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THE SUPREME COURT OF THE UNITED STATES: THE OHIO CONNECTION*

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Supreme Court Justices, from a distance, are bound to have considerable appeal as speakers for a distinguished occasion such as this. After all, there are only nine of us at any given time, and those nine together compose the membership of the highest court in the United States. This Court in its turn heads the judicial branch of the federal government, which, with the executive and the legislative branches, is one of the three coordinate divisions of that government which the Framers of the Constitution created. And, as all of you know, many of our decisions have considerable impact upon the way the nation's affairs are conducted.

Alas, upon a closer look, the initial appeal of a Supreme Court Justice wanes, at least to a certain extent. In the first place, he brings with him the general but not altogether unjustified stereotype of a judge — dignified, stuffy, and perhaps a little bit on the pompous side. And if one can overcome this hurdle, there remain the numerous taboos as to what a Justice of our Court may discuss in public — no cases currently pending before the Court, and certainly not directly any issues involved in those cases. And yet my colleagues and I do our best to overcome these handicaps, feeling that we can perhaps bring some worthwhile observations to an audience such as this, and feeling even more strongly that we ourselves come away from a visit to a city outside of Washington better for having made the visit.

As you might expect, my subject tonight deals with the Supreme Court of the United States. In a state such as Ohio, I make no apology for having chosen such a subject. Just as Ohio competes with Viriginia as being the "mother of Presidents," I am sure that Ohio can hold its own with any other state of the Union as a "mother" of Supreme Court Justices. For Associate Justices, its claim begins with John McLean, appointed by Andrew Jackson in 1829, and runs to its most recent son, Potter Stewart, appointed by Dwight Eisenhower in 1958.

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And as for Chief Justices of our Court, Ohio is tied with New York for first place, each having contributed three out of a total of sixteen. Ohio's Chief Justices are Salmon P. Chase, Morrison R. Waite, and William Howard Taft. Although Taft's commission shows him as being from Connecticut, that was because he was a professor at the Yale Law School at the time of his appointment. It would take a good deal more than that to convince me, and I suspect to convince most of you, that a member of the Taft family was not from Ohio. Ironically enough, just as Taft was born in Ohio but appointed from Connecticut, Waite, who was appointed when he was a prominent practitioner in Toledo, was born in Connecticut.

While all of this geographical data could pass for introductory local color before the serious part of a serious jurisprudential dissertation, I think it has more significance than that. It was Clemenceau who said that military justice is to justice as military music is to music. I think constitutional law is every bit as different from the more established and ordinary branches of the law as military law is different from them, and I think that one reason why constitutional law differs is that the history of its development is inextricably entwined with the Supreme Court of the United States. The history of the Supreme Court of the United States is in turn inextricably entwined with the one hundred and one people who have served as members of that Court. Thus it is all but impossible to understand the evolution of constitutional law from *Marbury v. Madison,*[1] decided in 1803, to cases decided in the present time, without understanding a little bit about the history, geography, and politics of our nation. Consequently, the fact that the Supreme Court has had so many Ohioans as members has given the Court, over the years, a flavor that would not have been quite the same if nine Ohioans — John McLean, Salmon P. Chase, Morrison Waite, Stanley Matthews, Rufus Day, John Clarke, William Howard Taft, Harold Burton, and Potter Stewart — had not graced it by their presence.

I do not intend to discourse at large on the role of the Supreme Court in our society tonight, both because I am sure you have been exposed at one stage of your education or another to such a discourse, and because I think it may be of more interest to pick out a smaller sliver of that rather large pie and try to emphasize some of the personalities — not all of them judges by any means — who have had an impact on the make-up of the Court over the nearly two centuries of its existence. Anyone familiar with the American constitutional system of government knows that the federal judiciary, with its power to

1. 5 U.S. (1 Cranch) 137 (1803).

declare laws passed by Congress and by state legislatures unconstitutional, is a potent component of the system of checks and balances established by the Framers of the Constitution. Indeed, it may quite plausibly be argued that this authority, reposed in a judiciary headed by a Court composed of nine appointed Justices who, once nominated by the President and confirmed by the Senate, have life tenure and are responsible to no constituency whatever, is a paradox in any system which prides itself on being a self-governing society.

Of course, for those of you familiar with the opinion of the Supreme Court of the United States in the famous case of *Marbury v. Madison*, written in 1803 by Chief Justice John Marshall, the apparent paradox is not a paradox at all. When the Framers of the United States Constitution met in Philadelphia in the summer of 1787, they devised a Constitution which would ultimately gain its validity from ratification by representatives of the people in what were then thirteen former English colonies along the Atlantic seaboard. This fundamental charter created a tripartite federal government and granted to it limited powers: Some powers were granted to the Congress, in which was vested the legislative authority of the United States; some powers were granted to the President, in whom was vested the executive authority of the United States; and some powers were granted to the Supreme Court of the United States and such other federal courts as Congress might create to exercise the judicial power of the United States. Marshall's view, expressed in his opinion in *Marbury v. Madison*, was that each of these three branches of the federal government was but an agent for the people, who had expressed their supreme sovereign will by ratifying the Constitution drafted at Philadelphia. Since that Constitution had contemplated a system of checks and balances, and a government of limited powers, its design could be fulfilled only if there were some effective means of holding the three branches of the federal government within their designated spheres of authority. And, said Marshall, since it was the duty of the Supreme Court of the United States to decide cases and controversies which came before it, if one party in such a lawsuit claimed under a law enacted by Congress, and the opposing party asserted that the law enacted by Congress was outside of the authority granted to Congress by the Constitution, the Court would have to decide which of these two claims would prevail. Marshall added, almost anti-climacticly, if the Court decided that the Act of Congress was beyond the constitutional authority of Congress, it would have to declare the law invalid and unconstitutional.

John Marshall's opinion makes it all sound very simple. The comparison which comes most readily to mind is stamp collecting, in which

the Supreme Court or some other court is the collector, using an album which has been designed by the Framers of the Constitution. In the album are numerous places for each different kind of case or law, just as a stamp album has many pages of places for various kinds of stamps. Each case coming before a court is in effect a stamp, and a highly skilled lawyer may be able by virtue of his skill to place the case in the right line on the right page of the constitutional album designed by the Framers.

This is all very sound in theory, but somehow it did not work out quite so mechanically and easily in practice. One hundred and fifty years after the adoption of the Constitution, Robert H. Jackson, who was then Attorney General of the United States and would shortly be appointed Associate Justice of the Supreme Court, wrote:

> As created, the Supreme Court seemed too anemic to endure a long contest for power . . . .
>
> Yet in spite of its apparently vulnerable position, this Court has repeatedly overruled and thwarted both the Congress and the Executive. It has been in angry collision with the most dynamic and popular Presidents in our history.[2]

On the eve of the Civil War, Abraham Lincoln, in his first inaugural address upon taking the oath of office as President of the United States in March, 1861, put the matter this way:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[3]

There are large elements of truth in both the Lincoln and the Robert Jackson quotes which I have just read, but both go too far in suggesting that the Framers provided no popular control whatever over the Supreme Court of the United States. The Framers intended to create an independent judiciary, and once a judge became a member of that judiciary he was to be independent of public or political pressure. But to become a member of that judiciary, whether of the Supreme Court of the United States or one of the other federal courts, one had to receive the imprimatur of representatives of the two popularly chosen branches of the federal government.

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2. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY IX (1941).
3. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 268 (R. Basler ed. 1953).

The Framers were not mere theorists, by any stretch of the imagination. As anyone who has read the Federalist Papers can tell, they were likewise men of shrewd insight into human nature and how it worked. In providing that Justices of the Supreme Court, and indeed all federal judges, must be first nominated by the President, who is responsible to a popular constituency, and then confirmed by the United States Senate, who are also responsible to a popular constituency, the Framers provided for some checks and balances on the Court itself. In short, the Court is on the receiving end as well as the giving end of the checks and balances.

The Supreme Court is expected to give reasoned opinions for the decisions which it reaches in the cases before it, but neither the President who nominates a Justice of the Court nor a member of the Senate Judiciary Committee or of the entire Senate is required to give reasons for nominating or confirming a nominee. Thus we do not have a series of bound volumes of reported decisions of Presidents as to why they nominated particular people to the Court, or of Senate Judiciary Committee hearings or Senate debates in which the qualifications of each nominee were discussed at length. But there are enough shreds of such history about to give us some insight into what Presidents have considered when it came to nominating members of the Supreme Court, and how, on at least two occasions, the Senate has reacted to those nominations.

Perhaps the clearest and most outspoken indication of presidential concern for the composition of the Supreme Court came at the time of President Franklin Roosevelt's so-called "Court packing" plan. Those of you who are law students now think of that as history; my generation lived through it as youngsters. I, for example, must have been in junior high school, because I can remember having to at least hastily thumb through front page accounts of the President's see-saw battle with Congress in an effort to get to the section of the newspaper containing the sports pages and the comics. But whether from history or from having lived through the event, I am sure that most of you know what led to this dramatic confrontation in 1937. President Roosevelt was elected by a huge majority in 1932, and four years later by a landslide in which he lost the electoral votes of only Maine and Vermont. During his first term there was enacted much "New Deal" legislation, which embraced various items of social reform, but a number of laws enacted during that time were declared unconstitutional by the Supreme Court of the United States. After President Roosevelt's landslide victory in 1936, he proposed, in his words, to "reorganize" the Supreme Court by giving to himself the power to appoint an additional Justice to the Court for each Justice over seventy who did not retire.

Since at that time six of the nine Justices were over seventy, enactment of his proposed "reorganization" would have given him instantly six vacancies to fill. The President was accused of attempting to "pack" the Court, and responded in one of his famous "fireside chats" in March, 1937. He said:

> In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The Court has been acting not as a judicial body, but as a policy-making body.
>
> When the Congress has sought to stabilize national agriculture, to improve the conditions of labor, to safeguard business against unfair competition, to protect our national resources, and in many other ways, to serve our clearly national needs, the majority of the Court has been assuming the power to pass on the wisdom of these Acts of Congress — and to approve or disapprove the public policy written into these laws . . . .
>
> The Court in addition to the proper use of its judicial function has improperly set itself up as a third house of the Congress — a super legislature, as one of the Justices has called it — reading into the Constitution words and implications which are not there, and which were never intended to be there.
>
> I am in favor of action through [this] legislation . . . because it will provide a re-invigorated, liberal-minded judiciary necessary to furnish quicker and cheaper justice from bottom to top.

But Franklin Roosevelt was neither the first nor the last President to express himself as to the characteristics he wished to have in a Justice of the Supreme Court. Our second President, John Adams, observed after John Marshall had been Chief Justice of the Supreme Court for 25 years: "My gift of John Marshall to the people of the United States was the proudest act of my life . . . ."[4] Adams' successor, Thomas Jefferson, likewise had his own views of what kind of people were needed on the Supreme Court. The one written record of these views gives a less than flattering image of our third President. Upon learning of the death of Justice Cushing in 1810, he wrote to Albert Gallatin, who had served as his Secretary of the Treasury:

> I observe old Cushing is dead. At length, then, we have a chance at getting a Republican majority in the Supreme Judiciary. For ten years that Branch has braved the spirit and will of the Nation after the Nation has manifested its will by a complete reform in every Branch depending on them. The event is a fortunate one, and so timed as to be a Godsend to me. I am sure its importance to the Nation will be felt, and the occasion employed to complete the great operation they have so long been executing, by the appointment of a decided republican, with nothing equivocal about it. But who will it be?[5]

4. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 178 (1926).

5. *Id.* at 403, quoting Jefferson to Albert Gallatin, Sept. 27, 1810.

A half century later, President James Buchanan made this observation:

> No Whig President has ever appointed a Democratic Judge of the Supreme Court of the United States, nor has a Democratic President appointed a Whig; and yet the remark has been general that the Democrats appointed to this Bench from the very nature of the Constitution of the Court have always soon leaned to the side of power and to such a construction of the Constitution as would extend the powers of the Federal Government.[6]

This was indeed the fact, and it was not simply a matter of party politics. There were deep philosophical and political cleavages between the Jeffersonian Democrats and the Whigs, cleavages which went to their respective understandings of how the Constitution should be interpreted in granting power to the national government. This is evident from an editorial appearing in the Richmond Enquirer on July 28, 1835, shortly after the death of Chief Justice Marshall and while the country was awaiting President Andrew Jackson's nomination of his successor:

> The Court has done more to change the character of the Constitution and to shape, as it were, a new Constitution for us, than all the other departments of the Government put together. The President will nominate a Democratic Chief Justice, and thus, we hope, give some opportunity for the good old State-Rights doctrines of Virginia of '98 - '99 to be heard and weighed on the Federal Bench. The very profound and brilliant abilities, with which they have been hitherto opposed in the Supreme Court, have only contributed to make us more anxious to bring back the ship to the Republican tack. We believe that Taney is a strong State-Rights man.[7]

But the task of placing upon the Court appointees who would necessarily share the jurisprudential views of the President who appointed them was a difficult and uncertain one. President Abraham Lincoln made this clear when he was given the opportunity to fill the position of Chief Justice. Chief Justice Roger B. Taney was over eighty at the time he delivered the opinion of the Court in the *Dred Scott*[8] case, and he was eighty-four at the time that he administered the oath of office to President Lincoln on March 4, 1861. The Republicans were sure that, if any faith at all were to be put in actuarial tables, President Lincoln would have an opportunity to fill the Chief

6. 8 THE WORKS OF JAMES BUCHANAN 420 (J. Moore ed. 1960) (letter to Mr. Hemphill, July 18, 1851).

7. Richmond Enquirer, July 28, 1835.

8. Dred Scott v. Sandford, 60 U.S (19 How.) 393 (1856).

Justiceship sometime during his first term with someone more sympathetic to his anti-slavery views than Taney. But 1862 succeeded 1861, 1863 succeeded 1862, and 1864 came around. Roger Taney continued to preside over the Supreme Court, although he was feeble and in ill health. One of the more colorful but less diplomatic members of the Senate, Ohio's Ben Wade, observed at this point that: "No man ever prayed as I did that Taney might outlive President Buchanan's term and, now, I am afraid I have overdone it."[9]

But Wade had not, as a matter of fact "overdone it." Taney died in 1864, and Lincoln was faced with the choice of his successor. Lincoln ultimately settled upon Ohio's Salmon P. Chase, although not without reservation. He said to a political friend:

> There are three reasons in favor of his appointment, and one very strong reason against it. First, he occupies the largest place in the public mind in connection with the office; then we wish for a Chief Justice who will sustain what has been done in regard to emancipation and the legal tenders. We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known.[10]

President Theodore Roosevelt had none of the punctilious sense of the distinction between proper and improper inquiries that a President might make of a potential nominee, and took pains to assure himself in advance that Oliver Wendell Holmes, whom he nominated to the Supreme Court, was "sound" on the "insular cases."

The principal biography of William Howard Taft[11] gives this account of Theodore Roosevelt's approach to Supreme Court appointments:

> Among the presidential powers which Roosevelt relished, took very seriously — and augmented when possible — there was none more vital than his duty of naming the distinguished jurists of the Supreme Court. Among the doctrines of government which he viewed lightly, and undermined when possible, was the theory that the executive, the legislative and the judicial branches are coordinate and equal.
>
> "The President and the Congress," he was to declare in 1906, "are all very well in their way. They can say what they think they think, but it rests with the Supreme Court to decide what they have really thought."
>
> Inevitably, then, it was essential for President Roosevelt to mold, in so far as his power of appointment enabled him to do so, a Supreme

9. B. STEINER, LIFE OF ROGER BROOKE TANEY 540 (1922).

10. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 400-01 (1926) (quoting, G. BOUTWELL II, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 29 (1926) (quoting, conversation between Abraham Lincoln and George S. Boutwell.))

11. H. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT (1939).

Court which agreed with his own views; in short, to have "men of my type" on the highest tribunal. Only thereby could potential nullification of the executive will be halted. His first opportunity came during July, 1902, when Associate Justice Horace Gray, a member of the court for twenty years, decided to resign. The President asked Cabot Lodge whether Oliver Wendell Holmes, chief justice of Massachusetts, was a man who met the Rooseveltian specifications.

"In the ordinary and low sense which we attach to the words 'partisan' and 'politician'," Roosevelt wrote, "a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a party man, a constructive statesman . . . and . . . [keeps] . . . in mind also his relations with his fellow statesmen who in other branches of the government are striving in co-operation with him to advance the ends of government."

Mr. Justice Holmes succeeded in passing the tests and was appointed . . . .[12]

Ironically enough, neither Lincoln's decorous approach to the nomination of Chase, nor Roosevelt's franker approach to the appointment of Holmes, proved totally satisfactory to either President. Lincoln was determined that his appointee for Chief Justice should be one who believed that the government had constitutional authority to print greenbacks. Since he felt he could not ask a potential nominee outright how he would vote in such a case, he did the next best thing. He nominated the man who, as Secretary of the Treasury, had devised the entire legislative basis for the government's issuance of such currency. What would have been his amazement had he lived to hear Salmon P. Chase, as Chief Justice of the Supreme Court, delivering the opinion, for a Court split five to three, holding that the greenback legislation was unconstitutional![13] Yet Theodore Roosevelt, who was quite willing to subject potential nominees to cross-examination at the hands of his intermediaries, fared little better. After Oliver Wendell Holmes, Jr. dissented from an opinion of the Court upholding the government's position in the *Northern Securities* case,[14] which Roosevelt favored, the latter exclaimed: "Out of a banana I could have carved a Justice with more backbone than that."[15]

Let me conclude these remarks by returning briefly, not merely to the subject of "The Ohio Connection" to the Supreme Court of the United States, but to the role that the members of that Court have

12. *Id.* at 238-39 (footnotes omitted).

13. Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869).

14. Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

15. H. ABRAHAM, JUSTICES AND PRESIDENTS 62 (1974).

played in the shaping of constitutional law. I grew up in Wisconsin, served three years as an enlisted man in the Army from 1943 to 1946, attended college in the Midwest, on the west coast and on the east coast. I practiced law for sixteen years in Arizona, and have lived in Washington for the last ten years. I think this sort of a background—perhaps I should call it a geographical crazy quilt — qualifies me to make the statement that people in the southwestern part of the United States do not view public issues the same way as do people in the upper Midwest, and people in the Ohio Valley do not look at them quite the same way as do people in New England. Of one thing I am certain — probably few people in *any* of the fifty states look at things the same way as do public officials in Washington, D.C. There is a tremendous geographical diversity in our country which remains, notwithstanding the homogenizing tendencies of television, the automobile, and the airplane. It has been said, and rightly so, that when a person is made a judge, he takes with him all he has been in life by way of experience. And certainly a part of that experience is the sounds, the sights, and the general atmosphere of the particular place or places in which he has lived. As I previously said, I am not enough of a psychologist to be able to demonstrate that any particular line of constitutional decisions would be different if there had been no Ohioans on the Court instead of the nine that there were. But there is sufficient latitude in interpreting the United States Constitution so that it does make a difference whom the President nominates and the Senate confirms to be a member of the Supreme Court. The interaction, throughout nearly two centuries of our history, of the one hundred and one people who have been members of the Supreme Court is largely traceable to the differences in personality, temperament and philosophy of the people who occupied seats on that Court at any given time. And it is this interaction which is responsible in no small part for the majority and dissenting opinions rendered by the Court year in and year out. One might wish that the decisions were all unanimous. One might wish that the Constitution were more definite in some areas so as to give the judges less latitude to import into the decision-making process, albeit unconsciously, their own personal philosophies. But given a nation of such tremendous diversity — in geography, in racial and ethnic background, in religious affiliation, and in all the other things, great and small, which make one person differ from his neighbor—would it be possible or would it even be desirable to have a homogeneous Supreme Court? I think not. We do pay a price, in certainty of constitutional principle and in clarity of doctrine, for the fact that the nine members of the Court are indeed

nine different people. But for my part, I would be quite unwilling to give up the Ohio Connection to the Supreme Court, any more than I would give up the Arizona Connection, or the connection of any other state to that tribunal. Its strength, and I think it has a great deal of strength, lies in no small part in the diversity of background of its members.