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THE SUPREME COURT AND CELEBRITY CULTURE

RICHARD A. POSNER*

Remarks at the Symposium on the Supreme Court and the Public
November 15, 2012

My assigned topic is public intellectual activity by Supreme Court justices, but I'm going to expand it in one direction. I'm going to talk about the Supreme Court justices' behavior at oral argument as well, because that is a parallel phenomenon, closely related to their public intellectual activities—it could even be regarded as a part of them. I'm going to talk about how the justices' public intellectual and questioning activities have changed over the last half century and I'm going to offer some reasons for why there has been this change and also try to explain the process, the dynamic, of such changes.¹ I'll also talk a bit about the consequences.

It happens to be fifty years ago that I clerked on the Supreme Court and just a few years after that I was an assistant to the Solicitor General, and so I'm pretty familiar with the way the Supreme Court operated in the early 1960s—and it is quite different from today. The justices were very quiet in those early days. They didn't ask many questions at oral argument and they engaged in few public intellectual activities. They were quiet—almost cloistered. It was the era of the Warren Court, and the Court was very activist and controversial, but the justices weren't really public figures except for Warren, because he was Chief Justice and because of his authorship of *Brown v. Board of Education*. And then there was Justice Douglas, the only colorful figure on the Supreme Court, who wrote a good deal about subjects unrelated to law, such as the environment, and had an irregular personal life that made him an object of some public interest. The rest of the justices were pretty much wallflowers.

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1. For some background data on these activities, see LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE*, 37-40, 305-36 (2012).

And this historically had been the general character of Supreme Court justices, except when the court was embattled, and then they might step forward, a famous example being the Hughes-Brandeis letter to Congress in 1937 obliquely criticizing Roosevelt's Court-packing plan. That was a dramatic intervention in a political struggle, but such interventions were rare. And even though the Warren Court was controversial, I don't think the justices felt any sense of embattlement or any need to make their case to the public.

So how have things changed? Well, now the Supreme Court justices are both very voluble at oral argument—extraordinarily so; the lawyers can barely get a word in edgewise—and very much involved in public intellectual activities, whether it's presiding at moot courts or conducting mock trials of historical or fictional personages or writing books. These are changes that I am presenting as snapshots taken at a fifty-year interval. And we don't have good records of the justices' public intellectual activities. They do make public reports of their outside activities, but the reports are not complete or detailed. So it's hard to pinpoint the occurrence of the changes that I am discussing.

Justice Brennan said early in his Supreme Court career when asked about his relations with the press that he would not meet with a journalist in any place, at any time, on any subject. But in the '80s, when the Reagan administration, particularly in the person of Ed Meese, was criticizing the Supreme Court as excessively liberal, Brennan changed his view and made a series of television appearances to present his side of the issue. But my impression is that as the issue of the Court's liberalism faded with Reagan's appointment of conservative justices, public activity of that character by justices also faded. It's exploded in the last few years, however, particularly since Justice Souter retired; although he was quite voluble in the Supreme Court's oral arguments, he didn't engage in any public intellectual activities all. His replacement, Justice Kagan, is active on both the oral argument and public intellectual fronts. All nine of the current justices engage in public intellectual activities and all but Justice Thomas are very talkative during oral arguments.

Why the increases in these parallel behaviors of Supreme Court justices—public intellectual writings and appearances, and volubility at oral argument? I can think of three possible reasons. One, a general phenomenon relating to public intellectual activity is that there's much greater access to the media today than in times pasts. There's no more gatekeeping by newspapers and magazines. You can upload a cat video

to YouTube and if it catches on (“goes viral”) you can become a celebrity in minutes. The media, realistically defined to include the Internet and not just radio, television, and the print media, are vastly expanded and therefore have a desperate need for content. Anyone with some celebrity potential will be courted by the media and so encounter no difficulty in obtaining public exposure.

Second, the cost of public intellectual activity by Supreme Court justices has fallen because they have more time on their hands. When I was a Supreme Court law clerk, in the olden days (the 1962 term), the Court was deciding about twice as many cases (after oral argument and with full opinion) than it is today. And staff was much more limited; each justice had two law clerks instead of the present four. Staff was also of lower quality on average, because, though this is hard to believe in this era of the \$280,000 dollar signing bonus for Supreme Court law clerks, not only were there no signing bonuses but a Supreme Court clerkship was not that big a deal. There weren’t many applications; there were no particular standards. Often the justice would delegate the selection of his law clerks to a personal friend, a professional acquaintance, or a law professor he was friendly with, without bothering to screen or interview applicants himself. There was no expectation that Supreme Court law clerks would already have served a clerkship for a lower-court judge, though that sometimes happened. Often the justice would not interview his prospective clerks. Overall, the process was casual. No more, and so the quality of Supreme Court staff has increased. And the cert pool (whereby one law clerk writes a cert memo for eight of the nine justices—all but Alito, who has opted out of the pool) has freed up a great deal of law clerk time to spend on the smaller number of opinions that the Court is issuing. They are very eager and aggressive people, these law clerks, so there is a subtle pressure exerted on Supreme Court justices to delegate more and more work to the clerks. With larger and better staff and a lighter caseload the justices have more time for travel, public intellectual activities, writing books, whatever it is they like to do. The opportunity costs of being a public intellectual Supreme Court justice thus have fallen.

Access to the media, the opportunity to be a celebrity and have your name in the papers and on the screen and so on—these are attractive to many people; people like to be lionized. There are also more extracurricular financial opportunities for Supreme Court justices than used to be the case—book deals with big advances. With the oppor-

tunity costs of public intellectual activities diminished and some financial benefits to boot, it's not surprising that there should have been an increase in Supreme Court justices' public intellectual activity.

But that doesn't explain why there's so much more volubility at oral argument. One possibility is since the justices have fewer cases and ampler and better staff, they should be better prepared at oral argument; and the better prepared they are, the more confident they can be about being able to ask questions without embarrassing themselves. And since the oral arguments increasingly are publicized in the media and recordings of the arguments occasionally played in public, the Supreme Court justices, by the questions they ask or comments (often flippant) that they make at oral argument, obtain an audience outside of the legal community. So it's a kind of public intellectual activity.

I said I would describe the dynamic of this process. You all know what an equilibrium is and often the same system has multiple equilibria. So, for example, H₂O can be a gas, can be a liquid, can be a solid, and it's characteristic of multiple equilibria that the change from one to another can be very abrupt. At 211 degrees Fahrenheit H₂O is a liquid and at 212 degrees it is a gas. So a small change can have a dramatic effect.

I can imagine two equilibria in the Supreme Court with regard both to volubility at oral argument and to public intellectual activity. One is forbearance—being quiet on the bench and not engaging in public intellectual activity. In short, being a wallflower. If all the justices are wallflowers, that's fine for them. It's the way the Supreme Court has been most of the time historically. The other equilibrium is everybody talking on the bench, everybody engaged in public intellectual activities. Consider how one of the equilibria might give way to the other one. Suppose one justice is very voluble and the rest are quiet. That's all right; he's an outlier, an eccentric. But suppose there's a change in membership and now two or three who are talking a lot at oral argument. The others may become uncomfortable. They may say to themselves: "Oh look, the public is going to think there are these smart guys who ask questions and the rest of us sitting there like dumbbells who probably don't understand what's going on and that's why we don't ask questions and make witty sallies and so on." And similarly if some of the justices start going out and appearing on talk shows and they're being written about and writing books and articles and what have you, the others may feel like wallflowers—no one's in-

terested in them, they don't have any audience outside the handful in the Supreme Court courtroom. They become uncomfortable. Thus, once there is an alteration in the demeanor of a few justices, the change can spread rapidly throughout the Court. This is what scientists call a phase transition, a very rapid change from one equilibrium to another. That may be what's happened in the Supreme Court.

So now, while Justice Thomas doesn't ask questions or otherwise participate actively in the give and take of oral argument, all the others are very active talkers. And all nine are involved in public intellectual activity. It seems a stable equilibrium, though it could change if a bunch of introverts were appointed, like Justice Souter.

Are the developments I've described good or bad? I think they're bad, but also inconsequential, especially the volubility at the oral arguments. The quality of discussion is not high. There's a lot of clowning. It's an undignified spectacle. But there's very little dignity in American public life these days, which is why I say the justices' volubility is inconsequential.

I have stronger objections to their public intellectual activity. Again there's a dignity factor though again I attach little weight to it. The *Wall Street Journal* had a picture on its front page a couple of years ago of Justice Ginsburg wearing a Civil War-style uniform because she was presiding at a posthumous court martial of George Custer for having blown the Battle of the Little Big Horn. And just to show that I'm not just a sourpuss, I have no criticism of Justice Sotomayor's appearance on Sesame Street adjudicating a dispute between two stuffed animals. That sounds ridiculous but she was doing this for children and there was no pretense that she was engaged in a serious intellectual activity.

But I strongly disapprove of mock trials of historical and fictitious characters and of historical controversy.² Several Supreme Court justices have presided at trials of whether Shakespeare was the actual author of the Shakespearean plays or whether it was the Earl of Oxford. This is crank stuff, like belief in flying saucers and a flat Earth. Moreover, Supreme Court justices have no competence to opine on such an issue. It's an issue for Renaissance historians and literary scholars. It's not for judges. When Supreme Court justices venture into areas about which they know nothing, they create a bad impression of the judiciary. One justice has presided over trials of Hamlet for mur-

2. See Richard A. Posner, *Mock Trials and Real Judges*, 34 *CARDOZO L. REV.* (forthcoming Aug. 2013).

dering Polonius; trials in which Hamlet's defense is insanity. But if you know the play, you know that Hamlet kills Polonius thinking that Polonius is Claudius, whom he wants to kill. There's nothing insane about Hamlet's action on that occasion; it's a case of mistaken identity, not insanity. He thinks Claudius killed his father and committed adultery with his mother. He wants to kill Claudius, as there is no way of bringing Claudius to justice in the usual way, since Claudius is the king. Whatever mental problems Hamlet displays at other times in the play are not involved in his accidental killing of Polonius.

A mock-trial favorite is whether Richard III was really responsible for killing the little princes. There is actually a good deal of historical controversy over how evil Richard III was and how deformed he was. Recently in a construction excavation in England, Richard's skeleton was found and sure enough it was deformed by scoliosis, though maybe not as badly deformed as depicted by Shakespeare in *Richard III* because the controversy over Richard was a phase of Tudor/Plantagenet rivalry, and Elizabeth I was a Tudor and Richard had been a Plantagenet. So there is a lively historic controversy, but the justices are in no position to opine on it. It doesn't create a good impression when a person by virtue of being prominent in one field starts offering irresponsible opinions in another field. That is Donald Trump syndrome.

But the real objection to the mock trials (forcefully made by Lawrence Douglas, a professor at Amherst) is that they reflect a misunderstanding of what a trial is—which is an odd mistake for a judge to commit. Trials are not designed for or used to determine historical truth. The reason is that, if you think about it, many aspects of the trial process subordinate the truth-seeking function of the trial to other social values, such as privacy. Some highly probative evidence is excluded merely because it was obtained illegally or because its probative value is deemed outweighed by the likely prejudicial effect of the evidence on jurors. Nor are trials designed to determine contested historical facts from long ago, especially in foreign countries. Justices who use trials to determine historical truth are perpetuating a misconception of the nature and capabilities of trials.

But as I said I don't think that these extracurricular activities by judges are of any consequence. I am mindful of the perennial concern about threats to the "legitimacy" of the judiciary. It's true that political stability depends to a degree on popular acceptance of the legitimacy of the basic political institutions of a society, including its judiciary. But

acceptance of the institution must not be confused with having a high regard for its personnel. Think of Congress, which has an approval rating of less than twenty percent. No one says, "Congress had better watch out, it has a low approval rating, indicating doubts about its legitimacy, and soon people are going to start proposing that Congress be abolished." Congress feels no "existential" threat, and there isn't any and there's no greater threat to the Supreme Court, which anyway has more than twice the approval rating. It doesn't matter whether people like the Supreme Court justices, or don't like them, or know who they are. Actually, the names of very few Supreme Court justices are known to the public. For many years, the only one who had a recognition percentage above five or six percent was Justice O'Connor, because she was the only woman, so she was a focal point. Even someone very well known in legal circles, like Justice Scalia, has only about a five percent recognition rate. Many people if you ask them how decisions are arrived at by courts will give you all sorts of unflattering explanations: politics, connections, mistakes, what have you. But that doesn't damage the courts. Their decisions are still obeyed, and they mete out sanctions that are enforced by the executive branch, and they're treated politely by the legislative branches and by the states, and so on. So I don't think there's a legitimacy issue with regard to the Supreme Court. That's why, even if I or others don't think that their public intellectual activities and their behavior at oral argument bathe the Court in an attractive light, there are no consequences. They're having a good time, and they're not hurting the institution, even though one can criticize them for these activities I've been describing if you're a fusspot like me.

TOPIC 1

THE SUPREME COURT AND
TECHNOLOGY

