

## JUDGE LAURENCE H. SILBERMAN SYMPOSIUM ESSAY

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“I wanted to be a lawyer from the time I was six years old.”<sup>1</sup> So was launched the career of Laurence H. Silberman, who served faithfully as a public official and, in the best sense of the word, an intellectual. His career spanned private practice, the Department of Justice, an ambassadorship, think tanks and the legal academy, and decades on the U.S. Court of Appeals for the D.C. Circuit. He served America in her hour of greatest need as Chair of the Robb-Silberman Commission, and was awarded the Presidential Medal of Honor. He did it all with wit and grace, powered by an abiding love for country.

Judge Silberman lived a life well-remembered, perhaps most fondly by those who were privileged with his touch. His work took him from practicing labor law in Honolulu—an unlikely springboard to Solicitor of Labor at the age of thirty-four—to Yugoslavia, where he served as Gerald Ford’s ambassador, and subsequently to Georgetown Law, where he taught labor and administrative law for over three decades. He twice declined to be U.S. Attorney General, but in fact did run Justice as Deputy and Acting Attorney General after Watergate, at a time when the Department needed his steady hand and political touch. On his desk was a billy club from FBI Director Clarence Kelley with the following inscription: “Presented to Hon. Laurence H. Silberman, Deputy Attorney General, United States of America and the *Whole* Department of Justice.” Quite a tribute, right after J. Edgar Hoover and decades before James Comey.

But of course, his enduring legacy is writing the first draft of so many landmark Supreme Court cases and often having the last word on the most consequential constitutional issues of the day.

Having played all positions on the diamond, Judge Silberman knew his role on the team. Jurists are not to be politicians in robes. A supporter of legal abortion, he nevertheless could not locate, and would not invent, any such right in the federal constitution.<sup>2</sup> And even as he criticized the Affordable Care Act’s individual mandate as an “intrusive exercise of legislative power,” the Judge wrote that his view was “political judgment rather than a recognition of constitutional limitations.”<sup>3</sup> That is the emblem of judicial restraint. “It has always seemed rather simple to me,” he once remarked, “that in a democracy federal judges appointed for life may not allow themselves, or should not allow themselves, to make policy judgments but should do their very

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<sup>1</sup> New York University School of Law – Institute of Judicial Administration, *Oral History of Distinguished American Judges*, “Hon. Laurence H. Silberman: An Interview with Paul D. Clement” at 7 (May 17, 2017).

<sup>2</sup> See, e.g., *J.D. v. Azar*, 925 F.3d 1291, 1343 (D.C. Cir. 2019) (Silberman, J., dissenting) (refusing to condone a “constitutional right to choose whether to carry a pregnancy to birth”).

<sup>3</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 20 (D.C. Cir. 2011) (Silberman, J.)

best to interpret the policy judgments Congress makes and turns into legislation as well as the policy judgments that are embodied in constitutional law, that is to say the Constitution.”<sup>4</sup>

But within the judicial role, the Judge was fearless in defense of the Constitution. Legal questions have right answers, and the jurist’s duty is to provide them. The answers he gave would often appear, in one form or another, in the more famous opinions of the High Court. For example, when Justice Scalia wrote his dissent in *Morrison v. Olson*<sup>5</sup>—which Justice Kagan wrote was “one of the greatest dissents ever” and “gets better every year”<sup>6</sup>—to denounce the procedures for removing independent counsels as violating separation of powers and the Appointments Clause,<sup>7</sup> Judge Silberman quipped to Scalia: “You didn’t do it, you just followed me.”<sup>8</sup> So too *Parker v. District of Columbia* did the spadework for *District of Columbia v. Heller*, which held that the right to bear arms was an individual right abridged by the District’s gun laws.<sup>9</sup>

Judge Silberman, the intellectual titan and conservative icon, was, to me, Uncle Larry. He was a friend whom I called to talk about a bad day, a good date, or a new episode of *Foyle’s War*. He was a mentor and advisor on every decision of consequence, and many of insignificance. He challenged my thoughts, cheered my successes, and was a total pain in the ass when we disagreed. Almost daily I struggle without his voice, and the only solace is that I can still call on his wisdom through his family and the network of his students, friends, and law clerks.

The law clerks! A Silberman clerkship was a winning lottery ticket—a front row view of a maestro conducting an often-discordant orchestra, a daily diet of Cold War history, and a constant seminar on constitutional theory, political maneuverings, and how not to deal with the press. But a clerkship with the Judge was not just a one-year apprenticeship, it was admission to a permanent family. His advice was always honest and direct, but I never once heard him badmouth another clerk—even when the transgression deserved it. He recognized that people and places need encouragement and solicitude to thrive, and the more they’re given the worthier they become.

Thus, he loved Dartmouth and Harvard, and AEI and Georgetown thereafter. He loved his work, his teaching, and the intellectual battles. He loved his clerks. Most of all, he loved Ricky and, later, Tricia and their children and grandchildren. He loved his people. Is it any wonder that we all still love him so?

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<sup>4</sup> The Historical Society of the District of Columbia Circuit, *Oral History Project*, “Honorable Laurence H. Silberman” at 165 (Feb. 6, 2002).

<sup>5</sup> 487 U.S. 654 (1988).

<sup>6</sup> “Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench,” 92 *Stanford Lawyer* (2015).

<sup>7</sup> *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Silberman, J.).

<sup>8</sup> *Supra* note 1 at 116.

<sup>9</sup> *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) (Silberman, J.), *aff’d sub nom*, *District of Columbia v. Heller*, 554 U.S. 570 (2008).