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The Supreme Court Editorial

(Reprint)

THERE is now pending before the Congress a proposal of the President to authorize him to appoint a new Justice of the Supreme Court for each member of the Court over the age of seventy years. Inasmuch as six members of the Court are over the prescribed age, the effect of the proposal would be to add six new members to the Court. The proposal has been described (not inaptly), as an attempt to "pack" the Court.

James Bryce, in his great work, "The American Commonwealth," referred to such a proposal as "immoral in substance." His comments on the Supreme Court are in Chapter XXIV ("The Work of the Courts"), from which the following quotation is taken (New and Revised Edition, Vol 1, pages 276–277):

"The Fathers of the Constitution studied nothing more than to secure the complete independence of the judiciary. The President was not permitted to remove the judges, nor Congress to diminish their salaries. One thing only was either forgotten or deemed undesirable, because highly inconvenient, to determine—the number of judges in the Supreme Court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate. Congress having in 1801, pursuant to a power contained in the Constitution, established sixteen Circuit courts, President Adams, immediately before he quitted office, appointed members of his own party to the justiceships thus created. When President Jefferson came in, he refused to admit the validity of the appointments; and the newly elected Congress, which was in sympathy with him abolished the Circuit courts themselves, since it could find no other means of ousting the new justices. This method of attack, whose constitutionality has been much doubted, cannot be used against the Supreme Court, because that tribunal is directly created by the Constitution. But as the Constitution

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does not prescribe the number of justices, a statute may increase or diminish the number as Congress thinks fit. In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up till the number was reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and presently the altered court allowed the question of the validity of the Legal Tender Act, just before determined, to be reopened. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme Court deems contrary to the Constitution. They pass a statute. A case arises under it. The Court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the Court. The new justices outvote the old ones; the statute is held valid; the security provided for the protection of the Constitution is gone like a morning mist.

“What prevents such assaults on the fundamental law—assaults which, however immoral in substance, would be perfectly legal in form? Not the mechanism of government, for all its checks have been evaded. Not the conscience of the legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend.”

Opponents of the President's proposal object to it on the ground that it would make the Supreme Court subservient to the President. And, yet, some of them would substitute, for the President's proposal, one which would make any act of Congress constitutional if, after having been declared unconstitutional by the Supreme Court, it should be reapproved or reenacted by two-thirds of the Congress. A proposed constitutional amendment, having the purpose and effect last mentioned, is now pending. This proposal would substitute a new form of subserviency for that proposed by the President; it would make the Supreme Court subservient to the Congress, rather than to the President.

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Any proposal to make the Supreme Court subservient to either the President or the Congress should provide thinking people with food for thought, particularly those who belong to classes who have been subjected, in the past, and may, again, be subjected to class persecution.

Constitution Protects Minorities

It should be remembered that the provisions of the Bill of Rights in the Constitution were designed to protect minorities from the fanaticism of temporary majorities, in respect of matters that closely affect the life, the conscience and the well-being of the citizen.

One may wonder whether the guaranties of the Bill of Rights would continue to be "guaranties" or be anything more than mere admonitions or "counsels of perfection," if the Supreme Court, which was designed to be, and through the century and a half of its existence, has been their vindicator, should be made subservient to either the President or the Congress. These guaranties are as follows:

1. "No religious test shall ever be required as a qualification to any office, or public trust under the United States." (Art. VI.)

2. "Congress shall make no law respecting an establishment of religion or preventing the free exercise thereof; or abridging the freedom of speech or of the press." (First Amendment.)

3. "No soldier shall in time of peace be quartered in any house without the consent of the owner." (Third Amendment.)

4. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." (Third Amendment.)

5. "No person...shall be...deprived of life, liberty or property without due process of law." (Fifth Amendment.)

6. "Private property (shall not) be taken for public use without just compensation." (Tenth Amendment.)

7. "Neither slavery nor involuntary servitude, except as a punishment for crime...shall exist within the United States, or any place subject to their jurisdiction." (Thirteenth Amendment.)

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8. “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.” (Fifteenth Amendment.)

In addition to the foregoing which are limitations upon the Federal government, are the following two guaranties, which are limitations upon the States:

(a) “No State shall make or enforce any law which will abridge the privileges or immunities of the citizens of the United States.” (Fourteenth Amendment.)

(b) “No State shall deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.” (Fourteenth Amendment.)

Fanatical Civil War Days

One many wonder, also, what would have happened if the Supreme Court had been subservient to either President or Congress during the fanatical days that followed the Civil War, when various States sought to impose test oaths upon their citizens, which would have proscribed non-combatants, such as the physician, the nurse and the chaplain, who had given medical assistance or religious consolation to soldiers of the Confederacy. These test oaths, which would disqualify such persons from office or the pursuit of lawful vocations were, at the suit of a Catholic priest whom they deprived of the right to exercise his priestly vocation, held, in *Cummings* v. *Missouri* (71 U. S. 277), to violate the above mentioned provision of the Bill of Rights which declares that “no State shall pass any bill of attainder or ex post facto law” and, thereby, make unlawful what had not been unlawful when done.

One may wonder what would have happened if constitutional guaranties were dependent for their vindication upon a political or servile court, in the era of hysteria that followed the World War when attempts were made, in various States, to regiment the children of the country, to compel their education in State schools conforming to State standards, and to substitute the guardianship of the State for the guardianship of the parent. Fortunately, however, the Supreme Court was neither political nor servile, but fearless and independent, and it thwarted these attempts in the foreign language cases (*Meyer* v. *Nebraska* , 262, U. S. 390; *Bartels* v. *Iowa* , 262 U. S. 404), and in the Oregon School Law case (*Pierce* v. *Society of Sisters* , 268 U. S. 510).

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What has happened before may well happen again. Governor Pierce of Oregon, who was responsible for the Oregon School Law, is now a member of the House of Representatives. Who is to say that his views have changed, or that he would not advocate a similar measure if there were a public clamor for its enactment, and he were aided and abetted by a sufficient number of Senators and Representatives who entertained similar views?

The plight of the Church in Mexico should be an object lesson to all Americans. That plight is due to a lack of constitutional government, a bill of rights and a free and courageous court to make both effective.

Let us in America learn from the sufferings of our neighbors in Mexico, and cling tenaciously to our time honored and oft proven bulwark of constitutional liberty—the Supreme Court of the United States.

Dec. 14, 1937

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