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LIMITING THE IMPERIAL JUDICIARY

A few years ago, we heard a lot of talk from the Watergate reporters about the danger to democracy from "the Imperial Presidency." After many months of hammering by the media, all threats from that source were thoroughly eliminated.

We don't hear anything in the national media about "the Imperial Judiciary," yet the Supreme Court has forced decisions down the throats of the American people which could never be approved in the democratic process, notably in the areas of forced busing and prayer in public schools.

Few people have any notion of how to deal with the Imperial Judiciary, but one who does is Jules Gerard, professor of constitutional law at Washington University Law School in St. Louis. In testimony this summer before the Senate Subcommittee on the Constitution, Gerard said the Supreme Court today is "without allegiance to principle, except to the principle of being unprincipled. It regularly substitutes sophistry for logic, obfuscation for explanation, and personal predilection for reasoned analysis in its opinions, wherein day becomes night, and up means down. What it delivers in many cases are peremptory edicts rather than persuasive judgments."

Symphathizing with the exasperation, even the despair, of those who are fed up with the Imperial Judiciary, Gerard concludes that "any step, however, small, in the direction of alleviating the (intolerable) situation is to be welcomed." One major step would be for Congress to exercise its constitutional power to regulate and make exceptions to the jurisdiction of the federal courts.

In a scholarly and methodical way, without reference to any particular proposal to withdraw federal court jurisdiction in a specific area (which most such legislative proposals try to do), Gerard showed that Congress' power under Article III to make exceptions to the appellate jurisdiction of the Supreme Court, and to all jurisdiction of other federal courts, is, on the whole "reasonably clear -- clear from constitutional

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language, structure and history, and from prior Supreme Court decisions."

Some legal writers have asserted that today's Supreme Court would not permit the Congress to interfere with what they call the "essential functions" of the Supreme Court. This "essential functions" theory is flatly contradicted by constitutional text and history, as well as by dozens of Supreme Court opinions.

Those who assert the "essential functions" theory usually invoke the holy name of "checks and balances." But, as Professor Gerard so aptly pointed out in his testimony, "it surely is ludicrous to argue that the system of checks and balances can be maintained only by reading out of the Constitution the only explicit check on the judiciary that the Framers deliberately put there," namely, the Article III power to limit jurisdiction.

It is no answer to say that the Constitution provides a process of impeachment of judges. If Congress tried to impeach every federal judge, or even every Supreme Court Justice, who abused his power, Congress would have little time left for anything else.

Nor is it satisfactory to say that we can overturn bad Supreme Court decisions by constitutional amendments. They require a long-drawn-out process and super-majorities. Why should the people have to shoulder this burden when the fault was the abuse of judicial power?

The short-term solution for the problem of the Imperial Judiciary is for Congress to limit the jurisdiction of the federal courts. The long-term solution is to cut the power of the federal judges by eliminating their lifetime tenure. This would require a constitutional amendment to Article III.

We could change the Constitution so that all federal judges must stand for a retention election every six years, as is required for many state judges under the so-called "Missouri Plan." The Justices of the Supreme Court would be voted on by the entire nation, and the circuit and district court judges would be voted on by the people in the geographic district they serve.

The real issue is whether democratic government is to survive. Do we want government by appointed judges, or do we want government by elected representatives?

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