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"THE LIBERTY LEAGUE AND THE CONSTITUTION"

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Fellow Members of the Buffalo Lawyers Club:

Under the sponsorship of the "American Liberty League", James M. Beck lately lectured the Bar, by radio and by pamphlet, on "The Duty of the Lawyer in the Present Crisis". His speech was an indiscriminating attack upon the legal advisers of this Administration, and the duty which he urged upon all lawyers was, "We must defeat the sappers and miners of the New Deal, who are insidiously undermining the very foundations of the Constitution".

Is the Constitution in danger and if so from whom?

You will recall that this Administration assumed the responsibility of government during the complete collapse of 1933, and, with much support from both parties, adopted a program. It may be divided roughly into two parts -- one a program of spending Federal money in an effort to provide relief and advance recovery; the second, a program of reform to eliminate abuses as to security issues, holding companies and the like.

Let us first consider the spending program, not from the economic or policy viewpoint, but from the viewpoint of Constitutional limitations.

American business men have denounced the spending in bitter terms. They say it threatens solvency, it is wasteful, political, socialistic, communistic, illegal, not for a Federal purpose, and outside the proper power of the Federal Government.

Why, then, do the Liberty League lawyers not do something about it?

If you want to know why these able lawyers can do nothing more than to talk about illegal spending of Federal tax money, read the decision of the United States Supreme Court in Massachusetts and Frothingham vs. Mellon as Secretary of the Treasury, reported 262 U. S. 447, decided June 4, 1923.

The Harding Administration passed a "Maternity Act" which made grants of Federal money to such states as would yield a portion of their local sovereignty to a Federal Bureau. The State of Massachusetts and an individual taxpayer joined in contending that it was an illegal use of the Federal taxpayer's money.

The Supreme Court said that its right to hear the plea of a taxpayer to enjoin a Federal appropriation which resulted "in taxation for illegal purposes, has never been passed upon by this Court". This same James M. Beck, then Solicitor General, went into court in this unsettled state of the law, and on behalf of Secretary Mellon argued that there was no legal control whatever over appropriations "even if money raised by Federal taxes is being misspent". The Court heeded his plea and held it had no power to prevent even an unconstitutional expenditure of Federal tax money. Thus Mr. Beck got the Congress and the Executive departments released from any court control whatever over use of Federal money.

So serious was this blow to judicial supremacy that neutral observers have held it to be the beginning of the "Twilight of the Supreme Court". If an administration can

spend tax money with no constitutional restraint, then the Executive and legislature can reach almost any desired goal. The doctrine that spending money is above the law was a legacy from the Beck-Daugherty days as legal advisers to an Administration that is not remembered favorably for its respect for law.

No New Deal lawyer has ever originated an argument that was so "undermining" as this Harding-Mellon-Beck doctrine which makes every dollar of Federal money above the law so far as the courts are concerned. This is the spokesman whom the Liberty League selects to call us "miners and sappers". This is the record in office of the man who, out of office, is damning the Constitution with a driveling defense against phantom enemies. Is his suspicion of all those in office autobiographical?

The Liberty League super-lawyers urge us everyday lawyers to go to battle at the polls and on the platform. They modestly offer to take care of all the law business connected with the Holy War themselves.

They want you to rally to the cause of their clients because they say the President is overthrowing or will overthrow constitutional government.

Of course there has been no instance in which the President has refused to accept and abide by the decision of the Supreme Court. Though he expressed some doubt as to economic effects of one decision, he did not adopt the attitude of

Andrew Jackson who said, "John Marshall has made his decision, now let him enforce it". He has not followed Mr. Lincoln who, as Commander-in-Chief of the Army, against all legal advice, reversed the Dred Scott decision of the Supreme Court by Proclamation.

The President did suggest that Congress should not reject the Guffey Coal Bill because of doubts as to its constitutionality, however reasonable. By this suggestion he took the constitutional question to the courts -- just where Liberty League lawyers take such questions. Two lower courts have acted on that law -- one has fully sustained it, and the other sustained all but one feature of it. The doubt appears to have been at least reasonable, and why may not a bill be given the benefit of the doubt as well as a criminal?

The Constitution, as Charles Evans Hughes once said, "is what the judges say it is", and no President has been able to anticipate decisions of the Court as to constitutionality and so avoid all doubtful measures. The Supreme Court held Mr. Lincoln's action illegal in the Milligan case, and his money policy unconstitutional in the Legal Tender cases. President Taft disapproved the Webb-Kenyon Act because he said it was unconstitutional. Congress overrode his veto and the Supreme Court, through Mr. Taft's own appointee Chief Justice White, held the law constitutional. The Court has upset, on constitutional grounds, three bills signed by Mr. Hoover, seven of those of Mr. Coolidge, and seven of those which had the Harding signa-

ture. Mr. Beck's list of "miners and sappers" has omitted some of the most distinguished names. Why did Comrades Beck and Daugherty, legal advisers to Mr. Harding, allow him to "mine and sap" seven times, if the limits of constitutionality are so clear to them?

George Washington wrote to Hamilton in 1791:

> "Sir: An act to incorporate the subscribers to the Bank of the United States is now before me for consideration.
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> "The constitutionality of it is objected to. It therefore becomes more particularly my duty to examine the ground on which the objection is built. As a means of investigation, I have called upon the Attorney-General of the United States, in whose line it seems more particularly to be, for his official examination and opinion. His report is, that the Constitution does not warrant the act. I then applied to the Secretary of State for his sentiments on this subject. These coincide with the Attorney-General's; and the reasons for their opinions having been submitted in writing, I now require, in like manner, yours on the validity and propriety of the above-recited act; * * *"

Washington, without benefit of the ethical guidance of the Liberty League, went right ahead to form an opinion of his own on the constitutionality of a statute, and approved a measure as to which very leading lawyers of his day had raised constitutional objections.

While these lawyers are urging you to make a feeless fight on the frontier, under the cover of your advance they are waging a fight of their own closer to the commissary department. They have begun a campaign to throw the power of the courts between their clients and the Administration at every possible

point. Whether their views are the result of their retainers or their retainers the result of their views, it becomes apparent that if they should admit any New Deal law to be constitutional some of them would have to give up valuable retainers. Their right to publish and urge their mass views is unquestionable, but their views like my own, are those of advocates, and why try to conceal honorable advocacy by simulating judicial disinterestedness?

A leader of big business, Mr. Edward F. Hutton, gave his associates this advice, "So, I say, lets gang up". Though it was repudiated, its suggestion was heeded in the "gang" strategy of the super-lawyers in the struggle of the great financial interests to use the judicial powers to tie the hands of the Executive and the Congress.

The processing tax for farm aid was obnoxious to interests which had long had a tariff tax as a business aid. The Supreme Court has said that taxes are "the sole means by which sovereignties can maintain their existence" and that their "prompt and certain availability is an imperious need".

Notwithstanding the long established practice that collection of taxes will not be stopped by injunction, a multiplicity of actions has been brought and the collection of processing taxes against all of the bigger concerns of the country well nigh stopped although no decision has yet been rendered by the Supreme Court of the United States. Last month the collection of processing taxes dropped as against a year ago about 40 million dollars, largely due to these injunctions. Not since

the "Whisky Rebellion" has there been such a wide spread concert of action to resist a tax law of the United States in advance of a Supreme Court Decision as to its legality.

Big business dislikes the Public Utility Holding Company Act. But Wendell Willkie, President of the Great Commonwealth and Southern system described the situation that faced Congress, reported by the New York Times of December 4th, 1935:

> "'No radical public ownership advocate hates half as much as I do the men who have made personal profit out of their corporate trusteeships, men who profited from engineering services rendered to their companies, and who acquired property only to put it on the books at excessive values.'"
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> "He explained that while he was for regulation, strict regulation, so that we can be freed from the Insulls and Foshays, so that we can be freed from the pirate and the raider, he could find no economic, social or constitutional grounds for the abolition of holding companies, as contemplated under the Wheeler-Rayburn Act."

Congress agreed that the pirate and the raider must go and provided that on December 1st each public utility holding company should register with the Federal Government as the first step of regulation to that end. Congress faced an admitted evil, "pirates and raiders" preying on an essential industry. Congress may have written a drastic remedy, but it was not obliged to leave the utility bad boys alone on their promise to spank each other. A regulatory law was duly enacted by Congress, signed by the President. It has never been set aside by the Supreme Court nor by any circuit court of appeals. But on December 1st the big utility groups, guided by the advice of

Liberty League lawyers, almost unanimously refused to obey the law even in the simple act of registration, although, in the interests of orderly procedure, the Government offered to let them register with a full reservation of the right to contest constitutionality. I will quote the advice of Roger Babson, an opponent of the Act, to his fellow directors of utility companies:

> "In this crisis a lapse by us into lawlessness would do more to degrade and damage the utilities than any attack made by hostile critics. It would be hailed as proof that some of the severest charges made against this industry are perhaps true.
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> "Irrespective of the moral questions involved in registration, we public utility directors would be playing directly into the hands of Communists, Socialists and Fascists by flouting the law at this critical time. How can we expect radical groups to abide by democratic principles if we ourselves are to defy the law whenever it suits our convenience!"

Now let us consider the uses that are being made of the lower Federal courts in this extraordinary chapter of Liberty League lawlessness.

A sustained effort is being made to have district courts render judgments of unconstitutionality in law suits to which the Government is not a party. The stockholder's action, by which he asks that his corporation be restrained from complying with the Act, is brought. The interests of the stockholder and the interests of the corporation are, of course, the same, but, for the purposes of the action, they assume a pretended hostility. The result is that both sides of the law suit are in the control of those opposed to the law, and the Government, whose

acts and laws are being mulified, is excluded from the case.

Public utility counsel have now invented a refinement of the process of excluding the Government from the decision of constitutional questions. Applications are being made to the Federal District Courts for "instructions" and "advice" to trustees of corporations in reorganization under Section 77B of the Bankruptcy Act.

This procedure was adopted in Baltimore. The trustees applied for advice and asserted that the holding company law was unconstitutional. A creditor answered and asserted that the law was constitutional, but strangely enough, the lawyer who appeared to support the Act, admitted that he had opposed it before its passage, and had "perhaps reluctantly come to the conclusion that the Act was constitutional". The Act would be likely to be well defended by such a champion. But this was not the end of the farce. Another creditor was found and induced to sign papers authorizing the eminent counsel for the Edison Electrical Institute, to represent him. This creditor testified at the hearing that he did not understand that he was authorizing the New York lawyer to represent him, but thought that such lawyer was to represent the company, that he never agreed to pay the lawyer any fee in connection with the proceeding and had never before seen the lawyer who appeared for him. The lawyers appearing for the three groups, all opposed to the law, conferred, and they drew the pleadings,

admitting many facts that would have a controlling influence in the decision.

Government counsel requested that Court to permit an adjournment of thirty days so that they might investigate the facts. The request was refused. A few days later, the decision that the Act was unconstitutional came down. Is it any wonder that so conservative a writer as Arthur Krock has described this case in the New York Times as "The back-door suit at Baltimore. Babson's warning against playing into the hands of radical groups was not heeded.

A similar petition came before Judge Nields of Wilmington, who dismissed it saying:

> "But where the petition for instructions challenges the constitutionality of an Act of Congress and the power and existence of a governmental commission created thereunder a very different question is presented. Far more than instructions as to the administration of a trust is asked for. A body created by an Act of Congress is sought to be destroyed and stripped of its powers without being a party to the proceeding and without having its day in court. Such a course violates accepted canons of legal procedure".

After this glimpse of procedure to test constitutionality, at its worst, let us look at such procedure at its best. Many radical suggestions for limiting review of constitutionality have been made and are apt to be revived. It is my feeling that the substance of judicial review is much less irritating than the procedure by which we go about it.

Every one of us, by membership in the legal profession and probably also by conviction, is committed to the mainten-

ance of the judicial branch as the authority which defines and applies constitutional limitations. But it is highly important, if we are to continue to have this power exercised, that it be exercised with utmost care so that it is orderly and neutral.

The Supreme Court decides matters of constitutionality only in private litigation. The president of the United States, representing the welfare of 120 million people, cannot ascertain what the opinions of this court may be. However desirous he may be of keeping within its decisions, he cannot learn those decisions until some private litigant gets a decision in a case. The Supreme Court will answer the constitutional doubts as to the constitutionality of the gold policy of the Government for the holder of $13.50 worth of coupons of a railroad, but it will not advise or inform the President of the United States.

Yet legislation and administration cannot await the delays of the courts. This is particularly true in time of emergency. Not even the most ardent champion of judicial supremacy would claim that this Administration could halt its policies dealing with the banking emergency, unemployment relief, gold as the basis of our currency, or many other problems, while the judicial view was slowly made available through the tedious and often devious process of private litigation. It would require, not one decision, but a cluster of decisions to settle the judicial attitude on some of these policies.

Can we adhere to a legal philosophy that denies the benefit of our judicial department's wisdom and neutral views to our policy-making departments, except as they may, after a lapse of years be revealed piece meal through opinion on private litigation? If the highest authority on legal philosophy is unable to reveal itself to the Congress or the Executive, can we as lawyers complain if the processes of legislation and administration must go on meanwhile?

The mass attack on statutes, as shown by the processing tax cases and by the utility cases, changes the essential nature of the process of judicial review. Under all former practice, the laws of Congress took effect unless and until set aside by the Court. Under the new Liberty League practice, the law of Congress is treated as a complete nullity until the Supreme Court says it can take effect. The difference, subtly introduced, in the past year, is fundamental. The utility industry when it made mass defiance of the laws of the United States, had one supporting decision by a Federal District Judge, in the famous "back-door" case. Condemning such practice was the decision of another District judge of equal weight. With no better judicial basis than this, the whole law is nullified, and will be for an indefinite time pending a Supreme Court decision. This is not orderly government, it is lawlessness.

The Supreme Court was created by the Constitution, and has shown a high sense of its responsibility. Its rule making

power has been exercised with great foresight and in the interests of orderly procedure, expedition and simplicity. It is inconceivable that it would act on a collusive record or deny the Government an opportunity to present its full case. Only here, if anywhere, was it intended that laws of Congress be set at naught and only here can the power be prudently left.

There is neither present nor historical justification for scattering jurisdiction to nullify a sovereign act, among dozens of district courts, each the creature of the Congress itself. The rush to choose among these courts and select among these judges and hurry cases some places and delay them elsewhere, can only lead to a public belief that known leanings or local influences have a substantial part in the decision. Conflicting opinions lead to nothing but confusion, promote controversy and all are finally merged in the pronouncement of the one final Court. Could we not arrange to get the final word, without so many preliminary and rather unseemly manouvers?

Could we not, as to acts of Congress, limit their review to a prompt, direct action by the Supreme Court, in exercise of its original jurisdiction and governed by its rule-making power? The Government, in all cases, should be a necessary party, and wide discretion to consolidate cases should exist. Preliminary injunctions or summary halting of the processes of enforcement should be wholly in the discretion of the Supreme Court and not subject to local and irresponsible action.

The American Bar could render a constructive and statesman like service to our judicial system if it would lead the way

to organizing the process of testing constitutionality, and save it from being discredited by the present conflicts and confusion. Democracy is, in the end, all powerful. This multiplicity of law suits, deluge of lower court opinions, defiance of the laws passed by Congress, and long delay in getting the case to the only court that can determine it, are not looked upon by anyone, except the lawyers engaged, as very becoming to a democratic institution. The substance of judicial review might be impaired by disgust with its procedure.

The Liberty League appeal to the Bar, based on its mixture of retainers, politics and sentimentality, should be answered by an intelligent movement to simplify and speed judicial proceedings. Meanwhile, let no disagreement with the policy of one Administration lead the Bar to help paralyze the Government itself, upon whose strength and prestige, all that we have, and all that we are, depends.