BOOK REVIEWS

Federalism and Civil Rights. BURKE MARSHALL. New York: Columbia University Press, 1964. Pp. 85. $3.50.

Although now well over a year old, Mr. Marshall's little book, *Federalism and Civil Rights*,[1] is still of topical as well as scholarly interest. On one level, the book is an analysis of a few of the problems that arise because the struggle for civil rights in the South has occurred within a federal system; on another level, the book is a brief for the Government and, more specifically, for the policies of intervention and nonintervention adhered to by the Department of Justice in this struggle.

Mr. Marshall is no longer the Assistant Attorney General for Civil Rights, but it is accurate, I think, to report that his views are also those of the present Assistant Attorney General for Civil Rights and of the Attorney General. This statement of the philosophy behind present-day governmental policy is especially deserving of careful scrutiny because it is, in my opinion, unsound and deleterious in several important respects.

The large question, as Mr. Marshall sees it, is simply this: do the results of recent federal attempts to enforce and protect civil rights entitle us to conclude that there are basic flaws in the structural arrangements of our federal system? On the surface at least, the results to date, according to Mr. Marshall, suggest that the system is not working well. In the two areas he considers—the right to vote and the administration of justice—the federal government has, he observes, not succeeded either in making meaningful the command of the fifteenth amendment or in preventing systematic abuses of the criminal process.

The reasons for this failure are delineated by Mr. Marshall. To begin with, there is the nature of the federal system itself. It is necessary, he reminds us at the outset, "to be realistic about the limitations on the powers of the federal government to eliminate racial discrimination by simple law enforcement."[2] For the federal system is such that the states, rather than the federal government, are vested with control over the "normally routine decisions affecting the daily lives of all citizens."[3] In addition, there is a "constitutional reluctance" on

1 MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964).

2 P. 3.

3 P. 4.

the part of the federal courts to intrude in the states' exercise and enforcement of these decisions.[4] Yet Mr. Marshall hastens to remind us that these two attributes of federalism are limitations and not necessarily weaknesses at all. His chief villain is, of course (and quite properly), the states—the state and local officials who consistently fail to do what federal law commands and who equally consistently do what that law expressly proscribes. Mr. Marshall's general thesis is that federalism is sound, the flaw is in the men. He uses the federal experience in voting and in the administration of local justice to make this plain to all.

In that area where the Constitution is plainest and where federal law is most explicit—the impropriety of any denial of the right to vote on grounds of race—the results through 1963 were not, in Mr. Marshall's eyes, encouraging. The attempts by the federal government to bring about the elimination of racial barriers through injunctive relief under the provisions of 42 U.S.C. § 1971[5] did not yield either a rich harvest of newly registered Negro voters or even the elimination of racially discriminatory registration practices and procedures.

This was due, he points out, to several factors. First, the techniques available to registrars intent upon maintaining the disenfranchisement of the Negro were many. They were often unimaginative, crude, brutal, and wholly specious (even under state law), but, as Mr. Marshall concedes, they worked. Second, the federal judges were not, for the most part, enthusiastic about enforcing the provisions of 42 U.S.C. § 1971. In what is surely an understatement of the dimensions of the problem, Mr. Marshall observes that:

> [I]t is inevitable that most district judges want to do as little as possible to disturb the patterns of life and politics in their state and community. They are not reformers by profession or belief. More than one district judge has expressed hostility to federal efforts to enforce the right to vote, and others have candidly admitted their personal disagreement with the desegregation decision of the United States Supreme Court.[6]

Such a description hardly does justice to the ingenuity of those federal district judges who so effectively and so zealously managed to read section 1971 out of the United States Code and the fifteenth amendment

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4 *Ibid.*

5 Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, as amended, 78 Stat. 241 (1964), 42 U.S.C. § 1971 (1964). This statute authorizes the Attorney General to seek relief, including injunctive relief, to prevent acts which intimidate, threaten, or coerce persons not to vote and to prevent other violations of the voting law.

6 P. 31.

out of the Constitution. Third, Mr. Marshall explicitly concedes that the federal policy was one of trying "to make the federal system in the voting field work by itself through local action, without federal court compulsion."[7] This is a policy which Mr. Marshall obviously applauds, and it is one which seems to enjoy no less favor today.

Although progress has been minimal, Mr. Marshall is reluctant to conclude that there is any "structural reason in federalism" why the problem cannot be solved. After all, in a few counties vigorous judicial enforcement eliminated serious racial discrimination. And if this has been done in some counties, "failures elsewhere can be attributed not to flaws in the system, but to flaws in courts and men and to lack of time. And these are defects that can be remedied with enough money, enough energy, enough lawyers, and enough months and years."[8] But the further problem, as Mr. Marshall sees it, is that time may be running out because of the momentum of the civil rights movement. And it is this which caused him to endorse a relatively modest legislative proposal that "would temporarily alter and temper the degree of state control over the registration process in the most difficult counties."[9]

The record of the unequal administration of justice and, more specifically, of the use of the legal system of the state as an instrument of oppression is, in his judgment, as dismal as that in the area of voting. There were and are, Mr. Marshall observes, innumerable examples of wholly unjustified arrests of civil rights workers and potential local voters by local officials. He recites in capsule form a number of the more typical cases of flagrant misuse of the criminal law. And what, he asks, can be done about this? Precious little. Why? Because the federal system is what it is.

> The most fundamental, primary notion, of course, is that the constitutional rights involved are individual and personal, to be asserted by private citizens as they choose, in court, speaking through their chosen counsel. If the matter is one of unjustified criminal charges, the individual's rights are protected by the court system and by the right of trial by jury. . . . If

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7 P. 6.

8 P. 38.

9 *Ibid.* The proposal provides for the establishment of federal machinery "whereby in counties with less than 15 percent of the eligible Negroes . . . registered, the qualifications of Negro applicants turned down by state officials could be tested immediately, on an individual basis, but under state law, by the federal court, or its officers." P. 39. It is relatively modest, surely, in comparison to the provisions of the Civil Rights Act of 1965 which summarily strike down many state-imposed qualifications for voting and which permit the complete removal of the registration process into the hands of federal officials. 79 Stat. 437 (1965), 42 U.S.C. § 1973(a), (b), (d) (1965).

> the federal system of justice is not recognized and followed by the state courts, then recourse is had from review by the United States Supreme Court or in the federal courts through habeas corpus. In this fashion individual rights are protected on an individual case-by-case basis, as they should be. All that is involved is a question of time. Even that is not of major importance as long as reasonable bail is allowed while the questions are in litigation.[10]

Thus, because our federal system is a system in which rights must be asserted by individuals and in which federal courts will not, except in very unusual circumstances, enjoin a pending or future state criminal case, there is comparatively little that can or should be done by the federal government to prevent even systematic misuse of the state criminal process.

Mr. Marshall suggests only two possible remedies for these abuses, neither of which is very drastic. First, he proposes that the Department of Justice be given the power to seek injunctions against deprivations of federally protected rights. And second, he suggests, with considerable misgivings, that removal to the federal courts be permitted in cases involving alleged infringements of constitutional guarantees. Neither of these, however, seems likely to succeed in altering the plight of the typical militant Negro civil rights worker who is arrested (and beaten in jail?) for parading without a permit because he wears a T-shirt that says "freedom now"[11] or who is arrested for unlawful assembly because, all alone, he stands with a sign urging people to register to vote.[12]

As was observed at the outset of this review, *Federalism and Civil Rights* is an important book because it so largely reflects the contemporary as well as prior governmental ideology concerning the appropriate reach and kind of federal involvement in the enforcement of federal law. This ideology holds that the Government's role in the legal enforcement and protection of civil rights should be a restricted one. It consists, further, of the commitment to secure voluntary compliance from state and local officials.[13] And it insists, finally, that the federal system itself is not at fault—only the persons functioning within the system are to blame.

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10 Pp. 50-51.

11 P. 48.

12 *Ibid.*

13 That this philosophy still prevails is evident from the fact that federal examiners have been sent into only a few deep South counties even though the prohibitions of the 1965 Civil Rights Act in respect to literacy tests continue to be violated in many other counties.

If taken wholly seriously, this ideology is difficult to understand and even more difficult to commend. If a system really works so badly, if it has permitted—as Mr. Marshall so readily agrees that it has—systematic abuses and evasions of the magnitude of those he himself delineates, then it would surely be appropriate to conclude that there are serious and pervasive flaws in the system itself. The distinction between system and persons is just not a real one. A system is worked by and for people. If it is a good system, it is good because it fulfills certain desirable functions, given the nature of the people involved. It is suspect if, despite its theoretical virtues, people can and do regularly subvert its purposes with impunity.

Similarly, the ideology at times assumes the status of a mythology. There is surely something unreal and fantasy-like about maintaining the belief that local white segregationists will act voluntarily to abandon their vested interests in the maintenance of the system of white supremacy. And even if there is some plausibility in believing in the possibility of this occurrence, one may still ask where within the calculus of the ideology is there recognition of the present, immediate, and severe harms done to the Negro citizens of the South? If Mr. Marshall's analysis is correct, if this is all that the federal system has to offer, if this is the "realistic" view of federalism, then a much stronger case than he has made must be made for its virtues. Otherwise the present injustices, the continuing indignities, and the more than occasional murders cannot rationally be viewed as a price clearly worth paying for the nondestruction of the federal system.

But the hard fact, as I see it, is simply that what Mr. Marshall has described is not the federal system as it is and must be. The limitations he imposes on federalism are in several respects unnecessary. And it is this that makes his book so troublesome and its philosophy, because so fully accepted in important circles, so unfortunate. On at least two occasions Mr. Marshall expresses concern over the "misguided" but incessant pleas of civil rights workers for meaningful federal protection and intervention. The object of his indignation is not, however, the workers; rather, it is institutions of higher education, almost all of which have failed to teach people about the limitations of federalism. Apparently, he notes, the schools and universities attended by civil rights workers "have not taught them much about the working of the federal system."[14] For, he reports, "there exists an immense ignorance, apparently untouched by the curricula of the best universities, of the consequences of the federal system."[15] If Mr. Mar-

[14] P. 49.
[15] P. 4.

shall's conception of the nature and limitations of the federal system is correct, then his complaint is probably justified. I suspect, however, that a solid course in federalism would probably only exacerbate the demands of civil rights workers. Such a course neither would nor should diminish the disillusionment of our youth simply because it would quite properly teach that the federal system permits, if it does not in fact require, federal activities and federal commitments of a sort Mr. Marshall does not consider in his book. Let us imagine some of the things that such a course on federalism might consider.

The course might begin, for example, with the notion that the United States is a federal system and not a confederacy. Article VI of the Constitution does proclaim that the Constitution and laws of the United States shall be the supreme law of the land—even in state courts and even for state and local officials. But if the supremacy clause were thought too general an object of study, the course might consider those federal laws that relate explicitly to civil rights activity. Although Mr. Marshall does not mention it once, section 242 of title 18 does provide that:

> [W]hoever, under color of any law . . . willfully subjects any inhabitant of any state . . . to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties . . . by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.[16]

Conceivably exposure to a course in federalism might lead students to suppose that this penal law (even with its most restrictive interpretation) imposes a serious obligation of enforcement upon those charged with the duty of enforcing federal laws generally. It would be quite hard to see why such a course should teach that section 242 really means the statute is to be enforced only where the likelihood of conviction is great, or where the crime is especially heinous. Yet such is, apparently, federal policy.

Suppose our course talked some more about the enforcement of federal penal laws generally. Where is the text that would instruct the students that an agent of the Federal Bureau of Investigation—or perhaps even any person—cannot make an arrest without a warrant for a misdemeanor committed in his presence? The course could report,

[16] 18 U.S.C. § 242 (1964). See also 18 U.S.C. § 241 (1964).

though, that FBI and other federal officials have been present innumerable times when section 242 has been violated, and an arrest without a warrant has never been attempted.[17]

To be fair, our course on the federal system might also point out that some (including Mr. Marshall, no doubt) have argued that there are sound policy, if not legal, reasons for proceeding with utmost caution in the enforcement of sections 241 and 242 of title 18. More specifically, it is often urged that an arrest should not be made or an indictment sought unless there is a really strong case—unless there is evidence that even a white southern jury would find it difficult to ignore. But our course should then surely inquire as well into how aggressively the United States has sought to obtain such evidence. Has the federal government ever, for example, considered disguising FBI agents as northern white SNCC workers, equipping them with miniature cameras and the like, and sending them into an ongoing racial demonstration for the purpose of seeing whether those awful, melodramatic tales of police brutality really are true? To put the point somewhat differently: does the federal government pursue violators of sections 241 and 242 with one-half or even one-quarter of the zeal with which it searches out violators of the federal narcotics laws or labor racketeers? Again, were our students of federalism to ask what there is about the federal system that makes these laws different from all other federal criminal laws, I suspect that no very plausible answer could be forthcoming.

The list of unanswered questions could be lengthened appreciably. Why has the Government not sought to have the registrars who so openly disregard injunctions secured under 42 U.S.C. § 1971 held in contempt of court? Who can say what the deterrent effect upon the typical recalcitrant registrar would have been had only a few notorious violators been fined or jailed? The only thing we can say is that not a single one has yet to suffer this fate—despite Mr. Marshall's acknowledgement that the number of Negroes registered since the passage of 42 U.S.C. § 1971 is small indeed. Or what about the impeachment of judges who have, in Mr. Marshall's own words, "expressed hostility to federal efforts to enforce the right to vote"?[18]

17 To test the consistency of federal practice here, consider the following possible examination question: "An FBI agent is standing outside a U.S. mint. Suddenly, he sees three men with stockings over their faces come out of the building. They are armed with submachine guns and they are carrying bags of money. Would the FBI agent: (a) set up his tripod camera, carefully photograph the activity, then return to his office and that evening compose a detailed report of his observations? or (b) attempt to arrest the three men, using all force reasonably necessary to do so? If your answer is (b), would it violate any federal law for him to do so?" For powers of FBI agents, see 18 U.S.C. § 3052 (1964).

18 P. 31.

Does it not cease to be "good behavior" within the meaning of article III of the Constitution when this hostility is expressed in open court and overtly acted upon to the detriment of federal laws and the rights protected by those laws? How should the schools have taught the impatient, disillusioned civil rights workers to answer this one?

There may be, although I do not think there are, good and satisfying answers to these and other questions. The questions are almost surely, however, unanswerable from an inspection and analysis of the structure of the federal system. One can, of course, answer them by reading into the federal system all of the limitations and restrictions that Mr. Marshall apparently finds there. But one should be very clear that what is then being discussed is not the federal system per se, but rather the federal system with a complicated, restrictive, and by no means self-justifiable gloss imposed by conscious choice, and not by structural or textual necessity.

Another attempted answer would point to the political dimensions of the problem: since a southern Senator controls certain key committees, the White House deems it inexpedient to push too hard for registration in his state; since the FBI is, as a practical matter, immune from direction by even the Attorney General, FBI agents cannot be forced to make arrests; since if a local white southern official is prosecuted, the only result will be the solidification of his local power base, prosecution is politically unwise. I do not mean to suggest that factors such as these are necessarily crass or unworthy of consideration just because they are labeled "political." Indeed, they may well be decisive. But they are not, I suspect, the kinds of things that Mr. Marshall expects to have taught in that course on federalism.

My complaint with Mr. Marshall's book is, of course, in part disagreement with the policies of limited action under which the federal government has proceeded in the area of civil rights. More relevant to an assessment of the book's merit, however, is its failure even to hint that these constraints might be the result, not of our federal system, but rather of a series of conscious decisions to reinterpret, redefine, and reconstruct the limits of justifiable federal action. The hard question that Mr. Marshall's book does not answer satisfactorily is how, in the light of the dismal record of enforcement to date and the injuries all too long endured and still suffered daily, the continued imposition of these constraints on federal action can still seem defensible.

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