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LEGISLATIVE PROPOSALS TO CURTAIL THE JURISDICTION OF THE FEDERAL COURTS

HONORABLE PETER J. RODINO*

I am particularly pleased that I was specifically requested to address the subject of bills that are now before the Congress that would strip the federal courts of their jurisdiction in certain areas of legislation.

Had I not been asked, very frankly, I think I would have chosen this topic anyway, for this balance of power that is involved in such court-stripping bills has served our nation superbly for two hundred years now. It is one that goes to the heart of our system of government, and in my opinion the current efforts before the Congress to limit or take away the federal courts' jurisdiction over school desegregation, school prayer, and abortion have implications that transcend the importance of the issues themselves, however troubling those issues might be to many of us. Indeed, in my judgment, they threaten what has been called one of the most serious constitutional crises since the Civil War.

Nine years ago, as many of you will remember, our nation faced another constitutional crisis: the time of the impeachment proceedings against the President of the United States, an era known as Watergate. At that time, much more than the fate of a president was at stake in my opinion, for we were in fact undergoing a survival test of our system of constitutional government. We were confronted then with the need to demonstrate the mightiness of the fundamental principles on which our nation was founded, that ours is, indeed, a government of laws, not of men, and that no one is above the law.

We survived that crisis. We proved our commitment to those principles. And, if that crisis was brought on in large measure by lawyers in the

* Chairman, Judiciary Committee, House of Representatives.

service of a lawyer-president, happily it was also averted responsibly by lawyers, the members of the House Judiciary Committee. They represented all sections of the country, and they were male and female and black and white and with diverse points of view. But they all were committed to one fundamental principle, to the preservation of the law and the Constitution.

Those were sad times for lawyers. Our reputation was at an all-time low. Our profession was viewed with cynicism, and disrespect. It was forgotten, however, that lawyers had seized the occasion of a petty squabble between a tyrannical king and a collection of greedy barons to establish the great principles embodied in the Magna Carta, that the king, like his subjects, is under God and the law. It was forgotten also that lawyers—Jefferson, Adams, Madison, Patrick Henry—had articulated and then fought for the fundamental precept of the American revolution, the then-radical notion that sovereignty resides not with kings and emperors, but with the people.

While the legal profession has not yet fully recovered from that dismal performance in that era of Watergate, it has regained standing because the vast majority of lawyers continue to demonstrate the competence and the will to shoulder the social, ethical, and legal responsibilities that lawyers have always borne, the aberration of Watergate aside. And the legal profession can win back public confidence by doing those things that lawyers by education, training, and experience are best equipped to do, that is to help re-establish confidence in our system of justice and to try to provide equal access to justice for all citizens, especially the poor and the powerless who need our system of justice more than any others to protect them from institutions that would take away some of the advantages that are provided for them under the Constitution and that would take advantage of them economically, socially, and politically.

Lawyers for the most part have always been eloquent leaders in promoting respect for the law in our society and in the political process at all levels of government. Sadly, however, our efforts and talents have not always been appreciated. Plato would have banished us, and Shakespeare would have killed us. And Edmund Burke, in discussing the reasons for troubles with the colonies, had this to say: "In no country perhaps in the world is the law so generally studied. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze."

No matter these quotable sayings, lawyers have served as the conscience of mankind, giving expression in rules and bearing witness by their conduct to the highest ethical aspirations of civilization. And if we as lawyers are to continue to meet our obligations to protect our ethical aspirations, to uphold our Constitution, to serve society and improve con-

ditions in society we must be ever alert for the tainted breeze.

In my view, the ongoing efforts in Congress to restrict the federal judiciary are nothing less than an attack on the Constitution, and, if successful, they would be a large, misguided step toward restoring to the legislatures the unchecked powers they exercised after the revolution—abuses that led our Founding Fathers to conceive and draft a Constitution based on the principle of separation of powers, a system that established an independent judiciary so that our Republic might more perfectly function and survive.

Mr. Wilfred Caron, in commenting on one of the court-stripping measures introduced in the last Congress, summed up in stark terms the threat this legislation holds. In his analysis of the bill, Mr. Caron wrote, “it is especially dangerous because it fosters the institutionalization of a subtle tyranny whereby a majority of legislators could achieve potentially unconstitutional objectives by suppressing the federal judiciary. This view of government places at risk the full range of constitutional rights and safeguards. It places special interests above the Constitution and the common good.”

I agree wholeheartedly. I believe that these bills, these proposals that would deny the federal judiciary authority to interpret the Constitution and order remedies for violations would, if enacted, threaten constitutional collision of tragic dimensions.

There are at present more than a dozen such bills pending in the Congress. Some would strip all federal courts, including the Supreme Court, of jurisdiction in the areas I mentioned. Others would affect only the lower courts. This challenge to our Constitution and the principle of separation of powers in my opinion holds profound implications for all of our citizens. If it were to succeed, no constitutional guarantee would be secure. And we as lawyers, I suggest, as vigorous and articulate defenders of our legal system and our Constitution, should be in the vanguard of the resistance to such an assault. However, it is a battle to be fought not by lawyers alone, but by all citizens.

“A people may prefer a free government,” John Stuart Mill wrote, “but if, from indolence or carelessness, or cowardice, or want of public spirit, they are not equal to the exertions necessary for preserving it . . . though it may be to their good to have had it even for a short time they are unlikely long to enjoy it.”

This then is a primary obligation of those who understand the law. No matter what our politics and ideology, it is our obligation, I believe, to defend and preserve the Constitution. And I am delighted to report that many knowledgeable people in and out of government, liberals, conservatives, Democrats, Republicans have united in opposition to this type of challenge.

Four former attorneys general have denounced these proposals. Wil-

liam French Smith, the present Attorney General, has warned that the Congress cannot tamper with what he calls the "core functions" of the Supreme Court. He did, however, endorse as constitutional a bill passed by the Senate last year that would have limited the power of courts to order busing for school desegregation. That measure, however, died in the House.

Robert Bork, a former Solicitor General with conservative credentials, appointed by President Reagan to the federal appellate court bench, has labeled these bills unwise and probably unconstitutional. Senator Barry Goldwater, who has fallen into disfavor with elements of the so-called New Right because of his crusty defense of constitutional principles, has assailed these bills as assaults on the doctrine of separation of powers and on the independence of the courts.

But to me, the most telling rejection has been the unanimous denunciation of these proposals by the chief justices of the Supreme Courts of all fifty states. It has been suggested that some proponents seem to imply that, with these laws on the books, the state courts would wink at established constitutional law. The states' chief justices found unacceptable this apparent assumption that they would dishonor their oaths to obey the Constitution and would not meet their absolute obligation to follow the law as laid down by the Supreme Court. Their unanimous resolution adopted last year in conference at Williamsburg, Virginia, rejected this notion. They branded the court-stripping idea "a hazardous experiment with a vulnerable fabric of the nation's judicial system."

Because there has been no authoritative ruling on the matter, there is scholarly disagreement over the extent of the power of Congress to limit court jurisdiction. Some argue that the Exceptions Clause of Article 3 of the Constitution gives Congress the power to regulate the jurisdiction of all federal courts. Others, including many who oppose abortion, busing, and the ban on school prayer, argue that congressional power in the Exceptions Clause is limited by the Supremacy Clause and other constitutional provisions—the fifth and fourteenth amendments—that guarantee due process and equal protection. And as one put it, the Exceptions Clause "does not automatically give Congress a free ride through the rest of the document."

The Exceptions Clause does confer great authority on the Congress. But that authority is not absolute, and, personally, I do not believe that Congress can strip the Supreme Court of its essential role of reviewing the constitutionality of state laws and state acts.

But let us suppose for a moment that the Congress did enact a law denying the Supreme Court jurisdiction over, for instance, state school prayer statutes. Then suppose that a state passed a law authorizing prayer in public schools. And, despite the federal law, a plaintiff challenges the state's statute and takes its case to the Supreme Court—and

that court rules the act denying it jurisdiction is unconstitutional. What happens then? Each of you can write your own scenario, any of which is certain to be a prescription for a horrible confrontation between the branches, a constitutional gridlock.

If these court-stripping proposals were found to be constitutional, and I do not think that that is going to happen, the precedent established would, I think, be equally disastrous. No longer would there be a single interpretation of the Constitution. No longer would we be one nation indivisible. Indeed, state courts could go in fifty different directions. Persons asserting the same right would be treated differently in different jurisdictions, a circumstance certain to sow confusion, chaos, and conflict among citizens, breed disrespect and cynicism about our legal system, and lead to disorder and disobedience. And, if Congress could ultimately control the issues the federal courts can address, all constitutional rights would be subject to the will of the majority of the moment.

We acknowledge that many of today's Court critics are disturbed and troubled with the rulings on abortion, busing, and prayer. But, if they can nullify these decisions by court stripping, where might tomorrow's majority strike? Would they take from the Court authority to rule on state laws that might restrict freedom of the press or the right to peaceably assemble? Would they bar the Court from hearing challenges to laws impinging on constitutional protections against unreasonable searches and seizures? Would they place beyond the Court's reach laws that nullify property rights, due process, and equal protection? Who, at a given time, might not be subject to majoritarian persecution, if you will? As Sir Thomas More warned, "If you cut down the law to get at the devil, what will you hide behind when the devil comes after you?"

Some of us may passionately disagree with the Court's decisions on some constitutional issues. We do not have to agree with the Court, but we are bound to obey it. These bills, however, are not really about abortion or busing or school prayer. Rather, they are radical efforts to redefine the role of the courts in determining constitutional rights and remedies, to reallocate authority in our system of checks and balances. That is what they are really all about.

The Constitution is a flexible document. But it must not be one that can be bent at the pleasure of a mere legislative majority. A legislative majority has no right to subvert the Constitution, to transfer to Congress final power to interpret the Constitution.

Our system of justice, we can all agree, is a global marvel. The availability of the courts to assist the least among us is an attribute of our society that makes our nation special. The courts are the institutions to which our people can turn when they are without resources to open other doors. Indeed, Tocqueville pronounced American courts as "the most powerful barriers that have been devised against the tyranny of political

assemblies." We must not permit those barriers to be destroyed.

Do we really want to chance embarking on a course that would give ordinary majorities in the Congress, with the approval of a President, the right to abolish constitutional rights as determined by the courts? Do we really want to give Congress the last word on what the courts may judge? Then what if the state legislatures follow the lead of Congress and deprive state courts of their jurisdiction, leaving aggrieved citizens with no recourse to judicial review in constitutional cases. The court decisions to which supporters of this legislation object would still be the law, but there would be no way to enforce those decisions. The lofty guarantees of the Constitution would then be, in Justice Jackson's words, "a teasing illusion like a munificent bequest in a pauper's will."

The courts, of course, are not always right. When dealing with the law and its applications, Chief Justice Hughes remarked, judges "do not suddenly rise into a stratosphere of icy certainty." This is evident in the several times the Supreme Court has modified its decisions or reversed itself over the years. As Justice Brandeis wrote, "[I]n matters involving the Constitution, the court bows to the lessons of experience and the force of better reasoning."

If we seek to overturn Court decisions there are constitutionally permissible ways to proceed. First, we can amend the Constitution, to legalize or prohibit those acts that the Court has prohibited or legalized. But amending the Constitution is, as Justice Frankfurter observed, "a leaden-footed process," one deliberately and rightly made difficult by the Founding Fathers to provide time for serious public discussions and debate. It is a process the court strippers seek, however, to sidestep, and if they can accomplish their ends by such means, the amendment process would be a pointless exercise.

Short of constitutional amendment, we can follow the path that Senator Moynihan had succinctly labeled "debate, legislate, litigate." It is the duty of legislators to debate these issues at length and in depth. We should adopt only such laws that seek to comport with the Constitution as interpreted by the Court. We should defend these laws before the courts to try to get the judges to bow to the force of better reasoning.

If the law is struck down, it becomes necessary to go back to the drawing board and try and try again, a process that has worked to some extent in the area of public aid to religious schools.

Many of us may share with the well-meaning supporters of these bills an uneasiness about the moral tone of our times. Some of us may also share their frustrations over the inability or unwillingness of the legislatures to address these concerns.

Throughout my 34 years in Congress, I have firmly insisted that we protect our legislative prerogatives and exercise our constitutional rights. But we in Congress have no right to transfer frustration—or a longing for

a simpler time when citizens did not assert constitutional claims—into legislation that could nullify our tripartite system of justice.

Hostility toward the judiciary stems not only from dissatisfaction with certain decisions, but also from frustration with what some perceive to be unwarranted judicial activism in other areas as well. Indeed, Attorney General Smith has called for judicial self-restraint and has insisted that the judges should not substitute their policy judgments for those of elected officials.

There, of course, have been instances when the federal courts have acted where the political branches with “quivering sensitivity” to the popular will have enacted laws or endorsed concepts that denied, modified, or eroded basic rights. Many question whether in such situations the courts have the competence and the resources to undertake the resolution of cases that involve the operation of mental hospitals, prisons, schools, or welfare departments.

I am sure you will concede that judges are not particularly anxious to undertake the responsibility for the operation of prison systems and school systems and all of the rest. I am sure you know they do not want to be wardens and superintendents. They are not over-zealous social engineers invading from some alien community. Judges are, like you and me, home-grown folk with a duty to perform, persons with a responsibility to decide controversial cases involving constitutional principles that require vindication. In such cases, the courts have moved to fill voids created by failure of the executive or the legislature to respond to the demand of individual rights. Yes, the judiciary has at times assumed legislative and executive obligations because the political branches through intent, ineptness, or insensitivity have avoided the risks these obligations impose.

As David Brink, past president of the American Bar Association, put it, “the other branches have used the courts as dumping grounds for hot potatoes and then castigated the courts for the way the cases were handled.” In short, dissatisfied citizens have turned to the courts only after other branches have either shirked their obligation to protect—or acted deliberately to deny—basic rights. But weakness or timidity in one branch is not properly corrected by shackling another. When the other branches meet their responsibilities there is no need for the judiciary to intrude. In fact, I am sure that the judges would gladly refrain from doing so.

Under the Constitution, majority rule is vested in the Congress and the President, while the courts are the watchdogs for the rights of the minority. Historically, Congress and the courts have accommodated each other. Each side’s self-restraint has legitimized the other’s authority. One scholar has written, “It is on that fragile reed that our democratic system rests.” Conflicts in a system of divided power are inevitable. Accommodation and compromise, as well as respect for and understanding of our sys-

tem of separation of powers, are necessary to resolve these conflicts if our system is to survive.

We, the people, and especially those of us who work with the law, must be wary of legislation that would strip from the courts their constitutional role, deprive people of the ability to assert their rights and perhaps snap that fragile reed.

The bills I have been discussing have been referred to the House Judiciary Committee, and, as chairman of that committee, I have been credited—or blamed—depending on one's point of view, with bottling up these proposals. Some years ago my predecessor as chairman, the late Emanuel Celler, reportedly was asked where he stood on a piece of legislation. He is said to have replied, "I don't stand on it. I sit on it."

That anecdote is often cited by those who complain that the Congress is frequently dilatory. But Congress has been described as a body made up of 535 diverse persons that is not designed to be fast on its 1,070 feet.

The Judiciary Committee does approach, I can assure you, its responsibility in a careful and deliberate manner, and I make no apology for this.

These proposals seek radical changes in the law, and, as a consequence, they demand the most thoughtful and searching examination for their potential effect on our system of government, on individual rights and on the doctrine of separation of powers. This debate in my judgment cannot be minimized. It demands the careful participation of all of us who care about our system of government. The very future of our country depends on the stability of that system.

The Constitution is a magnificent document. Its guarantees have passed unfettered from generation to generation. We are the inheritors of the inestimable gifts of this marvelous document and this system of law. But we, all of us, have an obligation as well to be the trustees and guarantors of this system to ensure that those rights and protections are not eroded or chipped away.

Benjamin Franklin long ago reminded all of us that preservation of our form of government depended on our constant vigilance. He was asked one time here in Philadelphia what kind of government we had, a republic or a monarchy. Franklin replied, "A republic if you can keep it." This, my friends, is our challenge: to preserve the principles on which our nation was founded, to preserve the integrity of our institutions. And I would hope and suggest that as lawyers we would speak out against this dangerous strategy being pursued in the Congress that would undermine the stability of our marvelous system of government.

In conclusion, I firmly believe that the real security of this nation lies in the integrity of its institutions and the informed confidence of its peo-

ple. Let us leave the Constitution for our descendants as unimpaired as it was left to us.