703-898-8074

JOHN B. MINNICK

SEP 12 1990

The Honorable Joseph R. Biden, Jr., Chairman
Senate Committee on the Judiciary
SD 224, Dirksen Senate Office Building
Washington, DC 20510-6275

Subject: Hearing on the nomination of Judge Souter

Dear Mr. Chairman:

Thank you for your kind letter of September 6, 1990.

A member of your staff notified me by phone September 11, 1990, of your decision to deny my request to be heard and to question the nominee on separation of powers. He also told me that I would be permitted to file a statement for the record. Accordingly, please accept this letter as my statement and include it in the official public record of the confirmation hearing on the nomination of Judge Souter to become an Associate Justice of the Supreme Court.

At the outset, Constitution, Article III, section 2, paragraph 2, second sentence provides that the Supreme Court shall have appellate jurisdiction in all other cases, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. Pursuant to that constitutional provision, Congress made the rules governing the practice and procedure in the Supreme Court for 160 years.

In 1949, the rule making power prescribed by the Constitution was transferred by Congress to the Supreme Court. Act of May 24, 1949, Chap. 39, section 102, 62 Stat. 104, amending 28 USC 2071.

While Congress was making the rules pursuant to the Constitution, the rules governing the practice and procedure in the Supreme Court were an integral part of the supreme Law of the land by constitutional definition under Article VI, 2d paragraph.

When the Court was given the rule making power by Congress, the old rules including the rules relating to evidence were discarded. New rules were promulgated by the Court in 1954 substituting oral argument for the old rules relating to evidence.

11509 STURBRIDGE CT. FREDERICKSBURG, VA 22401

Senator Biden

The Congressional transfer of the rule making power was not then nor is now sanctioned by any substantive provision of the Constitution of the United States. In any case, the new rules governing the practice and procedure in the Supreme Court do not qualify as part of the supreme law of the land because they were not made pursuant to the Constitution.

The 1949 technical amendment to the Judicial Code of the United States not only violated the principle of separation of powers, but also destroyed one of our most important constitutional checks and balances. Besides destroying the last vestige of our constitutional system of checks and balances, the 1949 amendment opened the door to unprecedented judicial legislation by the Court.

If you had allowed me to speak, I would have questioned the nominee along the following lines:

1. What provisions for separation of powers are made in our State Constitutions and Bills of Rights?

2. Where do such provisions come from?

3. What provisions for separation of powers are made in the Constitution of the United States?

4. Where do such provisions come from?

5. What happens when one branch exercises the powers or performs the functions of the other two or either of them?

6. What does the principle of separation of powers mean?

7. Do you agree with the position take by John Marshall during Virginia's ratifying convention that the Constitution, if ratified, would ensure a regulated democracy?

8. What was the basis for Marshall's position?

9. Do you agree with the position taken by James Madison on the floor of the first Congress that the principle which separates our powers of government is the most sacred principle of the Constitution, indeed of any free constitution?

10. What was the basis for Madison's position?

Senator Biden

11. Do you agree that Congress made the rules governing the practice and procedure in the Supreme Court for 160 years pursuant to the second sentence of the second paragraph of section 2 of Article III of the Constitution?

12. Do you agree that Congress transferred the rule making power to the Supreme Court in 1949 by a technical amendment to the Judicial Code?

13. What substantive provision of the Constitution sanctioned the transfer of the rule making power to the Court?

14. Do you agree that the old rules made by Congress pursuant to the Constitution qualified as an integral part of the supreme law of the land by constitutional definition under Article VI, 2d Paragraph?

15. What happened to the old rules relating to evidence?

16. What did the Court substitute for the rules relating to evidence?

17. Do the new rules promulgated by the Court without constitutional sanction qualify as part of the supreme law of the land under Article VI, 2d paragraph?

18. If confirmed, how can you in good conscience and without reservation give your oath to support and defend the Constitution of the United States when the rules governing the practice and procedure in the Supreme Court are not sanctioned by the Constitution?

Please acknowledge receipt and confirm inclusion of my letter of August 30, 1990 and this letter in the official public record of the confirmation hearing on the nomination of Judge Souter to become an associate Justice of the Supreme Court.

Please also send me a copy of the Committee rules governing confirmation hearings as requested in my letter of August 30, 1990.

Thank you again for your courtesy and consideration.

Sincerely,

John B. Minnick, individually
and on behalf of the National
Committee for Constitutional
Integrity

703-898-8074

Constitution Day, September 17, 1990

JOHN B. MINNICK

The Honorable Joseph R. Biden, Jr., Chairman
Senate Committee on the Judiciary
SD 224, Dirksen Senate Office Building
Washington, DC 20510-6275

Subject: Hearing on the nomination of Judge Souter

Dear Mr. Chairman:

I wish to file objections to the general line of questions being asked of Judge Souter.

1. The questions are designed to preserve judicial legislation not sanctioned by the Constitution.

2. The questions are designed to cover up flagrant violations of the principle of separation of powers.

3. The questions are designed to cover up the destruction of our constitutional system of checks and balances.

In support of my objections, I am attaching a copy of my 1974 report to the Virginia State Bar.

Please include this letter and the attached exhibit in the official public record of the confirmation hearings on the nomination of Judge Souter to become an Associate Justice of the Supreme Court.

Thank you very much for your courtesy and consideration.

Sincerely,

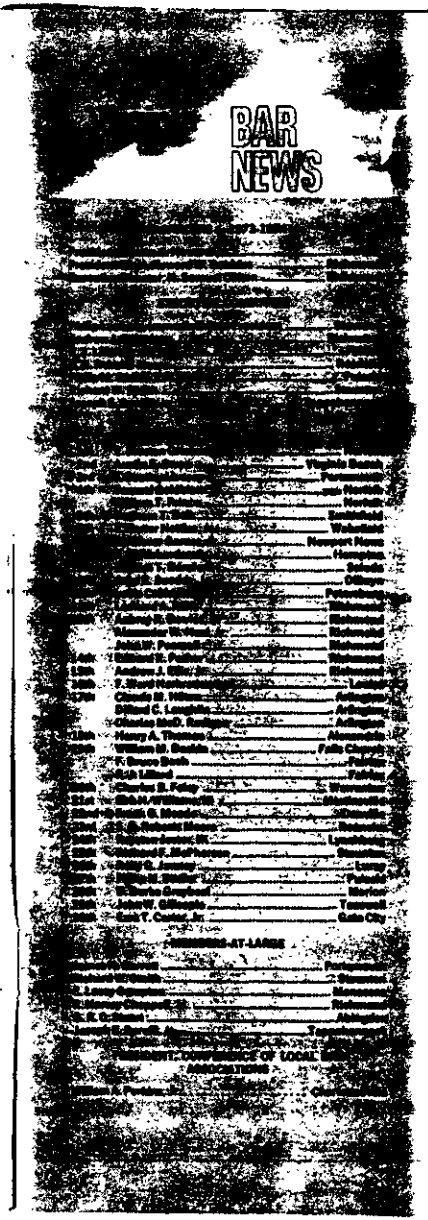
John B. Minnick, individually
and on behalf of the National
Committee for Constitutional
Integrity

Attachment: Copy of 1974 report to the Virginia State Bar

11509 STURBRIDGE CT. FREDERICKSBURG, VA 22401

ANNUAL REPORTS ISSUE

Reports Commence on Page 22



Vol. 22. No. 6 April/May 1974

CONTENTS

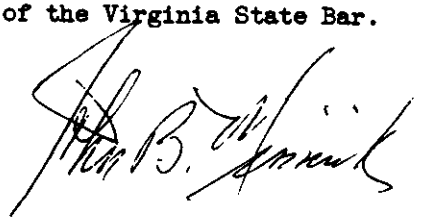
Virginia Bar News is published bi monthly by the Virginia State Bar, Imperial Building 5th and Franklin Streets, Richmond, Virginia 23219 (Telephone 804-770-2061) Editor N Samuel Clifton Subscription Rates $3 50 per year for members (subscription included in annual dues) For non members $10 00 per year Second class postage paid at Richmond, Virginia

Annual Reports 1973-74
Table of Contents

(Committee and Section Reports Commence on Page 23)

DISCLAIMER

The following report is the product of my personal experience and basic research. The findings of fact and conclusions of law are mine and do not necessarily represent the views, opinions or conclusions of the officers and members of the Virginia State Bar.



SPECIAL COMMITTEE ON FEDERAL JURISDICTION RULES AND PROCEDURE

Foreword

Purpose

This report is designed to uncover the destruction of our constitutional system of checks and balances by prior Congresses of the United States and to expose the curret cover up effort of the 93d Congress.

Scope

The Special Committee on Federal Jurisdiction Rules and Procedures focused primarily on rules of evidence, division of jurisdiction, executive privilege, impeachment, and separation of powers. Five relevant legislative proposals were selected out of many for discussion.

Effect

Hopefully, the practical effect of this report will be to strip off the double standard of conduct enshrouding "Watergate" and related matters including the current impeachment proceedings. The beneficial effect will be to shed new light on fundamental principles of constitutional law once taken for granted and long since forgotten.

Background

Thirty-fifth Annual Meeting

This report is directly attributable to the splendid presentation by the panel on the proposed Federal Rules of Evidence at the 35th annual meeting of the Virginia State Bar. The panel recommended the appointment of a committee to study the proposed rules and to make suggestions on or before July 30, 1973.

Committee

By letter dated June 22, 1973, President Howard created the Committee to

Study Federal Rules of Evidence and named John B. Minnick as chairman and Gregory U. Evans and Plato Cacheris as members to serve with him.

The committee immediately secured copies of the hearings, bill, and related materials on H.R. 5463 on the proposed Federal Rules of Evidence.

Preliminary Report

A preliminary report was submitted July 23, 1973, to point out among other things that the proposed rules, hearings, and related materials raised serious constitutional questions under the doctrine of separation of powers.

Enlargement

In the meantime, S. 1876 on the proposed division of jurisdiction between State and Federal courts was referred to the committee for study and comment. Additionally, the committee was redesignated the Special Committee on Federal Jurisdiction Rules and Procedure and its functions were enlarged to include monitoring Congress. The work and plans of the Special Committee were outlined and reported at the fall conference in Staunton.

Preliminary Report

In a preliminary report dated September 26, 1973, the Special Committee pointed out that the principal question raised by the proposed Federal Rules of Evidence involved the doctrine of the separation of our powers of government under the first three articles of the Constitution; and that the big question raised by the proposed division of jurisdiction between State and Federal courts involved the concept of the equal protection of the law under the Fourteenth Amendment as applied to both State and Federal Governments by the courts. The Special Committee also announced that it planned to ask for hearings on the constitutional questions raised by both bills, and requested that the announcement be circulated. The announcement was published in the November-December 1973 issue of the Virginia Bar News.

Monitoring Service

The monitoring services of the Special Committee picked up information on several legislative proposals including H.R. 12135 and H.R. 12462 on amendments to the Freedom of Information Act, S. 2803 to insure the separation of constitutional powers by establishing the Department of Justice as an independent establishment of the United States, and S. 2978 to establish a special commission to study the establishment of an independent permanent mechanism for the investigation and prosecution of official misconduct and other offenses committed by high Government officials. The particular relevance of these legislative proposals determined the thrust of this report.

The Legislative Proposals

H.R. 5463 Proposed Federal Rules of Evidence

This legislative proposal originated in a suggestion made by former Chief Justice Warren; but the suggestion was caused by the so-called "enabling acts" which gave the Court the power to prescribe the rules, and in particular by the last one contained in the Act of May 24, 1949, Ch. 39, section 103, 63 Stat. 104. The provisions of that Act gave the Supreme Court the power to make its own rules and constituted a grant of the legislative power reserved to the Congress as one of our checks and balances under Article III of the Constitution.

After the Court was given the power to make its own rules, it proceeded to

Erratum: The citation above should read Act of May 24, 1949, Ch. 39, section 102, 62 Stat. 104.

adopt its own rules and of course threw out the old rules including the rules relating to evidence. Since the new rules do not constitute part of the supreme law of the land under Article VI of the Constitution, the suggestion by former Chief Justice Warren appears to have been made in an obvious effort to cover up the destruction of one of our constitutional checks and balances.

After the suggestion was made by the Chief Justice, a special committee was appointed to study the feasibility of establishing uniform rules of evidence for the Federal judicial system. The special committee determined that it was feasible. An Advisory Committee on Rules of Evidence was appointed and H.R. 5463 is the result of the work of the Advisory Committee. When that committee commenced its work, however, it established several criteria, one of which was the avoidance of constitutional issues. Hearings, page 91; Congressional Record for Wednesday, January 30, 1974, page H 307.

H.R. 5463 encountered a stormy reception in Congress and the rules as proposed by the Advisory Committee were rejected. Pub. L. 93-12, March 30, 1973, 87 Stat. 9; see also, 119 Cong. Rec., No. 22, February 7, 1973, S 2241-2242; 119 Cong. Rec., No. 40, March 14, 1973, H 1721-1731; 119 Cong. Rec., No. 42, March 19, 1973, S 4493-5009; Federal Bar Journal, Evidence, Part I, Volume 32, Number 4, Fall 1973.

While the debates were going on in Congress, the Special Subcommittee on Reform of Federal Criminal Laws of the House Committee on the Judiciary was holding hearings on the proposed rules of evidence. Those hearings demonstrate the failure to account for fundamental principles of constitutional law despite some self serving statements seemingly to the contrary. Thus it appears that "Constitutional issues would be avoided to the extent possible, on the theory that the formulation of rules was not in general an appropriate method of resolving them." Hearings, page 91; see also, Hearings, page 35; and the Congressional Record for Wednesday, January 30, 1974, page H 307.

As a result of the 1973 hearings and mark up session, most of the controversial provisions of the proposed rules were eliminated, and a much modified version of H.R. 5463 was reported to the House November 15, 1973. H. Rept. No. 93-650, 93d Cong., 1st Sess. The proposed rules as revised by the House Committee on the Judiciary were passed by the House with floor amendments, February 6, 1974, 120 Cong. Rec., No. 12, page H 570; and referred to the Senate. H.R. 5463 as modified by the House was read twice in the Senate and referred to the Committee on the Judiciary. 120 Cong. Rec., No. 13, February 7, 1974, S 1552.

The Special Committee has requested a hearing on the constitutional issues.

There are other defects in the proposed Federal Rules of Evidence. The Advisory Committee's notes, the hearings, the committee report and related materials do not establish a need for black letter statutory rules of evidence. The danger of a black letter statutory rule on presumptions is glossed over under the guise of labelling the rule a technical matter. The treatment of evidence generally and hearsay in particular fails to account for the fundamental rule of exclusion where the evidence is not competent to prove the truth of the matter asserted.

S. 1876 Proposed Division of Jurisdiction between State and Federal Courts

As in the case of the proposed rules of evidence, the proposed division of jurisdiction arose out of a suggestion by former Chief Justice Warren. In proposing the study, he stated:

"It is essential that we achieve a proper jurisdictional balance between Federal and State court systems, assigning to each system those cases most appropriate in light of basic principles of federalism."

The American Law Institute acted upon his suggestion and made a ten-year study of the jurisdiction of Federal Courts. S. 1876 is the result of that study and covers six broad areas of Federal jurisdiction: diversity of citizenship; Federal question jurisdiction; jurisdiction of the United States as a party; admiralty jurisdiction; jurisdiction of three-judge courts; and multi-party-multi-state litigation.

The initial suggestion by the Chief Justice did not account for the fact that the judicial power of the United States under the Constitution does not extend to the assignment of the jurisdiction of the State courts; and neither does the legislative power in the absence of a proper amendment.

Aside from the ramifications of the American Law Institute proposal, the bill is described at the very outset as "lawyers' law." Hearings, page 98. As such, the proposal is reduced to an effort to impose a set of arbitrary standards for the benefit of the legal profession without regard to the rights of the people to the equal protection of the law guaranteed by the Fourteenth Amendment. Accordingly, the proposal may be classified as a rule of men and not of law.

The Special Committee on Federal Jurisdiction Rules and Procedure has requested a hearing on the constitutional aspects of the proposed division of jurisdiction.

H.R. 12135 and H.R. 12462 To Amend the Freedom of Information Act.

H.R. 12462 is the result of executive mark ups of H.R. 12135. The basic proposal to amend the Freedom of Information Act, 5 U.S.C. (1970 ed.) section 552, originated in the efforts of the courts and Congress to get information from the executive branch and involves the executive privilege concept. Additionally, the hearings, bills and related materials manifest an effort to lay a foundation for contempt proceedings in order to lend some color of criminality to possible impeachment charges. See particularly, the provisions of the bills for filing law suits in the United States District Court for the District of Columbia; see also, Hearings, pages 6113 et seq.

Of course the difficulty with the proposal lies in the fact that 5 U.S.C. section 552 is part of the Administrative Procedure Act of 1946, 60 Stat. 237, as codified and enacted into positive law in 1966, 80 Stat. 378, 381-388, now 5 U.S.C. (1970 ed.) sections 551-559. By the express terms of the Administrative Procedure Act, the executive branch and the so-called "independent agencies" were given the power to "prescribe law or policy". 5 U.S.C. (1970 ed.) section 551. The grant of legislative power by Congress to the executive branch is not only inconsistent with our great American doctrine of separation of powers, it also destroys our constitutional system of checks and balances. Additionally, the grant of legislative power to the executive branch is the proximate cause for the recent assertions of executive privilege.

S. 2803 To Insure the Separation of Constitutional Powers by Establishing the Department of Justice as an Independent Establishment of the United States

This legislative proposal is the product of the constitutional confusion generated by the destruction of our constitutional system of checks and balances by prior Congresses of the United States; and, as such, manifests an effort in the 93d Congress to cover up that destruction.

S. 2978 To Establish a Special Commission to Study the Establishment of an Independent Permanent Mechanism for the Investigation and Prosecution of Official Misconduct and other Offenses Committed by High Government Officials.

This proposal arises out of the same problem, namely, "Watergate," that produced S. 2803 and H.R. 12462. As such, it represents another layer in the attempted cover up of the destruction of our constitutional system of cheeks and balances.

Discussion

The Special Committee on Federal Jurisdiction Rules and Procedure has uncovered two of the specific Acts of Congress which have destroyed our constitutional system of checks and balances. In addition, the Special Committee desires to point out that there is nothing in the Constitution to prevent one branch of government from exercising the power of the other two branches. Accordingly, the only constitutional way to insure the separation of our powers of government is not to give any of them away.

By the act of giving away constitutional powers, the Congress of the United States has not only made it impossible to maintain the separation of powers, it has also reduced us to a government of men and not of law.

"Watergate" is merely the manifestation of the constitutional confusion of the rules generated by the "giveaway" acts of Congress. The impeachment proceedings stand on no better footing. Those proceedings are the direct result of the confusion and reflect the charges and countercharges generated when one branch of government compounds the mistakes and errors of another branch.

Since the problem is essentially a question of the rules, the Special Committee on Federal Jurisdiction Rules and Procedure desires to furnish a brief analysis of the real reason for the separation of our powers of government.

The Legislative Branch operates under the rules of parliamentary procedure.

The Executive Branch operates under administrative rules and regulations including executive orders.

The Judicial Branch operates under the rules of court subject to the rules of evidence.

The rules of parliamentary procedure do not work in the Executive and Judicial Branches.

Administrative rules, regulations and executive orders do not work in the Legislative and Judicial Branches.

Rules of court and evidence do not work in the Executive and Legislative Branches.

The reason why the rules of one branch do not work in the other two branches is essentially a matter of functions.

The legislative function is essentially a policy making function.

The executive function is essentially a policy keeping function.

The judicial function is essentially a policy applying function.

When all three branches are actively engaged in making national policy, there are bound to be not only honest differences of opinion, but also diametrically opposed points of view.

"Watergate" with its ramifications including impeachment proceedings is a

classic example of what can happen when all three branches are busy exercising legislative powers. In short, the current confusion in government today is directly attributable to the destruction of our constitutional system of checks and balances by the Congress of the United States.

Findings

The Special Committee on Federal Jurisdiction Rules and Procedure finds:

1. The hearings, debates, committee report and related materials on H.R. 5463 do not demonstrate any real need for black letter statutory rules of evidence. Additionally, the hearings, debates, committee report, and the proposed Federal Rules of Evidence demonstrate not only a failure to account for elementary principlesof jurisprudence, but also the deliberate avoidance of constitutional issues.

2. The hearings and related materials on S. 1876 do not demonstrate any real need for the division of jurisdiction between State and Federal Courts. Additionally, the hearings and related materials demonstrate an insensitivity to the needs of the people as well as a general avoidance of constitutional issues.

3. The hearings and related materials on H.R. 12462 demonstrate the efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.

4. S. 2803 and S. 2978 demonstrate further efforts in the 93d Congress to cover up the destruction of our constitutional system of checks and balances.

5. The impeachment proceedings manifest the overall effort to cover up the destruction of our constitutional system of checks and balances.

Conclusions

The Special Committee on Federal Jurisdiction Rules and Procedure concludes:

1. Our education in the field of Constitutional Law has been sadly neglected.

2. The Executive and Judicial Branches have compounded the mistakes and errors committed by the Legislative Branch.

3. The 93d Congress is fatally bent on covering up the destruction of our constitutional system of checks and balances.

Recommendations

The Special Committee on Federal Jurisdiction Rules and Procedure recommends:

1. Establishment of a permanent standing committee on Constitutional Law.

2. Transfer the functions of the Special Committee on Federal Jurisdiction Rules and Procedure to the permanent standing committee on Constitutional Law.

3. Conduct a Constitutional Workshop at the Thirty-Sixth Annual Meeting of the Virginia State Bar.

4. Establish Constitutional Workshops in the Law Schools of Virginia.

5. Conduct the pilot project at the Washington and Lee University Law School in conjunction with its student research program.

Respectfully submitted,
John B. Minnick, *Chairman*