North Dakota Law Review

Volume 40 | Number 1 Article 2

1964

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DECISION WITHOUT POWER—THE DILEMMA OF THE SUPREME COURT

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What should the Supreme Court do about those issues upon which there is no national consensus but which nevertheless clearly raise constitutional questions of immense significance? Should the Court refuse to decide questions on the ground that it is better to forego decision than to risk wholesale disobedience of its mandates? Examples of this dilemma are plentiful in constitutional litigation: If the states refuse to reapportion their legislatures, and Congress refuses to correct the inaction of the states, should the Court then enter when so many others have foreborne? If some of the states refuse to desegregate their schools, and if Congress refuses to instruct these recalcitrant members of our union by statute that they must do so, should the Court speak where other co-ordinate branches of government have kept silent? If the Constitution says that only Congress shall suspend the writ of habeas corpus, and the President orders the writ suspended although Congress has not acted, should the Court then tell the President he has usurped the function of the Congress?

The foregoing questions are not moot or hypothetical. They are rather descriptive of some of the most bitterly contested constitutional struggles in our history Two of the questions refer to cases which involve topics that have become the subject matter of endless controversy in our daily newspapers. One of the questions involves a matter deeply buried in our history, an issue raised in 1861, but an issue which remains even today fundamentally unresolved.

What is the proper blend of courage and forbearance? When should the Court act and when should it refuse to act? If Stalin had been a reader of the U. S. Supreme Court reports, as doubtless he was not, he might have asked:

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"How many armored divisions has the court?" To use a less alien example of those who take a wholly pragmatic view of law even though it emanates from the Supreme Court: it was Andrew Jackson who allegedly remarked, "John Marshall has made his decision, now let him enforce it."

How far should the Court go in instructing the nation? Even if it teaches good doctrine, doctrine that has an eminently persuasive basis in precedent and constitutional text, how forthright should it be in pronouncing its decision on matters upon which we as a people are divided and uncertain? Posing these questions makes it clear that one of the most compelling problems in constitutional litigation is fundamentally not a problem of law at all, but a problem of power During Mr Justice Frankfurter's long reign on the Court he never tired of admonishing that nine men could not save the liberties a nation was bent on surrendering, and that the Supreme Court, unlike Plato's guardians, did not constitute a court of philosopher - kings empowered to act as a permanent legislative revision commission. In *Baker v Carr*,[1] the case that finally brought the problem of legislative reapportionment before the bar of the federal courts for resolution, Mr Justice Frankfurter made this pronouncement in dissent:[2]

> "The Court's authority — possessed neither of the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements."

And again:

> " there is not under our constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power
>
> In any event there is nothing judicially more

1. 369 U.S. 186 (1962).
2. *Id.* at 267.

> unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sending a word of promise to the ear, sure to be disappointing to the hope."

Justice Frankfurter was, in fact, confessing that which all of us admit: the Court has no armored divisions. Even John Marshall could not enforce a decision when the litigants were not inclined to obey and the other branches of government looked the other way What Mr Justice Frankfurter was saying, and saying with considerable eloquence, is that the Court must not render decisions which will not be obeyed. If the Court speaks where previously it has remained mute, the argument runs, obedience to its mandates will be undermined not only in "thickets," to borrow Justice Frankfurter's term, which have formerly been classified as "political," but also in those areas where its judicial competence is long established.

Mr Justices Black and Douglas, for two, have refused to heed Mr Justice Frankfurter's counsel — counsel that is now delivered with the same zeal by Mr Justice Harlan — that it is better not to speak at all than to speak and be ignored. It is a paradox that in the reapportionment field, where the Court was so bitterly divided as to whether it should pass judgment on a subject whose very nature made it likely that its words might be so much whistling in the wind, the Court has had very remarkable influence in causing local legislatures to reconstruct election districts. Yet as to the *School Segregation Cases*,[4] where the court at last prohibited that which it had so long tolerated, not even the most sanguine approach to their aftermath can lead to any conclusion other than that the Court's decision has failed to receive substantial compliance among those for whom it was intended.

But the question persists: when should the Court exercise its power of judicial review? It has been argued by at least one constitutional scholar that if the supremacy clause, Article VI of the Constitution, gives the Court the power of judicial review, then the Court has an obligation

3. *Id.* at 270.
4. 347 U.S. 483 (1954).

to reach a decision whenever it has jurisdiction. There is no constitutional text, certainly, which makes the power of judicial review available to the Court on a discretionary basis. If the Court's jurisdiction is properly invoked, so it is said, there is a duty to render judgment.

What is the traditional response to this position? It rests on the fact that the doctrine of judicial review owes far more to Marshall's conception of the necessities of federalism than to any historical basis grounded in the intent of the Framers or to any textual support in the Constitution itself. Since there is embarrassed uncertainty about the birth of judicial review in American constitutional history, a protective attitude has developed. The gist of that attitude is that since judicial review lacks specific mention in the constitutional document itself, we must be chary of its use. In fact, we need not look any farther than Frankfurter's opinion in *Baker v Carr*[5] for a contemporaneous expression of this view

It is interesting to note that in the attack which is presently directed against the Supreme Court by its critics, the Court's power of judicial review is rarely questioned. It appears quite evident that John Marshall has very thoroughly won his great battle with Thomas Jefferson. The Court's power of judicial review — the power to invalidate legislation because of its inconsistency with the the constitutional text — is apparently too deeply entrenched to be reconsidered at this late date. The institutional architecture of the Court is not the real target of many of the Court's contemporary critics. The subject of the attack is the personnel of the Court, and they are under attack for their personal views rather than because they belong to the Court as an institution. We are witness to a rather angry difference of opinion which revolves chiefly around the interpretation of the due process and equal protection clauses of the Fourteen Amendment. But for all the controversy, what is truly astonishing is that, despite the slender textual basis for judicial review, that power as such is now quite generally accepted by all segments of opinion in this country

5. 369 U.S. 186 (1962).

But if judicial review is no longer a subject of controversy, the propriety in any given situation of its exercise very definitely is. Obviously if the Court refuses review its act of abstinence has no less decisive effect on law and society than if it had accepted review in the first place. If the fear of an unselective approach to judicial review is that the judges will be free to apply to the broadest spectrum of problems their own notions of policy, it is of course just as likely that the declension of review can as easily be founded on their own notions of policy, i. e. their contentment (and in the case of an earlier Court — enchantment) with the status quo.

II

If we take a detour into Supreme Court history, we can find graphic illustrations of the problem of decision without power An example which dramatically reveals the nature of the dilemma can be found in a famous encounter between Chief Justice Taney and President Abraham Lincoln. In 1861 Chief Justice Taney was sitting on the federal circuit court in Baltimore. One John Merryman had secured a writ of habeas corpus. He had been arrested and confined to Fort McHenry because of his sympathies with the Secessionists. The facts of the case are none too attractive. Taney describes them in his opinion:

> "The petitioner resides in Maryland, in Baltimore County; while peaceably in his own house, with his family, it was at two o'clock in the morning of the 25th day of May 1861, entered by an armed force, professing to act under military orders; he was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority "

Gen. George Cadwalader, the commanding officer of Fort McHenry, failed to yield up the prisoner with the writ. As Taney, in dignified anger, expressed the matter in his statement of the facts, he refused "to produce the prisoner before a justice of the Supreme Court, in order

6. *Ex Parte* Merryman, 17 Fed. Cas. 144, 147 (Sup. Ct. 1861).

that he may examine into the legality of the imprisonment."[7] General Cadwalader justified his defiance on the ground that the President had decreed that the military could suspend the writ in their discretion.

The ninth section of the First Article of the Constitution, declaring the powers of the Congress, states:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public safety may require it."

But the writ in fact had been suspended not by the Congress but by the President. Surely the constitutional text, if not the power to compel compliance, was with Taney What then was he to do? He had authorized the writ to issue. General Cadwalader refused to deliver the prisoner Taney decided to write an opinion in the case. He was not confident that his opinion would be obeyed. On the other hand, he wanted history to know that the Constitution had been transgressed, and he also wished history to know that the Supreme Court had not countenanced that transgression.

From a superficial standpoint, analysis of the dramatic clash between Lincoln and Taney finds Taney on the side of the angels. Let justice be done though the heavens fall, and so on. But there is a question which it is impossible to suppress: If Roger Taney had not been the southern sympathizer that he undoubtedly was, would he still have written an opinion in the *Merryman* case? Whether it is private ends that are being exploited by means of the judicial process or whether it is detached response to judicial obligation which motivates a court is of course a secret too submerged ever to be really told.

Professor Clinton Rossiter has asked of the fracas between Lincoln and Taney, perhaps with tongue in cheek, whether the law of the matter is what Lincoln did or what Taney said. So, similarly, we wonder now whether the law of school desegregation is as we read it in the School Segregation Cases or as we find it in the deep south. We are thus met by the question with which we began: Should

7. *Id.* at 148.

the Court speak when its decision for the moment falls on deaf ears?

Chief Justice Taney resolved this unhappy dilemma in favor of publishing an opinion. He suggests in his decision a hope that a constitutional lecture might yet incline Lincoln to change his mind. Taney's decision had no immediate effect. But on March 3, 1863, in the Habeas Corpus Act, the Congress, in rather Delphic language, said that the President was authorized to suspend the writ "during the present rebellion." This of course was not curative of the Merryman matter, but it did illustrate in a sense Taney's wisdom in writing a decision. The law of the suspension of habeas corpus is still, so far as the precedents of the Supreme Court are concerned, as the Framers intended. That a President, and a great President, interfered with their scheme was not permitted to permanently alter it. Perhaps Taney has supplied us with the answer to our question. The Court's power of judicial review must be exercised wherever it is invoked with jurisdictional propriety

It is true of course that discretion is the essence of the certiorari process by which the great volume of the Court's cases come to it. The great mass of petitions for certiorari are inevitably rejected. Limitations of time and human capacity necessarily compel such a result. Nonetheless, the certiorari process proceeds on the assumption that cases presenting matters of the greatest constitutional significance are those that should make up the business of the Court.

Constitutional problems which come to the Court bearing the stamp of struggle and conflict should not be turned aside on that ground alone. In the view of this writer, it is the responsibility of the Court to hear cases involving issues whose constitutional time has come. There are persuasive signs that this view is shared by a majority of the present Court. Only this term the Court has agreed to consider a case involving the issue of whether a state or local government can use its legal process to enforce a private businessman's policy of not serving Negroes. Will the court hold that the Fourteenth Amendment forbids

businessmen to avail themselves of the legal process of a state in order to treat one class of their customers differently than all others? Or will the case be decided on some less explosive basis? Whatever the answer, the Court has not refused to hear the matter This is all the more remarkable since the celebrated "public accomodations bill"[8] is currently under such anguished study in the Congress. One can imagine very well how easy it would have been for the Justices voting on the petition in chambers to have persuaded themselves that this was — a question which could be deferred.

These developments suggest an answer to the supposed impasse between power and decision. The fear that we as citizens and government officers may not comply with their judgments cannot activate the Justices. How we react to their decree is not their responsibility but in the deepest sense imaginable — ours.

8. H.R. REP No. 7152, 88th Cong., 1st Sess. (1963).