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# WHOSE FEDERAL JUDICIARY IS IT ANYWAY?†

*Honorable Stephen Reinhardt**

A major battle is underway over the future of the federal judiciary. So far, it has been waged behind closed doors. Soon, it will move into the open. Its outcome will affect all young lawyers, and more important, all Americans with legal problems, civil and criminal.

The struggle is over the heart and soul of our federal judicial system. Whose courts are they? What is the purpose of federal courts? Are they there to serve the judges or the people? All the people or just the few? The battle is taking place in the form of a struggle over the size of the federal courts. Will they grow so that they can serve the needs of an expanding population with expanding rights, or will they be frozen in size and the number of judges capped at the number now serving? If those favoring a freeze on the number of judges prevail, the end result will be a drastic limitation on the number of cases that can be litigated in the federal courts.

We hear much about the problem of increasing delay in our federal courts. We hear complaints that litigants are frequently denied oral argument, that the size of briefs is being limited unreasonably, that written opinions are being replaced by inadequate informal memorandum dispositions. All these charges are true, all these complaints are justified, and all result from a single cause. We do not have enough federal judges to do all the work that is necessary to provide first-class justice to all.

The solution is simple. There are only 170 federal appellate court judges in a country of 240 million people. Yet, except for the 100 odd cases a year the Supreme Court hears, courts of appeals are the courts of last resort in all federal cases. Why only 170 judges, sitting in panels of three—meaning only roughly fifty-five panels—to hear all the federal appeals affecting two to three hundred million people? No reason at all. But the opposition to growth is fierce—and stems from an odd mixture of motives.

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Let me first give you a practical example of the consequence of the movement to stop growth in the federal courts. The Judicial Conference, consisting of the leadership of the federal judiciary, sponsors bills to add federal judges when, under a complex formula, the number of cases warrant it. This year the Judicial Conference, in an unprecedented move, refused to approve the ten new judgeships to which the Ninth Circuit is entitled, tabling the proposal pending a September report by its Long Range Planning Committee on the future size of the federal judiciary. As a result, Ninth Circuit judges must continue to handle a rapidly growing caseload with less than three-fourths of the judges that are needed—even under the highly conservative formula employed by the Judicial Conference. The result will be more delay, more work by judges that falls short of the quality we are capable of providing, and more frustrated litigants and lawyers.

The proposal to freeze the number of federal judges has gained considerable support in the federal judiciary. It is the subject of a soon-to-be released study by the Federal Judicial Center. Recently one committee of the Judicial Conference even went so far as to recommend *reducing* the number of federal appellate court judges to 120—a reduction of almost one-third. Were this proposal to be adopted, the limitation on access to the court by people deserving of a federal hearing would be immense.

The freeze movement serves the philosophical objectives of Chief Justice Rehnquist and Justice Scalia. These justices have for years sought to limit access to the federal courts, principally through a series of rulings on arcane procedural subjects such as standing, ripeness, and mootness. These indirect limitations have taken their toll, especially in public interest areas. In cases ranging from *Los Angeles v. Lyons*,[1] the chokehold case, to *Lujan v. Defenders of Wildlife*,[2] the latest environmental case, the Supreme Court has turned back the requests of those who seek to limit arbitrary or unlawful governmental action on the ground that their cases do not qualify for a federal court hearing under the Rehnquist Court's new procedural rules. These justices have a different vision of the role of the federal courts—a far different one—from Earl Warren or William Brennan, for example, from William O. Douglas or Thurgood Marshall. Justice Scalia has frankly and openly stated his views on the proper limits of federal court jurisdiction. He believes that the courts should be reserved for "important cases" and disdains those involving mundane matters, such as claims of employment discrimina-

1. 461 U.S. 95 (1983). —*Eds.*
2. 112 S. Ct. 2130 (1992). —*Eds.*

tion on the basis of race or gender, unfair denials of desperately needed benefits in disability and social security cases, and arbitrary governmental actions in deportation proceedings even though the issue, ultimately, may be one of life or death. There would be no better way to rid the federal courts of these "unimportant" cases involving serious injuries to the rights of individuals than to limit drastically the number of cases that can be heard.

At the heart of the freeze movement is judicial elitism. It is the view that federal courts and federal judges are too important for routine matters that only affect ordinary persons. Conservative judges, such as former Judge Bork and his intellectual allies, have long urged that the federal court system be preserved as a small jewel, to resolve major disputes with significant economic consequences. In short, the elitists think that the federal courts exist primarily in order to resolve cases involving large business interests—to decide "big buck" cases, cases that interest them. Problems incurred by real people, human problems, are simply beneath these judges. Human problems can be handled in the state courts or by administrative agencies, they believe.

The essential flaw in the approach of the judicial elitists is that they believe the courts are there to satisfy their intellectual desires, to provide them with intellectual stimulation—rather than to serve the needs of the public, to promote the public welfare.

Surprisingly, it is not only conservative judges who wish to freeze the size of the federal courts. Among the leaders of the movement are a number of liberal and moderate judges who are comfortable with the way courts have always operated and fear change. They yearn for the days, long gone if they ever existed, when a federal judge could walk down the street and be recognized and greeted by an admiring populace. They have visions of sitting in their chambers ruminating on important matters of the day and issuing decisions that will gain the immediate attention of the leaders in the business and academic world who will proclaim in unison, "Well done, Follansbee," or some such plaudit. They think their first names should be Learned or Augustus or maybe that they should even be known by two, such as Oliver Wendell. These judges are simply victims of nostalgia for days they never knew.

The supporters of the freeze movement have more worthy concerns as well. They worry that restructuring of the court system may be necessary—and that may well be the case. They fear a proliferation of circuits, or the creation of mammoth courts of appeals with an attendant increase in the number of internal circuit conflicts. It is true that structural problems will require our attention, that change will be necessary,

that we cannot anticipate all the difficulties that will arise, that there will be disadvantages as well as advantages. But that is a small price to pay for having a judicial system that remains fair and open, that is available to all. We will simply have to solve the problems of bigness—and we can. We have made a good start in that direction on the Ninth Circuit, and we can make a similar one in the rest of the country.

The opponents of growth also argue that bureaucratization will result, and that the quality of federal judges will decrease. Both these arguments are demonstrably wrong. Bureaucracy occurs when there are too few judges, not too many. When there are too few judges for the number of cases, we lean too heavily on staff, enact procedures that result in the arbitrary classification of cases that receive second class treatment, and then dispose of them by shortcuts taken behind closed doors.

Nothing is healthier than a full public ventilation of all of the issues in a case—through a full-scale oral argument in a public courtroom. Then, everyone knows what is going on. But that essential process is simply unavailable when there are not enough judges to hear the cases. In short, there is more danger of bureaucratization from too few judges than from too many.

As to the quality of federal judges—we are simply deluding ourselves if we think that we are the brightest and the best. There are three, four, ten, or more lawyers out there, at least as well qualified as each judge who is appointed. Nor will the quality diminish because the selection process will become "routine." There is nothing routine about the judicial selection process. The struggles for appointments will be just as fierce, the examination of qualifications by opponents just as rigorous. In the case of lower court judges, these battles take place largely out of public view anyway. There is simply no reason to believe that any change will occur in the selection process as a result of the fact that more rather than fewer judicial prizes are at stake.

So, where are we in this struggle? The freeze forces are moving rapidly within the judiciary. They have much support at the top—among the judicial establishment. Among the rank and file, the picture is less clear, but there is certainly significant support there as well. Judges are conservative by nature. They view change with skepticism—particularly institutional change. Over three-fourths of the current judiciary was appointed by Ronald Reagan or George Bush. Many of the rest, almost all Carter appointees, have grown weary or comfortable in office. Soon, however, there will be a fair-sized number of new judicial appointees—if the current administration ever gets around to starting the long and arduous process of filling the numerous existing vacancies. One would cer-

tainly hope for a young, vigorous group of new judges, with ideals untarnished, with concern for the rights of all—a group of judges who would understand the need for growth.

But the problem of the future of our nation's federal courts is far too important to be left to judges. It is the people and their elected representatives who must determine what the size of our courts will be, what role they will play in our system of government, whose needs they will serve, what kinds of cases can be brought in the federal courts. The battle is just beginning. Now is the time for lawyers, bar associations, law professors, deans, students, public interest groups, and others to join the fight. I urge you all to do so. Write letters and articles, speak out, introduce resolutions, work through professional and other organizations to which you belong. Get on record, get your organizations on record. If you care for your courts, fight for them. If you believe the courts should remain open to all, make your views heard.

Why is your voice so important? Because if those who oppose an elitist federal court system are to prevail, they will in all likelihood have to overcome the influence of the judicial establishment. Neither the issue nor its importance is readily apparent to the public—or even to the Congress. The debate is superficially over the number of judges to be appointed. But the behind-the-scenes agenda of many of the advocates of a freeze is to roll back the Warren-Brennan era, to return us to a time before the Congress enacted so many of the laws that serve to protect society's interests today—environmental, civil rights, and social welfare legislation. If people are deprived of the opportunity to seek remedies for the violation of those statutes, if they are denied *access* to the federal courts, their rights will be of little value. It is the federal courts that, since the 1950s, have kept our governments honest, have protected individual rights against arbitrary government action. Only if our courts remain healthy, vigorous, and open, only if we ensure that there are enough judges to protect individual liberties and freedom, will those rights remain safe.

I can assure you that the advocates of a minimalist federal court system—the "jewel" advocates—are well aware of the effect their proposal would have if adopted. They talk openly of forcing Congress to limit federal jurisdiction, of stopping Congress from passing new laws that can be enforced in federal courts. They sometimes suggest that their goal can be accomplished by removing other parts of our present jurisdiction, such as diversity cases or run-of-the-mill narcotics prosecutions. The first would simply be a drop in the bucket, and the second is simply not practical from a political standpoint. Congress is not going to pass any

law that looks like a step backwards in its war on crime. Anyone familiar with the political process can tell you that. So, what's at stake is clearly the type of cases that Justices Rehnquist and Scalia have long targeted. Clearly what's at stake are cases affecting not large business interests, but the poor, the minorities, women, and the disadvantaged. And clearly the end result of a freeze would be to limit drastically Congress's ability to expand individual rights. The freeze would not just be on the number of judges. It would also be on our access to our courts, and thus on our liberties and freedom.

At present we have fewer than 1000 federal judges (excluding magistrate-judges and bankruptcy judges) in the federal court system. That is far fewer than the number of judges in the state of California's judicial system. It is not much more than the number of lawyers in some of the nation's larger law firms. It is an infinitesimal number of judges for a rapidly growing nation of 240 million people—a country whose laws must grow to meet its needs. Yet it is this "magic" number of 1000—a number totally without rhyme or reason—that the freeze advocates have seized on as their maximum. To adopt such a cap would not only be irrational, it would be disastrous.

What do we need to do? And by we, I mean those I spoke of earlier—I mean you—students, professors, lawyers. First, we must persuade Congress to look at the question of the size of the federal courts in terms of what is needed to help the courts fulfill their mission. Second, we must develop a clear definition of the role and function of the federal courts, with primary emphasis on the rights of individuals, of those who need *assistance from* government as well as those who need *protection against* arbitrary government action. Third, we must sell that position to the Congress and to the Administration. Fourth, we must press for the rejection of any freeze and instead urge a substantial increase in the size of the federal judiciary.

A few months ago, I floated the idea of doubling the size of the federal judiciary in order to get the debate going. That is not too large a number. However, our fifth step must be to refine our approach and develop numbers that can be supported by empirical and statistical arguments. Sixth, as a stop-gap measure, unless the Judicial Conference reverses its position in September, we must, without further delay, persuade Congress to give the Ninth Circuit the additional judges to which it is entitled under the formula that governs every other circuit. Seventh, we must mobilize public support for these efforts. In that regard, I count on you here today to help get this critical project underway.

Finally, let me add one word about cost. Doubling the size of the judiciary will cost a small amount of money. That is true. But the price is right. The annual cost of operating the federal court system is less than the cost of building one space shuttle, only slightly more than one stealth bomber. We receive less than three-tenths of one percent of the federal budget. Doubling our size would be a drop in the bucket. And the benefits to our criminal and civil justice system would be enormous. Even in an age of deficit reduction, court expansion is a winner.

So, I thank you for the honor you pay me today and I thank you for the privilege of addressing you. I am most grateful to the St. Thomas More Law Honor Society, to Loyola Law School, and to all of you who are present. I look forward to working with you and seeing you all again. And, finally, I wish you all the very best.