

BALONEY, FORTUITY, AND CHARACTER

PAUL CLEMENT*

In May 2017, I had the opportunity to interview Judge Silberman for an oral history project being assembled by NYU's Institute of Judicial Administration. I felt like I had won the lottery. The chance to sit down with Judge Silberman for the better part of a day and ask him questions—talk about role reversal—was too good to pass up. The resulting oral history runs over three hours and spans a remarkable career on and off the bench. It deserves to be savored in full. But in revisiting the interview recently, I was struck by a few recurring themes that merit special emphasis.

Let me start with “baloney.” That was his pithy response when asked about what he thought of critics who attacked judicial restraint as being in the eye of the beholder and little more than a shorthand for judicial decisions that produced a preferred policy outcome. The response was classic Silberman: frank, slightly archaic, and entirely heartfelt. As the oral history makes clear, Judge Silberman had a very clear idea of what judicial restraint was—and was not—and a dedication to judicial restraint was the throughline of his legal career and the hallmark of his three and a half decades on the bench. He traced that fealty to his Harvard Law School days, where praise of judicial restraint and disdain for the judicial activism of the *Lochner* era was a veritable article of faith across the political spectrum. Judge Silberman decried the erosion of support for judicial restraint on the political left, as evidenced by the increasing difficulty of identifying law clerk candidates who were politically liberal, but judicially conservative. But he was even more critical of conservative apostates tempted by the siren song of judicial activism. I have a distinct memory of him challenging a questioner at a Federalist Society event to admit *Lochner* was wrongly decided or sit down.

Nothing Judge Silberman said in the oral history on this topic surprised me, as a clerkship with Judge Silberman was a yearlong tutorial on the virtues of judicial restraint. What did surprise me as I heard the Judge recount the arc of his storied career was the role that fortuity played in it. While aphorisms about one door closing and another opening are commonplace, Judge Silberman clearly provides an extreme case. The pattern started even before the Judge left law school. He was slated to clerk for a federal judge in New Jersey, Mendon Morrill, only to have his would-be judicial mentor pass away. As he scrambled for a plan B, his beloved labor law professor, Derek Bok, alerted him to a job opening with a top labor law firm in Hawaii. Having never been west of Cincinnati, the intrepid young Silberman jumped at the chance. The pattern continued, as chance encounters connected him with a rising star in the Nixon

* Paul Clement is a partner at Clement & Murphy and was a law clerk to Judge Silberman from 1992–1993.

Administration named George Schultz, which resulted in a series of promotions and the Undersecretary of Labor post while still in his early 30s.

Fortuity also played a huge role in guiding Judge Silberman to the D.C. Circuit. A judicial appointment was far from Judge Silberman's first pick when it came to opportunities in the Reagan Administration. Having played a key role on the Reagan campaign's foreign policy team, Silberman had his sights set on the top job at the CIA. But when Bill Casey's nomination to be Secretary of State encountered turbulence, and Casey was shuffled over to the CIA, that particular dream job eluded the Judge. But the nomination process taketh and giveth. A few years later, Professor Paul Bator was the first pick for an open D.C. Circuit seat, and after he withdrew, the slot went to the ever-confirmable Laurence H. Silberman. He was confirmed unanimously for the sixth time.

That statistic stands out in our own hyper-partisan times as nearly unfathomable. How could an outspoken conservative be confirmed time after time without a single negative vote from a Senate that included the likes of Ted Kennedy and Howard Metzenbaum? While all that unanimity was in large measure a product of the times, Judge Silberman had a secret weapon that served him well: His character. Judge Silberman was a man of deep principles. One could fault his principles, and on occasion his critics did, but it was hard to criticize him for wavering when sticking by his principles became difficult. It simply did not happen. Time after time, he showed a willingness to walk away from a plum assignment when he perceived it as being inconsistent with his own principles. Early on in his career, he was willing to walk away from his job as Solicitor of Labor rather than allow the White House to co-opt him to report on any deviation from administration priorities by his Labor Department superiors. A few years later, he drafted a resignation letter rather than accede to a presidential request to interfere in the prosecution of a powerful political ally. He was willing to let his D.C. Circuit nomination be withdrawn rather than violate the attorney-client privilege to document his non-involvement with a regulatory violation at Crocker National Bank. Later still, he declined consideration for the Attorney General post because of doubts about core presidential policies within the Justice Department's purview. The list goes on.

But the example that best demonstrates the Judge's character and commitment to principle, and how it ultimately fueled his career and paved the way for unanimous confirmations, involves the case of Clayton Cottrell. As the Judge recounts the episode, he was tasked as Undersecretary of Labor with identifying nominees for the newly created positions of Regional Directors. The Judge believed he had found the ideal candidate for the critical New York area Regional Director position in Clay Cottrell. He was New York based, steeped in labor law, and a Republican. He also happened to be black. Silberman was shocked when he learned that the White House in the person of Chuck Colson had blocked the nomination. The young Undersecretary was no doubt rankled by White House interference with a specialized appointment, but Silberman was too much of a believer in the unitary executive to resign over that. But when he learned that Colson was blocking the appointment because of Cottrell's race, it became a matter of principle, and he resigned. The White House briefly relented and allowed the appointment to proceed, rather than risk a public fight before Nixon's re-election. But once the election passed, both Silberman and Cottrell were fired. Thus, having landed the number-two position at a cabinet department at a remarkably young age, the Judge sacrificed that plum position over a matter of deep principle.

In the moment, the Judge must have perceived his prospects for future executive branch employment as remarkably bleak. Getting crosswise with a key player in a demonstrably vindictive White House hardly seemed like a good career move. Fast forward a few short years to the heart of Watergate and President Nixon's need to re-staff the Justice Department after the Saturday Night Massacre, and having crossed swords with Chuck Colson on a matter of principle turns out to have been a uniquely valuable calling card. As the Judge describes it, he was about the only person in Washington who could have been nominated by the President and confirmed by the Senate for the Deputy Attorney General post. And so, he was unanimously confirmed to be Deputy Attorney General at the ripe old age of 34.

Quite a reversal of fortune, but the Judge would be the first to say that the reason to stand on principle is the importance of character, not the prospect that your opposition will get their comeuppance in the end. Judge Silberman understood Washington far too well, and advised far too many on negotiating its ways, to think that standing on principle is always rewarded in this life. But he also understood that jobs come and go, while character (or lack thereof) endures. Thus, every one of his law clerks knew that if you consulted his advice, you had better be prepared to do the right thing.

As I have written elsewhere, the Judge was an extraordinary mentor and a constant source of wise counsel for all his law clerks and countless other confidants, from Supreme Court Justices to bright-eyed interns and grand-clerks.¹ The advice was invaluable and generally started and finished with the importance of character and standing on principle. Although less obvious, the Judge never lost sight of the role that fortuity played in his own career. He was routinely contacted by his clerks, myself included, confronting personal or professional decisions that seemed absolutely critical at the time. But with the benefit of his wisdom and his own experiences, he consistently advised taking the long view and maintaining perspective about the immediate prospect, especially if pursuing it would produce an unhappy spouse (he passed up the Embassy post in Germany to preserve marital harmony). Finally, in dispensing advice, the Judge would tell it to you straight. If he thought an idea was baloney, he would not mince words.

All his confidants are at something of a loss without the Judge and his good counsel. Fortunately, much of his wisdom is on display in the oral history. I commend watching the entire interview to get the benefit of the Full Larry. But, at a minimum, remembering to call out baloney, recognize fortuity, and prize character will get you pretty far.

¹ Paul Clement, *America Loses a Judicial Giant*, WALL ST. J. (Oct. 2, 2022), <https://www.wsj.com/articles/america-loses-a-judicial-giant-laurence-silberman-restraint-dc-circuit-constitution-judge-legacy-scalia-clerks-second-amendment-11664750990> [<https://perma.cc/7RMB-RLLB>].