A Brief Essay on the Judiciary

In the 2005 film *Thank You For Smoking*[1], there is a scene in which tobacco industry lobbyist Nick Naylor is sitting with his teen-age son, Joey, who is struggling with a homework assignment. Joey asks his father, "Why is America's government the best government"? And without hesitating a moment, Nick replies, "Because of our endless appeals system." Whether or not you agree with Nick Naylor probably depends a lot on your economic circumstances. In Mr. Naylor's case, he is a spin doctor for an industry that has taken a good deal of criticism for the product it markets, but which has the financial power and political influence to use our court system to its advantage. Whereas, the average person rarely has need for the courts, except when crossing the law, or civilly, when involved with legal matters involving the transfer of wealth, such as in divorces, personal injury suits, property rights, and business disputes. Such conflicts require some of that wealth to be transferred to lawyers hired to help resolve such matters.

Despite what we often hear in the news about court cases and trials, both civil and criminal, most cases brought before the courts end up not going to full trial. In the case of civil suits, cases are usually resolved through agreement of the parties; in criminal matters, the accused is often presented with the "people's" evidence, and is offered a "plea bargain," wherein the person charged with the crime is offered a lesser charge in exchange for a more lenient sentence or the dropping of other charges.

But theoretically, at least, Nick Naylor has a point. We live in a country where we have the right to use the U.S. court system, known in government terms as our "judiciary," to resolve disputes. These can be private or public matters. These rights are identified in our U.S. Constitution. And beginning with even the most insignificant of matters, and following "due process," which means following all legal rules and principles pertaining to the case, each of us could conceivably bring a case before the courts, and through appeals, end up in the highest court in the land, the Supreme Court. It can happen. But you better have money, or wealthy friends. When Suzette Kelo of New London, Connecticut, wanted to remain in her home rather than sell it to developers for the City of New London, her defiance caught the eye of a libertarian group called the Institute for Justice, and others, and an appeal of the Connecticut Courts found her in the U.S. Supreme Court, where powerful interests wrestled with a fundamental Constitutional right set down in the Fifth Amendment. Local author Jeff Benedict wrote of Ms. Kelo's ordeal in a 2010 book titled *Little Pink House*.

But the *judiciary*, established as one of the three equal branches of our government (many Americans can't name all three), has in the past couple of decades been under siege by powerful conservative interests. These interests, backed by wealthy corporations, recognizing that another of those branches, the *legislative* branch, has been ineffective in getting things accomplished, has instead invested in getting judges appointed who are ideologically aligned—which is to say, bought and paid for—and resulting in the courts effectively legislating for them because Congress has been underachieving. And it seems to be working, quite well, actually. For them. But that is not how it is supposed to work.

To be sure, the Supreme Court has, over our country's history shifted from conservative to progressive and back again, modulated by the influence of nominations by the sitting President (executive branch) at the time, and by the Senate, that confirms the appointment. Currently (2023), we have a conservative court, with critics pointing out that the court make-up does not reflect the make-up of the country. Six of the Supreme Court justices are of the Catholic faith, for example. There have been suggestions that the court be expanded to more than nine justices, or that terms be limited rather than be appointments for life. Most recently, we have seen several of the justices flouting the traditional understanding of appearances of conflicts of interest, receiving gifts from wealthy business interests,

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[1] *Thank You For Smoking* is an American satirical black comedy film, based on a novel of the same name written by Christopher Buckley.

some of whom appear before these same justices. Such appearances weaken the integrity of the court and the people's trust in the court's decisions being fair and just.

While the Democrats were napping, conservative groups such as the Heritage Foundation have over the past couple of decades been grooming and lining up judicial nominees that are to their liking, and their patience has paid off. Conservative corporate-aligned judges can be valuable to big-moneyed interests, but those same interests have also recognized that a conservative judiciary might also help bring about favorable court decisions when there are challenges to election results, although in the 2020 Presidential elections, the courts overwhelmingly upheld the results—chiefly on the lack of evidence. But over time, and particularly when judicial competency appears to be supplanted by loyalty to party[2] or ideology, our system of government gets worn down and may become increasingly susceptible to corruption and ultimately to collapse. It is cliché to talk about democracy as being fragile, but it is, in reality, an act of faith; the faith in each and every one of us who purports to hold public office in support of the U.S. Constitution and the rule of law.

Richard Waterman

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[2] Florida Federal Judge Eileen Cannon of the Donald Trump classified documents case comes to mind