

But Cf. . . .

MOVING THE SUPREMES TO THE HEARTLAND: THE CASE FOR OMAHA

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Justice Scalia recently proclaimed that the “proudest thing” he has done on the Court was to refuse to recuse himself from a case involving Vice President Cheney, with whom he had recently been duck hunting.¹ Views will no doubt differ as to whether Scalia should have recused himself or whether any of his judicial opinions deserve a higher place in the annals of judicial history than his refusal to step aside. But there is a deeper question: Do we want our Justices to be hobnobbing with the great and powerful? Or to put it another way, how much of the “Beltway mentality” do we want them to absorb?

Of course, Justice Scalia is hardly alone among Justices in his penchant for associating himself with Washington insiders. Justice Fortas’s friendship with Lyndon Johnson and Frankfurter’s with FDR come immediately to mind. But in a world in which the Court is seen as increasingly political, and in which political life seems increasingly polarized, perhaps we should seek a judiciary with fewer ties to Washington and more with the ordinary lives led by most Americans, who do not go hunting with Vice Presidents (as in Scalia’s case) or play poker with Presidents (as in William O. Douglas’s). Having the Court in Washington, where the Justices attend high powered cocktail parties and diplomatic receptions, can only serve to make the Court more political.

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1. Associated Press, April 12, 2006.

Relocating the Court far outside the Washington Beltway might help it reconnect to the rest of the country.² Omaha, for example. After all, Omaha is good enough for Warren Buffett. He “lives in a house he bought for \$35,000, dines on burgers and quotes Mae West.”³ That’s just the kind of all-American lifestyle we should want from the highest tribunal established by We the People. And if the city is good enough for the “Oracle of Omaha,” it should be good enough for Antonin Scalia and Stephen Breyer.

A move to Omaha would also provide the opportunity to get the Court out of the marble mausoleum where it now sits. Justice Brandeis considered it an inappropriate building to house a court in a democracy, and the temple-like architecture does seem to send the wrong message.

It may seem odd to separate the head of the judicial branch physically from the executive and legislative branches. But as the Germans have recognized, there is good sense in such a separation: “That the Constitutional Court in Germany is in Karlsruhe, while the capitol is in Berlin, limits the influence of one branch of government over the other.”⁴

It’s true that some Justices may pine for warmer climes or for more of the bright lights of an east coast metropolis. And some may miss the heady political atmosphere of Washington. But this, too, could be an advantage: perhaps fewer Justices would be tempted to terms of thirty or forty years, if the time had to be spent in Nebraska.

But doesn’t the Constitution require that the Court be located in the capital city? Not really. Article I, section 8, clause 17, refers to a congressional power over the “seat of government” as well as other land obtained with the consent of the states. But Congress was not obligated to exercise this power at all, let alone to place all “heads of departments” or other non-inferior officers there. It is also noteworthy that Berlin is still called the seat of German government even though the high

2. For an earlier suggestion to this effect, see Steven Calabresi, *Relimiting Federal Judicial Power: Should Congress Play a Role?*, 12 J. L. & POL. 627, 636-637 (1997). In a forthcoming article, Calabresi argues for similar reasons that Congress should reinstitute the practice of circuit riding by Justices. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal* (forthcoming Minn. L. Rev.).

3. “Warren Buffet,” in *Salon Brilliant Careers*, www.salon.com/people/bc/1999/08/31/buffett.

4. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 508 (1999).

court does not sit there. And surely it is odd to think that we are “governed” by the courts, at least if we continue to put any stock whatsoever in the idea of the courts as guided by law rather than exercising raw power.

Of course, a move to Omaha would not be a cure-all. Presumably, Justice Scalia could still hunt ducks with his friends, perhaps somewhere close to town. But it would be nice for the Justices to think of themselves as more like the lawyers, judges, and other honest folk of Nebraska, and less like the movers and shakers in Washington. A move to Omaha would be a step toward making Justices feel less imperial and more down-home. And after all, Omaha has worked very well indeed for Warren Buffett.

