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DUE PROCESS: HAS THE TIME COME TO DRAW BACK FROM JUDICIAL ACTIVISM?

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The following is the manuscript of a speech given by Chief Judge Paul Benson to the Fargo-Moorhead Legal Secretaries Association. The speech was presented May 1, 1984, in commemoration of Law Day. Judge Benson graduated from the University of North Dakota in 1942 and earned his law degree from George Washington University in 1949. He is a former attorney general for the State of North Dakota. He has been a federal district court judge since August of 1971.

In observance of Law Day, I am going to talk about our system and the administration of that system. In doing so, I will be making comments which some may interpret as being critical. I am obviously expressing my own philosophy. I have great respect for all of my colleagues on the district and appellate benches. Any disagreement I have is strictly professional and well intended. It arises out of my respect for the system and those who must make the difficult decisions.

The theme for Law Day this year is "Law makes freedom work." Does it? Not always. How many countries can you name wherein law at one time made freedom work, and then laws were imposed that destroyed those freedoms; lost freedoms that have not been regained in our lifetime. I think we should give some thought as to how we can keep that from happening here.

But first we should ask, what do we mean when we speak of

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freedom? Is it working? If it is, what is it that makes it work? If it is not, why is it not?

You might say that freedom is personal liberty. If freedom is personal liberty, what is anarchy? Anarchy is a society where there is no law, and isn't that then the ultimate freedom? It, of course, is not, because in an anarchy only the strongest survive, and the weaker are subjugated or destroyed. Freedom then is something more and something less than personal liberty. It is more than personal liberty, in that it is the right of each of us to enjoy the collective protection provided by all of us. It is less than personal liberty, because each of us must subject areas of our personal liberty to the common good of all. Freedom then is the right of each of us and all of us to participate in the making and administration of the laws necessary to create an orderly society that will preserve those facets of liberty that we have come to regard as basic to life, human dignity, and the pursuit of happiness.

Our founding ancestors, drawing on the experience of our mother country, England, implanted those facets of liberty in our Constitution where today we refer to them proudly as the first ten, and fourteenth amendments.

They departed somewhat from the English concept and devised a system of government wherein the powers were separated into three co-equal branches in such a way that any one branch would find it very difficult to trample those basic freedoms. The system has worked for nearly two hundred years, but as our population has increased, along with a phenomenal growth of science and technology, society has become more complex and problems have arisen which assault the system. Each year that passes requires from each of us more of that eternal vigilance which has been described as being the price of liberty. Unless we recognize the problems and take steps to correct them, the system will begin to erode and crumble, and we may also lose those basic freedoms that have now been lost to much of the world. Today I want to mention a few of the problems that exist in each of the three separate branches of the government. However, I will touch but lightly on the legislative and executive branches, and direct my comments for the most part to the judicial branch.

The Congress is having difficulty enacting legislation. Years go by without regular departmental appropriation bills being agreed upon. Appropriations are provided through continuing resolutions and supplemented by deficiency appropriations to meet particularized needs. New programs are enacted under broad

general plans that leave the interpretation and implementation to executive regulations and judicial interpretations. This in turn creates uncertainty in the law and disagreements that at times rise to a point of chaos. It delegates the legislative process to the executive and judicial branches. Today the legislative and executive branches have great difficulty in reaching agreement on goals in both domestic and foreign affairs. Leadership is lacking in Congress because individual members take pride in loudly proclaiming they didn't come into government to be led by someone else. Single issues and partisan advantage predominate over general welfare.

The lack of direction and agreement in the political arena is reflected in the judiciary. Chief Judge Frank J. McGarr of the Northern District of Illinois, speaking on the subject of frivolous law suits, made some pertinent comments which seem to me merit repeating here:

> We live in an era of great emphasis on rights. Americans have not quite gotten up the speed in the recognition of their duties, but they yield to no one in the world in the assertion of their rights; and we also live in an era which has seen the demise on a broad scale of what I used to call common sense of reasonableness. Reasonableness in expectation; reasonableness in assertion. We have a lot of intelligent people in the United States, and we provide an awful lot of education for everybody who wants it, and yet we see an alarming paucity in modern science of common sense of reasonableness.
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> Perhaps a word for it is wisdom. And this lack of wisdom regrettably seems to be very prevalent at the highest levels of intellectual and political leadership, and in the media, and in the opinion formers of the United States, and you add that to the instant and almost universal communication we have, and we find that our ability to communicate has outstripped the supply of things worth communicating. So we are inundated daily with nonsense passing for wisdom, and the intellectual flotsam and jetsam that flow about us is finding its way into our courts. Another side of the same phenomenon is that we live and work in a society that is laboring under, what I think at least, is the misguided notion that we are

doing something noble about tailoring society to its misfits. As an example, and you need only one although you could think of others, we have lifted to the eminence of a recognized and constitutionally protected minority, the gay community, whose only claim to legal status as a constitutional class is their perverse desire to live as sexual deviates and go public on that subject. And finally, the abundance of frivolous litigation has been made possible by long-term developments in the law. Over the last many decades, the courts have been activist. No doubt our motives were good, and the results achieved undoubtedly justified the means we used, but the changes wrought in the law by activist adjudication has opened the door to unanticipated varieties of litigation. There were once several very real barriers to the exercise of our jurisdiction, but we have pretty well distinguished them away. The definition of case or controversy has been stretched beyond any logical limit. The concept of standing to sue has been watered down to the point where it is virtually nonexistent, and another question almost frivolous in itself is, whatever happened to the de minimis doctrine? Whatever happened to the notion that there were some things that were beneath judicial notice? Is there any assertion of right today so trivial that we can ignore it? I suppose not.

What has really happened is that we must recognize that we may have opened the courtroom doors too wide, and that has created a public perception of us which is one of the causes of worthless litigtion, if you want to call it that. What does the public read about us in the paper? What does the public hear about us in the news? How does the public see us as the federal judiciary? Well, they see us dispatching fleets of school buses; overseeing faculty promotions and tenure; redistricting cities and states; overseeing the administration of prisons; setting personnel policies for police and fire departments; we are charging in to keep the Christmas creche out of public places; we have kept the moonies safe and warm in the airports: arranged for universal availability of pornography; and we've even, with Godlike detachment, determined — give or take a week or two — when life begins; let a teacher swat a rebellious pupil or a principal

search lockers for guns or pot; a girl be refused the left tackle position on the varsity team; a minority member be given a "C" when he expected an "A"; a teacher fired for alleged incompetence; a student sent home because of an obscenity on his T-shirt; a fire woman disciplined for nursing her baby at the firehouse; a secretary censured for refusing to make coffee; a male pilot fired for becoming a female pilot; an anchor woman replaced by a more charming one; whatever the problem the federal courts have been there. The list is endless. You could each add a dozen more cases. The point is that we took them all. We opened the courthouse door wide — we invited the public in. We waived their fees if they couldn't pay. We gave them lawyers, or let them handle their own cases if they wanted to. We encouraged them all, and we created the public perception by which society sees the courts today. And society has responded to this with the notion that there is virtually nothing that the federal courts won't tackle, and people have come to look at us as the arbitror [sic] of all their controversies, and resolvers of all their conflicts, the grantors of all their claims.

Many years ago, U.S. Attorneys and other government lawyers were plagued by the borderline psychopaths who, with shopping bags of notes and documents, used to go from lawyer to lawyer, from bar association to bar association, and finally to the prosecutors' offices, with tales of imagined grievances, the search for redress of which consumed all of their waking hours. These people are no longer to be found in the waiting rooms of the profession. They are now pro se litigants enjoying the wonderful world of discovery. So, if we wonder now why we are besieged with frivolous litigation, we must recognize in seeking a solution to the problem, part of the problem and part of the answer must recognize that we asked for it. Our motives have been noble, activist judges have done what had to be done, usually what Congress should have done, but didn't.[1]

Substantial power has been vested in federal judges. We are seperated and insulated from the political arena through our

1. Address by Frank J. McGarr, Chief Judge, U.S. District Court, Northern District of Illinois, Combined Workshop for the Judges of the 8th and 10th Circuits, in Phoenix, Ariz. (Jan. 19, 1984).

lifetime tenure. The Supreme Court has the final jurisdiction to overturn the decision of the supreme court of a state. The power over the state judiciary is grounded primarily on those basic rights found in the first ten, and the fourteenth amendments. In the field of criminal law, a federal district judge has the power to second-guess the state courts, including the state supreme courts, and overturn the judgment of the state courts. In most cases the judgment of a federal district judge is reviewed, if at all, by a three-judge panel of the court of appeals, and the review usually goes no further. There are reasons for this vesting of power in the federal judiciary. It is designed to protect those basic freedoms that I have been talking about.

It seems to me, however, and I believe Judge McGarr is suggesting, that the federal courts exercise their powers with too little restraint. I speak of self-restraint, although Congress is beginning to look for legal ways to restrain the court. We sometimes appear to have the impression that we are endowed with greater wisdom than a state judge possesses, and that we have been mandated with some unseen power to determine that which is fair and that which is not, even though the Constitution fails to use that word. We may slide into the habit of looking to what we perceive should be a fair result, rather than whether the process which has been afforded was constitutionally sound, thereby meeting the requirement of due process. We thereby effectively eliminate certainty from the law, and create the situation wherein, as expressed by Judge McGarr, "the people have come to look to us as the arbitror [sic] of all their controversies and resolvers of all their conflicts, the grantors of all their claims."[2]

Lest the lawyers should assume they are free of criticism, I remind you of that part of your pledge you took when you were admitted to practice: "I will not cousel or maintain any suit or proceeding which shall appear to me to be unjust."[3] However, how many times have you told a prospective client, "You don't have a case," or how many times have you taken the case because you knew if you didn't take it, someone else would.

Also, the appellate courts are not free from comment. Too frequently the trial courts are guided by their reversals arising out of previous cases wherein the result produced by due process was perceived by the appellate court to be an unfair result. A result should be considered unfair or unjust only if the trial court failed to

2. *Id.*

3. The Lawyer's Pledge, *reprinted in* NORTH DAKOTA STATE BAR BOARD, DIRECTORY: LAWYERS AND JUDGES at 77 (1984).

afford due process, or misinterpreted or misapplied the law, or made a factual finding which was clearly erroneous. Parties are entitled to a fair trial through due process. They are not entitled to a result different from that returned by the trier simply because they, or a reviewing court, subjectively view the result as being unfair. Jurors are told by the trial court they must return a verdict based only on the evidence and the law that is presented in the courtroom, and that they cannot be influenced by either sympathy or prejudice; that everyone who comes before the court is entitled to justice based on the evidence and the law. It has always been my observation that when the lawyers and the judge do their job, the jurors almost invariably arrive at a just verdict, adhering to the admonitions that I have just mentioned. It seems to me that judges do not always adhere to those admonitions.

Fairness is afforded when due process is afforded, but that doesn't guarantee everyone a fair result. That which is perceived as being fair to one may be unfair to another. I will illustrate my point by telling you about an actual case.

Not long ago, an Indian defendant was convicted in federal court of raping a thirteen year old girl on the reservation. The evidence presented to the jury included evidence from which the jury could have found the defendant to have been drunk at the time of the incident. From all the evidence, it appeared that intoxication was an important part of the totality of the circumstances of the case. Over the defendant's objection, the jury was instructed that intoxication was not a defense. The reviewing panel reversed, holding that to give the instruction on a general intent offense was prejudicial error, because it may have given the jury the image of a drunken Indian, which apparently was unfair, but which is exactly what he appeared to have been. On retrial, the prosecution carefully avoided presenting any evidence or mention of drinking or intoxication The second jury acquitted. I made a prediction to my staff, based on my perception of the defendant, that he would be back before the court before very long. I was mistaken. He hasn't come back. He hasn't come back because he is now serving a thirty year prison term in Montana — for raping another thirteen year old girl. What was perceived to be fair to the defendant was grossly unfair to two thirteen year old girls, each of whom in addition to the assault, had to undergo the trauma of appearing in court to testify as to the incident. In reality, the result also wasn't fair to the defendant, it wasn't fair to the prosecution, it wasn't fair to the jury, and above all, it wasn't fair to the system. Law did not

make freedom work.

I have taken a long time to come to the point that I wish to make. Aside from international treaties, the Constitution is the supreme law of the land. Our basic freedoms are encased in the Constitution. Neither the Congress, nor the executive branch, nor the judicial branch can change the Constitution, but the law of the Constitution will not make freedom work unless we who hold public office and are charged with the duty to administer the law, impartially refrain from the temptation to bend the law to achieve what we may personally perceive to be a fair result. We should make every effort to make the system work as it was designed to work, which is for the common good of all.