Speaking Just for Myself

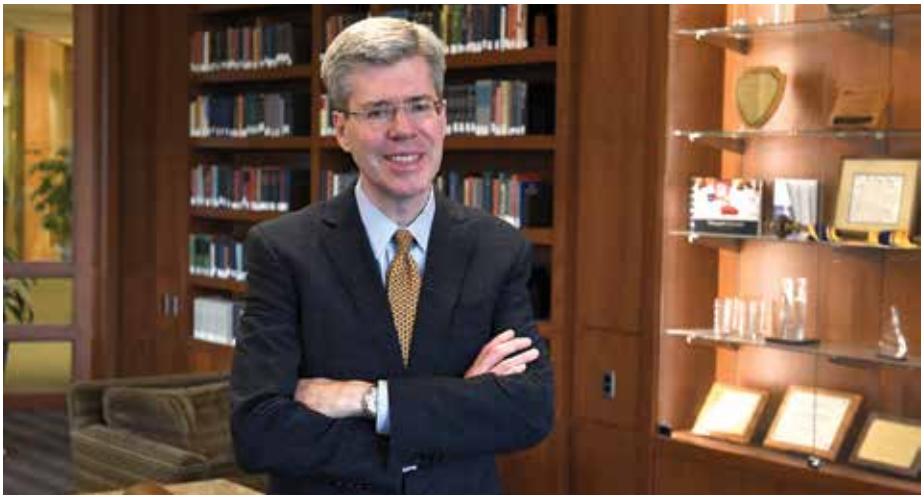
I recently read an article whose premise was that the Supreme Court had entered a particular order by a six-to-three vote. This seemed obvious to the writer because three justices had signed onto a dissent from the unsigned order. I saw it differently: We could know only that at least five of the justices had voted for the order. For all we knew, another ("the sixth") had *voted* with the three but decided against joining their dissent. Indeed, in our not-*too*-distant history, many judges noted or even "voted" their dissent only rarely.

The point is on my mind for a combination of reasons. One is that there is much call these days for people to "speak up." I have a good deal of sympathy for this. Years ago my mother wrote a brief piece appreciating William F. Buckley's essay, "Why Don't We Complain?" And surely there is a role for a lawyer in particular to contend against *injustice*—indeed, rather a unique duty, insofar as a client is the subject of it. I have considerable admiration for lawyers, including various of my fellow law school deans, who, during any presidential administration, act to "dissent" by their best lights, as with respect to recent political assaults on members of the legal profession.

Best lights vary, and so does different people's judgment. It would be rare for me to "sign" a joint statement as dean, just as it would be for me to join an amicus curiae brief speaking from an academic position. In the past 20 or so years as dean, for example, I can recall joining one group letter, addressing what some of us deans regard as troubling trends in the American Bar Association's approach to accreditation of law schools. My more typical forbearance is (to invert the example with which I began) not necessarily dissent.

The point came up rather "famously" in 2010 when I publicly supported Elena Kagan's nomination for the Supreme Court. The White House set up a conference call for reporters with the law deans of Harvard University, the University of Michigan, and Marquette University. After our brief statements, the reporter for the Associated Press asked me why I hadn't signed a group letter of law deans supporting the nomination. I noted my general aversion to group letters and then spent my time explaining *my own* substantive view as to why Kagan was well qualified to serve on the Court.

I was baffled the next day that more than 100 newspapers across the nation (given that it was in the AP story) included such statements as "Kearney . . . said his policy is not to sign group letters." Yet it was true, and eight years later, when I supported Brett Kavanaugh's nomination (the only other time that I have spoken publicly about a nomination to the Court), even leaving aside that there was no proposed group letter of law deans in circulation, I wrote an op-ed in the Milwaukee daily newspaper. I wrote or spoke in those instances—the Kagan and the Kavanaugh nominations—because I knew both nominees and thought myself to have something worth saying.



Why not join a group letter more frequently? The reasons include, even beyond a preference for proceeding personally, an efficiency or perhaps perfectionism interest (not signing frees me up from considering whether the letter says everything that, and only what, I wish to convey) and an attribution concern (a standard disclaimer in a group letter that signatories are not speaking *for* the institutions they are listed as serving may not be fully credited, especially when the signatories are all or mostly deans). In all events, I seek to be very careful about these matters, lest I tread on the general openness and diversity of thought we welcome at Marquette Law School, and I hope that my absence from any particular group activity is seen in that light and not necessarily as dissent.

I *will* speak for the Law School on occasion—saying here that we hope that you enjoy this issue of the *Marquette Lawyer*. Constitutional interpretation by the Supreme Court of Canada (pp. 6–17) and using tax policy to regulate artificial intelligence (pp. 18–25) are not matters on which I myself will go on the record. Yet I will make this exception, drawing on personal knowledge: the advent of President Kimo Ah Yun (see pp. 4–5), former provost and former dean of an undergraduate college here, is a most welcome matter for the Law School and Marquette University more generally. ■

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