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Reorganization of the Federal Judiciary

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REORGANIZATION OF THE FEDERAL JUDICIARY*

Mr. Chairman and Gentlemen of the Committee: The obvious purpose of this bill to increase the number of judges of the Supreme Court is to bring the views of the Court into harmony with the ideas of Congress upon the constitutional validity of its own enactments. This would make the Court, in some measure, subservient to Congress. The fact that the means to be employed to accomplish this result are circuitous and not direct does not alter the situation.

My first objection to this measure is that I believe it to be contrary to the plain intent and express words of the Constitution itself. As everyone knows, the framers of that instrument recognized a double peril,—the tyrannies and outrages of autocratic government on one hand, and the danger of the excesses of an unrestrained democracy on the other. They rejected both and chose a middle course, and formed a government in which, though the source of ultimate power was to reside in the people themselves, such checks were put upon its exercise as to prevent hasty and ill-advised action based upon fluctuating and ephemeral public opinion or caprice. They provided for a bi-cameral legislature and a veto power in the President. But the framers of our Constitution did not stop there. Recognizing that there were certain fundamental human rights so necessary for ordered society, so indispensable for mankind that they wrote them into the Constitution itself and the first ten amendments so that their existence would be beyond the reach of either the legislature or the chief executive. Now what branch of the government was to be entrusted with the interpretation and enforcement of these constitutional guaranties? It is significant that the convention passed over the legislative

*Statement concerning the proposed reorganization of the federal judiciary made by Judge William M. Cain before the Senate Committee on the Judiciary, April 9, 1937.

and executive branches of the government, and vested this power in the *judiciary* in these words:

> "The judicial power shall extend to all cases in law and equity *arising under this Constitution. . . .*" (Italics are mine.)

As an additional safeguard, the convention provided that the judges should be appointed and should hold their offices "during good behavior" thereby placing them beyond the reach of popular reprisals and insuring their absolute independence. Hitherto, I have regarded the Supreme Court of the United States as a place where a minority, hard pressed by legislative folly or madness, could find sanctuary, but if the principle and *precedent* be established that the Court, in considering the validity of legislative acts must heed the wishes or opinions of the legislature or the executive, I shall so regard it no longer.

My next objection to this change is that it might result in the Court approving legislative acts which attempt to limit the exercise of equitable jurisdiction. The Federal Constitution and most state constitutions provide in effect that "the judicial power shall extend to all cases in law and *equity.*" (Italics are mine.) Again, as all lawyers know, equity is a system of justice based upon the natural rights of man and the moral law. It recognizes and enforces the fundamental rights of man, protects him in the enjoyment of what is his and restrains him from encroaching upon what is not his. Thus far, with a possible exception unknown to me, the courts have declared that, when equity jurisdiction is vested in the courts by a constitution, it is beyond power of the legislature to curtail or abolish. Nor is this fear of mine at all fanciful. There is a considerable opinion that the courts should not have the power to grant injunctions restraining imminent or continuing injury to property or property rights. Several state legislatures have passed acts prohibiting courts from granting injunctions especially in labor disputes. I believe that there is a bill now pending in the Senate, introduced by the distinguished Senior Senator from

Nebraska, prohibiting federal courts from issuing injuctions in labor strikes. If it should pass and receive executive and judicial approval, then the owner of property would have to stand by and witness the wrongful destruction of his property and be content with a money judgment likely uncollectible.

Another reason for opposition to this bill is that it would tend to increase uncertainties and doubts in regard to governmental policies which affect business and industry. Nothing so discourages private enterprise as instability in government. No man seeking investment for his capital is likely to assume the hazard he would be compelled to assume if interpretation of the constitutional guaranties were to vary with variations of public opinion. His failure to invest in industrial enterprise would, of course, result in fewer jobs for working men, a diminishing of their purchasing power, lessening demand for manufactures and corresponding business stagnation. Every constitution is subject to emasculation by interpretation, and, if that interpretation is to keep step in any degree with fluctuating public opinion, no man could depend upon the guaranties of the Constitution. It may be said that this could not happen here, and that the idea is fantastic. To this I reply that once the idea is recognized that the people have anything at all to do with the interpretation and application of these constitutional guaranties which are limitations upon legislative power, there will be a potential danger to the Constitution unnecessary to assume and wise to avoid.

It has been frequently stated that the idea that the Supreme Court has the power to annul legislative acts was newly-hatched and freshly sprung upon an unsuspecting and amazed America by Chief Justice Marshall in 1803 in the case of *Marbury v. Madison*;[1] that no language in the Constitution justifies it; that it was not debated in the constitutional convention; and that its delegates had no thought

[1] 1 Cranch 137 (1803).

that the instrument they adopted lodged such a great power in the Supreme Court. All this is wholly untrue. The language in the Constitution which expressly conveys this power has already been quoted. Many delegates opposed the adoption of that provision because it does vest the Court with that power. And it was debated. Time does not permit much quotation, and I venture but two. Delegate James Wilson of Pennsylvania said:

"If a law should be made inconsistent with the powers vested by this instrument in Congress, the *judges, as a consequence of their independence,* and the particular power of government being defined, will declare such law null and void, for the power of the Constitution predominates; anything, therefore, that shall be enacted by Congress contrary thereto will not have the force of law."

Gouverneur Morris, who had the chief part in drafting the instrument said:

"He could not agree that the judiciary which was part of the executive should be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. *But view the danger on the other side!* The most virtuous citizens will often, as members of a legislative body, concur in measures which afterward, in their private capacity, they will be ashamed of."

Nor was Marshall's idea new. Before the decision of *Marbury v. Madison,* nine of the state supreme courts had declared acts of their legislatures void. Even before the adoption of our Constitution, the colonial court of Rhode Island in 1786, in the case of *Trevett v. Wheeden,*[2] declared an act of its legislative assembly void, under its Royal Charter granting to its inhabitants all the rights of Englishmen including the "jury" and "due process" provisions of Magna Carta. This *Trevett* case is interesting enough, I think, to justify taking the time for a very brief review of it.

The returning Revolutionary War soldiers were unpaid and discontented and found the home people as impoverished as themselves. Money was very scarce and a party arose which obtained a large majority in the Assembly. Acts

2 4 Am. State Trials 548, 2 Chandler's Crim. Tr. 269 (R. I. 1786).

were passed providing for the issuance of 100,000 pounds sterling of paper money and making it legal tender for the payment of debts; and a bank was established to issue this money to be loaned to farmers upon their land at 4 per cent interest. But when this paper money was issued, the merchants would not accept it as payment. Thereupon, the Assembly passed an act which provided that any person who refused to accept this money should be fined 100 pounds and forever be incapable of holding public office. Even this act did not accomplish the purpose as the people still refused to take the money, and, if brought to trial, juries freed them. So still another act was passed that all offenders against the bank act should be tried within three days after complaint was made. *No jury was to be allowed and no appeal permitted.* After the passage of this last act, a Newport cabinet maker named John Trevett tendered some of this paper money to a butcher named John Wheeden in payment for some meat, and Wheeden refused to accept it. Then Trevett had him arrested on the charge of violating the bank act. James M. Varnam, Esq., defended Wheeden and challenged the constitutional validity of the bank act, chiefly upon the ground that it denied the accused a trial by jury. The court was composed of four judges and the trial occupied two days, the time being devoted almost wholly to argument upon the constitutionality of the bank act. The court unanimously sustained Varnam's contention and discharged the defendant. The subsequent history of this case is that the Assembly vainly attempted to remove these judges.

Another serious objection to having as many as fifteen members of the Court is that it would likely make it so unwieldy as to result in congestion of its docket. It is a frequent error to assume that an increase in the number of judges of a reviewing court will result in a corresponding increase in the output of decisions. Every survey that has been made of the causes of delay in the administration of justice estab-

lishes, beyond reasonable controversy, that to be untrue. The latest survey on this subject that I know of is the Third Annual Report of the Judicial Council of Michigan of two or three years ago.

It seems to me that the experience of North Dakota for a few years next following 1920 should be an impressive argument in favor of complete independence of the judiciary. I happen to have had a fine opportunity for knowing, in advance, the program of the Non-Partisan League because I was in St. Paul during the national convention of that party, met Mr. Townley, its president, and had a long talk with the Secretary whose name I have forgotten. At any rate, the Secretary outlined to me the whole legislative program that this League was to put through the North Dakota Legislature, and which a few weeks later they put through. This League had adopted the policy of state-owned dairies, line elevators, and general benevolence. The Legislature passed an act providing for the Stated-owned Bank of North Dakota with five million dollars capital stock, and requiring state banks to deposit their reserves in it. Another act was passed providing for a Home Builders Association to be financed by the State and to build houses not exceeding a cost of $5,000 each. The Secretary outlined the complete program to me and it was carried out exactly as planned. I suggested to him that there seemed to be serious doubt of the constitutionality of such acts. To this, he smilingly assured me that that matter was "taken care of"; and that they would not permit any legal "technicalities" to stand in the path of their progress. There had been a previous decision of the North Dakota Supreme Court which, if followed, would defeat execution of their plan, and I was informed by someone whom I believed that two candidates for the Supreme Court had pledged themselves to overrule that obstructing decision. These legislative acts were assailed on the ground that they were in conflict with the Constitution, and a majority of their Supreme Court sustained

their validity. The Home Builders Association began to function, and the first thing they did was to build a home for the Attorney General at a cost of $22,000; then they built 50 more homes all in excess of the limit of $5,000; and then—they went broke; and the people "turned the rascals out." Some years later, I read a carefully prepared and apparently authentic report that this experiment in a limited state socialism had cost the people of North Dakota eleven million dollars. This is one example of the results of a prepledging of judges.

In addition to what I have said, I find myself unable to shake off the conviction that the proposed increase in the number of judges of our Supreme Court, especially under the prevailing circumstances, would substantially detract from the prestige of the Court, and still further lessen respect for law.

Finally, this country is committed to the theory and fact of *judicial supremacy*, and I am opposed to any bill that may or will afford the slightest opportunity to change it. If our Constitution is lacking in the powers delegated to Congress, that lack may be supplied by way of amendment. And if an amendment were adopted giving to Congress the power to regulate industry and commerce, there would be no doubt that the present membership of the Court would sustain legislation under that power.

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