually invite litigation.[7]

tial commission to investigate Pearl Harbor, and Justice Robert Jackson served as chief prosecutor of Nazi leaders at the Nuremburg trials. Chief Justice Earl Warren reluctantly headed an investigation of the assassination of President John Kennedy.

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 consititutional 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 with 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."[14]

A more typical, less objectionable, 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*[15] became a classic; it was required reading for generations of lawyers, judges, and court watchers.[16] Justices James Wilson[17] and Henry Baldwin[18] also wrote major works in the early nineteenth century, as did Justices Samuel Miller[19] and Benjamin Curtis[20] 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[21] are illustrative of contemporary judges' recognition of the expressly political role of courts in our system of free government;[22] works by Justices Hugo Black,[23] William O. Douglas,[24] and Wiley Rutledge[25] are representative of the style of recent judicial scholarship and the personal expression of judges' avowed "political jurisprudence."[26]

Despite institutional, political, and historical considerations, and despite the relentlessness of Court business and acquired judicial habits, off-the-bench commentaries are the prominent tradition and norm. There have been, to be sure, some especially reclusive judges: Chief Justices Roger Taney, Morrison Waite, Edward White, and Harlan Fiske Stone, as well as Justices Benjamin Cardozo and Thurgood Marshall, with rare exception ventured forth after they assumed their seats on the bench. Still, even those judges—notably Justice Frankfurter—professing "judicial lockjaw" often publicly addressed a wide range of judicial and extrajudicial matters.[27]

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, no less than judicial opinions, may thus prove instructive about the governmental process, public policy, and enduring political principles.

This collection presents the views of leading justices and judges on the judicial process, the function of judging, and the role of courts—particularly the Supreme Court—in our increasingly litigious society. It provides a unique view of the judicial process, the dilemmas of deliberation and decision making, and other matters about which court watchers and the general public may otherwise only speculate. No less important than the insights they offer about the operation of and the problems confronting courts, the selections make accessible contemporary justices' and judges' thinking about judicial activism and self-restraint, and the role of courts in the political process.

We hope this collection makes the judiciary and the judicial process more understandable and encourages readers to think about the qualities of judges—their temperament, character, judicial philosophies, and political views—as well as the role of the courts and judicial review in our constitutional system of free government.

NOTES

1. A.J. Mikva, Q. and A.: "On Leaving Capitol Hill for the Bench," *New York Times* B8, col. 1 (12 May 1983).

2. J. Frank, "The Cult of the Robe," 28 *Saturday Review* 12 (13 October 1945).

3. F. Frankfurter, "Personal Ambitions of Judges: Should a Judge 'Think Beyond the Judicial'?" 34 *American Bar Association Journal* 656 (1948).

4. In 1793, the Supreme Court's refusal to answer a set of questions submitted to Secretary of State Thomas Jefferson, on behalf of President George Washington, concerning the interpretation of treaties with Britain and France. See C. Warren, *The Supreme Court in United States History,* Vol. 1, 110-111 (Boston: Little, Brown, 1922). See also *Muskrat v. United States,* 219 U.S. 346 (1911).

5. W. Brennan, Jr., Address, Student Legal Forum, University of Virginia, Charlottesville, Va. (17 February 1959).

6. See H. Black, Address, 13 *Missouri Bar Journal* 173 (1943).

7. See H.F. Stone, "Fifty Years Work of the Supreme Court of the United States," 14 *American Bar Association Journal* 428 (1928).

8. F. Frankfurter, " 'The Administrative Side' of Chief Justice Hughes," 63 *Harvard Law Review* 1, 1 (1949).

9. Quoted by G.S. Hellman in *Benjamin N. Cardozo: American Judge* 271 (New York: McGraw-Hill, 1940).

10. L.F. Powell, "What the Justices Are Saying . . . ," 62 *American Bar Association Journal* 1454, 1454 (1976).

11. E. Warren, "A Conversation with Earl Warren," WGBH-TV Educational Foundation (1972).

Arizona Law Review 599 (1979); and *New York Times* A14, col. 1 (9 September 1979) (quoting Justice Stevens's view that "members of the general public, including the press, could not assert rights guaranteed to the accused by the Sixth Amendment"); *New York Times* A17, col. 1 (9 August 1979) (quoting Chief Justice Burger "that the opinion referred to pretrial proceedings only"); *New York Times* A13, col. 1 (14 August 1979) (reporting Justice Powell's address to a panel at the annual meeting of the American Bar Association and explanation that *Gannett* was based only on the Sixth Amendment); and *New York Times* A15, col. 1 (4 September 1979) (reporting Justice Blackmun's view that after *Gannett v. DePasquale* [1979] closure of trials is permissible).

32. See, e.g., D. Brewer, "Protection of Private Property from Public Attack," 10 *Railway and Corporation Law Journal* 281 (1891).

33. See, e.g., W. Brennan, Address, 32 *Rutgers Law Review* 173 (1979); P. Stewart, "Or of the Press," 26 *Hastings Law Journal* 631 (1975); J.P. Stevens, "Some Thoughts about a General Rule," 21 *Arizona Law Review* 599 (1979).

34. See, e.g., H. Leventhal, "Principled Fairness and Regulatory Urgency," 25 *Case Western Reserve Law Review* 66 (1974); and "Environmental Decisionmaking and the Role of the Courts," 122 *University of Pennsylvania Law Review* 509 (1974); J. Wright, "Rulemaking and Judicial Review, 30 *Administrative Law Review* 461 (1978); and D. Bazelon, "The Impact of Courts on Public Administration," 52 *Indiana Law Journal* 101 (1976).

35. See, e.g., citations to Justice Frankfurter's writings in the Selected Bibliography.

36. I. Kaufman, "Judges Must Speak Out," *New York Times* A23 (30 January 1982).

37. See, for example, C. Warren, *The Supreme Court in United States History,* 3 vols. (Boston: Little, Brown, 1922); W. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); W. Murphy and J. Tanenhaus, *The Study of Public Law* (New York: Random House, 1972); H.J. Abraham, *The Judicial Process,* 5th ed. (New York: Oxford University Press, 1985); S. Wasby, *The Supreme Court in the Federal Judicial System* (New York: Holt, Rinehart and Winston, 1978); W. Murphy and C.H. Pritchett, eds., *Courts, Judges, and Politics,* 4th ed. (New York: Random House, 1985); S. Goldman and A. Sarat, eds., *American Court Systems: A Reader* (San Francisco: Freeman, 1978); J. Grossman and R. Wells, eds., *Constitutional Law and Judicial Policy Making,* 2d ed. (New York: Wiley, 1980); C. Sheldon, *The American Judicial Process* (New York: Dodd, Mead, 1974); G. Schubert, ed., *Judicial Behavior* (Chicago: Rand McNally, 1964); J. Schmidhauser, *Justices and Judges* (Boston: Little, Brown, 1979); J.W. Howard, Jr., *Courts of Appeals in the Federal Judicial System* (Princeton: Princeton University Press, 1981); R. Carp and C.K. Rowland, *Policymaking and Politics in the Federal District Courts* (Knoxville: University of Tennessee Press, 1983); and A.T. Mason, *The Supreme Court From Taft to Burger,* 3d ed. (Baton Rouge: Louisiana State University Press, 1979).

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Judge Antonin Scalia for an abridged version of his article, adapted from the Frank J. Donahue Lecture delivered at Suffolk University Law School on 28 March 1983, appearing in 4 *Suffolk University Law Review* 881 (1984).

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Judge Henry J. Friendly for excerpts from his article in 33 *University of Miami Law Review* 21 (1978).

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12. See Warren, supra note 4, Vol. 1, at 269-276.

13. See A. Westin, ed., *An Autobiography of the Supreme Court* 6-10 (New York: Macmillan, 1963). See also A. Westin, "Out of Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw," 62 *Columbia Law Review* 633 (1962); and R. Wheeler, "Extrajudicial Activities of the Early Supreme Court," *1973 Supreme Court Review* 123.

14. Quoted in Westin, *Autobiography,* supra note 13, at 18-19.

15. J. Story, *Commentaries on the Constitution of the United States,* 3 vols. (Boston: Little, Brown, 1833).

16. No less important in the late nineteenth century was Judge Thomas Cooley's *A Treatise on the Constitutional Limitations* (Boston: Little, Brown, 1868).

17. J. Wilson, Lectures, "Of the Judicial Department," in *The Works of James Wilson,* Vol. 2 (Chicago: Callaghan, 1896).

18. H. Baldwin, *A General View of the Origin and Nature of the Constitution and Government of the United States* (Philadelphia: J.C. Clark, 1837).

19. S. Miller, *Lectures on the Constitution* (Washington: Morrison, 1880).

20. B. Curtis, *Jurisdiction, Practice, and Peculiar Jurisdiction of the Courts of the United States* (Boston: Little, Brown, 1880).

21. R. Jackson, *The Struggle for Judicial Supremacy* (New York: Knopf, 1941); and *Supreme Court in the American System of Government* (Cambridge: Harvard University Press, 1955).

22. See also, from a different perspective, Judge Richard Neely, *How Courts Govern America* (New Haven: Yale University Press, 1981).

23. H. Black, *A Constitutional Faith* (New York: Knopf, 1969).

24. W.O. Douglas, *We the Judges* (Garden City, N.Y.: Doubleday, 1956).

25. W. Rutledge, *A Declaration of Legal Faith* (Lawrence: University of Kansas Press, 1947).

26. For further discussion, see symposium "Whither Political Jurisprudence," Harry Stumpf, Martin Shapiro, David Daneleski, Austin Sarat, and David O'Brien, 36 *Western Political Quarterly* 533 (December 1983).

27. See Selected Bibliography (303-316). See also R. Wheeler, "Of Standards for Extra-Judicial Behavior," 81 *Michigan Law Review* (1983) (Book Review).

28. See, e.g. the testimony of Justice Willis Van Devanter on the passage of the Judges' Bill of 1925 in U.S. Congress, 68th Cong., 2d Sess., H.R. Committee on the Judiciary, *Hearings on the Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States* (Washington, D.C.: Government Printing Office, 1925); Letter of Chief Justice Charles Evans Hughes to Senator Burton Wheeler on proposed reorganization of the federal judiciary, reprinted in U.S. Congress, 75th Cong. 1st Sess., Senate, Committee on the Judiciary, *Hearings on the Reorganization of the Federal Judiciary,* S. Rept. No. 711, at 38 (Washington, D.C.: Government Printing Office, 1937).

29. F. Frankfurter, *Proceedings in Honor of Mr. Justice Frankfurter and Distinguished Alumni* 11, Occasional Pamphlet No. 3 (Cambridge: Harvard University Press, 1960).

30. See *Philadelphia Union* (28 April, 1 May 1810) (New York Historical Library Collection), and discussed by Westin, supra note 13, at 19.

31. "Brennan Assails Media Criticisms of Court Decisions," *Washington Post* A12, col. 1 (18 October 1979); "Justice Marshall Hits Colleagues on Rights," *Seattle Post-Intelligencer* B2 (3 June 1979); John Paul Stevens, "Some Thoughts on a General Rule," 21

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; with newspaper, magazine, and broadcast interviews; and with polished scholarly articles and books. Occasionally, judges have also written to congressmen and testified before Congress on pressing issues confronting the courts and the country.[28]

The topics addressed by justices and judges are no less numerous and diverse; they run 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,"[29] 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;*[30] and in 1979 five justices sought to explain their ruling in a controversial case involving public access to judicial proceedings.[31] More typically, judges who publicly address matters of public law—such as the constitutional protection afforded private property,[32] the meaning of the First Amendment,[33] or the evolution of administrative law and regulatory politics[34]—do so from a historical and doctrinal perspective or by means of judicial biography or autobiography.[35] There are, however, some matters, such as judicial administration and legislation affecting the courts, on which, as Judge Irving Kaufman has said, "judges must speak out."[36] 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 operation of the judicial process, and innovations in the administration of justice, as well as on the litigiousness of our society.

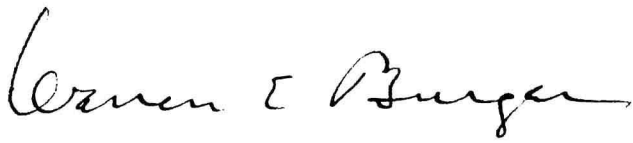
The value of off-the-bench commentaries naturally depends on what they reveal about the way judges think, and what they think is important in understanding the judicial process. Their value in part turns on the relationship between judges' rhetoric and the reality of the judicial process and behavior. Judges, like other political actors, of course are neither always in the best position to describe their role nor able to detach themselves and critically assess their presuppositions and the way in which their policy orientations affect their decisions and the judicial process. The tradition of judicial lockjaw and the operation of the judicial system, moreover, provide judges with fewer opportunities than those of other political actors to explain their decision-making process and role. Judges' explanations of the deliberative process, for example, thus tend to be more inhibited, rather formal in emphasizing the rule-bound nature of the process. Their explanations are therefore only partial and must be supplemented with what we learn from social science, history, and philosophy.[37] What judges say remains nonetheless crucial for understanding the judicial process

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. Judicial opinions, moreover, 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."[8]

The constraints of judges' "self-denying ordinance,"[9] which Justice Benjamin Cardozo abided throughout his tenure on the high bench, further inhibit disclosures about the deliberative and decision-making processes. Justices' revelations inexorably must 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, incremental, and reached in an atmosphere that Justice Lewis Powell has described as one of "the last citadels of jealously preserved individualism."[10] 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, after his retirement, 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."[11]

The lessons of history also incline members of the judiciary to refrain from voicing their views on matters not only 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 over 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 for that office in Massachusetts; and Justice Samuel Chase campaigned for the election of John Adams as President.[12] By the late 1840s and 1850s, however, there emerged considerable opposition to judges', and specifically Justice John McLean's, active participation in partisian politics.[13] Still, throughout the late nineteenth and twentieth centuries, justices and judges have 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 in 1916 against Woodrow Wilson, and Chief Justice William Howard Taft advised the Republican party on a range of matters; Justices Frankfurter and Louis Brandeis had a long, close relationship with President Franklin Roosevelt. Members of the Court have also in extraordinary circumstances accepted extrajudicial assignments; notably, Justice Owen Roberts headed a presiden-

stand how judges themselves approach their function and the role of the judiciary in our constitutional system of free government.



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