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SOME THOUGHTS ABOUT JUDICIAL REFORM

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THE TOPIC of judicial reform is most timely in light of recent events. Many people are questioning the fundamental framework of our Republic; old traditions and loyalties, long cherished ideals, and institutions of government are being challenged and shaken by strong hands of militant dissent. In and out of court our judicial system is subjected to ridicule and mockery—not only by radical elements bent upon destruction, but also by persons in high places and erstwhile law-abiding citizens whose disobedience of court orders is a phenomenon all too prevalent. Often such disobedience and disrespect is practiced by those who have the most to lose from a general deterioration of law and order; their irresponsible conduct invites bitter response, further polarization of attitudes and possible censure from their fellow citizens. The end result is subjection of the judiciary to pressures that would belie its existence as a separate, co-equal branch of government. The decisions which the courts of this land are now making, and will be required to make in the near future, dictate that the men upon whom the responsibility lies be eminently qualified for the task. Whether our current selection processes afford a system which guarantees that such men will, in fact, be sitting on the bench is questionable. I believe it is time for the bench and bar to re-examine, *seriously*, the questions of qualification, selection, tenure and retention of judges. Illinois, as well as Indiana, has taken the first step, as witnessed by their respective proposals for constitutional revision of their judicial departments. Other states, and indeed the federal system, have not been as diligent.

In most instances, state judges are selected by means of the partisan political process—with all the risks and insecurities attendant to

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such a process. Federal judges, on the other hand, are appointed, and enjoy a tenure for life or "good behavior." Both systems have desirable attributes, yet each evolved as a result of circumstances existing at various times in our history.

The manner in which federal judges gain access to the bench is quite apparently the result of the customs and attitudes prevailing prior to and immediately following the revolution. The English custom was for the king to appoint colonial judges, their salaries and term of office being subject to his absolute discretion. Royal coercion was not unfamiliar, and "justice" often had overtones of royal expediency. The Declaration of Independence, in fact, listed judicial abuses as one of the colonists' primary complaints against George III. One should note, however, that the framers of the Declaration did not regard appointment as undesirable, but were concerned only with the lack of secure tenure and salary.[1] What they were really concerned with was an *independent judiciary.* These concerns surfaced in the Constitutional Convention and were allayed by the provisions of our Constitution, which placed appointive powers in the hands of the President, subject, of course, to the advice and consent of the Senate.[2] Tenure and salary were safeguarded.[3] It was thought that such a method would correct the abuses mentioned in the Declaration of Independence.

Second thoughts were had by Thomas Jefferson, one of the major architects of those provisions, after the case of *Marbury v. Madison*[4] had demonstrated the risks, at least in the mind of Jefferson, of making the judiciary *too* "independent." However, the original constitutional provisions relating to our federal judiciary have remained substantially unchanged since their adoption.

The influences which were largely responsible for the method by which the majority of states eventually came to select their judges were of a different nature. The tremendous growth of the Western frontier, coupled with the election of Andrew Jackson as President

1. "He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."

2. U.S. CONST. art. II, § 2, states: "[H]e [the President] shall nominate and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."

3. *See* U.S. CONST. art. III, § 1.

4. 5 U.S. (1 Cranch) 137 (1803).

in 1828, resulted in a political philosophy now referred to as Jacksonian Democracy.[5] Crucial to this philosophy was an absolute belief in the ability of the "common man" to participate in, and actually administer, the affairs of state.[6] Initiated primarily as an attack on *aristocratic* control of the government, this philosophy gradually led to the advocacy of universal elections for all public officials, including judges.

The Jacksonians believed that American judges were invested with legislative functions. In many states there was little statutory law, almost no local precedent, and the common law was regarded with a great deal of suspicion. In the eyes of some, the courts were beginning to act *and* legislate according to the common law, without responsibility to any controlling authority. So strong was this feeling that New Jersey and Kentucky actually passed statutes prohibiting the citation of common law authority. The end result was a popular clamor for judges to be placed under the direct control of the electorate. The rationalization for such a system was the belief that the elected judges were more likely to adjudicate disputes according to the popular will and opinion of the people.

The adoption of the elective method did not occur because of a failure of the appointive method. Each was essentially the product of circumstances and passions existing at the time. Both systems represent the preservation of a basic philosophy relating to courts, which, however, should now be combined in a universal reform of this nation's court systems. The federal system sanctifies an independent judiciary with lengthy tenures. But those state systems utilizing the elective method have recognized that the judiciary should not be so independent as to deprive the populace of some method by which the judiciary can be made responsive to the will of the people.

With this in mind, let us quickly review the most prevalent criticisms of both systems. Most are well aware of the faults inherent in the elective process. The courts are susceptible to political pressures, the corollary of which is that the citizenry lose respect for what they consider to be politically motivated judges. Tenure is often unreasonably short and subject to partisan frivolity at election time.

5. *See* HOFSTADTER, THE AMERICAN POLITICAL TRADITION 45-67 (1948).
6. *Id.* at 55-56.

Who cannot recall the name of a qualified judge who has been defeated by issues involving, not himself, but those running on the same political ticket? Further, the elective process discourages many qualified attorneys from seeking judgeships because of their distaste for the political arena. Is the risk of political abuse equalized by the honor of serving on the bench? Many say no. Often the result is a bench composed of individuals whose talents and interests lie in areas other than in the field of legal scholarship and judicial acumen.

Different, yet equally substantial criticisms have been leveled at the federal appointive system as it currently operates under the Constitution. Many would question the advisability of life tenure and all it represents. Further, the mode of removal provided by the Constitution is totally unsatisfactory. The drastic and far-reaching consequences of impeachment, with all it connotes, does nothing to enhance the image of the judiciary. Surely a less traumatic means of removal might be devised.

Coupled with the problem of life tenure is one which has become increasingly apparent over recent years, during which numerous decisions have been handed down affecting each and every citizen. The problem is that of philosophical rigidity—rigid because the members of the court, although entitled to their respective viewpoints, are allowed to remain on the bench, unchecked, for life. Certainly one does not subject himself to impeachment merely for articulating unpopular viewpoints in a written opinion. There is no breach of judicial ethics, and "good behavior" is not a question. However, allowing such a person to remain on the bench indefinitely without affording the citizenry some mode of effectively expressing approval or disapproval would seem to run counter to our basic democratic philosophy of government by the people. An independent judiciary does not, I believe, necessarily require that it be answerable to no man. To argue otherwise is to endorse an "aristocracy of the robe"![7]

Others would focus on the *manner* by which federal court judges are selected. Need I point out those instances known to each of us where political considerations were apparently paramount? Surely a more professional screening and selective process could be implemented where the executive's authority to appoint might be checked

7. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 365 (1898).

by an independent screening commission.

Having reviewed what I consider to be the basic disadvantages of both systems, I would like to outline briefly what I consider to be an appropriate manner by which to select judges on both the state and federal level. The features of this plan closely approximate the proposal now pending voter approval in Indiana and are embodied in the proposed judicial article of Illinois.

First, appointment would be made by the executive officer, President or Governor, *but only from* those nominations submitted by an independent, non-partisan screening body. The appointee would then serve for an interim period (two years in Indiana), after which the electorate is asked, on a non-partisan ballot, to indicate their approval or disapproval of the nominee's judicial performance. Upon initial approval by the electorate, the "approved judge" then serves for an extended term (ten years in Indiana) on the bench. At the close of each term of office, the judge is again placed on a non-partisan ballot to determine voter approval.

It should be apparent that this very basic proposal goes far to meet the objections heretofore noted to both of the present systems. The independent commission narrowly confines the choices available to the executive officer, hopefully eliminating, at least in a large measure, political considerations. Appointees are spared the travails of the political gauntlet. The court's independence from pressures, political or otherwise, is assured while at the same time the people are afforded a voice in the court's ultimate composition. Tenure is lengthened, when compared to the present elective systems, yet it is not absolute. A method of removal is afforded, less drastic than impeachment yet no less effective. Finally, the citizenry need not feel helplessly bound by a legal philosophy imposed and preserved by a judicial body over which they have no control. The end result can only be to enhance the stature and prestige of the judiciary in the eyes of the public.

The approach described would be particularly apropos as a method of selecting and retaining the Justices of the United States Supreme Court. I believe very strongly that a change in the manner of selection and retention of our nation's highest judges would not only contribute directly to the cause of judicial reform, but would

also go a long way toward restoring respect and confidence in all the courts of this land.

Although the fourteenth amendment to the United States Constitution has been in force for over one hundred years, it has been only within the last ten years that the United States Supreme Court has begun its system of "incorporation," whereby most of the first ten federal amendments, together with accompanying federal standards, have been enforced against the states. Most of these decisions have been rendered by a one judge majority of that Court, a fact which not only points out the absence of unanimity in this new approach, but also dramatizes the extraordinary power concentrated in five justices of that Court. The "Bevy of platonic guardians"[8] referred to by Justice Learned Hand might well be amended to "a quintet of platonic guardians."

The judicial soundness of the controversial line of Supreme Court cases such as *Miranda v. Arizona*,[9] *United States v. Wade*,[10] and *Chimel v. California*,[11] is not at issue here—what is important is the far-reaching effects of these decisions. I would dare suggest that when the United States Supreme Court decides a case and sets "minimal" standards therein, it frequently contributes to the overall lessening of the judicial flexibility exercisable by the courts of the fifty states of this nation. The recent trend in this direction is apparent and somewhat disconcerting. When one considers that these landmark decisions have been decided by a majority of five men on the Court, and when one further considers the far-reaching impact of these decisions, it seems illogical that these justices serve for life terms unchecked, in a practical sense, by either the citizenry at large or by another co-equal branch of government. The importance of adopting methods of selection and removal, when viewed in light of the expanding power of the United States Supreme Court, assumes compelling proportions. I submit that reposing so much power, essentially unchecked for life, in so few men is at odds with the foundation upon which this country was founded, that is: government by the people. It is this unchecked concentration of power which

8. HAND, THE BILL OF RIGHTS 73 (1958).
9. Miranda v. Arizona, 384 U.S. 436 (1966).
10. Wade v. California, 388 U.S. 218 (1967).
11. Chimel v. California, 395 U.S. 752 (1969).

breeds frustration among the American people and often renders judicial innovation on the state level much more difficult. The ideological controversy surrounding the attempted appointments of Judges Haynsworth and Carswell by President Nixon represents, in my opinion, one of the unfortunate consequences of the present method of selection and removal of Supreme Court justices. The President's unsuccessful attempts to seat a "strict constructionist" on the Court were merely a reflection of the frustration of that substantial body of the American public aware of their inability to render the Court's members more responsive to their view of the United States Constitution in these rapidly changing times. To be sure, it is *not* the Court's function to interpret the Constitution the way the majority of the American people would like it to be interpreted, but there is certainly something to be said for enabling the citizenry to change the composition of the Court at regular intervals as a means of exercising a check on its judicial performance. Much of the criticism of the Supreme Court would be greatly attenuated were the people of this nation able to pass at regular intervals on the conduct of the Court. There is little doubt that most of the Court's recent decisions would remain unchanged irrespective of any changes in its membership. However, the mere presence of a procedure for changing the composition of the Court less drastic than impeachment is necessary if the power of the Court is to be effectively controlled. More important, such a change would encourage greater respect for our courts by giving to the people the satisfaction of knowing that no institution of their government is beyond their effective reach. The tremendous and far-reaching social consequences flowing from decisions which become "the law of the land" should cause us to reconsider the present system under which the Court operates.

Such a situation is typified by the 1896 case of *Plessy v. Ferguson*,[12] in which the United States Supreme Court held that separate but equal facilities for black and white Americans were constitutionally permissible. It took fifty-eight years for the Court to reverse itself by its opinion in *Brown v. Board of Education*.[13] It might be well to consider the ever-present possibility that any one of the Court's more recent decisions could have the same adverse impact

12. Plessy v. Ferguson, 163 U.S. 537 (1896).

13. Brown v. Board of Education, 347 U.S. 483 (1954).

years from now that *Plessy* had in our recent past. I submit that under the present scheme of selection and life tenure, the Supreme Court's decisions are, for all intents and purposes, unassailable—for so long a period of time that irreparable social consequences could and do result in the interim. A growing number of our citizens from all walks of life are questioning whether this nation can any longer afford the great time lag between necessity for change and its actual accomplishment.

I suppose that the tenor of this article sounds a bit like some of the recent dissents written by Justice Hugo Black, in which he evidences a fundamental distaste for the assumption of power by a small number of men at the expense of the fifty judicial systems of the states of the Union. Although this may or may not be the case, I believe it to be secondary to the precise question with which this paper is concerned: judicial reform must take place throughout the legal system in its entirety, and *not* be confined merely to one or a few states. People who choose to disrespect our legal system will do so without regard to geographic boundaries or jurisdictional niceties. We *could* reform our state courts to a high level of perfection, but if the federal system, particularly the United States Supreme Court, remains inflexible or unresponsive, our goals will never be achieved. Clearly, there is a need for judicial balance and mutual respect among the various judicial systems of this nation. It would be asking too much to expect our people to have respect for our courts if *we* had none.

I firmly believe that instituting procedures similar to those outlined above in the federal system, with particular emphasis on the United States Supreme Court, would go far toward restoring the respect and confidence in the law among the citizens of this country. Such reform is essential.

It would be folly for us to argue that our judicial institutions are being challenged only by the radical elements in our society. The truth of the matter is that the group known as the "Silent Majority" in America has begun to join in the chorus of those who are questioning the efficacy of our legal system. It is a truism that if fealty and respect for the judicial system is in the process of erosion, then the concept of "government of laws" is at a very precarious state in our history.

Respect for our judicial system and its functions must be a constant force in our constitutional republic if it is to survive. Judicial reform is essential to accomplish that respect.