

The High Court: A Time Of Weakness

By Philip B. Kurland

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“AND SO THE GREAT man is gone.” This was Justice Brandeis’ response to the news of the death of Oliver Wendell Holmes. “And so the great men are gone.” This must be the response to the news that both Justice Black and Justice Harlan have departed the court. For it was these two justices who, in recent years, assumed the mantles of intellectual leaders of the court. And, even in the Age of Aquarius, intellect is the stuff of which Supreme Court justices are made.

That the resignations of two justices whose judgments were so often in conflict should deprive the court of the same quality will seem strange only to those who measure votes and not reasons, who are concerned with ends but not means. For Black and Harlan, as for their great predecessors, the obligation of a high court judge was to resolve the issues brought to them only after recognizing and dealing with the complexities of the problems and not by ignoring them.

No matter who their replacements might be, the Supreme Court is likely to be a sadly debilitated institution for some time to come. For history has made it clear that great justices are made, not born; that experience on the Supreme Court is itself a necessary though not a sufficient condition for judicial eminence; that it takes time for any new appointee, however vast his prior judicial experience, to meet the extraordinary challenges that inhere in the job. No less accomplished justices than Charles Evans Hughes and Robert H. Jackson have given personal testimony that they felt inadequate to their task during their periods of apprenticeship.

The court, then, would seem to be moving into a condition unfortunately similar to that which resulted when the Roosevelt Court under Stone was transmuted into the Truman Court under Vinson. Indeed, conditions are worse. For during the Truman period the court had the strengths of Hugo Black and Felix Frankfurter and Robert Jackson. There is none left on the present court to carry the same traditions of greatness. Unless Justices

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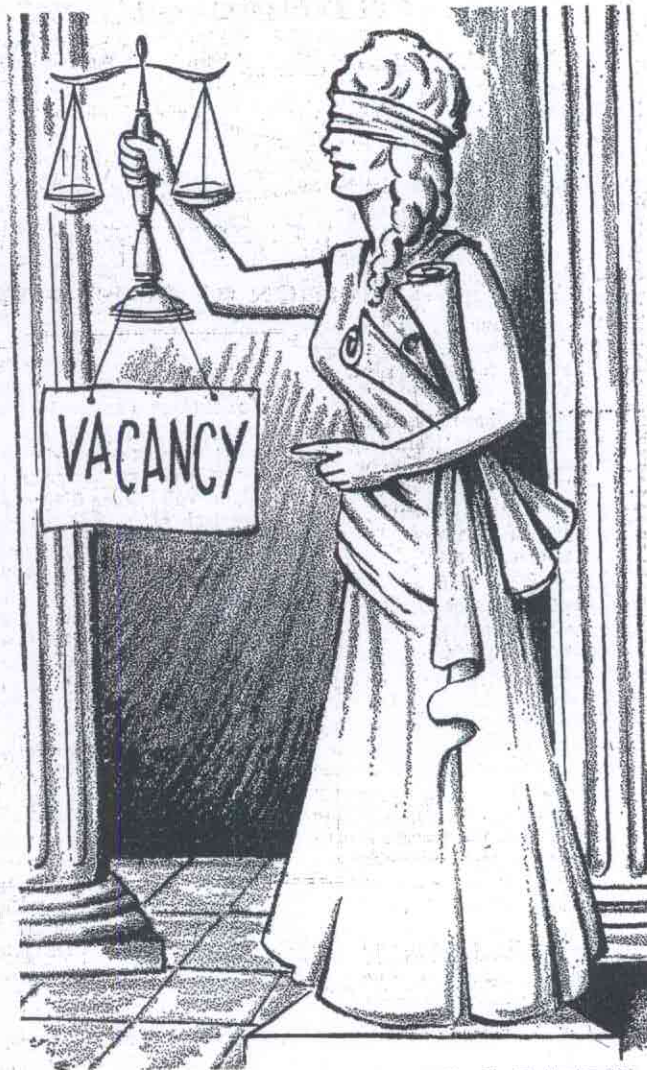
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Stewart and White, both of whom have the potential, emerge from the shadows to lead the court in justifying its conclusions by adequate reasons, the court may disintegrate into a purely political body whose decisions are merely euphemistic expressions of partisan preferences.

It has been said, and it is true, that justices often have a way of growing into their jobs. Justice Black is himself an example of that phenomenon. Unfortunately, this is not the usual pattern. For the most part, mediocrities appointed to the Supreme Court have remained mediocrities. To appoint a small man, with the hope—it certainly cannot be an expectation—that he will gain stature, is a far greater risk than the appointment of a man of talents who, admittedly, might squander them as some justices have done.

Judge Learned Hand once spoke of the appropriate qualifications of a great jurist. He said: "I venture to believe that it is as important to have a judge, called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have specifically been written on the subject. For such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined." Such a judge as Hand prescribed was John Marshall Harlan.

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Drawing by William Perkins, The Washington Post

A Weakened High Court

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Felix Frankfurter, too, spoke many times to the question of what makes the great jurist. On one occasion he said: "Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy the impulse behind it at least in part, may burst forth with an intensity that exacts more than reasonable satisfaction. Law as the response to those needs is not merely a system of logical deductions, though considerations of logic are far from irrelevant. Law presupposes sociological wisdom as well as logical unfolding . . . A judge whose preoccupation is with such matters should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demand upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time is the gift of imagination . . . These judges, you will infer, must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond the logical, let alone quantitative, proof." Such a judge as Frankfurter prescribed was Hugo Lafayette Black.

Both the statements of Hand and

Frankfurter and the judicial careers of Black and Harlan attest that to talk of "strict constructionists" is to use a meaningless phrase to cover some different criterion. The grand provisions of the Constitution—whether they be "due process of law," "equal protection of the laws," or "privileges and immunities of citizenship," whether they are "cruel and unusual punishment," "abridging the freedom of speech, or of the press," or "the right to a speedy and public trial"—are not susceptible to dictionary definition. These and many others are concepts that have to be adapted to each new development in a swiftly changing society. It is their connotations for today, not their denotations of yesterday, that must guide the Supreme Court to its decisions. Anyone who asserts that there can be "strict construction" of the Constitution is only displaying naivete about the Constitution and the role of the court as its expositor.

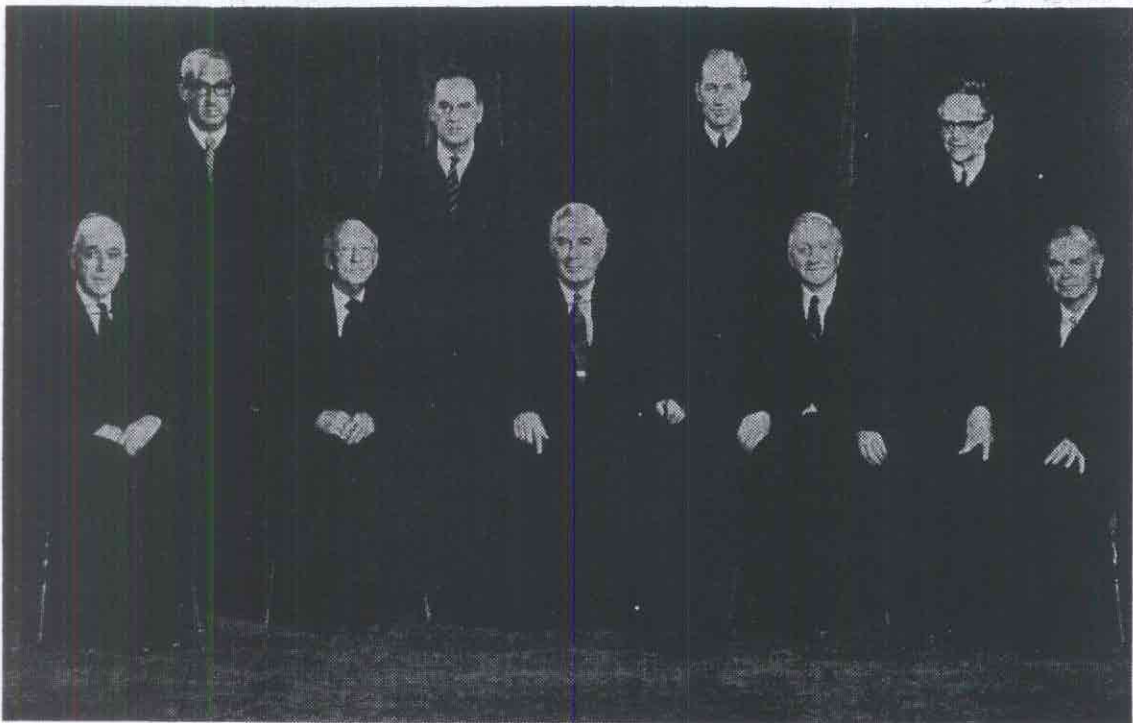
For some, "strict constructionist" means one who wishes to return to the rulings of an earlier era. For some, "strict constructionist" means one who readily jumps from the premise that courts cannot by themselves bring about social change to the conclusion that courts have no role at all to play in bringing about social change. For some, "strict constructionist" means only one who rejects the concept that the Constitution is a totally plastic document to be fitted to the whims of

the justice appointed to interpret it. In short, there is no "strict construction" of the phrase "strict construction."

What ought to be recognized is that, in a day when more and more power over the lives and fortunes of every American is more and more concentrated in the national government—indeed, in the executive branch of the national government—the vital role of the court is to protect the individual against the incursions of the Leviathan. The court may well be the last bulwark of freedom as well as the schoolmaster of the nation. It would behoove a President of the United States to make his judicial appointments with cognizance of the important and difficult job that he is filling. It would behoove a President to rise above himself and not use the appointments for the satisfaction of partisan political objectives.

Alas, it has been too seldom true in the past, and it is not likely to be true in the immediate future, that quality will be the only measure of the men chosen for the high court. It matters little whether the new justices will vote the way their predecessors did. It matters much that they will perform their task in a way that will preserve the majesty of the law, for "law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised."

And so, as clerics who were divines before they became politicians used to say: "Let us pray."



The Burger Court as it sat for its official portrait last January: From the left, Justices Harlan, Mar-

shall, Black, Stewart, Chief Justice Burger, and Justices White, Douglas, Blackmun and Brennan.