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Book Review

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BOOK REVIEW

AN AUTOBIOGRAPHY OF THE SUPREME COURT. Edited and with an introduction by Alan F. Westin. New York: Macmillan Co. 1963. Pp. 475. $7.50. At the turn of the nineteenth century, John Randolph asked whether a judge should not " 'put off the political partizan when he ascends the tribune, or shall we have the pure stream of public justice polluted with the venom of party virulence?' "[1] The implication is that judges should not speak, *ex cathedra,* on public matters. Most of us believe that it is in this tradition that our judges have operated. Alan Westin of the Columbia faculty has constructed a book, properly styled *An Autobiography of the Supreme Court,* which reveals quite convincingly that at least the justices of our Supreme Court have not been as taciturn as we might imagine. These pages are a collection of the out-of-Court pronouncements (speeches, articles, memoirs, letters) of Supreme Court justices from John Marshall to Earl Warren.

The collection is preceded by an informative introduction by Professor Westin which contrasts judicial lockjaw — the feeling on the part of the Supreme Court judiciary that it is improper for members of the Court to speak in public about the judicial process — with its more interesting, if more perilous, obverse. It appears from Professor Westin's account that judicial candor is quite cyclical. Thus, as far back as Marshall's time, we find that the great federalist took pen in hand and, writing under an honest *nom de plume, i.e.,* a friend of the union, poured out his heart, as doubtless many judges have wished to do before and since, against those who impugned the motives and logic of one of his decisions.[2] It is amusing and oddly humanizing to think of John Marshall as the pseudonymous author of letters-to-the-editor. But he is not unique. For example, we are told that Mr. Justice McLean, using his own name, did the same in the defense of the Court in 1847.[3] Silence and withdrawal from the limelight, of course, always interrupt these periodic forays into public by the Court's personnel. As Professor Westin points out, the present Court is far less reticent in public than were its predecessors on the Court from 1920-1940.[4]

Unfortunately, Professor Westin does not explore what prompts the justices to go to the public from time to time. I would suggest that the reason for these alternate periods of sound and silence is not entirely inscrutable. Although Justice McLean was an abolitionist by personal belief, he wrote in defense of Supreme Court rulings concerning that bane of northern abolitionism, the fugitive slave laws, much as the contemporary court has rallied against attack by southern segregationists. Three years ago, Justice Douglas wrote a letter to *The Reporter* attacking an article which had declared that the division in the Court between the four and the five had led each bloc to "suspect the good faith of the other."[5] If one takes a hard look at these occasional nonjudicial pronouncements of the Justices concerning the Court, there is no mystery as to why the judges "go to the country." In the main, they do so when they feel that the Court or its members need explication or defense. The fusion of personality between the Court and the justices has continued unabated from the Marshall to the Warren Court.

This book is dedicated to Mr. Justice Felix Frankfurter and proof of the editor's affections is not limited to the dedication. Of four hundred and twenty-four pages spanning the years from 1790-1962, no less than one hundred and eighteen of these pages are written by Felix Frankfurter. This fact in itself heavily weights the book in favor of the moderns, with particular emphasis on the justices who have come to the Court since the thirties. Of course it is possible to be only as representative as one's material will permit. But even in terms of that limitation

1 Quoted in text at 15.
2 *Id.* at 77.
3 *Id.* at 19.
4 *Id.* at 29.
5 Cited in *id.* at 33.

I wonder if this book would not have been more faithful to its title as an autobiography of the Court if an occasional Frankfurter piece had been exchanged for that of some lesser known justice of an earlier time. For example, I notice from Professor Westin's interesting selected bibliography of out-of-Court pronouncements of the justices from 1790 to 1962 that there is a speech extant by John Campbell to the Alabama Bar Association in 1884.[6] John Campbell served on the United States Supreme Court from 1853-1861. Campbell, who was well regarded as a judge in his own day,[7] is quite generally unknown today. He resigned from the Court in 1861 when Alabama left the Union, although he had quite conscientiously worked until that time to keep his state from seceding. Would it not have been better to have given us some idea of the mind of a southern jurist like Campbell whom we know not at all in lieu of one of the pieces by Frankfurter whom we know so well?

These reservations aside, the Frankfurter material is certainly absorbing. It is moderately ironical to note that even Justice Frankfurter, who finds it as difficult to stop talking about the Court as Don Quixote did about Dulcinea Del Toboso, has misgivings about speaking publicly on Supreme Court matters. Thus at a student meeting at Harvard Law School in 1962, Frankfurter is quoted as having said:[8]

> I do not want to talk about any matters connected with the Supreme Court. I do not like to give mutilated or partial comment. I don't like to comment on things as to which I cannot fully lay bare my mind.

Justice Frankfurter, as evidenced by the selections in this book, has managed to surmount his inclination to abstinence with regard to talking about the Court for which we, as well as future historians, may well be thankful. His perceptions have the stamp of accuracy. In discussing how one can predict what kind of a justice a man will make, Frankfurter points out the enormous insignificance of a man's party label as a guide. He documents this assertion by one fact that speaks volumes: James C. McReynolds and Louis D. Brandeis were both Democrats.[9] This insight underscores the acuity of the observation of other students of the Court that the best clue to a man's future judicial behavior is shown neither by his clients, nor his party, but rather by the books in his library.[10] Frankfurter is an exponent of the transforming quality of the Court. And this is a theme concerning which he tirelessly gathers materials. He writes:[11]

> It is a very interesting thing, but Edward D. White, the Confederate drummer boy, was much more nationalistic, if that phrase carries the meaning I should like it to carry, was far more prone to find State action forbidden as an interference with federal power than was Holmes, the Union soldier, who went to his death with three bullets in his body.

Of course in a sense each man finds what he sets out to look for, and Justice Frankfurter likes to collect lore on the Court which vindicates his belief that "[F]or judges, it is not merely a desirable capacity 'to emancipate their purpose' from their private desires; it is their duty."[12]

To compare Frankfurter's insistence on maintaining a tense but impregnable wall between the private opinions of a judge as a *man* and his opinions as a *judge* with the complacent world of Mr. Justice David Brewer is an interesting study in contrasts. Professor Westin treats us to a fascinating address given by Mr. Justice Brewer to the New York State Bar Association in 1893. Now, seventy years later, when we think of the due process clause of the Fourteenth Amendment, phrases like civil rights and desegregation rush instantly to the mind. But in the gilded

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6 *Id.* at 38.
7 See 3 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 97 (1st ed. 1922).
8 Text at 3.
9 *Id.* at 178.
10 Freund, *Umpiring the Federal System,* 54 COLUM. L. REV. 561, 574 (1954).
11 Text at 219.
12 *Id.* at 275.

age, the "nation's safeguard," as Brewer, in characteristic rococo style, dubbed the Constitution, was oriented not to individual or minority rights but to the new industrialism which had transformed the country since the Civil War. If anything is typical of the vanished heyday of substantive due process, the selection by Justice Brewer comes as close to being as representative as possible. The following hymn to railroad corporations was delivered by Justice Brewer to the New York Bar Association:[13]

> The property of a great railroad corporation stretches far away from the domicile of its owner, through State after State, from ocean to ocean; the rain and the snow may cover it; the winds and the storms may wreck it; but no man or multitude dare touch a car or move a rail. It stands as secure in the eye and in the custody of the law, as the purposes of justice in the thought of God.

Reading a collection like this, which pushes together in one volume the qualities of men as disparate as Frankfurter and Brewer, familiar doctrine takes on new meaning. The Supreme Court of the United States, unlike courts dealing chiefly with questions of private law, has been unable to follow *stare decisis* with that disciplined vigor which has always characterized the English courts, and until recently, even American courts such as the Supreme Judicial Court of Massachusetts. Professor Westin has thus quite appropriately included an essay by Justice Douglas on *stare decisis.*

That the Supreme Court is a political as well as a legal institution may be the beginning of wisdom in understanding American constitutional law. But to let it remain the end of wisdom is to confuse sophistication with cynicism. When students confront the history of the federal commerce power and trace it from John Marshall to Roger Taney to Harlan Stone, they watch, first fascinated and then repelled, as it becomes clear that the Court first expanded the commerce power, then contracted it, and then expanded it once again. The answer to the historical fact of alternate contraction and expansion of the federal commerce power, the student says, is not to be found either in distinguishing nonconforming cases or in showing by careful legal reasoning fatal errors in opinions that have been reversed. The answer, says the disillusioned student, lies not in law but in politics. But in constitutional litigation, law is necessarily as much an inconstant as politics. The rejoinder quickly comes: if that is the case, when then should the Court do homage to *stare decisis* at all? Justice Douglas's reply merits quotation because it is so directly responsive to this honest and impatient cry from the heart:[14]

> We can get from those who preceded a sense of the continuity of a society. We can draw from their learning a feel for the durability of doctrine and a sense of the origin of principles. But we have experience that they never knew. Our vision may be shorter or longer. But it is ours. It is better that we make our history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive forces in the life of our age.

Something is provided in this book of the richness, the variety, the ever-present sense of battle furnished by the competing social values whose continual combat is presented to the Court for equally continuing arbitrage. As Holmes said of the Court, tersely but completely as was his manner: " 'we are very quiet there, but it is the quiet of a storm centre.' "[15] In the sense that this collection captures something of this abiding quality of tension it is successful. Its weakness is that as a panoramic study the present has been overemphasized at the expense of the past.

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13 *Id.* at 123.
14 *Id.* at 331.
15 *Id.* at 199.
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