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The Role of Federal Judges: Their Duty to Enforce the Constitutional Rights of Individuals When the Other Branches of Government Default

Ivan E. Bodensteiner

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THE ROLE OF FEDERAL JUDGES: THEIR DUTY TO ENFORCE THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS WHEN THE OTHER BRANCHES OF GOVERNMENT DEFAULT

IVAN E. BODENSTEINER*

A. INTRODUCTION

At least since *Marbury v. Madison*[1] in 1803 the proper role of the federal judiciary has been debated. Particularly since the days of the Warren Court, the federal judiciary has come under heavy attack because of its decisions upholding the constitutional rights of individuals. The attacks generally come from those who disagree with the decisions on the merits, but there are some who question whether the judiciary has exceeded its proper constitutional limitations, even though they may agree with the actual holdings of the courts. Numerous books and articles have been written on this topic and they raise very basic, serious questions about the proper role of each of the three branches in our constitutional system of government. There are well-developed theories supporting all sides of the issue. So, the obvious question—why choose this topic? I did so for one simple reason: in my view the federal judiciary is becoming less and less receptive to plaintiffs seeking to enforce individual rights guaranteed by the Constitution at a time when the need for a strong, independent judiciary is becoming greater. Fewer and fewer federal judges are willing to serve as a check on the other branches of government. Why is this the case? I'm not sure—maybe it simply reflects the mood of the nation.

In addition to the normal debate among scholars and the familiar attacks on particular decisions, there are some other more disturbing things happening which may jeopardize the judiciary. For example:

(a) recent presidents have politicized the judiciary even

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* Inaugural Lecture by Ivan E. Bodensteiner, Professor of Law, Valparaiso University School of Law, delivered on April 6, 1983. The original text and colloquial tone of the lecture have been preserved. Footnotes have been added.

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

more than in the past, with the possible exception of Roosevelt's court-packing plan;[2]

(b) judges are frequently selected primarily on the basis of their position on a few current issues;[3] having given an advisory opinion on an issue, without the benefit of facts, such judges might feel compelled to be consistent when confronted with an actual case;

(c) judges issuing far-reaching decisions in an effort to protect constitutional rights have come under severe attack from politicians and the community at large;[4]

(d) Congress is considering bills which would remove the courts' power to hear certain cases and eliminate particular remedies in other cases;[5]

(e) in an article appearing in the Wall Street Journal last year, a Harvard law student expresses an opinion which I fear is quite prevalent in law schools today; he concludes that the courts routinely manage schools, hospitals and prisons and suggests that such excessive

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2. As the federal courts play a greater role in shaping important institutions in our society, it is not surprising that special interest groups and politicians pay closer attention to the selection of judges. *See generally Symposium: Judicially Managed Institutional Reform,* 32 ALA. L. REV. 267 (1981). While there is frequent discussion of merit selection, political considerations are certainly the critical threshold. *See, e.g.*, Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench (in his own Image),* 66 JUDICATURE 335 (1983); Grossman & Wasby, *The Senate and Supreme Court Nominations: Some Reflections,* 1972 DUKE L.J. 557 (1972); Slotnick, *The ABA Standing Committee on Federal Judiciary: A Contemporary Assessment,* 66 JUDICATURE 349, 385 (1983); Slotnick, *Federal Appellate Judge Selection: Recruitment Changes and Unanswered Questions,* 6 JUST. SYS. J. 283 (1981); Slonim, *Picking Federal Judges: To the Presidential Victor Belongs the Spoils,* 66 A.B.A. J. 1185 (1980); *Reagan's Judicial Selections Draw Differing Assessments,* 41 CONG. Q. WEEKLY REP. 83-84 (Jan. 15, 1983); Graham, *Supreme Court in Recent Term Began Swing to Right that was Sought by Nixon,* N.Y. Times, Nov. 2, 1972, at 18, col. 1.

3. While maintaining that they are not asking nominees how they would decide specific cases, members of the Senate Judiciary committee come very close to this under the guise of seeking "judicial philosophy." *See, e.g., Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings before the Senate Committee on the Judiciary,* 92nd Cong., 1st Sess. 16-86 (1971).

4. Judge Johnson refers to this in one of his articles. Johnson, *The Role of the Judiciary with Respect to the Other Branches of Government,* 11 GA. L. REV. 455, 474-75 (1977). *See also* Baucus and Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress,* 27 VILL. L. REV. 988 (1982).

5. S. 26, 98th Cong., 1st Sess. (1983) (abortion); S. 139, 98th Cong., 1st Sess. (1983) (school busing); H.R. 253, 98th Cong., 1st Sess. (1983) (prayer in public schools).

> judicial management is consistent with the first year curriculum at Harvard which seems aimed at developing social engineers rather than traditional lawyers;[6] civil procedure, with its emphasis on "public law litigation," is singled out as the worst culprit.

It is not my goal to summarize or evaluate the various theoretical approaches to this subject; even if I understood them, I would not attempt it in this short time. Rather, after briefly exploring the nature of the more common attacks on the judiciary, I will attempt to defend the so-called "activist" judges on functional grounds which may or may not be theoretically sound. "Activist" is not a good term because it can be used to describe a lot of judges I'm not interested in defending—I want to defend those judges who are frequently criticized for over-extending the Constitution to protect individuals. The premise is simply that our system of government, with a constitution which emphasizes individual rights and a political process which claims to be democratic, *needs* a strong, active judiciary.

Political reality cannot be ignored. The separation of powers, the checks and balances built into our constitutional system of government obviously must be maintained. However, like other parts of the Constitution, these concepts are not rigid and must be interpreted in light of the realities of government today. For example, as the legislative and executive branches become less accessible and responsive to those without the resources to influence the political process, the courts must become more accessible to this group which is otherwise powerless in dealing with government. The issue must be framed in terms of the proper role of the federal judiciary when other branches of government default on their constitutional responsibilities. Without courageous judges, the Bill of Rights would too frequently represent only hollow promises. If such judges are a necessary part of our system of government, then we must encourage and support their efforts to guard individual rights from the will of the majority.

B. WHAT ARE SOME OF THE REASONS FOR THE CONTROVERSY SURROUNDING THE FEDERAL JUDICIARY?

It certainly cannot be denied that there are some very legitimate questions and concerns about the proper role of the federal judiciary. To an extent, the controversy is inherent in the division of powers mandated by our Constitution. One argument is that the courts have

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6. Troy, *Learning the Law at Harvard,* Wall St. J., Aug. 6, 1982, at 14.

usurped the functions of the executive and legislative branches in certain areas. While the lines between the three branches are not always drawn with precision, it is argued that some decisions clearly exceed the authority of the courts. Related to this is the argument that many decisions of the federal courts deal with matters which are not appropriate for the judiciary because it is an undemocratic institution. Federal judges are appointed by the President, with the consent of the Senate, with life-time tenure. It is virtually impossible to remove a federal judge from office. Another argument is based on the concepts embodied in the tenth amendment—the separation of powers between state and federal government. To the extent that federal courts invalidate state legislation and order state officials to either take or refrain from certain actions, it is argued that the federal courts have overstepped the bounds implicit in the tenth amendment.

As mentioned, efforts are under way to limit the power of the federal judiciary.[7] In large part, the impetus for these efforts is disagreement with particular decisions rather than the more principled grounds listed above. Legislation which places limitations on the courts' power to either hear certain types of cases or order certain remedies is being considered by Congress. The most recent proposals of this kind deal with abortion, prayer in the schools and busing as a remedy for school segregation. These efforts are so drastic and represent such a basic disruption of our system of government, that even those who are critical of some of the decisions of the federal courts frequently oppose such efforts to deal with the perceived abuses.[8] A more legitimate way of dealing with unpopular constitutional decisions is through the more difficult constitutional amendment process. Such efforts are also underway.[9]

A less direct attack on the federal judiciary, which has probably been utilized for many years but seems more prevalent today, relates to the initial selection of judges. Based on their own view of the proper role of the judiciary, and in an effort to solidify their support from certain "single issue" political groups, recent presidents have announced in advance that they will be selecting judges whose views on important issues pending in the courts are consistent with their own

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7. *See supra* note 5.

8. *See generally Symposium: Congressional Limits on Federal Court Jurisdiction*, 27 VILL. L. REV. 893 (1982); Farren, *Restoring School Prayer by Eliminating Judicial Review: An Examination of Congressional Power to Limit Federal Court Jurisdiction*, 60 N.C.L. REV. 831 (1982).

9. *See, e.g.*, S.J. Res. 73, 98th Cong., 1st Sess. (1983) (school prayer amendment).

and those of the pressure groups.[10] This raises questions about whether the judiciary is really independent, non-political and undemocratic.

Finally, the courts are under attack from within. Frequently relying on caseload statistics as their justification, too many judges are willing to restrict the exercise of their jurisdiction in cases brought by individuals to enforce constitutional rights. This is done under a variety of self-imposed doctrines. For example, some issues are classified as "political questions" to avoid hearing them.[11] Standing often provides a barrier to judicial resolution of issues.[12] Various types of abstention are utilized to relegate certain matters to the state courts.[13] Standards for reviewing both federal and state legislation, except in a few areas where strict scrutiny is required, give extensive deference to the legislative bodies.[14] All of these doctrines serve as limitations on the role of the federal courts, particularly in constitutional litigation.

If crowded dockets are really the concern, why not develop similar doctrines to limit diversity cases in federal courts? This would

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10. *See supra* notes 2 and 3.

11. Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring); Gilligan v. Morgan, 413 U.S. 1 (1973) (plaintiffs sought relief which would have required judicial surveillance over the training, weaponry and orders of the National Guard). *See also* Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J., 517 (1966).

12. *See, e.g.*, Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Linda R. S. v. Richard D., 410 U.S. 614 (1973).

13. There are different types of abstention. The so-called Pullman abstention, named after Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), requires the federal court to send the plaintiff to a state court for resolution of a state issue which might eliminate or substantially affect a federal constitutional question, while retaining jurisdiction over the case. Another type of abstention, based on notions of comity and federalism, results in dismissal of the federal action. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971).

14. Strict scrutiny is utilized only in those cases involving classifications which disadvantage a suspect class or impinge upon the exercise of a fundamental right. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (racial discrimination); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel). An intermediate level of scrutiny is utilized in other situations. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (sex discrimination); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy). In other cases the court simply inquires as to whether the legislation is rationally related to some legitimate state interest. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (welfare benefits); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (quality of education).

seem to be a more appropriate place to make cuts in the federal court docket because it is generally agreed that the historical justification for such jurisdiction—local bias—is no longer a compelling factor. Instead, the courts tend to stretch this jurisdictional grant. While Congress has attempted to limit the number of diversity cases by imposing a $10,000 jurisdictional amount requirement,[15] its effect has been virtually eliminated by judicial interpretation. If the plaintiff says the claim is worth in excess of $10,000, that generally satisfies the requirement.[16]

In light of the valid constitutional questions about the role of the federal judiciary and the activity on various fronts to limit this role, I will attempt to justify a more active role for federal judges.

C. DEFENSE OF THE "ACTIVIST" JUDGES

The term "activist," when used to describe judges or courts, generally has a negative connotation. It is commonly used to describe judges perceived as being too liberal, such as members of the Warren Court. This is true even though the Alabama federal judge, who recently ignored 30 years of Supreme Court precedent in interpreting the first amendment to allow prayer in public schools, could certainly be described as activist but not liberal.[17] Similarly, during the *Lochner* era the Court was very active in using substantive due process to protect big business from certain acts of Congress.[18] Contrary to the usual negative implications, I suggest that the exact opposite is true—generally the judges who are labelled activist today are courageous judges with a healthy appreciation for our constitutional system of government. In defending the "activist" judges, I will start by addressing the arguments utilized in the attacks on such judges.

1. *Separation of Powers*

Implicit in the separation of powers mandated by our Constitution must be an assumption that each of the three branches of government will be accessible to those governed on a somewhat equal basis. This is clearly not the case today. Many people are virtually without access to the executive and legislative branches. Even taking into account my current concerns about the decline in judicial activism, the

15. 28 U.S.C. § 1332 (1976).

16. St. Paul Mercury Indem. v. Red Cab Co., 303 U.S. 283, 288 (1938).

17. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983), *modified sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

18. Lochner v. New York, 198 U.S. 45 (1905).

judiciary is still far more accessible to many people than the other branches. As a result, the majority of the cases which lead to the most extensive and severe criticism of the federal courts clarify and enforce the constitutional rights of people with the least access to the other branches of government. Those charged with criminal offenses, victims of racism, those involuntarily confined to state and local institutions, those who must rely on social welfare for the necessities of life and those who have been excluded from the election process by voter qualifications and unbalanced districts, are generally powerless when it comes to influencing the executive and legislative branches. As a result, the legislative and executive branches have frequently failed to uphold or have actually infringed upon the constitutional rights of such persons. When two of the three branches of government default in their obligation to uphold the Constitution, it is imperative that the third step in.

While the trend today seems to be in the opposite direction, several of the decisions in the past which subjected the Supreme Court to severe criticism involved access to the courts. Accessibility has been addressed through a series of landmark decisions assuring the right to counsel in criminal proceedings[19] and certain civil proceedings,[20] requiring free transcripts for indigents in criminal appeals,[21] requiring the waiver of filing fees in some types of civil matters[22] and requiring that certain critical evidence be made available without regard to the parties' ability to pay.[23] The courts have also developed special rules of construction when considering pleadings filed by litigants without counsel, thereby facilitating access.[24]

If the courts fail to uphold the rights of individuals, it is imperative that Congress or the executive branch step in. For example, several years ago when the U.S. Supreme Court gave Title VII of the Civil Rights Act of 1964 a more restrictive interpretation than

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19. *See* Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

20. *See, e.g.*, Lassiter v. Dep't of Social Serv., 452 U.S. 18 (1981) (termination of parental rights); Vitek v. Jones, 445 U.S. 480 (1980) (transfers from prison to state mental institution); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of parole). *See also* Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983) (establishes guidelines for district court judges in deciding whether to appoint counsel for pro se litigants).

21. Griffin v. Illinois, 351 U.S. 12 (1956).

22. Boddie v. Connecticut, 401 U.S. 371 (1971).

23. Little v. Streater, 452 U.S. 1 (1981) (an indigent defendant in a paternity action is entitled to blood grouping tests, with the cost of such tests to be paid by the state).

24. *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972).

intended by Congress,[25] Congress immediately amended the statute to make it clear that discrimination against pregnant women was "sex" discrimination within the meaning of the Act.[26] This sort of "dialogue" between two branches of government is healthy. Unfortunately, there are not enough examples of the other branches stepping in.

Frequently legislative and executive officials are fully aware that they are violating individuals' constitutional rights but are unwilling to change their practices or policies because such change would not be politically expedient. This leads to situations where well-intentioned officials invite litigation because court-mandated changes do not carry the same political liabilities as voluntary changes. Voters can hardly blame elected officials for implementing a court order. The constant concern about being re-elected is obviously one of the shortcomings of the legislative and executive branches, particularly when it comes to protecting individual rights. It was clearly a stroke of brilliance on the part of the framers of the Constitution when they removed certain basic, individual rights from the political process. Justice Jackson, in striking down a West Virginia regulation requiring public school children to salute the flag, stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: They depend on the outcome of no elections.[27]

The practical inability of the legislative and executive branches to protect individual rights is one of the strongest arguments in favor of judicial activism, particularly on behalf of those generally excluded from the political process. As indicated earlier, a rigid separation of powers makes little sense to those who are generally excluded from the political process. For these people, the courts are truly the forum of last resort.

2. *Federalism and States' Rights*

The states' rights argument, loosely tied to the tenth and

25. General Electric Co. v. Gilbert, 429 U.S. 125 (1976).
26. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (Supp. IV 1980).
27. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

eleventh amendments and notions of fedealism, is without merit when the courts are asked to enforce provisions of the Constitution which on their face serve as restrictions on the states. The primary example of this is the fourteenth amendment. It was passed because of the states' inability or unwillingness to protect constitutional rights. The supremacy of federal law requires that the courts invalidate state legislation, policies and practices whenever they conflict with federal requirements. Therefore, while the tenth amendment has some vitality in the area of commerce,[28] it is relatively insignificant when dealing with individual rights protected by the Constitution.[29]

Similarly, broad notions of federalism are unconvincing as a basis for restricting the activity of the federal courts. These judge-made limitations, such as various types of abstention,[30] on the exercise of federal jurisdiction, which have enjoyed extraordinary growth under the Burger Court, are generally undisciplined and too frequently serve as nothing more than rhetoric for avoiding meritorious claims. When state or local officials are violating federal laws, why should the federal courts be reluctant to intervene? Shouldn't the primary purpose of federal courts be to protect federally created rights?

It is far too simplistic to suggest that state court judges have been sworn to uphold the federal constitution and, therefore, it is appropriate to send some plaintiffs seeking to enforce federal rights to the state courts. While civil rights litigants may choose state court in a few states, in the vast majority of states civil rights attorneys will consistently select the federal forum whenever it is available.[31] There may be a variety of reasons for this, but the primary reason relates to the state court judges' ties to state and local politics. Often they are concerned about re-election. Obviously there are excellent state court judges but in most jurisdictions it is too easy for defense attorneys to get civil rights cases out of the hands of these judges.[32] Even where you can select and retain such a judge on the trial level, state appellate court judges are generally more closely aligned with the political process than federal judges. This is certainly not meant

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28. Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981); Nat'l. League of Cities v. Usery, 426 U.S. 833 (1976).

29. City of Rome v. United States, 446 U.S. 156 (1980); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

30. *See supra* note 13.

31. See discussion of this in Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

32. For example, Indiana Trial Rule 76 gives defendants an absolute right to one change of venue from the county and one change from the judge.

to suggest that political considerations are not important in the selection of federal judges; in recent years, just the opposite is true. However, lifetime tenure and compelling fact situations often lead even the most politically conservative federal judges to rise above their personal preferences in enforcing constitutional rights.

This suggests another reason why it is important for the federal courts to continue to play an active role in enforcing individual constitutional rights. Only through application to concrete fact situations can the Constitution remain alive and responsive to our ever-changing society. Even when Congress passes enforcement legislation, it generally requires refinement through court decisions. Because of political compromise, difficult issues are purposely avoided in the legislative process. The courts are expected to fill in the gaps.[33] Even absent political considerations, the executive and legislative branches generally deal with broader issues and often cannot foresee the ramifications of legislation when it is applied to individual circumstances. With their emphasis on a "case or controversy," the courts are better able to humanize the law by interpreting it in light of human fact situations.

3. *Undemocratic Nature of Federal Judiciary*

Opposition to an active judiciary on the grounds that it is undemocratic may have some merit, but it has serious limitations. First, it assumes that the other branches of government are democratic. To the extent democracy implies that government reflects the will of the majority, we do not have a pure democracy in this country. While the majority of those who vote in any given election determine the makeup of the legislative branch and some of the executive officials, this does not necesarily mean that we have a true democracy. For years before various court decisions, decisions which are heavily criticized by some, many people were systematically excluded from the election process.[34] Getting elected takes a tremen-

33. In Cannon v. University of Chicago, 441 U.S. 677, 717 (1979), the Court indicated its preference for more direction from Congress. This may be unrealistic, particularly in complex or controversial legislation. *See, e.g.*, Steinberg, *Implied Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33, 41 (1979); Wartelle & Louden, *Federal Enforcement of Federal Statutes; the Role of the § 1983 Remedy*, 9 HASTINGS CONST. L.Q. 487, 536-37 (1982).

34. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980); City of Mobile v. Bolden, 446 U.S. 55 (1980); Avery v. Midland County, 390 U.S. 474 (1968); Katzenbach v. Morgan, 384 U.S. 641 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

dous amount of resources and those with resources have a disproportionate amount of influence in determining who gets elected and what they do after they are elected. The importance of resources excludes a high percentage of the population from ever considering elective office. Within the legislative process, deals and compromises, when combined with the influence of powerful lobbyists, result in legislation which may be strongly opposed by the majority of people. The executive branch, while headed by an elected president, is to a great extent run by lifetime civil servants or bureaucrats. At the level where the executive agencies directly affect the average citizen, the influence of the elected official—the President—is not always apparent.

Second, as indicted earlier, certain parts of the Constitution were by design taken away from majority rule. The framers of the Constitution did not intend for individual rights to be dependent on the will of the majority. Therefore, it is not important that the branch of government with the primary responsibility for enforcing individual rights be democratic.

Third, while the judiciary may not be as democratic as the other branches, Congress can certainly influence the judiciary. When the courts interpret legislation contrary to the intent of Congress, it is open to Congress to revise or amend the legislation to "correct" an inappropriate court decision. The amendment to Title VII to correct the Court's limiting definition of sex discrimination is an example.[35] This is less possible when the courts interpret the Constitution, however, even there the executive and legislative branches can have an influence on the courts. The Constitution can be amended. Also, the courts give deference to Congress when it acts to enforce the Constitution under enabling provisions such as section five of the fourteenth amendment.[36] To a great extent, enforcement of broad sweeping court decisions requires the cooperation of the legislative and executive branches. While the decisions obviously represent a powerful

35. *See supra* notes 25 and 26.

36. In Katzenbach v. Morgan, 384 U.S. 641 (1966), the Court considered the constitutionality of § 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e), and whether Congress had exceeded its power under § 5 of the fourteenth amendment. In upholding the legislation, the Court utilized the test established by Chief Justice Marshall in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

In applying this test, the Court noted that "[i]t is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." 384 U.S. at 653.

impetus for change, decisions reforming state institutions are not self-executing. Fortunately, such decisions are frequently implemented with the cooperation of the other branches because executive and legislative officials appreciate the appropriateness of them. In other words, court orders serve to get the attention of legislative and executive officials and provide the catalyst for change.

At least to some extent, the legislative branch can control the judiciary by expanding and contracting jurisdiction.[37] When some members of the federal judiciary complain about the flood of civil rights actions in the federal courts, they are asking Congress to place restrictions on the access of civil rights litigants to federal court. As indicated earlier, because these cases seek to enforce federal rights, they are more appropriate for the federal courts than the many cases in federal court only because of diversity of citizenship. However, powerful interest groups like the Association of Trial Lawyers of America and big business, which favor diversity jurisdiction for a variety of reasons,[38] have been very successful in overcoming efforts to eliminate it.[39]

4. *Justification for More Activism*

Undoubtedly there are other arguments against judicial activism and there are probably better responses to the arguments than I have given. However, whatever the merits of these arguments, in my mind the overriding consideration supporting judicial activism is a very functional one—necessity. Under our Constitution it would not be tolerable to have a system of government in which all three branches are virtually inaccessible to vast segments of the population. Justice Stone

37. With the exception of the U.S. Supreme Court, Article III of the U.S. Constitution is simply an enabling act giving Congress the power to create "such inferior Courts as [it] may from time to time ordain and establish."

38. The primary reason is that lawyers and their clients prefer having a choice of forum.

39. Several years ago Congress considered bills which would have eliminated diversity jurisdiction. H.R. 9622, 95th Cong., 2d Sess. (1978), passed the House on February 28, 1978; when it was introduced in the Senate, it competed with another bill, S. 2094, 95th Cong., 1st Sess. (1977), which proposed only partial curtailment of diversity. Both bills died in the Senate Committee. *See also* H.R. 2202, 96th Cong., 1st Sess. (1979), and S. 679, 96th Cong., 1st Sess. (1979). For an example of the testimony offered by the Association of Trial Lawyers of America see *Diversity of Citizenship/Magistrates Reform: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary*, 95th Cong., 1st Sess. 70 (1977) (statement of Robert G. Begam, past president and chairman, National Affairs Department, Association of Trial Lawyers of America).

suggests this in a now famous footnote in *Carolene Products* where he questions

> whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[40]

He certainly supports a functional approach in attempting to define the proper role for the judiciary. To me this footnote indicates that the judiciary must act as the "safety net" of our three branch system of government—it must assure that government is accessible to all. It is not enough that legislative and executive officials are theoretically accessible; they must be *actually* accessible so that citizens' grievances receive meaningful consideration.

Why give this important function to the courts? Not only is the judicial branch currently the most accessible to the average individual, the courts can serve as a method of access to the other branches as well. A favorable decision from a federal judge gives the cause of an otherwise powerless individual legitimacy. The decision converts the plea of an individual who is otherwise ignored into a mandate from a generally respected federal court judge. This gets the attention of other officials. Consider the following example. Probably the most powerless persons in our society are those who are involuntarily confined in state institutions. Nearly all of them are poor and a disproportionate number are members of a racial minority. Even without the assistance of attorneys, such persons can get the attention of federal judges by filing inartful, handwritten pleadings. In most courts, this sets in motion all of the procedures surrounding the judicial system; this most vividly demonstrates the value of procedure. Such complaints cannot be ignored by state officials because this could lead to default. While there is certainly no assurance that all such complaints have merit and even those with merit will not necessarily succeed, the point is simply that the complaint of the most powerless member of society must be considered in accordance with fairly well defined and standardized procedures. The opposition must respond.

Contrast this with treatment of the same complaints, alleging constitutional violations, filed with either executive or legislative officials. There is generally not a formal grievance process; nothing requires a response. While there may be a response, it is unlikely

40. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

that it will be meaningful because the individuals filing the complaint have no political debts to collect and have little if any ability to affect the re-election of the officials involved. There is no mandatory process. There is no assurance that there will ever be a response—not even a polite rejection.

Again, this is not meant to suggest that the courts are always responsive to individual complaints nor that individual complaints always have merit. Rather, it simply demonstrates the ease of access to the judicial system and a set of procedures which, absent application of vague judge-made doctrines designed to limit the exercise of jurisdiction in some cases, require consideration of the complaints on the merits. In many situations, the availability of the courts may be the only thing which deters the oppressed from resorting to the streets. Assuming we prefer a more orderly means of redressing grievances, we should be grateful to the courts.

Before concluding that broad-sweeping federal court decisions, requiring extensive reforms in governmental institutions and large expenditures of public funds, represent an abuse of judicial power, we should consider the following questions.

1. Is there an alternative forum where the plaintiffs could have obtained *meaningful* consideration of their grievance?
2. Does the situation addressed by the court result from a default or failure on the part of executive or legislative officials—have they had an opportunity to remedy the situation?
3. How outrageous, or how compelling, were the facts presented to the court?
4. In light of an oath to uphold the constitutional rights of individuals, what would you have done as judge? Having found a constitutional violation, would you nevertheless reinforce the behavior of the responsible officials by refusing an effective remedy?

Ask yourself these questions in the context of a suit challenging conditions and treatment in a state school and hospital for the retarded. The judge describes the situation as follows:

> The Associate Commissioner for Mental Retardation for the ... Department of Mental Health testified that [the institution] was sixty percent overcrowded; that the school, although it had not, could immediately discharge at least

> 300 residents; *and that seventy percent of the residents should never have been committed at all.* The conclusion that there was no opportunity for habilitation for its residents was inescapable. Indeed, the evidence reflected that one resident was scalded to death when a fellow resident hosed water from one of the bath facilities on him; another died as a result of the insertion of a running water hose into his rectum by a working resident who was cleaning him; one died when soapy water was forced into his mouth; another died of a self-administered overdose of inadequately stored drugs; and authorities restrained another resident in a straitjacket for *nine years* to prevent him from sucking his hands and fingers. Witnesses described the ... facilities as barbaric and primitive; some residents had no place to sit to eat meals, and coffee cans served as toilets in some areas of the institution.
>
> With the exception of the interim emergency order designed to eliminate hazardous conditions ... the court at first declined to devise specific steps to improve existing conditions in [the state's] mental health and retardation facilities. Instead, it directed the Department of Mental Health to design its own plan for upgrading the system to meet constitutional standards. Only after two deadlines had passed without any signs of acceptable progress did the court itself, relying upon the proposals of counsel for all parties ..., define the minimal constitutional standards of care, treatment, and habilitation for which the case ... has become generally known.[41]

Should this judge be criticized? Only if you think he waited too long to mandate a remedy. Would there be a public outcry if in this situation the judge simply ordered the release of the named plaintiff from the institution? Probably not. This tells us something about the nature of the criticism.

A procedural rule providing for class actions has made the courts more accessible.[42] It has also made judges much more vulnerable to criticism. For example, no one gets too upset if a judge simply finds that a school system has discriminated against an individual black student and orders the school officials to remedy the situation by providing the student an equal educational opportunity. Such an order

41. Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 909 (1976).

42. Fed. R. Civ. P. 23.

would not be viewed as too significant. However, when the same case is brought on behalf of a class of all black students attending the school system and the relief attempts to provide all black children in the school system with an equal educational opportunity, then the judge is accused of taking over the school system. The same is true of court-ordered reforms of other state and local institutions. An order requiring the institution to provide an individual inmate with medical care draws little attention. In contrast, an order requiring the institution to establish a plan whereby all inmates can receive adequate medical care quickly draws the criticism of the public and members of the other branches of government. Why the different response when the liability determination made by the court is precisely the same? The court is simply accomplishing in one lawsuit what would have to be done in a series of lawsuits if all the individuals affected brought their own case. What is wrong with judicial economy?

It would seem that the real criticism is directed to the fact that the class action device has suddenly made the judicial system much more accessible to more people. One client, with one attorney, in one lawsuit can bring the grievances of thousands of individuals before the court. Absent Rule 23, it is fair to assume that a very small percentage of the individuals concerned would take the initiative to present their grievances to a court. So the real goal of those attacking the judges may very well be to further deprive the powerless of access to government.

D. The Activism Demonstrated By The Warren Court Must Be Made More Acceptable

Because I believe it is imperative that all citizens have access to at least one branch of our government, federal judges like the one involved in the case described above must be encouraged to not only continue but increase their "activism." That is, federal judges must continue to enforce the constitutional rights of the powerless—those without meaningful access to the other branches of government. If my assessment is correct—that the number of federal judges in the mold of the Warren Court is on the decline—then an obvious question is what can be done about it.

I think attorneys, both as individuals and as members of organized bar associations, must come to the defense of those courageous judges who are willing to enforce federal law even when it is extremely unpopular in their community. Just as it is often not easy for attorneys to litigate unpopular cases, so too it is not easy for judges to decide cases upsetting well-established practices and

policies in a particular community. Frequently the judges must bear the brunt of the community outrage which executive and legislative branch officials are unwilling to face. Judges are humans who have lives off the bench; often they and their families live in the communities demonstrating hostility toward their decisions. Support is obviously critical. The most likely source of such support is from their peers in the community—the legal profession—because lawyers should best understand the important role of these judges.[43] Instead, it is often attorneys who lead the opposition when unpopular decisions are announced.

Certainly there is nothing wrong with debating the merits of such decisions; this should be encouraged. But it is very troublesome when attorneys avoid the merits of the case and either attack the individual judge involved or the judiciary as a whole simply because they disagree with the decision. Community acceptance is obviously a very important part of implementing any court decree and the legal community has an important role to play in facilitating such acceptance. The press is also very important in shaping community opinion relative to unpopular court decisions. Although some federal court judges have written law review articles defending their activism,[44] they are generally not free to defend themselves through the media.[45] Therefore individual attorneys and organized bar associations should make an effort to assure that the community at least understands both sides of an issue and the reason why judges must intervene when constitutional rights are being violated. Public debate and discussion of the

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43. An indication of attorneys' obligations in this area can be found in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY E.C. 8-6 (1982):

> Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

(Footnotes omitted.)

44. *See, e.g.*, Johnson, *The Role of the Judiciary With Respect to the Other Branches of Government*, 11 GA. L. REV. 455 (1977); Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903 (1976); Swygert, *In Defense of Judicial Activism*, 16 VAL. U.L. REV. 439 (1982); Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968).

45. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 3, § A(6) (1982) ("A judge should abstain from public comment about a pending or impending proceeding in any court, . . ."); *Id.*, Canon 4 (judge "may engage in . . . quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him").

appropriate role of judicial review in our system of government should also be encouraged. But this too should be on a higher, more principled level instead of emotional, personal attacks on certain judges.

Judges can, and frequently do, make efforts to facilitate community acceptance and implementation of court decrees by involving the defendants, and the community to the extent possible, in the formulation of the actual relief. A determination of liability and a broad outline of necessary relief is combined with an order requiring the defendants to submit a plan for implementing the relief.[46] Ordering the defendants to formulate the exact contours of the relief, often with the participation of the plaintiffs, increases the chances that the defendants will cooperate in bringing about the necessary changes. This is quite natural because even though a court has mandated change, the defendants now have a stake in the success of their own plan.

Efforts by the courts to utilize this method of formulating relief have not always met with success. Frequently defendants engage in dilatory, bad faith tactics.[47] Either they do not submit a plan, or they submit a plan which cannot be approved by a court or they submit a plan which is approved but with which they have no intent to comply. When this happens, a court must act swiftly and firmly in order to bring about the necessary changes. As a deterrent, such dilatory, bad faith conduct should be punished with an assessment of punitive damages. This plus a substantial award of attorney fees[48] to the plaintiffs should make it costly enough that ill-willed executive and legislative officials will have no choice but to implement and enforce the constitutional rights of individuals. When officials have been given this sort of opportunity to correct their illegal conduct, there is certainly no basis for criticizing the courts for intervening. This situation represents an even more outrageous default by the other two branches of government. Such defaults must be made costly in order to make the other branches more responsive to the rights of individuals. Payment of substantial damages and fee awards by state and local governmental entities should cause taxpayers to take note and express their disapproval at the next election.

Those who see judicial activism as a problem and criticize the

46. Judge Johnson discusses his efforts in *Wyatt v. Stickney* in Johnson, *The Constitution and the Federal District Judge*, 54 TEX. L. REV. 903, 909 (1976).

47. *Id.*

48. Attorney fees are generally available to prevailing plaintiffs in civil rights actions under 42 U.S.C. § 1988 (1976).

judiciary because of it should be challenged to address the question of access to government. How do they propose to make the other branches of government more accessible and more responsive to the oppressed and even the average citizen? Is it possible to develop procedures whereby citizens can trigger a systematic response to their grievances from the executive and legislative branches?

The theories utilized, particularly by the Warren Court, to make the judicial process more accessible to all, regardless of wealth and influence, are not totally inapplicable to the other branches of government. In other words, if the executive and legislative branches are accessible only to those with resources, due process and equal protection concerns are raised. Isn't a branch of our government, such as the legislative branch, inherently unfair if it is inaccessible to a substantial portion of our population? To some extent, the so-called activist judges have alleviated this concern by their willingness to consider cases brought by those who are generally excluded from the political process and therefore the other branches of government. Absent the willingness of the courts to hear such cases, our entire system of government is inaccessible to substantial segments of our population. Until the legislative and executive branches do something to alleviate this situation, the courts must step in and act as the "safety net."

E. CONCLUSION

In summary, an active federal judiciary is not only defensible, it is imperative in our system of government as it currently operates. The activist federal judges should be supported and commended for their courageous efforts to keep government at least somewhat accessible and responsive to the powerless.