1984

Who's to Blame for Judicial Activism?

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REVIEW & OUTLOOK

Who's to Blame for Judicial Activism?

By NEAL DEVINS

The battle between the judiciary and the popularly elected branches of government has grown increasingly bitter. In an effort to curb so-called "judicial activism," Congress and the executive branch have sought to limit the authority of federal courts. Yet, on many occasions, the real villains in this drama are the very branches of government that criticize improper judicial decision making; for it is the frequent abdication of responsibility by the elected branches that represents one of the underlying causes of our "activist judiciary." Rather than solely criticize the courts for ignoring their designated role in our constitutional scheme, Congress and the executive branch also should look at their own blemishes.

The Reagan administration, with its announced policy of "judicial restraint," has been especially severe in its criticism of the courts. According to outgoing Attorney General William French Smith, the federal courts have improperly "trespassed upon responsibilities our constitutional system entrusted to legislators." On another occasion, the attorney general remarked that "[w]hen courts fail to exercise self-restraint and instead enter the political realms reserved to the elected branches, they subject themselves to political pressure endemic to that arena and invite popular attack."

Restrictions on Social Issues

Current administration policies reflect this view. By limiting its use of the courts, the Reagan administration has restricted the judiciary's decision-making authority on key social issues. Strict enforcement of environmental regulations, for instance, has been impeded by cutbacks in the Environmental Protection Agency's legal staff. Similarly, the administration has tried to severely reduce federal support to the Legal Services Corp. as well as to prevent their lawyers from initiating certain kinds of lawsuits.

More important, the administration has avoided litigation by entering into consent decrees on such matters as antitrust (AT&T; IBM) and desegregation (Lima, Ohio; Bakersfield, Calif.). The Justice Department also declines to raise certain issues before the courts or seek some types of court-ordered remedies. In desegregation law, for example, the Justice Department, in addition to refusing to pursue mandatory busing remedies, will not make use of the Supreme Court presumption that intentional segregation in a significant part of a school system suggests intentional segregation in other racially imbalanced portions of the school system. Finally, the administration has recently proposed to amend the Constitution to permit voluntary school prayer.

Congress also has tried to rein in expansive court rule-making. In the past few years, legislative proposals that would restrict federal court jurisdiction on such issues as abortion, school prayer and busing have nearly passed.

Congress also has used its appropriations power to limit the effect of perceived judicial excess. Examples include the termination of federal funding for abortions as well as limitations on Justice Department funding in school desegregation and IRS funding to enforce expansive nondiscrimination requirements. In addition, legislation has been enacted that prohibits courts from mandating busing unless it is constitutionally required, and to prevent courts from extending certain Social Security benefits to both men and women.

It is the frequent abdication of responsibility by the elected branches that represents one of the underlying causes of our "activist judiciary."

Congressional and executive branch action designed to limit court authority frequently seems to be a proper reaction to improper judicial activism. Courts have strayed from their designated role. Striking examples include: (1) Roe vs. Wade (the abortion decision), in which, according to Harvard Law Prof. Laurence Tribe, "nothing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest [in life] should not . . override [the woman's privacy interest]"; (2) the Nashville desegregation lawsuit in which a federal court of appeals held that modifications in desegregation remedies must reflect the current ratios of black and white students, even if such an approach cannot effectively desegregate the schools and is educationally unsound, and (3) the Chicago desegregation lawsuit in which a federal district court temporarily froze $250 million in federal education funds, without even giving the government an opportunity to either challenge the money judgment or voluntarily comply with it.

The courts also seem eager to supply a legislative judgment on the issue of tax exemptions for private schools. But more than suggesting possible judicial excess, the tax-exemption issue exemplifies the failure of Congress and the executive branch to abide by their designated roles in our constitutional system.

Congress, well aware of the tax-exemption controversy for more than 15 years, has yet to enact clear legislation on this matter. Instead, it has permitted a jerry-built regulatory scheme to originate primarily from court rule-making. The closest Congress has come to acting on this matter was when it prohibited the Internal Revenue Service during the Carter administration from implementing its 1978 proposal that tax-exempt private schools satisfy quotalike, nondiscrimination enforcement standards. Congress, however, did not respond to President Reagan's January 1982 announcement that he would grant tax-exempt status to racially discriminatory schools. In fact, our legislators could not even muster enough support to approve a proposed joint resolution opposing the administration's position. Ironically, the basis of the Reagan policy was that Congress needed to enact specific legislation on this matter. Congress thus hasn't given any real guidance to the other branches of government in interpreting or implementing their intent on the tax-exemption issue.

The president has neglected his own rule-making responsibility on this matter in a quite different fashion. Immediately after announcing its decision to grant tax-exempt status to racially discriminatory schools, the Reagan administration claimed that the Bob Jones University lawsuit was moot. Yet, after the administration suffered severe criticism and political embarrassment for this policy decision, the Justice Department asked the Supreme Court to hear the Bob Jones suit. The Reagan administration, however, was unwilling to reverse its January 1982 decision. Consequently, the department was forced to ask the court to appoint "counsel adversary" to Bob Jones University (and itself) on the case's underlying issue. Otherwise, the case would not satisfy the threshold constitutional requirement of adverseness—namely, that two opposing views be presented to a federal court.

Adverseness, however, also requires that the parties who bring a case to court should be the ones whose interests will be represented before the court. Thus the administration request still abandoned this fundamental requirement of federal judicial proceedings. The Supreme Court, instead of abiding by the Constitution's inherent restrictions on federal court jurisdiction, agreed to hear the case. This court action simply served to transfer to the judiciary the apparent responsibility for a controversial political decision. Ironically, both the Reagan administration and Congress have rebuked the federal courts for making precisely this type of political decision. Apparently, the elected branches of government are only concerned with judicial activism when such activism interferes with their policy preferences.

In May 1983, the court upheld the pre-Reagan "government position" in the Bob Jones University case and denied tax-exempt status to racially discriminatory private schools. This decision, however, won't necessarily mark the end of judicial policy making on this matter. The case of Regan vs. Wright is now before the Supreme Court. In this case, civil-rights plaintiffs are seeking judicial imposition of quotalike enforcement standards similar to those proposed by the IRS under Carter (and prohibited by Congress). Yet, before the court can address this substantive issue, it must determine whether the plaintiffs have suffered a sufficiently identifiable and redressable harm to justify judicial relief.

Similar to the adverseness requirement, the Constitution also demands that parties present a concrete claim for relief. In the Regan case, black plaintiffs claim that their "race is denigrated" unless the government strictly enforces the Bob Jones University nondiscrimination requirement.

Abstract Generalized Claim

Plaintiffs, however, do not allege either that they have been discriminated against by any private school or that denial of tax-exempt status to discriminatory private schools will have any tangible effect on the policies of those schools. This claim is neither concrete nor redressable. Instead, it is the type of abstract generalized claim that should not be resolved by the federal courts. Yet, since the courts have been encouraged to abandon normal standards of judicial restraint on the issue of tax exemptions for discriminatory private schools, it is quite possible that the Supreme Court will permit these plaintiffs to proceed and eventually impose quotalike standards on tax-exempt private schools.

Such a result would run counter to the strongly expressed wishes of Congress and the executive branch on the matter and surely would elicit an outcry against judicial activism from both branches. Yet, the history of judicial activism and congressional and executive abdication of responsibility on this issue clearly encourages such continued judicial control.

Congress and the president may yet discover that they have paid an unacceptably high price for the convenience of passing the buck on a politically sensitive subject to courts that are all too willing to make the required political judgments in their place.

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