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LAW DAY: SOME REFLECTIONS ON CURRENT PROPOSALS TO CURTAIL THE SUPREME COURT*

CHARLES A. HORSKY**

On May first of this year, by proclamation of the President,[1] the people of the United States celebrated "Law Day." It is no accident, of course, that Law Day in the United States falls on the day on which world communism traditionally celebrates the idea of revolution. That coincidence, however, requires that we recognize and define what kind of law it is which we are honoring. There are laws in the Soviet Union, in Hungary, in Cuba, which no doubt people are obeying. The Czar and the Kaiser enforced laws, as did the Caesars of Rome. But I take it that we are talking about something different. I take it that we are talking of laws based on the consent of the people—the laws of a government in which the governed are also the governors, a government of the people, by the people and for the people.

That, at least, is our tradition. Alexander Hamilton, in the Federalist Papers, remarked that:

> it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.[2]

Fortunately, Mr. Hamilton was not wholly correct. We are no longer the only people who have undertaken to establish good government by their own choice, rather than to accept the dictates of force or of history. Not only the nations of Western Europe and of the British Commonwealth, but also many new governments in Asia, Africa and South America have likewise committed themselves to the idea of government, and law, based on reflection and choice. For these people our progress, our law, have been a major inspiration. For them, by the same token, a weakening of our own faith, a doubt as to our own ultimate success, will be a major tragedy. We now have, whether we would wish it so or not, a responsibility not only to ourselves but to the whole free world.

It is in this light that I would direct my thoughts. How well, by our "conduct and example," to use Hamilton's phrase, are we now carrying out this vital experiment of law based on the consent and

*The substance of this paper was delivered as a speech at the University of Minnesota Law School Alumni Banquet on April 29, 1958.

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1. Proc. No. 3321, 23 Fed. Reg. 821 (1958).
2. The Federalist No. 1, at 1 (Tudor ed. 1947) (Hamilton).

restraint of those who live under it? How well are we, and our laws, measuring up to the ideas which this Nation once held to be self-evident? Daniel Webster's famous toast was "The Law: It has honored us, may we honor it." The honor we can best accord is not simple eulogy. We honor it far more by examining how far we are maintaining the conditions which are a prerequisite to the very existence of law itself.

On that score we can be anything but complacent. We say we believe in law. We dedicate a day to its honor, by formal proclamation of our President. That proclamation recites that it is individual freedom under law which distinguishes our system of government from the slavery which exists under communism.[3] Yet, day by day, we hear many voices that seem to be subversive of law. We hear a distinguished conservative Senator call for "massive resistance." We hear a Governor invite such resistance to the order of a federal court. We find a Chief Judge of one of our states writing that certain decisions of the Supreme Court—unanimous ones, as it happens—"are entitled to no respect and obedience any time or anywhere." Indeed, we have the spectacle of the Committee on the Judiciary of the United States Senate voting to report favorably a bill which would remove a portion of the appellate jurisdiction of the Supreme Court. Not since the unhappy days of the Reconstruction era and *Ex parte McCardle*,[4] almost a century ago, has Congress taken such action.

As symptomatic as the Committee's favorable report on this bill is another related action. There has recently been published a thirteen page document which is entitled, *The Supreme Court as an Instrument of Global Conquest.*[5] It is described as a study by "SPX Research Associates." There is no further identification of the authorship, nor of who or what "SPX Research Associates" may be. It is, to say the least, a disturbing document.

It is disturbing because it is a most appalling and distorted piece of writing. It seeks to show that the Supreme Court is an instrument of the communist conspiracy—wittingly or unwittingly is left an open question. The pattern of Supreme Court cases, it asserts, fits the Communist Party line. Referring to decisions which range from *Brown v. Board of Education*[6] and *Shelley v. Kraemer*[7]

3. See note 1, *supra.*

4. 74 U.S. (7 Wall.) 506 (1869).

5. See *Hearings Before the Subcommittee to Investigate Administration of Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary,* 85th Cong., 2d Sess., S. 2646, Appendix IV, Part 2 (1958).

to *Cole v. Young*[8] and *Service v. Dulles*,[9] the document concludes:

> In the paralytic effect of its pro-Communist decisions, on States and Federal agencies of internal security, the United States Supreme Court is the most powerful, and potentially determinative, instrument of the Communist global conquest by paralysis.[10]

It is equally disturbing that this intemperate and unprincipled attack on the Supreme Court should be printed for general circulation as a separate document of the Committee on the Judiciary of the United States, and without comment on or criticism of its content.

These items I have mentioned are no more than symptomatic. They suggest—perhaps more accurately they warn—that we are forgetting that law, as we know it, is the supreme exercise of self-discipline.

We must also remember that there is an aspect of our own legal heritage which imposes on us a peculiar burden of responsibility. We have, in America, given a new exaltation to the power of the judiciary. We have accorded to our courts the power to invalidate the acts of those who are more directly responsible to the people's will. Both de Toqueville and Bryce have remarked that in our polity scarcely a question arises which does not become, sooner or later, a subject of judicial debate. Our courts are rightly regarded as the ultimate embodiment of our law, yet they are necessarily a part, indeed perhaps the ultimate part, of the procedure by which we resolve our most fundamental political questions.

We are so accustomed to this that we regard it not only as natural but as necessary. Yet, we might think, for a moment, of the nature of a possible Law Day in England. That country shares with us our tradition of the common law. Its Magna Charta is our Magna Charta. Due process of law, personal freedoms, the rights of the individual to liberty of mind and spirit which we cherish, are equally cherished there. Yet, the guardian of those rights in England is not the judiciary, but the House of Commons, restrained only by the suspensive but not the veto power of the House of Lords. Law Day in London would properly honor not only the Chancellors and the Chief Justices, but likewise the political representatives of the people elected and assembled in the Houses of Parliament.

6. 347 U.S. 483 (1954).
7. 334 U.S. 1 (1948).
8. 351 U.S. 536 (1956).
9. 354 U.S. 363 (1957).
10. See note 5, *supra* at p. 1081.

My point, however, is not that we should reexamine *Marbury v. Madison*.[11] What is important is that we recognize the additional stresses to which our system subjects our courts and, in the sense in which we now use it, our law. Our judges personify law and the rule of law. We owe them the same honor we owe the law itself. Yet, we impose on them the role of a super-legislator on almost every major question of our day.

One consequence of this is the unhappy equation of wisdom and constitutionality. The restraint which lies at the foundation of law in a republic is assumed to exist when constitutional boundaries are not overstepped. And, of equal importance, a decision by the courts that the law is constitutionally valid is taken by many to be conclusive evidence that it is proper and even necessary.

But the more important consequence, and the one which brings me back to the recent actions with which I began, is the extent to which the courts are plunged into the partisanship and deep feeling which exist on our political and social problems. Whenever our courts pass judgment on such questions, there will be those who disagree with the decisions, and when emotions are deeply stirred the disagreement will be deeply felt. It is our responsibility, however, if we are to maintain the law as we know it, to distinguish between dissent, even vigorous dissent, and acts of hoodlumism which would warp and ultimately destroy our legal heritage.

The registry of dissent to law is a part of the process of government by the consent of the governed. Responsible criticism of particular court decisions is, like a dissenting opinion, a reasoned appeal to some future court majority to adopt a different position. Since the courts, at least in the federal system, do not directly confront the electorate, serious discussion of their work provides almost the only reliable evaluation of how well they are performing it. One cannot but welcome the recent lectures of Judge Learned Hand on the Bill of Rights,[12] for example, whether one agrees with him or not.

Indeed, I would not be particularly disturbed even were dissent to go beyond words to invoke Thoreau's theory of civil disobedience to resist peacefully some particular law or court decision. One way of dissent is to say, in effect, "I consider this law wrong and unjust. I recognize it to be the law, but I will not obey it. I accept the alternative of going to jail in protest, in the hope

11. 5 U.S. (1 Cranch.) 137 (1803).

12. The Oliver Wendell Holmes' Lectures delivered by Judge Hand at the Harvard Law School, published as The Bill of Rights (1958).

of persuading public opinion to change it." Abolitionists did that in protest against the fugitive slave law. Negroes in Montgomery, Alabama, did that in protest against a bus segregation law. This is not defiance, but a solemn act of vicarious suffering to prick the general conscience to amendment or repeal.

But, while it is vital that we preserve the freedom to dissent against a law, it is equally vital that we distinguish between dissent and subversion. In a government whose laws are not based on the consent and restraint of the people, dissent usually has to take the form of conspiracy to overthrow the government. No process other than the conspiratorial is available.

We do not need conspiracies. The foundation of the democratic experiment upon which we have embarked is the belief that men are capable of governing themselves, as Hamilton said, by reflection and choice. Consistent with that belief we cannot treat the law as an alien force, which we can but obey, evade, or try to overthrow by force. Once we accept that attitude, we will truly be conspirators against the law whenever we disagree with it. Once we equate disagreement with conspiracy, we will make it a conspiracy. And if we let this happen, we will have taken on the worst trait of the adversary with whom we are contending in the world.

The habit of treating those with whom we disagree as conspirators now goes very deep in public life. That, for example, seemed to me to be the root evil of what we remember as McCarthyism. I have no doubt myself that innocent people were injured by false charges, but the greater damage was the facile equation of dissent and conspiracy. I find the same pattern in attacks on some of those who suggest that there is room for improvement in some practices of the Federal Bureau of Investigation, or who criticize the loyalty-security program, or the Smith Act, or who defend the Fifth Amendment.

I find it, too, in the conduct of both sides in the current racial conflict in the South. The strident voices from that area are crying conspiracy and are waving documents to show that the Supreme Court decisions are part of an international communist conspiracy. On the other hand, many Negroes and northern white liberals appear to regard all southern opposition to desegregation as a conspiracy against the Constitution and fundamental human rights. This cold war going on in our midst produces little but propaganda and counter-propaganda.

Somewhere, in all of this, we are losing respect for law, and respect for the restraint without which law as we know it will

perish. I am as certain of that as I am uncertain of what can be done to avoid it.

I am sure that the answer does not lie in the hands of lawyers alone. Yet, we do have an ever-present responsibility for promoting among our people an intelligent understanding of our constitutional system. It seems readily apparent that there are substantial segments of our population who do not understand that the Constitution is a living and expanding document, and that, indeed, it must be so. We cannot rest on the fact that the Supreme Court has made its decision. Mr. Justice Frankfurter was certainly right when he said, more than thirty years ago, that "the real battles of liberalism are not won in the Supreme Court," but through "a persistent, positive translation of the liberal faith into the thoughts and acts of the community."[13]

To me, at least, it is particularly important that the controversy which whips today around our courts concerns human rights. To my mind, we should be proud that within our time the Supreme Court has given new vitality to the constitutional safeguards which the President's Law Day proclamation urges us to preserve and strengthen—the aspects of human liberty which ensure freedom of mind, freedom of conscience, freedom of the person, and equality before the law. It is in these guarantees, to the extent that they are made meaningful, that we can take pride.

It is no doubt true that we are still in the process of achieving the high ideals articulated in the Fourteenth Amendment. A century ago, they could not immediately be achieved—perhaps not even approached. *Plessy v. Ferguson*,[14] which was decided in 1896, had not given us time to adjust from slavery to full practical recognition of the principle of equal protection of the laws. Sixty years have since elapsed. Continued adherence to the separate but equal doctrine in 1954 would have been no better than moral drift. This is not to minimize the complexity of the problems, social, economic and psychological, which must be resolved. Nor is this to indict or condemn the South, where the problems are concentrated but to which they are by no means confined. The very magnitude of the problems demand our highest and greatest efforts to resolve them within the structure of our legal tradition.

Our responsibility as lawyers is even more directly involved in meeting the challenge to the nature and function of the Supreme Court. We must answer those who would strip from citizens a protection which has existed since the first days of our Republic.

13. Frankfurter, Law and Politics 197 (1925).
14. 163 U.S. 537 (1896).

In its original form, the bill now pending in Congress would withdraw from the Court appellate jurisdiction to review cases arising from the investigative functions of Congress, the security program of the Executive Branch of the Federal Government, state anti-subversive legislation, local governmental rules concerning subversive activities of school teachers, and the admission of persons to the practice of law within the several states. It is this last provision which the Senate Committee has already approved; more may be approved later.

The proponents of this bill disagree with the recent decisions of the Supreme Court in these several areas. We are all familiar with the decisions, and with the difficulties of reconciling national security and individual freedom. But the bill rests upon the assumption that the American people are so lacking in democratic faith, in basic loyalty, that they require for their own protection government security measures that cannot withstand traditional constitutional scrutiny by our highest court. I happen not to share that assumption, nor do I really believe the American people share that lack of confidence in themselves.

Because we are lawyers we can more clearly understand that this bill is, in the true sense, subversive of law itself. We are committed to our constitutional system, in which the courts stand as the ultimate guardians of our fundamental rights. And in such a system it is intolerable that we deny to the Supreme Court the power to accord that protection when a case is presented. We can understand that Supreme Court decisions can be changed, and, indeed, have been changed. Sometimes it has required no more than the amendment of a statute. Sometimes it has required an amendment of the Constitution. Sometimes it has been done by an overruling decision. But we subvert the basis upon which our law is based if we seek to prevent its guarantees from being made effective.

But what I would like to leave with you is not an answer, but a question. We all want to see the triumph of law; we all rejoice in what we call the majesty of law. Can we be complacent when, among a part of our people, law is regarded with scorn and even hate? Are we doing our part if we praise our Bill of Rights and remain silent when proposals are made to deprive the Supreme Court of the power to declare those rights infringed? As this Nation celebrates its first Law Day, let us remember the words of Thoreau, who said: "The law will never make men free; it is men who have got to make the law free."

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