

The Task of Maintaining Our Liberties:

The Role of the Judiciary

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■ Our traditional freedoms, says Mr. Justice Jackson, "are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value". And he concludes that, in the last analysis, it must be the people, rather than the courts and judges, who permanently guard liberty. The following paper was the principal address at the dinner in honor of the Judiciary of the United States, sponsored jointly by the Section of Judicial Administration, Conference of Chief Justices and the National Conference of Judicial Councils, on August 24, during the Diamond Jubilee Meeting of the Association in Boston.

■ There is a lesson for us in the unique and ancient office of Lord High Chancellor. Our forefathers understood, on high authority, that England had strictly separated executive, legislative and judicial functions. Thinking well of the example, they made separation of these powers the basic principle of our Constitution. Their misunderstanding is apparent. The Lord High Chancellor is at once the highest judicial officer in the realm of Elizabeth II, a minister in the cabinet of Sir Winston Churchill's government, and the presiding officer of the upper legislative house. It would not be impossible for him faithfully to follow a precedent (that still being a custom in England), though he regarded it as outmoded, and then to sponsor and manage in the House of Lords a bill to correct the mischief he had perpetuated as a judge. Perhaps this combination of judicial, legislative and executive powers has been found acceptable because it is so forthright that it invites no suspicion of dissembling. If the Lord Chancellor feels impelled to speak on a policy matter, he may do so

frankly in Parliament and is not tempted to disguise a speech as a judicial opinion. He may satisfy any urge to improvise new remedies or make innovations in the law by sponsoring legislation instead of reaching that end through the fiction that he merely is construing a constitution or interpreting a statute.

In the United States, controversy as to the bounds of judicial law-making has persistently divided judicial, professional and public opinion. Many political leaders and large segments of our people, though of opposite schools at different times, urge a "judicial activism" to take the initiative in bringing about changes in fundamental law. On the other hand, Presidents Jefferson, Jackson and Lincoln each in his time complained that the Supreme Court was invading the legislative field. More recently, President Roosevelt stated his grievance to be that "The Court has been acting not as a judicial body, but as a policy-making body."

No one has proposed and, of course, no one can devise a formula that will insure judicious use of judicial power. Considering that the judi-

cial office is the least representative in our system, that the litigation process is narrowed by serious limitations and that judicial power normally is exerted with retroactive effect, I should not suppose it open to doubt that overstepping or irresponsible use of judicial power is as much an evil as lawlessness in either of the other branches of government.

How Can We Tell Judicial from Political Power?

However, since all interpretation is a making of decisional law, the question which underlies this old controversy is by what sign shall we know the limits of the power which is given to the courts as distinguished from political power not entrusted to them. Chief Justice Marshall for the Court penned this definition:

... Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

But does this do much to tell the profession what concrete factors actually will shape the judgment on any reasonably debatable issue? At its least, and probably at its most, it is a pledge that decisions will be

reached so far as humanly possible by application of existing and ascertainable legal criteria and standards. Yet, as an advocate at the Supreme Court Bar in many constitutional cases, I never was able to determine what material would really be considered by the several Justices as controlling such issues.

And I am bound to admit that a decade of experience as a judge throws little more light on the problem. Nothing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politicolegal questions put to our courts. Few judges like to be accused of acting from merely personal predilections. Yet, frequently that is the point of dissenting opinions. Confusion at the Bar and disagreement on the Bench usually begin in lack of an accepted system of weights and measures to mete out constitutional justice. Unfortunately, the conclusion of judges having the highest sense of professional responsibility is that the present state of our constitutional development provides no definitive principles of decision.

To recount possible sources of guidance is to remind us how inscrutable they all are. We start, of course, with the constitutional text. But if that makes the answer clear, there is no problem. It is the imprecise, obscure or ambiguous state of the text that raises the issue. So where do we go next?

In a private law case we would go to the common law, perhaps, which has served to steady the hand of generations of judges. For interpretations of public law we get a little, but only a little, help from it. While the compact is rooted in English legal philosophy and embodies many of its presuppositions, it is our doctrine that there has been no federal reception of the common law.

I suppose we would agree that the most lawyerly and appropriate source of guidance is any applicable decision by our predecessors. But for over a century it has been settled doctrine of the Supreme Court that

the principle of *stare decisis* has only limited application in constitutional cases. It might be thought that if any law is to be stabilized by a court decision it logically should be the most fundamental of all law—that of the Constitution. But the years brought about a doctrine that such decisions must be tentative and subject to judicial cancellation if experience fails to verify them. The result is that constitutional precedents are accepted only at their current valuation and have a mortality rate almost as high as their authors.

Some earlier cases relied upon "natural justice" or the "laws of nature and of nature's God", which our Declaration of Independence invoked. But new schools of thought scorn that belief as a sort of legal superstition and propose, in the name of "realism", to rely upon "facts" to determine decisions. These they would select largely from sociology, political science, psychology and other nonlegal disciplines. Citations of weekly magazines, newspapers and an endless list of popular, scientific and professional books and reviews are now found in briefs and opinions. We need not enter the controversy between these schools, for this "realism" and "natural justice" have much in common; both shield the judge with an impersonal and probably unconscious camouflage for holdings that emerge out of the mists of preconception. Unfortunately, both also are alike in bewildering the profession and arousing suspicion that decisions may be reached from latent motives and policies not avowed.

Standards of Constitutional Decision Are Soft and Transient

Thus we find standards of constitutional decision soft and transient. Judge Cardozo put it politely in saying that much turns "upon the social or juridical philosophies of the judges who constitute the Court at one time or another". Judge Learned Hand says as to many constitutional commands, "Nothing which by the utmost liberality can be called interpretation describes the

process by which they must be applied." But he sees no remedy, because this condition is due to the generality of some of these rubrics, and adds: "Indeed, if law be a command for specific conduct, they are not law at all; they are cautionary warnings against the intemperance of faction and the first approaches of despotism."

These conclusions of experienced and disinterested jurists are significant, perhaps ominous, for the long future of our constitutional freedoms. Lord Acton spoke of liberty as "an idea of two hundred definitions". There is no such thing as an achieved liberty; like electricity, there can be no substantial storage and it must be generated as it is enjoyed, or the lights go out. If knowable and impersonal standards for ascertaining the scope of our liberties are lacking, constitutional law is almost as liquid as legislation, and we have little more of a written Constitution than does Great Britain. Can safeguards of this character be made steady and strong enough to withstand what Judge Hand calls "the intemperance of faction and the first approaches of despotism"? To answer, we must consider the momentum and potency of two distinguishable but closely related movements that hold some threat to our traditions.

One now is called authoritarianism, a new name for the old practice by which official authority, unconfined by law, rides roughshod over individual rights. Our forefathers sought to forestall this kind of oppression by providing that official actions affecting life, liberty and property be confined to those legislatively authorized and executed by procedures which conform to due process of law. Out of these texts have grown our many decisions that support the principle of individual freedom as opposed to the principle of authority.

But a more subtle form of aggression against individual freedom comes, not from the usurping officeholder, but from the state itself, under the philosophy that all else

must give way to the interests of the state. This movement is likely to progress strictly within the terms of legislation and forms of law. Government gradually takes over direction of the total life of the citizen—economic, educational, social, artistic and religious. It regulates each step of one's daily affairs and tolerates no conflicting loyalties or duties. In moderation, many may welcome this as a "planned economy" or "welfare state"; in excess, it becomes the totalitarian state. Our forefathers knew, too, the dangers of excessive government and sought to forestall it by confining the reach of the Federal Government to a small segment of the daily life of the individual or of the local community. It was to be a government of enumerated powers; and others, unless prohibited, "are reserved to the States respectively, or to the people".

It seems to me that these traditional freedoms are less in danger of any sudden overthrow than of being gradually bartered or traded for something else on which the people place a higher current value. In this anxiety-ridden time, many are ready to exchange some of their liberties for a real or fancied increase in security against external foes, internal betrayers or criminals. Others are eager to bargain away local controls for a federal subsidy. Many will give up individual rights for promise of collective advantages. The real question posed by the Fascist and Communist movements, which together have captivated a large part of the world's population, is whether, today, liberty is regarded by the masses of men as their most precious possession. Certainly in the minds of many foreign peoples our type of individual liberty has been outvalued by promises of social welfare and economic security, which they want too passionately to be critical of the price. If this indifference to traditional values should spread to us, it would be the greatest threat to our own liberties.

Measures of public welfare or security are apt to be demanded without considering that execution of

each added function requires an incalculable number of detailed official decisions important to the property, welfare or perhaps the liberty of those affected. However, most are of small consequence to the general public and constitute routine, tiresome duties for often anonymous officials secure in their tenure and beyond the reach of aggrieved citizens. That among their multitude of acts are many careless or arbitrary ones we may be sure. Many of them are immune from judicial review, but the very mass of these decisions and their particularized character make review, even if allowed, sporadic, costly, superficial and largely futile. Thus, unless new safeguards are devised, an administration that is all-embracing will of necessity tend to become all-powerful. It will take considerable ingenuity and diligence to find techniques to extend the protection of individual rights to keep pace with the expansion of power. The Federal Tort Claims Act, to give remedies for injury from official negligence, and the Administrative Procedure Act, to assure more impartial administrative decisions, are examples of measures that may help to prevent government from becoming arbitrary and oppressive as it grows big.

It is said, by advocates of the expanding socialization, that it chiefly affects "property rights", as to which it is safe to let the legislators and administrators have their way so long as courts uncompromisingly protect "human rights". For purposes of that argument, it is assumed that our forefathers were absent-minded when the citizen's property, as well as his person, was assured due process of law. The longer I work with these problems the less certain I am that what they joined we can put asunder. My equal right to drive an automobile may be only a claim to use of property, but it concerns my personal freedom as well. Prohibition may be looked upon as no more than a regulation of a particular kind of property, but many took it as rather personal. If officers search my house and seize my papers, with



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no threat to my person, only property may be directly touched; but I can think of no greater affront to my person. But, even if we think property sometimes has had undue protection against regulation, the question remains, how far so-called rights of property can be swept away without encroaching upon rights of the person as well. Every foreign state that has deprived persons of fundamental "property rights" has eventually also taken away the rights of the person. Those who operate intensive state controls of property have found it necessary soon to take equally intensive state control of labor also. Compulsory service, heavy penalties for absenteeism, production quotas, and all the apparatus of the police state, ultimately are introduced upon the same arguments from state necessity that usher in more popular early measures.

I am not alarmed by any "clear and present danger" of this whole train of evils overtaking us in the United States. But in modern conditions, to identify and forestall the "first approaches of despotism" will take more insight and farsight than is afforded by catchwords or slogans carried over from eighteenth-century political struggles to settle twentieth-century constitutional cases. Again I tap the wisdom and experience of Judge Hand:

... The answers to the questions which they raise demand the appraisal and balancing of human values which

there are no scales to weigh. Who can say whether the contributions of one group may not justify allowing it a preference? How far should the capable, the shrewd or the strong be allowed to exploit their powers? When does utterance go beyond persuasion and become only incitement? How far are children wards of the state so as to justify its intervention in their nurture? What limits should be imposed upon the right to inherit? Where does religious freedom end and moral obliquity begin? As to such questions one can sometimes say what effect a proposal will have in fact, just as one can foretell how much money a tax will raise and who will pay it. But when that is done, one has come only to the kernel of the matter, which is the choice between what will be gained and what will be lost.

Who, indeed, can peer far enough into the future to say whether more is to be gained than lost by sustaining a particular claim of liberty against that of authority? One is not always the antithesis of the other. Liberty is not self-supporting, but is the child of a just and stable legal order. An immunity which too far undermines government would be self-destructive, while today's infringement of liberty may purpose its long-range preservation. One of the paradoxes of our history is that the administration of Mr. Lincoln, most prolific in invasion of individual rights, is most commemorated for its over-all service to human liberty. It is especially difficult to judge between immediate loss and ultimate gain to liberty when there is an organized movement to make the rights of some a weapon to destroy the rights of all. A balance suitable to one time or condition may not be valid for others. Not every defeat of authority is a gain for individual freedom, nor every judicial rescue of a convict a victory for liberty.

What is the net gain if the liberty of one is sustained to the injury of another's? Can we avoid the logic that one man's right must end where another's right begins, and that any overextension of the rights of one group or individual will merely subtract from that of another?

Above all, who has a juridical

formula to identify manifestations of "the intemperance of faction" from legitimate expressions of the will of the majority? The reconciliation of majority rule and minority rights involves the most debated theoretical problems in the philosophy of free government. Mr. Jefferson asked where else we may "find the origin of just powers, if not in the majority of the society? Will it be in the minority? Or in an individual of that minority?" Presumably we enforce rights of a minority which restrict the majority only because a one-time majority will established them. May later majorities rescind the grant?

Judge Cardozo reminds us that the words which express our great constitutional generalities "have a content and a significance that vary from age to age." If so, should judges apply them according to the understanding of the generation which promulgated them or according to their meaning to contemporaneous society? On this issue between the quick and the dead, Mr. Jefferson stood squarely on the proposition that "the earth belongs to the living generation . . ." Followers in his political tradition therefore have insisted that courts abstain from frustration of the legislatively expressed will of the current majority, at least in all except the clearest cases of transgression of the Constitution's text. But those in the tradition of Marshall have put a high value on the original purpose and have accorded less weight to contemporary opinion.

The judge who would resolve uncertainties of interpretation by conscious deference to public opinion will find new pitfalls in his path. Is there any more reliable test of prevalence of a public opinion or will than the election returns? That certainly is its legal manifestation, and I see no reason to believe that judges have better understanding of it than those the public has elected to represent them. To the extent that public opinion of the hour is admitted to the process of constitutional interpretation, the basis for judicial re-

view of legislative action disappears. If interpretation is not to be a mere following of election returns but a legal process, the utmost deference that courts can consciously pay to political trends is a strong, but rebuttable, presumption in favor of the constitutionality of action by the political branches.

Exclude as far as humanly possible the pressures of group opinion, but let us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation. Each new member of the ever-changing personnel of our courts brings to his task the assumptions and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority. Judicial review in practice therefore has proved less an obstacle to majority rule than the followers of Mr. Jefferson feared and less a guaranty of the *status quo* than the followers of Mr. Hamilton hoped.

But for all this, the responsibilities of the judges and lawyers for the preservation of our scheme of liberty under law is heavy, and failure will not be excused by the difficulties, weaknesses or uncertainties that I have pointed out in our process. We cannot escape the dangerously vague by resort to the dangerously rigid. But we must recognize the pliability of the process for what it is and strive to keep our liberty under law by keeping ourselves under law. The profession knows that the law is a progressive discipline and that each decision cannot be a mere copy of one that went before. It knows that the nature of our task gives much latitude to our judgment. But it also has an instinctive dislike for rootless or erratic decisions which it expects to be rewritten when the wind shifts to another quarter. It will be satisfied if our conclusions, fallible though they are and mistaken though they may be, represent a real respect and aspiration for law, a faithful effort to apply law and a veneration for the work of the great

minds that have made our legal structure the nearest to a safeguard of freedom that has been devised.

Whatever license of constitutional construction one group of judges may take in one direction a later group may take in an opposite direction, as they succeed to office from different political backgrounds and atmospheres. The changes brought about in the last score of years are some measure of those which a prolonged future regime could accomplish. Only the people themselves who make and unmake our political regimes can permanently guard

their liberty. As Attorney General, speaking for the executive branch of government at the 150th Anniversary of the Supreme Court, I was moved to observe: "Judicial functions, as we have evolved them, can be discharged only in that kind of society which is willing to submit its conflicts to adjudication and to subordinate power to reason." That still is my conviction. In the wise and eloquent words of Chief Justice Hughes: "Whether that system shall continue does not rest with this Court but with the people who have created that system. As Chief Justice

Marshall said: "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will.' "

So I urge that the lawyer, as a leader of public opinion, can do no greater service to our institutions than to see that the people are repeatedly warned and kept everlastingly aware that they must be their own guardians of liberty and that they cannot thrust that whole task on a handful of judges.

We whose lives are dedicated to freedom under law add a fervent "Long live the Constitution."