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THE IMPACT OF JUDICIAL TRANSITIONS IN ADMINISTRATION*

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In the history of our constitutional democracy, it is not surprising that executive and legislative transitions in administration have so often been saddened by disappointment, frustration and bitterness. A Wilsonian dream of world order shattered by an electoral disaster presaging a time of American isolationism and withdrawal, and the illusion of a never-ending casual prosperity. The cold transfer of presidential power from a bewildered administration caught in the vortex of circumstance, a tragic depression, to a new administration—one vibrantly committed to a resurgence of the American spirit, yet one which at the end of a desperate war would find Americans so tired of sacrifice as to turn away politically in the congressional elections of 1946. Like instances abound not only on the national scene but on the state level.

Such is the ebb and flow of political fortune, subject to tides of strong though transitory public sentiment. Zeal for betterment of the human condition, and the conscious desire for right, alternate with fear of the future, mesmerization by a Proposition 13,[1] and the temptation to abandon hope in that American dream which inspired our forefathers. Yet the swing of the pendulum from one political urge to another may constitute a vital force in the strength of the American system, so long as it is contained within the framework of our nation's Constitution.

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* A portion of this article was contained in the author's news release upon confirmation of the nomination of Robert N. Wilentz as Chief Justice of the Supreme Court of New Jersey.

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[1] On June 7, 1978, California voters approved Proposition 13 which cut property taxes by seven billion dollars. N.Y. Times, June 7, 1978, at 1, col. 4.

It is that constitutional scheme which explains why administrative changeovers in courts are not accompanied by human feelings of disappointment and frustration, as one incumbency succeeds another. While comparisons are made between the "Warren Court" and the "Burger Court,"[2] and mention is made of the "nine old men" who survived the Roosevelt onslaught of 1937,[3] these represent differences of judicial philosophy and tendency rather than of court management and direction.

Although philosophical surges in judicial thought gave rise to the cynical comment of Mr. Dooley that even "th' Supreme Coort follows th' iliction returns,"[4] our system in New Jersey differs from that in many other jurisdictions.[5] Here our judges are neither elected, nor subject to recall, nor otherwise implicated in any way in the political stream.[6] They are, in fact, totally divorced from political involvement or constraint. They are subject to the Constitution alone and to their oaths of office to support it.[7] Only through idle curiosity need they be attentive, if they wish, to the "iliction" returns.

This independence of the judiciary was a dream of our forefathers, who declared in the charter of their independent rights a distaste for the enslavement of the colonial judiciary to the will of the British Crown.[8] As one of the basic aims of revolution, independence of the courts was thus a cherished goal of Americans, yet always designed to exist within the constitutional framework which would bind Americans together. Therefore, judicial power, like that of the other branches, is never, however independent, uncontrolled, nor should it be. As Lord Acton stated, power tends to corrupt and absolute power corrupts absolutely, and no one, least of all the

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[2] *See, e.g.*, Defeis, *The 14th Amendment: A Century of Law and History* (pt.II), 103 N.J.L.J. 109, 114–15 (1979).

[3] In 1937, President Roosevelt proposed a bill which would have allowed him to appoint one additional justice for each justice on the United States Supreme Court who had served at least ten years and had not retired within six months of his seventieth birthday. S. REP. NO. 711, 75th Cong., 1st Sess. (1937); *see* Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

[4] F. DUNNE, MR. DOOLEY AT HIS BEST 77 (1938).

[5] *See* Atkins, *Judicial Elections—What the Evidence Shows*, 50 FLA. B.J. 152 (1976); Reath, *In Support of Constitutional Revision to Provide for Merit Selection of All Judges*, 45 PENN. B.A.Q. 406 (1974). *See generally* Seiler, *Judicial Selection in New Jersey*, 5 SETON HALL L. REV. 721 (1974); Schrader, *Judicial Selection: Taking the Courts Out of Politics*, 46 A.B.A.J. 1115 (1960).

[6] N.J. CONST. art. 6, § 6, para. 1; *In re* Gaulkin, 69 N.J. 185, 199, 351 A.2d 740, 747 (1976); *In re* Pagliughi, 39 N.J. 517, 189 A.2d 218 (1963).

[7] N.J. STAT. ANN. § 41:1-3 (West 1971 & Cum. Supp. 1978-1979).

[8] *See generally* J. POMFRET, COLONIAL NEW JERSEY—A HISTORY 148–49 (1973); PROCEEDINGS OF THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1844, J. Bebout introduction at li-lvi (New Jersey Writers Project ed. 1942); 1 J. FISKE, THE AMERICAN REVOLUTION 13–14 (1891).

courts, would challenge this truism. While one hears occasionally, in the rhetoric of the political world, references to "judicial intrusion," these can hardly be taken seriously. Judicial power, at least in my own experience, has never been used in such a manner, except to fill a legislative or executive void violative of the plain will of the people as expressed in the Constitution.[9]

The opinions of the New Jersey Supreme Court are replete with precedents in which interference with the legislative process has been shunned.[10] The United States Supreme Court exercises similar restraint, asserting that it does not "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions."[11] However, where a vacuum exists which is offensive to the Constitution, the courts are constrained to act in faithfulness to the oath of office. In truth, the judiciary is, in the last resort, guarantor of the constitutional promise, and so the people intended. Controversial and politically sensitive issues are often left to the courts, such as: how shall a prison be administered?[12] Where shall a highway be located?[13] Where may the Concorde land?[14] How shall schools be financed?[15] How shall congressional districts be apportioned?[16] Yet courts are not eager to venture into other fields, outside the administration of justice in the judicial sphere, except out of compulsion to defend the Constitution. Even then the judiciary acts carefully and deliberately, even hesitantly, sometimes over a span of years, out of respect to the other branches of government.[17]

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[9] Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976, *aff'd as modified on rehearing, juris. retained*, 63 N.J. 196, 306 A.2d 65 (1973), *order entered*, 67 N.J. 35, 335 A.2d 6, *order entered*, 69 N.J. 133, 351 A.2d 713, *order vacated*, 69 N.J. 449, 355 A.2d 129, *injunction issued*, 70 N.J. 155, 358 A.2d 457, *order amended*, 70 N.J. 464, 360 A.2d 400, *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976); Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713, *juris. retained*, 43 N.J. 491, 205 A.2d 735 (1964), *juris. retained*, 44 N.J. 312, 208 A.2d 648, *juris. retained*, 44 N.J. 414, 209 A.2d 825 (1964), *juris. retained*, 49 N.J. 406, 231 A.2d 193, *juris retained*, 50 N.J. 127, 232 A.2d 419 (1967), *juris. retained*, 53 N.J. 585, 252 A.2d 209, *cert. denied*, 396 U.S. 822 (1969), 55 N.J. 371, 262 A.2d 389, *cert. denied*, 400 U.S. 849 (1970).

[10] *See, e.g.*, Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975) and cases cited *id.* at 517 & n.19, 341 A.2d at 640; Ward v. Marine Nat'l Bank, 38 N.J. 132, 183 A.2d 60 (1962).

[11] Griswold v. Connecticut, 381 U.S. 479, 482 (1964).

[12] *See, e.g.*, Cooke v. Tramburg, 43 N.J. 514, 205 A.2d 889 (1964) (courts not required to supervise administration of prison procedures so long as prisoner's constitutional rights not deprived).

[13] *E.g.*, Borough of Paramus v. County of Bergen, 25 N.J. 492, 137 A.2d 425 (1958).

[14] British Airways Bd. v. Port Auth. of N.Y. & N.J., 431 F. Supp. 1216 (S.D.N.Y.), *rev'd*, 558 F.2d 75 (2d Cir. 1977).

[15] *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273.

[16] Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713.

[17] *Id.*; Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273.

In light of my own experience and research, then, the judiciary in New Jersey has not forgotten the adjuration of the great Chief Justice John Marshall to show utmost respect to the co-equal branches. Very early in our history, while sitting at circuit in *Ex parte Randolph*,[18] the Chief Justice stated:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires, that the obligation of its laws should not be unnecessarily and wantonly assailed.[19]

In those early years of the Republic, the courts stood alone in many a test of the Constitution, sometimes opposed by even the greatest of Presidents. Yet the Supreme Court had no army or police force, but only the people and their trust. It was deemed by Alexander Hamilton to represent the weakest of the three branches of government.[20] One may note, however, that in 1937, a President with unparalleled political power, in office by the electoral votes of forty-six out of forty-eight states, sought to "pack" the Supreme Court in order to control its decisions. In 1938, he suffered an unprecedented repudiation by the people.[21]

It is quite simple, though politically dangerous, for the other branches to attempt to dominate the courts. A legislative appropriations committee, for instance, may starve the courts of resources needed to fulfull their constitutional mission to administer justice. In fact, a legislature might seek to dismantle a court system itself, although, as Franklin Roosevelt discovered in 1938, the public would respond quite vigorously. The people value "their" courts as much now as they did in 1776 or 1938. This was indicated in New Jersey only last year, when the people approved by referendum the merger of the county courts into the State system.[22] This was a forerunner of the final unification of the court system, and the people reaffirmed their desire for independent and honest justice, through an independent and honest judiciary.

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[18] *Ex parte* Randolph, 20 F. Cas. 242 (C.C.D. Va. 1833) (No. 11,558).

[19] *Id.* at 254.

[20] THE FEDERALIST NO. 78 (A. Hamilton) 504 (bicentennial ed., Robert B. Luce, Inc. 1976).

[21] *See* note 3 *supra*. In the congressional elections of 1938, the Democratic majority in the House was reduced by 75 members and in the Senate by 7 members.

[22] *See* N.J. CONST., art. 6, § 1, para. 1.

That is why, although I am saddened by thinking of the years which seem to have disappeared while I was not looking, I yet rejoice in the identity of my successor as Chief Justice. When I came to this Court in 1973, I found daily inspiration in the model of Chief Justices Vanderbilt[23] and Weintraub,[24] not to speak of the unfulfilled promise of Pierre Garven,[25] who stated so briefly but unmistakably his adherence to their ideals. They were leaders and not pedestrians. Each day that I have been here I have thought of their dreams for this court system, that it should be the best—some think it is the best—in the English-speaking world. It has the tools it needs—the gift of the people in the 1947 Constitution—administrative and rule-making flexibility unmatched in other court systems.[26] Yet it needs another dimension, an activist Chief Justice who will set a tone of progressive change, a man restless for the doing of right, untiring in the elusive search for justice, unfailing in his insistence upon excellence in performance of a court system designed for excellence. The record of Robert N. Wilentz, an uncommonly gifted man, augurs well for the future.[27] He possesses the mystique of moral leadership. When he spoke in the Legislature on matters of principle, political considerations and fears seemed to vanish into thin air. People took courage—they saw and did what was right. So he led, not by domination but by reason, not for expediency but for principle. He will do as much, I am convinced, in this new responsibility; and I believe that he will do it in large part by communication with the other branches and with the people, for, given knowledge of the facts, the people will respond. They will support "their" courts as long as they respect them—and to respect and trust them they must know them.

I would not want my successor to think that his job will be an easy one. We have indeed accomplished several things in these years, but much remains: matrimonial and child custody problems, civil backlogs, shortages in personnel, juvenile delinquency and violence in the streets, alcohol and drug-addicted defendants and sufferers, computerization to deal with the courts' problems, new modes of administration.

I know Chief Justice-designate Wilentz can face this challenge. I am convinced his lifetime resolve will be to do his job well. I wish him Godspeed in that mission.

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[23] Arthur T. Vanderbilt served as Chief Justice from 1948 to his death in 1957.

[24] Joseph Weintraub served from 1957 to his retirement in 1973.

[25] Chief Justice Garven served from September 1, 1973 until his death on October 19, 1973.

[26] *See* Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950).

[27] For a brief accounting of some of the new Chief Justice's achievements, *see* 103 N.J.L.J. 245, 247 (1979).