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AKHIL REED AMAR

Chief Justices and Chief Executives: Some Thoughts on Jim Simon's Books

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ABOUT THE AUTHOR: Sterling Professor of Law and Political Science, Yale University. This essay is based on oral remarks delivered at *Supreme Court Narratives: Law, History, and Journalism*, a symposium held at New York Law School on April 12, 2012, *available at* http://www.nylslawreview.com/supreme-court-narratives-law-history-and-journalism/. Special thanks to Nadine Strossen for her customary hospitality at this event and for many acts of friendship and collegiality over the years.

CHIEF JUSTICES AND CHIEF EXECUTIVES: SOME THOUGHTS ON JIM SIMON'S BOOKS

It is an honor to be here with my dear friend Nadine Strossen and to be at an event celebrating James Simon, who has been a real role model for me. Congratulations, Jim, on yet another amazing book.

I say "yet another" because several of Jim's books are obviously connected, and these books, read as a whole, highlight some interesting structural tensions between the Chief Executive and the Chief Justice at various particularly fascinating moments in American history.

To begin to see the pattern in Jim's work, think for a moment about the key constitutional clause limiting each presidential term to "four years." Prior to FDR, the President's tenure by tradition was limited to two terms—eight years. As with so many presidential traditions, this one began with George Washington, who stepped down after two terms. Had he wanted, he could have gotten elected to a third term—and even to a fourth and fifth had he lived long enough. He was unanimously elected President in 1789, and unanimously re-elected in 1792. Every elector who cast a ballot voted for Washington. Prior to his resignation, it might have been widely believed that the presidency would end up being de facto a lifetime office, and that a tradition might emerge in which an incumbent would be routinely re-elected unless he somehow dishonored himself. Such was the emerging tradition at the state level: Massachusetts Governor John Hancock was routinely re-elected, as were Governors Jonathan Trumbull in Connecticut and William Livingston in New Jersey.

Washington, however, put the presidency on a different path. After Washington, John Adams did not have much of a choice. He got voted out (and that fact is featured in one of Jim's books)[1] and then Jefferson made a point of stepping down after two terms, openly championing an avowedly republican and antimonarchial tradition of presidential rotation. Madison and Monroe followed suit; and soon thereafter, Andrew Jackson also left after two terms. Thus was a tradition established—a tradition that would eventually be codified (in the Twenty-Second Amendment) after FDR's death.

In contrast to the presidential term of four or eight years, the Constitution establishes life tenure for the Chief Justice of the United States. Before John Marshall, this tradition was not entirely obvious. Several early Justices stepped down after relatively short stints on the bench. John Jay left to become governor of New York. John Rutledge stepped off the U.S. Supreme Court to take a position in South Carolina. Associate Justice William Cushing ran (unsuccessfully) for the governorship of Massachusetts.

So before Marshall came along, the modern pattern was not so apparent, but, in retrospect, the typical pattern is that Presidents leave after four or eight years, while most Justices stay on for much longer. This simple fact creates an interesting structural tension. Courts are, in general, ghosts of Presidents past.

Now factor in a second structural feature of the system: the process of selecting Justices is political. Presidents pick Justices. That is not true around the world,

1. JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 147 (2002).

especially for lower judicial positions. Some European countries have something akin to a civil-service model in which judges in effect pick other judges, in a self-replicating bureaucracy.[2] If you want to be a judge in these countries, you take special courses in law school. You take a special exam. Then you are a baby judge. Then you work your way up through the system. You sit with other judges. They evaluate your performance, and you rise depending on their assessments of you in a meritocratic system. But this is not how it works at the apex of the American judicial system. Politicians—Presidents—pick judges and Justices, and these members of the judiciary outlast the President who picked them. So, to repeat, Chief Justices are ghosts of administrations past.

Now factor in a third structural point: the presidency is the element in our system that is probably the most dramatic engine of change because the office turns over all at once. The Senate never does—it changes gradually. As for the House, there are so many members that they are often not quite of one mind. But structurally, Presidents are change agents. In fact, most of our Presidents have been failed Presidents—many have unsuccessfully attempted to transform the status quo. Only a few Presidents have actually succeeded in transforming the basic political regime that pre-existed them.

America begins with Federalist Presidents: Washington and Adams. Then Jefferson comes along and he is the beginning of a new political order—a new partisan dynasty, if you will. This new order is eventually reinforced with Jackson, and the Jefferson/Jackson Party is basically the dominant force in America until it self-destructs just before and during the Civil War. Abraham Lincoln comes along, and he, too—like Jefferson—is a transformative President, the founder, in effect, of a partisan dynasty that will reign until Herbert Hoover crashes the whole thing. Then along comes the next transformative President, FDR, whose governing coalition dominates until 1968 or 1980, depending how you count.

So there are these transformative presidents—Jefferson, Lincoln, and FDR—who inherit ghosts of Presidents past called Justices. The Supreme Court is the lagging element in this political story. And there is high drama when a rising new President confronts the ghosts of administrations past—Jefferson against his kinsman John Marshall (and that is one of Jim's books);[3] Lincoln against Taney (another of Jim's books);[4] and FDR against the Hughes Court (the subject of Jim's most recent book).[5]

Another dramatic episode might have ensued had Chief Justice Earl Warren timed his exit better. Had Warren and LBJ managed to deliver the top judicial job to Abe Fortas, we would have witnessed Nixon against Fortas—with an even more dramatic clash of ghosts of soft-on-crime liberals against Nixonian Law and Order.

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2. For another example of a self-replicating bureaucracy, consider how a typical law school faculty replenishes itself.

3. *See* SIMON, *supra* note 1, *passim*.

4. *See* JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS (2006).

5. *See* JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES: THE PRESIDENT, THE SUPREME COURT, AND THE EPIC BATTLE OVER THE NEW DEAL (2012).

But because Fortas's nomination failed to go through, Nixon ended up getting something close to a new Court from the get-go, with Warren Burger and three other appointments. So by the time Reagan came along, the gap between the executive branch and the judicial branch was not nearly as wide as it might have been.

Why is that relevant today? Recall the poignant oath ceremonies—Marshall swearing in his adversary Jefferson; Taney swearing in Lincoln, who had made his career bashing Taney; and Hughes swearing in FDR. Now recall the most recent swearing in, with Chief Justice Roberts, the ghost of Republicans past, and President Obama, the rising new Democrat. These two men actually flubbed their lines at this event. From one perspective, the two are locked in agonistic struggle—the former President of the *Harvard Law Review* against the former Managing Editor of the *Harvard Law Review*. Can either live while the other survives?[6]

One final structural thought: The Republicans' best presidential candidate this year is not Mitch Daniels. He is from Indiana, and that is the right part of the country, but he is not very charismatic. But what about another famous Indiana Republican—namely, John Roberts? Is it impossible that a leading Justice would aspire to be President? Perhaps in today's world. But things were different in earlier eras.

At the Founding, judges and Justices were also once and future politicians. In the first election for President, Washington came in first, and Adams came in second. But John Jay and John Rutledge—soon to become America's first two Chief Justices—came in third and fourth, respectively, in the presidential sweepstakes of 1789. In 1801, the Federalists' best candidate for the presidency was probably John Marshall. Indeed, Bruce Ackerman has uncovered evidence that, only days before being named to the Court, Marshall was actually angling to win the presidency for himself in the knotty Burr-Jefferson deadlock of 1801.[7]

Jim wrote about Salmon P. Chase in one of his earlier books. Salmon P. Chase was third in the Republican Convention presidential vote in 1860, and he tried to leapfrog Lincoln for the top executive position in 1864. When Lincoln put Chase on the Court, here is what Lincoln said, privately:

> [Chase] is a man of unbounded ambition, and has been working all his life to become President. That he can never be; and I fear that if I make him chief-justice he will simply become more restless and uneasy and neglect the place in the strife and intrigue to make himself President.[8]

While Chase was presiding over Andrew Johnson's impeachment trial, the Chief Justice was angling to get the Democratic nomination in 1868. Here was the sitting Chief Justice aiming to be Chief Executive! Later, President Taft ended up as Chief Justice Taft. As Jim's new book recounts, Hughes stepped off the Court to run for

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6. Hat tip to J.K. Rowling.

7. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 43–45 (2005) (discussing the likelihood of John Marshall's authorship of the Horatius essay, a commentary subtly suggesting Marshall should assume the presidency in the event of a deadlock in the House).

8. 9 JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY 394 (1890).

President. And let us not forget that Earl Warren was the vice presidential candidate of the Republican Party shortly before becoming Chief Justice.

But today, things have changed a bit. Roberts may continue to square off against Obama in various ways, but not as the Republican nominee for the presidency, even though such a thing would not have been unthinkable at earlier moments of American history.

So these are the structural tensions between Chief Justices and Chief Executives. With his earlier books on Jefferson/Marshall and Lincoln/Taney, and now with his new book on FDR/Hughes, Jim Simon has helped us see a much larger pattern in American political history. So the next book, Jim, needs to be on Obama/Roberts. I can hardly wait.

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