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Introduction: A View from the Bench

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Introduction: A View from the Bench

JUDGE JESSE E. ESCHBACH*

The authors of the articles which appear in this Symposium are able, concerned members of the federal judiciary; concerned, and to an extent frustrated that the judicial power as exercised by individual judges cannot itself rectify the failures of our judicial system which increasingly cry out for public awareness and congressional response. The causes are many: among others, too few judgeships, too many cases, too broad a jurisdictional base, too many legislatively created causes without evaluation of the impact on the judicial machinery, and failure to recognize the impact of inadequate judicial compensation on the retention and attraction of competent judges. But whichever issue may serve as a focal point, the ultimate problem is that civil litigants can no longer expect that their cause will be determined speedily before a judge, drawn from the highest ranks of the legal profession, who has had the time to apply his expertise to the thorny legal and factual questions which constantly arise.

The sentiments expressed in this Symposium are not altogether new. It will not be seriously disputed that "the duty of lawyers and the function of judges is to deliver the best quality of justice at the least cost in the shortest time."¹ Ironically, the measures necessary to alleviate the problems are themselves beyond the power of the courts to achieve, for such questions as the scope of federal jurisdiction and the qualification and compensation of judges must be answered by society generally and by Congress in particular.

Not merely in theology does the image of rebirth give structure to the process of transformation by which the old is both replaced and retained. So also Lincoln could remind us at Gettysburg that the transformation by which the individual states that day again became a nation required a rededication to, and a rebirth of, the "old" constitutional values. This bicentennial year provides an appropriate time to take measure of our federal judicial system. Indeed, as Judge Renfrew notes, "it is a time of desperate need for direction, clarification and

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¹ Address by Chief Justice Warren E. Burger before the American Bar Association Annual Meeting, Aug. 14, 1972, quoted in Wright, *Selection, Training and Use of Law Clerks in United States Courts of Appeals*, 63 F.R.D. 465 (1974).

improvement."² Sentencing, outmoded grounds for federal civil jurisdiction, shortages of judicial manpower, disparity between incomes of judges and those of the practicing bar, potentially inadequate removal mechanisms, and perhaps even the politically oriented method by which judges are selected are matters of immediate concern. These are issues not merely of academic interest; they are issues which vitally affect every citizen, for each citizen has the right to expect that justice be swift, that it be administered as inexpensively as possible, and—most importantly—that the courts be dispensers of justice and not mere processors of cases.

Congressional response, unfortunately, has been inadequate. Indeed, recent practice has been to superimpose litigation priorities on the existing overburden. Examples include the Speedy Trial Act³ and the priority provisions of Title VIII of the Civil Rights Act of 1968.⁴ The objectives of such legislation are commendable, but this observation does not end the inquiry. Something more must be accomplished. Surely *all* cases deserve expeditious handling; failure to legislate a super-priority for other classes sub silentio institutionalizes a policy of delay inconsistent with the premise that justice delayed is justice denied. Judge Bratton's suggestion that diversity jurisdiction be pared away represents but a proposal to do directly what the various priority rules seem to accomplish indirectly.

Judge Bratton's arguments become all the more compelling when one realizes that not only do diversity cases unnecessarily "clog" the courts' calendars, thus diverting judicial energies from matters cognizable only in federal court, but even now the promise of diversity jurisdiction itself often goes unfulfilled. The very congestion that diversity cases help create makes it difficult for courts to give those cases the time or reflection that these problems of state law or conflicts of law demand. In short, if there must be diversity jurisdiction, it ought to be extended only under such conditions that the federal court's *Erie* obligations can be intelligently met.

Proposals for change ought not be based solely on caseload data. Certainly such data are relevant, as Judge Bratton's article demonstrates. And sophisticated techniques for predicting the growth of caseloads are being developed, whereby the federal trial courts' rate of descent into the morass of their own caseload can be pinpointed with even

² Renfrew, *Sentence Review by the Trial Court: A Proposal to Amend Rule 35*, 51 IND. L.J. 355, 366 (1976), *infra*.

³ 18 U.S.C.A. §§ 3161-74 (Supp. 1975).

⁴ 42 U.S.C. § 3614 (1970).

greater accuracy.⁵ But caseload is relevant only because it reflects upon a judge's ability to devote sufficient time to each case, to appraise each litigant's position, and to reflect upon each counsel's brief. Briefs need to be studied, not just read in haste. Certainly justice must be swift, but it ought not be hasty. That justice may be swiftly dispensed does not ensure that justice will be properly dispensed. The recent habit of equating "justice" primarily with quantity needs reexamination.

The articles by Judges Marovitz, Sprecher, and Wallace identify other criteria by which the quality of justice may be assessed. Each speaks to judicial competence: Judge Marovitz offers proposals relating to subject matter competence, Judge Sprecher points to the problem of attracting qualified attorneys to the bench, and retaining them once there, and Judge Wallace is concerned with the need for proper and constitutional removal mechanisms. If speedy adjudication is the sole object of the judicial system, then none of these judges can be correct in his concern for informed and able decisionmakers. Nor can administrative innovation overcome the type of judicial mediocrity which Judge Sprecher warns against. Judge Marovitz's proposals, Judge Hastings' discussion of the Seventh Circuit's publication policies, and the proposed intermediate court of appeals analyzed by Judge Swygert may provide stopgap assistance in limited areas, but as is well discussed elsewhere⁶ all such administrative innovations cannot preserve the excellence of the federal trial courts in the face of existing and predicted per judge caseloads. As noted in that study,⁷ more judgeships must be created. And as Judge Sprecher rightly explains, the benefits of office must be such that these new judgeships will be filled with the ablest of attorneys, else the reduction in caseload will not increase the quality of justice dispensed.

The growth of reliance upon judicial decisionmaking within this century has been immense. Perhaps there is a subtle assumption that only judicial participation can ensure the due process of law;⁸ perhaps it is also that society increasingly seeks to ascribe to the disinterested judge the additional role of national statesman. To those not already familiar with him, Judge Renfrew reflects in his article that he is among those jurists prepared to accept this added role. A judge sensitive to the awesome responsibility of sentencing the convicted must pause

⁵ See FEDERAL JUDICIAL CENTER, DISTRICT COURT CASELOAD FORECASTING: AN EXECUTIVE SUMMARY (1975).

⁶ COMM'N ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

⁷ *Id.* at 55-56.

⁸ See, e.g., Note, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 IND. L.J. 783 (1975).

at Judge Renfrew's profound introductory paragraph. His proposals for amending Rule 35 of the *Federal Rules of Criminal Procedure* can be effective, however, only if federal judges are given the time to fulfill their duties in as conscientious a manner as Judge Renfrew proposes.

Those who read these Symposium articles cannot help but be impressed with the immediacy of the problems facing our judicial process. It is now time to revitalize the system, to clarify our goals, and to establish realistic and practicable means of attaining those goals. That these articles need be written at all by the learned authors is a matter for concern, and for frustration.