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Carl McGowan

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It is very pleasing to be back in the atmosphere of the University of Chicago Law School. Although I cannot claim the status of an alumnus, my associations with the School are many. They go back to 1939 when I first came to this City to teach at Northwestern Law School—an institution for which I also have lasting respect and affection. There was then in existence a most amiable custom whereby the law faculties of the two universities met together twice a year, once on the South Side and once on the North, to dine together and to engage, in the happy phrase used by the Association of the Bar of the City of New York, in "social and fraternal exchanges." It was by this means that I first got to know the University of Chicago law faculty, and particularly some of the younger members who were just beginning the brilliant careers that have meant so much to all of you, to the University, and now to the nation.

Although Pearl Harbor brought those highly civilized occasions to an end, the friendships so made I managed to keep green in one way or another, and they were actively resumed in my post-war incarnations in Chicago. During the 1950's I was even privileged to teach some seminars at the Law School, which possibly some of you here may have endured and survived with no permanent injury to your professional competence.

On the social side, one of the heavier costs of my entry into the federal judicial system was the

**Judge, U.S. Court of Appeals, District of Columbia. Address given at the University of Chicago Law School Annual Dinner, April 17, 1975.*

geographical barrier interposed to the continued enjoyment by my wife and myself of our frequent visits to the University area. For the intellectual stimulation and congenial discourse so provided, Washington, I assure you, provides no really comparable substitute, despite its earnest pretensions to being a latter-day Athens. Milder winters and fleetingly newsworthy names have little to do with the life of the mind, or, indeed, with such essential enterprises as educating the young and providing clients with decent professional services.

Fortunately my trade has provided me with one means of keeping in touch with the Law School. Periodically I am favored with one of its new graduates as a law clerk: Donald Glaves, who helped me through the first traumatic months of the switch from advocacy to decision-making, Milton Schroeder, George Ranney, Douglas Ginsburg, and presently, Bill Block.

For the coming year, there is Gene Comey who, so I read recently in the *New York Times,* appears to entertain the antiquated idea that grades have something to do with capacity. He does not realize, I guess, that I hired him solely because of his bright blue eyes. Gene's colleague with me next year also brings the stamp of the Midway, although he pursued his higher education at Harvard—possibly because, after prolonged and close exposure to revealed truth from one source, he wanted to hear how it was at another knee. His name is Meltzer.

I hope I may associate myself with all of you in tribute to your retiring Dean. I first got to know Phil in 1954 when, lately returned to practice from the public trough and not oppressed by clients, I spent the summer quarter on the law faculty at Stanford. I was impressed with him then, as I have continued to become more impressed throughout the succeeding years. His is one of those keen and rational legal minds that can invariably illuminate any problem—legal or otherwise. I was greatly grieved that I left Chicago not long after he arrived. But I have fol-

lowed his career here with interest and admiration, and I am sure that his contributions to the Law School and to legal scholarship will redouble as he rejoins the ranks.

The Law School will, I have no doubt, prosper under the new leadership as it has so mightily under the old. My only concern for it derives from the cloud on the horizon vividly described by Walter Blum in his recent reflections on the new consumerism. You have undoubtedly shuddered, as have I, in your reading of his occasional paper on this subject. Class actions by law classes for eccentric teaching; defective legal research publications called back for repairs; damages sought from the Law School by dissatisfied clients for professional incompetence lurking behind the J.D. degree—all these and kindred horrors diverting the time of the faculty from teaching and research to defending themselves in court, and inevitably chilling imaginativeness in method and unorthodoxy in analysis. And, if practitioners must continuously go back to school, as Minnesota and other states are beginning to require and the bar associations to accept, why not the law professors? And who will there be to teach them, when they go?

Of course what really disturbs me about Walter's piece are its implications for the judiciary, as he darkly speculates about the recall of judicial opinions along with academic treatises. Have the courts with their progressive weakening of sovereign immunity and executive privilege left themselves naked to profane invasion of the sacred temple of judicial immunity?

At least the medical men, bereft as they very nearly are of the availability of malpractice insurance, will view such a desecration with sardonic satisfaction. The only cheering thought that comes to mind is that, since the courts have embraced the new consumerism so enthusiastically in other contexts, surely the beneficiaries of it will, in their own self-interest, be alert to spare the goose that has laid so many golden eggs.

I had thought to talk with you for a few minutes tonight about a subject which has come to interest me greatly after twelve years on the bench. That is the current relationship between the Congress and the federal judicial system. It happens, I believe, to be relevant to the new consumerism, because Congress is fast becoming our biggest consumer. Indeed, it threatens to consume us utterly. On one aspect of that relationship I content myself with noting that, unlike other consumers, Congress is in the uniquely happy position of being able to freeze the price of the judicial services required by it. In that one respect at any rate, it has been able to whip inflation now. My concern is, rather, with the more significant question of the allocation of tasks by the Congress to the federal courts—their extent, their nature, and what they portend for the future.

As most of you need no telling, the business of the federal courts, with the exception of the original jurisdiction reposed in the Supreme Court by the Constitution, depends upon the affirmative action of Congress. Indeed, the lower federal courts exist only by virtue of such action, as does the appellate jurisdiction of the Supreme Court. The business they do is limited to what Congress authorizes and directs. What they have in fact been given to do has varied greatly since the First Judiciary Act of 1789, but the trend has been unmistakably, and now overwhelmingly, towards enlargement.

At the present time that trend is vastly accelerating, as I can readily see when I compare the way I spend my working day when I first entered the system with what I am doing now. My own court has increasingly become a court preoccupied with civil litigation involving the federal government. During the last fiscal year, appeals of this nature constituted two-thirds of our business. They will soon become, I believe, over 90% of the total.

Paralleling the growth in the numbers of these appeals is an observable change in their nature—

and in their novelty, complexity and difficulty. And in their interest as well, perhaps I should add, at least for any one with a fascination for the strange and wondrous workings of the far-flung federal establishment in both its executive and legislative embodiments.

This has all been due to a number of things. One is chargeable to the courts themselves. Progressive relaxation of judicially created requirements of standing has enabled almost any person to get into court to complain about almost any act, or omission to act, of the executive branch and the independent agencies. But the capacity of the courts to reverse that relaxation is now being impaired by a spectacularly increasing tendency on the part of the Congress to provide explicitly for federal court remedies and judicial review in every new federal statute.

This trend was impressively described and documented by Henry Friendly in his Carpentier Lectures at Columbia in 1972. If you think Congress has heeded that or similar warnings, I can supply you with a long list of statutes enacted since that time indicating that the current Congressional love affair with federal jurisdiction is heating up rather than cooling.

There recently became effective the Social Services Amendments of 1974, providing for civil actions in the federal district courts to enforce state child support orders upon certification by the Secretary of Health, Education, and Welfare. A few weeks earlier the President signed the Safe Drinking Water Act of 1974 which, after taking a deep breath, provides for (1) civil actions by the Administrator to require compliance, (2) civil penalties, fines, and injunctive relief for failure to obtain permits, (3) exclusive review in my court of regulations promulgated under certain sections of the Act, and in other specified courts of appeals, of regulations under other sections, (4) district court review of actions concerning variances or exemptions, and (5) civil actions by citizens in the district court without limitation as to the amount in controversy. The Endan-

gered Species Act of 1973 also provides for citizens' suits in the district court without regard to jurisdictional amount; and the Older Americans Comprehensive Services Amendments of 1973 puts in the federal courts of appeals mandatory jurisdiction of appeals by states from the Commissioners' actions. And these are but a handful of the newer jurisdictional grants, many of which deal with infinitely more complex, if indeed not more important, subjects.

The pattern taking shape appears to be that of a Congress intent upon bringing federal power to bear in an ever-widening range of human affairs, but having no better answer for the monitoring, supervision, and enforcement of that power than the employment of the federal courts to these ends. That is conceivably one way to govern the country, and perhaps we of the federal courts should be flattered by this seeming mark of confidence in our capacities. I suggest, however, that it was not in this way, or by such heavy involvement in tasks of this nature, that the federal courts achieved such prestige and popular acceptance as they may now enjoy.

That prestige, in my submission, can only suffer if the federal courts are made to carry too active a role in what is surely in large part simply day-to-day public administration. It was in a similar context that Governor Charles Evans Hughes of New York in 1907, fighting against crippling judicial review additions to his bill for a public utilities commission, made his famous statement, often quoted in apparent ignorance of the circumstances in which it was made, that "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and property under the Constitution . . . Let us keep the courts (said the embryo Chief Justice) for the questions they were intended to consider."

I am reminded in this regard of the deathless, and wholly revealing, defense offered last week by a high federal officer to the charge that the air lift of orphans from Vietnam had been poorly

organized and executed. "I am not," he said, as quoted in the *New York Times,* "an expert. I am an administrator."

The current Congressional involvements of the federal courts in public affairs does not stop with their immersion in administration. It extends to the legislative process itself. A recurring phenomenon is for the legislative branch, in addressing itself to major areas of public concern, to finesse hard choices of policy, likely to tie up elected legislators representing differing interests in knots of controversy and resulting inaction. Instead, it makes broad delegations of authority to department heads or newly-created commissions to make those choices in the form of implementing regulations. In order to assure that such regulations are carefully scrutinized for conformity to the dimly ascertainable Congressional intentions, judicial review is provided by reference to variously articulated standards such as arbitrariness, rational basis, or, God help us, substantial evidentiary support in the record.

When that record is one made in informal rule making, it is indistinguishable in its content from the proceedings before a legislative committee hearing on a proposed bill, consisting as it does of letters, telegrams, and written statements from proponents and opponents, including occasional oral testimony not subjected to adversary cross-examination. It is on that kind of a record that a Congressman decides which way to vote on a bill, if indeed he is one of those who tries conscientiously to inform himself of anything other than the relative political weight of the lobbies at work. The resulting policy choices, when reflected in the statutes themselves, are virtually immune to judicial scrutiny except as constitutional barriers are transgressed. As Justice Brandeis said long ago, speaking for his Court, when dealing with statutes directly, courts presume that facts exist supportive of them.

The point I am making is, thus, obvious. When, by Congressional delegation tantamount to abdication, the policy choices are largely con-

fined to agency rule making, the record before the reviewing court is essentially the same. No matter how the standard of review is articulated, there is great latitude for the judge to vote his policy views in the same manner as does the legislator. No matter how sensible of the necessity for restraint by a life-time judge not accountable to the electorate, the opportunities, and the consequent temptations, are great to come down on the side of the judge's personal conceptions of policy. Even the humblest judge —and the most alert to the dangers of result-oriented adjudication—may slip, sometimes subconsciously, if his predilections are sufficiently engaged, and thereby risk nullification of the principle that democracies are to be run in accordance with the majority will.

It is one thing for a federal judge to sit in judgment upon an order of the National Labor Relations Board, or of the Interstate Commerce Commission, made in an adjudicated case upon a record compiled in adversary proceedings under statutes concretely formulating legislative policy choices. It is quite another where the court is called upon to review regulations made in rule making by an agency to which Congress has made a sweepingly broad delegation of power to put flesh on the bare bones of precatory prescriptions that there shall be cleaner air and unpolluted waters, or greater product safety, or no discrimination in employment, or working conditions less hazardous to health or safety, or greater conservation of energy.

This is a new kind of regulatory control which, as Professor Murray Weidenbaum of Washington University has recently pointed out, departs widely from the older and more familiar model. The supervisory agency has no responsibility for the particular industry as a whole in its impact upon the public. The focus is rather upon a single aspect of its activities to the exclusion of everything else. Necessary as the new model may be thought to be, the problems inherent in it are not lessened by the second guessing of judges

ill-equipped by training or experience to make the judgments appropriate only for the elected representatives of the people.

If federal judges presently hold a great potential of power to impose their views upon many aspects of the modern economy, it is surely the Congress that has made them so by its penchant for combining broad delegation of law-making authority with sweeping, albeit inexpertly conceived, provisions for judicial review. In any event, my immediate concern is less with the implications of that approach for the philosophical underpinnings of our democracy than with its effect in adding new grist for the mills of an already over-taxed federal court system.

The prospect presently faced by the federal courts is that of a Congress always adding to their jurisdiction, but never taking anything away. This is accompanied by a seeming indifference, as Chief Justice Burger so justly complains, to the necessity of providing increased resources to enable the courts to cope with the rising tide. An example of this blithe approach is the Regional Rail Reorganization Act of 1973—the statute passed on an emergency basis to try to keep the bankrupt eastern railroads running until they could be reorganized on a unified basis. That Act created a special three-judge district court to serve in effect as the reorganization court for seven railroads, including the Penn Central, on a very tight statutory time-table in which to get its work done.

But no provision was made for additional judicial manpower or even any funds for supporting staff or other purposes. The system was somehow, presumably, supposed to absorb this additional task within its present capabilities. I serve on that court, on top of my regular duties, along with Henry Friendly and Judge Roszel Thomsen of Baltimore. So far it has cost me much of my single summer holiday; my unreimbursed expenses of being present at the hearings; and, very nearly, my wife.

At the same time, Congress seems unable to

move on the pending suggestions to reduce the jurisdiction of the federal courts and to rationalize the means by which it is exercised. The American Law Institute's modest proposals for a more rational allocation of jurisdiction between the state and federal courts principally involve not a complete abolition of diversity jurisdiction as should be done, but only closing the federal courts to resident plaintiffs. They have not been able in five years to reach the stage of final committee consideration. In this instance I feel bound to add that the inertia of Congress is almost entirely attributable to a conspiracy of silence by the practicing bar. The politically sensitive legislators correctly interpret that silence as opposition, albeit one that must be largely covert because it cannot counter logically the reasonableness of the change.

The Freund Committee's recommendation that three-judge district courts be ended, which has been acclaimed on all sides as a very useful step in reducing both jurisdictional confusion and administrative strain, remains, in its major aspects, blocked by the opposition of a single minority group. The facts of life are that, with the average voter's understandable indifference to the intricacies of federal jurisdiction, the federal courts, with no lobby going for them, are vulnerable to any single special interest possessing some capacity, however slight, to punish at the polls.

What Congress was able to pass at the last session with no difficulty at all was a statute on judicial conflicts of interest—a subject which has about as low a priority as one can imagine, in view of the comprehensive Canons of Judicial Ethics proposed by the American Bar Association and embraced by the Judicial Conference of the United States as controlling upon federal judges. Apparently the Congressmen simply could not resist getting into that act.

Their other legislative achievement was to impose on the already struggling federal courts a rigid schedule for the disposition of federal crim-

inal cases, and that at a time when the federal courts have been moving mightily and with visible success to bring this problem under control despite the dramatic increase in federal criminal prosecutions. No thought, of course, was taken as to how the courts could meet the new requirements without a substantial increase in judicial resources. Nor has any action been taken on the sweeping revision of the federal criminal code, including the elimination of a lot of offenses which do not require the exertion of federal power, proposed by a presidential commission a few years ago.

Meanwhile, there are to be seen in the burgeoning ranks of our litigants some new faces—those of the Congressmen themselves. With the decline of standing requirements, and the expansion of judicial remedies and review, a growing number of legislators have awakened to the political advantages of going to court to challenge executive, agency, and even legislative, action. This attracts publicity, and is likely to be popular with the constituents. It has few, if any, drawbacks, especially if there are *pro bono* groups or private law firms available, as they appear to be, to provide the legal representation.

I do not say that this is an undesirable development, but there may be implications of it not yet thought through with sufficient care. It might, for example, be unhealthy if the federal courts come to be regarded as a higher chamber where a legislator, who has failed to persuade his colleagues of the demerits of a particular bill, can always renew the battle. And some might conceivably think that, in certain contexts, free legal services, if such there be, are perhaps indistinguishable in substance and effect from political contributions. In any event, this is one area in which the legislators are direct consumers of our product, and consumers peculiarly situated to do something about it if they are not satisfied.

The federal courts in Washington, because they are where they are, are undoubtedly more caught up in what I call, for want of a better

word, public interest or public affairs litigation. But we are not alone among the circuits in this respect; and, if what I see happening in our court is any guide, then it may be that private civil litigation is in for some hard times. Already it is at least arguable that A who sues B to enforce a contract, or to assert a tort or fraud liability, is getting lost in the shuffle. He may, indeed, be regarded at worst as a positive nuisance, or, at best, as a minor distraction of the court from the pressing public business at hand.

It has long been an article of faith, as Professor Harry Jones of Columbia Law School recently reminds us in his excellent initiation of the John Dewey Lectures on Legal Philosophy—honoring a name closely associated with your own University—that one of the great ends served by law and the courts is "the authoritative settlement of disputes between individuals and between individual citizens and the state." In my own observation, it is that latter aspect that is preempting the time of the federal courts, and very possibly to the subordination of the former.

Perhaps this was inevitable from the day we rejected the parliamentary system, electing to live under a written Constitution in which power is dispersed between three separate branches of government, and with one of those branches having, thanks to John Marshall, the authority to examine the actions of the other two by reference to that Constitution. Our revolutionary origins may explain why, in enacting a federal system, we tacitly accorded a primacy and priority to the individual's right to complain about his government over his grievance against his neighbor. Our colonial forebears may very likely have felt that they could usually handle their neighbors by themselves, but that standing up to George the Third called for something more than self-help.

However this may be, the preoccupation of federal jurisdiction with that primacy is large and growing, with inescapably adverse impact upon the handling by federal courts of purely private

litigation. This is something which, if I am right, the practicing bar must take into account in its own interest. Perhaps it may even decide that it has nothing to lose by speaking up on the subject of diversity jurisdiction.

The judiciary—at both the state and federal levels—is an institution I have always believed to be of critical importance to our national well-being. As the time approaches to hand along my very small piece of the torch, my concern is that the flame be not dimmed by either neglect, or a too expansive concept of how far its light can reach.

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