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

Bruce Fein
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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, 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 tribunals for activism.
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, 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.

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