Volume 41
Issue 4 *Dickinson Law Review - Volume 41, 1936-1937*

6-1-1937

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Dickinson Law Review

VOLUME XLI JUNE, 1937 NUMBER 4

OBSERVATIONS ON THE PROPOSALS OF THE PRESIDENT TO CHANGE THE PERSONNEL OF THE JUDGES

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Article 3 Section 1 of the Federal Constitution is the tendon of Achilles of the American system of government and also may be its safety valve. The duty to create a Supreme Court and inferior Federal courts necessarily includes the control over the judges through whom the judiciary functions. The performance of this duty is imposed on the Congress and the President and they also are invested with the incidental powers to confer jurisdiction, to define the judicial function and to fix the number of judges. The President, with the consent of the Senate, names the judges. Lord Bryce refers to the failure of the Constitution "to determine the number of judges in the Supreme Court" as "a weak point, a joint in the court's armor through which a weapon might some day penetrate." It is this dual legislative and executive power to create the courts and to determine the number and perso nel of the judges that in full understanding and proper exercise has made a free and independent judiciary; and figuratively, is the tendon which maintains the equilibrium of justice and sustains the weight of order as administered under our dual Federal and State governments. But this vital tendon is exposed to the possibility that executive dominance over a subservient Congress may atrophy or cut it, with resultant collapse of equilibrium and the executive becoming the dominant authority in government and in its administration of justice.

The reason our government is so delicately balanced and the administration of justice so sensitive to change is because its structure is defined, its mechanism is determined, the rights of the people are protected and the limitations on the functions of its organs are imposed by a written constitution whose words of general import must be given ultimate meaning by a human tribunal. The mechanism of our government and its principles of constitutional law are in a constant state

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of flux and of becoming and both reflect in their evolution not only the variant political and economic conditions but also the minds, characters and environments of the judges that give meaning to the Constitution and apply it to changing conditions. They then are the real arbiters of government and of law under our Constitution who on final appeal speak last in the judicial understanding of its vital written words and in its application to new conditions.

It is clear that with statutory change in the personnel of the Supreme Court and with consequent constitutional change of interpretation, (i.e., when the prior interpretation gives definition to uncertainty or sustains a statute of doubtful constitutionality or condemns a statute that clearly offends the Constitution) the last interpretation is not in the nature of an amendment to the Constitution but rather is declaratory of the Constitution; and this because neither interpretation is purposive by giving a meaning now different from that when first written or arbitrary by not applying that meaning now as then to similar situations, but both interpretations are the conscientious opinions of independent and oath-regardful judges. When, however, the Congress, at the request of the President, creates new judges for the avowed purpose of sustaining as constitutional legislation similar to that which the Supreme Court heretofore in proper discharge of its functions had stricken down as unconstitutional, then the statutory increase in the number of judges and their change of meaning or of the application of the words of the Constitution is not interpretation but in fact and effect is an amendment to the Constitution, because made for that avowed purpose.

The essentials of a representative democracy are that the people shall ordain a fundamental law which establishes a government with sovereignty vested in the popular will, exercised for the general welfare and which functions through agents. There can be no democracy with representation without either the traditional assent of the people or, after referendum to them, their original adoption or subsequent amendment of a constitution.

The unwritten constitution of England may be amended by act of Parliament or by judicial interpretation of the House of Lords, but by either only if and when sustained by public opinion. There is reserved always to the people of England the power of repeal by subsequent Parliament and to nullify constitutional interpretation of the House of Lords by the creation of new Lords.

While amendments may be made to the written Constitution of the United States in four different ways, each of the methods makes the approval or ratification by the people a fundamental essential of constitutional change. The executive in effect may write into our Constitution a basal principle declaratory of human relations only if it is universally accepted as true because founded on obvious or admitted fact, as when former President Theodore Roosevelt declared the consuming public to be a third party in interest to all disputes between capital and labor. The two-third requirement to propose and the three-fourth vote of the legislators or of the conventions for the approval of amendments make clear

that under the two formal methods constitutional amendments must be the seasoned judgment of the American states and of the people.

The people through their representatives in Congress and the President in theory have two checks on judicial usurpation. They may impeach and remove the offending judges or they may amend the Constitution formally or declare it through interpretation by additional judges created by Congress after referendum to the people for the purpose of sustaining legislation deemed by them as essential under the Constitution for the general welfare, but which the judges as instrumentalities of judicial action arbitrarily have struck down. It is possible for a minority of the States and people not only long to delay but finally to prevent formal amendment to the Constitution as construed by an arbitrary Supreme Court which persists in nullifying the popular will. Judicial usurpation in the nature of a stubborn determination arbitrarily to thwart legislation deemed constitutional by the executive, by a majority of Congress and by a majority of the people on referendum even if made a count in impeachment proceedings is so difficult of proof as to make improbable conviction and removal of the offending judges. It would then seem that the only remedy under the Constitution which a majority of the States and people have against the usurpation of judges by arbitrary persistent and wrongful interpretation, is the creation by the people through their representatives in Congress and the President of new judges with different attitudes of mind and new concepts of life relations. It is this safety valve which the fathers in wisdom provided as the alternative to violent revolution and by which a growing and ever expanding Constitution may be vitalized by adapting it to new conditions and relations, with identity of meaning and certainty of its application to situations now as when ordained by the people.

In the knowledge of the nature of the attacks made on the Supreme Court because of its decision in three leading cases, each of which involved property interests of magnitude (e.g., a deliberate conspiracy to protect property in slaves, the creation and appointment of new judges sympathetic to legalizing fiat money, and the reversal of opinion of a judge on arbitrary reargument to prevent the imposition of income taxes), it cannot be said that such always has been or will be the personnel of the judges and so impeccant their judicial acts, either of method or of decision, as to preclude the fact or the probability or the suspicion that the arbitrary will of a judge or unworthy personal motives or public considerations other than of justice, have thwarted or will thwart the popular will by declaring unconstitutional statutes which a dominant majority believe to be constitutional.

The President grounds the instant proposals to increase the number of judges of the Supreme Court on three propositions: (1) That the advanced age of some of the sitting judges burdens and delays the administration of justice; and (2) the assumption that because of the inclination of age to cling to the old the elder judges purposively have declared by arbitrary interpretation a Constitution

contrary to the President's conception of its meaning, which conception (3) he further assumes is in exact coincidence with the Constitution as understood by the great mass of the people whose mandate he has to make new judges that his conception of the Constitution shall prevail.

It did not require the conclusive statement of the Chief Justice to demonstrate the diligence and competency of the Supreme Court and to induce a discerning public to suspect that the imputation of its delay might be a subterfuge to mask a deeper purpose fraught with peril to the continuance under the Constitution of representative democracy.

The President's assumptions that the Supreme Court by arbitrary interpretation has usurped the people's prerogative and wrongfully has amended the Constitution and that he, without antecedent referendum to the people, holds their mandate to repeal its (to him) odious judicial amendments, is in truth the feared sword that may cut the Achilles tendon of American constitutional government.

However divergent the respective understandings of the Supreme Court and the President as to constitutional limitations and however many the citizens are who accept the President's assumptions, there are many more millions of Americans who repudiate them because of their confidence in the integrity of the courts and in the loyalty of the judges to their oaths to maintain the Constitution as their minds understand and their consciences apply its limitations to Federal and State legislation. It is this admitted diversity of opinion on this momentous issue that makes it imperative for the President to submit to the people the question of the truth of his factual assumption of judicial usurpation by purposive and arbitrary interpretation if he would avoid the suspicion or escape the condemnation of making proposals in studied disregard of the people's prerogative by their act to change their Constitution.

The national platform of the Democratic party and, during his canvass, the President repeatedly declared for formal amendment as the remedy against the Supreme Court's interpretation of the Constitution. Neither the President nor any of his supporters charged the Supreme Court or any of its judges with arbitrary interpretation in nullification of the people's will as embodied in any statute. The President at no time in his public life ever suggested the use by the people of their power to change the personnel of the Court in relief of alleged judicial usurpation, but repeatedly disavowed such method as a remedy and many of his opponents accepted his remedy of formal amendment as the promise of a sincere and honorable President and refrained from charging him with the revolutionary purpose embodied in the proposals which he now asks Congress to adopt at its first session after his election.

It is the full and complete form of his proposals, the precipitate haste of their presentation, the subtle nature of their coercion on the elder judges and the political sagacity of his request for immediate congressional enactment without referendum to the people, that give substance to the fear of an ulterior and sinister purpose to mold an emasculated judiciary to his will preparatory to and as the

one essential of executive mastery under the shadow of constitutional forms.

The power that makes the courts can unmake American representative democracy. If the President can persuade or coerce the present Congress to accept as truth his unwarranted assumptions and to enact into law his revolutionary proposals, he will have usurped the people's prerogative to change the Constitution and can make himself the supreme power in the Nation. Thus the President may make use of a constitutional remedy aimed against judicial usurpation and a safety valve against violent revolution to destroy the ultimate sovereignty of the people.

It is submitted that the proposals of the President imperil our representative democracy because in denial of the people's fundamental prerogative. They are founded upon the error of a dangerous, because false in fact and of revolutionary effect, assumption that the people have given him a mandate against the judicial usurpation of upright judges whose only offense is that in good conscience they could not declare the Constitution as understood by the President or apply it as he desired.

It is suggested that an independent judiciary as an essential organ of representative democracy under the Constitution can yet be saved by the President and by the Congress. There are sufficient liberals in this Congress *forthwith to authorize* the submission to the people of carefully worded constitutional amendments remedial of what by them and the President is conceived as erroneous constitutional interpretation and *meanwhile to stay* congressional action on the proposal to change the personnel of the Supreme Court until after the next congressional elections. If this is done then will go to the people under constitutional referendum the issues vital to representative democracy and to the supremacy of the people under the Constitution.

One-third of the States have now permanent statutes which permit action immediately upon submission of the amendments and the required number to adopt can act on the amendment before such elections. Whether the amendments are adopted or not, if the elected representatives of the people so will, Congress and the President by statute may then change the personnel of the Supreme Court without offending the letter of the Constitution, whatever the violence to its spirit, and this because after referendum the statute is in accord with and gives effect to the will of the people and under the American system of jurisprudence their mandate cannot be wrong either legally or morally or as the policy of the Nation.

In final analysis then the issue involved in this controversy is factual, and as that fact is found, the statutory change in the personnel of the Supreme Court by this Congress may be enacted with or without breach of the fundamental law. The President does not avow an explicit mandate from the people to increase the number of judges of that court. Is he warranted in basing his assumption of the people's implied mandate to do this revolutionary thing on his vague and tenuous promise to use every legal method to correct the alleged errors of the Supreme Court? Has this assumption by implication the justification of good

faith when in truth the President expressly characterized as "unthinkable" his disavowal of a purpose to pack the Supreme Court, and his supporters then condemned as "fantastic" the suggestion to increase its members?

In the recollection that he stated in the language of his party platform the alleged wrongful interpretation should be cured by formal amendment to the Constitution, may the President be permitted now to assume that he has the real and true mandate of the people to make a vital change in their Constitution; have the people indeed, after free discussion and in full understanding of the exercise of their sovereign power, deliberately decreed that the whim or want of a self-aggrandizing congressional majority henceforth shall be the only determinant of what is constitutional and shall it be the sole judge of the rights and liberties which a people originally had ordained as inalienable and forever within guardian keeping of the Supreme Court?

The question now for the decision of Congress is the most momentous that can confront a people for it involves not only the constitutional fabric of a nation but in deeper significance the usurpation of the power which gives life, energy and purpose to the sovereign will of the people. The present Congress may increase the number of judges of the Supreme Court only if it believes (a) that the Court arbitrarily has struck down constitutional statutes or, assuming the Court's conscientious performance of duty, (b) that the people have given to Congress authority to change the Court's interpretation of the Constitution by changing its personnel. Change of court personnel means more than mere change of a particular past interpretation or of anticipating a new construction of the Constitution to meet a future statute.

The conclusion is crystal clear and cannot be evaded that the acceptance by Congress of the assumptions of the President means that the Constitution is no longer the fundamental law of the people, but that the changing rule of Congress, with its passions and its greeds, its prejudices and its creeds, has become the supreme law of the land; that while a subservient judiciary may survive, constitutional limitations are destroyed; and that the Congress and the President may now invade the powers of the states, may now impinge on the freedom of individual initiative, effort and enterprise and may now violate the basal principles of American individualism and of equality before the law by modification or denial of the fundamentals of liberty, of property, of worship and of justice as once defined by the people in their Constitution.

It is hoped and here urged that the President in denial of the people's prerogative and by assumptions contrary to fact, may not prevail on the Congress to impair the independence of the judiciary and thus weaken, if not destroy, representative democracy under the Constitution, and this to the end that the people may continue to make the Constitution which defines the government and determines the limitation under which they must live.

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