

1982

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Repository Citation

Devins, Neal, "Is the Supreme Court on the Reagan Team?" (1982). *Popular Media*. 338.
https://scholarship.law.wm.edu/popular_media/338

OPINION AND COMMENTARY

Is the Supreme Court on the Reagan team?

By Neal Devins

The Bob Jones University lawsuit exemplifies the failure of both the Reagan administration and the Supreme Court to abide by America's system of checks and balances. Had the court paid attention to our constitutional mandate of an adversarial system of justice, it would have refused to hear the case.

Similarly, had the Reagan administration heeded its stated policy of judicial restraint, it never would have asked the court to decide the case. Ultimately, the case is indicative of a dramatic shift that has taken place in the structure of American government whereby each branch has taken on responsibilities originally designated to other branches.

The Reagan administration fully agrees with Bob Jones University's position that the Internal Revenue Code permits the granting of tax exemptions to discriminatory schools, and asked the court to hear this case only because a related court order prevented them from granting such a tax exemption. Because of this, the administration asked the court to appoint "counsel adversary" to Bob Jones University (and itself) on this underlying issue. Hearing this case thus abandons a fundamental requirement of federal judicial proceed-

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ings, namely that the parties who bring a case to court should be the ones whose interests will be represented before the court.

In trying to avoid further embarrassment on this matter, the President persuaded the court to disregard its procedures so that it could hear this case. He apparently wanted the

Supreme Court to conduct its judicial proceedings as though it were a congressional committee.

The Supreme Court's decision to resolve this case was a political one of the type, ironically, that the Reagan administration has rebuked courts for making. According to Attorney General William French Smith, the federal courts have improperly "trespassed upon responsibilities our constitutional system entrusted to legislatures." Apparently the administration wishes to transform a supposedly independent judiciary into an agency of a powerful executive branch. The attorney general has bluntly suggested that the courts "follow the election returns."

The administration's handling of this matter also sheds light on other policy decisions impacting on the courts. Since taking office, the Reagan administration has restricted the judiciary's decisionmaking authority on key special issues. The enforcement of environmental regulations, for instance, has been impeded by cutbacks in the legal staff of the Environmental Protection Agency. Antitrust enforcement efforts have been hampered by the administration's entering into consent decrees with AT&T and IBM. Yet another example is the administration's refusal to pursue busing remedies in desegregation cases.

Will the administration only enforce those laws which it finds politically acceptable? Such an approach would be anathema to the President's constitutional duty to "faithfully execute the laws." Clearly, other presidents have sought to use the judicial process for their political ends. But unlike other presidents, Mr. Reagan has not just selectively used the courts. He attempted to manipulate court proceedings when he asked the Supreme Court to decide the Bob Jones University case. Mr. Reagan thus has misled the public.

Fault in the Bob Jones University affair, however, ultimately lies with the Supreme Court. Federal judges are life tenured so that they will not be suspect to political pressures. As Alexander Hamilton stated: "There is no liberty if the power of judging be not separated from the legislative and executive powers. The complete independence of the courts of justice is peculiarly essential in a limited constitution." And it is this independence which gives the Supreme Court power to serve, in its own words, "as ultimate arbiter over the Constitution." Yet that power does not permit the court to ignore the Constitution. In fact, the court noted that it does not necessarily have jurisdiction over a matter even if "all parties earnestly wish a resolution of an issue or that swift resolution of an issue would benefit the general public."

among the three branches of government. Many individuals feel that this has already occurred. Congress, for example,

will consider enacting legislation which would restrict federal court jurisdiction on such issues as abortion, school prayer, and busing.

The stage is set. The court will not let the constitution stand in its way as it decides the Bob Jones University case. The Reagan administration, too, is satisfied to have the

decisionmaking responsibility lie with the court, at least for the time being. The only apparent loser in this case is our system of a government of divided powers.

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