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### First Amendment - Does Media Coverage Influence the Outcome of Judicial Decisions?

Bruce Fein

Rodney A. Smolla

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#### Repository Citation

Fein, Bruce and Smolla, Rodney A., "First Amendment - Does Media Coverage Influence the Outcome of Judicial Decisions?" (1992). *Popular Media*. 74.

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# 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 Wil-

liam 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 "over-

whelming 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. ■

good. I didn't feel like a whole person." After 16 years she decided "no more. I don't want to be married."

The 1980 divorce was painful. Her ex-husband, who still does not speak to her, took custody of the children, although two of them, college student David and high school senior Andy, now live with her. The youngest boy lives with his father and the oldest is married and living in Texas.

Cammermeyer remembers a "sinking feeling" about her career when she acknowledged her homosexuality in the 1969 security interview. Still, she held out hope that the institution she worked for would bend to accommodate her.

But four months after the interview, she was informed that the Army was starting dismissal proceedings. "I was devastated," she said. "I just felt like my whole world had collapsed."

Her achievements were meaningless in the face of military regulations, which are unyielding on the issue of gays. The Army's only statement on Cammermeyer's dismissal is to refer to the rules.

They state: "Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in

with her for a while not only about the revelation of her discharge with other family.

The reaction has been more restrained. Since her case has grabbed the world from letters in support.

The head of the American Affairs Media Center, where she

through her own courage and dogged battle of agriculture, the time he has served in the Senate.

California's Vice President of the California Farm Bureau, David Moore, president of the California Agriculture Council, and the United States Senator John Seymour, who is expected to be elected.

The agriculture community is also looking for a leader to take the reins of the industry.

California's agriculture industry is a major part of the state's economy. The industry is expected to grow in the next few years.

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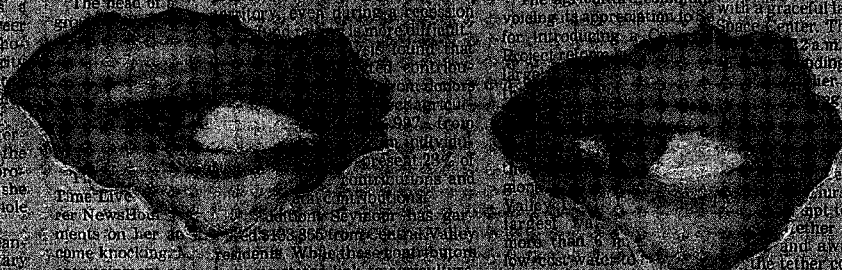
## Lether Failure

**RUDY ABKAMSON**  
PHOTO BY JEFF WATKINS

**K**ENNEDY SPACE CENTER, Fla. — Heralded by a familiar pink room, the space shuttle *Arctic* streaked over its home port Saturday, arched back and concluded eight flying days in space with a graceful landing at Kennedy Space Center. The orbiter touched down on the runway, having passed up landing opportunity 190 minutes before because of a problem along the Florida

The shuttle's cargo bay, which carried a 1000-pound Italian satellite, was jettisoned in a space maneuver on Sunday after an attempt to fly it on the end of the mission was aborted. Also jettisoned was the external tank and a failing inspection of the tether control system that failed and by the way, deployment of the satellite caused one of the 11-year-old shuttle program's major setbacks.

John J. Tereshima, the National Aeronautics and Space Administration's associate administrator



## 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 force in the freewheeling rhetoric of dissenting opinions, may be less appealing when cast in the form of a 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."