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

Bruce Fein

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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.

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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 interested 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 cases.

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 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, thoughtful, 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."