FROM A WARM BENCH TO A HOT SEAT: THE TRANSITION FROM JUDGING TO DEANING

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THE literature on appellate judging usually refers to a court that is well informed about a case when it hears it as "hot" and one that is not as "cold." The rare appellate court that drafts an opinion and asks the lawyers to argue its correctness would be a truly "hot" bench. The English system, in which the judges assume the bench with no knowledge of the case whatever, best exemplifies a "cold" bench.

I served for six years as a judge on the North Carolina Court of Appeals and for over twelve years as an associate justice on the North Carolina Supreme Court. Both courts could aptly be described, in my time there at least, as "warm" benches. Most, if not all, of the time, no member of either court would have read the full transcript of the evidence, done significant independent research, or worked on a draft opinion before oral arguments. Thus, no member was thoroughly familiar with the case, and the bench could not properly be styled "hot." With rare exceptions, however, every judge or justice sitting had read and studied the parties' briefs, or at the very least given careful attention to a summary of the briefs, with analysis prepared by a law clerk. The appellation "warm bench" thus seems apt.

In December 1998, I retired from the North Carolina Supreme Court with twenty-eight years of state service (ten years in the state legislature had preceded the eighteen years on the appellate bench). When I had made the retirement decision over a year earlier, I had assumed that I would return to the practice of law—probably in an "of counsel" capacity, though perhaps in a more active role. I had begun conversations with two law firms when, in early August 1998, the morning newspaper informed me that the dean of the Campbell Law School had resigned after eleven years in the position. He would be resuming full-time faculty status, and the associate dean would be serving as acting dean while the school conducted a search for a replacement. The thought fleetingly crossed my mind, "Would I be interested in this?" I rather immediately dismissed it, however. The university probably would not be interested in me, I thought. Twenty-three years earlier, its president, who was still there, had asked me to give up my law practice and state senate seat to join the faculty of this little new law school he was opening the following year. I had turned him down, and I thought he might well remember that unfavorably. Further, I knew from having served on three law school dean search committees that they strongly tended to favor scholars renowned in their fields. Although many had considered me, rightly or wrongly, to be the scholar on the North Carolina Supreme Court, by the very nature of the judicial process, judges are generalists; and I was hardly a nationally renowned scholar in any field of law. Finally, I lived an hour's drive from the school, my wife worked at Duke University,

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which was near our home, and personal inconvenience probably made that career choice impractical or undesirable in any event.

Soon thereafter, however, a letter from the search committee prompted a reevaluation of this initial, rather hasty, dismissal of the idea. I had been nominated for the deanship, the letter read; was I willing to be considered? I did not respond until the day before the stated deadline. Even then, only the ingrained lawyerly instinct to preserve options prompted a positive response. I was then only three months away from leaving the Supreme Court. I had no definite future plans at that point. So, I said to myself, without any notion that it would actually happen, why not keep this possibility alive?

To shorten the story, mine was one of three names the search committee sent to the faculty; all were external candidates. The faculty and the students who considered the candidates (a majority of them at least) and the university administration apparently preferred me to the other choices. The president must have forgiven my earlier refusal. When offered the position, I came to see it as an opportunity to continue my twenty-eight years of public service. Although my employer would be a private university, I would be helping to prepare students for very public functions. I thought that by mentoring a whole crop of young lawyers rather than just a few in a single law firm, I could make a greater contribution to the legal profession and, through the profession, to the state, the country, and to some extent the world. On those premises, I accepted the position.

Now, in my sixth year in the office, I am often asked to compare the deaning task with the judging enterprise. There are similarities.

While we like to idealize judging as divorced from politics, every jurist comes to the bench through some political process. It may be bar or bar association politics, or it may be of the more hard-boiled, partisan variety. Whatever the case, all judges initially arrive at their chambers through some process that can only be characterized as political, and the political or interpersonal skills that enable them to get there certainly have utility in performing many of the tasks of a law school deanship.

Further, the judicial function is best performed by securing all the relevant information one can; processing that information, preferably in conjunction with fellow jurists and perhaps with law clerks; making decisions based on that dialogue; and implementing those decisions through a written order or opinion. The undertakings of a law school dean involve much the same modus operandi, though more rarely is an extensive written product the preferred method of implementation.

While there are similarities, then, the differences are dramatic. Once on the bench, the jurist's primary constituency is the law. Although those who must retain the office through the electoral process continue to have some concern for multiple constituencies, judges generally have long terms and can, if they choose, focus on the judicial function to the exclusion of political considerations for extended periods. A dean cannot. I have often analogized the dean's situation to having forty bulldogs simultaneously nipping at one's heels; one can only reach down and pat one of them at a time, and *perhaps* that one is content for the moment. The other thirty-nine, however, are still nipping. Although the jurist may have a heavier caseload than is reasonably manageable, there is the luxury of working on one case at a time until it is finished, an amenity not permitted to the law school dean.

Perhaps the most dramatic difference is that with the exception of oral arguments, most of an appellate judge's work is performed behind closed doors. Most of a dean's work, by contrast, takes place in the open. If efficiency is the ultimate value, this is highly undesirable. I have always deemed it more important, however, that a dean be approachable and empathetic than that he or she be efficient.

As I was leaving the law school around 10:30 one evening last semester, I stopped to speak to two students who were studying in the library. One asked, "What are you doing here this late, Dean Whichard?" I responded, "I guess I'm just inefficient." The other stated, "No, Dean Whichard, it's because you have an open-door policy." She was right. A dean probably could close his or her door each morning, attend to the necessary paperwork and incoming communications, and leave most days when the "punch-the-clock" employees do. Such an approach to the job would not be good deaning, however. Almost by definition, openness to interruptions is a basic requisite for the task.

When I first came to Campbell, I started something called "A Conversation with the Dean." I asked the Student Bar Association to be the sponsor of a regular event at which I "threw myself to the wolves," inviting students to ask me or tell me anything they wished. The room was packed for the first few of these. I made it a point to report at the next one on the matters raised at the previous one. I could recite some concerns as resolved, some as unresolved or unresolvable, and some as not yet addressed. It was clear that students appreciated both the openness and the candor. As student concerns were addressed and resolved, attendance at these sessions diminished. I viewed that as a sign of student perception, at least, of amelioration. I thus held the sessions less frequently, but I have consistently done it at least once a semester, and more often if particular conditions warranted it.

At the outset of each such occasion, I remind the students that they should not view these sessions as their only opportunity to converse with the dean. I emphasize that both my office door and my mind are always open for the expression of their concerns and assistance with their problems. I let them know that they should not apologize for coming to see me; that although they correctly perceive that I am busy, I am not too busy to find time for them whenever they think they need it.

To amplify the point, I make it a practice to get out of the office and among the students on a regular basis. When I send notes to students, it would be easy to ask an assistant to place them in their boxes in the student commons area. I usually deliver them myself, however, because it puts me where the students are and enhances the possibility of chance interactions with them. I follow a similar practice as I enter and exit the law school buildings. It would be easy, and would save time, to avoid or ignore the students in this process. Instead, when I can, I pause at least briefly for the exchange of friendly banter with them.

Except within the limitations imposed by orders or opinions in cases, judges rarely discourse on public issues or events. By contrast, I have thought it appropriate for a law school dean to do so. I had occupied the position less than three weeks when John F. Kennedy, Jr. died in a plane crash. I then offered, among others, the following thoughts to the Campbell Law School community:

I am among the many members of my generation who thought President Kennedy brought to public life a special measure of intellect, grace, style, and wit. Whatever our views on politics or personalities, however, surely our common humanity unites us in the most caring and compassionate concern for this family that has sacrificed and suffered so much. Our thoughts and prayers should be with both the Kennedy and Bessette families at this difficult time.

Matters like this should also cause us to reflect on how we should live and relate to one another in light of our common humanity and our shared mortality. Justice Holmes often wrote to his friends quoting the adage of a Latin poet, "Death plucks my ear and says, 'Live—I am coming.'"[1] Apart from the faith with which most of us deal with the mystery that awaits us at the end of life, there is "but one remedy against the fear of death that is effectual [—that is,] ...so to live before we die as we shall wish we had when we come to it."[2]

Six months later, a group of students, with my approval, invited Sara Weddington, the attorney for the plaintiff in *Roe v. Wade*,[3] to speak at the law school. There was quite vocal objection from students, faculty, alumni and others who opposed the *Roe* holding favoring a woman's right to choose whether to continue a pregnancy. I viewed the matter as presenting a basic question of academic freedom or freedom of inquiry and expression. I thus defended the invitation on these grounds:

The engagement presented a significant opportunity for our students to hear a major figure in American legal history. This would be equally true if the students had endeavored to bring to the school Robert Flowers or Jay Floyd, the assistant attorneys general who represented the state of Texas in defending the criminal statutes at issue in *Roe*. They, like Weddington, were officers of the Court in a major constitutional decision in United States history. Any law school would be fortunate to have any of the participants in the argument and decision of such a case on its campus.

The nature of the legal profession and the role of the lawyer in the Anglo-American adversarial system of justice, too, were pertinent considerations. Our codes of professional responsibility require us as lawyers to represent our clients competently and zealously. We are constantly encouraged by the basic norms of professionalism to be willing at times to represent unpopular clients and unpopular causes. It is counter to our long-taught legal tradition to condemn a lawyer for representing a client, even if we disagree with the outcome of a case. To criticize a court for the way it decides a case is well

1. James Vorenberg, *In Memoriam: Paul A. Freund*, 106 HARV. L. REV. 13, 16 (1992) (quoting Oliver Wendall Holmes, *The Race Is Over, Radio Address to the Nation* (Mar. 8, 1931), *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDALL HOLMES 178 (Mark DeWolfe Howe ed., 1962)).

2. TRYON EDWARDS, USEFUL QUOTATIONS: A CYCLOPEDIA OF QUOTATIONS 119 (C.N. Catrevas rev. ed., Grossett & Dunlap 1933) (1891) (quoting John Norris).

3. 410 U.S. 113 (1973).

within our traditions and professional norms, but to demonize a lawyer for being a successful advocate in a case is not.

The next focus should be on the nature and role of a university. To be a university in the truest sense, an institution must be characterized by freedom of expression and freedom of inquiry. A university community, to be worthy of the name, must be willing to hear conflicting points of view. To repress speech on a university campus because it is offensive to some, perhaps even a majority, of the university's constituents, is counter to these traditions and would considerably diminish the life of the mind in a grand center of learning.

The principal objection to the Weddington visit seems to be that an invitation to her to appear on this campus constitutes an endorsement of the abortion-rights position she advocated before the U.S. Supreme Court. This objection, if honored, would virtually preclude all speakers on controverted topics or with controverted histories. In the 1950s there were committed Christian people on both sides of the issue litigated in *Brown v. Board of Education*—some who deeply believed that God had ordained separation of the races, others who believed with equal fervor that God intended that everyone be treated equally. The first group would not have wanted to endorse Thurgood Marshall's position for the plaintiffs; the second would not have wanted to endorse John W. Davis's advocacy for the defendant school boards. It was almost unthinkable, however, that a major American law school would not have wanted to hear from either of these renowned lawyers. The lawyer for Dred Scott's owner was an advocate for an institution, slavery, most of us today would consider evil; but any American law school would have wanted him as a speaker because of his role as a successful advocate in a major constitutional law decision. Abraham Lincoln represented slave owners who sought return of their human property; surely no one would deny him a law school forum on that account. Our library is in the process of acquiring the files of a lawyer who represented a capital murder defendant over a 15- to 20-year period. Surely this cannot legitimately be construed as honoring or endorsing capital murder.

I concluded the discussion as follows:

As a university, Campbell must be open to discussion and debate about major issues in American society. When those issues are legal in nature or implication, its law school should facilitate that discourse. We have done that by publishing a law review article which speaks from the "pro-life" position. We will do that by hearing from Ms. Weddington who has, at least in a formal legal proceeding, advocated the "pro-choice" position. If we are to function as an academic institution, and particularly as a major law school should, we will hear the views of both sides with equanimity, civility, and a proper respect, notwithstanding agreement or disagreement with the positions advanced. We should ask both the advocates and ourselves the hard questions this discourse invokes. We should then refocus on our primary task of teaching and learning the law, while continuing a very civil dialogue about the nature of the legal profession, the nature of a university, and our calling as

lawyers in a society in great need of a public discourse characterized by civility, magnanimity, and a generosity of spirit.

One of the largest snowfalls in North Carolina history caused cancellation of the Weddington appearance. Perhaps, I conceded afterward with tongue in cheek, God really did not intend for her to come. The scheduling of it, however, prompted a very productive and enriching dialogue about academic freedom, the nature of the legal profession and the role of the lawyer, and the nature and role of a university. It was a discussion in which the dean, while on a hot seat, had, and should have had, a very prominent role.

All of us remember where we were and what we were doing when we first heard of the tragic events of September 11, 2001. I was driving to a county courthouse twenty-five miles from the law school to present one of our graduates to the court for his oath as an attorney. I was listening to a book on tape about Thomas Jefferson, and when a tape ended, I extracted it and allowed the radio to come on. My first thoughts upon hearing the news were that the subject was the 1993 bombing of the World Trade Center, or that perhaps it was some modern version of Orson Welles' "War of the Worlds." In only a matter of seconds, though, I realized that I was hearing a vivid description of events then unfolding.

Following the swearing-in ceremony, I paused in the clerk's office for a brief look at the television news. Before returning to the school, I made calls to check on my own family. My niece and nephew in New York City were fine. My son-in-law's father, a New York City lawyer whose office was near the World Trade Center, was also fine; but he had seen the second plane fly by his office window on its way into the World Trade Center. One son-in-law was in Pennsylvania that day serving as a pallbearer at his grandmother's funeral, only about twenty-five miles from where Flight 93 went down.

When I returned to the law school, I again thought it appropriate for the dean to communicate to the community. I retreated to the library stacks for some necessary solitude, and upon returning addressed the following memorandum to students, faculty, and staff:

> This morning we received a jarring reminder that human civilization, like human life, hangs by a thin and fragile thread. Surely our thoughts and prayers will be especially with the victims of this senseless tragedy and with those who loved them. We should pray as well for ourselves, our country, and our world.
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> Absent a different directive from the university administration, we will carry on here as normally as possible. Individual faculty members who perceive compelling reasons to do so may postpone classes in their discretion, to be made up as soon as feasible. Otherwise, classes and other events will be held as scheduled.
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> We are all shocked, dismayed, and distracted by the events of the day. We should, as a consequence, exercise a tolerance and patience for one another beyond the norm. We should be as humane as possible, especially to the members of our community who may be more directly affected by these events than others.

> But this is not a time to rest. It is, instead, an occasion for renewed and enhanced commitment, especially by those of us here in the School of Law; for we are the guardians and perpetuators of the rule of law, which is the only viable alternative to the reiterated rantings, and the violent and evil deeds, of fanatics and madmen. Ours is the course of sanity and equanimity; theirs, that of violence and destruction.

Not all calamities are as dramatic or pervasive in their effects as the events of September 11th. The following year we had two student deaths only a little over six months apart.

The first decedent was a student who had just completed her second-year exams when her husband beat her so severely in the head with a baseball bat, while she slept, that she could not survive the attack. She was pregnant at the time, and the physicians successfully delivered a three-and-one-half-pound baby girl who survived and has done well. My statement to the law school community on this occasion concluded as follows:

> We will all cherish memories of Brandy as a pleasant friend who contributed significantly to the life of this community of learning. We should keep her family, especially her two young children, in our thoughts and prayers.
>
> Matters of this nature are beyond our capacity to understand. We can only cherish our memories of Brandy, commit her spirit to God, and cling tenaciously to those ancient words of comfort and hope:

> I am the resurrection and the life.
> He (she) that believeth in me,
> though he were dead yet shall he live,
> and whosoever liveth and believeth in me shall never die.[4]

The second decedent was in the first semester of his first year. He was absent from classes one day, and three members of his study group went to check on him and found him dead at his residence, apparently from a seizure while in the shower. My statement to the community was much the same as upon the earlier death, but included the following further quotes:

> Yea, though I walk through the valley of the shadow of death,
> I will fear no evil, for thou art with me.[5]

> Yet, in the maddening maze of things,
> And tossed by storm and flood,
> To one fixed trust my spirit clings;
> I know that God is good![6]

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4. *John* 11:25-26.
5. *Psalms* 23:4.
6. John Greenleaf Whittier, *The Eternal Goodness*, *in* 2 THE POETICAL WORKS OF JOHN

I am often asked if I would like to return from the hot seat of a dean to the warm bench of the Court. My answer is "yes," but with considerable limitations. I miss the work of the Court only when I see that it has an interesting and important new kind of case. I do not miss the day-to-day petition work or reading and writing the same thing iteratively in the death penalty cases.

Would I miss the dean's hot seat if I left it? Everyone who has been a law school dean surely knows that, in many respects, the answer must be "no." Everyone who has held the position also knows, however, that it provides a forum for leadership that offers very special opportunities. Just as I do not miss many aspects of the Supreme Court's work, when I leave the deanship I will quite happily relinquish many of the situations and responsibilities it involves. I am equally confident, however, that, viewing the experience in its entirety, I will be grateful that the opportunity to exercise this form of leadership in these times came my way.

GREENLEAF WHITTIER 269 (Houghton, Mifflin & Co. 1892).