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Viewpoint: Legislating Without Deliberation

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Legislating without deliberation
Lawmakers must employ thorough procedures when legislating changes that may seriously affect individual rights or a co-equal branch.

Several years ago, Third Circuit Judge Edward R. Becker trenchantly admonished Congress to improve the quality of its legislation, especially lawmaking that affects the federal judiciary. Since Judge Becker published that article, the situation apparently has deteriorated. Congress has recently exhibited a striking and troubling propensity to enact substantive laws outside the normal legislative processes. Illustrative are recent efforts to legislate in fields that profoundly affect detainees who seek federal court relief from incarceration, and the federal judiciary, a co-equal governmental branch. One of these attempts proved successful and the other did not in the initial session of the 109th Congress.

The first example involves the 500 persons detained by the U.S. as alleged terrorists at Guantanamo Bay, Cuba. On November 10, 2005, the Senate adopted 49-42 an amendment to the Department of Defense Authorization Act, which would have abrogated federal court jurisdiction over the detainees’ pending and future habeas corpus petitions. On November 15, senators adopted 84-14 a compromise that tempered some of the amendment’s worst features, but it was not a comprehensive solution. In late December, as Congress raced to recess, it passed the compromise with little change, and on December 30 President George W. Bush signed the measure into law. The substance of the amendment, the compromise, and the final version, as well as the severely truncated processes by which Congress approved them, were mistaken.

The amendment purportedly removed Supreme Court jurisdiction to decide the legality of military tribunals created by unilateral executive action four years ago. It also eroded one 2004 Court opinion, which ruled that due process applies to persons labeled “enemy combatants” and prescribed standards for challenging those designations, and a second, which held federal courts have jurisdiction over Guantanamo detainees’ habeas petitions. The amendment drastically limited federal court habeas review and seriously undermined separation of powers by assigning basic human rights protection almost completely to the executive.

Sharp criticism of the amendment led to the hastily assembled compromise that the Senate adopted November 15, but this compromise raised more questions than it answered. For instance, it arguably required that the Supreme Court’s appeal of military tribunals’ validity and the 200 pending habeas petitions be dismissed. Moreover, the compromise appeared to govern only detainees at Guantanamo. In late December, lawmakers passed the compromise with few changes.

Congress adopted the amendment, the compromise, and the final legislation after minimal consideration. The Senate Armed Services, Foreign Relations, and Judiciary committees have the responsibility, and the expertise, to address the critical issues raised, but they failed to do so. Senator Arlen Specter (R-Pa.), the Judiciary chair, voted against the amendment, the compromise, and the final bill. He observed that attempts to treat the questions were short circuited, admonishing: “When you undertake to remove habeas corpus, you better have a comprehensive plan.” Specter was vindicated in January when the Department of Justice sought the pending cases’ dismissal by arguing—contrary to apparent congressional intent—that Congress meant the law to be retroactive.

Circuit splitting
The second illustration relates to perennially offered legislation that would split the Ninth Circuit. In early 2005, Representative James Sensenbrenner (R-Wis.), the House Judiciary Committee chair, sponsored a circuit-splitting proposal that also authorized new judgeships for appellate and district courts. On October 27, the committee adopted this measure, a day after the Senate Judiciary Committee conducted a hearing on its version of the circuit-splitting bill. In early November, House members inserted in a deficit

reduction bill a circuit-division provision, thereby avoiding Senate Judiciary Committee approval of an issue essential to the federal courts. On November 18, the House passed that bill with the circuit-division provision. This maneuver enabled proponents to circumvent normal legislative evaluation. On December 19, Congress omitted the circuit-bifurcation provision from the final legislation.

Both examples illustrate inadvisable use of the legislative process, although ultimately Congress refused to split the Ninth Circuit in this way. Lawmakers must employ thorough procedures when legislating changes that may seriously affect individual rights or a co-equal branch. Any idea that modifies federal court jurisdiction, changes habeas corpus, affects international relations, and implicates the "war on terrorism," or dramatically alters federal court structure, would typically receive the complete panoply of legislative procedures. The proposal would be embodied in a bill introduced in both houses, assigned to committees with jurisdiction, receive hearings at which experts testify, revised in markups, voted on, and sent to the floor where it would be fully debated and amended, if necessary. It would then be sent to the other house and modified in conference committee, should the two houses disagree. Only then would it be passed.

The litigation that the hastily assembled Detainee Treatment Act provoked less than a week after President Bush signed it attests to the problems with short-circuiting thorough legislative processes. Members of the 109th Congress's second session who still believe that Ninth Circuit division is warranted should not short circuit those processes.

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fully adopted in a carpetbag in South Dakota, it would receive a more enthusiastic reception in California. We are reminded of a federal judge's wise observation: "Give a bad dogma a good name and its bite may become as bad as its bark."

We hope and expect that the voters of South Dakota will greet this attempt to export an unnatural disaster just as they would an attempt to export California's natural disasters. There is no need to "restore judicial accountability and a perception of justice" in South Dakota. South Dakota judges, who must stand for election or retention election, are already amply accountable because of that fact, because most of their decisions are subject to appellate review, and because the state has a system for investigating and imposing discipline for judicial misconduct.

Even if there were a problem of judicial misconduct in South Dakota, J.A.I.L. would not be a good solution. Apart from the fact that most of the conduct it targets would not be shielded by immunity under existing law, at least one of its standards is so vague as to invite abuse, and its provisions on attorney appointment and reimbursement for judges would leave them hopelessly exposed to disappointed litigants. South Dakota voters will surely recognize that, as scholars have pointed out, without judicial immunity for most judicial acts judges, including judges in elective systems, would lack the independence necessary to apply the law without fear or favor.

An organization in which non-lawyers are both members and leaders, AJS supports judicial accountability through its Center for Judicial Ethics and Task Force on Judicial Independence and Accountability. We reject both thoughtless support of, and thoughtless attacks on, judges. J.A.I.L. is a thoughtless attack. We do not believe that South Dakotans are so radical that they would tamper with the essential structure of their government—as they would if they adopted this amendment crippling their judiciary—without any reason to do so.

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And so, encouraged by the presence of a waiting jury, parties resolved their dispute without going to trial.