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SHOULD THE POWER OF THE FEDERAL GOVERNMENT BE INCREASED? *

Donald R. Richberg †

THIS question, in its broadest aspect, may call for an opinion as to whether the power of the federal government, delegated and limited by the Constitution, should be enlarged by constitutional amendment. The question, more narrowly construed, may be whether the federal government should extend the exercise of its present, delegated powers over more subjects of regulation and into more detailed controls of American life and work.

Proposals to enlarge the existing federal authority range from the passage of a child labor amendment to a comprehensive revision of the Constitution for the purpose of completely changing our form of government. It would be difficult even to begin the preface to an introduction to the study of such an issue in the time allotted to this forum. Therefore, I shall undertake to discuss only the wisdom of an increased use of the powers of the federal government under the present Constitution. Even that is a Mammoth Cave in which my brief candle will shed little light. I shall not try to explore the deeper question as to whether any further powers, which are now reserved to the states or to the people,¹ should be delegated to the United States. But, without arrogance of opinion, I will simply state my belief that the present federal powers are adequate to meet our present needs.

Let us consider, first, the power to tax and spend in order to "provide for the common defence and general welfare of the United

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¹ U. S. Constitution, Tenth Amendment.

States.”² According to recent revelations of the Supreme Court, this is not the constitutional grant of an unrestricted power to legislate for the general welfare, but is a practically unrestricted grant of the power to tax and spend for the general welfare, which necessarily includes a tremendous power of indirect regulation. The Congress has a “wide range of discretion” in determining whether legislation will promote the general welfare, and “every presumption is to be indulged” in favor of constitutionality.³ Accordingly, under Justice Story’s interpretation of the general welfare clause, which was finally adopted by the Supreme Court in preference to the Madison interpretation, the power of the federal government may be increased very greatly beyond that now exercised.⁴

There is, however, one doctrine of restriction which waxes and wanes according to astronomical changes in the Supreme Court. This doctrine shone forth when the Agricultural Adjustment Act was held unconstitutional,⁵ but has been in eclipse since the constellation called the “new” Supreme Court moved into the judicial zenith.

In the AAA case, it was held that the power to provide for the general welfare did not validate an act which invaded the reserved rights of the states; and the principle was laid down sternly that no power granted by the Constitution “could be used for the destruction of local self-government in the states.”⁶ If this doctrine could be regarded as settled, it would also establish a principle limiting the exercise of another great federal power—that is, the power “to regulate commerce with foreign nations, and among the several states.”⁷

Regardless, however, of the uncertain authority of this doctrine, it presents a fundamental issue concerning the wisdom of increasing the power of the federal government; and at this point I propose to lay aside any futile, discouraging effort to guess what limitations may be laid down by the Supreme Court on the exercise of federal power. In private practice, lawyers are often compelled to give opinions to their clients, guessing at what the courts will hold. A good opinion is almost as valuable—and unusual—as a good tip on the market. In times such as the present, when conditions, opinions and political influences change rapidly, it is very difficult to make reliable guesses as to the

² U. S. Constitution, art. 1, § 8, cl. 1.

³ *United States v. Butler*, 297 U. S. 1 at 67, 57 S. Ct. 312 (1936).

⁴ *Id.*, 297 U. S. at 66.

⁵ *Id.*

⁶ *Id.*, 297 U. S. at 77.

⁷ U. S. Constitution, art. 1, § 8, cl. 3.

constitutional limitations upon the powers of the federal government which may become visible or invisible in the courts.

But in a forum of public discussion, it is not necessary or wise to delegate our thinking processes to the members of the judiciary, regardless of their eminence or transient authority. Furthermore, it is often a waste of time to speculate upon what the courts will rule until we know what will rule the courts—which is frequently a force called public opinion. So it may be a very good use of our time to discuss, and to help formulate public opinion upon, certain fundamental questions of public policy, such as:

1. Should we endeavor to maintain the principle of local self-government, or is this an outmoded political theory?

2. If the principle of local self-government is to be maintained, how far should the federal government extend its powers which necessarily interfere with and restrict the powers of local self-government?

3. If we cannot draw a clear line separating the desirable fields of federal and local government, can we establish principles whereby we can judge whether, in particular instances, federal powers should be increased or diminished?

In launching a discussion of these questions, let me express a conviction that clear thinking is not promoted by assuming the answer to a question and announcing it as the principle which should guide one to the answer. For example, it was strongly declared by the unreconstructed Supreme Court of 1935, in a notable opinion which had a brief authority, that “building is as essentially local as mining, manufacturing or growing crops.”⁸ But, in view of the interstate commerce power which the federal government with judicial approval is exercising in 1940 over building, mining, manufacturing and growing crops, you will observe that these activities are no longer to be defined as “essentially local.”⁹ If it be desirable to preserve as much local self-government as possible—which is my own conviction—then some better way must be found to define what matters are primarily of local concern than a judicial assertion that they are “essentially local”—which another court may deny with equal assurance and perhaps equal authority the next day.

Perhaps we can find a criterion of judgment if we think of local

⁸ *Schechter Poultry Corp. v. United States*, 295 U. S. 495 at 547, 55 S. Ct. 837 (1935), quoting from *Industrial Association v. United States*, 268 U. S. 64 at 82, 45 S. Ct. 403 (1925).

⁹ *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656 (1938).

government not as the original source of national government but as the present means of decentralizing the national government. We began the history of the United States with a grudging acceptance by the individual states of the necessity of establishing some sort of national government. As long as we maintain the attitude that a state government is a cherished ideal and that a national government is an unfortunate necessity, we will continue to make progress walking backward, with our eyes always fixed upon that which we are leaving, as though it were the objective toward which we are moving. Such crab-like progress is slow, uncomfortable and uncertain. Foresight is a more useful guide than hindsight.

We should realize today that we are primarily citizens of a nation, that national unity is essential to our existence as a people, and that a national government is the real foundation of our political life, even though the foundation stones were once called "sovereign states."

But we are 130,000,000 people, populating a vast territory wherein geography, climate, social traditions, differences of race and creed, all create need for variations in political institutions and activities. Our government must be decentralized to be effective and democratic. We have the traditional machineries of state and municipal governments through which the national government can be decentralized. They should be used for that purpose, and they should not function as jealous rivals of the government that must be supreme and of which they are a part.

But decentralizing a national government does not mean that all authority should first be concentrated in the national capital and that then provincial governors and legislatures should be established to carry out the purposes of the central government. On the contrary, true decentralization means that the people, as the source of all power, should create national agencies with limited powers, and state and municipal agencies with limited powers, should make each agency responsible for meeting within its capacity those public needs to which it is most immediately responsive, and should coordinate all these national and state agencies into one government of the nation.

This is precisely what the people of the United States endeavored to do in adopting the constitutions of the United States and of the several states. But federal and state officials, jealous of their prerogatives—and supported by a die-hard tradition of state sovereignty—have never undertaken to coordinate their public services. In such a coordination of the governments of these United States, the conceded

supremacy of the national government might seem to mean an increase in present federal power. But, the actual result ought to be to restore the earlier authority of local government; and to transform much of the federal authority which has been recently exerted directly upon people in the various states, into mere federal supervision of authority exerted by state and municipal governments directly upon their own citizens.

Up to this point, we have been considering the federal power to regulate a peace-time economy; and we need not spend much time today on the subject of national defense. The maintenance of an army and navy, specifically entrusted by the Constitution to the federal government,¹⁰ is a necessity of national existence. The state militia is a wisely segregated state police force, available to the national government in time of need.¹¹ It should be well understood that when the army and the navy are maintaining their activities throughout the country, local governments have no control over such national operations. When, however, the individual soldier is not performing his official duties to the national government, when he is acting as a private citizen, living in his home, or going about his private business, he is the subject of local government.¹²

Thus we recognize the sweeping authority of the national government over men engaged in matters of national concern while they are so engaged, and the complete authority of local government over such men when they are not engaged in the work of the nation. Here, we may glimpse a guiding principle, which is that every citizen of the United States has a responsibility to, and is subject to regulation by both national and local governments, but that even the predominant character of his occupation should not subject him to an exclusive, all-embracing regulation by the central government. That is a principle which has not been safeguarded in many recent extensions of federal power, wherein it has been assumed that if part of an activity in which an individual or a corporation is engaged is subject to regulation by the federal government, he and the entire activity thereby become subject to comprehensive federal regulation.¹³

In the early stages of federal regulation of interstate commerce, it

¹⁰ U. S. Constitution, art. I, § 8.

¹¹ *Id.*

¹² *Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18 (1883). See also *Fifth Amendment and Kurtz v. Moffitt*, 115 U. S. 487, 6 S. Ct. 148 (1885).

¹³ See *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 59 S. Ct. 206 (1939).

was a common assumption that federal control should be extended only to instrumentalities of interstate commerce, such as vehicles crossing state lines, or to transactions which concern "more states than one."¹⁴ But with the development of our industrial system, and the increasing interdependence of communities and enterprises in many communities, we have been steadily expanding our concept of the proper field of federal power. Among many causes, special emphasis may be laid upon three: (1) the growth of large businesses of national concern which cannot be effectively regulated by the uncoordinated powers of local governments; (2) the increasing importance of unfair competition in commerce of national concern between enterprises operating under the various standards of local regulation; (3) the increasing distrust of corrupt and inefficiently operated local governments, which has created a tendency to establish regulative power remote from immediate selfish influences.

We have been forced to face the fact that enterprises operating in several states could not be effectively regulated by local governments, not only influenced by sectional interests and varying political and economic theories, but far too often influenced by a desire to give local industries a competitive advantage, or to induce enterprises to move from other localities where heavier public obligations might be imposed upon them.

We have been forced to recognize that enterprises such as food-packing¹⁵ or clothing manufacturing,¹⁶ although located in a few states, are matters of national concern. So we have employed the federal power to regulate interstate commerce as the means of regulating many activities, actually carried on largely or even wholly within one state. Lawyers and judges have talked learnedly about "burdens upon," and "obstructions of" interstate commerce, and the necessity of maintaining a "free flow" of commerce, when what has really been meant has been that enterprises of national importance, essential to the well-being of all the people, were of greater concern to the nation than to the inhabitants of a particular locality; and that they should be subject to national regulation as to all matters not of purely local concern.

We have also found that interstate commerce, or let us say the national interest, frequently suffers from unfair competition, which

¹⁴ *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1 at 194 (1824).

¹⁵ *Stafford v. Wallace*, 258 U. S. 495, 42 S. Ct. 397 (1922).

¹⁶ *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 57 S. Ct. 615, 630, 645 (1937).

may not be harmful locally but which may injure business as a whole. For example, the establishment of a monopoly may actually benefit the community from which it operates but harm all others and impair the maintenance of a competitive economy.

We have come slowly to realize that the political economy of the nation must be based on principles which are nationally accepted and maintained. Several states could not attempt to establish a state-controlled economy in the midst of others seeking to maintain an individualistic, competitive economy, without disintegrating the nation. Long ago, we found it impossible to remain a nation half-slave and half-free, not simply because of a conflict in moral ideas, but largely because of an irreconcilable economic conflict. For similar reasons, we cannot maintain national unity without maintaining fundamentally the same economic and political system throughout the nation. For all practical purposes, the power of the Congress to regulate interstate commerce can be asserted to maintain a consistent national economy, without preventing such local experimentation as will not impair the economic health of the nation.

But, throughout the processes of federal regulation, it is important to maintain two limitations. First, federal regulation should not be made the means of regulating matters which are not of necessary national concern. Second, the agencies of federal regulation should be so decentralized that public officials, even when responsible directly to the national government, will be, so far as possible, residents of and responsive to the sentiments of the communities in which they exercise immediate authority. A fair example of such decentralization is found in the federal judicial machinery, in which the judges and federal attorneys are, in the main, members of, and to some extent, responsive to public opinion in the communities in which they exercise authority. A bad example is found in several departments of government which operate almost entirely from Washington, and which exert local authority through roving officials who regard themselves, and are regarded, as aliens in the communities subjected to their regulation.

Absentee control has not always been imposed. It has often been unwisely invited. The tendency to turn to the national government for a stern, impartial regulation of local affairs, in order to thwart the corruption and favoritism of local officials, is a misguided effort to correct the evils of self-government by destroying self-government. When local inefficiency or corruption is not necessarily a matter of national concern, there should be no strained attempt to make it a

matter of national concern. When the good citizens of a metropolis, unable to overthrow a corrupt political machine or to stop bad business practices which are locally harmful, call on the federal government to clean house for them, they surrender part of their right of self-government and do their share to bring about an inherently undemocratic centralization of power.

There have been many ironic comments on the fact that the city of Chicago was relieved of Al Capone, not by a local prosecution for violating the laws of the state of Illinois—or even the ordinances of the city of Chicago—but by federal prosecution and conviction for income tax violation. But, please note that the federal government acted properly to enforce a federal law and left it to the state of Illinois to suffer the shame of being unable to enforce its criminal law. That is the way responsibility for law-making and enforcement should be divided if self-government is to be preserved. I submit that the preservation of self-government is more important in the long run than the immediate saving of any community from the incompetence of its own local government.

Anyone familiar with recent federal legislation will recall many instances where the federal government has stretched its power over interstate commerce into the regulation of many matters of essentially local concern. This has been done partly by legislation and partly by an extremely liberal interpretation of legislation by administrative officials and by judges so remorselessly “liberal” as to shrink from being conservative enough to conserve democracy. Such activities may seem, for the moment, to be demonstrations of “liberalism.” In the long run, they will be identified as serious and reactionary encroachments upon the power of self-government.

After the foregoing general observations, our main question may be divided into two questions which can be somewhat dogmatically answered.

1. Should the power of the federal government over business be increased? Certainly the federal power to develop and sustain throughout the nation a coordinated but competitive economy should be increased. But what is needed is not an increase in coercive federal power which may stifle private enterprise with political controls; but an increase in cooperative federal power, which may be exercised to protect and promote private enterprise and to create public enterprises to meet whatever national needs cannot be served, either at all or as well, by private action.

2. Should the power of the federal government over living and working conditions be increased? Certainly the federal power to relieve the economic distress of individuals and communities, caused by weaknesses in our national economy, should be increased. But we do not need an increase, but rather a decrease in those exercises of federal police power that deny to state and municipal governments the full exercise of that local police power that is the very essence of local self-government.

Before I close my introduction to this discussion, let me return to a fundamental question which was earlier asked: Should we endeavor to maintain the principle of local self-government, or is this an out-moded political theory? Upon the answer to this question depends the political destiny of America.

The permanence of our democratic institutions is threatened by pressures from abroad and from within, under which we are being compelled to develop a stronger government than we have heretofore known or desired. It should be evident that the government of the United States in the future must be able to preserve not only social order but also economic order. The orderly society of the future must be not only one in which violent interferences with personal liberty are prevented, but also one in which the security of the individual is preserved by maintaining a reliable economic system in which every willing worker can earn a livelihood with at least a fair prospect of bettering his lot by increasing the social value of his labor.

It is quite evident that the once attractive anarchy of an unregulated competitive system is no longer tolerable. A nation cannot organize a modern military defense without reordering its economic system so that things most needed will be produced first, and with efficient speed, in adequate quantities and at reasonable cost. It is equally apparent that vast unemployment and the tragic waste of human and natural resources cannot be prevented, and that we cannot defend ourselves against these internal forces of disintegration, unless we reorder our economy so that the boasted values of our citizenship become a reality to millions of people who do not now enjoy them.

The advocate of the totalitarian state is ready with his remedy. Whether his inclination be toward communism, fascism or nazism, or whether he inclines toward the development of some American form of dictatorship, he is prepared to argue stoutly that the trend of world affairs is driving us willy-nilly to establish an all-powerful central government if we are to survive as a nation. Against this insistent and

rising clamor, the defenders of democracy are relying far too much on worn-out phrases, on threadbare promises, and on empty boasting of the invincible force of democratic legions—that are, in fact, dissolving before our eyes. Democracy will be preserved, not by shouting for it, or even by fighting for it, but by working to make it work.

We do need increased power in the federal government to develop and to preserve a sound national economy. But at the same time, we need to fight against any increase of federal power to order our daily lives, to circumscribe our ambitions and to limit our essential freedoms. Local government is a mighty barrier to the imbecile plans of remote tyrants who have the conceit to believe that any mortal ruler is equipped to play God and to pass judgment upon what are the relative values of the infinite varieties of human desire, aspiration and effort. That is precisely what national socialists must undertake when they attempt to plan what and how much shall be produced, where and how it shall be distributed, and what prices shall be charged to consumers in order to pay the wages which superhuman wisdom must find to be the just rewards of labor.

Men are capable of organizing manufactures to make the things that people want. They are capable of organizing the distribution and transportation of things that people want. Men can create an economic system to produce and distribute the things that people want and, by government controls, can maintain order in such a system. But human wisdom cannot be trusted to determine what things people should want, what things are good for them and, therefore, what should be produced and distributed, or what is the worth of a man's labor to another man, or the fair price according to which one man must sell and another must buy. It follows that an all-powerful government, a master-minded government, will always turn out to be a bad government.

To create and to maintain a strong government as the worthy and faithful servant of a strong people, there are two essentials: First, there must be a competitive system for the development and satisfaction of human needs and the distribution of the rewards of labor. Second, there must be local self-government, whereby, when self-discipline fails and discipline must be imposed upon the individual, it will be the discipline of his own community, composed of men like himself, with similar interests and problems, and a knowledge that whatever they do unto others may be done unto them. The further government moves away from its source, the less tolerable and the less reasonable

become its compulsions. When we grant power to a central government, we should grant it jealously, measure by measure, and we should watch most closely those to whom such powers are entrusted.

Federal officers should be as anxious as we are not to extend their authority one step beyond what is necessary. If they are true servants of democracy, they will practice self-restraint. If the present authority of the federal government should be extended, which seems desirable in some directions, then at the same time many powers of federal officials should be reduced. Vague grants of authority by the Congress should be revised and definitely limited. Balloons of authority, stretched by the executive and inflated by the judiciary, should be pulled down and deflated. This would enable many public servants to get their feet on the ground once more; and would relieve their anxious friends of a growing fear that they will never return to earth and bring government back to the people as they once promised.

If, however, each desirable increase of federal power is to be accompanied in the future, as in the past, by an undesirable and unnecessary curtailment of the power of local self-government, then there is a serious question as to whether we are making progress or losing ground as a democracy. Certainly we do not move toward greater individual liberty by establishing more and more remote controls over our daily lives. Certainly we do not move toward a sounder competitive economy by strengthening the hands of public officials already outstretched toward federal management of the industrial system.

You ask: Should the power of the federal government be increased? The answer lies in the answers to three other questions: For what purpose? By what means? In whose hands?

Throughout the nation, men and women are seeking the paths of study and experience that may lead them to the answers to these questions. It is a search well worthwhile, for the correct answers are of vital importance to the oncoming generations of Americans.