
Judicial Activism and the Independent Regulatory Agency

One of the rewarding aspects of preparation for an occasion such as this is the opportunity it provides to reflect upon some of the jurisprudential wisdom that fascinated us as students but has now been filtered, screened and absorbed into our subconscious personal view of the law. Most of the oracles to be consulted in this process were, and a few still are, in some way active in the legal profession—as judges, practitioners or teachers.

Holmes and Cardozo, Pound and Llewellyn, Jerome Frank and Landis—all of these have left their imprint on the developing law of our century. Yet it was a non-professional from the arena of politics who, more than sixty years ago, set forth what may have been the most prophetic description of our current situation. Theodore Roosevelt, the activist president, in a 1908 message to Congress, painted a word portrait of what has come to be known as the activist jurist, in these terms:

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction
to all law-making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.

Though he had early rejected the law as a chosen profession, Roosevelt was no stranger to the judicial personality or its kaleidoscopic tendencies. But as he neared the end of his White House tenure, he had made only three appointments to the Supreme Court, and would get no more. It's interesting, therefore, to see how well his rather small sample met his criteria.

William R. Day and William H. Moody do not stand out as beacon lights in the court's history, though Day labored there for nearly twenty years and authored a number of key decisions, mostly in tune with Bull Moose thinking. Roosevelt's other selectee, Oliver W. Holmes, certainly epitomizes the ideal, though the President had early reason to suspect that he had miscalculated or midjudged when Holmes took a rather limited view of the anti-trust crusade.

We are now approaching another "round" in this century's cyclic concern about the philosophical compo-
sition of the high court. In between, another Roosevelt had seen his social reforms founder on the reefs of a Court that fell short of TR's ideal by almost any standard but especially that of the New Deal.

The great difference between our present predicament and those of 1908 and 1937 is that today's concern is centered, not in the rigidity that the two Roosevelts sought to dislodge, but in a widely held view that the Court over the last decade and more has been too resourceful in discovering juridical solutions to pent-up social, economic and political problems.

Last February in another paper I concluded that "all the subordinate federal courts, all the commissions, and even the State judicial systems pay a price for the Supreme Court's activism which is both heavy, and too seldom weighed in the balance."

Correspondence with one of your members led to the invitation to pursue the topic here. Having enjoyed so much my appearance here a year ago, when I shared the platform with the distinguished A. J. Priest in discussing regulation generally, I accepted readily enough. I confess that I have had a number of second thoughts during the past week. When President Nixon announced that he was nominating Circuit Judge Warren Burger to be Chief Justice
of the United States, the topic of judicial activism moved to the front pages.

Judicial activism is a shorthand term whose meaning changes coloration. It seems now to have acquired a vaguely opprobrious shade which tends to shift a perfectly respectable continuing debate which began before the Republic was founded into the emotional arena of such other etymological symbols as "law and order". The words are neutral enough, but they trigger unneutral reactions.

The daily newspaper columnists are now being followed by the writers for the weeklies and the monthlies, and soon by the editors of the law journals, in endless analyses about a President's role in reshaping of the Supreme Court into a less "activist" role.

Much of the discussion surrounding the new appointment centers on criminal law matters. Judge Burger's dissenting views, and his public statements, have made clear that the Supreme Court's center of gravity on some of these Fifth Amendment cases will shift.

The body politic feels qualified to have and express views on criminal law questions. The fires of public controversy are fanned by the public information activities of those deeply involved, notably police
officials. The civil rights decisions in my view rest on a different base, and comparatively speaking at least they have been accepted for their moral content. The apportionment decisions are somewhere between, in their public impact. "One man, one vote" is a good enough slogan, but to the working politician its ramifications are endless.

Business regulatory decisions, finally, are so specialized in their impact as public or political issues that they draw little public attention. One cannot conceive of the general public getting excited about the handling of a railroad or bank merger, or a monumental opinion upholding the Federal Power Commission on an area pricing scheme for natural gas, even though millions of people are affected by these decisions.

Thus activism requires definition, and the definers sometimes forget what Justice Cardozo pointed out a half century ago, namely that the forces of which judges avowedly avail to shape the form and content of their judgments are seldom fully in consciousness. Others, not avowed, are below consciousness—likes and dislikes, predilections and prejudices, the complex of instincts and emotions and habits and convictions, which make the
"[I]f there is anything of reality in my analysis of the judicial process, [judges] do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."
(The Nature of the Judicial Process, p. 168)

I find it interesting that two of the most articulate definers and critics of the judicial activism of the Warren era both served as law clerks to Justice Brandeis. Dean Acheson, in his volume *Morning and Noon*, for example, equates "activism" with being "result-minded":

"A present vogue in judicial practice and theory is to turn from the ideal of restraint in the exercise of judicial powers, from restraints imposed by respect for precedent and predictability in the law, as well as from deference to legislative and executive judgments and prerogatives in the constitutional field, to a more "activist" and "result-minded" role. The role would use vague and general phrases of the Constitution, in some instances, to veto legislation contrary to the contemporary ethos of democracy as the particular judge understands it; in other instances, to prod reluctant legislatures forward to achieve it.

"I can hear objection raised that what is novel is not the veto but the prod; and there is truth in this so far as constitutional decisions are concerned. But truth goes deeper. What seems to me novel is the self-consciousness of the "activism" both in constitutional decisions and in less far-reaching but still important ones applying historic statutes and common law conceptions. By self-conscious activism I mean an
acknowledged desire for change in the law in accordance with the decider's own conception of right. He may conscientiously be seeking to administer justice, but it is personal justice—the justice of Louis IX or Harun al-Rashid, not that described on the lintel of the Supreme Court Building, "Equal Justice Under Law."

Judge Henry J. Friendly was also a Brandeis clerk. His definition of "activism" is found in his criticism of Miranda. He made his point devastating by articulating the rule enunciated in that case as it would be stated in a legislative bill presented to the Congress for enactment. Then he contrasts the "legislating" in the interstitial areas which courts commonly do, such as fixing per se rules under the antitrust laws, with the Miranda result, where, he notes, the Congress can do nothing to reassert itself except promote an amendment to the Constitution:

"... The vogue, even with the present Court, for "guideline" decisions on criminal procedure going far beyond the case in hand had previously been confined to instructing its inferiors in the federal judiciary. It might thus have been thought that if the awesome force of the Constitution was to be placed behind so detailed a set of prescriptions not merely for the federal government but for fifty states over the expressed opposition of more than half, a more decisive majority among the Justices might have been awaited." [Benchmarks, p. 269]

Acheson noted that the process was by no means limited to constitutional decisions. Another commentator, Pro-
Professor Louis Jaffe, paraphrases Acheson:

"In interpreting a statute the activist judge ignores the palpable settlement to be gleaned from text and history, substitutes his own better view, and says, as it were, to the legislators: 'If you don't like what we are doing, you can always change it—if you can muster a majority.' . . . If it is improper for the judge to use his power to impress his own image on the law, it is even worse, it is argued, for him to assume jurisdiction—to reach out for power over cases which are outside the proper pale of adjudication, cases which are not meet for judicial decision." [80 Harv.L. Rev. 986, 988.]

Professor Paul Freund, third Brandeis clerk, does not choose to characterize his mentor in the modern terminology, but his nostalgia for Brandeis's wisdom suggests, nevertheless, a criticism—"the Court must be careful," he says, "not to dissipate its prestige and authority needlessly, lest in some time of crisis, when the Court must be obeyed, it will have forfeited so much of popular acceptance that its decision will go unheard. We know what happened after the illfated and unnecessary Dred Scott decision." [26 Ohio St. L. J. 225, 238]

One does not need to go to the commentators or to other judges to find definitions and characterizations of the competing ideas in this area. Justice Tom Clark, for example, reacted to Justice Frankfurter's "thicket" dissent in Baker v. Carr, on a candidly pragmatic basis:
It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time.

Justice Potter Stewart's dissent in *Lucas v. Colorado General Assembly* turns Justice Clark's test around, looking to the representative assemblies of the states as evidence of the popular will:

"Simply stated, the question is to what degree, if at all, the Equal Protection Clause of the Fourteenth Amendment limits each sovereign State's freedom to establish appropriate electoral constituencies from which representatives to the State's bicameral legislative assembly are to be chosen. The Court's answer is a blunt one, and, I think woefully wrong. The Equal Protection Clause, says the Court, 'requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis.'"

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"... The Court's draconian pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union. With all respect, I am convinced these decisions mark a long step backward into that unhappy era when a majority of the members of this Court were thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory."

Alpheus Thomas Mason, in the April, 1969, issue of the Virginia Law Review, which reached my desk this last
Monday, definitively summarizes the whole "activism" question in an article "Judicial Activism: Old and New."

He quotes from a speech of Justice Harlan, as follows:

"From the beginning . . . two views as to the proper role of the Supreme Court in our governmental system have existed . . .

"The one [view] is that the Court should stand ready to bring about needed basic changes in our society which for one reason or another have failed or lagged in their accomplishment by other means.

"The other [view] is that such changes are best left to the political process and should not be undertaken by judges who, as they should be because of their office, are beyond the reach of political considerations . . .

"'There can be little doubt,' the Justice concluded somewhat sadly, 'but that the former, broader role of the Supreme Court is the one currently in vogue, and that it is resulting in the accomplishment of basic changes in governmental relationships.'"

The quotation from Justice Harlan reminds us, and it is Professor Mason's basic thesis, that "activism" is not a new phenomenon and that it has not been consistent in its social outlook. Marshall's use of the Court to develop the national entity was hardly less passive than Warren's intercession on behalf of civil rights. "Activism" can even be negative in its thrust--to defeat or delay an income tax system, social legislation or economic controls.
Dean Kenneth A. Pye, of Duke University Law School, hails the activism of the Warren court in the jargon of today's militancy:

"[T]he temper of the times provided strong reasons for the Supreme Court of the sixties to forego the passivity advocated by Justice Frankfurter in favor of a more activist course. The danger of surging too far ahead of public or congressional opinion had to be balanced against the danger that too much restraint might make the legal process irrelevant to the pressing social needs of the day. If we are to persuade dissidents to stay within the system and out of the streets, we must have courts which are responsive to changing social values and which have the capacity to provide redress for basic grievances. It is to the credit of the Supreme Court that it recognized that the nation was in the midst of a social revolution before this became apparent to most of the elected representatives of the people, and that it sought to eliminate the basic defects in our system for the administration of criminal justice within our present structure. The result of this perceptive approach has been to immunize the Court from much of the alienation expressed against other institutions of our society not only by the disadvantaged, but also by large numbers of our youth, upon whom the future of the nation depends." [67 Mich. L. Rev. 249, 257-258.]

The discussion of activism thus far is intended to lay a foundation for my thesis that judicial activism is magnified or amplified by the regulatory agencies. It is the dynamics of the process, not its direction, which I believe needs attention and understanding.

Simply stated, agencies are embarrassed to be told
by a court that they have interpreted their legislative charters too narrowly. They do not like to be on the "wrong side" of jurisdictional questions.

Something like this is the lesson of *Scenic Hudson*, wherein the Court of Appeals for the Second Circuit reversed the Federal Power Commission's grant of a license to construct a pumped storage generating project. When the court said that the right of the public must receive active and affirmative protection at the hands of the Commission, the Commission smarted under the implied criticism. When the Supreme Court made an equivalent implied criticism in the *High Mountain Sheep* case, it really expanded the scope of the Commission's proceedings, if not its jurisdiction. However at a loss the Commission might be in considering such generalized public issues as the "public interest in preserving reaches of wild rivers and wilderness areas," it is bound to have a different type of proceedings in succeeding rounds.

As I stated in another paper, these cases, and the *United Church of Christ* case, constitute an added and new dimension to the administrative process—a product, if you will, of judicial activism. I decry neither the activism *per se*, nor the results of these cases; my

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point tonight is to emphasize that after such cases come down from a court, an agency is likely to react in a way which magnifies or amplifies the force, speeding it on its court-directed path.

The process is not new. The courts have devised a variety of theories to nudge regulatory agencies. For example, the Federal Power Act's jurisdiction-expanding history follows at least three identifiable strands: it has been allowed to be the analyzer of facts which lead to the conclusion of jurisdiction; it has been given the authority to determine the meaning of words and phrases of the statute in a jurisdiction-expanding direction; and it has been told to do what it can to see that no jurisdictional "gaps" remain unplugged.

I discussed the first of these strands in my dissent in *Florida Power and Light*, Opinion No. 517:

"... The Supreme Court in *Connecticut Light and Power Co. v. FPC*, 324 U. S. 515, at 515, credited the Congress with determining that "federal jurisdiction was to follow the flow of electric energy." (at 529)

"But is federal jurisdiction to follow the changes in the theories which are devised by company or Commission engineers to describe a still-mysterious phenomenon? For myself, I cannot accept the premise that the "commingling" theory can change the law as radically as to eliminate two explicit exceptions to our jurisdiction."
'Turning to the cases cited by the majority, most of these cases involved jurisdiction over wholesale sales, not jurisdiction per se. The two "straight status" cases in the Supreme Court reports—Connecticut Light and Power Company v. FPC, 324 U. S. 515 (1945), and Jersey Central Power & Light Co. v. FPC, 319 U. S. 61 (1942)—do not support the approach used here, and the Commission's opinion today is directly contrary to the latter's statement (at 319 U.S. 72) that "mere connection determines nothing." Today's decision has connection determine everything.

"The cases cited in the Commission's opinion, although sales cases not solely status cases, carry the process of interpreting legislative language almost as far as the Commission goes today. The final step may be a short one, but short or not, it is legislative."

Connecticut Light and Power Company also stands for the proposition that the Commission may pick and choose in the statute, to find "clear and specific grants of jurisdiction" which may seem inconsistent with the expressed purpose of a statute gleaned not from its legislative history, but from the statute itself.

After the Supreme Court tells an agency that one section of the statute is a clear grant of power, while another is merely a "policy declaration . . . of great generality," an individual commissioner who might have different views as to what the Congress intended, or how a statute ought to be read, doesn't have a great deal of maneuvering room. For an extensive example of this problem, I call attention to my dissenting statement to
the Order issued in the rulemaking proceeding to specify the meaning of the statutory term "net investment" in section 3(13) of the Federal Power Act. (Order No. 370).

The "gap" cases have been extensively discussed by Mr. A. J. G. Priest of this bar in a masterful pair of articles in Public Utilities Fortnightly, and I shan't spend much time beyond mentioning the City of Colton case FPC v. Southern California Edison Company, 376 U.S. 205, wherein the Court said:

"In short, our decisions have squarely rejected the view of the Court of Appeals that the scope of FPC jurisdiction over inter-state sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." 376 U.S. at 205-6.

Judicial language which allows regulatory agencies to bottom their jurisdiction-expanding decisions on catch-all housekeeping sections like Section 16 of the Natural Gas Act and Section 309 of the Federal Power Act, are particularly pernicious, for they represent an opportunity for commissions to abandon their legislative  

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charters almost completely as they seek authority for their actions.

Examples could be pursued endlessly, but it is better, I think, to make two final points related to our earlier discussion, and then close.

One is that although it may not be necessary to delve into the question of whether there are basic psychological differentiations which account for a judge being "activist" or restrained in his philosophy, it is necessary for us to agree that distinctions cannot be made between judges and agency members in this respect. Jerome Frank, who was a commissioner before becoming a judge, devotes a chapter to "Judges and Commissioners" in his book If Men Were Angels. He is vehement about the suggestion that somehow judges are more to be trusted, more prone to act impartially, than quasi-judicial officers, or "that a man named John Jones is a totally different type of person when he holds an office as a member of a quasi-judicial commission and when he holds an office as a judge."

In the same way, therefore, members of boards or agencies may tend to be on one side or the other of a midpoint on a scale of activism-restraint, and agencies may be chargeable with the same tendencies to indulge "an

acknowledged desire for change in the law in accordance with the decider's own conception of right" to quote again from Dean Acheson.

The final point is that Professor Jaffe's description of the activist judge challenging the legislature to muster an overruling majority in matters of statutory interpretation identifies the true vice of the phenomenon we have been talking about. Although this description is too simplistic where judicial pronouncements give new dimensions to constitutional questions, judicial pronouncements based upon this naked challenge to the legislature to legislate away the judicial interpretation goes to the very heart of all of an agency's activities. For statutory interpretation is the very stuff of the regulatory agencies. For them, jurisdiction is statutory construction.

If this point be conceded, then our real concern has to be with the tendency to remove whole fields of administrative activity from the kind of responsibility to the elected legislature envisioned when the regulatory agencies were first created.

We stand on the threshold of an interesting period of national history, in these relationships of court and agency, court and congress, and agency and congress. Prophecy takes more bravery than I care to display on this
occasion. I hope, however, that as President Nixon's appointments to the courts and to agencies are made, from time to time for the next few years, we will try to think of activism in less emotional terms than have marked the recent debate on such questions as apportionment, civil rights, and criminal law. We have such an opportunity at the regulatory agencies.