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Commentary [Symposium: Politicians on Judges: Fair Criticism or Intimidation]

Susan Herman

COMMENTARY

SUSAN N. HERMAN*

Both Governor Cuomo and Professor Bright, talking about some of the problems with an elected judiciary that is too vulnerable to political attacks, have recommended that the selection of state judges move towards something closer to that of the federal system, where judges are selected on merit and then given life tenure to protect their independence. Governor Cuomo has done a wonderful and, as usual, eloquent job of describing what kind of values judicial independence is supposed to protect.

I think, though, that the political attacks on the judiciary are not the problem but in fact a symptom of a much deeper problem. That is, at this point there is virtual unanimity—not only among the public but also among all three branches of the federal government—in losing sight of the values that judicial independence was supposed to protect. Article III suggests that federal judges are expected to take the part of minorities, dissenters, and other politically powerless and unpopular people, including criminal defendants. Governor Cuomo mentioned *Brown v. Board of Education*,[1] which provides an example of the heroism of federal judges who, although vilified in their own communities, desegregated public schools in the South at a time when political branches could not muster the will or ability to do so.

Today, among the areas that act as lightning rods for criticism of the federal system is habeas corpus, an area quite familiar to Professor Bright. I have long thought of federal judges who grant writs of habeas corpus as heroes. Part of the reason is that the image that comes to my mind when I think of federal habeas corpus is from the beginning of the century, and it is the face of Leo Frank. In 1915, the Supreme Court denied Leo Frank's habeas corpus petition.[2] The judgment of history is that Leo Frank was a man who was convicted of a capital crime not because he was guilty, but because he was a Jew living in Georgia at the turn of the century, and the local passions and prejudices blinded people to the fact that there was not very convincing evidence against him. Well, I think it is an understatement to say that not everybody views federal judges as heroes when they grant

* Professor of Law, Brooklyn Law School. B.A., 1968, Barnard College; J.D., 1974, New York University.

1 347 U.S. 483 (1954).

2 See Frank v. Mangum, 237 U.S. 309 (1915).

writs of habeas corpus. The current image is not Leo Frank but Ellis Felker, a murderer with no sympathetic defense who presumably brings multiple habeas corpus petitions only to delay his execution.[3] Which of these images is the truth? I think the point is that they are both true. There are both kinds of cases out there in the federal courts, but the public gets a very distorted view of what's going on.

Judges, like any other group, tend to fall in a bell-shaped curve, and it is always the decisions at one extreme end of the curve that seem to be news. When the mayor or the police commissioner criticizes a decision that he says has outrageously let a criminal go or has outrageously set bail too low, that's news. It's all over the newspapers and all over television. If a criminal defendant wants to complain that in his or her case, bail has been set outrageously high, or that a judge ridiculously has refused to suppress evidence, that is not news (and here, I can say, "Present company excluded," about Bob Herbert). So the public equates habeas corpus with the reviled Ellis Felker, the same way that they have been led to believe that the role federal courts are assuming in prison litigation is to ensure that prisoners get their choice of chunky or creamy peanut butter, while I could document that federal judges use their power to prevent the spread of tuberculosis and gang rape in prisons, not the spread of peanut butter.

Following Justice Holmes' great dissent in *Frank v. Mangum*,[4] the federal courts eventually got on the habeas corpus case. One American Bar Association report showed that between 1976 and 1991, in 40-46% of capital cases that were reviewed on federal habeas corpus, the courts found constitutional defects.[5] To me, this shows not that the federal judges were a bunch of liberal busybodies who needed to have their sails trimmed, but that there is something deeply wrong in the states' criminal justice systems. This group of judges—and this is at a time when the majority of the federal bench were pedigreed conservative Reagan-Bush appointees—was shown what was going on in the state criminal justice systems, and they were very troubled. But again, the public is not encouraged to think that this record shows that Article III was working as it should.

What I want to tell you about the federal experience is that the process is not enough. When there is such a widespread consensus that the values on the other side of democracy, those countermajoritarian values, are not important, even the process does not protect the federal courts. Look at what's happening in the fed-

[3] See Felker v. Turpin, 116 S. Ct. 2333 (1996).

[4] 237 U.S. at 345-50 (Holmes, J., dissenting).

[5] See Memorandum from Professor James S. Liebman to Senator Joseph Biden, Chairman, Senate Judiciary Committee 1 (July 15, 1991) (on file with author).

eral courts today. Maybe individual judges cannot easily be hounded off the bench, because they have life tenure, but the federal courts are being restricted, in a much more meaningful way, from hearing the kinds of cases I just mentioned. Congress recently enacted, and the President signed, the Antiterrorism and Effective Death Penalty Act,[6] which in fact puts so many restrictions on federal habeas corpus that we're just about back to where we were at the time of Leo Frank. The Prison Litigation Reform Act imposes procrustean limitations on those busybody federal judges in prison conditions cases.[7] So federal judges have some actual restrictions and some actual protections, but they also, even with their life tenure, feel some of the same pressure that the state court judges feel.

I want to close by telling you where I was this past Friday. I was in Massachusetts talking to the judges of the First Circuit, who were convened partially in order to learn about how to conduct federal death penalty trials in states that have no death penalty, such as Massachusetts, Vermont, Rhode Island, and Maine. These judges have no experience with death penalty cases, and some of them were quite worried about being unpopular for the opposite kind of reason that Professor Bright presented. They were going to have to preside over cases that their communities did not believe in and did not agree with. At the end of the talk, I found myself thinking about tonight's panel, and wanting to thank those judges for being willing to undertake what was designed to be an unpopular job.

And I want to tell you that in talking to these and other federal judges I have met, I realized that they fell into two different categories. There are judges who are wearing their life tenure like a bullet-proof vest, and they are doing as much justice as the current Supreme Court and the revised statutes allow them to do. But then there are other judges who sound like rape victims. They are traumatized, they are looking back over their behavior, studying their behavior to see if there is anything that they might have done to provoke these attacks, and they are considering whether to play it safe in the future to avoid attacks.

The process is not enough. I think we need more than that, and I think we need to have conversations not only about what the mechanism should be for judicial selection, but also about how we are going to get the word out that the values that judicial independence is designed to protect are crucial.

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[6] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (to be codified in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49, 50 U.S.C.).

[7] See Prison Litigation Reform Act of 1995, Pub. L No. 104-134, 110 Stat. 1321 (to be codified at 28 U.S.C. § 1932).