

Leo E. Strine, Jr.

## MY RANDOM OBSERVATIONS ON ADVOCATING BEFORE THE GOVERNMENT

I have had the good fortune to spend most of my career advising important government decision makers – as counsel and chief policy advisor to Governor Thomas R. Carper and as a law clerk to two superb federal judges. While in private practice, I worked as a litigation associate with one of this State's finest law firms.

I have lobbied and been lobbied. I have written briefs and read briefs designed to persuade me or the judges for whom I worked. As Joni Mitchell sang about more important subjects (life and love), I've seen advocacy from "both sides now" and in each of the primary government forums where advocacy

occurs. I've had my share of victories and defeats.

These experiences have taught me some basic rules (some hard learned) about what it takes to advocate effectively before a government entity. Although some of these rules have more applicability to certain contexts than in others, many of them apply equally well to civil litigation, administrative practice, and legislative lobbying. While adherence to the rules may not guarantee your clients victory, it will, in general, maximize your clients' chances of success and, as important, solidify your reputation as a straightforward, effective advocate whose word can be trusted.

None of them are novel. At the risk, therefore, of sounding trite or preachy, I will set them forth as plainly as I can. The frequent use of the words "for example" is intentional, since I approached the writing of this article from a practical perspective informed by my own experiences in government service. At this point, I recognize that many of you will prefer to flick on an Ally McBeal rerun, crack open (or chill) a cold one, and read no further. Trust me, if that's your view, I can relate. For the rest of you, I hope you will find some of my observations helpful to you in your practices.

*Understand the institution, how it works, and its perspective* – Whenever you are trying to persuade a governmental entity to assent to your position, it is advisable to understand its institutional perspective: know the process by which its decisions are made and the interests that its decision-makers serve.

For example, in pushing a piece of legislation, a lobbyist must, among other things, consider: how the General Assembly works; which legislators make it work and their likely positions on the issue; when it works; and which of its committees are likely to have jurisdiction over the bill. If the bill is a controversial one, the lobbyist must consider how to influence and manage public opinion. If the bill is being pushed during an election year, this consideration is even more important.

Even if you consider all that, you have not even begun to do your job unless you consider what position the governor and the relevant executive agencies may have on the bill. As the person responsible for managing state government, the governor's perspective on particular bills is often different from those of individual legislators. Governors are often the bad guys of the legislative process, vetoing bills that legislators know are ill-advised but pass anyway because of constituent demands. In particular, governors closely scrutinize bills that make exceptions to a general rule for a particular individual or business (such as a special pension or tax exemption bill). Governors are also keenly interested in whether a bill, if enacted, can be administered effectively without undue interference with other government priorities. The generally bigger picture perspective of the governor must be considered by the lobbyist. Otherwise, the veto pen might undo all the lobbyist's good work on behalf of his client.

An important part of knowing the institution which you are trying to persuade is understanding who is involved in its decision-making process. Attempts to bypass the institution's decision-making process by avoiding discussions with or attempting to endrun key staff are unlikely to meet with success. Few sophisticated government decisionmakers will make a commitment without input from key advisors. Successful advocates recognize this and make it a point to brief all key advisors likely to be involved in the decision-making process. By interacting with and showing respect for all persons likely to have influence, the advocate not only generates goodwill, he discovers critical information about the factors most likely to influence the determination of the issue.

Whenever I pushed major bills in the General Assembly, for

example, I always made it a point to discuss the bills with the legislative attorneys. By taking the time to provide the legislative attorneys with drafts of bills and explanatory materials, I made their jobs easier. For my part, I was able to work out technical issues in advance of floor consideration, to help these key legislative advisors understand what our bills were intended to do (thus putting them in a position to convey that understanding to their clients), and to better anticipate objections to our bills – invaluable benefits in the legislative context.

Litigators must consider similar institutional factors. For example, the Court of Chancery's willingness to adjudicate matters on an expedited basis is well-known. However, so is the Court's unwillingness to do so *ex parte*, except in the most exigent circumstances. Yet, where there is time for proper notice to be given, there are lawyers who still attempt – unsuccessfully – to obtain temporary restraining orders and to schedule important proceedings without promptly advising their adversaries. By knowing the Court's perspective on this and other issues, you will better serve your clients.

*It's your cause, act accordingly* – It is maddening to be the subject of advocacy by a lawyer who doesn't appear to want to do the necessary work. On occasions too numerous to count, lobbyists called me up in the governor's office and asked to meet regarding their bills. In such circumstances, it was typical for me to agree but to ask to receive a copy of written materials explaining the bill in advance of the meeting.

Frequently, this request was met with resistance. Often I was told that nothing explaining the bill had been prepared. Sometimes I was told that the bill itself had not yet been drafted. "Couldn't we must meet and I'll get you the stuff later?" When I scheduled a meeting with a lobbyist or advocate, I wanted materials to read in advance so that I could reflect upon what the advocate was proposing, obtain advice and input from others in the Administration, and prepare myself to make the meeting with

the advocate meaningful.

Governors, cabinet secretaries, and legislators frequently distrust anything that is not in writing and that is not subject to scrutiny by their professional staffs. Even if they are not big readers, they often turn to staff members who are. They will often not make a commitment without input from others. Nor are they likely to sign on to a non-existent piece of paper.

Aides to governors, cabinet secretaries, and legislators *invariably* distrust any-

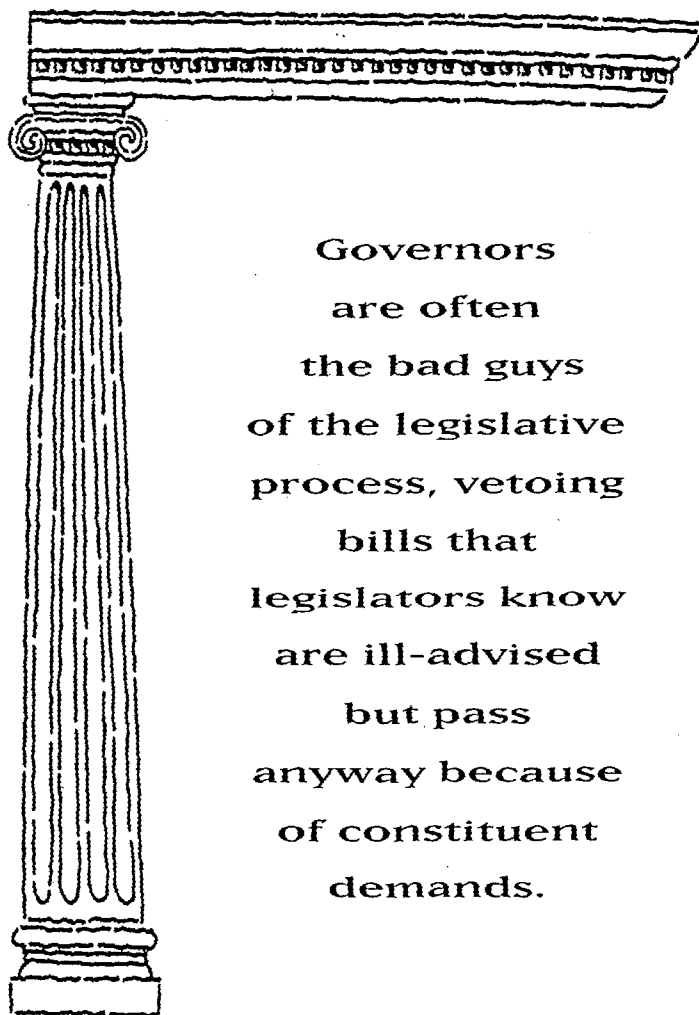
Similarly, litigators need to put their hours where the mouth is. In the short time I have been a Vice Chancellor, I have experienced some surprising situations in which proponents of expedited action by the court seemed reluctant to file timely papers. In one instance, a lawyer submitted an order to my Chambers that would have set an expedited trial date and have enjoined certain individuals from representing themselves as the directors of a corporation. When my secretary called to ask whether the lawyer was going to be submitting a brief in support of his application, the lawyer said he didn't know he needed to submit a brief and didn't know when he would be able to get one filed. In another case, a lawyer who was seeking a preliminary injunction on a very compressed time schedule expressed concern that the briefing schedule might require members of his firm to work on the weekend.

When you are asking a government tribunal to act – pass a bill, grant an injunction, or approve a license – you should present the tribunal with timely and persuasive documents in support of your position. Don't look at this requirement as a burden – view it as an opportunity to have your work frame the tribunal's actions.

*Get to the point and use decision-maker's time wisely* – Government decision-makers are busy people. Your advocacy materials need to be crafted with that in mind. Many lawyers,

myself included, tend to be, to put it nicely, overly thorough, or to put it less nicely, fulsome.

The advocate should present only substantial arguments and do so clearly and concisely. The nature of the materials presented should be tailored to the decision-makers who will receive them, the precise decision to be made, and the context and time in which the decision will be made. For example, an advocate should never present a governor, a cabinet secretary, or legislator with a twenty-five page memorandum in advance of a meeting and expect it to be read. Rather, the advocate



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thing that is not in writing. I know for a fact that this one did. After five and a half years of working for Governor Carper, I never discovered how to fax an oral presentation to the Budget Office, Finance Department, or other agency for their comments. To the extent that an advocate gave me his oral eloquence only, he imposed upon me to do his work for him by distilling that eloquence into a memorandum to others in the decision-making process. An effective advocate wants staff aides to write their briefing memoranda using the advocate's written presentation as their primary source.

should present a short (preferably no more than two pages) overview that the key decision-maker can digest and a more detailed memorandum (if necessary) for consumption by staff advisors.

Nor are courts and administrative tribunals hungry for prolix documents. Pointed briefs that make only strong arguments are much more likely to carry the day than weighty tomes that include every conceivable argument, however insubstantial. Again, the procedural context is critical to consider. To be effective, a brief must be read. If the TRO hearing is at 3:00 p.m. and you file a 30 page brief at 1:30 p.m., can you reasonably expect the judge to absorb it?

Always imagine yourself in the decision-maker's position as you determine how and what information to present. The need to get to the point also applies to meetings and hearings. Face time with government decision-makers is precious. The advocate needs to prepare carefully for the encounter, do the necessary spade work in advance, and get right to the point. The advocate should not expect a leisurely opportunity to make a ninety minute "power point" presentation to a room full of government decision-makers. This rule bleeds into the next.

**Welcome questions and answer them directly and promptly** – Most good advocates obey this rule instinctively and seize the opportunity to grapple forthrightly with a question posed to them by a key government decision-maker. When they don't have the answer at their fingertips, such advocates obtain the information promptly and put a direct and well-reasoned response in the decision-maker's hands.

Unfortunately, certain advocates seem to think of questions as intrusions on their opportunity to make an oral presentation. If the oral presentation is the only opportunity for an advocate to make his case, that perspective is understandable. Where, however, the advocate has had the opportunity to provide the government decision-maker with lengthy written materials (e.g., 80 pages of briefing) in advance of a meeting or hearing, this perspective is misguided. By the time a decision-maker has read 80 pages of your writing, he, I assure you, has heard you argue at length.

After digesting your written materials, the government decision-maker will have formed an initial impression of the key issues. At a face-to-face meeting or hearing, the decision-maker will not desire a rehash of your written work product. Rather, the decision-maker will want to ask you the

questions he needs answered to make his final decision – outcome-determinative questions. The advocate should jump at the chance to provide the decision-maker with direct, informative answers that support a decision in his client's favor. Recognizing that the time for oral advocacy is limited, the advocate must master the skill of giving direct answers while also respectfully, but clearly, steering the government decision-maker towards important considerations the advocate believes the decision-maker might be slighting. The advocate who gives such skillful answers instills confidence in the decision-maker that a ruling for the advocate's client will make sense. The advocate who evades or belittles the decision-maker's questions has the opposite effect.

Follow-up promptly on requests for further information. During my tenure with Governor Carper, I remember many situations in which the Governor told an advocate that he would not make a decision until he knew the answer to a question or until the advocate had touched certain bases. On more than one occasion, the advocate dillydallied and failed to follow up promptly on the Governor's requests. This suggested a lack of seriousness and purpose, and impeded the decision-making process.

**Be candid about what you want and be candid about whether the current state of policy or the law supports your position or whether you are seeking a departure from current practice** – Nothing is more injurious to an advocate before the government than a lack of candor. For example, every time you cite a case for a proposition it does not support, you damage your reputation. It's that simple. Judges and law clerks read briefs and cases carefully. Few things are more annoying in that process than pulling a case and finding that it provides little or no support for the proposition for which it is cited. Anytime that happened to me as a law clerk, I thought "[insert frustrated word of your choice], what if I had cited that in my draft for the judge?" As a judge, my reaction is probably even stronger. When judges sense that your beliefs do not reliably cite the law, they will begin to more closely scrutinize your arguments. They have to because they can't rely on you.

If existing case law does not support your position, you must be bold enough to craft a persuasive argument as to why the law should recognize your client's position as the correct one (or, if not, to advise your client not to proceed). While you might not prevail at the trial court

level (see the rule on understanding the institution before which you are advocating) with this approach, your chances of obtaining a victory through the misleading quotation of excerpted portions of off-point cases are even dimmer.

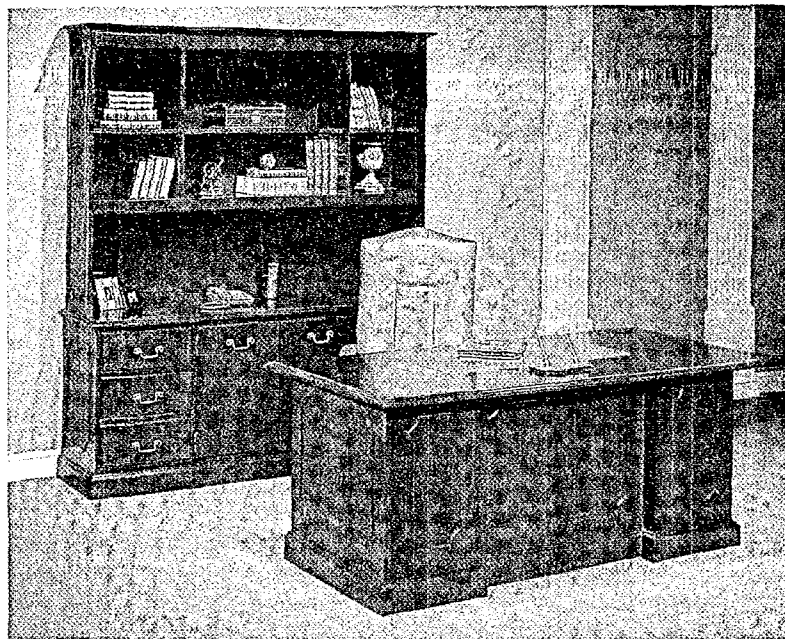
Candor is even more important in the legislative process. In late June in particular, things happen at lightning speed. Even the best of legislators or governors can't keep track of all that is happening. In the governor's office, we tried to do our best to know what was going on in every committee and on each floor as to each bill about which we harbored concerns. However, in the last few days of the General Assembly, it was humanly impossible to do so. Instead, we concentrated on those bills we needed passed and on those we most opposed.

In the late June melee, bills are sometimes passed that are poorly understood. It is not unknown for an advocate to take advantage of this possibility by introducing and obtaining passage of a bill with a synopsis that does not clearly state the public policy implications of the bill. The impression such a tactic makes on those in the Administration who deal with legislation is quite negative. They – who have literally hundreds of bills to review in July – rightly wonder – as they help the governor craft his veto message for the bill – whether the advocate was trying to put one over on them. They will remember the next time the advocate pushes something and they will look at what he is proposing much more carefully.

The administrative and legislative processes often tempt advocates to try to be all things to all people. It is nice to think that public policy issues can be resolved on a "win-win" basis; most important ones cannot. Advocates who lead divergent interests to believe they will each get what they want play a very dangerous game. Advocates, like Gregg Brady, can't take two dates to the prom. Government decision-makers talk with one another. Advocates who promise too much are quickly found out.

**Understand and explain the public policy implications of your position** – There is no rule more important than this if you are seeking to prevail on a matter of major public policy significance. You must identify why the world will be a better place if the decision-maker adopts your position.

A great deal of cynicism exists about how governmental decisions are made. I will not pretend that much of that cynicism is unjustified. Still the advocate who



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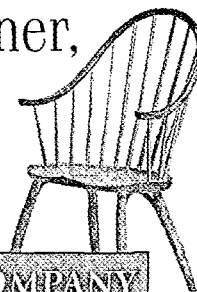
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ignores the fact that most government decisions-makers strive to do the right thing is unlikely to be very effective.

Even if you believe in your heart of hearts that government decisions turn on illicit factors, only a fool acts on that belief in professional practice. Believe it or not, there are government decision-makers whose principal concern in addressing an issue is in knowing "what is the right thing to do." Unless you have thought through that issue and are able to articulate a concise reason, you have not done your job as an advocate. If you must maintain your cynicism at all times, think of yourself as providing the decision-maker with a plausible fig leaf for taking self-interested action in your client's favor.

Too often, advocates are so intent on what their clients want, that they ignore the inconvenient fact that the government decision-maker cannot accord special treatment to their clients without justification. Too often, advocates believe that if their client is important enough, then the government decision-maker will believe the client's happiness is sufficient justification for the measure proposed.

The government decision-maker will consider how a ruling for your client will affect others. The government decision-maker will also consider what effect the precedent set by a ruling for your client will have on the decision-maker's flexibility to make future decisions. If the good that a decision will do for your client is far outweighed by the problems it will create for other citizens and the problematic precedent the decision will set, the decision is not likely to go your way. To prevail, you must make a persuasive case that a decision in your client's favor is fair, is the type of decision that should be rendered as to all citizens in similar circumstances, and will, if followed in future cases and circumstances, produce desirable public policy outcomes.

In formulating your arguments, you should consider the questions that will be on the minds of government decisions-makers. As a result of adopting your client's position: Will citizens be treated more or less fairly? Will citizens be encouraged to act in more or less socially productive a manner? Will the community experience benefits or detriments? Will the cost of delivering government services increase or decrease? If the costs increase, do the expected benefits justify the increased costs?

Even if you can't rid yourself of skepticism, remember: Few things are as off-putting to a government decision-maker

concerned with policy merits as to be confronted with an advocate who premises his argument on the fact that the decision-maker's personal political interests will be served by agreeing with the advocate. Such arguments make decision-makers uneasy and implicitly suggest that the advocate's position has so little substantive merit that he must resort to crassness.

Although public policy concerns might seem to loom somewhat larger in the legislative and administrative context than the judicial one, that perception is, I think, exaggerated. Judges frequently confront cases which are difficult not because the cases hinge on disputed facts, but because the cases turn on the legal implication of undisputed facts in contexts where the law is undecided. Although judges owe a duty to decide these cases within a framework shaped by the Constitutions and statutes of nation and state and judicial precedent, an important realm of discretion remains in which judges must make decisions about how the law should be applied. In that realm, judges must consider the policy ramifications of their choices carefully, lest they set socially harmful precedents which make it more difficult to do justice in future cases.

The very best advocates realize this and devote attention in their briefs to the larger implications of what they ask courts to do. But other highly competent advocates are content to write solid briefs correctly citing existing precedent, without setting forth persuasive reasons why the court should adopt the view of the law they advocate. In a case involving an important question of unsettled law, this type of advocacy is likely to be inadequate to carry the day. A trial court in particular may well feel that you have not given it adequate information for it to adopt a position that requires an evolution or innovation in the law. *See, e.g., Mentor Graphics v. Quickturn Design Sys., Inc.*, Del. Ch. 728 A.2d 25, 52 n.105 (1998), *aff'd*, Del. Supr., 721 A.2d 1281 (1998).

*Maintain your integrity and sense of humor* – Being an advocate in the public realm can be extremely rewarding. But it can also be exhausting, dispiriting, and disillusioning. Don't forget to laugh: there is no conflict between being serious about your purpose and having a sense of humor. Both are vital to the good advocate. Most of all, remember who you are, why you decided to become an advocate, and act accordingly.

If you do that you'll always be able to take pride in your work – and you just might maintain your sanity. ♦

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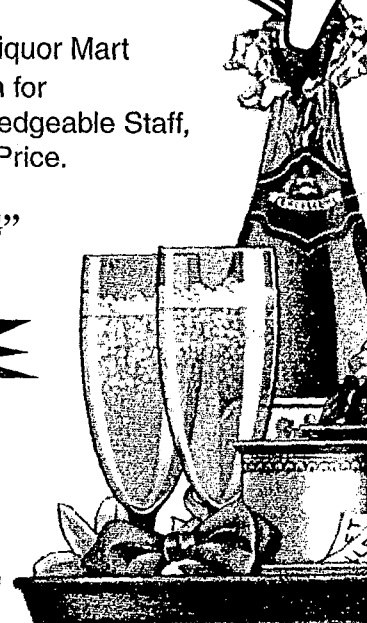
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## BOOK REVIEW

*continued from page 28*

peared was the best-selling issue in its history, not because of anything I had written, but because it contained "An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague," written by A. Leon Higginbotham, Jr., Chief Judge Emeritus of the U.S. Court of Appeals for the Third Circuit.<sup>2</sup>

Describing Thomas's public comments in prior years as "flashy one-liners to delight the conservative establishment" which "convey a stunted knowledge of history," Judge Higginbotham took it upon himself to lecture the former chairman of the U.S. Equal Employment Opportunity Commission about how civil rights lawyers and the Supreme Court had affected Thomas's life, by striking down school segregation, racial barriers to voting, racially restrictive deed covenants and anti-miscegenation laws. Expressing consternation that Thomas described himself as a black conservative, Higginbotham wondered what "so-called black conservatives" were anxious to conserve "other than their own self-advancement," and suggested that Thomas reflect on how white conservatives had fought to uphold state-imposed segregation and private race discrimination. Higginbotham's letter inspired a torrent of essays, and Higginbotham himself later wrote in 1994 that Justice Thomas's views "are for the 1990s at times the moral equivalent of the views of the shameful majorities in the nineteenth century Supreme Court cases of *Plessy and Dred Scott*."

If Higginbotham thought Justice Thomas could be swayed by external pressure, he misjudged him. In his early years on the Court, Justice Thomas wrote significant opinions on affirmative action, school desegregation and voting rights that broke sharply with the dogma of the civil rights establishment. Many of these opinions were concurrences in which Justice Thomas wrote for himself alone. Whether or not one agrees with President Bush's assessment that Judge Thomas was "the best person for the position," no other person could have written them.

Gerber is sympathetic to Thomas's opinions on race, because he sees in them his own political philosophy, which he calls "liberal originalism." As defined by Gerber, liberal originalism "maintains that the Constitution should be interpreted in light of the political philosophy

of the Declaration of Independence," unlike "conservative originalism," which "maintains that the Constitution should be interpreted as the Framers themselves would have interpreted it." Gerber believes that the former approach leads to color-blind constitutionalism. On two separate occasions, Gerber quotes with approval the following passage from *Adarand Constructors, Inc. v. Peña*,<sup>3</sup> in which Justice Thomas explained in a short concurring opinion why strict scrutiny must be applied to all racial classifications, including affirmative action programs:

There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

This passage leaves me cold. It is not implausible to me that a line can be drawn connecting the Declaration of Independence, the original constitutional text and then the 14th Amendment, and that these authorities require the invalidation of not just slavery and segregation, but also racial preferences in any form. To make the leap in one step, however, without legal or historical analysis, strikes me as dangerous judicial craftsmanship. It risks rendering the corpus of constitutional law a nullity.

But Justice Thomas is no simple liberal originalist. His jurisprudence finds its fullest expression not in *Adarand*, but in a much longer concurring opinion handed down the same day, in the school desegregation case of *Missouri v. Jenkins*.<sup>4</sup> In *Jenkins*, the Court held that the district court overseeing the desegregation efforts of the Kansas City, Missouri, School District (the "KCMSD") had exceeded its authority in ordering salary increases and the funding of educational programs for the purpose of reversing "white flight" and increasing student test scores. Justice Thomas wrote separately "to add a few thoughts with respect to the overall course of this litigation."

Justice Thomas began by identifying two threads in the Court's jurisprudence since *Brown v. Board of Education*<sup>5</sup> that

produced "this unfortunate situation, in which a District Court has taken it upon itself to experiment with the education of the KCMSD's black youth." First, the District Court misinterpreted *Brown* as resting on the theory that "black students suffer an unspecified psychological harm from segregation that retards their mental and educational development." Second, the Supreme Court "permitted the federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation." In untangling these two jurisprudential threads, Justice Thomas explained how constitutional law must be based on moral and political principles informed by a close reading of the historical record, not on contemporary notions of what is best for that group of people a civil rights organization claims to represent.

On the first point, Justice Thomas interpreted *Brown* as resting on the "simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race." Citing a law review article that gathered the historical evidence that the framers of the 14th Amendment opposed segregated schooling, Justice Thomas suggested that the *Brown* Court should have looked to that history rather than citing psychological studies about the impact of *de jure* segregation on black student achievement. Justice Thomas faulted the district court for indulging sociological or psychological theories linking racial isolation, attitudes of inferiority and low student achievement. He wrote that *de facto* segregation unaccompanied by racial discrimination is not a constitutional wrong, and that the idea that black students cannot achieve without the presence of white students must be based upon a theory of black inferiority.

On the subject of remedy, Justice Thomas wrote that federal courts did not have the authority to issue injunctions ordering the expenditure of funds for the purpose of decreasing racial isolation or increasing student achievement. Justice Thomas compared the wide-ranging "structural injunctions" used to implement *Brown v. Board of Education* with the Framers' far narrower conception of the equity power. Justice Thomas discussed a debate between the Anti-Federalists and the Federalists about the equitable powers of the federal courts and applied his own interpretative principle: "When an attack on the Constitution is followed by open Federalist effort to narrow the provision,



the appropriate conclusion is that the drafters and ratifiers of the Constitution approved the more limited construction offered in response." Originalism, federalism and the separation of powers all weighed against structural injunctions designed to achieve abstract goals and in favor of precise decrees designed to benefit only those who have been victims of *de jure* segregation.

I have discussed *Jenkins* at length because it illuminates the type of reasoning employed by Justice Thomas in *Adarand* and in many of the other cases discussed in Gerber's book, whether the subject matter be voting rights, prisoners' rights or the allocation of powers between the states and the federal government. Justice Thomas strives to locate a moral truth that is reflected in the constitutional (or statutory) text, structure and history, and then distinguish that operative principle from those underlying the legal claim being pressed in the case at hand.

Justice Thomas's approach magnifies the constitutional stakes. It shows little deference to the motivations behind a contemporary legal claim or governmental action, and does not lend itself to creating rules of decision that turn on close

analysis of the judicial precedents, which may minimize the tension between legal text and modern sensibility. In *United States v. Lopez*,<sup>6</sup> Justice Thomas wrote a concurring opinion in which he stated that the Court "must modify" its Commerce Clause jurisprudence of the past 60 years, and that "he might be willing to return to the original understanding," although "[c]onsideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean." His is a conservative jurisprudence for an ideological age. In that sense, Act One of Justice Thomas's confirmation hearings was an apt prelude for all that has followed. ♦

#### FOOTNOTES

1. I would add to that catalogue an unpublished manuscript written in 1992 by the sociologist Philip Rieff, bearing the unfortunate title, "*se offendendo*: The structure of a narrative never to be written; in seven speech-acts."
2. 140 U.Pa.L.Rev. 1005 (1992).
3. 115 S. Ct. 2097 (1995).
4. 115 S. Ct. 2038 (1995).
5. 347 U.S. 483 (1954).
6. 115 S. Ct. 1626 (1995).

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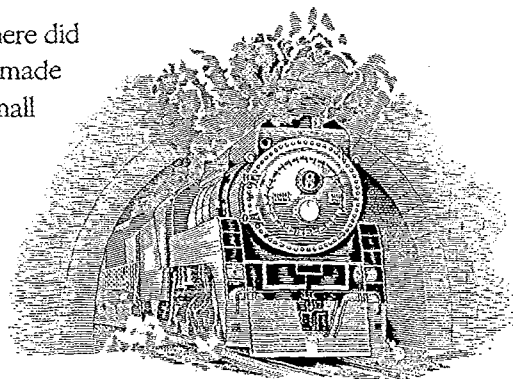
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- **Confidential Risk Management** - Our Risk Management professionals can help to identify day-to-day practices and patterns that may be exposing your firm to costly lawsuits.
- **Your Risk Management Resource** - We provide policyholders with publications that keep you up to date on relevant risk management issues.
- **Early Response** - ALPS claims experts are on call 24 hours a day, 365 days a year, and we encourage policyholders to call at the first sign of a problem.

With ALPS, you'll be prepared to handle whatever is coming around the bend. To find out more, or to apply, give us a call today.



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ALPS is the endorsed professional liability insurer of the Delaware State Bar Association.

## ALPS

Attorneys Liability Protection Society

A Mutual Risk Retention Group