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# STARVING THE TIGER: SOME PROBLEMS ABOUT THE FEDERAL BENCH

by

*Thomas Gibbs Gee\**

[N]o one was to have any of the ordinary possessions of mankind; they were to be . . . guardians, receiving from the other citizens . . . only their maintenance, and they were to take care . . . of the whole State.

Plato, *The Republic*, Book VIII, at 543.

Today the federal judiciary both presents and suffers from serious problems. The latter category, problems of the courts, may seem of little present import except to judges; but their long-range implications, given what I shall suggest about problems *with* our courts, may be grave. Since I am presently writing principally for those who have a proper special interest in such courts—lawyers and law students—I shall commence with a brief survey of some problems of the courts. My short discussion of these will lead into the few words I shall have to say about problems with the courts. In brief, I shall argue that the apparent congressional resolve to deal with judicial activism by a policy of attrition directed at the judges themselves is misguided, that the end of it can only be a bench occupied by people of lesser stature than at present, that what is needed there is restraint, and that lesser persons are unlikely to act with more restraint than abler ones.

## PROBLEMS OF THE COURTS

### *Judicial Compensation and Survivors' Benefits*

I shall not dwell on this topic at great length: self-concerning presentations are seldom attractive. For reasons sufficient to itself, the Congress has for many years now persisted in a policy of setting federal appellate judges' salaries at the exact level of those received by members of the House of Representatives, with trial judges receiving slightly less. Since the jobs of judge and representative are in no way comparable, this policy is difficult to understand as an initial proposition. In the nature of things, moreover, many sources of outside income available to congressmen are denied to judges: membership in law firms, active participation in the operation of corporations and other commercial enterprises, and similar endeavors. About all a member of the federal judiciary may now properly do to earn outside income is teach, write, or deliver addresses for honoraria—all time-consuming activities that the nature and rapidly increasing quantity of his official work make very difficult for him to pursue. Con-

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gressmen also receive considerable additional income, even from governmental sources, in the form of substantial and recently increased expense allowances for which no accounting is required, for example, and are notoriously chary of increasing their own direct compensation. This incongruous yoking has consequently resulted, through inflation, in a diminution of district judges' compensation over about the last two decades from a 1969 value of around \$107,000 per year (retroactively expressed in hypothetical 1980 dollars) to what is actually paid them presently in real 1980 dollars, \$54,500 per year.<sup>1</sup> Appellate judges receive slightly more, \$57,000, and Supreme Court Justices \$72,500.<sup>2</sup>

These levels are not realistic compared with those of other members of the legal profession at present. For law clerks departing for private practice after a year of service in the offices of these very judges, starting salaries in the \$35,000 to \$40,000 range are not uncommon. Increases are rapid; and today seasoned attorneys of the caliber of those on the bench, and with comparable experience—fifteen to twenty-five years in the courtroom—command compensation in the \$100,000 to \$200,000 range and often a great deal more.<sup>3</sup> That judges should receive the same compensation that they could earn as lawyers in private practice is no part of my thesis: the jobs of practicing attorney and sitting judge are little more comparable than those of judge and member of Congress. Judges' working hours are, for example, more within their own control than those of lawyers and hence tend to be, if often as long, far more regular. Judges are relieved from the whims and caprices of clients and from the economic uncertainties attendant upon obtaining and keeping business and meeting payrolls. Outside the courtroom, and usually in it, they are generally treated with respect and deference.

That these things have value cannot be denied; but they do not go very far toward putting the children through college and permitting the accumulation of funds to see the judge's wife through life after he dies. The old saw professes that when the judge's dog dies, everyone goes to the funeral;<sup>4</sup> when the judge dies, nobody goes. Lest the reference be thought unduly cynical, I shall say no more regarding the present level of survival

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1. The statement in the text, while strictly accurate, requires supplementation so as not to be misleading. Because of cost-of-living adjustments, the present authorized salary rate of these judges is higher than the textual figures by almost 12%, with that of appellate judges slightly higher because of their slightly higher base figure. Judges have not been receiving the increase, however, because the Congress attempted to retract a portion of it after it had gone into effect and provided that whoever accepted the reduced amount did so on pain of waiving any right to the larger. Few if any judges accepted the increase, and the Supreme Court has since decided that the retracted increases could not constitutionally be withheld. Initial newspaper accounts indicate that the salaries now approved will be approximately \$61,600 per year for district judges, \$65,000 per year for courts of appeals judges, and slightly over \$80,000 per year for Supreme Court Justices.

2. The Chief Justice now receives \$75,000.

3. The November 4, 1980, issue of the *Wall Street Journal* reports that at least 100 law firm partners regularly earn over \$500,000 per year, with top associates commanding up to \$66,000, and paralegals earning up to \$32,000.

4. Unaware, doubtless, that a recusal would be the only conceivable reward for his presence.

benefits for judges' spouses than to give one illustration: the widow or widower of a federal district judge who died after seven years' service would presently receive an annuity of \$4,800. Irrationally, if the judge lives but can do little or no work, the salary continues; but even judges are mortal.

Enough. Able judges—more in the last six years than in the entire period from the Second World War to 1973—are leaving the federal bench, and able lawyers are increasingly refusing to accept judgeships and make the \$50,000 to \$100,000 sacrifice in annual income that taking such a position entails. If present policies continue, the melancholy event can only be a federal bench occupied chiefly by those who are either well-to-do, or mediocre, or both. Lawyers and law students, those whose present and future livelihoods depend on producing informed and just results from a mechanism of which judges are a principal feature, may properly view this trend with trepidation. If you do not now know what damage a stupid or uninformed judge can do, you may not have long to wait.

### *The Expansion of Federal Jurisdiction*

The same twenty years or so in which federal judges' real compensation has been cut in half by inflation and congressional policy have seen an enormous and unprecedented increase in these same judges' jurisdiction, formal and informal, imposed and self-generated. Decisions of the Supreme Court, familiar to any likely reader of this piece, and decisions of lower courts as well, have so wrought affairs that almost any case except one about domestic matters or land titles can be brought in federal court. Countless new types of actions unknown to the common law have been legislated by the Congress, and many new ones have been divined by the courts themselves. The combination of a traditionally litigious citizenry and a burgeoning bar increasingly able to recover its fees from, in effect, the litigation process itself, has loaded our dockets. In no sense do I imply that all or even most of these changes are bad; who can say, for example, that furnishing gratis counsel to indigent criminal defendants is not a good and just policy? Good or bad, however, the consequences are real. Some of these developments—even this last—are dubious: who, even if guilty and conclusively shown so, would forego a free appeal from any criminal conviction, especially one entailing a hefty fine and a stay in Leavenworth?

Our own decisions in the areas of standing and mootness, especially involving class actions, combined with the relentless constitutionalizing of every aspect of the law—with its follow-on expansion of habeas corpus, section 1983,<sup>5</sup> and *Bivens*-type actions<sup>6</sup>—are at the root of much of this problem, if such it be. I sometimes fear that, in our well-meaning zeal and our sometimes justified impatience with what we may see as legislative

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5. 42 U.S.C. § 1983 (1976).

6. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). In *Bivens* the Court held that a citizen whose fourth amendment rights are violated may sue for money damages. *Id.* at 397.

inertia or pusillanimity, we are in the process of converting the Constitution from a safety net into a purse seine, drawn up so tightly around the legislative neck as to leave little room for movement.

During these same two decades, the Congress has added to our dockets several large classes of disputes to which applying a district judge and a panel of appellate judges for resolution is ludicrous excess. I am the last to deny that devious lenders and fraudulent used-car dealers, as examples, should receive their comeuppances, but to play our ponderous dispute-resolution mechanism upon them is to kill mosquitoes with cannon fire. Of diversity jurisdiction I need scarcely speak. An idea whose time has come and gone, it persists like a fly in amber because none aware of its existence wishes to be done with it except the judges. Maintaining an entire redundant system for resolving disputes between citizens of different states because an occasional local judge<sup>7</sup> may be prejudiced against the outlander is not a rational or economical response to that problem.

Finally, and overlapping many of the foregoing, are the problems stemming from the steady flow of power and policy crafting from the other organs of government, state and federal, to the courts. Many of these questions of policy are not amenable to the categorical sort of decisions that courts are accustomed and equipped to make—decisions necessarily made without adequate consideration of competing goods foregone, of fiscal impact, or of legitimate popular desires and opinion. Some of these matters are deliberately thrust upon us by the legislative branch; even so, I fear, we are usually found all too ready to receive them. Some we take upon ourselves; and of this, more later.

Another unfortunate result is the progressive conversion of the federal court system, by the continued expansion and elaboration of concepts of constitutional rights, into first virtually, and now all but literally, a second system for appellate review of state criminal matters via the Great Writ. The Supreme Court's recent decision<sup>8</sup> requiring lower federal courts to pass on the sufficiency of record evidence to support state convictions goes a long way toward closing this ring. I doubt that we have yet felt its full impact, probably because of exhaustion requirements; but the decision may very well be held to be retroactive,<sup>9</sup> and as I write a wave may be working its way through the state court systems that will overwhelm the federal. I fear as well that I see early signs that the law of evidence is being constitutionalized via the due process avenue. When and if it is, habeas corpus will have become a full-blown vehicle of redundant review, resting on all but unalterable constitutional pinnings and unlimited as to time; and no state conviction may ever be viewed as final.

So much for problems *of* the federal court system. Doubtless there are

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7. Not a jury; federal and state juries come from roughly the same in-state citizenry.

8. *Jackson v. Virginia*, 443 U.S. 307 (1979). *But see* *Allen v. McCurry*, 49 U.S.L.W. 4015 (U.S. Dec. 9, 1980).

9. The Fifth Circuit has recently held it to be, in effect, retroactive. *Holloway v. McElroy*, No. 79-3325 (5th Cir. Dec. 11, 1980).

others, but those I have instanced above seem to me central at present. They may be epitomized as those presented by the aspect of a small body—even now, fewer than 850—of nonelected, life-tenured technicians, increasingly burdened by trivia beneath their competence and increasingly thrust into policy matters beyond it, while at the same time menaced by an incipient downgrading of their individual abilities. Let us turn now to problems *with* the courts, many of which are foreshadowed by and intertwined with those I have sketched above.

#### SOME PROBLEMS WITH THE COURTS

No one can tell today whether or, if so, to what degree the general quality of those occupying the federal bench has already been reduced by the trivializing of its docket—the development cited by Griffin Bell as a principal reason for his leaving it—and by the all but spiteful treatment the judiciary has been accorded as to compensation over the past twenty years. Such losses as those of Judge Bell from the appellate bench and, to cite only one among many, Judge Finis Cowan of Houston from the trial bench are heavy and hard to repair. Strong and dedicated lawyers have, however, so far continued to step forward to fill the ranks; perhaps they will continue to do so for a long time. Even today, however, it is already patent that some simply cannot: those with large and dependent young families, or substantial financial obligations assumed in reliance on an income level twice or three times higher than that afforded by the office, and without outside resources upon which to depend. The congressional policies to which I referred earlier have persisted with little respite for two decades and must, if not soon repaired, begin at last to take a significant toll in the number of quality applicants coming forward. We may all hope that this deterioration will be slow and that help will come soon; but while we hope, we must bear in mind that an incompetent federal judge, once seated, may well prove to be a long-time inconvenience and embarrassment: he is unlikely to have many inducements to go elsewhere and, in the immortal words of Coco Chanel, “Sinners can repent, but stupid is forever.” If incompetence on our bench is not yet a general problem, I dare venture it soon may be.

A second and more subtle complex of problems has been spawned by the accelerating irruption of federal judges into policymaking at all domestic levels.<sup>10</sup> The origins and causes of this development are obscure, but they may perhaps be guessed at with some assurance. It is even possible to speculate that, with the Supreme Court’s audacious seizure of power in *Marbury v. Madison*,<sup>11</sup> present trends, though long delayed, were written on the wall. After the power of final decision was thus preempted, and no successful counter-foray was mounted by the Congress (the argument

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10. Foreign policy, both as more remote and as more plainly disposed elsewhere for determination, has thus far mostly failed of our attentions. Attempts have been made in the area, however, as in the effort to have the Viet Nam conflict declared unconstitutional.

11. 5 U.S. (1 Cranch) 137 (1803).

runs), the precious prize lay safe and silent in the Court's bosom against a future day. After *Marbury*, it is familiar lore that this power was not used again for over fifty years,<sup>12</sup> when in *Dred Scott v. Sandford*<sup>13</sup> the Court next asserted its power to strike down federal legislation at variance with its view of the literal terms of the Constitution. As the decades have passed, the Court, first timidly and rarely and then with accelerating boldness and frequency, has increased its interdiction of congressional action and, given the opportunity, has often acted on its own initiative. Lawyers are accustomed to thinking in categories that incorporate the notion of separation of powers. Other students of politics and government tend to view such matters more grossly. Who, they inquire, had the final say in the matter? Grossly, candor compels us all to concede, the answer has increasingly been: the Supreme Court.

As is known, our current century opened and advanced well into the Great Depression to the accompaniment of a drumfire of economic decisions by the Court, first advancing and later seeking to preserve what in its view was the economic order that the Constitution had established. Meeting then a significant check, in the form of a President holding different views about what was mutable in the economic order, the Court retired with dignity from the pursuit of economic deregulation in the name of substantive due process. What is interesting about this episode, for our present purposes, is the mechanism that it illustrates.

A principal weapon of the Court, and its chief source of political power, is the Constitution. This civic ace of trumps takes all other cards: admirable! To play it, however, the Court must first find in it somewhere a command or a prohibition relevant to the particular game in progress. When an institution deriving its powers from a document finds need to expand those powers it must either (1) expand its existing interpretation of some portion of the document upon which it has opined and relied in the past, as the due process clauses have been expanded (and sometimes partially contracted) in this century; (2) activate some existing provision of the document that has lain dormant, as the equal protection clause has been resurrected in the last three decades; or (3) discover or divine some implied power or prohibition arising from, but not literally stated in, the writing, as the right of privacy recently found there. None of these measures are difficult ones to a resolute and ingenious final authority; and the Court has employed them all with increasing freedom and frequency in recent years, though arguably in diminished measure since the heyday of the Warren Court. Even so, two of the most arresting and open applications of these and similar techniques by the Court have occurred quite recently.

In the earlier of these, *Roe v. Wade*,<sup>14</sup> the Court of its own main force imposed on the country what it thought good policy by finding warrant in

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12. The brief and synoptic report of *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), indicates that the familiar lore may not be quite correct.

13. 60 U.S. (19 How.) 393 (1857).

14. 410 U.S. 113 (1973).

the Constitution for distinctions based on the trimesters of human pregnancy, perhaps the most radical example of constitutional exegesis in history. And only last year, in *United Steelworkers v. Weber*,<sup>15</sup> the Court rejected congressional language and legislative history of pellucid clarity, and the congressional policy against racial preference so plainly expressed there along with that language, and imposed its own contrary policy countenancing and, indeed, taken in combination with executive directives known to it, requiring "reverse" discrimination.<sup>16</sup> Thus did the two ancillary branches effortlessly set at naught legislative policy, lain down in Congress's own proper sphere. Such lessons from their exemplar have not gone unheeded in the lower federal courts.

Their hands—equally, but for its sole gainsaying, with those of the Supreme Court—have been placed by that Court's decisions on the levers of policy control. Equally with that Court and subject only to its revision, those courts too can construe and employ the constitutional trump. Each of these judges has his or her own discrete convictions about what matters should be reformed or righted in the polity and about which among those matters requires priority attention. Unground axes lie about even in their toolsheds, and among them there are those who, humanly enough, are not averse to seizing the opportunity to write a landmark decision.

In all fairness, one must observe that the Congress itself has contributed mightily to the situation and tendencies that I have described. In addition to enacting such measures as those involving lending practices and odometers on used cars and mandating the full panoply of federal trial and review for their disposition, a torrent of broad and vague social legislation has poured forth in recent times that invites and sometimes all but requires policy interventions by the courts. Much of title VII<sup>17</sup> and the OSHA<sup>18</sup> legislation, to cite only two examples, is so generally couched as to resemble nothing so much as a punting of the policy football to the courts for handling there.

The courts' increasingly frank incursions into domestic policy matters have been followed by predictable consequences, consequences interacting to produce a synergistic effect of their own. As some of our judges have developed and defined relatively stable policy positions and as these have become public knowledge, constituencies have developed about them. Groups with an interest in moving the law in one direction or another quite naturally tend to bring their test cases before trial judges known to favor their views in principle. The sweeping remedies that often result from such suits, with their attendant publicity, reinforce the predilections of both judge and litigant, and the process and tendency proceed.

A similar partisanship has come to attend the nomination and confirma-

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15. 443 U.S. 193 (1979).

16. Here the Court's implement was not its final say on the Constitution's meaning, but imaginative statutory construction amounting to repeal and revision of legislation.

17. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978).

18. 29 U.S.C. §§ 651-678 (1976, Supp. II 1978 & Supp. III 1979).



tion process of Supreme Court Justices, which increasingly resembles an election. What is more natural or reasonable, where long-term policy is (quite correctly) perceived to be at stake, than for those having political power and long-term policy interests to intervene in that process with all the resources at their command? Senators serve six-year terms, representatives two-year periods; but a federal judge may hold office for thirty, forty, or even more years; and while his powers may still be narrower than those of elected officials, they are arguably stronger and seem constantly to broaden and increase.

And so those who appear at senatorial hearings for confirmation as Supreme Court Justices increasingly are attacked and defended along the lines of their known views on policy issues: Mr. Justice Rehnquist, whose appointment survived the assault, and Judges Carswell and Haynesworth, whose did not. Mr. Justice Stevens's appointment was an exception, for reasons unknown to me, but which may have been a general perception of him as competent, nonideological, and middle-of-the-road. It will be surprising if the struggle over selection and confirmation of Supreme Court appointees does not deepen and extend itself to appointments to the lower federal courts. Indeed, perhaps it should if those courts are to be sources of broad and final social policy. Some will feel that, after all, in view of the metamorphosis of the judge's role that I have described (not approved), it would be better to embrace the Jacksonian model of elected judges and abandon attempts at the Missouri Plan and like merit selection systems. If we cannot keep judges out of policy matters, they reason, then perhaps we should make them responsible to the electorate for their policies. Such a course has its perils, but it has at least the merit of replacing vanishing restraints—judicial deference to elective office, modesty, and reticence—with a real if clumsy one.

Doubtless the former model was superior: major policy made by the legislature, carried out by the executive, and held within constitutional limits by the courts. Of course, these general lines were never so rigid; they were blurred at the outset by practical considerations and measures such as the presidential veto. As general outlines, however, they have historically been broadly observed, though they incorporate a basic structural asymmetry. The executive and the legislative branches are restrained by the electorate; except on rare occasions, the judiciary has been restrained only by itself. So long as it viewed itself as a body of technicians, making molecular policy as a necessary byproduct of construing and harmonizing legislative enactments, this flaw in the checks and balances figured small. With the accelerating advent of the judiciary into molar policy, however, it looms larger day by day.

Well, it may be asked, what is so bad about that? Suppose the metamorphosis that you describe is in progress, have not governmental institutions always undergone sea changes over decades and centuries? Is not the federal bench a body of carefully selected and tested people possessing unusual ability, experience, and training? Why is it such a disaster if that

bench makes a significant portion of national policy? These are not fanciful arguments; I have heard them seriously advanced more than once by intelligent and conscientious people.<sup>19</sup> How are they to be answered?

An answer should probably commence with the classic and obvious responses: that the system is not designed to function this way and that the notion of a nonelected, life-tenured peerage exercising broad policy powers is not agreeable to our constituent political theory. To those who are not convinced by these arguments, let me offer a few others.

The most cogent of these, I think, is that policy decisions are the kind that courts are not well-equipped to make. Sound policymaking considers cost factors and competing values foregone. Even this nation cannot afford the expense of doing *every* desirable thing at once, and often approving one involves denying another or others. Legitimate popular desires and opinion are entitled to consideration; popular response and the lessons of experience with the policy adopted may indicate needed revisions. For obvious reasons, courts do none of these things well. Their decisions are categorical ones, necessarily rendered without adequate consideration of the costs they entail or of competing interests unrepresented in the courtroom. If they consider popular opinion, they do so sub silentio and inadequately. Their decisions are not subject to very easy revision in the light of experience with the effects of them.

In addition, much can be said for the notion that where policy that affects the public broadly is concerned, it is important that the public has and perceives that it has a voice and a responsibility in the decision made. These it has, if vicariously, in decisions made by elected representatives. It has neither possession nor perception of responsibility in those of the courts, whose decisions are rightly perceived as imposed from above by authority that the public did not select and cannot practically reject. No matter how right any decision may be, its acceptance is facilitated greatly by the traditional process of arriving at it: getting there by election of representatives who advance and resist it, compromise, and so on.

Finally, as I noted early in this writing, a major tool of the courts is the Constitution. When policy is placed on that ground it is, for practical purposes, immutable unless revised by the courts themselves. When policy is so made, the legislature is shut out and the elective and legislative process stultified. Where a clear constitutional restraint or command is truly implicated, doubtless this should be so; but it is interesting to remember that England, the mother of our polity, has managed to get along for many, many centuries without confiding such powers to its courts. Further, our courts have often reached very far into the constitutional store indeed for their discoveries, finding there what the Founding Fathers would be surprised to be told was laid up.

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19. A graceful and spirited piece by such a person, Judge Frank M. Johnson, Jr., of my court, has recently appeared. Johnson, *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979).

## CONCLUSION

I have tried to depict what seem to me the main problems and dangers clustered about the federal judiciary today. As one who is a member of it, my views may be narrow; but I have given them as candidly as I know how. From one aspect, we see an office possessing vast and increasing powers, some self-generated and many casually imposed by congressional inattention or abdication upon a judiciary that has been so mischievously treated in matters of compensation as to cast in doubt the caliber of its future members. From another, we view human nature attacked at one of its weakest points—that point at which it is faced with no clear or present obstacle on the road to increasing its powers by its own fiat.

Both aspects require attention. What to do about the first is simple: increase judges' salaries and survivors' benefits in a degree sufficient to compensate for the inflationary damage they have sustained. As to salaries, the outlay involved would not be very large by comparison with a myriad of other national programs. There are at present only about 830 active and senior federal judges. Thus, their compensation could be doubled (and so restored roughly to its 1969 value) for an annual expenditure of about \$50,000,000. Admittedly, this is a significant sum, but scarcely a week has passed in this election year without the announcement of some grant of similar or greater magnitude to some local project of small significance by comparison with attracting and retaining first-rate judges on the national bench.

What to do about excessive judicial policymaking is more doubtful. A return to self-restraint would be the most desirable remedy; and perhaps it may occur, though I see few signs of this result at present. Electing judges by popular ballot would have the effect of making them in some degree responsible for their policies but has many undesirable features, chief among them the circumstance that the electorate is unlikely, in the nature of things, to be in a very good position to evaluate their scholarly and technical competence. Such limitations on the injunctive power as presently exist in the areas of tax and labor law and restriction of the power to declare legislation unconstitutional are possible courses of action. No simple or general solution of the problem is apparent.

If solutions are not found, however, I do not, as have some, foresee a government by judiciary, though something approaching it may obtain for a time. A more likely upshot is the restriction of judicial power and jurisdiction, perhaps to a compass smaller than that which the Constitution broadly contemplates. Even the legitimate powers of the office can only be described as awesome, however; and whether or not federal judges are to continue to exercise such far-reaching powers as they presently employ, it is obvious, good policy to see that those judges are made from the best material that we can find. Plainly, the current policy of demeaning the

office will not have that effect. Nor is it likely to produce greater restraint on the bench; for it has not been the common experience of mankind that persons of lesser character and scope are likely to be correspondingly more self-restrained, rather the contrary.

