The Judiciary Act of 1789: Some Personal Reflections

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Abstract

Since our country’s founding over 200 years ago, we have witnessed a major expansion in the concepts of liberty and justice.
as to suggest in his article that every once in a while it is a good thing for the Legislature to fly completely in the face of what the Court has said and pass a law that is in conflict therewith to set the stage for a rehearing—a rethinking perhaps of the proposition. That is what is occurring right now with the kind of statute that was passed by the state of Missouri which may cause the Court to revisit the case of Roe v. Wade. Even though I happen to agree with the decision in that case, I agree with the idea that there is a legislative responsibility and a responsibility on the part of an executive who feels strongly about an issue to assert his powers in order to set the stage so that we can have the kind of adjudication that I spoke of.

The Judiciary Act of 1789: Some Personal Reflections

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Since our country’s founding over 200 years ago, we have witnessed a major expansion in the concepts of liberty and justice. What role have the courts played in bringing this about? For the first 150 years, the courts played a very small role. The Bill of Rights was added by the Congress and ratified by state legislatures. The thirteenth, fourteenth and fifteenth amendments were the product of a bloody civil war. In a number of cases, the Supreme Court actually reflected the worst kind of prejudice and weighed in on the side of discrimination. Dred Scott v. Sandford, Plessy v. Ferguson, the decision barring women from arguing before the Court, and the Japanese internment cases make us say “ouch” when we read them.

However, starting in the 1950s, the judiciary began to play a very different role. Look at the Supreme Court’s decisions in Miranda v. Arizona, Gideon v. Wainwright, Roe v. Wade, Griswold v. Connecticut, and Brown v. Board of Educ. These cases profoundly and irrevocably enlarged our notions of individual dignity, justice and human rights.

Most of the scholarly attention paid to the judiciary has focused on the Supreme Court, and properly so. But since the Judiciary Act of 1789 also created a structure of lower federal courts, and since the Supreme Court handles only a relatively small percentage of federal cases, the operation of federal district and appellate courts should not be ignored. This conference is an important opportunity to explore

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1. 60 U.S. (19 How.) 393 (1856) (United States citizenship does not extend to a freed slave).
2. 163 U.S. 537 (1896) (Separate but equal accommodation for different races does not violate equal protection).
8. 381 U.S. 479 (1965).
some aspects of their work. I will focus on those instances with which I
had some personal connection.
It seems to me that the lower federal courts' most glorious (and I
use that word advisedly) involvement in bringing about a new vision of
justice and human dignity was during the civil rights movement of the
1950s and 1960s. The Fifth Circuit Court of Appeals, together with a
few district court judges in that circuit, basically dismantled the appa-
ratus of segregation in the South in the face of extreme antagonism
from the white population there.
It is hard for many today to imagine what it must have been like
for those judges to act; it is hard to imagine what the South was like
then. Segregation permeated everything. Separation of the races was
required not only in schools, but also in parks, public facilities and
movie theaters; indeed, I recall seeing instances where a white person
was walking on a sidewalk, and a black person had to get off that side-
walk and walk in the gutter. Even the streets were segregated.
This system operated largely by expectation and tradition, but it
was also enforced by the gun and by local police authorities who were,
in turn, backed by a local structure of courts and laws. Blacks had no
control over the courts and laws because they were not entitled or per-
mitted to vote; the operation of that society was one in which they had
no say.
The court-related history of the Civil Rights movement began pri-
marily with the Supreme Court decision in Brown v. Board of Educa-
tion. In 1954, the Court decided Brown, holding that the concept of
"separate but equal" in education violated the United States Constitu-
tion.¹⁰ The decision made itself felt in many ways. One of its effects
was to help encourage blacks to express their desire for full equality.
It led ultimately to Rosa Parks' refusal to give up her seat in the white
section of the bus, and to the Montgomery bus boycott.¹¹ This was fol-
lowed by the freedom rides, where people tested the right to non-segre-
gated travel in interstate commerce, and by sit-ins at lunch counters.
These efforts to protest and dismantle segregation were largely unsup-
ported by the executive branch of the federal government. This indif-
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Schwerner, Andrew Goodman and James Cheney—three young men,
two whites and one black—were killed while involved in voter registra-
tion efforts in Mississippi. The assassinations finally prompted seri-
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10. Id. at 495

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and sustained involvement on the part of Washington. That is the
background against which the Fifth Circuit was operating.
In the summer of 1963, when I was working for a black civil rights
attorney in southwest Georgia, I was able to see the Fifth Circuit in
action. I remember going to the court when it was sitting in Montgomery,
Alabama. There was electricity in the air when the court, with
Chief Judge Elbert Tuttle presiding, heard cases attacking a segregated
society. Some of the outstanding civil rights attorneys of the
time—including Constance Baker Motley of the NAACP Legal De-
defense Fund (who later became a federal district court judge)—gathered
before that court to seek basic civil rights for blacks.
It is crucial for us today—when judicial activism is under at-
tack—to understand how much it meant for these civil rights lawyers
to have a court that would consider their claims fairly and implement
the Supreme Court's decisions sympathetically and vigorously.
The Fifth Circuit responded to the seriousness and urgency of the
problems presented to it by interpreting Brown broadly. It did not wait
for the Supreme Court to rule explicitly that the ban against "separate
but equal" applied to more than schools. It extended the logic of Brown
on its own and applied the Supreme Court's denunciation of segrega-
tion in the school system to governmental actions in general. As a re-
sult, the Fifth Circuit ordered desegregation in schools throughout
the South and barred discrimination in jury selection,¹² public transpor-
tation,¹³ voting rights,¹⁴ and employment.¹⁵
Just as important as the Fifth Circuit's substantive decisions
against segregation—and essential to those decisions—was its use of
innovative procedures. One of the main obstacles to the Fifth Circuit's
ability to review cases and thus order desegregation was the tactic of
delay used by many federal district court judges who strongly sup-
ported segregation. These judges tried by inaction to prevent cases
from reaching the Fifth Circuit.
Generally, before an appellate court can act, it needs a final order
from a lower court. But what was the Fifth Circuit to do when a fed-
eral judge simply failed to rule on a desegregation or voter-intimidation
case? The Fifth Circuit decided that it would not allow such tactics to
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It seems to me that the lower federal courts' most glorious (and I use that word advisedly) involvement in bringing about a new vision of justice and human dignity was during the civil rights movement of the 1950s and 1960s. The Fifth Circuit Court of Appeals, together with a few district court judges in that circuit, basically dismantled the apparatus of segregation in the South in the face of extreme antagonism from the white population there.

It is hard for many today to imagine what it must have been like for those judges to act; it is hard to imagine what the South was like then. Segregation permeated everything. Separation of the races was required not only in schools, but also in parks, public facilities and movie theaters; indeed, I recall seeing instances where a white person was walking on a sidewalk, and a black person had to get off that sidewalk and walk in the gutter. Even the streets were segregated.

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It is crucial for us today—when judicial activism is under attack—to understand how much it meant for these civil rights lawyers to have a court that would consider their claims fairly and implement the Supreme Court's decisions sympathetically and vigorously.

The Fifth Circuit responded to the seriousness and urgency of the problems presented to it by interpreting Brown broadly. It did not wait for the Supreme Court to rule explicitly that the ban against "separate but equal" applied to more than schools. It extended the logic of Brown on its own and applied the Supreme Court's denunciation of segregation in the school system to governmental actions in general. As a result, the Fifth Circuit ordered desegregation in schools throughout the South and barred discrimination in jury selection, public transportation, voting rights, and employment.

Just as important as the Fifth Circuit's substantive decisions against segregation—and essential to those decisions—was its use of innovative procedures. One of the main obstacles to the Fifth Circuit's ability to review cases and thus order desegregation was the tactic of delay used by many federal district court judges who strongly supported segregation. These judges tried by inaction to prevent cases from reaching the Fifth Circuit.

Generally, before an appellate court can act, it needs a final order from a lower court. But what was the Fifth Circuit to do when a federal judge simply failed to rule on a desegregation or voter-intimidation case? The Fifth Circuit decided that it would not allow such tactics to perpetuate an unconstitutional system. It determined that a significant
delay by a district court was the functional equivalent of a denial of the request for relief. That gave the Fifth Circuit its final order—the basis it needed to intervene.18

So, for example, when Judge Cox in Mississippi failed for two years to act on a case to prevent intimidation in voter registration, the Fifth Circuit deemed his inaction a denial of the petition. The Fifth Circuit then reviewed the case and ordered its own remedy.27

In addition, to overcome the extreme hostility of district courts toward desegregation, the Fifth Circuit issued its own injunctions pending appeal. In some cases, the Court actually wrote the orders that it wanted the district courts to issue and directed the issuance of those orders.

As many others have noted, Chief Judge Tuttle was willing to use unprecedented approaches and novel techniques to meet the demands of justice and to bring about the constitutional adjudication that was necessary. However, he was a remarkable legal figure. He did not act alone. There were a few other Fifth Circuit judges who shared his commitment to justice. Unfortunately, there was a social cost to the Fifth Circuit judges’ courage. They were overturning the basic mores, the basic structure of the society in which they lived. These judges therefore became victims of social ostracism in their own communities. They were threatened with violence—and in some instances there was actual violence against them. But these were people with extraordinary strength of character who, despite the violence, the threats, and the ostracism (one of the judges was preached against in his own church and had to leave it) despite all the obstacles, stood up for a moral vision of the Constitution, and did not swerve from their responsibility to implement it.

As I mentioned earlier there are many today who attack the idea of an activist court. However, we have to understand that if it had not been for the Fifth Circuit’s implementing Brown in an expansive way, there might have been a very, very different outcome of the civil rights struggle in the South.

The basic nature of that movement was nonviolent. It was premised on Martin Luther King, Jr.’s vision that people’s minds could be changed, not with guns or bullets, but with words and persuasion and prayers. The essence of that vision was hope—a belief that an immoral system, even the entrenched system of segregation, could be shattered.

19. Id. at 223, 224 (to successfully challenge racial peremptory challenges, there had to be proof of systematic use in a number of cases).
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But if there was no possibility of change within a reasonable period of time by using non-violent means, surely bloodshed and violence would have ensued. The desegregation revolution was basically peaceful, and the strategy of non-violence succeeded because the legal system, thanks to the Fifth Circuit, responded. As a result, there is a New South—with much improved race relations, a much more forward-looking society and a relatively growing economy. That is the real legacy of the Fifth Circuit’s activism.

The effective use of the courts in the civil rights movement to establish new norms of social justice inspired the growth of public interest law in general. Others began to use the courts to attack gender-based discrimination and environmental pollution, and to establish rights for prisoners and the mentally ill—in other words, to use the judiciary as a way of addressing social wrongs on a broad basis. This is also the legacy of the Fifth Circuit’s work.

There are still judges, on both district and circuit courts, who have the kind of vision and courage that the Fifth Circuit possessed. One example involves the history of jury discrimination through racial use of peremptory challenges.

Although racial discrimination in the creation of jury rolls was declared illegal, in Swain v. Alabama 18 that the Supreme Court decision also made it virtually impossible to prevent the racially based use of peremptory challenges. Swain barred attacks on racially based peremptory challenges when the attack was founded on a single case. 19 Thus, racial discrimination could still determine the actual composition of juries.

My office had a case that involved this issue. 20 We believed that racial use of peremptory challenges by the prosecutor—or defense counsel—was unconstitutional, even if it took place in only one case. State action was involved, in our opinion, because the challenges were exercised in the context of a state created proceeding and were authorized by state law and were enforced by judges. Further, prospective jurors were compelled by state process to come to court and were faced with state enforced penalties if they refused.

19. Id. at 223, 224 (to successfully challenge racial peremptory challenges, there had to be proof of systematic use in a number of cases).
The case ultimately went from New York's highest court, which rejected our position, to the United States Supreme Court. Although certiorari was denied, five justices wrote opinions that argued the demise of Swain. Two justices stated that racial peremptory challenges were unconstitutional. Three others that the issue was important and needed more consideration; they invited lower federal courts to re-examine Swain.

Defense counsel then went to the federal district court in New York and urged the judge to overrule Swain. A federal district court judge rarely overrules a settled precedent of the United States Supreme Court. But the judge did so here, relying explicitly on the invitation of three Supreme Court justices to re-examine Swain—and the opinion of two others that Swain should be overruled. The judge also took into account the position of my office in opposing Swain.

The judge's decision was ultimately upheld by the Supreme Court in another case, Batson v. Kentucky, in which the Court outlawed a prosecutor's use of racially based peremptory challenges in a single case. (The Court has not yet ruled on the issue of defense counsel's use of such challenges.) Since a majority of the Supreme Court had intimated its dissatisfaction with Swain, perhaps the district judge's decision did not require all that much courage. Still, his landmark ruling was in the highest tradition of judiciary intent realizing the values of the constitution and racial justice.

When talking about courage in judges, one cannot ignore the actions of Judge Sirica in Watergate. When the Watergate burglars were arrested, a cover-up began—to make sure that nobody found out who ordered the break-in. As the public learned later, the break-in was ordered by top White House officials, and the cover-up was orchestrated by the President of the United States. Since the political price of exposure was enormous, the President and his men had an intense interest in making sure the cover-up did not unravel. Thus, the burglars were taking guilty pleas instead of going to trial.

As a practical person, Judge Sirica realized that something was wrong. Although he might not have known who ordered the cover-up, he sensed it was going on, and he did not want to be part of it. He announced that he was going to impose extraordinarily stiff sentences on the defendants, hoping that they would be persuaded to tell the truth. The stratagem worked: one of the burglars, McCord, wrote a letter to Sirica admitting the cover-up.

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Had it not been for Judge Sirica's efforts, the Watergate scandal may never have been broken. It took courage and independence on his part, and he faced highly vocal criticism for what he did. Obviously, life tenure makes it possible for a federal judge to challenge even the President of the United States and his top staff.

Judge Sirica also had to rule on President Nixon's Watergate tapes. The President took the position that those tapes had to be kept secret because of national security and executive privilege. As it turned out, these claims were baseless, and were put forward simply to conceal improper and criminal White House conduct. Not only did Judge Sirica order that the tapes be turned over for in camera inspection, but his decision was unanimously upheld by the United States Supreme Court, which realized that what was at stake was the preservation of constitutional government. This decision—reiterating the facts that the President is bound by the law, the courts are the vehicles for announcing the law, and the President must accede to the courts—was as fundamental a decision as any that we have had in this country. One of the most important lessons of Watergate is how crucial a role a federal district judge can play in making our democracy work.

When it comes to foreign policy and war-making powers, however, the courts have not always been as bold and as willing to step in and protect the constitution and basic liberties. This failing is a long standing one as we can see from Ex parte Milligan involving the Civil war and the Japanese internment cases involving World War II.

The same was true for the Vietnam War—with one exception. During the course of the Vietnam war, members of Congress and others brought numerous actions in the federal courts to stop the war. Their principal argument was that Congress had never explicitly and formally declared war. This claim was grounded in the Constitution which grants Congress the power to declare a war and gives the President, as Commander-in-Chief, the power to implement that decision. But in the cases challenging the constitutionality of the Vietnam war, the courts refused to be bound by the absence of a formal declaration of war; instead they ruled that Congress could—and did—show its approval of the war in other ways.

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Judge Orin Judd, a federal district judge in Brooklyn, was one of the judges confronted with this issue. He ruled that there was no basis for finding the war unconstitutional, because Congress had actively and systematically approved and participated in the conduct of that war by approving voting authorizations and appropriations time and time again.  

But the situation was different with respect to the bombing of Cambodia; Congress never authorized that in any fashion. Four American pilots stationed in Guam, who were assigned to engage in the bombing of Cambodia, joined with me in a lawsuit in 1973 to enjoin the bombing, on the basis that it was unconstitutional and unauthorized. Judge Judd, who was assigned the case, decided that it was substantially different from the cases attacking the Vietnam War. Even though no federal judge had ever before enjoined a Presidential war-making activity, Judge Judd ordered the bombing to stop. Like Judge Sirica, Judge Judd was a Republican. However, he did not let ideology or politics interfere with his conscience and his view of the Constitution.

Judge Judd's decision was overturned, two to one, by the Court of Appeals, which found every conceivable basis for overruling him, including the claim that neither the Air Force pilots nor I had standing to bring the action. This stingy view of a Congressman's standing was subsequently rejected in other cases.

The pilots and I immediately sought relief in the Supreme Court. Sadly, a Court that would win plaudits for its courage in standing up to a President who abused his power domestically showed no signs of such courage here.

We asked Justice Douglas to stay the Court of Appeals decision. Justice Douglas held a hearing and ruled in our favor. His view was that our case was akin to a capital case because American pilots as well as Cambodians could be killed in future bombing missions. In a capital case, if there is any doubt of the legality of the government's action, the status quo should be preserved until the merits of the case can be fully reviewed.

The effect of Justice Douglas' ruling was to reinstate Judge Judd's injunction against the bombing. But then, the Supreme Court panicked. The only way to overrule a Justice's stay — under the Court's own rules — was by a vote of the Court itself, with a quorum present. But no quorum of Supreme Court justices was in Washington at the time because it was summer. Finally, a way was found to continue the bombing. Violating the spirit of its own rules, a single justice was found who would stay Judge Judd's injunction. Sadly, Justice Marshall did this.

Justice Douglas' prediction turned out to be accurate. A few days later a "friendly" Cambodian village was bombed accidentally by the United States, and hundreds of villagers were killed. (By the way, even though the injunction against the bombing was in effect for several hours, the Pentagon paid no attention to it whatsoever.)

Ultimately, the President agreed to stop the bombing because of the pressure from Congress which voted to cut off all funds for it. The Supreme Court never decided the merits of the case; the bombing was over. The issue, said the Court, was moot.

It is clear, from what I have said, that the Judiciary Act of 1789 is not self-enforcing. The quality of judicial decision-making depends on the quality of the men and women appointed as judges. Thus, we cannot look at the Judiciary Act without examining the appointment process.

Interestingly, most of the judges on the Fifth Circuit who sought to enforce Brown were Eisenhower appointees — Republicans in the deep South where there was no Republican Party of any significance. This might give us a clue to their willingness to undo the underpinnings of the society they lived in; they were outsiders, non-traditionalists, people who were not part and parcel of the establishment structure. Ironically, President Kennedy relied on Southern Democratic Senators for his appointments, which turned out to be among the worst in the South.

It is not political party affiliations alone which make a difference in how the appointee will behave; it is character, courage and integrity. The question for us is whether presidents will name judges on a basis of their ability, or whether they will use a lesser litmus test such as ideology. We must call on presidents to employ the highest standards.

The Senate also has an important role to play because of its power to confirm. As recent history suggests, the Senate is willing to give at
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The Senate also has an important role to play because of its power to confirm. As recent history suggests, the Senate is willing to give at

28. Id.
29. Id.
least some scrutiny to Supreme Court nominees, but it pays far too little attention to those named to the lower federal courts. Take the case of Robert Bork. The Senate defeated Bork's nomination for the Supreme Court by the largest majority in history for any such nominee, but subsequently confirmed him unanimously as a Circuit Court judge. Given the critical importance of Circuit Court judges, how could someone like Bork who was so unacceptable for the Supreme Court be one hundred percent acceptable for the Circuit Court?

As we embark on the third century of the Judiciary Act, I hope that the constitution and laws of this country will be interpreted fairly and honestly and, if possible, that the boundaries of our ideas of justice and human rights will be further expanded. It is our obligation, as lawyers and citizens, to insist that the President and the Senate exercise their responsibility to ensure that people of only the highest caliber become judges of the lower federal courts.

Response to Representative Elizabeth Holtzman's Presentation*

MARC ROHR: It seems a misleading impression has been created regarding the degree of oversight that is or is not exercised by the Senate Judiciary Committee with respect to the appointment of lower federal court judges. I am thinking of two prominent cases of nominees to the federal Courts of Appeals who were rejected in the last couple of years. I will not talk about Bork; however, I will say that many people thought he was a fine choice for the Court of Appeals but not necessarily the Supreme Court. Bork aside, has not a misleading impression been created here about the degree of oversight of the appointment of lower federal court judges?

ELIZABETH HOLTZMAN: I cannot say I was close to the Senate's decision-making process on confirmation of judicial nominees. But I think there are a number of circumstances where the Senate refused to confirm an appointment or allowed some of them to die in committee. On the whole, it is fair to say that people get through the confirmation process without enough scrutiny. There are people who should have been confirmed but never were; there are other judges who may not have been as good, but who got through the process. When the spotlight is not on, there is a good chance that the Senate is going to allow politics to happen as usual. The Senate does not always have the stomach to continuously resist the President. Thus, the Senate was willing to fight over Bork, but then went along unanimously with Kennedy. Similarly, the Senate fought over Rehnquist, but approved Scalia unanimously. On the Supreme Court level, if there is not some major press disclosure about a nominee, then generally speaking that nominee seems to get through. If there is enough public outcry and enough public attention focused on some of these nominees by local groups, such as the bar association groups, the legal aid groups, the civil liberties

* The panelists for this session included Bruce Rogow, Professor Law, Nova Center for the Study of Law, Fort Lauderdale; Jon Sale, partner, Sonnett, Sale & Kuehne, P.A., Fort Lauderdale, Florida; Theresa M. Van Vliet, attorney; Marc Rohr, Professor of Law, Nova Center for the Study of Law; Lino A. Graglia, A. Dalton Cross Professor of Law, University of Texas; and Elizabeth Holtzman, Comptroller of New York City, New York.