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CHAPTER 8

COURT MODERNIZATION FOR AIDING THE PATENT SYSTEM AND THE LAW, IN GENERAL

Since there is a decided legal, as well as technical, side to the problems of patents and of protecting proprietary rights, a pin-pointing of difficulties in our current system of judiciary review is necessary in the interest of completeness. This is done here in language that the nonlawyer also can understand. Included are some suggestions that would have far-reaching effects for patent litigants as well as all those having property rights.

The suggestions for improving the attitude of the courts toward the property rights of the creative individual, in order restore incentive to our present patent system, are arrived at perhaps piecemeal. If the Supreme Court's hostility to or disinterest in patents is overcome, there may still remain other personal prejudices relating to other facets of the law. A more generalized proposal for trying to remedy all these disturbing influences is thus in order, especially since we recognize the fact that the complexion of the court cannot be changed overnight.

8.1 The Nature of the Criticism

Altogether apart from partisan or ethnic dissatisfaction with decisions of the Supreme Court in particular cases (which will probably always persist but may perhaps be tempered by a better selection of justices from many legal fields and experiences) there are serious, more deep-seated worries among legal professionals. They are naturally reluctant to criticize the august institution, not because of undue awe for the intellects or judicial perspicacity of the appointees to the high bench but, rather, because of the importance of the historically stabilizing effect of prior courts upon our way of life.

Informed criticism of the conduct of the Supreme Court covers a wide range. Some critics feel, generally, that the number of cases crowding the court makes impossible well-considered, well-written decisions, worthy of respect. Professor Henry M. Hart, Jr., of the Harvard Law School, has presented "The Time

Chart of the Justices¹” showing the actual impossibility of reaching conscientious, erudite decisions under present conditions, quite apart from fair play for litigants. Under Professor Hart’s assumptions, the justices, if in fact they do study all petitions and appeals, can give each of 1300-odd annual petitions for writ of certiorari and appeals about ten minutes’ consideration²:

Others feel that they court pays little attention to, and indeed is disposed to ignore, many, many fields vital to our way of life, including patents, copyrights, and property rights in general, in favor of multitudes of perhaps nationally trivial, minor abuses of other kinds of rights³. Among the justices themselves, indeed, there appears to be great resentment over the conversion of the Supreme Court into an appellate tort court:

To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court’s proper function, but to deflect the Court’s energies from the mass of important and difficult business properly here⁴.

Many lawyers object strenuously to the philosophy that justices – appointed for life – should foist upon an electorate their own personal views as to matters of social, economic, and legal conduct. Still others decry the lack or respect among certain justices for legal precedent, the legislative functions of Congress, and the historic duty of the Supreme Court to try, at least, to bring some measure of stability and order to our judicial and legal processes. In the Holmes Lectures at Harvard in 1958, Judge Learned Hand frankly explained this dangerous condition:

I trust it is not disrespectful to say that I find it impossible to predict what attitude the Court would take towards a statute of which it much disapproved even where it concerned economic issues only; and ... the answer becomes decidedly more obscure when the statute touches those other interests, now called “Personal Rights⁵.”

How correct was Mr. Justice Roberts’ earlier prediction in *Mahnich v. Southern S.S. Co.*⁶:

The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound

¹73 *Harvard Law Review*, pp. 84 - 125 (1959).

²By the same computation formula, the ten minutes had been whittled down in 1960 and 1961. 74 *Harvard Law Review*, pp. 99, 100 (1960) and 75 *Harvard Law Review*, pp. 85, 86 (1961).

³Robert H. Rines, “Some Legal Considerations in Presenting Technical Information,” *Institute of Radio Engineers Transactions*, Vol. EWS-2, No. 3, pp. 84-88 (1959); Harry G. Hehn, “Current Developments in Copyright Law,” *American Bar Association Ninth Annual Symposium on Copyright*, p. 10.

⁴Mr. Justice Stewart, *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959).

⁵“Personal Rights” refers to the Bill of Rights.

⁶321 U.S. 96, 113 (1944).

to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them ... and ... the deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.

And coupled with this is the apparent philosophy that the ends of justice are served by attaining the desired result of favoring or disfavoring a class of litigant, even if this is done on the flimsiest of rationalization. In the words of one of our ablest federal judges ⁷:

In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and *I hope I am a lawful judge*, and I recognize the limits of my authority, *whether appellate judges do or not*.

The host of relatively recent Congressional countermands of the effects of the Supreme Court decisions demonstrates, others point out, an unhealthy conflict. The readiness of certain justices to overturn long-established and well-considered law and legal rules, to attain a given result, has been particularly frustrating to conscientious law-enforcement officers, also. Recent episodes of this character are illustrated by *Rios v. United States* and *Elkins et al v. United States* ⁸. Under this procedure, we may expect newly fashioned reversals of law every time that the court changes its members, or the members change their personal views.

As another illustration: in reviewing the past two decades, without first looking at the actual decisions of the Supreme Court, I found it possible to predict with almost 100 per cent accuracy, which justices would ultimately decide against the patentee. And this was true even in the absence of knowledge as to the merits or issues of a patent case or a case in which a patentee was somehow involved.

While recognizing the necessity for the justices to exercise discretion in matters of certiorari, many lawyers protest the clear usurpation of Constitutional power by the court in declining to hear matters concerning which the Constitution directs that the Supreme Court “*shall* have the appellate Jurisdiction.” It declines by dismissing appeals for “want of a substantial federal question.” If the work load is too onerous, some feel ⁹, it behooves the court to protest

⁷Judge Charles E. Wyzanski, Jr., *New York, New Haven & Hartford Railroad Company v. Henagan*, as quoted and aff., 272 F. 2d 163, 155 (1959).

⁸364 U.S. 253 and 364 U.S. 206.

⁹62 *Harvard Law Review*, pp. 488-496 (1948-1949).

to Congress, since the Constitution distinctly provides that the Supreme Court “shall” hear appeals “arising under this Constitution” and “the Laws of the United States,” and that it is the province of Congress, *not* the court, to make “Exceptions”¹⁰.

Every active practitioner before the court feels the frustration of this free and easy fiat by which

The Court has for some years been in the process of interpreting away the difference between appeals and certioraris, reducing the appeals also to a matter of its own discretion¹¹,

despite the Constitutional mandate, so that today

it has long since become impossible to defend the thesis that all the appeals which the Court dismisses (for want of a substantial federal question) are without substance¹².

In connection with the practice of my own firm, for example, I would inquire

1. Whether a case involving a construction of a State statute that authorized deprivation of a right to trial by jury by an order for a new trial, issued pursuant to a secret hearing, held without notice, in a locked private room of the court house from which counsel was deliberately excluded by a judge, presents no “substantial federal question”¹³.

2. Whether a case involving a novel construction of the Patent Act of 1952 that permitted the destruction of a patent for a device that the Court of Appeals¹⁴ had to admit was (1) “useful and ingenious,” (2) “not known prior,” (3) had “solved these problems” of the prior art, and (4) had “commercial success” (in short, all the tests heretofore known to the law for demonstrating patentable invention) was of import for decision; particularly where, under similar circumstances, other Courts of Appeals had interpreted the Act contrarily, and the parties before such Courts of Appeals joined with plaintiff in seeking a first interpretation from the Supreme Court of the Act¹⁵.

3. Whether a patent for an invention widely used in radio can be valid in one circuit and invalid in another¹⁶.

¹⁰Art. III, Section 2 of the U.S. Constitution.

¹¹John P. Frank, “The United States Supreme Court: 1950 - 1951,” *The University of Chicago Law Review*, Vol. 19, No. 2, pp. 165, 231 (1952).

¹²73 *Harvard Law Review*, pp. 84 - 125 (1959).

¹³*Rines v. Justices of the Superior Court*, 330 Mass. 368, appeals dismissed, 346 U.S. 919.

¹⁴*Glagovsky v. Bowcraft*, 164 F. Supp 189, 190; 1 Cir., 267 F. 2d 479 (1959), certiorari denied 361 U.S. 884.

¹⁵The Supreme Court has denied every petition to date for an interpretation of what is and is not patentable under the Patent Act of 1952, despite the conflicts in the Circuits and despite the fact that the Patent Office, totally in the dark, is granting thousands of patents weekly!

¹⁶*Pierce v. American Communication & MacKay Radio*, 280 F. 2d 278, 1st Cir. (1960), *Pierce v. Allen B. DuMont Laboratories, Inc.*, 297 F. 2d 323, 3rd Cir. (1962) cert. denied Oct. 9, 1962, *Pierce v. Aeronautical Communications Equipment, Inc.*, 307 F. 2d 790, 5th Cir. (1962), cert. denied 371 U.S. 954 (Justice Douglas dissenting), rehearing denied 372 U.S. 925.

4. Whether the havoc wreaked among thousands of mineral lease applicants by a split-decision of the Court of Appeals for the District of Columbia¹⁷, permitting the Secretary of the Interior to ignore his own admittedly mandatory regulations to divest an oil-lease applicant of his rights under the Mineral Leasing Statute, was of sufficient importance for the consideration of the Supreme Court, particularly where, within a one-month period of this decision, three different panels of the Court of Appeals for the District of Columbia in parallel cases differed, also by split decisions in each case, as to whether to follow or to decline to follow this decision.

Other lawyers could easily supplement and complement these illustrations with even more deserving and far-reaching questions – but questions that apparently are of no concern to some Supreme Court justices.

What can be done about it?

8.2 A Few Measures Already Proposed

There have been proposals to lighten the burden of the Supreme Court and the complete federal judiciary by eliminating certain kinds of cases of federal jurisdiction, to wit, those based solely upon diversity of citizenship. It appears that this has had the support of some of the courts and some members of Congress¹⁸. But it has evoked serious objection by those who believe that it is vitally necessary for the federal courts to exercise such jurisdiction¹⁹. Though a compromise in the raising of the jurisdictional sum from \$3,000 to \$10,000 was adopted, our troubles still persist.

Justice Harlan has proposed increasing the number of law clerks. Certainly this should be done in any event – but not to substitute the views of law clerks for those of the justices as to whether or not a case should be heard, or as to the decision to be rendered. Others have suggested that administrative assistants of commissioners be given to the court, or experienced lawyers be appointed to aid the justices in the pursuit of their tasks²⁰. These proposals, however, clearly cannot obviate the real difficulties before recounted, as pointed out by the late Justice Jackson²¹.

Still other suggestions for an enlarged court and for sitting in sections of chambers have been found wanting²².

¹⁷*McKenna v. Seaton*, 259 F. 2d 780, certiorari denied, 358 U.S. 835 (1958). The gravity of the question involved was described by dissenting Judge Prettyman (p. 786). “The basic problem is the ‘rule of law.’ We have laws – either statutes or rules legally adopted – and we are supposed to be governed by them. If our governors merely do whatever strikes them as just and fair and reasonable at the moment, we have rule by men instead of by law. These are no cliches. Rule by law alone is the precise essential which differentiates our system from the totalitarian system. ... Not law but the will of the Secretary will then govern.”

¹⁸Justice Frankfurter in *Burford v. Sun Oil Co.*, 319 U.S. 315, 348; and Senator Norris, Senate Report No. 691, 71st Congress, 2d Session (1930).

¹⁹Donald S. Cohan and Mercer D. Tate, “Manufacturing Diversity Jurisdiction,” *Villanova Law Review*, Vol. 1, No. 2, pp. 201, 242 (1956).

²⁰Doris M. Yendes, 25 Univ. K. C. L. Rev. 178 (1956-57).

²¹Robert H. Jackson, *The Supreme Court in the American System of Government*, Harvard University Press, 1955, pp. 19 - 22.

²²Felix Frankfurter and James Landis, *The Business of the Supreme Court*, pp. 82 - 83,

8.3 A Different Proposal

An answer may lie in the lightening of the load of the Supreme Court, also providing a most desirable review of the decisions of the often conflicting panels of the various Circuit Courts of Appeals, by a newly created Intermediate Court or Courts of Appeals, sitting between the Circuit Courts of Appeals and the United States Supreme Court. This would enable the review of cases that presently should be heard by the Supreme Court but which that court just cannot handle physically or, because of personal interest or disinterest, is not disposed to handle²³.

Our society may presently be so complex, indeed, that individual judges of the Intermediate Court of Appeals, more knowledgeable in specialized fields, such as patents, unfair competition, taxes, copyrights, and the like, can guide the Court in those fields, but without the danger possibly inherent in making the trial court a tribunal of specialists or technicians. Such an Intermediate Court of Appeals with the Supreme Court as a tribunal above it, would not be disposed to foist its personal views upon the public or to decide cases on other than legal precedents and principles. Some measure of stability and uniformity in the law, moreover, could thus be introduced and many facets of our way of life, including property rights, no longer ignored.

This, moreover, would leave the Supreme Court free to hear mandatory appeals and the very occasional cases certified from, or through, such an Intermediate Court of Appeals. Perhaps, indeed, the mandatory field could be restricted or limited (as the court has done for itself by the “insubstantial federal question” doctrine) and all cases relegated to the realm of certiorari – somewhat as in the New York appellate practice. Special provision, in certain limited cases, for sidetracking the Intermediate Court of Appeals and proceeding directly to the Supreme Court might also be provided.

This proposal, it appears to me, might to a long way toward solving the difficulties before recounted, yielding a stabilizing single-court review, to which our citizenry is entitled and which the Constitution contemplated, but releasing the Supreme Court itself from all cases but those that it should be required to hear and *carefully* to consider and decide. The proposal could serve, moreover, to protect the court from most of the citizenship-diversity appeals that clutter its schedule, and as to which there has been great criticism.

Ancillary benefits from such an intermediate tribunal would inure in other cases of jurisdictional dispute between the Supreme Court justices, as in *Florida Lime and Avocado Growers, Inc. v. Jacobsen, et al.*²⁴, where the objection was raised by Justices Frankfurter and Douglas that the effect of the decision of a three-judge District Court enjoining a State statute on the grounds of its unconstitutionality not only serves to expand the Supreme Court’s

obligatory jurisdiction but contradicts the dominant principle of hav-

98 - 101 (1928); Hearings before the Senate Committee on the Judiciary on S. 1392, p. 1871, 75th Congress, 1st Session(1937).

²³Robert H. Rines, Unpublished Law Lecture, Detroit College of Law, November, 1959.

²⁴362 U.S. 73, 92, 93 (1960).

ing this Court review decisions only after they have gone through two judicial sieves.

So, also, might the disputes as to improvidently granted writs, as in *Needleman v. United States*²⁵, be at least partially obviated.

8.4 Conclusion

The time has come to consider positive action. Lawyers have heretofore historically protected our freedoms with their checks and balances. These are now in serious jeopardy from within. We of the present generation should not be found wanting in our interest and determination to find a prompt and workable remedy.

²⁵Certiorari granted 361 U.S. 808; dismissed (1960) as improvidently granted.