

# THE SUPREME COURT, CONGRESS, AND THE RIGHT TO VOTE\*

CHARLES A. HORSKY\*\*

We meet here tonight because each of us, in his way, is dedicated to the law. Not law, in general, but law in our own tradition—law based on the consent of the governed. All of us have a responsibility to preserve and to strengthen in every way we can that law and that tradition.

Experience surely teaches us that in carrying out that responsibility we cannot rest on our oars and rely on momentum to carry us on. The dynamics of our own society, as well as of the world community, demand affirmative and constant effort to realize our heritage, and to preserve it from forces which daily threaten to weaken and to destroy it.

There are many such forces. Some of them are overtly hostile; and some of them are insidious—like a dry rot which, unseen and unrecognized, saps at the heartwood. Those which are overtly hostile, let me put to one side. There are great dangers from outside—enemies which press upon the United States, and which would destroy our law and our traditions utterly were they to succeed. Whether we are adequately prepared to deal with our external enemies is a question which must, of course, concern us all. My excuse for speaking of other things is that lawyers and those whose interest is close to the law are perhaps more fitted to discuss the challenges we face at home.

My concern this evening is with the manner in which we exemplify, in practice, the postulates upon which, as I have already mentioned, our law is based—that it rests on consent; that the governed are also the governors. We have embodied this concept in several parts of our Constitution. This is *the* premise of democracy. This is a premise, indeed, that is not overtly challenged by any of our responsible statesmen. Yet, I am very much afraid that a sober look at the facts will compel the admission that it is a premise which has yet to become a full reality. And because in many areas it has not secured more than lip service we put strains and pressures on our whole governmental system.

The peculiar importance of the right of suffrage in a democracy is of course obvious. My concern with the restraints which are imposed on it is in part a concern that we have not realized one of our fundamental goals. But my greater concern is with a more fundamental danger—a danger related to the rather unique characteristic of “law” in our country. At the risk of appearing to digress, let me discuss for a

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\*\* Senior partner, Covington & Burling, Washington, D.C.

few moments the nature of "law" as we know it in the United States, and our relation to it as citizens.

The characteristic of our polity which bears most directly upon what I shall have to say tonight is the way in which "law", "policy" and "courts" have become entangled. Far back in our history Alexis de Tocqueville, that perceptive observer and analyst, remarked, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." We continue, perhaps even increasingly, to regard the contours of the basic political rights of the citizen as matters for judicial interpretation and their enforcement as matters for our judges.

This tendency is not without its advantages. It makes civil liberties subjects of legal right. Yet it has real disadvantages, as well as dangers. Civil liberties tend to be no greater than the strictly legal rights as a court may find them. Still more significant is the weakening of the responsibility of the citizen, as a citizen, of maintaining, as a political matter, respect in the community for civil rights.

Indeed, the exact reverse tends to occur. The courts, and particularly the Supreme Court, are regarded as alien institutions which are invading the rights of the communities, and Congress is petitioned to redress these wrongs. In the long run this pervasive attitude of the population—from which future judges are drawn—has its effect on judicial decisions. Mr. Dooley, was, of course, speaking figuratively when he remarked to Mr. Hennessy that "the Supreme Court follows the election returns." Mr. Justice Frankfurter states the point more soberly and precisely in *Dennis v. United States*, 341 U.S. 494, 556 (1951):

. . . The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. A persistent, positive translation of the liberating faith into the feelings and thoughts and actions of men and women is the real protection against attempts to strait-jacket the human mind. Such temptations will have their way, if fear and hatred are not exorcized. The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind. We may be grateful for such honest comforts as it supports, but we must be unafraid of its incertitudes. Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved.

Learned Hand, too, has made the same point in one of his classic statements:

[Liberty] is the product not of institutions, but of a

temper, of an attitude toward life; of that mood that looks before and after and pines for what it is not. It is idle to look to laws or courts, or principalities, or powers to secure it. You may write into your constitutions not ten, but fifty, amendments, and it shall not help a farthing, for casuistry will undermine it as casuistry should, if it have no stay but law. It is secure only in that . . . sense of fair play, of give and take, of the uncertainty of human hypothesis, of how changeable and passing are our surest convictions, which has so hard a chance to survive in any times, perhaps especially in our own.

In short, because in the United States the powers of government are separated, it does not follow that the protection of civil rights is the function of the judiciary alone. The other branches of government have their duties, too—the legislative to provide interpretive and protecting law; the executive to enforce that law. And, finally, we as citizens, if we wish to be citizens of a state which preserves individual freedom, cannot run off after fascist doctrines and leaders, hoping that the courts will keep us from going too far. So often have we done this that in an address a few years ago at Washington University the Chief Justice of the United States speaking of such an incident said, "It is straws in the wind like this which cause some thoughtful people to ask the question whether ratification of the Bill of Rights could be obtained today if we were faced squarely with the issue."

But this does not state our whole duty to our courts. Under our Constitution we have placed on them a unique and heavy task. Their duty includes a jurisdiction almost unknown elsewhere, to pass on the validity of legislative enactments, having as their guide only such general phrases in the Constitution as "due process of law" and "the equal protection of the laws." These questions involve "law" and legal considerations which a British judge or lawyer would not recognize as such. They would regard these questions as involving legislative policy of the highest order, questions to be resolved at the polls and in Parliament.

Hence, our courts must expect criticism, such as Parliament receives. Indeed, a democracy must be hospitable to dissent and criticism—of courts and judges no less than senators and presidents and governors and mayors. That is a part of the process of government by the consent of the governed. But our courts are entitled to expect also from the citizen—and particularly from the Bar—an enlightened understanding of the duties they are called on to perform and a vigorous attachment to the liberties incorporated in our Constitution.

What we must seek to avoid is what, for lack of a better word, I will call subversive criticism. Such attacks do not express dissent; they seek to destroy the very structure of our law. I can conceive of no more truly subversive doctrine, for example, than one which would destroy the power of the Supreme Court to protect a constitutional right in a case properly brought before it. Yet, serious efforts are being made

to limit the jurisdiction of the Supreme Court in cases involving particular kinds of constitutional rights.

Whether we like it or not, we are walking near the edge of the cliff. The Supreme Court is now caught up in two issues on which it cannot avoid major political repercussions. The first of these is communism—the domestic variety, in its various direct and indirect manifestations. Though this issue is receding from the panic proportions it reached at the height of the McCarthy era, it is still a matter on which many people feel strongly. Probably it will remain so for many years, at least so long as foreign communism continues as a massive external threat. And, by the same token, the decisions of the Supreme Court which measure laws dealing with loyalty and security by the standards of the Bill of Rights will be highly controversial decisions.

For the moment, I see no escape from this, though the prospect is highly unpleasant. Judges are human and when there is constant and intense pressure on a constitutional right—such as the right to freedom of speech—there is very real danger that it will be warped and distorted. Indeed, I fear in the case of that particular right there has already been considerable erosion, and that our right to speak and write as we wish is no longer as free as it was when Jefferson delivered his famous first inaugural address.

The second major issue which is bedeviling the Supreme Court is the school segregation controversy. *Brown v. Board of Education* in 1954 was, in my judgment, no more than the inevitable culmination of a trend, not only of prior Court decisions, but of the moral feeling of the American people. Yet, it has added fuel to the fires already burning brightly in the camps of those who would strip the Court of its powers.

Here, however, there is an alternative. Here there is no need to put sole reliance upon the traditional method of applying to the courts for the protection of constitutional rights. In many places the answer can come from the ballot, once we remove the restrictions on its exercise which now exist. The road ahead is indeed long and rocky and fraught with danger if every segregated school in the country must be desegregated by judicial decree. Why not try alternatives?

In a tentative way, we have already recognized that the best and ultimate solution for a minority as large as the Negro is through the ballot box, rather than through the courts. But, true to our custom, we are proceeding in a way which will once again put the courts squarely in the middle of the fight. If we go on as we are, we must expect to add a new ground for controversy about the Supreme Court and its decisions. To the controversy over judicial decisions involving communism and school segregation we will add, in the near future, controversy over judicial decisions concerning the right to vote.

Let me review with you for a moment where we are. In the Civil Rights Act of 1957, after enormous political travail, we have a

recognition that, when there is an interference by officials of a state with the right to vote, the Attorney General of the United States may bring an appropriate legal action—that is, an injunction proceeding in a federal court—to prevent the interference. How has this worked?

Two things are clear. First, and the one about which I have already spoken, is that we have put a major part of the burden of resolving this essentially political problem on the backs of the judges. The political issue, true to the tradition observed by deTocqueville, has been translated into a matter for judicial decision. The right to vote is to be secured by way of the injunctive process. No one can foresee the precise nature of the cases which will reach the Supreme Court under such a program, but that they will be fraught with political overtones is obvious. Two lower courts have already denied the Attorney General the relief he sought. In one case the issue is whether the Attorney General is powerless under the statute when the local voting registrars simply resign. The other is whether the statute is so drafted as to exceed the powers of Congress. Both cases are headed for the Supreme Court, and under the present law are no more than the advance guard of a legion of issues which will impose on the Supreme Court new stresses and strains—and no doubt new bills to reverse its decisions, or to restrict its jurisdiction.

The second thing that is clear is that the procedure is ineffective. There is not, to my knowledge, one voter in the entire United States who has won the right to vote by reason of the Civil Rights Act of 1957, even though that act has been on the books since September of that year.

Moreover, the device of resignation may well turn out to be an effective answer to the Attorney General's requests for injunctions. I doubt seriously that a federal court can require a man to remain in an office. I also doubt that many registrars would hesitate to give up their jobs if that would maintain the *status quo* by barring effective injunctive relief.

What, then, is the answer, which will reaffirm the right of suffrage without new demands on our federal courts? Let us examine the constitutional right to vote. Here is one situation where the Constitution is crystal clear. There is no need—indeed, there is no room—for interpretation, or even for argument. The Fifteenth Amendment of the Constitution provides:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

What could be clearer than this? The rule of law is laid down in the first section. The power of Congress to enforce it by legislation is unequivocally given in the second.

The Fifteenth Amendment applies by its terms to any election—local, state or national. As to the latter the Constitution contains further voting provisions. Senators and congressmen are to be elected “by the people” in each state, and the qualifications for voting shall in each state be those “requisite for electors of the most numerous branch of the State legislature”. (Amendment XVII and Article I, Section 2) Presidential electors for each state may be appointed “in such manner as the Legislature thereof may direct”. In fact, the states have directed that the electors be chosen by the same persons qualified to vote for senators and congressmen. Finally, the Constitution provides that:

the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations. . . . (Article I, Section 4).

But let us put these provisions to one side and return to the simple mandate of the Fifteenth Amendment—that the right to vote shall not be denied by any state on account of race or color. Can we seriously believe, at least since the hearings of the Civil Rights Commission in Montgomery, Alabama, that the rights of Negro voters are secured in many of our states? Those hearings made it apparent not only that the right of Negroes to vote has been abridged, but also that a principal method of the illegal denial is by the refusal of the state registrars to follow the provisions of state law and register Negroes to vote.

This does not require the weighing of conflicting evidence. For example, it is a fact that in two states there are ten counties in which the majority of persons over twenty-one years of age are Negroes, and, yet, not one Negro is registered to vote. In the same two states there are five additional counties in which the Negroes form more than thirty-five per cent of the total population in which no Negro is registered. In another state two counties, with a majority of Negro inhabitants, have none registered, and in eight similar counties the registered Negroes number less than three per cent. In still another state there is less than five per cent of Negro registration in seventy-five per cent of all the counties in the state. Statistics could be multiplied indefinitely. It is enough to say that in some areas it is open and notorious that state officials are flouting the Constitution in the preparation of the registers of voters and in the conduct of elections.

Now, remember that the Fifteenth Amendment declares specifically that Congress shall have power to enforce it by appropriate legislation, and ask yourself what legislation would be most appropriate. Surely not that by which Congress engages in the frustrating and undignified attempt to have the Attorney General and the federal courts pursue state registrars of voters who resign as fast as they are caught, and pass the torch of defiance to another runner. The most appropriate course is the simplest. If some states will not in good faith administer

their own laws, but insist on making maladministration of them a method of denying the right to vote, the Congress has a plenitude of power to legislate that administration shall be taken over and done honestly by someone else.

The statute need not be complicated. A Federal Board of Elections could be created and charged with responsibility. Whenever that Board, after due investigation and hearing, shall find that the list of eligible voters is not being prepared in good faith in accordance with state laws, and that by reason of this the right to vote is being denied or abridged in violation of the Fifteenth Amendment, it is authorized through its own employees to prepare a proper list in accordance with state law. Thereafter, only that list shall be used and any other list shall be void. Provision should be made for adding and deleting names under the supervision of the Board. Finally, if the right to vote continues to be denied or abridged by the conduct of election officials at the polls, the Board would be authorized to supersede them with its own people.

There are, of course, problems of detail. Perhaps the functions of the Federal Board of Elections could be given instead to an existing agency, or even to Senator Lyndon Johnson's Community Relations Service, if that be established. Perhaps the use of the list of voters should be made mandatory, at the outset, only for the election of federal officers, in which the nation as a whole has a direct and vital interest. Perhaps the findings of absence of good faith compliance with state registration laws should be on a county-by-county basis rather than state-by-state. And no doubt there should be provision for the return of the registration function to state officials as soon as a finding can be made that the state registration laws will thereafter be complied with in good faith. None of these details would involve a modification of the basic purpose.

The constitutionality of such a law is unassailable under the grants of power to Congress which I have mentioned. But, it may be said, the law could never get by a Senate filibuster. On the contrary, I believe such a filibuster would not only fail but would be one of the most educational uses of the Senate's time imaginable.

What could be the arguments brought against the bill? That no denial or abridgment of the right to vote exists? The facts would be devastating, and the whole country would know about them as it does not today.

Could it be said that states' rights would be infringed? But the laws to be enforced would be state laws. Incidentally, it would be interesting to see how long the requirement that applicants construe passages from the Constitution would remain on the books if all applicants had to pass before an informed and impartial registrar. Could it be said that to supersede state officers by federal officers, as proposed,

would invade states' rights? This position seems to claim a right in state officers to discharge their duties fraudulently in order to deny to a large group of citizens their constitutional rights. This is a novel doctrine of law and political conduct which might involve its advocate in some embarrassments during the debate.

Could the broad line be taken that the judgment as to who should vote is a state matter? Not so far as considerations of race and color are concerned, since the Constitution specifically forbids them.

What could participants in a filibuster say? They might—as has been done before—read the Bible. But they would have to be very careful about the parts they chose. Moreover, plain irrelevant speech to continue the denial of the basic right to vote would, I venture to say, become too irksome for many to wish to engage in it.

More than that, can any of us doubt that, if a determined attempt were made in the legislative and executive branches to move directly toward removing racial discrimination in registering voters, the very attempt would produce almost instant improvement? Of course, no one can be registered who will not make the attempt. But many will. As they do and are successful, the whole situation would begin to change.

Instead of the courts being called upon to force solidly resisting municipal agencies to make decisions and take administrative action, an opportunity would be afforded to affect the will of the municipality at the source; that is, at the polls where candidates can be forced to state their positions and stand or fall by them. The judicial task would be very different when officials before the court were willing to obey the law as declared by the court, than when every artifice conceived by ingenuity is used to frustrate and delay.

My concern is whether we can afford *not* to take this approach. My concern is whether we can afford the luxury of letting the judges of our courts fight our battles while we cheer and jeer on the sidelines. We, as citizens, and through our representatives in Congress, must recognize that what is at stake is the basic integrity of our whole governmental system. No one of us would willingly default it, but pride and loyalty are not enough. Last Saturday evening in Charlottesville, Virginia, I heard the Lord Chancellor of England say this:

The defense of liberty must go beyond the trite "eternal vigilance" and wage an eternal battle. . . . That is the challenge to democracy—the maintenance of unceasing and active interest in freedom itself and hence in the machinery by which it is preserved.

So far in both the United States and in Britain that challenge has been met. May it always be so.