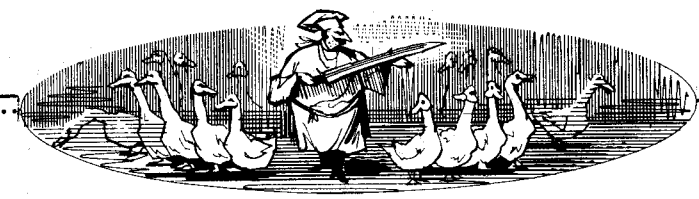




# OVERLOADING THE CIRCUITS

by Orrin G. Hatch

On March 4, Charles Winberry, an amiable lawyer and politico from North Carolina, became the first nominee to the federal bench to be rejected by the Senate Judiciary Committee in 43 years. Winberry earned this distinction because a coalition of Democrats and Republicans, including myself, thought him rightly disqualified by certain allegations of ethical and criminal wrongdoing. Yet, were it not for these allegations, there is little reason to suppose that Winberry would have been turned away, especially on the basis of his "judicial philosophy," whatever its ultimate nature. On this broader issue, hardly any of the new wave of nominees being processed under the 1978 Omnibus Judgeship Act are questioned at all. And increasingly some of us who have participated in these affairs are asking ourselves if this is right.

Judiciary Committee nomination hearings are held in a large, dark room in a remote corner of the Dirksen Senate Office Building. There is usually no press and no audience, just a few bored staff members and one or two senators. A court stenographer records the desultory exchanges. Sometimes, six or seven nominees are processed by the Committee within an hour. Barring unforeseen developments, these nominations for lifelong positions in the judiciary are approved by the full Committee without debate, by a voice vote, and reported to the full Senate, where they are approved finally under similar circumstances.

The casualness notwithstanding, what has been taking place here is nothing less than the transformation of an entire branch of the national government. It has occurred in an atmosphere that could not be more different from that attending the selection process for the executive branch. No armies of reporters assess the prospects of the nominees, no cameras focus upon those being elevated to permanent positions of national influence, and no commentators worry over the nuances of their public statements.

But how much less important will these people be to the tenor of our society? After all, it has been the federal judiciary, not the executive and certainly not the legislative branch, that has been in the forefront of change in recent years in the areas of race relations, crime and punishment, abortions, apportionment, women's rights, educational policies, land-use planning, federal-state relations, and the environment. In the month of June alone federal judges ordered the army to upgrade the dishonorable discharges of veterans involved in drug-related activities, dictated which textbooks were to be considered by Mississippi school districts, and ordered public funds appropriated for purposes expressly rejected by large majorities of both houses of Congress.

The Omnibus Judgeship Act of 1978 established 117 new federal district judgeships and 35 additional circuit judgeships. This increased the total number of federal court positions by nearly one third. With normal levels of attrition, this means that, whatever happens in November, President Carter will probably be responsible for appointing nearly one half of the federal bench by 1981, a legacy that will persist until well into the twenty-first century.

What is the nature of this legacy? Although it is difficult to discuss these matters with great certainty, it is likely that the Carter bench will be far more inclined toward "judicial activism" than the federal courts have been in the past. This, at a time when there is growing concern that the federal judiciary has already been too quick to usurp the legitimate prerogatives of other branches, and other levels, of government.

Despite his "commitment" to base judicial selection on merit, President Carter has remarked that, "If I didn't have to get Senate confirmation of all my appointees, I could just tell you flatly that 12 percent of all my judicial appointments would be black and 3 percent would be Spanish-speaking and 40 percent would be women and so forth." This need for "balance" on the court manifestly does not encompass philosophical balance.

In a study it conducted last year, the American Judicature Society concluded that only 3 percent of President Carter's appointees to the circuit courts viewed themselves as "conservative." To a man (or, increasingly, to a woman), they identifed themselves as "very liberal," "liberal," or "moderate," and as Democrats, many of them actively and partisanly so. Professor Sheldon Goldman of the University of Massachusetts has observed that the Carter appointees are more "liberal" than their predecessors, more "sensitive" to matters of civil liberties, and more likely to affect the laws governing the environment, labor, and race and sex discrimination. Not surprisingly, in their responses to a questionnaire prepared by Senator Paul Laxalt of Nevada and myself, recent nominees spoke with eerie unanimity on the need for a "flexible" Constitution to meet the "evolving" needs of society.

A specific case of the philosophical uniformity among recent appointments is the District of Columbia Circuit Court, arguably the second most influential court in the land because of its jurisdiction over much of our nation's regulatory and environmental law. President Carter's four new nominees to this panel have been: Abner Mikva, a highly respected but undeniably left-wing congressman from the silk-stocking suburbs of Chicago; Patricia Wald, a Deputy Attorney General in the Carter Justice Department best known for her "progressive" views on "children's rights" (she has recommended, for example, suffrage at age 13); Harry Edwards, a black law professor from the University of Michigan noted for his support of "affirmative action"; and Ruth Bader Ginsburg, a Columbia University law professor best known for her feminist views and active participation in the ERA effort. No wonder Abram Chayes of the Harvard Law School, in a speech arguing that the "public interest" law movement should explicitly commit itself to economic redistribution, said that the "legacy of the administration" on the D.C. Court will be "superb and with us for a long time."

Beyond the D.C. Circuit, the transformation of the Federal bench has been less visible, but no less dramatic. The *National Law Journal* has observed, for example, that individuals with "strong liberal" backgrounds have been placed on, and are likely to dominate, the second and ninth circuit courts in New York and California, respectively.

So uncritical has the Judiciary Committee been in weighing upon these nominations that not a single vote of opposition was registered against one nominee who, when confronted with the question of how he would resolve differences between his conscience and the clear letter of the law, responded unhesitatingly that he would be obliged to abide by the former. Another nominee, receiving similar approval, described a

*Orrin G. Hatch is the junior United States Senator from Utah.*

recent Supreme Court decision limiting the scope of school busing as the "culmination of a national anti-black strategy" which is in turn fueled by Congress inclined toward policies "which drip with racist anti-city and anti-busing features."

In fact, the few controversies that have developed before the Committee over recent nominations, Winberry notwithstanding, have been over the issue of race. In these instances, the Committee minutely examines nominees for evidence of membership in organizations without sufficient numbers of blacks or other minorities. In addition, it scrutinizes the patterns of a nominee's judicial decisions for evidence of racial bias, and it reviews a nominee's clerk-hiring policies for the same thing.

Why haven't we pursued with similar tenacity signs that nominees subscribe to jurisprudential philosophies at variance with a large number of the American people and their representatives in Congress? Why has the confirmation process taken place amidst so much silence and inattention?

At least in part, this is attributable to the fact that most senators (and I am no exception) have only the vaguest idea of just what their role ought to be in the confirmation process. There are no clear, commonly accepted standards by which nominations are weighed. During the Winberry nomination, for example, senators sharply disagreed over whether a legal standard of criminal guilt ("beyond a reasonable doubt") was necessary before the nomination could be properly rejected. In fact, for most senators, once the Committee has determined the legal competence of a nominee, and ensured his compliance with a modicum of ethical standards, it has done its job. Never mind that a nominee is "liberal" or "conservative," "activist" or "strict constructionist," with or without sympathy with the judicial trends of the day. To question him on his jurisprudential views would be somehow inappropriate—or so it is thought.

Whatever its virtues during normal times, when nominees appear before the Committee only infrequently, such thinking is dangerous when the entire judicial branch is being refashioned over a short period of time. Moreover, the spirit of institutional comity which prevents senators from questioning the qualifications of candidates from their colleagues' states is manifestly abused when these candidates fall into a sustained ideological pattern. The defects, flaws, and ideological biases that are countered, or at least tempered, by a nomination process that occurs over a long period of time are only exacerbated when the process is compressed.

The Republicans in the Senate can be faulted for not having recognized the ways in which the regular confirmation process differs from the process set in motion by the Omnibus Judgeship Act. They have allowed the administration to set the priorities for the confirmation process. They have cooperated with them in efficiently handling the unprecedented flow of nominations. But they have not scrutinized them, nor have they drawn the public's attention to the events taking place here.

As a partisan, I am apprehensive that many of the policies likely to be adopted by what I hope are future Republican majorities in Congress are likely to be tested severely by the Carter "windfall" judiciary. More important, as an American who believes strongly in the constitutional principles of checks and balances, federalism, and the separation of powers, I am concerned by the school of jurisprudence, now taking deep root in our judiciary, that does not, to my mind, respect these principles. □


# WILD ABOUT HENRY

by Richard Hanser

For the passage of time to turn an iconoclast into an icon is not all that rare, but there is always a cruelly comical element in the process when it happens. It is as if the dragon, disregarding St. George's sword, buckler, and hostile intent, should gather him to its bosom with happy cries of "Atta boy, George! Come to Papa!" Or as if the Christian Endeavor, in pious conclave assembled, should rise to its feet to acclaim Robert Ingersoll for spreading truth and wisdom.

Those are fantasies, of course, but something that lags not far behind them for irony and incongruity has in fact befallen Henry Louis Mencken, of all people. The centenary of his birth in September 1980 has been taken as a cause for pious celebration by many of the same folk he spent a lifetime knocking in the head.

Long before his death, in one of the playful *obiter dicta* he used to scatter among his longer pieces, he gave his own idea of how he might best be saluted *post mortem*. "If, after I depart this vale," he said, "you ever remember me and have thought to please my ghost, forgive some sinner and wink your eye at some homely girl." This was far too engaging and unconventional a notion to be taken seriously, of course. Those who now have thought to please his ghost go about it in ways that may well be causing the same roars of derision in Gehenna that the living Mencken emitted so freely when he walked the earth.

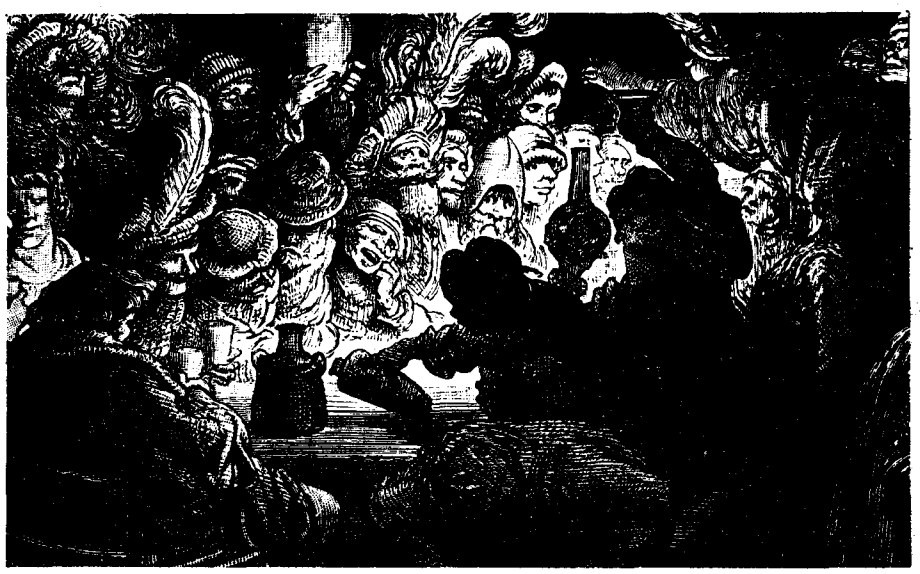
Did he regard oratory as "the lowest of all the arts" and ask: "What genuinely civilized man would turn out to hear even the champion orator of the country?" Well, oratory was the centerpiece of the Mencken epiphany that was celebrated on September 12 at the Belvedere Hotel in Baltimore. The demand for tickets to the rites, at 15 dollars a throw, turned out to be so overwhelming that an identical orgy was arranged for the following day to accommodate the overflow of idolators. ("The will to worship," he said, "never flags.") On both occasions the role of champion orator was assumed by Alistair Cooke, whose Chesterfieldian suavity remains miraculously untarnished after some 45 years on these shores.

Needless to say, the banquet room of the Belvedere, with its $150 tables, is a long cry, in style and ambience, from Mencken's own idea of after-hour conviviality. What he relished was a shirt-sleeve session of his beloved Saturday Night Club in the back room of Hildebrandt's music shop. "A refined and intellectual struggle with the Rum Demon," he called one such bash, "with music by Haydn." Or perhaps an unbuttoned romp at Shellhase's saloon where "after an opening bust of melody we slide to the beer table, and stick there until the last kidney gives out." There was nothing Belvedere or Chesterfieldian about Henry Mencken on his nights out.

High on his ample list of prejudices was the teaching profession. He began one of his blowtorch commentaries with the words: "Next to the clerk in holy orders, the fellow with the foulest job in the world is the school master." He publicly proclaimed his sympathy for college boys who, he said, were "daily and hourly affronted with balderdash by chalky pedagogues." And he characterized one of America's most highly regarded professors, a veritable ornament of academia, as "a geyser of pishposh."

Nevertheless, bevies of chalky pedagogues, choosing to disregard Mencken's opinion of their breed, rallied round the pentecostal observances. A dozen universities and colleges are even now spreading themselves with lectures, courses, exhibitions, and other academic vaudeville of the sort that made him hoot when he paid any attention to it at all. Hotbeds of the higher literacy like the University of Pennsylvania, Dartmouth, Goucher, and, of course, the University of Maryland are projecting their flattering unctions upon the *Geburtstagkind* well into 1981. (He himself never got beyond Baltimore Polytechnic.) An "H.L. Mencken Forensic Tournament," complete with debates and speech contests, is to be held this December at Towson State University, which is also offering a course called "H.L. Mencken: Bad Boy of Baltimore," conducted by one of the distinguished members of the English faculty.

Always, whether as reporter or editor, as literary critic or social commentator, Mencken was an outright and relentless adversary of just about everything the ruck of his fellow Americans cherished and revered.



He was wonderfully eclectic in his antipathies, and if he hooted at socialists and uplifters he was also contemptuous of "the wealthy bounders who run the United States" and who, he said, threatened to "raise the boobery in revolt" with their "intolerable hoggishness." He was forever cuffing, tweaking, and bludgeoning the types he once capsulized as "bishops, college professors, Rotary lecturers and other such professional damned fools."

But his fundamental and enduring antagonism was reserved for the intrusion of the state into the living-space of the individual. "I still believe firmly," he said in 1937, "that the two greatest intellectual possessions of modern man are the idea of personal freedom and the idea of the limitation of government." It followed that he had a grim opinion of Franklin Roosevelt and the whole political apparatus erected in his name. Some of his most withering blasts were discharged at what he saw as the social degeneration spreading in ever widening circles from Washington. He was a dedicated foe of Big Brother before the name was minted. "I incline to the Right," he once wrote, "and am a Tory in politics." He spoke scathingly of liberals ("also my enemies") with "their jugs of Peruna" and "their brummagem Utopias."

But the liberal community took over the centenary revels from the start and marked them for its own. One winces to think how he would rend heaven with his howls could he know that something called the National Endowment for the Humanities, one of Washington's more redundant cultural agencies, has shelled out government grant money for a convocation of Mencken *Gelehrten* in Chicago and has lavished further public funds on a television drama called *The Ghost of H.L. Mencken* by the gifted thespians of the Maryland Center for Public Broadcasting.

But perhaps the crowning, and crushing, irony is manifest in what has happened to the Mencken home

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*Richard Hanser is a documentary film writer and author of* A Noble Treason: The Revolt of the Munich Students Against Hitler.