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“NOT WILL, BUT JUDGMENT”*

JOHN MITCHELL

ALTHOUGH largely unnoticed in the press outside of Washington, one of the vital controversies in American history reached a dramatic high point three weeks ago in the nation’s capital.

Chief Justice Warren Burger had been invited to give the main address at the dedication of Georgetown University’s new Law Center. But a number of Georgetown law students were disturbed by a previous remark of the Chief Justice to the effect that the elective and legislative process, rather than litigation, should be regarded as the principal avenue of social change. They organized their own counter-dedication in the street outside the new Law Center, and for the main speaker they invited William Kunstler, the activist attorney who had received several sentences totaling over four years for contempt of court in the Chicago Seven Trial.

So, on September 17 we had two speeches at the same time and almost at the same place—one by the nation’s most eminent jurist and the other by a self-proclaimed “anti-establishment” lawyer who is among the most conspicuous exponents of activism in the courts. To give you an idea of the tone of Mr. Kunstler’s speech, the press quoted him as having said, “Chief Justice Burger represents a vile system, and speaks for a vile system. He is not fit to dedicate this law school . . .”

You can see that this whole situation was hardly calculated to enhance the dignity of the highest court and the highest magistrate in this land. Yet, far from being intimidated by this spectacle, the Chief Justice chose as his theme the very issue that had apparently brought on the counter-dedication in the first place.

On the earlier occasion, in a *New York Times* interview last July, the Chief Justice had been asked whether law students were justified in hoping they could accomplish “a change in the system through law.”

* An address by the former Attorney General of the United States before the Oregon State Bar Association, Gearhart, Oregon on October 8, 1971.

He had answered, in part:

I sincerely trust that some of their hopes may be justified. . . . Young people who decide to go into the law primarily on the theory that they can change the world by litigation in the courts I think may be in for some disappointments. It is not the right way to make the decision to go into the law, and that is not the route by which basic changes in a country like ours should be made. That is a legislative and policy process, part of the political process. And there is a very limited role for the courts in this respect.

It was apparently in response to this statement that Mr. Kunstler—and again I am referring to press accounts of the counter-dedication—declared, “I think the Chief Justice . . . is embarked on a program of destroying the new breed of lawyers as a force for social change.”

With this kind of rhetoric on one side of the issue, it is difficult to make any rational comparison between the two viewpoints. But since the encounter is so arresting, it almost commands our attention on one of the truly basic questions in our governmental system. Many young people are going into law because they anticipate using the courts to effect social change. The question is, therefore, is this the best channel that can be used by the energies working for change?

In his Georgetown University address, just as in his earlier press interview, Chief Justice Burger did not say that the courts should be avoided as an avenue of change. He did say that “although the litigation process is one factor in change, it is a slow, painful and often clumsy instrument of progress” He pointed out that “Federal

judges in particular need not be troubled by constituents or elections” He asked those who look to this source for change “to ponder what remedy is available if the world shaped by the judicial process is not to their liking.” And he reminded them that our history “began with a revolution instituted to overthrow a government that was beyond recall by the votes of the people.”

In fact, belief in rule by the people was so strong when the Constitution was originally formed that there was considerable argument for making the Federal judiciary an arm of the legislative branch. But the framers of the Constitution kept it separate as a check against the other two branches. Writing in the Federalist papers, Alexander Hamilton considered it to be the “least dangerous” of the three branches, since it “can take no active resolution” in the governing process. “It may truly be said,” he added, “to have neither force nor will, but only judgment.”

Since then there have been times when many feared that Hamilton was wrong. One who feared this declared:

The Court . . . has improperly set itself up as a third House of Congress—a super legislature . . . reading into the Constitution words and implications which are not there, and which were never intended to be there.

Who said that? Not one of today’s conservatives protesting the court’s opinion in *Miranda vs. Arizona* or *United States vs. Wade*. It was President Franklin D. Roosevelt, stung by a Supreme Court which had declared key New Deal measures to be unconstitutional—had, in his opinion, substituted will for judgment.

I bring this up as a reminder that the judiciary can and does work in either direction from one's own opinion and from public opinion. Those who may be enchanted with the Court as an instrument of change today would have opposed its actions yesterday and might oppose them again tomorrow. And the disenchantment can turn to alarm if the judgment referred to by Hamilton gives way to sheer will—the will of activist attorneys before the bar, the will of the judges themselves, or the will of another governmental branch trying to dominate the Court.

In retrospect, it is even more appalling today than it was in 1937 that President Roosevelt would attempt to destroy the independence of the Supreme Court with his court-packing scheme. In rejecting that scheme, Congress championed at that time just what Chief Justice Burger championed in his Georgetown University speech. It insisted on maintaining its own limitations and it defended the powers of another branch of Government. In reporting against the court packing bill, the Senate Judiciary Committee stated: "We are not the judges of the judges. We are not above the Constitution."

In this same spirit, the Chief Justice is saying today, in effect, "We cannot legislate for the legislators. We are not above the Constitution."

To some, it may seem strange for a man who has gained such eminence through a career in the courts to offer such a warning about the courts. Yet history will testify that such "judicial restraint"—the refusal to substitute will for judgment—is precisely the quality that most distinguishes a great judge. Even Chief Justice John Marshall,

who first effectively asserted the Supreme Court's power to declare an act of Congress unconstitutional, recognized that the true power in this country is and should be in the hands of the voters. "The people made the Constitution," he wrote, "and the people can unmake it. It is the creature of their own will, and lives only by their will."

You will recall that Justice Oliver Wendell Holmes was noted for approaching the law more from a philosophical than a legalistic viewpoint. But he was appalled when some of his colleagues seemed to measure a law in question, not by the Constitution, but by their personal leanings . . . seemed to apply will and not judgment.

"I strongly believe," he wrote, "that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."

All of this may sound naïve to those who cynically regard all of Government as a raw power struggle, with no holds barred, even if they do violence to the plan of Government itself. When it comes to the judiciary they hope to use it as, in Roosevelt's words, "a third House of Congress"—but a House not responsible to the people. Such a superlegislature might accomplish short-term results. But when will is thus substituted for judgment, neither the champions of the right nor of the left can benefit for long. What had seemed to be a sophisticated exploitation of the machinery of government would, in reality, turn the clock back hundreds of years to a day when the law was what the king said it was.

Certainly, it is true that the good fight can be fought and won in the courts. They have been the great bulwark against undue assumption of power by another branch.

They have provided an alternate mode for relief of grievances at times when the more active branches seemed stalemated.

Without trying to get the courts to re-make the law, young activist attorneys already have worlds to conquer in using the courts to enforce the law. Wrongs upon the public in such areas as environmental pollution, wrongs upon the individual in such areas as consumer fraud—these offer vast fields for plowing by those who commendably want to make their careers relevant to the needs of society. Let us remember that the discovery of facts constitutes more than half the practice of law. To document injustice and to invoke the law for the public good is no prideless portion of the human adventure.

And to work through law and the judicial institution in this manner is infinitely preferable to the tragic alternative espoused by some—to defy the law and destroy our institutions. In a country which offers the redress of the bench and the ballot, he is no hero who resorts to the barricade.

Yet with all this, it is also true that the courts are not constructed to carry the mainstream of national change. They are not intended to initiate, but only to respond. What they may consider, and when they may consider it, are limited by circumstances. Generally, they are to wait until a specific case is brought under someone else's law before they can perform what is best described as, not an action, but a reaction. And as they do this, their fact-finding capability is not nearly so comprehensive as that of a legislative body.

This, then, is the “slow, painful and often clumsy instrument of progress” to

which Chief Justice Burger referred. The purpose of the judiciary is to provide a detached and impartial judgment of legal problems presented to the Court, not to effectuate the people's will.

Finally, it is true that judges may in many instances give us a more clear cut decision than we can get from elected legislators, who must reconcile conflicting interests through compromise, or perhaps even from an elected executive, who is also mindful of varied interests and who must work through the extended machinery of government. But because of the need for judicial independence, judges are the least responsible to the people, and at the Federal level they are not responsible to the people at all. Hence, if judges were to step beyond judgment and substitute their will for the people's will—as expressed through the other branches—then we revert to some form of government other than a democracy.

In fact, it is not through just one, but through all three branches of government that young lawyers can find opportunity to effect change. All three branches have their share—some would say more than their share—of lawyers. In completing his answer to the *New York Times* interviewer, the Chief Justice touched on this when he said, “But if they see that as lawyers they may exert great influence on the whole system, then they may not be disappointed.”

I dare say that each of us may sometimes feel the frustration that was observed by the celebrated French traveler, Alexis De-Tocqueville, who visited America in the 1830s. “The lawyers of the United States,” he wrote, “form a party which is but little feared and scarcely perceived . . .” Yet

listen to what he added: "But this party extends over the whole community . . . it acts upon the country imperceptibly, but it finally fashions it to suit its own purposes."

Many of DeTocqueville's observations of American life are found to hold good to this day, but I do not believe that lawyers

as a class could ever agree among themselves how to fashion the country. Yet if only half of DeTocqueville's claim is true, lawyers exercise far more power than any other profession that young people could enter. And I would charge those who eventually attain to the bench, that they use this power, not with will, but with judgment.