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Judicial Reform

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JUDICIAL REFORM

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The title judicial reform is so broad that it needs definition in order to determine what it is we are discussing and in order to have a meeting of the minds. The term judicial reform has different meanings when talking about the federal court system as compared to the various state court systems. Because of the fact that many of the states are engaged in reforming their judicial systems, including the method of tenure and appointment of the judges of the respective benches, most of the comments that I will make will apply to the federal court system.

If one asks a legislator, and in particular a congressman, what he envisages by the term judicial reform you are more than likely to get the response that judicial reform means somehow limiting the jurisdiction of the federal court system or overhauling the administrative structures of the court system; normally you do not find congressmen thinking of judicial reform in terms of the method of selection and length of tenure of judges of the federal courts. This would include judges of the United States district court. Accordingly, in the past sessions of Congress we have seen a number of bills being introduced addressing themselves to this congressional concept of judicial reform and they include the following, among others:

1. We have seen a bill to establish a commission to revise and restructure the federal judicial circuits.
2. We have seen several bills which address themselves to limiting or taking away the jurisdiction of the federal court in cases relating to:
    a) Religious institutions which are exempt from taxation;
    b) Eligibility for public assistance payments;
    c) The sale or the use of any narcotic or drug;
    d) The distribution, sale or use of pornographic or obscene materials;
    e) Litigation involving the subject of abortions;
    f) Litigation involving the recital of prayers or Bible reading in the public school systems;
    g) Decisions of state courts regarding the pretrial law enforcement actions in criminal cases.
3. The confirmation process of federal judges by the United States Senate every ten years.
4. Mandatory retirement of judges in the federal court system at age 70.
5. The deletion of section 2281 of the United States Code relating to the establishment of three-judge district court panels.

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6. Controversies involving public schools.

In relation to congressional judicial reform, one should take note of the United States Constitution, article III, which contains some limitations on specifically what Congress can or cannot do relative to the district court system. Article III, in its pertinent part, reads as follows:

> Article III, Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
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> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the *Laws of the United States*, ... (emphasis added).

The question has been raised as to whether or not Congress has the power to limit the tenure of judges of the federal courts to retirement at age 70 in view of the fact that the Constitution says that they "shall hold their Offices during good Behaviour."[1]

In passing, one would note that the legislators of the various states have been active in reforming the judicial systems of some of the states. The most prominent and best known of the systems under the state reforms is the Missouri plan in which a judge does not run against opponents at large but runs against his record in terms of the question on the general election ballots. If one is interested in state reform, considerable information can be gained from the American Judicature Society, from the American Judges Association, and from various states that have implemented various judicial reforms.

If one asks lawyers who are practicing before the federal court what they might think of in terms of the phrase judicial reform, you would get a variety of responses which would cover perhaps some of the following, if not all of them:

> 1. We should reform the method by which judges are selected to serve on the bench. This should be done by a committee or a group of other lawyers or at least persons who are competent to judge the qualifications and credentials of a person being considered for the federal bench.
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> 2. Tenure should be limited to a mandatory retirement age of somewhere between 65 to 70 years. In addition, perhaps tenure should only be for ten year appointments at one time or some other logical period after which the appointee would have to return to the Senate of the United States and on the basis of his record seek reappointment to the office by the Senate. Thus, the judicial candidate would be subject to some kind of accountability to the elected representatives of the people.

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[1] U.S. CONST. art. III, §§ 1, 2.

3. It has also been suggested that perhaps a judge should be appointed for a 6 to 10 year term, which would not be renewable and after which he would leave the bench and be returned to private practice or any other activity that he would choose. The thrust of this suggestion would be that if a judge has to seek reappointment every 6 to 10 years, it is going to turn him into a politician and he is going to be susceptible to pressures by Congress; on the other hand, if he knows that he is only on the bench for a one-shot term of 6 to 10 years or perhaps even 15 years, he will serve with independence, which is good, but his term will not be extended and he will not be turned into a politician by way of altering his actions on the bench in order to accommodate reappointment, etc.

4. Lawyers also think in terms of limiting the jurisdiction of the courts as was discussed under the congressional heading above.

In talking to lawyers, one is more likely than not also to elicit the observation that one reason we need judicial reform, especially at the federal court level, is to stop the federal courts from their current practice of legislating from the bench. The reason given for this is that judges are appointed to the bench early in terms of their chronological age and can look forward to a long lifetime tenure on the bench. During that tenure they are practically totally autonomous from any of the branches of government and, in fact, they are accountable to no one. They are not even accountable to the people from whom their power is derived. The thrust of the suggestions, therefore, that you would elicit from lawyers as well as from others is that the complete and total autonomy of the bench has its good sides and its bad sides. In terms of a lack of accountability it is not necessarily desirable.

If you discuss the subject of judicial reform with the non-lawyer or layman you will immediately find that the average layman is not well advised or competent enough in terms of information that he perceives and obtains to evaluate and judge the judicial system and the judges that serve it. Thus, you will find laymen responding to the question in terms of: "some judges are too hard;" or, "some judges are too soft" (in terms of the sentences they hand out in criminal proceedings); or you will find them responding with indignation or enthusiasm, depending upon the point of view, concerning civil damage verdicts which are generally read about in the news media and which constitute the great bulk of information that the average layman has about the court system. They are not aware of the administrations of the courts nor are they aware of the law that the courts have to apply. Generally they just do not know whether a judge is good or not except in terms which are, for all practical purposes, irrelevant and immaterial. This raises a very serious question about having judges evaluated in general elections by the general electorate. The average member of the electorate is not competent to judge members of the bench in terms of their goodness or badness as the case may be. This is one of the major criticisms of the Missouri system in that it calls for an evaluation by the general electorate which, for all practical purposes, again is meaningless.

Thus we find the courts and Congress and lawyers thinking in terms of judicial reform committees or having judges reaffirmed by the Congress or Senate as the case may be.

In order to bring some of the above observations into sharper focus let me refer to some other sources of observation concerning the federal court system. I would refer you first of all to an article written by James L. Oakes, Circuit Judge, United States Court of Appeals for the Second Circuit, which appears in the *St. John's Law Review*.[2] Judge Oakes makes the following observations, among others. The article should be read because it contains observations about the three-judge panel which are very apropos. But to quote the judge:

> Three-judge courts as an institution are under considerable pressure. Increasing federal court business coupled, perhaps, with less fear that a single judge's enjoining a state statute that is unconstitutional might create a constitutional crisis in a federal system, have led distinguished bodies, commentators, judges, and now the United States Senate alike to call for the partial abolition and modification of the requirements in 28 U.S.C. § 2281 that: [and here section 2281 is repeated verbatim but will not be repeated here].[3]

And Judge Oakes again at the conclusion of his article states:

> Abolition of the procedure as called for in the Senate Bill [S. 271, 93d Cong. 1st Sess. (1973)] is, however, a consummation devoutly to be wished . . . . [T]hose of us in the federal courts who would rather get down to the substantive business at hand, of which we have enough, will shed no tears at the demise of three-judge courts. I suspect that lawyers bent on obtaining prompt and proper rulings on constitutional issues with adequate factual records will not either.[4]

Mr. Charles Tobin, who is an attorney in New York and the Secretary of the New York State Catholic Committee, has been concerned with the subject of judicial reform for some time. In a general memorandum dated June 15, 1972, Mr. Tobin makes the following suggestions relative to some of the solutions that might be suggested for the subject and dilemma of needed judicial reform:

> All of this comment brings us to the question of proposed solutions. It seems to some of us that we will continue to be adversely affected by the Federal litigation process so long as the current procedures remain for appointment and for commencement of litigation. We would think it desirable that there be a major effort made through the appropriate sources to recommend to the Congress that there be some changes in the structure of the Federal Judiciary. We would have in mind that these changes might include all or some of the following:

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[2] Oakes, *The Three-Judge Court and Direct Appeals to the Second Circuit*, 48 ST. JOHN'S L. REV. 205 (1973).

[3] *Id.* (footnotes omitted).

[4] *Id.* at 211 (footnotes omitted).

1. That there be a severe limitation upon the right of taxpayers to sue and to begin a three-judge court case.
2. That organizational plaintiffs should be barred unless they can specifically demonstrate a direct interest.
3. That the method of assignment of the judges to these courts be completely automatic and without any possibility of "forum shopping" or selection of particular judges.
4. That the term of Federal judges be fixed for no longer than 6 to 10 years and that they have a mandatory retirement age of 65.
5. That there be established a special appellate panel of judges of the several circuits made up of probably 5 judges who would be an intermediate Court of Appeal from three-judge courts, so that there would be an assurance of one full review in every three-judge court litigation. At the present time we do not feel that the certiorari route gives an adequate review because the Supreme Court is forced to restrain itself from taking cases because of the size of the court and the limits of its docket. Literally, the Supreme Court is swamped by cases and as a result many cases which should be reviewed by that court get pro forma dismissal by clerks employed by the judges.

I would also refer you to the January, 1974 issue of the *Journal of The American Judicature Society*,[5] which is dedicated almost entirely to the subject of judicial reform at both the state and the federal court level.

I have exchanged correspondence with Frederick C. Wright, III, who is an Administrative Judge of the District Court of Maryland, District No. 3, and he has responded by a copy of a report that he rendered to the American Judges Association. It deals primarily with reform or the status of state court systems, but it is comprehensive and has a remark concerning almost every state in the Union. Copies of this are available, I would assume, from either Judge Wright or I would be happy to supply them to anyone desiring them from my office copy.

Lest anyone think that the need for judicial reform is merely an academic thing, let me relate to you what I have heard referred to as a horror story concerning the need for judicial reform. Earlier I stated that the basic reason for the need for reform was that courts have become totally autonomous and accountable to no one and have, thus, begun to legislate from the bench. Thus, the courts have assumed the role of writing the law rather than interpreting and applying decisions concerning the law as written by the proper legislative bodies. I think that some specific examples will serve as well here. The first is in the area of education law and specifically laws that have been passed by the various state legislatures throughout the nation concerning aid to nonpublic education. The most recent of these are *Levitt v. Committee for Public Education & Religious Liberty (PEARL)*[6] and *Committee for Public Education & Religious Liberty v. Nyquist*.[7] We

[5] 57 J. AM. JUD. SOC'Y 227, 227-74 (1974).
[6] 413 U.S. 472 (1973).
[7] 413 U.S. 756 (1973).

are all familiar with the three prong test that has been promulgated by the court prior to the *PEARL-Nyquist* cases to determine the constitutionality of state aid bills. The three prong test was: primary purpose, legislative effect, and entanglement. In the *Nyquist* case we saw that Mr. Justice Powell, who wrote the decision, went through and reviewed the New York legislation against the background of the three prong test; he found in each specific instance that the law met the test. He then went on to announce, however, a fourth test which had never been heard before and which I would say is that fourth rule that we heard Mr. Joseph Skelly make reference to as a possibility in *Meek v. Pittenger*[8] that they have successfully pursued so far in the federal court system. The fourth test, of course, was dredged up by the Court simply because the Court in its legislative function was not satisfied with the results that would occur by the application of the previously announced three prong test. In other words, the Court made up a rule as it went along to accomplish the result that it wanted to accomplish because the previously announced rules would not do that. The fourth test, of course, was Mr. Justice Powell's pronouncement:

> But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.[9]

Thus, the Court has injected the fourth criterion for the applying of its three previous rules and makes the rules up as it goes along. Other examples of the autonomy of the court are ample. The State of Ohio has seen its legislative laws continuously stricken by the same three-judge panel over a period of about three years. In one instance the court made disposition of the case on the merits in response to pretrial jurisdictional motions without even waiting for the case to be heard or the issues to be joined by the filing of answers.

Of course, I think we are all familiar with the abortion cases of *Wade*[10] and *Bolton*,[11] wherein the Court not only legislated from the bench but interpreted the United States Constitution in a way that is totally foreign to that document itself and the applications which it has received down through our almost 200 years of history since the Constitution was ratified. In holding that the unborn children are not persons in the full sense of the law, the Court was clearly in error, clearly contrary to previous rulings of all the courts of the land including itself, and clearly was legislating.

In terms of the general subject of separation of church and state, we

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[8] 374 F. Supp. 639 (E.D. Pa. 1974), *prob. juris. noted*, 43 U.S.L.W. 3207 (U.S. Oct. 15, 1974) (No. 73-1765).

[9] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[10] Roe v. Wade, 410 U.S. 113, *rehearing denied*, 410 U.S. 959 (1973).

[11] Doe v. Bolton, 410 U.S. 179, *rehearing denied*, 410 U.S. 951 (1973).

have seen the Court again legislate by interpreting the term "separation" in a way which was clearly not defined or intended by the founders of the Constitution and in a way which is clearly erroneous and which constitutes legislation in terms of the supreme law of the land, *i.e.*, the Constitution.

Flast v. Cohen[12] stands very close to being a legislative decision by the Court in terms of expanding its own jurisdiction. You will recall that *Flast* was the case wherein standing requisites were drastically changed by the Court and the Court opened itself up to litigation by granting standing to almost anyone that cared to file a court case in the federal court system.

These are just a few examples of what might be interpreted by some as legislating from the bench, which I think served to sharpen up the focus of need for legislative reform as outlined above. The point is that in terms of petitioning the government and seeking our rights to the passage of proper legislation at both the state and the federal levels, the church-state issue seems to be in proper context and we are able to obtain fair hearings and a share of our rights before the legislative bodies of the nation. It is all for naught, however, when proper legislation is continuously struck down as being unconstitutional by a federal court system which insists on substituting its judgment for that of legislators and insists further on legislating from the bench in the form of making up the rules as it goes along to attain the ends which they think ought to be attained. The autonomy of the court is intolerable and even if the court were of a mind to legislate and to hold all rulings in favor of the church we should still stand as being opposed to the ability and the allowance of the court to legislate from the bench as being a violation of the general principles of democratic government. It is not so much what the court does by way of legislating and failing to follow its own rulings and the law but the fact that it is allowed to happen that constitutes the real danger to any person or group of persons in the nation, be they in favor of aid to nonpublic education or against abortion, or whatever. One would think that even the Civil Liberties Union and the other libertarian groups would be opposed to the autonomous powers of the court; however, it is understandable that currently they are not because the court is predisposed to making rulings in their favor. It would be interesting to see what their stand would be on this subject of court autonomy if the court were to turn around and begin to issue rulings by way of legislation against libertarian concepts. Even if that were to happen, we should still stand on record as being against the court having such powers and we should stand in favor of judicial reform which would bring this kind of activity by the court to an end.

In closing let me observe that if what I have said sounds paranoid it is because probably I am becoming paranoid at the treatment that we are receiving in the hands of the court. I would say, again, for emphasis,

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[12] 392 U.S. 83 (1968).

however, that even though we have suffered at the hands of adverse decisions, it is not so much the adverse decisions as the principle that the courts need reforming to change and take away from them their autonomy and to make them accountable through some proper process to the will of the people. While it is true that the court must have autonomy to be taken out of the field of politics and not be held in check in any way by the legislative and executive branches of government, it is not proper democracy that the courts should be completely and totally autonomous and no longer accountable to the people from whom they have derived their power.