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The Judge

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It was 1973 when I first went to work as a law clerk for Judge Justice. I had been taught by such scholars as Bernard Ward and Charles Alan Wright, and had been exposed to the debate about the proper limits on the power of the judiciary; the word "antimajoritarian" was in my vocabulary, and Richard Nixon had made "strict constructionism" a term of everyday political parlance (if not of clear meaning). But that debate was neither as sophisticated nor as acrimonious in those days as it has since become: most of Judge Justice's critics (who were legion) would then have explained their objections to his judicial style by claiming that he was "too liberal." To me this was no objection at all; had I not gone to law school because I wanted to enlist in the battle to save the world from war, poverty, and injustice?

When I began working for the Judge, I discovered that war and poverty were pretty much outside the Judge's jurisdiction. But injustice—that was different. Although Judge Justice was as particular a scholar as ever parsed a concurrence, and an excruciatingly careful craftsman, these skills were the tools of his work, not its raison d'etre. The man fairly burned with the determination to insure that no person who sought justice from his court would fail to find it—not necessarily victory or vindication, but justice. The best example of this quality that I can remember was the matter of the tiny hamburger patty. All of the Judge's law clerks, I suppose like law clerks everywhere, dreaded the daily influx of prisoner petitions. Most of these were complaints from prisoners held at various facilities of the Texas Department of Corrections within the Judge's jurisdiction, complaining that their civil rights had been violated by their custodians. Although the sort of case that would have excited me in the abstract while I was in law school, these prisoner civil rights cases were unbelievably tedious in practice. The complaints themselves were inevitably handwritten, often on toilet paper, and usually accompanied by a litany of explanations concerning the difficulties the inmate had experienced in trying to formulate and write his complaint, coupled with a prayer for the court's forgiveness of his inability to observe the rules of pleading, filing, and service. Though wearing enough, this was only the beginning: there then followed a minute description of the many wrongs the prisoner believed he had suffered, all phrased in often elliptical prison lawyerese. As an academic frequently faced with the task of grading examinations, I've discovered what may be the only activity as tedious as reading those prisoner petitions, and for the same reason: buried under mounds of unnecessary verbiage and mistaken understandings about the law often may be found important

and meritorious claims. And in the Judge's eyes, no failing as a judge could have been greater than dismissing a prisoner's civil rights suit—no matter how inartful, intemperate, or illiterate—that contained somewhere in its miserable contents a claim that raised a genuine issue under the civil rights statutes. Hence the tiny hamburger story.

One day I put a sheaf of routine papers on the Judge's desk for his approval and signature. Included in this thick pile was a one-page order dismissing the civil rights petition of a prisoner. The Judge asked me the nature of his complaint. I told him that this complaint was a rare one-issue petition, and that the single issue it raised had no legal significance: the prisoner complained that at supper one evening he had been given a hamburger patty which was much smaller than those served to all of the other inmates. Even in my zeal for correcting injustice, I couldn't see that this complaint deserved the attention of a federal judge. But the Judge was not satisfied. Suppose it was because of race, or because the inmate spoke out against one of the prison's policies, that he was not given as much to eat as the others, he suggested. Well, I replied, he doesn't say so. No? smiled the Judge, but maybe he didn't know it was important. I rewrote the dismissal order; it dismissed the complaint, but it also contained the Judge's observation that in the event the short rations had been a consequence of a prison official's desire to discriminate or retaliate against the inmate because of his race or his exercise of his first amendment rights, the case would be a different one. He signed it and it was sent to the prisoner. (I believed at first this order would merely serve as an invitation to the inmate to claim that race or speech had been the reason for the tiny hamburger, but we never heard from him again.) I've thought about this episode many times, imagining how it must have felt to that prisoner to open the order and realize the care with which his complaint had been read. This thoroughness, and refusal to do things the way they had always been done in East Texas, was absolutely characteristic of the Judge. And it must be said that there was a stubbornness, too, that has often made the Judge unwilling to placate or even explain himself to his critics. But the tiny hamburger story, and hundreds of others like it, belie the claim sometimes made by his opponents that Judge Justice is a megalomaniac who loves to wield power. Would such a person have concerned himself with the inadequacies of one miserable prisoner's diet and the possible reasons for it?

Today the character of the debate, both public and scholarly, about judicial power has changed. Conservative scholars who criticize federal judges for "noninterpretive" constitutional rulings and the use of creative equitable remedies have made valuable contributions to a healthy national dialogue about the separation of powers and federalism, but some have indulged in bitter ad hominem attacks on courageous judges

who believe they are doing the job they were appointed to do. (One Texas law professor said in a televised interview that the proper response to the argument that Judge Justice is simply enforcing the Constitution is "to snicker.") Many of these scholars have themselves been appointed to judgeships during the Reagan administration. But new voices have also been added to the debate, including those of the Critical Legal Studies movement who apparently believe in the illegitimacy of all existing legal institutions. To them the term "liberal" is an insult, and they sometimes seem to have no more sympathy for the painstaking, professional, and personally costly work of interpreting the law without fear or favor than those who would abolish the judiciary and permit the Executive, or the Congress, or the states, to decide everything. This state of affairs makes defenders of judicial constitutional review feel like flaky radicals and hopelessly outdated reactionaries at the same time.

Outside the law journals and the halls of academe, the public political debate has been less sophisticated, but certainly more colorful. I was somewhat astonished to hear that the recently elected Governor of Texas had referred to the Judge as a "goofball." The ritual denunciation of William Wayne Justice and his rulings has become practically an inescapable feature of any East Texas political contest. But there are signs the political acrimony may be mellowing. I was amused recently to hear a local East Texas attorney observe (accurately) that "the Judge is a hell of a lot more conservative than these guys think he is." (It was meant as a compliment.) Judge Justice's neverfailing courtesy, good humor, and unimpeachable integrity may finally win over those who actually have the privilege of knowing him. Academic hostility to what is sometimes called the "activist judiciary" shows no signs of tempering, however. (I do have some hope that as more former law professors become judges, they will realize that judging may be harder than criticizing, and transmit this message to their former colleagues.)

As I listen to the current debates, often impressed by the learning and eloquence of the participants, I find that there is much to be said for judges who are aware of their limitations, and are cautious about imposing their own political beliefs onto their reading of the Constitution. But the Constitution, as many have observed, does not interpret itself; the time is past when any judge could credibly claim that he or she decides constitutional questions simply by holding the statute or practice questioned up to a copy of the Constitution and declaring that the two are either matched or mismatched. Certainly any judge, whether "conservative" or "liberal," "strict constructionist" or "critical legal scholar," must bring to the task of judging something of his or her essential character and disposition. The question is what constitutes an ideal judicial disposition. Respect for the limits of the office is, of

course, essential. But any lawyer, scholar, or citizen who believes that the nation would be better off without judges of the courage and humanity of William Wayne Justice must be asked the question attributed to Sir Thomas More: "Do you really believe you could stand upright in the winds that then would blow?"

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