

A Shot in the Foot

The old gun slinger is known as the fastest man in the West. He is so quick that he fires his gun before it is out of his holster; and guess what? He has shot himself in the foot!

The forces aligned to work for the defeat of Donald Trump's United States Supreme Court nominee, Neil Gorsuch, are about to shoot themselves in the foot. *Why Courts Matter* is an organization that is made up of a coalition of groups now on the warpath to defeat the President's nominee. The organization has done many good things in its past. During the Obama administration, *Why Courts Matter* lobbied the President to do his job of nominating candidates for the federal courts. The President was not doing a very good job of proposing candidates. Those he proposed tended to come from corporate and United States attorney backgrounds. I was one of those who went to the White House and sat in the Roosevelt Room, listening to the administration's reason for not proposing more candidates, thus helping to create and prolong the crisis in many districts throughout the country. "We simply have too much work to do with Iraq and other problems." The thoughtful Judge who led the delegation chided the President's representative by noting that the nation cannot promote the rule of law without judges, and that the legacy of nominations to the federal courts would follow a President for 40 years. Democrats blamed the judicial crisis on Republican obstruction of the President's selections.

Enter Neil Gorsuch, who is the sacrificial lamb for everything that opponents hate about Donald Trump. When I urged serious consideration of Judge Gorsuch, I was lectured that he is "qualified" in "terms of skill as an attorney and judge" but he is "far to the right – as a strong pro-corporate anti-worker, anti-women's rights, pro-executive power, anti-LGBT record." Forget for a moment that many of those issues have never been addressed by Judge Gorsuch. He has been fried in hot oil by opponents because he is "as much out of the mainstream as Garland was within the mainstream." Payback may be delightful revenge, but it is certainly not constructive politics.

The number of judges who became justices of the Supreme Court and were not necessarily loyal either to their past or to their appointing Presidents are too numerous to mention. Consider, for example, Benjamin Cardozo and Felix Frankfurter. Cardozo moved from the New York Court of Appeals, where he certainly would have been labeled a progressive, to the Supreme Court of the United States thanks to the wisdom of President Herbert Hoover. Cardozo was a Democrat, and Hoover the quintessential Republican. Cardozo, loyal to the law and where it takes the careful jurist, was never motivated by partisanship or politics.

Felix Frankfurter, born in Austria, was nominated to the Court by Franklin D. Roosevelt and politically was an independent. He helped to found the American Civil Liberties Union, but Frankfurter was cautious and loyal to the constitutional structure.

Justice Hugo Black had been a United States Senator from Alabama and was nominated for the Court by Franklin D. Roosevelt. Black was a former member of the Klu Klux Klan, but his pro-civil rights rulings have made him a legend. His fidelity to a relatively inflexible Constitution frustrated Roosevelt.

Justices Earl Warren and David Souter were supposed to be conservatives. Nevertheless, they were willing to mold the constitutional structure into changing times. Earl Warren, I can remember as a youth, was the subject of billboards proclaiming "Impeach Earl Warren." There is some debate in the political world as to whether Republican President Dwight Eisenhower ever said that the nomination of Earl Warren to the U.S. Supreme Court was the biggest mistake he ever made. Many historians deny that Eisenhower held that sentiment. To many, the Warren court was the beginning of the end for a rigid, unchanging Constitution.

One month after the 9/11 attacks, I found myself in the presence of Justice Souter, along with a small group of lawyers from the Federal Bar Association. Souter lectured us on a number of cases where individual rights were challenged in the wake of catastrophic events. President Lincoln had suspended the Writ of Habeas Corpus during the Civil War. Japanese Americans were interred in camps during World War II, and African-Americans had to fight to overturn the discredited concept of "separate but equal" to achieve real equality. Souter's message was that the attacks on 9/11 should not be an excuse to upset our rule of law granting due process and equal protection to all Americans.

David Souter was nominated by George H. Bush in 1990. Souter replaced one of the most "liberal" judges in all of history, William J. Brennan, Jr. While sitting on both the Rehnquist and Roberts courts, Souter became a reliable vote for the court's so-called progressive wing. He was from New Hampshire, and defied all expectations of those who supported his nomination to the High Court.

What does this all mean for today's dysfunctional politics? Could Merrick Garland have become the next Antonin Scalia or Clarence Thomas? Will Neil Gorsuch espouse the views of Earl Warren or David Souter? No one knows the answer and neither does Judge Garland.

The Nature of the Judicial Process was written by Associate Justice Benjamin Cardozo in 1921, compiled from lectures delivered at Yale Law School. Cardozo wrote, concerning constitutional interpretation, that, "[T]he great generalities of the constitution have a content and a significance that vary from age to age." Cardozo understood the "intolerable vagueness" in attempting to create a clear philosophical direction that the judge should follow. Cardozo preached a kind of detached logic and disciplined recognition both of the origin of a legal precept with a current need to place flesh on a skeletal structure. To automatically assume, as the anti-Gorsuch forces do, that the new Justice would be unable or unwilling to abandon a political path for one based upon precedent is unrealistic. A "semi-intuitive apprehension of the pervading spirit of our law", to rely once again on Cardozo, should be the goal of every dedicated Judge.

While it may be impossible to predict or define the future with respect to Justice Gorsuch, we should expect and demand that he be an independent thinker whose decisions are based upon a recognition of constitutional and legislative intent while not ignoring the manner in which subsequent events have molded those precepts into a structure of government upon which all citizens depend.

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