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OPINION OF A SCHOLAR - The Future of the Judiciary: A Proposal

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THE FUTURE OF THE JUDICIARY: A PROPOSAL

J. CLIFFORD WALLACE*

INTRODUCTION

On April 2, 1990, the report of the Federal Courts Study Committee was presented to the leaders of the three branches of our federal government. This was the first statutorily created three-branch committee to study the future of the judiciary.

I. THE ORIGIN OF THE STUDY

This study of the future of the judiciary began at the request of Chief Justice Warren Burger on July 31, 1980. He requested that "I undertake the task of giving preliminary, exploratory thought to the problems that the judicial system will encounter 10, 15 and 20 years from now and what types of questions we should ask ourselves in progressing towards reasonable solutions to those future problems."[1] After my investigation, I concluded that "absent an inordinate horizontal increase in the court system, certain changes will need to be made in our system and procedures."[2]

I did not intend to produce an empirical study, but rather to make the inquiries that must precede more specific research by identifying problems and suggesting methods for analyzing them. I found that, barring a sudden drastic increase in the number of judges, our system will face a need for changes in both how disputes will be decided and what disputes will be decided. To accommodate a new era, different types of dispute resolution models are needed, and changes in the present mainstream court model must be made. Of course, it is easy to cry for revolution. However, we must accommodate these changes without interfering with the required independence of the judiciary and without modifying the important basic functions of the judicial system which have benefitted our country over the years.

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* Chief Judge, United States Court of Appeals for the Ninth Circuit. This Opinion is an adaptation of a commencement address given by Judge Wallace at California Western School of Law on May 6, 1990.

1. Working Paper–Future of the Judiciary, 94 F.R.D. 225, 226 (1981) [hereinafter Working Paper].

2. *Id.* at 228.

II. A TWO-STEP MODEL

I recommend attacking the problem with a two-step approach. "The first task would be to develop the tentative blueprint [of what would be necessary for the judiciary] to meet future needs."[3] This would require a multi-discipline approach which would bring together and analyze all of the relevant studies made thus far, and authorize future additional studies necessary to provide, within rather wide boundaries, some sense of the needs of the judiciary in the next one or two decades.

The second step would be to establish a long-term oversight entity.[4] This oversight entity would make annual reports to the President of the United States, the Chief Justice of the United States, and Congress, identifying the appropriate steps in each year which would meet the needs of the judiciary in the next ten or twenty years. As more data becomes available, this oversight entity would also make modifications in the blueprint for the future of the judiciary.

III. JUDICIAL AND LEGISLATIVE SUPPORT FOR CHANGE

The idea never would have progressed any further than my report without judicial and legislative leadership and encouragement. Many key legislators had to be convinced and compromises had to be made. Chief Justice Burger was an ardent supporter, and Senator Howell Heflin's leadership was evident from the outset. In the 97th Congress, Senator Heflin of Alabama introduced Senate Bill 1530 which incorporated the plan suggested in my proposal.[5] Later, Senator Thurmond, together with Senators Heflin, DeConcini, Simpson, and East, introduced Senate Bill 675 which contained a modified version of the proposal based on the same principle.[6] That Bill was passed in the Senate, but no action was taken in the House. In the 98th Congress, Senator Heflin introduced Senate Bill 381, a bill almost identical to the partially successful Senate Bill 675.[7] The Senate Judiciary Committee approved this Bill in June 1984. Finally, in November 1988, the 100th Congress enacted the legislation creating the Federal Courts Study Committee.[8]

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3. *Id.* at 225.

4. *Id.* at 225, 235-36.

5. Wallace, *Judicial Reform and the Pound Conference of 1976*, 80 MICH. L. REV. 592, 595 (1982). Senate Bill 1530 was entitled "A Bill to Establish a Federal Courts Study Commission and a Federal Courts Advisory Council on the Future of the Judiciary." S. 1530, 97th Cong., 1st Sess., 127 CONG. REC. 17991-92 (1981).

6. S. 675, 97th Cong., 1st Sess., 127 CONG. REC. 3969-70 (1981).

7. S. 381, 98th Cong., 1st Sess., 129 CONG. REC. 1397-98 (1983).

8. Federal Courts Study Act, 28 U.S.C. § 331 note (1989), Pub. L. No. 100-702, §§ 101-09, 102 Stat. 4644.

It took eight years of constant attention and the indispensable support of the judiciary to accomplish this step. Although the final Bill did not incorporate the entire theory of my proposal, the basic thrust of treating the judiciary as an entity which, like modern businesses, requires long-term planning, was adopted in the final legislation. In addition, the recommended concept of a three-branch approach to problem-solving was accepted.

IV. FUTURE PLANNING APPROACHES

But what about the future of long-term planning? Consideration should be given to my suggested two-step approach. I had in mind an initial two-year study;[9] the Federal Courts Study Committee, however, was given only fifteen months. Subsequently, the Committee properly recognized the need for additional study and investigation.[10] "It is not enough to develop a plan. There should be a method to reevaluate the plan as circumstances change, new facts are found, and new projections are developed. In addition, there should be some way of determining whether what is currently being considered to modify court output and input is consistent with the long-range plan."[11] A committee or commission could make recommendations as to what legislation would be appropriate in progressing towards the demonstrated goals based on this committee's study. The original proposed legislation called "for the establishment of a permanent advisory council made up of representatives from each of the three branches of the federal government. The council would have continuing responsibility to recommend ways in which future judicial needs can be met."[12]

I recommend that the Congress adopt the second phase of my original proposal. This would require that either the Federal Courts Study Committee or an independent, but similar, committee be established on a long-term basis. This committee would make specific annual proposals for consideration by the President, the Chief Justice, and Congress. A long-term committee working towards an eventual solution in an incremental manner is less disjointed, provides an evolutionary rather than revolutionary approach, and allows some degree of experimentation as the process continues. Following up with the second phase will also assure that the Report of the Federal Courts Study Committee will not end up on dusty shelves—as so many studies do—but rather it will be a plan to be implemented on an incremental basis. A continuing committee with members from the three branches of government will also add legislative reality to the work.

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9. Wallace, *supra* note 5, at 595.

10. JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 48, 51-52, 67, 107-08, 186 (Apr. 2, 1990).

11. Working Paper, 94 F.R.D. at 235.

12. Wallace, *supra* note 5, at 595.

My plea is simple—we must continue to explore ways to improve the administration of justice. While the recommendations in the Committee Report are significant and should be studied, what we have learned from the study process may be even more important. In spite of my view of the necessity to maintain the separation of powers in our three branches of government, there is a place for cooperation among the branches in solving our problems in judicial administration. This is a start, *but only a start.* A decade of effort should not meet with speedy demise.

V. INVOLVEMENT OF THE PRIVATE SECTOR

It will not be enough simply to conduct government studies. The private sector must also accept responsibility if we are to maintain our quality of justice. First, law schools should provide research to determine what future structural and procedural changes should be made throughout our system of justice. In making this suggestion, I am consciously drawing an analogy from my recommended development of a plan for the future of the judiciary. In my proposal, it is obvious that research is the key, and that study is required. The need for research throughout the legal system is no less pressing. As President Derek Bok of Harvard University stated:

> The public complains about the cost of legal services, but no one has discovered how much money we spend each year on our legal system. Communities experiment with alternative forums for resolving disputes, but do not evaluate these experiments systematically to learn which ones work and how well. . . . [L]awyers are not making a[n] . . . effort to evaluate provisions for appeal, for legal representation, for adversary hearings, or for other legal safeguards to see whether they are worth in justice what they cost in money and delay.
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> If the necessary research is to go forward, legal scholars must help organize it and participate in it, albeit with the aid of interested colleagues from other disciplines.[13]

Relying on law schools for research, we look to a historical strength of purpose, although unfulfilled in some areas. As Dr. Calvin Woodard, the widely recognized historian pointed out, the "new law school" of 100 years ago consciously replaced practitioner faculty with "researchers."[14] There are many

13. Address by Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System,* Association of the Bar of the City of New York Thirty-Seventh Annual Benjamin Cardozo Lecture (Nov. 9, 1982), *reprinted in* 38 THE RECORD 12, 27-29 (1983).

14. Address by Honorable J. Clifford Wallace, *Legal Education and the Profession–Approaching the 21st Century,* McGeorge Law School (ABA Litigation Section) (Apr. 12, 1984) (available at California Western Law Review offices).

law school faculty members who do provide us with research and insight into the nature of the problems our courts face. These professors often challenge our basic assumptions about the limits of the current legal system in ways that may help shape our future. Yet too often the law schools' contribution is exclusively in the area of substantive law. I believe that law schools have excess resources for purposeful research, and that they should be called upon to use that capacity in planning for the future of our judicial system.

In examining the future of the judiciary, I argued for a working group, with a broad base, that could effectively develop an ongoing plan.[15] It would be beneficial to extend the working group beyond judges and lawyers, to representatives of Congress, lay members, and the private sector. The organization could function as a center of a web, bringing to one central place all private and public thought and experience on this problem. My aim is for one specific new structure to undertake an intense analysis of the judiciary. The law schools already provide formal structures with access to many of the same varieties of experience and viewpoint–if only they will make a concentrated effort.

The responsibility cannot end, however, at the law school gate. Today's lawyer must also contribute by assuming his or her share of the problem-solving duty. From the formation of our country, lawyers have been leaders in finding solutions to society's needs. One need only look to the founding of our country for a clear example.

Two hundred and four years ago, it was hot, humid, and uncomfortable in Philadelphia. As the delegates from twelve of the thirteen states met in Independence Hall, ostensibly to amend the Articles of Confederation, a movement began which laid the foundation for a free people and which ultimately provided leadership around the globe. Probably no one foresaw the future effect of their handiwork. Their's was the arduous task of laying brick upon brick with only a very limited view of what the ultimate result would be.

They moved forward day by day as if directed and motivated by a non-earthly force. They overcame critical obstacles, debated important issues, and made necessary compromises. Finally, on September 17, 1787, their work was completed–a work that British Prime Minister William Gladstone would later describe as "the most wonderful work ever struck off at a given time by the brain and purpose of man."[16]

These founders were a hearty lot. Thirty-five of the fifty-five participants had a college education which required them to be conversant in both Latin and Greek. Several were historical and political scholars. They were familiar with the works of political philosophers such as Locke and Montesquieu. They had participated firsthand in the art of government during the colonial years, and in the eleven years since independence. They were a unique group: Washington, Madison, Hamilton, Franklin, Gerry, Sherman, Morris, Rutledge, Randolph, and Mason. These men could have been great in any age, but were especially great

15. Working Paper, 94 F.R.D. at 235.

16. E. GERHART, QUOTE IT! MEMORABLE LEGAL QUOTATIONS 107 (1969).

in their day. Were lawyers involved? Of the fifty-five founders, thirty-three were lawyers. The need for lawyer leadership is of no less importance today.

How can lawyers prepare for this challenge? Law schools should instill in new lawyers the tools to grapple with a largely unknown practice. If you assume, as I do, that substantial changes in our justice system will occur in the next two decades, how can lawyers be prepared to deal with and adapt to the changes?

Lawyers need to provide leadership in solving systemic legal problems, but courses on problems in the legal system are almost always relegated to an elective slot. Few students receive the education that would help them provide leadership to assist in the changes that will be required. A striking example from my background involves the subject of judicial administration. A few years ago, I taught a course on this subject. Although limited textbooks existed, the type of course I wanted to teach required construction practically from the ground up. I received no personal help because no faculty member had taught a judicial administration course before that time.

Therefore, I believe that lawyers must do more than practice law. They must be aware of the need to improve the system. They can better carry out this function if law schools provide courses in judicial administration.

CONCLUSION

To meet the great problems of the future of our judiciary, all branches of government will need to work together, each acting in its separate role but cooperating on the goal of justice. Similarly, all parts of our profession must cooperate. The law schools should not lose sight of the universe of our legal system—all the institutions of law and actors of law—by focusing only on an interesting planet or two. Together with research, a dedication to problem-solving attitudes and skills, and a cultivation of leadership and professionalism, law schools can greatly assist in the effort to meet the upcoming years of change successfully.

But the major burden of solving systemic needs of an ever-growing judicial system will rest on the shoulders of law graduates. Service to clients will be a primary obligation. But graduates must not lose sight of the need also to be part of solving the administration of justice problems which will arise in the future. Without a functioning system, clients will have no place to have their disputes resolved. Indeed, it is hard to imagine the practice of law with a judicial system bankrupt from overload.

The history of our profession and our law schools has been one of responding to society's changing needs. As we pass our bicentennial, what better time to prepare for the changes of the upcoming one hundred years.