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Section 5: Plenary Review: Press Coverage of the Judiciary

Institute of Bill of Rights Law, William & Mary Law School

DEBATE ON PRESS COVERAGE OF THE JUDICIARY

JOURNALISTIC AND JUDICIAL ACTIVISM

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Press Commentary

"The Clarence Thomas Confirmation: A Retrospective"
by The Honorable Laurence H. Silberman*

Now that almost a year has passed since the nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States, it seems an appropriate time to reflect on the events. There is much for me to remember. Clarence Thomas is my friend, and my wife was one of his most outspoken proponents and defenders during his confirmation, so I admit to have suffered at the misery inflicted upon him. But confirmations--as I have said before--are political, and therefore federal judges should not be heard to express a view as to the right way either interest groups or senators should go about supporting or opposing nominees.

It is, on the other hand, very much the business of federal judges to comment on the manner in which other judges behave during a confirmation. My proposition, which once would have been thought non-controversial, indeed rather obvious, is that judges assiduously should avoid public involvement in this intensely political arena.

Of course the nominee, under present conditions, has no alternative but to become something very much like a political candidate during the endless weeks between his or her nomination and the Senate hearings. If the nominee does not seek to marshal support with the help of political institutions, he or she risks being crushed and personally destroyed. Nevertheless, in my view, that necessary political posture should never be allowed to affect subsequent

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* Of the United States Court of Appeals for the District of Columbia Circuit. This speech was delivered at a Federalist Society Conference entitled "The Congress: Representation, Accountability, and the Rule of Law," The Mayflower Hotel, Washington, D.C., June 13, 1992.

decisionmaking as a Supreme Court justice.

Nominees to the Supreme Court, or, for that matter, to any federal court, should, therefore, refuse to answer questions in the confirmation hearings that bear even indirectly on controversies that will come before them. The notion that it is perfectly appropriate to discuss the doctrinal basis of a class of cases, so long as the nominee avoids explicitly saying how he or she would cast a vote in a concrete case, is, in my view, fatuous. Going down that road, one can quickly say so much as to make a final step unnecessary. Moreover, the reason it is inappropriate to indicate a vote in a particular case--that it undermines the integrity of the subsequent adjudicatory process and the independence of the judiciary--applies equally to general discussions of doctrine. In either event, the nominee, under oath, is led to restrict his or her future freedom of decisionmaking, which is necessarily unfair to litigants. If one is forced, to use the famous example, to swear fealty to the right of privacy recognized in *Griswold v. Connecticut*, is not he or she psychologically hampered if, subsequently, as a justice, he or she hears an argument that seeks to limit or even reexamine *Griswold*'s premises? Many would say that is perfectly all right because of their strong view of the merits of *Griswold*, but it should be recognized that this is not a principled position. It is actually much worse for a nominee to answer these kinds of questions in the crucible of confirmation hearings than it would be to give a public speech on the subject. An answer to a senator's question could be seen to be a *quid pro quo* for a confirmation vote, putting a future justice or judge in a more difficult position to offer the requisite open mind to litigants.

It might be thought that this is strictly a matter for any nominee to decide, looking only to his or her conscience, but I would disagree. The type of confirmation dialogue we have suffered through, and now have come to expect, as I have said, threatens the independence of the judiciary. All judges have an interest in protecting that independence.

I realize that, after the Bork hearings, and subsequent confirmations, the "purist" position has become difficult to hold to, but it is time to call a halt to the slide. Recent nominees have been astonishingly resourceful in seeking to avoid confirmation commitments, but it gets harder and harder. Justice Thomas' deft use of the phrase "I have no quarrel with that decision," which, of course, is exactly what any open-minded judge who has not yet read briefs attacking a precedent should say, will, I am afraid, no longer suffice. I do not blame senators for asking searching questions, the answers to which I believe improper. The responsibility to decline is the nominee's, but he or she deserves the full support of the judiciary and the *bar*.

I wish to focus this talk, however, on another aspect of the confirmation process: the proper *public* role for judges regarding the appointment of other judges or justices. Unfortunately, the intensity of the battle over the confirmation of Justice Thomas led judges to cut the mooring lines that should have restrained them from drifting into the political fray. Perhaps most striking, Judge Jon Newman of the Second Circuit wrote an op-ed piece in *The New York Times* at the height of the struggle, urging the President to withdraw the nomination and to nominate instead another black judge from the Second Circuit who is, like Judge Newman, a Carter appointee. I do not

see how it could possibly be suggested that Judge Newman's dramatic entry into the intense political controversy was appropriate conduct for a federal judge. Yet, I saw no public criticism of his extraordinary action. Not from the bar, not from the law schools, and certainly not in the press.

After Justice Thomas was confirmed, another circuit judge, this time from the Third Circuit, former Chief Judge Leon Higginbotham, wrote Justice Thomas an open letter, soon thereafter published in the University of Pennsylvania Law Review. The letter can only be described as a political polemic, which, among other things, attacked Justice Thomas' statements when Chairman of the EEOC and the positions of American conservative political figures such as Presidents Ronald Reagan and George Bush. The letter's patronizing tone, telling a new justice how to vote, was surely in shockingly bad taste, but its political cast--it could have served nicely as an election campaign speech--breached any conceivable standard of judicial ethics. Again, not a word was raised in protest by the bar, nor in academia. And the press covered Judge Higginbotham's screed with unconcealed admiration and delight.

For some of us on the D.C. Circuit, the incident relating to the Thomas confirmation fight that reflected most poorly on the judiciary was the unprecedented and dishonorable leak of the substance of a preliminary draft of one of then-Judge Thomas' opinions. It is, of course, likely that this violation of the confidentiality of the court's deliberative process was committed by one or more judicial clerks. But we know that the reporter sought to persuade clerks to violate their ethical obligation by arguing that the

judge, or judges, for whom they clerked would approve the leak. That suggests that it is also likely that the clerk, or clerks, who did so believed that they were acting consistently with their judge's wishes, whether or not that was true.

Whatever the leaker's exact motive, and it surely included the desire to injure Justice Thomas' confirmation prospects, our court, in my judgment, made a profound mistake in not investigating the matter. Retired Chief Judge Gibbons was surely right when he said publicly at the time "that the judges of the Court of Appeals for the District of Columbia Circuit should immediately take steps to identify the source of the . . . report." We should have used, as did the Senate, a special counsel retained for that purpose. It cannot seriously be argued that a court is powerless to respond, and thus is unable to discourage future leaks of preliminary positions on cases *sub judice*. Sometimes those cases have enormous economic, social, and political consequences. Disclosure of preliminary positions of a judge or judges not only undermines the work of the court, which necessarily must take place in confidence, but it also disserves the interests of litigants and the public. As for the expressed objection that an investigation would have failed to identify the guilty, and so was not worth trying, that is a peculiar view for those responsible for upholding the law. In any event, I am quite certain an investigation would indeed have pointed rather easily to the leaker or leakers. It seems that Mr. Fleming's effort on behalf of the Senate turned out to be more fruitful than early press accounts revealed--as readers of *The Wall Street Journal* and *The Washington Times* editorial pages learned.

There has been a good deal of confusion as to exactly what the D.C. Circuit did about our leak. Two misimpressions have spread. One is that the issue of an investigation is still alive, and the other is that the Chief Judge somehow had authority, which he exercised, to block an investigation. Neither is true. We actually decided the question last November in a formal manner when we voted 6-6 (with a senior judge voting as has been our practice) to defeat a motion to conduct an investigation. Thereafter, our deliberations concerned *only* whether we would disclose our decision--and the vote--to the public and, if so, in what manner. I thought, and still do, that, given the public importance of the issue, we all had an obligation to tell the public what we decided. There cannot, however, be any valid objection to my open disclosure of our decision now, especially after we have seen a newspaper account that purports to describe the views of judges (distorted I might add) expressed in that private session. It certainly would have been much better if we had announced our decision forthrightly as a court at the time the opinion issued. I have not been able to discern any good reason why the court (or, for that matter, individual judges) should not disclose its (or their) position on such an issue.

In any event, notwithstanding the unprecedented and obviously damaging nature of the leak, again, I did not see any criticism from the bar, academy, or the press as to our inaction. I suppose it was to be expected that the press would not readily bite the hand that feeds it. *The Legal Times*, the recipient of the leak, sought to protect its source not only from identification but also, in clever ways, from any rebuke. I wonder, however,

whether if this sad event had occurred during the nomination of a judge with an apparently different approach to judging, the press would have been more probing and more critical.

All of these episodes that reflect badly on the judiciary occurred in connection with Justice Thomas' nomination, but we see other disquieting signs that federal judges are willing to engage openly in public criticism of the Supreme Court in a political fashion. Recently, Judge Noonan of the Ninth Circuit wrote an op-ed piece, again, not surprisingly, in *The New York Times*, openly disagreeing with the Court's recent disposition of the Robert Alton Harris case, in which the Ninth Circuit was ordered to stop efforts to interfere with Harris' execution. Judge Noonan even accused the Court of causing the Ninth Circuit to commit "Treason to the Constitution." If I am right that this sort of behavior is stunningly inappropriate, and also unprecedented, we must ask, why is it occurring now? What is it in our present environment that causes judges to cut the tacit and explicit ethical restraints that had been thought to prevent such conduct?

To answer the question, one must think about what it is that influences judges once they are appointed. I mean, of course, what influences them other than parties' arguments in litigation and the expected consultation with other judges. We can discount out of hand the organized bar, and not totally to its discredit. Lawyers, after all, are not in a particularly advantageous position to influence the behavior of judges. Time was when scholarly criticism at our law schools had some impact. Not so today. American law schools have changed dramatically in only the 30 years since I left Harvard.

Whereas then, there was a broad consensus within the faculty, across the political spectrum, as to the appropriate role of judges, that consensus fell apart in the '60s during the heyday of the Warren Court. Now, many of our most competitive law school faculties are dominated by those who wholly reject the basic premise that animated legal scholarship in 1960--that judges are in the business of trying to discern and apply neutral principles. For those professors, judicial decisionmaking is simply a charade, masking oppression. Thus, the law reviews today are full of articles exploring endless variations on a Marxist theme. All that is necessary to comprehend the author's concept is to understand how he or she measures the oppressed class. Most law reviews have therefore become virtually irrelevant to judges.

Judges do, however, hire law clerks every year, and clerks are recent products of the law schools. Of course clerks *do* influence judges--sometimes all too much. One of my former clerks told me of an advocacy group meeting a few years ago at a prominent law school where a faculty member who had clerked for a Supreme Court justice told the group exactly how this particular justice had been manipulated over the years--captured, if you will--by his activist law clerks. Not surprisingly, given the overwhelming endorsement of various kinds and degrees of judicial activism in the law schools, the supply of potential clerks who believe in, indeed even comprehend, notions of judicial restraint does not begin to match the number of incipient judicial activists.

Law clerks are not, to be sure, directly responsible for inducing judges to engage in inappropriate political activity. They can, however, subtly reaffirm the notion that the outcomes of judicial activism are so important that

virtually anything is justified to protect those decisions. To put it another way, judges, or nominees, who believe in a more limited role for the judiciary are thought in the academy to be in some sense illegitimate. Therefore, recent graduates may reinforce the view that illegitimate means can be used to oppose them so as to preserve activist precedents.

Still, I believe the more important influence and the key explanation for the recent misbehavior of judges is the press. Mr. Dooley said, as you will recall, that judges follow the 'lection returns. That is not really so. They, of course, owe their appointments to the electoral process, but in past decades the courts, perhaps particularly the Supreme Court, have seemed to take pride in ignoring popular will. Federal judges have instead appeared particularly prone to listen very carefully to the views of what has been described as the "new class" or, lately, the "chattering classes." In the United States, that very much means the press.

It is a commonplace that in a democracy we expect the press to patrol the abuses of government officials. Certainly the press often performs that role. Why, then, has it not restrained judges from getting into the political disputes I have described? Why is it that these judges know in their bones, if you will, that a certain kind of public utterance or action, regardless of its impropriety, will not be questioned? The answer, as I have foreshadowed, is that the American working press has, to a man and woman, accepted and embraced the tenets of judicial activism. Unlike the law schools, where one can still find a few professors who assert the virtues of judicial restraint, I have never met a legal reporter who holds to that view. Some columnists and

editorial writers, to be sure--but no reporters. And the cumulative weight of American legal reporters overwhelms those few columnists or editorial writers whose opinions are openly on display.

I once thought that was so because journalists covering the courts are primarily non-lawyers and might therefore be thought to be interested only in cases as policy issues. But the truth is that the lawyer/reporters are among the most unbalanced--the least abashed at asserting the value of judicial activism. The worst, in my view (with the notable exception of the "wicked witch of the airwaves"), are found in the pages of *The New York Times*, whose general news coverage in recent years has seemed to approach a daily version of *The Nation*. We never realized how much discipline Abe Rosenthal exercised until he retired and the advocates were allowed to run free. It seems that the primary objective of the *Times'* legal reporters is to put activist heat on recently appointed Supreme Court justices. Tom Sowell has described this technique as the "Greenhouse Effect," after the *Times'* leading court reporter. Their Washington second stringer, Mr. Neil Lewis, covers our court, and his reporting is so obviously distorted and tendentious that it reads as if it were a cross between the columns of his namesakes, Anthony and Flora Lewis.

The *Times* is by no means unique. All American newspapers, with a uniformity that is found with respect to other subjects that a judge does not discuss publicly, conform generally to the same line. *The Wall Street Journal*--under the direction of its always opinionated Washington Bureau Chief Al Hunt--*The Washington Post*, *The Los Angeles Times*, the *Associated Press*,

and virtually all other papers and newsmagazines are only a step behind (I exempt, of course, the editorial pages). The working press covers the federal courts, indeed any American courts, as if judicial decisions were simply the extension of politics by other means. As Justice Scalia has remarked, they seem uninterested in the reasoning of opinions--which should be even more important than the result since it is the reasoning that is really law. And rather obviously they approve of only certain kinds of results.

It has occurred to me that one could draw a parallel between modern judicial activism and what could be called journalistic activism. Both likely stem from the new class' impatience with the workings of American democracy in the latter half of the twentieth century. If one believes that reporters have some sort of obligation to seek objectivity in reporting, both could be thought an abuse of power. But one probably cannot draw from the First Amendment the same sort of corollary obligation to neutrality that one must certainly take from Article III. Journalists have the legal right to be as partial as they wish; it may be that there is no ethical obligation restraining partiality, either. In any event, I doubt I have standing to raise that issue, except to note the hypocrisy with which journalists discuss the matter. I can, however, legitimately describe the nature of journalistic reporting on the judiciary because it has an impact on judicial behavior.

Since it is virtually impossible doctrinally to defend judicial activism in a democracy, the strategy of those journalists who wish to support judicial activism is to deny the possibility of judicial restraint--to challenge the notion that there is anything to the pursuit of neutral principles, or, alternatively, to

so use the terms as to hopelessly confuse debate. It reminds me very much of my experience in foreign policy. Communist and Third World opponents of democracy would never frontally attack the concept. They would instead seek to debase the currency by misusing the term. Thus, "democracy" was used often to refer to coercive methods to achieve relative equality of nominal income. My particular favorite, though, was the phrase the Communists invented to describe dictatorial decisionmaking: "democratic centralism." I expect that, in the same Orwellian fashion, this speech criticizing judges for political interventions will, in turn, be described as "political."

Reporters will often describe an opinion they dislike as "activist" when it strikes down an act of Congress as unconstitutional. If one believes that the Constitution is positive law, rather than a delegation to a continuing constitutional convention, that charge is, of course, silly. Or sometimes we see a court described as activist for overruling prior precedent--particularly when the earlier decision was itself the product of press-approved judicial activism. A decent respect for precedent is, to be sure, an element of judicial restraint, but the core notion infusing that philosophy is that judges are not policymakers and should as much as humanly possible eschew policy choices. When a precedent is based on nothing more than such a policy choice, it may be imprudent, but it is hardly activist, to vote to overrule that case.

The press' ceaseless advocacy of judicial activism not only induces judges to misbehave in the manner I have described, but it also has its impact on judges' decisionmaking over time. When I served in the Executive Branch, I watched the press shape the behavior of senior appointees. Some, it

seemed, allowed their entire daily agendas to be set by the morning papers. The desire to curry favor with and avoid criticism from the Washington press corps outranked, for many, loyalty to the President or respect for Congress.

I do not think I fully appreciated, until I became a judge, however, how much impact press coverage can have on judges. Of course those of us who had been involved in judicial selection watched with great disappointment as judges seemed to change on the bench, or, as the press would say, "grew." It was quite frustrating to see those particular jurists come to accept and even relish the temptations of activism. They were rewarded by being described approvingly as "non-ideological"--deciding each case on its merits--which, as far as I can tell, meant that they were expected to reshape the law each time to conform to a desired outcome. (Ironically, hard core Warren Court-type activists are never described as ideological.)

So, I understand better today the reason for the evolution of some judges. More often than not it is attributable to their paying close attention to newspaper accounts of their opinions. You would be amazed at how thin-skinned some judges are. That is why the Reagan Justice Department was so determined at the outset of that Administration to pick academics for the federal judiciary--particularly for the Courts of Appeals--those persons who had developed a settled view of the appropriate judicial role and would not lack the intellectual confidence to hold to it under expected criticism.

That brings me back to Justice Thomas. He was, of course, not a law professor, and through his years of service in the Executive Branch he certainly--as would be expected in light of his positions--experienced rigorous,

even ruthless, press attacks. The President, when he announced his intention to nominate Clarence Thomas to the Supreme Court, nevertheless, described him as the best person available. There are a number of individuals who would make excellent Supreme Court appointments, but I think the President was right. Not only does Clarence Thomas--as all the world now knows--have the courage of a lion, he also has the kind of intellectual integrity that constitutes a solid foundation from which he cannot easily be pushed. But, in one vital respect, Justice Thomas is absolutely unique, amply justifying the President's characterization. He is the only judge I know who is impervious to the press influences I have described. He has, for some time, resolutely refused to read the newspapers. There will be, I would bet my shirt, no journalistic hole bored in his intellectual ozone level. This time, there will be no "Greenhouse Effect."

[6/10/92]

First Amendment

Does media coverage influence the outcome of judicial decisions?

Federal Court of Appeals Judge Laurence Silberman of the District of Columbia is not one to mince words. In a recent speech before the conservative Federalist Society, he stuck it to the Fourth Estate, accusing journalists of favoring judicial activists when they cover the courts.

Even worse, noted Silberman, some members of the bench pander to this prejudice by tilting to the left when they decide cases.

While a chorus of journalists blasted the judge for his own brand of activism, we put this explosive proposition—that judges make law with an eye to the headlines—to two constitutional scholars: commentator Bruce Fein and College of William and Mary law professor and First Amendment specialist Rodney A. Smolla.

Fein argues that Silberman is right in saying that the press dotes on liberal judges, but he urges them to resist the bait and decide cases on conscience.

Smolla, however, doesn't accept Silberman's premise and uses the news coverage of the judge's speech to illustrate the media's neutrality and dedication to principle.

Yes: The Press Loves Activists

BY BRUCE FEIN

Both direct evidence and human nature corroborate Judge Laurence H. Silberman's indictment of the media for its complicity in judicial activism.

The majority of print and broadcast journalists celebrate activist decisions. They are obsessed with results, not with principles of constitutional or statutory interpretation that prevent judges from usurping legislative or executive prerogatives.

Supreme Court nominee Robert H. Bork was widely criticized for interpreting OSHA to permit employers to exclude fertile women from jobs that would endanger fetuses. By contrast, last June, the media lauded Supreme Court Justice Anthony Kennedy for his opinions invalidating voluntary prayers at high school graduation ceremonies and reaffirming the *Roe v. Wade* abortion decree.

Again, in *Planned Parenthood v. Casey*, Justice Harry Blackmun urged the Senate Judiciary Committee to block any nominee to the Supreme Court uncommitted to *Roe*. That unprecedented effrontery was politely received by the media because Blackmun's *cri de coeur* furthered the cause of activist jurisprudence. But how would the media have reported an exhortation by Justice Antonin Scalia to deny confirmation to Supreme Court candidates reluctant to overrule *Roe*?

Similarly, Chief Justice Earl Warren and Associate Justice William O. Douglas were regaled for their activist decisions that undercut the text and purpose of various constitutional provisions. Their regular reliance on notions of fairness, emanations and penumbras went supinely unquestioned by journalists. By contrast, Justice John Marshall Harlan, whose less ebullient jurisprudence was graced with deep constitutional learning, received the prominence of an extra in a Cecil B. DeMille extravaganza.

Most recently, the joint plurality opinion of Justices Kennedy, Sandra Day O'Connor and David Souter in *Casey* expressly justified their votes by the fear that overruling *Roe* would be portrayed in the media as a surrender to anti-abortion advocates.

Strange Bedfellows

And a federal judge in Wichita recently appeared on "Nightline" to garner favorable coverage of his injunction against picketing of abortion clinics by Operation Rescue. Another federal judge in the District of Columbia similarly turned newspaper columnist to defend his AT&T divestiture decree. Who can deny that the media enjoys a seat in the judicial cloister?

As Justice Oliver Wendell Holmes warned in *Northern Securities Co. v. United States* (1904), great cases, like hard cases, make bad law "because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

What makes a case of "overwhelming interest," of course, is the media coverage it attracts. And that coverage characteristically promises media flattery for activist judicial decisions, but pejorative prose for rulings that deny judicial social engineering power.

Who wants martyrdom for upholding the Constitution's separation of powers or long-headed principles of interpretation that are denigrated as "esoteric" or "arcane" by reporters intoxicated with results? Who wants to risk a media beating a la Judge Bork in a Senate confirmation hearing?

Only a diminishing number display the intellectual incorruptibility of Socrates and, thus, like Judge Silberman, unflinchingly risk media obloquy and a seat on the Supreme Court to safeguard constitutional truths.

That is healthy neither for enlightened law nor the public weal. Constitutional principles, by definition, stand above media kudos or public opinion polls. To paraphrase Justice Robert Jackson, their vitality should not turn on the vicissitudes of political controversy or journalistic passions. Of course, a judge should not reject a constitutional interpretation because it may evoke media plaudits; but neither should a judge resist an interpretation because it might agitate the media.

The principal purpose of judicial life tenure is defeated when decisions are corrupted by the anticipated reportorial responses of tribunes for activism. ■

No: A Pat Thesis

BY RODNEY A. SMOLLA

In a provocative speech Judge Laurence H. Silberman recently attacked the manner in which the press reports on legal issues, claiming that there is at work a "journalistic activism" set on advancing an agenda of "judicial activism."

Although he singled out *The New York Times* and its Supreme Court correspondent Linda Greenhouse, his indictment was more sweeping, writing that "the American working press has, to a man and a woman, accepted and embraced the tenets of judicial activism." He attacked journalists for treating courts as political institutions, "as if judicial decisions were simply an extension of politics by other means," and claimed that journalists overemphasize the mere results of decisions, and seem uninterested in the reasoning of cases.

The facts do not support these claims. Take as a first exhibit the actual texts of the "next-day" stories that the major American newspapers and wire services run on Supreme Court decisions. They generally encapsulate the facts, the result, the core doctrinal and policy judgments that comprise the majority, concurring, and dissenting opinions, and attempt to offer a balanced assessment (often quoting from experts with opposing viewpoints) of the likely impact of the decision.

The stories tend to be generous in their quotations from all justices who write opinions, and fair in their selection of quotes. Legalisms like "strict scrutiny" or the "*Lemon* test" are distilled and made comprehensible. And the daily news coverage of the Court tends to go out of its way not to be judgmental.

Take as a second exhibit the longer analytic pieces that appear in the mainstream press. For example, since Judge Silberman singled out Linda Greenhouse, I will cite her. On the Court's controversial hate-speech decision this term, Greenhouse wrote: "The fault line that split the Court reflects a debate with deep roots in political theory and the history of the First Amendment ... between those who see free speech as an end in itself and those who see it as a means to an end."

On the evolving identity of the Court, Greenhouse wrote: "So if there is a constraint on the new majority, it may come down to this: Ideas that are inviting as theory, and that gain majority opinion that could change the way people live as well as how they view the Court."

Journalistic Balance

Judge Silberman and Linda Greenhouse do have different ideological and jurisprudential values; but certainly it is unfair to attack Greenhouse's writing (or that of her colleagues in other news organizations) by intimating that it lacks intellectual honesty, analytic probity or journalistic balance.

I also have observed first-hand how these news reports are constructed. Like many scholars, "liberal" and "conservative" (including my friend Bruce Fein), I often get called for reactions to cases. These are invariably arms-length, thought-minded, adversarial exchanges. The journalists are vigorous in their cross-examination; they instinctively react against attempts at "spin control"; they press me to defend positions much like a good judge will press a lawyer in oral argument.

When I later read the piece, I am usually impressed by the writer's attempts to sort out the often confusing and controverted implications of a new landmark decision.

Judge Silberman's speech had many good points, including some well-taken insights into the confirmation of Justice Clarence Thomas. But along the way he pointedly criticized his "activist" colleagues, law clerks, law professors and law reviews (the latter, for "exploring endless variations on a Marxist theme").

One of the saddest aspects of the whole Thomas nomination spectacle was the tendency on all sides to resort to hyperbole and ad hominem attack. Judge Silberman's thoughtful views on "activism" are welcome additions to our ongoing American debate about the role of courts. But whatever our viewpoint, it does not advance the cause of enlightening public discourse to caricature the arguments of people with whom we disagree, or to simply "blame it on the press." ■

COURTSIDE

BY TONY MAURO

Does the Court Play to the Press Gallery?

Three large boxes gathering dust under my desk are testimony to the increasing role of the press in judicial nominations.

I call them the Robert Bork Box, the David Souter Box, and the hopelessly bulging Clarence Thomas Box (Anthony Kennedy seemed to merit only a large folder). Each is filled with the dozens of reports, position papers, attacks, and analyses prepared by interest groups and academics in defense of or in opposition to these nominees.

Unlike reporters on other beats around town, Supreme Court reporters are unaccustomed to being lobbied or stroked. On a political beat, stories are read closely, and feedback is common. But Supreme Court and other legal stories resonate only rarely; reaction is uncommon.

Yet when a high court vacancy arises, the paper begins to flow. With each new nomination, the number of pages seems to grow exponentially. Strategists will tell you that how the press plays these nominees is of increasing importance in influencing the debate and the outcome.

But not until last week has anyone suggested publicly that the press also influences the judges and justices once they get on the bench. Critics, notably Justice Antonin Scalia, have attacked the press for how it covers the courts. But not even Scalia has suggested that our coverage influences how judges reach their decisions.

That was, however, the provocative thesis of Judge Laurence Silberman's wildly well-received speech before the Federalist Society at Washington's Mayflower Hotel June 13. *(For the text of Silberman's speech, see "Verbatim," Page 14.)*

Silberman, a judge on the U.S. Court of Appeals for the D.C. Circuit, suggested that every reporter he has met who covers the courts believes in judicial activism (more on that later) and that a disturbing number of judges have been nudged into the activist frame of mind by the press.

Silberman offered few specifics, saying afterward that "I don't think it would be appropriate" to mention actual cases or judges influenced by the press. He did mention the increasing number of federal judges, mainly Carter appointees, who find their way into the op-ed pages of newspapers with views that, Silberman said, clearly go beyond what is appropriate for judges to say. "I can't imagine Learned Hand writing an op-ed piece," Silberman commented later.

We all know judges who seek to curry favor with the press. And it is true that Carter appointees, feeling frustrated with the sharply different views of their Reagan and Bush colleagues, have turned to the press more and more, so that their opinions can have some currency somewhere.

But can it be possible that these judges, with the protection of life tenure, actually shape their decision-making with an eye toward receiving favorable mention in the press? It is frankly difficult to imagine.

As reporter Linda Greenhouse of *The New York Times*, one of Silberman's named targets, says in an interview, "I've never gotten the sense that anyone on the bench has been led around by the nose by the press."

Yet Silberman definitely struck a responsive chord when he said it, and comments I've heard from lawyers and others since the speech suggest that he was giving voice to a concern privately held by many judges throughout the federal judiciary.

In an interview after the speech, Silberman said that this sort of influence by the press definitely exists, "and it shouldn't be a surprise. . . . You have a lot more impact than you think."

He explained it this way: "Judges are pretty isolated. They don't talk to lawyers; in some instances, they are forbidden to.

PHILIPPE JENNETT

Laurence Silberman: Journalists have subtle effect on some judges.

So often, when they write an opinion, it drops off the face of the earth. They never hear about it. Some judges need to see some reaction, so they look to the press."

Silberman is clearly right that judges should not be playing to the crowds, deciding cases on the basis of how the press or public will react. And it would be foolish to deny that many reporters, consciously or not, tend to look at judicial issues through a liberal lens. When conservative judges make bold rulings, they ten to be described disparagingly as "ide logical." When liberals do the same thin they are called "principled."

But Silberman's assertion that the pre exerts anything like the influence he sug gests needs further fleshing-out. The ur predictability of federal judges—from th Supreme Court on down—tends to di prove his theory.

And Silberman needs to be careful n to take his point so far that he ends u advocating a know-nothing approach t judging. He came perilously close at th close of his Federalist Society speech when he heaped praise on Justice Thoma for his steadfast refusal to read newspaper at all.

"He is the only judge I know who i impervious to the press influences I hav described," Silberman said admiringly "There will be, I would bet my shirt, n journalistic hole bored in his intellectu ozone level."

Refusing to buckle under to outsid pressure is one thing. Sticking one's hea in the sand is quite another.

The Greenhouse Effect

Judge Silberman's provocative poi was obscured somewhat by his unfort nate personal attacks on reporters who, h said, are taking advantage of their here tofore uncharted powers to push the coun toward activist decision-making.

He singled out the reporting of Ne Lewis of *The New York Times*, describin it as "obviously distorted and tender tious." But Silberman did not mentio the likely source of his animus towar Lewis—namely a 1991 article on disser sion within the D.C. Circuit that reporte that Silberman had once threatened to a sault Judge Abner Mikva. *(See "Silbe man, Dogged by Story, Provides Detai of Outburst," Legal Times, March 1 1991, Page 7.)*

SEE COURTSIDE, PAGE

Tony Mauro covers the Supreme Court and legal issues for USA Today *and the Gannett News Service. His column on the Court appears every other week in* Legal Times.

COURTSIDE FROM PAGE 8

"He seems to thrive on animosity," offers Lewis. "A couple of years ago, he tried to engage me in a debate by mail [about another story Lewis had written]. I found his letters so churlish and loopy that I stopped responding to them."

Much to the amusement of his audience, Silberman also childishly criticized Linda Greenhouse by speaking of the "Greenhouse effect," a phrase first coined in this context by economist and columnist Thomas Sowell. Never mind that justices ranging from William Brennan Jr. to William Rehnquist have written and spoken admiringly of Greenhouse's reporting for *The New York Times*.

Silberman added a few more names to his enemies list before he was done: *The Wall Street Journal* (its reporters, not its simpatico editorialists), *The Washington Post*, the *Los Angeles Times*, and the Associated Press. He even referred to the "wicked witch of the airwaves," apparently a veiled reference to Nina Totenberg of National Public Radio.

Greenhouse, who is in her 11th term as court correspondent for the *Times*, says she found Silberman's attack "basically baffling"—and disturbing as well.

"I trust he is not seeking to use his position to chill or delegitimize penetrating coverage of the federal courts," she says.

Greenhouse adds that she has had little contact with Silberman over the years and is at a loss to account for which articles triggered his wrath. She disagrees with his thesis and holds no brief for activism. "There are quite a few activists on the Supreme Court now," she says.

And Greenhouse denies Silberman's assertion that in the post-Rosenthal era at the *Times*—referring to the years since Executive Editor Abe Rosenthal stepped down—journalistic advocacy has "run free."

Greenhouse is at a loss to explain which articles triggered Silberman's wrath.

PHILIPPE BENNET

Reporter Linda Greenhouse disagrees with Silberman's thesis.

The Power of the Pen

Judge contends colleagues become activists to please the press

It used to be that federal judges were seen and not heard; any speaking they had to do was in an opinion, and any disagreement with a colleague was settled in chambers.

In recent years, however, federal judges have been heard a lot. Members of the bench, from the Supreme Court on down, have tossed hand grenades at each other in speeches, opinions and on op-ed pages of America's largest newspapers. Some have even granted interviews to—heaven forfend—reporters.

Now, in a recent speech, Judge Laurence Silberman, of the U.S. Court of Appeals for the District of Columbia, has taken his colleagues to task for those public breaches of judicial etiquette.

The speech was delivered in Washington, D.C., before the conservative Federalist Society. Perhaps aware of the irony of the chosen forum, Silberman took pains to point out his salvo was different.

At the end of a discourse on judicial activism and the twisting of language, Silberman added, "I expect that, in the same Orwellian fashion, this speech criticizing judges for political interventions will, in turn, be described as 'political.'"

Regardless, Silberman has some interesting and novel points to make, as well as some perplexing ones.

In addition to covering such familiar territory as the sorry state of the judicial confirmation process, "Marxist" law reviews, and law clerks who try to subvert their bosses, Silberman developed the thesis that a symbiotic relationship exists between the judiciary and the press.

Liberal American newspapers, he complained, "conform to the same line. The working press covers the federal courts, indeed any American courts, as if judicial decisions were simply the extension of politics by other means."

Influential Words

Most astonishing was Silberman's assertion that journalists actually have an influence on judges who "desire to curry favor."

"The press's ceaseless advocacy of judicial activism not only induces judges to misbehave in the manner I have described [by writing for op-ed pages, for example], but it also has its impact on judges' decision-making over time," he said.

"I do not think I fully appreciated until I became a judge, however, how much impact press coverage can have on judges," he said.

"Of course, those of us who had been involved in judicial selection watched with great disappointment as judges seemed to change on the bench—or as the press would say, 'grew.' It was quite frustrating to see those particular jurists come to accept and even relish the temptations of activism."

Silberman offered no specifics for his assertion, which A.E. "Dick" Howard, a University of Virginia law professor and former Supreme Court law clerk, called "an unprovable proposition." He likened it to the old charge that liberal law professors send left-wing students to clerk and influence judges.

Howard conceded that judges are "pleased when the academy thinks well of their opinions and when the press has nice things to say about them, but the notion that they are influenced in any substantive way is far-fetched.

"I don't see any evidence of that."

Silberman did get specific in naming reporters and newspapers that he considered biased. He included the usual suspects, such as *The Washington Post* and *The New York Times*, and added a new one: the Associated Press, a wire service that historically has been known for cut-and-dry reporting.

James H. Rubin, who has covered the Supreme Court for the Associated Press for 10 years, said he would be "shocked" to find that what he wrote had any influence on judges.

Rubin said the source of the judge's displeasure is "a mystery to me." Reporters at the AP "pride ourselves on being fair and unbiased," he said. "It's what we strive for."

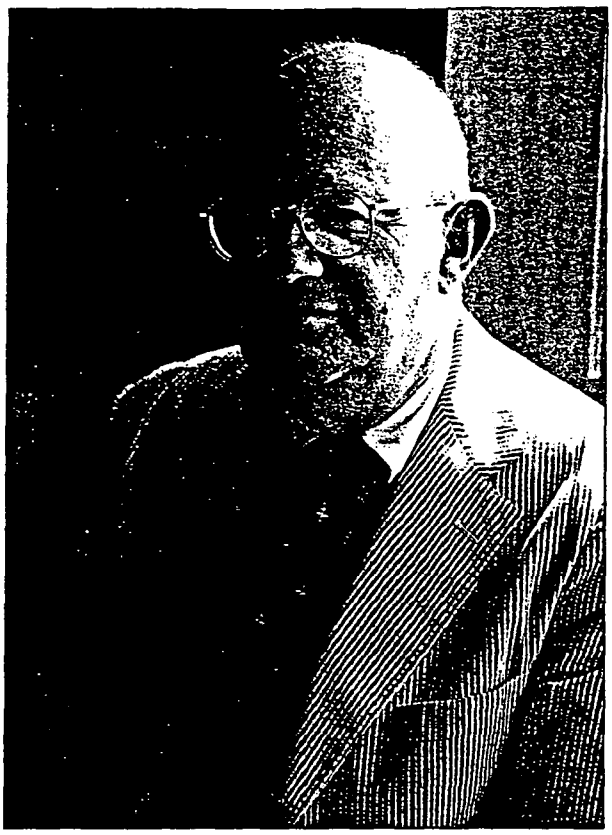
Tony Mauro, in a column for *Legal Times*, suggested a motive for Silberman's attack on the objectivity of Neil Lewis of *The New York Times*. It was Lewis who wrote last year that Silberman had threatened, perhaps without intent, to punch Judge Abner Mikva in the nose.

Lewis recounted the incident a second time in a story on philosophical differences among judges written about two weeks after Silberman's speech.

The dean of Washington, D.C., legal writers, Lyle Denniston, a *Baltimore Sun* reporter who has covered the Supreme Court since 1958, defended the right for judges to be opinionated.

"I think everybody has a First Amendment right to express themselves on any subject, including federal judges who have little sympathy for the First Amendment," he said.

—Henry J. Reske



Some judges "desire to curry favor."
—Judge Laurence Silberman

ABAJ/USA BERG

Press is a puzzler with abortion 'spins'

If you found this week's Supreme Court decision on abortion a bit baffling, you probably can blame it on your newspaper.

Many headlines across the USA read as though they were written by pro-choice or anti-abortion activists rather than journalists. Examples of the contradictions:

▶ *The Miami Herald*: "Court affirms abortion rights"

▶ *The Orlando Sentinel*: "Court weakens abortion rights"

▶ *The* (Oakland) *Tribune*: "Roe reaffirmed"

AL NEUHARTH
USA TODAY FOUNDER

▶ USA TODAY: "High Court reins in 'Roe' "

▶ *San Francisco Chronicle*: "Court upholds right to abortion"

▶ *Chicago Tribune*: "Ruling weakens abortion right"

▶ *Houston Chronicle*: "Court limits access to abortion"

Those headlines and many others misfired a little to the left or right. These two may have been the most pointed and most pointless:

▶ *Star Tribune* (Minneapolis): "Abortion ruling lands in middle"

▶ *New York Newsday*: "Abortion ruling 5-4"

Most journalists try to be objective. But they are human (honest!): Therefore the "spin" they put on a story or headline sometimes reflects their own preferences or prejudices.

Former Editor in Chief of USA TODAY John C. Quinn once quipped that a newspaper's philosophy, policy and style would show through even in the ultimate story — the end of the world. He predicted these headlines:

▶ *The New York Times*: "World Ends. Third World countries hardest hit"

▶ *The Washington Post*: "World Ends. White House ignored early warnings, unnamed sources say"

▶ USA TODAY: "We're Dead! State-by-state demise, Page 8A. Final, final sports scores, Page 6C"

Wiseacre Quinn and the abortion headlines send the same signal: Don't believe everything you read. And be sure to look beyond the headlines.

Abortion ruling sends the networks racing

CNN set the scene at 10 a.m. ET/7 a.m. PT Monday with pictures inside the Supreme Court of dozens of reporters awaiting the ruling on the Pennsylvania abortion case.

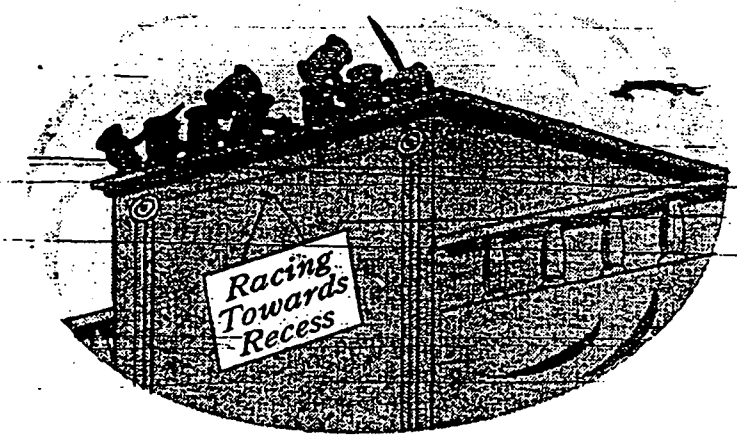
Minutes later the decision was out. Network legal correspondents had little time to read the thick decision but still had to report the findings. "There is no way to prepare for something this complicated," says CBS correspondent Rita Braver. "I just happened to turn to page 6 where the (spousal) notification provision was."

ABC did not air a live picture, opting for Tim O'Brien on the phone. "I was at my desk just a few feet from the press room," says O'Brien. "It may have given us another 10 or 15 seconds" to look at the ruling. O'Brien did slip on the notification provision, but anchor Peter Jennings quickly made a correction.

Each network also had legal experts on hand. Winner of the preparedness award goes to CNN, which had packaged reports plus live debate on *Crier & Co.* Two gofers helped CNN's Anthony Collings. "We had two runners, one familiar with the workings of the court and someone else who was a little more fleet of foot who ran outside in a 15-second sprint to where Collings was standing," says CNN vice president Earl Casey. **(Abortion ruling, 3A)**

News Management at Supreme Court? Not Guilty!

By Ruth Marcus
Washington Post Staff Writer



BY PETER ALSBERG—THE WASHINGTON POST

Most of official Washington spends its time trying to figure out how to get maximum press coverage. Should the president speak on prime time? Should the report be embargoed for release in Monday's papers, when there is little competing news? Can the senator crank out the statement in time for the evening news?

There are nine exceptions to this rule. They are all sitting on the Supreme Court.

Once again, as the court races toward its summer recess, the justices are demonstrating their total indifference to any semblance of news management.

Once again, reporters are grumbling about it.

This is the court's busiest time of year, with 25 rulings to get out within the next few weeks.

For reporters who cover the court, this is their month to get on the front page as the court, day after day, issues momentous decisions on the pressing legal issues of the time. But things aren't quite working out that way.

Granted, this is a slow term at the court, with the justices having taken a few dozen cases less than usual. Still, there are a number of cases of major interest remaining on the docket:

Does the Constitution protect one's right to dance without pasties and a G-string? Can news organizations be sued for manufacturing quotations? For breaking their promises to keep their sources confidential?

Can someone be thrown in prison for life without parole if caught with a pound of cocaine in his car? Should the court overrule itself and let juries in capital cases hear testimony about the murder victim's character?

Does the Voting Rights Act cover judicial elections? Can state judges be forced to take mandatory retirement at age 70? Can police board buses and ask passengers to let them search luggage for drugs?

Some of these cases have been awaiting a decision since they were argued in November. One important securities law case involving First American Bank was argued Oct. 9 and a decision still hasn't come down.

So court reporters arrive at the court on decision days this time of year feeling—or at least imagining that they feel—something like Michael Jordan before the playoffs. Only to find themselves, so far, out of luck.

On the last three days that they have issued decisions, the justices have come up with what are not so fondly referred to as "dogs"—the kinds of rulings that will be lucky if they get an inch of newsprint, that are hard to hype onto Page 29, no less the front page.

Take last week. Please.

Monday opened with four decisions, all unanimous. (This is already a bad sign.)

One of the cases is about the time limits for winning parties in Social Security cases to submit their request for legal fees—or, as Justice Sandra Day O'Connor mellifluously summarized it, "whether an administrative decision rendered following a remand from the District Court is a 'final judgment' within the meaning of EAJA."

Another concerns "whether a debtor can include a mortgage lien in a Chapter 13 bankruptcy reorganization plan once the personal obligation secured by the mortgaged property has been discharged in a Chapter 7 proceeding."

The third: "Whether claimants under the Age Discrimination in Employment Act of 1967, as amended, are collaterally estopped to relitigate in federal court the judicially unreviewed findings of a state administrative agency made with respect to an age-discrimination claim."

The fourth: a case only a securities lawyer could love.

Thursday was only marginally better. The justices took the bench again and quickly deflated any hopes of more exciting news, issuing (yet another) bankruptcy opinion, a ruling on federal sentencing guidelines and a consideration of the difference between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel that even the dissenters said was of little practical significance but that did have the redeeming feature of coming on the 25th anniversary of the Miranda ruling.

The spate of rulings in relatively minor cases means that the remaining important decisions could all be announced in the space of four days, conceivably less, maybe one or two more. That means they won't get the attention they deserve, without enough room in the newspaper to accommodate a full recounting, and reporters will be forced to speed-read opinions like Evelyn Wood on amphetamines.

This is particularly fun when the court issues one of its fractured decisions with concurrences and pluralities and Justice Antonin Scalia signing onto all but the next to last paragraph of part three.

Here, for example, is the lineup announced by the court in one particularly indecipherable labor law case last month: "Justice Blackmun announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III-B, III-C, IV-B (except for the final paragraph), IV-D, IV-E, and IV-F, in which Rehnquist, C.J., and White, Marshall and Stevens, JJ., joined, and an opinion with respect to Parts III-A and IV-A, the final paragraph of Part IV-B, and Parts IV-C and V, in which Rehnquist, C.J. and White and Stevens, JJ., joined.

"Marshall, J., filed an opinion concurring in part and dissenting in part. Scalia, J. filed an opinion concurring in the judgment in part and dissenting in part, in which O'Connor and Souter, JJ., joined, and in all but Part III-C of which Kennedy, J., joined. Kennedy, J., filed an opinion concurring in the judgment in part and dissenting in part."

Got it?

The news flood may have crested on the last day of the term in June 1988, when the court issued nine decisions—upholding the independent counsel law; forbidding capital punishment of people under 16; and issuing major rulings in the areas of sexual abuse of children, employment discrimination, church-state relations and labor law. Making it through the day was the Supreme Court reporter's equivalent of a triathalon.

The justices, beseeched by reporters to spread out the news, show no inclination to change. They say the decisions simply come out as they are printed and ready to be released. And it is true that the hardest cases can take the longest to decide, and to dissent from.

Also, they have life tenure.

Down in the press room, reporters have to content themselves with dreams of winning the annual pool about when the term will end, and with how many rulings.

This reporter has $2 riding on June 27, seven decisions, and 18 separate opinions. But the last number—counting concurrences and dissents—is probably overly optimistic.

HENRY HARPER, ET AL.

v.

VIRGINIA DEPARTMENT OF TAXATION

Record No. 900770

LAWRENCE E. LEWY, ET AL.

v.

VIRGINIA DEPARTMENT OF TAXATION

Record No. 900792

March 1, 1991

Present: Carrico, C.J., Compton, Stephenson, Whiting, Lacy, and Hassell, JJ., and Cochran, Retired Justice

The Davis v. Michigan Dept. of Treasury decision of the United States Supreme Court concerning taxation of federal retiree pensions is not to be applied retroactively; state law does not require refunds, but grants prospective-only application to decisions that invalidate a taxing scheme, and the unavailability of refunds includes the tax year 1988. The trial court's judgment in these consolidated cases is affirmed.

Taxation — State — Constitutional Law — Intergovernmental Tax Immunity — Supremacy Clause — Retrospective Application of Holding — Statutory Construction — Code § 58.1-1826 — Tax Year Defined

In *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), the Supreme Court of the United Sates declared that state taxation of pension income of retired federal employees, while exempting from taxation pension income of retired state employees, violated the doctrine of intergovernmental tax immunity embodied in the supremacy clause of the Constitution and, therefore, was constitutionally prohibited. The Supreme Court, however, did not decide whether the decision had retrospective application, and these cases were brought by retired federal employees who receive either federal pension benefits or military retired pay. They filed suits in the trial court against the Virginia Department of Taxation seeking refunds, pursuant to Code § 58.1-1826, for state income taxes paid for tax years 1985-1988. The trial court ruled that *Davis* should be applied prospectively only, and that the plaintiffs were not entitled to refunds. Plaintiffs appeal.

1. Whether a constitutional decision of the U.S. Supreme Court is applied retroactively is a matter of federal law and, in the civil context, retroactive application is governed by the test announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

2. In another case, the Court found that its earlier decision invalidating a state highway tax established a new principle of law under the commerce clause and that its decision should not be applied retroactively.

3. On the same day, the Court held that a clear and certain remedy, which could include refunds, was required to remedy a state's unconstitutional liquor tax statute because the state could hardly claim surprise when its statute was invalidated.

4. In the present case, nothing in the record suggests that the Commonwealth acted other than in good faith reliance upon a presumptively valid taxing statute. Therefore, the *Chevron* test must be employed to determine whether the *Davis* decision should be applied prospectively only.

5. For a decision to be applied non-retroactively, the first prong of the *Chevron* test requires that the decision establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

6. The intergovernmental tax immunity doctrine was grounded on the proposition that states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the federal government.

7. Pre-*Davis* cases invalidating state taxing statutes were decided on the proposition that the tax had a foreseeable and direct effect on some operation of the federal government.

8. In the present case, it is difficult to discern how the General Assembly of Virginia should have been expected to perceive that the scheme of exempting state pensioners from state taxation would have placed any direct burden on some federal operation.

9. The *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed, and the first prong of the *Chevron* test is satisfied.

10. The second prong of the *Chevron* test requires a court to weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Since the purpose of the intergovernmental tax immunity doctrine already has been fully served, and applying *Davis* retroactively would do nothing either to retard or to further the doctrine's purpose, the second prong of *Chevron* is satisfied.

11. The record supports the conclusion that allowing the requested refunds would have a potentially disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivering of state services.

12. The equities weigh heavily in favor of the Commonwealth in terms of disallowing retrospective application of *Davis*. Thus, the third prong of the *Chevron* test is satisfied.

13. Accordingly, under the *Chevron* test, the *Davis* decision is not to be applied retroactively.

14. Code §§ 58.1-1825 and -1826 provide that any person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may within three years from the date such assessment is made, apply to a circuit court for relief.

15. Because the *Davis* decision is not to be applied retroactively, the pre-*Davis* assessments were neither erroneous nor improper within the meaning of Code § 58.1-1826.

16. The Virginia Supreme Court has previously held that its ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. Consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule.

17. The last day for filing income tax returns is not the date on which income taxes are assessed for the preceding year. Rather, when the year has ended, the tax for that year was fixed and ascertainable. Only payment was delayed until the date on which payment was due.

18. The U.S. Supreme Court has said that tax liability depends upon the occurrence of the taxed transaction or the enjoyment of the taxed benefit, not the remittance of the tax.

19. Under the *Chevron* test, the *Davis* decision is not to be applied retroactively; state law does not require tax refunds, but grants prospective-only application to decisions that invalidate a taxing scheme, and the unavailability of refunds includes the tax year 1988.

Appeals from judgments of the Circuit Court of the City of Alexandria. Hon. Donald H. Kent, judge presiding.

Record No. 900770 — *Affirmed.*
Record No. 900792 — *Affirmed.*

Michael J. Kator (Stephen A. Bryant; W. Lester Duty; Mary-Leslie Duty; Gregory S. Hooe; Duty and Duty; Traylor & Morris, on briefs), for appellants. (Record No. 900770)

Gail Starling Marshall, Deputy Attorney General (Mary Sue Terry, Attorney General; H. Lane Kneedler, Chief Deputy Attorney General; Barbara M. Rose, Senior Assistant Attorney General; Gregory E. Lucyk, Senior Assistant Attorney General; Barbara H. Vann, Assistant Attorney General, on brief), for appellee. (Record No. 900770)

Joseph Hyman (Lawrence E. Lewy; George J. Rabin, on briefs), for appellants. (Record No. 900792)

Gail Starling Marshall, Deputy Attorney General (Mary Sue Terry, Attorney General; H. Lane Kneedler, Chief Deputy Attorney General; Barbara M. Rose, Senior Assistant Attorney General; Gregory E. Lucyk, Senior Assistant Attorney General; Barbara H. Vann, Assistant Attorney General, on brief), for appellee. (Record No. 900792)

JUSTICE STEPHENSON delivered the opinion of the Court.

In *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), the Supreme Court of the United States declared that state taxation of pension income of retired federal government employees, while exempting from taxation pension income of retired state government employees, violated the doctrine of intergovernmental tax immunity embodied in the supremacy clause of the Constitution of the United States. The Supreme Court, however, did not decide whether its decision in *Davis* had retrospective application.[1]

In these consolidated appeals, the appellants (collectively, Harper) are retired federal employees who receive either civil service retirement benefits or military retired pay. They filed suits in the trial court against the Virginia Department of Taxation (the Commonwealth) in May 1989, seeking refunds, pursuant to Code § 58.1-1826, for state income taxes paid for tax years 1985, 1986, 1987, and 1988. After consolidating the several suits, the trial court ruled that *Davis* should be applied prospectively only and, therefore, that Harper was not entitled to the refunds. Harper appeals.

In this appeal, the principal issue is whether *Davis* should be applied only prospectively, thereby denying the refunds, or retroactively, thereby granting the refunds.

I

[1] Whether a constitutional decision of the Supreme Court is applied retroactively is a matter of federal law. *American Trucking Associations, Inc.* v. *Smith*, 496 U.S. ____, ____, 110 S.Ct. 2323, 2330 (1990). In the civil context, retroactive application of such decisions is governed by the three-pronged test announced in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). *Smith*, 496 U.S.

[1] The Supreme Court did not consider this issue because Michigan conceded that "to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund." *Davis*, 489 U.S. at 817.

at ——, 110 S.Ct. at 2331; *see U.S.* v. *Johnson*, 457 U.S. 537, 563 (1982).

[2] In *Smith*, the Supreme Court considered a state's taxing statute that previously had been declared unconstitutional under the commerce clause of the Federal Constitution. 496 U.S. at ——, 110 S.Ct. at 2329. The Court denied the claimant's request for a refund of taxes paid prior to an earlier decision that invalidated the taxing statute. *Id.* at ——, 110 S.Ct. at 2334. In so doing, a plurality of the Court employed the three-pronged *Chevron* test and concluded that its earlier decision should not be applied retroactively. The Court found that its earlier decision invalidating an Arkansas highway tax, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U.S. 266 (1987), established a "new principle of law" under the commerce clause. *Id.* at ——, 110 S.Ct. at 2332. Arkansas's legislature, therefore, was justified in relying upon existing precedent and had "good reason to suppose" the enactment of the tax would not violate the Federal Constitution. *Id.* at ——, 110 S.Ct. at 2333.

Harper contends, nonetheless, that "because the taxes at issue here . . . constitute[d] an 'unconstitutional deprivation,' . . . Virginia must provide 'backward-looking relief' to the refund claimants." Harper asserts that such relief is required by the holding in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco*, —— U.S. ——, 110 S.Ct. 2238 (1990).

[3] In *McKesson*, decided on the same day as *Smith*, the Supreme Court held that a "clear and certain remedy," which could include refunds, was required to remedy Florida's unconstitutional liquor tax statute. —— U.S. at ——, 110 S.Ct. at 2252. In so holding, the Court rejected Florida's contention that its taxing authority implemented the tax preference scheme " 'in good faith reliance on a presumptively valid statute.' " *Id.* at ——, 110 S.Ct. at 2254. In rejecting that contention, the Court stated that the challenged tax statute "reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated" in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984). Thus, the Court concluded, Florida "[could] hardly claim surprise" when its later statute was invalidated. *Id.* at ——, 110 S.Ct. at 2255.

[4] In the present case, nothing in the record suggests that the Commonwealth acted other than in good faith reliance upon a presumptively valid taxing statute. We conclude, pursuant to *Smith*, that the three-pronged *Chevron* test must be employed to determine whether the *Davis* decision should be applied prospectively only.

A

[5] For a decision to be applied prospectively only, the first prong of the *Chevron* test requires that the decision "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. Satisfaction of this first prong usually has been stated as the "threshold test" for determining whether or not a decision should be applied prospectively only. *Johnson*, 457 U.S. at 550 n.12.

When *Davis* was decided, 23 states had statutes similar to the Michigan statute.[2] Virginia's statute had been in effect for almost half a century. *See* Acts 1942, c. 325. As far as the record shows, the federal pensioners had paid the tax without protest. Not a single federal pensioner had brought an action during that period in a Virginia court seeking a refund of taxes on the basis of the intergovernmental tax immunity doctrine. The absence of such litigation reasonably may be explained by examining the doctrine's origin and development.

[6] The intergovernmental tax immunity doctrine had its genesis in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The doctrine was grounded on the proposition that "[s]tates have no power, by taxation or otherwise, to retard, impede, burden or

[2] *See* Ala. Code Sections 36-27-28 and 40-18-19 (Supp. 1988); Ariz. Rev. Stat. Ann. Section 43-1022 (Supp. 1988); Ark. Code Ann. Section 26-51-3206; Colo. Rev. Stat. Section 39-22-104(4)(f) and (g) (Supp. 1988); Ga. Code Ann. Section 48-7-27(a)(4)(A) (Supp. 1988); Iowa Code Ann. Section 97A.12 (West 1984); Kan. Stat. Ann. Section 74-4923(b) (1985); Ky. Rev. Stat. Ann. Section 16.690 (Michie/Bobbs-Merrill Supp. 1988); La. Rev. Stat. Ann. 47:44.1 (Supp. 1989); Mich. Comp. Laws Ann. Section 206.30 (1988); Miss. Code Ann. Section 25-11-129 (1972); Mo. Rev. Stat. Section 86.190 and 104.540 (1986); Mont. Code Ann. Section 15-30-111(2) (1987); N.M. Stat. Ann. Section 10-11-145 (1978); N.Y. Tax Law Section 612(c)(3) McKinney (1987); N.C. Gen. Stat. Section 135-9 (1988); Okla. Stat. tit. 68 § 2358 (1988); Ore. Rev. Stat. Section 316.680(1)(c) and (d) (1987); S.C. Code Section 12-7-435(a), (d), and (e) (Supp. 1988); Utah Code Ann. Section 49-1-608 (1989); Va. Code Section 58.1-322(C)(3) (Supp. 1988); W.Va. Code Section 11-21-12(c)(5) and (6) (Supp. 1988); Wis. Stat. Section 71.05(1)(a) (Supp. 1988).

in any other manner control, the operations [of the federal government]." *Id.* at 436.

[7] The pre-*Davis* cases invalidating state taxing statutes were decided on the proposition that the tax had a foreseeable and direct effect on some operation of the federal government. *See, e.g., Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983) (state tax that imposes greater burden on holders of federal obligations than on holders of similar state obligations impermissibly discriminates against securities issued by federal government); *Phillips Chemical Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960) (state tax that imposes greater burden on lessees of federal property than on lessees of other exempt public property impermissibly discriminates against federal government). Indeed, *Davis* states that intergovernmental tax immunity is based on "the need to protect each sovereign's governmental operations from undue interference by the other." 489 U.S. at 814.

[8-9] In the present case, therefore, it is difficult to discern how the General Assembly of Virginia should have been expected to perceive that a statutory scheme, exempting state pensioners from state taxation, would have placed any foreseeable and direct burden on some federal operation. Consequently, we conclude that the *Davis* decision established a new rule of law by deciding an issue of first impression whose resolution was not clearly foreshadowed. Thus, the first prong of the *Chevron* test is satisfied.

B

[10] The second *Chevron* prong requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 404 U.S. at 106-07. In applying this factor, we must determine whether the intergovernmental tax immunity doctrine will be retarded or furthered by retroactive application of the *Davis* decision.

The purpose of intergovernmental tax immunity is not to prevent legitimate state taxation. *See Smith*, 496 U.S. at ____, 110 S.Ct. at 2332. Virginia's taxing statute was legitimate until a new rule was announced in *Davis*. As soon as the General Assembly became aware of the *Davis* decision, it acted to correct the defects in its statute. *See* Acts 1989, Special Session II, c. 3. As a result, the purpose of the intergovernmental tax immunity doctrine already has been fully served, and applying *Davis* retroactively would do nothing either to retard or to further the doctrine's purpose. Therefore, the second prong of the *Chevron* test is satisfied.

C

The third prong of the *Chevron* test requires a court to "[weigh] the inequity imposed by retroactive application." 404 U.S. at 107. In weighing the equities, considerable deference must be accorded a state's reliance upon a statute that was presumptively valid. *See Lemon* v. *Kurtzman*, 411 U.S. 192 (1973). Indeed, "[i]t is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy." *Id.* at 203. As Chief Justice Burger so aptly stated in *Lemon*, "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity." *Id.* at 199.

An important equitable consideration is the effect that retroactive application of a judicial decision may have on a state's financial stability. As the *Smith* plurality acknowledged, applying a judicial decision retroactively may "have potentially disruptive consequences for the State and its citizens. A refund, if required by state or federal law, could deplete the state treasury, thus threatening the State's current operations and future plans." 496 U.S. at ____, 110 S.Ct. at 2333.

In *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1105 (1983), the Supreme Court held that the State of Arizona's voluntary pension plan violated Title VII of the Civil Rights Act of 1964. The Court further held, however, that the state's liability would be prospective only. *Id.* The Court found that retroactive liability could cost the state hundreds of millions of dollars. As Justice Powell stated, "[i]mposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits." *Id.* at 1106-07. Because the illegality of Arizona's actions had not been declared until *Norris* was decided, Justice Powell further stated that "[t]here is no justification for this Court . . . to impose this magnitude of burden retroactively on the public." *Id.* at 1107.

[11] In the present case, the record discloses that retroactive application of the *Davis* decision would give rise to a potential tax refund liability, inclusive of interest, of approximately $440,000,000. This liability would come at a time when the Com-

monwealth is already struggling to meet enormous fiscal deficits. The record contains affidavits of Commonwealth officials that support the conclusion that allowing the requested refunds would have a potentially disruptive and destructive impact on the Commonwealth's planning, budgeting, and delivery of essential state services.

Harper contends, nonetheless, that "it is simply more equitable to place the financial consequences . . . upon the government (and thus the whole body of taxpayers) than upon a small subclass of taxpayers who had unconstitutionally been forced to pay the tax in the first instance." Thus, Harper asserts, "taxpayers who have been paying more than their lawful share of taxes should be reimbursed by those who have paid less."

The Commonwealth counters by pointing out that "hundreds of thousands of other Virginia taxpayers have paid taxes on their private pension income but have no claim for monetary relief." The Commonwealth further asserts that "over 2.5 million Virginians annually have paid their 'fair share' of taxes while only some sixty thousand state and local retirees were excluded from pension income taxation."

[12] The record supports the Commonwealth's assertions, and we conclude that, on balance, the equities weigh heavily in favor of the Commonwealth. Consequently, the third prong of the *Chevron* test is satisfied.

[13] Accordingly, we hold that, under the *Chevron* test, the *Davis* decision is not to be applied retroactively. *Accord Bass v. State*, 395 S.E.2d 171 (S.C. 1990).

II

[14] Harper contends, nonetheless, that the refunds are due as a matter of state law. He relies upon Code §§ 58.1-1825 and -1826. Code § 58.1-1825 provides that "[a]ny person assessed with any tax administered by the Department of Taxation and aggrieved by any such assessment may . . . within three years from the date such assessment is made, apply to a circuit court for relief." Code § 58.1-1826 provides, in pertinent part, as follows:

> If the court is satisfied that the applicant is erroneously or improperly assessed with any taxes, the court may order that the assessment be corrected. If the assessment exceeds the proper amount, the court may order that the applicant be exonerated from the payment of so much as is erroneously or improperly charged, if not already paid and, if paid, that it be refunded to him. If the assessment is less than the proper amount, the court shall order that the applicant pay the proper taxes and to this end the court shall be clothed with all the powers and duties of the authority which made the assessment complained of as of the time when such assessment was made and all the powers and duties conferred by law upon such authority between the time such assessment was made and the time such application is heard. The court may order that any amount which has been improperly collected be refunded to such applicant.

Harper asserts that, even if the *Davis* decision applies prospectively only, the federal retirees are entitled to refunds under Code § 58.1-1826. Harper argues that, because the assessments are unconstitutional, they also are "erroneous or improper."

[15] We reject this argument. We hold that, because the *Davis* decision is not to be applied retroactively, the pre-*Davis* assessments were neither erroneous nor improper within the meaning of Code § 58.1-1826.

[16] Harper's state-law contention also fails for another reason. We previously have held that this Court's ruling declaring a taxing scheme unconstitutional is to be applied prospectively only. *Perkins* v. *Albemarle County*, 214 Va. 240, 198 S.E.2d 626, *aff'd and modified on rehearing*, 214 Va. 416, 200 S.E.2d 566 (1973).[3] We adhere to our holding in *Perkins*. In so doing, we follow the criteria stated in *Fountain* v. *Fountain*, 214 Va. 347, 348, 200 S.E.2d 513, 514 (1973), *cert. denied*, 416 U.S. 939 (1974), that "consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule."

[3] The case of *Capehart* v. *City of Chesapeake*, No. 5459 (Circuit Court, City of Chesapeake, decided Oct. 16, 1974), followed *Perkins*. In *Capehart*, more than one hundred taxpayers in the City of Chesapeake, who had been subjected to the same practice that was invalidated in *Perkins*, brought suit in circuit court seeking, among other things, refunds of the taxes "illegally and unconstitutionally assessed." The City demurred, citing *Perkins*. The circuit court sustained the demurrer, being of opinion that the case was controlled by *Perkins*. We denied Capehart's petition for appeal, 215 Va. xlvii, and Capehart's petition for certiorari raising due process grounds was denied by the Supreme Court, 423 U.S. 875 (1975).

See also Quick v. *Harris*, 214 Va. 632, 634, 202 S.E.2d 869, 871 (1974), *cert. denied*, 420 U.S. 907 (1975).

III

[17] Finally, Harper contends that "even if *Davis* were applied prospectively only, refunds for 1988 taxes would nonetheless be due, for they were not assessed, and in many cases were not paid, until *after Davis* was decided." (Emphasis in original.) *Davis* was decided on March 28, 1989. The last day for filing individual income tax returns for the 1988 taxable year was May 1, 1989. Harper claims that the last day for filing income tax returns is the date on which income taxes are assessed for the preceding year.[4] We do not agree.

Income taxes are "imposed on the Virginia taxable income *for each taxable year* of every individual." Code § 58.1-320. (Emphasis added.) The taxable year ended on December 31, 1988, almost three months before *Davis* was decided. When the year ended, the 1988 tax was fixed and ascertainable. Only payment of the tax was delayed until May 1, 1989. Code § 58.1-341.

[18] The Supreme Court rejected a similar contention in *Smith*. The Court reasoned that tax liability depends upon the " 'occurrence of the taxed transaction or the enjoyment of the taxed benefit, not the remittance of the tax.' " *Smith*, 496 U.S. at ____, 110 S.Ct. at 2335. As Justice O'Conner observed,

> [a] contrary rule would give States a perverse incentive to collect taxes far in advance of the occurrence of the taxable transaction. It would also penalize States that do not immediately collect taxes, but nevertheless plan their operations on the assumption that they will ultimately collect taxes that have accrued.

Id. at ____, 110 S.Ct. at 2336.[5]

[4] Harper's reliance upon Code § 58.1-1820 is misplaced. Section 58.1-1820 defines "assessment" as that term is used in Article 2 of Chapter 18, which establishes limitation periods for various forms of relief. Individual income tax liability is established in Article 3 of Chapter 3.

[5] For the same reason, we reject the contention in *Lewy* (Record No. 900792) that the trial court erred in denying injunctive relief that would have barred the Commonwealth from filing any action to collect taxes from those who, after the *Davis* decision, had refused to pay the 1988 taxes.

IV

[19] In sum, we hold that, (1) under the *Chevron* test, the *Davis* decision is not to be applied retroactively, (2) state law does not require tax refunds, but to the contrary, grants prospective-only application to decisions that invalidate a taxing scheme, and (3) our denial of refunds includes taxes due for the tax year 1988. Accordingly, the trial court's judgment will be affirmed.

Record No. 900770—*Affirmed.*
Record No. 900792—*Affirmed.*