Future of the Judiciary

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Our University is celebrating its Centennial, and the nation is still commemorating the two hundredth anniversary of the Bill of Rights of the Constitution. Most of us understand and appreciate what this great University has given us as we look back at our educational experience, and, of course, we exalt in the codification of rights that we share as Americans through the first ten amendments. As important as this reflection on the past is, it is no less important that we attempt an assessment of what the future portends—particularly for the federal judiciary.

As a member of that judiciary, I have a great concern for its direction and as a citizen, I have an even greater need to believe that a strong and independent Judicial Branch will be a part of this nation’s future. Indeed, I am quite fond of telling my jurors (and anyone else who will listen) that it is our independent judiciary, established by Article III of the United States Constitution, that sets our nation apart from the other nations of the world, even the so-called “free” ones. While it is the Constitution and its Bill of Rights that afford us great protections, it is through the interpretations of this “principled” document by the courts that we actually realize the rights as applied in today’s society and, we hope, in tomorrow’s rapidly changing world.

It is uncertain, at best, that our Third Branch will continue to evolve and remain a co-equal branch of federal government. There are danger signals all around us that give pause to an assurance that the court system as we have come to know it will continue to exist. For some, it is not necessarily a bad thing that the courts may be weakened in the future. However, for the majority, including minorities and women, a diminution of shared powers by the judiciary augers disaster. Indeed, without a constantly strong and independent judiciary, there is the true danger of tyranny by majority sway without the protection of minority rights otherwise safeguarded by the Constitution—no real chance for all of us to play on a level playing field.

What danger signals? First, and foremost, how many people (even University of Chicago educated) realize that we spend less than one-tenth
of one percent of the national budget on the entire Third Branch of government? Every time a B-1 prototype goes down in a test flight in the California desert it represents an amount equal to at least a half-year’s funding of the federal judiciary. For the first time in history, we have reached just two billion dollars of annual funding. We are the only courts of record without assigned bailiffs—a district judge must give up a law clerk in order to secure a bailiff to staff the courtroom. We are the last branch to obtain full computer capability, even while our caseloads sky-rocket.

Together with an increasing caseload, there are more and more complex cases, both civil and criminal. What was once a court of limited jurisdiction has become essentially a general forum. This is in great part the result of ill-thought congressional legislation that has grown out of “tough-on-crime” politics. Such strange political bedfellows as Senators Ted Kennedy and Strom Thurmond have co-authored the Sentencing Guidelines, which are not guidelines at all but, instead, mandates that have effectively taken discretion in sentencing from life-time Article III judges and transferred it to young prosecutors. This “reform,” along with mandatory minimum sentences, also legislated by the Congress, has added greatly to the number and length of criminal hearings.

The civil bar initially did not feel threatened by the “tough-on-crime” bills. As it becomes more difficult to find firm trial dates, however, the ABA and state and local bar groups are beginning to express their concern directly to the Congress. Even with this welcome intervention, it will take decades to undo the harm already done to a balanced civil and criminal caseload.

The most recent Congressional foray into the operations of the Third Branch comes under the guise of case management legislation, entitled the Civil Justice Reform Act. Written principally by Senator Joseph Biden, this bill “authorizes” district courts to set timetables and discovery limits, among other things, but, in actuality, represents little more than an attempt at Congressional oversight of the judicial process. Many of my colleagues in the Central District of California agree that the Civil Justice Reform Act mandates actually mirror the Local Rules that our court has had in place for many years in this, the largest district in the nation, which serves some fifteen million people. They also agree that this Act is a thinly-veiled encroachment on the federal judicial prerogative to establish and maintain procedural—not substantive—rules for the functioning of the courts.

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Another area of concern is the preservation of the jury system. I was a student at the Law School when Professors Kalven and Zeisel were doing their formative work that led to their groundbreaking study, The American Jury. Many of the insights, problems, and proposed solutions in that 1966 work are no longer timely, but they still give focus for the future. While many practitioners and law professors lament such jury changes as less than twelve-person juries, judge conducted voir dire, and limited use of pre­emptory challenges, my concern is more with the increasing length and complexity of jury trials. I can envision our federal jury system emulating England in that jury trials will be seen only on the criminal side, and even there it will be difficult to obtain juries that are “legally” representative of a cross-section of the community. How can we expect ordinary citizens to take many months—and, indeed, years—away from work and family to sit on juries resolving other people’s disputes? Moreover, the complexity of issues that jurors are asked to resolve is increasing as litigation itself increases, particularly in such fields as antitrust, patent, copyright, environmental, and space law.

Some champion ADR (alternate dispute resolution) as a cure for many of the present and perceived future ills of the judicial system. We see more arbitration, mediation, summary jury trials, and other experimental projects being tried in place of the traditional courts. In California, we even have something called “Rent-A-Judge.” This “private judging” is another ADR tool that has proven effective in certain situations, but it also presents problems of its own. First, there is the appearance—indeed, the actuality—of a two-tiered justice system. One tier is swift and efficient and is available only to those few who can afford it. The other is the same crowded, under-funded system that less privileged litigants must continue to use. Second, many fine, experienced judicial officers are being siphoned into the more attractive (better pay, better hours) private system at further risk to the public courts. Especially worrisome in the long run is the fact that less attention will be given to improving the traditional court system as more of the “big players” leave it for the world of private judging.

Overlying the foregoing is what I perceive as a failure of confidence by the general public in the process of selecting federal judges, particularly at the highest level—the United States Supreme Court. The recent Senate confirmation hearings for Justice Clarence Thomas, while at times dramatic, were disquieting in result. As in the confirmation hearings of the two justices preceding Thomas, there was the constant undertone expressed by Senators of both parties that the President is owed deference in the nominating process. I submit that nowhere in the Constitution is “deference” to be found. Nor can it be argued that it was the original intent of the Founding Fathers to give deference to a President’s Supreme Court nomination. Indeed, the Senate has done violence to the separation of powers which is, together with the Bill of Rights, the keystone of our Constitution. The repeated failure of the Congress to exercise vigorously its mandate to ensure a constitutionally selected Supreme Court “...by and with the Advice and Consent of the Senate” spells political disaster. It is the Court, not the nominee, to whom
The Need for a Renewed Professionalism

Don Samuelson

The law industry has just completed two decades of unprecedented prosperity and growth. Lawyers have increased in number from 300,000 in 1970, to 600,000 in 1980, to 900,000 in 1990. Law is presently a $90 billion industry which has grown at a 10 percent rate during the last decade and compared to a 3 percent growth in the American economy. It has been common for partners in big firms in big cities to make between $300,000 and $900,000 per year. The law industry clearly prospered in the 80s.

What are the prospects for the 90s? In the economy in general, there is emphasis on quality, on value, on providing cost effective solutions to the needs of consumers. These are the principles that will be applied to the legal industry in the 90s. Are clients satisfied with the legal services they have been receiving? From a recent survey of owners of mid-sized businesses in Chicago, apparently not. The conclusions are:

1. Clients are dissatisfied with lawyer attitudes, narrow perspectives and costs.
2. Clients do not feel they are getting good value. The incentives in the current billable hour system appear to favor inefficiency, delay, and lawyer interests.
3. Lawyers do not adequately understand their clients' businesses. As a result, they don't appreciate the ways in which their experience, knowledge, and connections could create value for their clients.
4. Associate salaries and costs bear little relation to the value of their work. This is good for associates, good for leverage, good for senior partners, but bad for clients.
5. Law firms appear to have made little "investment" in their practices—developing products and systems, substituting technology for labor—to provide superior services at lower costs.
6. There is a paradox in the significant values that can be provided clients by senior lawyers in the early diagnostic and design phases of a legal matter and the great costs—rather than values—generated by younger lawyers in manufacturing the service. As much as 90 percent of the value can occur in the first 10 percent of the time. The remaining 90 percent of the time—and cost—produces the final 10 percent of the value.

Law is a profession, but it is subject to business principles. The legal industry today is a mature and competitive marketplace. It is a marketplace that is undergoing rapid and perhaps structural change. All industries proceed through stages in a common evolutionary process. The first stage emphasizes production. The product or service is new. The demand is high. There are few suppliers. The problem is in manufacturing the service and getting it out the door. This was the legal industry in the 70s and 80s, responding to the regulatory requirements of the Great Society. The second stage involves "selling." Demand is not sufficient to "clear" all of the available product. Sometimes customers need to be persuaded to buy. Law firms added "marketing" staff to assist in this selling function in the late 80s.

The third stage requires "marketing." The focus is on the customer. What do they need? What value is the service to them? The basic elements are: a) the client has a problem; b) the lawyer has a solution; c) the client receives a benefit; d) the benefit is of value; and e) there is a reasonable relationship between the value and the price. These principles make up the "business" of law. By this I mean the client centered and efficient delivery of an appropriate and needed level of service.

When an industry enters the mar-