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Cultural Commentary: Worth the Effort

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Recently, a number of events have occurred that highlighted for me how desperately important it is that we pay attention to the way our judges are appointed and confirmed to office. These events included 1) the 50th anniversary of the Brown v. Board of Education decision by the Supreme Court of the United States, 2) a visit to Bridgewater State College by the distinguished Harvard University law professor Charles Ogletree, 3) the death of the South Boston politician and anti-busing activist Louise Day Hicks and 4) an obscure and convoluted political struggle that took place in the United States Senate. I’ll begin with the Senate events.

It was 2 AM on November 14th, 2003 and I was trying to channel-surf my way back to sleep. There were congressmen on the screen and they were making impassioned speeches about something, but this wasn’t an old episode of West Wing I was watching. It was the actual United States Senate, and there was no snappy dialogue on the immediate horizon. So what were these men doing on the television at that time of the morning? As it turns out, a few Republicans had decided to talk non-stop about how the Democrats had been politicizing the nominating process. The commentator noted their goal was to talk for 40 hours straight. At least I knew that I would be sleeping soon. I was.

By the next morning the newspapers and radio reports explained what had made little sense to me the night before. It seems the Democrats in the Senate had used a filibuster (their own non-stop talk event) to prevent votes on four of George W. Bush’s judicial nominees to the U. S. Court of Appeals. The Democrats justified this tactic on the grounds that these nominees were too conservative to be fair judges. What made things more interesting was that three of the nominees were female and the fourth, Miguel Estrada, was Hispanic. Given the gender and ethnicity issues, and the power of the court to which they would be appointed, the political stakes were high.

Somehow, I became obsessed with the ins-and-outs of this matter. The strategic moves were, of course, shaped by Senate rules. To confirm a judge required only 51 votes, a simple majority. So the Democrats, being the minority in the Senate, could not deny the Republicans their preferred nominees by a regular vote. But they could filibuster against them, and the Republicans would then need a three-fifths majority, sixty votes, to end the filibuster and bring the nominations to votes. The Republicans had failed to muster 60 votes on any of the nominees because the Democrats had held ranks. So the Republicans decided to try to embarrass the Democrats before the court of public opinion. Fat chance.

For 40 hours the designated Republican talk-a-thoners, (Rick Santorum of Pennsylvania was the most recognizable of them), complained to an essentially empty Senate, that their opponents were denying the nominees the right to an up-or-down vote. Meanwhile, before network microphones Democrats argued that they had allowed floor votes on 168 of the President’s nominees, and were merely using the legal tools at the disposal of the minority party to block votes on the four most offensively conservative candidates. Needless to say, the Republicans failed to embarrass their opponents, mainly because the Democrats were quite pleased with themselves for having blocked the nominees without having had to resort to actual kidnapping. The next morning, the vote on cloture, the vote taken to see if a filibuster can be ended, failed by seven votes to reach the required 60. These nominations, at least, were dead.

I read all of this with a fascination that was, for me, another of those unpredictable mental detours. I like to follow important political issues, but I went overboard on this one. For example, did you know that the word filibuster very probably has its origins in the Dutch vrijbuit (freebooter) which roughly translates to us as something like plunder, or theft? No! O.K. My interest in the Senate manoeuvres was a bit wacky. But it may have made more sense if I had realized that I was unconsciously making connections between these events and others that had occurred within the previous few weeks. For example, late in October Louise Day Hicks died at age 87.

Hicks was an important figure in the history of Boston’s school desegregation cases in the late 1960s and early 1970s. I was in college and graduate school in Boston
back then, and recall how she became a symbol of racial bigotry to the rest of the nation. Hicks was at the forefront of opposition to judge W. Arthur Garrity’s court order that busing be employed to help achieve the desegregation of Boston schools. She expressed the outrage of her neighbors in South Boston, saying that “Boston schools are the scapegoat for those who have failed to solve the housing, economic and social problems of the black citizen.”

In early November, soon after Hicks’ death, Charles Ogletree of Harvard Law School came to Bridgewater to speak. This distinguished lawyer and scholar had written a book marking the 50th anniversary of the landmark Supreme Court decision, Brown v. Board of Education of Topeka. Speaking about his forthcoming book, All Deliberate Speed, Ogletree reminded the packed audience of Bridgewater students, faculty members, administrators and others, that the promise of civil rights is a long way from being realized in America. A brief look at the history of school desegregation since Brown makes this painfully clear.

In the Brown case, the Supreme Court was persuaded by Thurgood Marshall’s arguments on behalf of the NAACP to finally overturn the separate-but-equal standard established in the 1896 case of Plessy v. Ferguson. In Plessey the court had held that racial segregation in public facilities was not “unreasonable” and that they did not violate the Equal Protection Clause of the Fourteenth Amendment. But the Supreme Court, under Chief Justice Earl Warren, had found that the segregated school system in Topeka, Kansas, had not provided equal quality educations to its black and white students. Further, the court concluded in a unanimous decision that segregated schools systems were inherently unequal, and violated the Fourteenth Amendment to the Constitution. A year later, the Court established the remedy by ordering the school boards in segregated systems to desegregate “with all deliberate speed.”

But, as Charles Ogletree pointed out in his talk, progress toward school desegregation did not result soon, nor to any satisfying degree. The curious language crafted by the court was meant to make possible the political and cultural compromises that change in such a volatile area as racial relations would demand. “All deliberate speed.” “Deliberate” meant to go slowly. “Speed” meant to go fast. And “all” emphasized the importance of doing so, whatever those actions might be.

The reactions of southern school systems were predictable. By 1964, seven of the eleven southern states had not placed even one percent of their black students into integrated schools. In a series of cases between 1954 and the early 1970s, the Court tried to give added force to its order in Brown. But by the middle of the 1970s the momentum for civil rights decisions in the Supreme Court was gone. America was now struggling with high inflation brought on by sudden increases in the cost of foreign oil, and the need to pay the deferred bills for the war in Viet Nam from which we had just escaped, but which we never officially declared. In good economic times and bad, we seem to have become obsessed with our financial well-being, and promises of racial equality have, to a great extent, been put on the national back burner.

The decision of the Warren Court in Brown v. Board of Education made great demands on the nation. There has never been an easy time to ask Americans to make changes in the ways they live their lives. The Court and the politicians knew that school desegregation would strain the nation along racial, political and geographic lines. It was no surprise that politicians, local and national, resisted mightily. But beyond the often gritty struggles of electoral politics, the Supreme Court Justices have lifetime appointments and can focus on the search for the meanings in our Constitution. They are in unique positions to put painful issues on the national agenda. I believe that our courts are still the places most likely to confront our issues of racial inequality.

I have studied and taught about American prejudice and discrimination for my entire career at Bridgewater, and believe that the judges who decide on issues like this must be the very highest minded people in the country. It is appropriate that the struggle over who sits on our most influential courts be strenuous, and even extreme. The stakes are too high for it to be any other way. I hope that the forces that intend to confront racial inequality win.

—William C. Levin is Professor of Sociology and Associate Editor of the Bridgewater Review