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The Supreme Court - An Operational Survey

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Mr. Fey's article should help to combat much of the unjustified criticism of the United States Supreme Court which the prior article has established to be based upon ignorance of operational aspects.

THE SUPREME COURT— AN OPERATIONAL SURVEY

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THE POSITION OF the Supreme Court in the Government of the United States is largely a product of our federal system. An understanding of that system provides added insight in considering the extent to which the Supreme Court has fulfilled its function. The nature of the Court's undertaking and the form of our government precede the Constitutional Convention by 144 years. American federalism had its birth in the dangers of the frontier and in the community of interest in establishing security in a new world. This community of interest and unity of purpose was first exemplified in the articles of Firm and Perpetual League of Friendship, entered into in 1643 among the jurisdictions of Massachusetts, Plymouth, Connecticut, and New Haven. These articles can be viewed as the basis for the Continental Congress and the Articles of Confederation.

The unification of our colonies and the development of a federal system was, by necessity, a rapid development. The temporary confederation of the thirteen colonies bound together to wage a war for independence was an unlikely basis for continuing national unity. It was obvious that the only possible solution was union in a federal constitutional system. Such a system had much to offer the members of the confederation which insisted on a continuing independence and sovereignty in order that the real differences in economic, social, and political views of their citizens could be represented. Such a system offered a federal government to provide for the general welfare of the people of the colonies, and state governments to supply local and more specific needs. The result was a Federal Constitution which provided that there should be reserved to the states those powers not delegated to the federal government. Upon this basic division of governmental authority, a dual legal system was conceived which derives its authority from the nation and states respectively.

In our federal system, it is fundamental that the federal government possesses only those powers which are expressly delegated to it by the

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Federal Constitution and those implied powers that are necessary and proper in the execution of the express powers. The remaining powers reside in the states and are exercised under independent state constitutions which are generally patterned after the federal model. With this form of dual government, it is not only essential that there be explicit provisions written into the Constitution, but also that there be an arbiter to resolve the normal conflicts which are to be expected. This function of arbiter is exercised by the judiciary, providing through its decisions the constitutional law of the land.

Formation of the Court

The fathers of the Constitution, sitting at the Federal Convention of 1787, gave long and careful consideration to the character of the courts required by our federal system. At all times they were in unanimous agreement that there should be a federal judicial power with at least one tribunal to exercise that power. In the course of their deliberations varying plans were presented, with each plan including one or more supreme tribunals. On May 29, 1787, the Randolph Plan was presented proposing that ". . . a National Judiciary be established; to consist of one or more supreme tribunals. . . ."[1] On the same day, Pinckney submitted a plan providing that Congress was to establish such courts of law, equity, and admiralty as shall be necessary, and that one of these courts was to be termed "The Supreme Court."[2] The Patterson Plan, which was presented two weeks later, provided that ". . . a federal Judiciary be established, to consist of a supreme Tribunal. . . ."[3] And finally, Alexander Hamilton proposed that the supreme judicial authority of the United States should be vested in a number of judges.[4] It did not require extended debate for the convention to arrive at the conclusion that there should be one supreme tribunal rather than one or more as proposed by Randolph. The final constitutional provision was that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."[5] Thus it was that the judicial power at the top of the federal system was conceived as "one Supreme Court" which, under the philosophy of the framers of the Constitution, was to function as a unit. It is pursuant to this principle that each action of the Supreme Court is the action of all of the justices and not of divisions of the Court.

An Independent Judiciary

There was early agreement on the principle that the judiciary of the federal courts should be independent of political or economic influence. The wisdom of such independence was partly derived from the unfortunate experiences of the English courts under George III. George had relegated the British judges to complete dependence upon his will for their tenure of office and for salaries. The members of the convention were also able to draw upon the experience of the states, some of which had failed to provide for the independence of their judges. The experience of some states with elected judges had been unfortunate and the position of judge had become de-

[1] MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 62 (1893).
[2] *Id.* at 70.
[3] *Id.* at 165.
[4] *Id.* at 186.
[5] U.S. Const. art III, § 1.

pendent upon political successes. With these experiences before them, the framers of the Constitution were determined to protect the independence of the federal courts, and they did so by providing for life tenure and by a provision that judicial salaries ". . . shall not be diminished during their continuance in office."[6] Supplementary to these constitutional provisions, recent legislation provides that a justice who has served ten years and has reached the age of seventy may retire on full salary, at his sole discretion. These provisions, along with the benefits for the widows of justices, have placed members of the Court in absolutely secure positions which they may hold for life without political influence, either legislative or executive.

The Growth of the Court

When the Supreme Court was formed in 1789 with a chief justice and four associate justices, it was a Court without the benefit of American case law and with only the guideposts of constitutional provisions by which it was to steer the course of constitutional development.

The Judiciary Act of 1789,[7] among other provisions, established the jurisdiction of the Supreme Court to review final judgments of state courts in cases involving a federal question. Although the act set forth this express power over the acts of state courts, there was no such express provision for the review of federal legislation. It was not until the case of *Marbury v. Madison*[8] that the Supreme Court determined that this power existed and that it was to determine the validity of federal legislation against the background of the Constitution.

One of the first decisions which the Court was called upon to make was that of determining its jurisdiction and the law which was to be applied to the criminal cases presented. In the cases of *United States v. Hudson and Goodwin*[9] and *United States v. Coolidge,*[10] the Court determined that it had no common-law criminal jurisdiction in the absence of congressional action.

A second problem was that of determining the law applicable in federal civil cases. In both federal and state cases there developed what might be referred to as a general federal common law. For many years the principles of *Swift v. Tyson*[11] prevailed and, in the absence of statute, the Supreme Court determined the law which should be applied to the case before it, not being bound by the common law of the state which was involved. In 1938, the case of *Erie R. R. Company v. Tompkins*[12] overruled the principle of *Swift v. Tyson,* holding that in substantive matters the common law of the state should be applied in cases which did not involve a federal question. At the same time that *Erie R. R. Company v. Tompkins* was being decided, Mr. Justice Brandeis, in the case of *Hinderlider v. La Plata Company,*[13] made reference to the existence of the "federal common law" upon which neither the statutes nor the decisions of any state can be conclusive. Thus, there was a recognition of the existence of a common law on federal questions, necessitated by the federal government's interest in the controversy.

During the period outlined above, it was inevitable that the Court should come into conflict with the other branches of

[6] *Ibid.*
[7] 1 STAT. 73 (1789).
[8] 5 U.S. (1 Cranch) 137 (1803).
[9] 11 U.S. (7 Cranch) 32 (1812).
[10] 14 U.S. (1 Wheat.) 415 (1816).
[11] 41 U.S. (16 Pet.) 1 (1842).
[12] 304 U.S. 64 (1938).
[13] 304 U.S. 92, 110 (1938).

government. Throughout the history of the Court there have been recurrent attacks upon the authority of the Supreme Court. From the executive branch of government, it has been subjected to the strong criticism of Jefferson, Jackson, Lincoln, and Franklin D. Roosevelt. Such executive criticism was brought forth in situations where the executive believed that the Court was entering into political realms. Without reviewing the basis of the various controversies it should be sufficient to recognize that the Court, by necessity, must make decisions which have an impact upon the political structure of the American system of government. This is required by the fact that the Constitution, which it is charged to interpret, is the instrument which defines the political framework of our government. Any judicial interpretation of the political outline of government must run the risk of arousing executive or legislative criticism. Such a reaction is to be expected when the power of either body is subjected to limitations by judicial construction.

The history of the Court is filled with inevitable conflicts in philosophy occasioned by great changes in the economic, social, and political life of the nation. Change seldom occurs without an uprooting of established principles, and in law this is particularly troublesome.

There have been at least three notable instances where the Court has been criticized for a seeming inability to provide the desired result. The first of these was the Dred Scott case,[14] the decision being delivered at a time when the Court had reached an unequalled popularity. The Court determined that Dred Scott, a Negro, not being a citizen, could not sue in the United States courts and that Congress could not prohibit slavery in the territories. The decision prompted widespread attacks not only on the Court but upon the integrity of its members, and the popularity of the Court plummeted with unbelievable suddenness.

Almost a half century later the Populist tide, assisted by the farm-labor bloc and the eastern Democrats, had been successful in popularizing and procuring the enactment of a federal income tax. In the Court's first decision of *Pollock v. Farmer's Loan and Trust Company,*[15] the act was declared partly invalid by a divided Court. At a rehearing during the same term of Court, the entire act was invalidated by a new division of the Court.[16] This shift in vote, added to the disappointment of the proponents of the tax, brought the Court and the justices under severe public attack. Whether the Court was right or wrong is no longer an issue, for the processes of government have since provided for a federal income tax by constitutional amendment.

For the forty years following the decision in the *Pollock* case, the actions of the Court proceeded with only minor criticism. President Wilson, upon the resignation of Justice Clarke, lamented the absence of "liberalism" on the Court.[17] During the 1920's there were a number of instances in which federal legislation was declared unconstitutional. This trend in judicial construction reached a climax in 1935, when the decisions of the Court set aside a large part of the New Deal program of President Roosevelt. The National Industrial Recovery Act

[14] Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[15] 157 U.S. 429 (1895).

[16] Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895).

[17] 6 BAKER, WOODROW WILSON 117 (1937).

was nullified;[18] relief to farm debtors was invalidated;[19] the President's removal power was limited;[20] and the definition of federal power over interstate commerce was limited.[21] The history of the ensuing unsuccessful Court-packing plan and the resolution of the problems of the 1930's are too well known to justify further comment or discussion.[22]

Judicial Restraint

A large part of the success of the Court in adapting itself to its role as an independent branch of government has been its exercise of judicial restraint. Without such restraint the Court would undoubtedly have been not only criticized, but its powers would have been limited by constitutional amendment or legislative enactment. From the very beginning the Court recognized that its power was limited by the Constitution to "cases and controversies" and, therefore, refused to provide advisory opinions or declaratory judgments.[23] By this construction the federal courts are restricted to real controversies and cannot be drawn into the legislative or administrative process except by review of real questions of law between opposing litigants.

Out of the first limitation, the Court has imposed upon itself the further limitation of not interfering with state or federal political processes. Of course, it would be impossible to regard this limitation as absolute. However, the Court has refused to pass on a number of issues having to do with local state government and, in some instances, federal matters which are peculiarly within the political competence of Congress or the President.[24]

Consistent with its other self-imposed limitations, the Court has also developed the principle that it will not undertake to decide questions of the constitutionality of legislation unless the questions are properly presented and must be determined. This principle not only minimizes conflict with the legislative branch, but it tends to provide a more orderly process in the disposition of cases and supplements the necessity for restricting decisions to real questions properly before the Court.

The final restriction which the Court has imposed upon its power is that it will not undertake the review of questions of legislative policy. If the legislature has the power, and the exercise of that power does not infringe upon the constitutional guarantees of an individual, there is normally nothing which the Court will review. It is pursuant to this principle that the Court has in many instances supported the extension of federal power by Congress. Without this limitation on the Court, the system of government, with its three independent branches, could not function.

The Business of the Court Today

A fact which is worthy of emphasis is that the Supreme Court is not a court of general appellate jurisdiction. As previously suggested, the main function of the Court is to decide cases arising under the Federal

[18] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[19] Louisville Bank v. Radford, 295 U.S. 555 (1935).

[20] Humphrey v. United States, 295 U.S. 602 (1935).

[21] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[22] See JACKSON, THE STRUGGLE FOR JUDICIAL POWER 176-96 (1941).

[23] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[24] United States v. Pink, 315 U.S. 203 (1942); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

Constitution, statutes, and treaties, and in so doing to maintain the balance of power as a principle of American government.

This limited jurisdiction of the Court, as provided by the Constitution, along with the self-imposed limitations, has tended to keep the work of the Court within manageable proportions. Even so, there have been periods in history when legislative changes affecting the procedures of the Court have been necessary. The method of reviewing admiralty and equity cases was changed in 1803[25] but was amended in 1875.[26] In 1891[27] it was finally provided that these cases could come to the Supreme Court only by way of certiorari.

The most notable change in the work of the Supreme Court was brought about by the Judiciary Act of February 13, 1925.[28] That act was passed pursuant to the Court's desire that some limitation be placed on its jurisdiction. More than two-thirds of the cases which the Court was being called upon to review as a matter of right resulted in judgments of affirmance. The liberality of the then existing method of invoking the Court's jurisdiction had caused an overload which impaired the efficient operation of its processes.

The Act of 1925 removed numerous classes of actions from obligatory review by appeal or writ of error and substituted discretionary review. It also terminated review as a matter of right from the Court of Claims, from dependencies, and from the Court of Appeals for the District of Columbia.

This legislative change brought about a more orderly administration of the Court's business. By the end of the 1929 Term the backlog of work had been cleaned up and ever since that date the work of the Court has been kept current. The only cases carried over are those in which review was granted too late in the term for argument and a few cases set for reargument for various reasons.

In sheer volume of work the business of the Court has increased by rapid progression. When John Marshall became Chief Justice he was confronted with ten cases in his first year. During the ensuing five years there were but 120 cases filed and by 1830 the average number of cases filed each term was but fifty-eight. The total number of cases docketed in the first forty years of the Court's operation did not equal the number filed in the 1956 Term. With the termination of each war there have been substantial increases in the business brought to the Court. In the 1938 Term prior to World War II there were 1,007 cases docketed and 922 disposed of by action of the Court. In the 1956 Term there were 1,802 cases docketed and 1,670 disposed of by action of the Court. Each succeeding term of Court brings an increase in the number of cases docketed and disposed of.

Many of the cases brought to the Supreme Court are frivolous and are presented without any reasonable expectation of successfully invoking the Court's jurisdiction. This has long been a matter of concern as indicated by a statement made in 1934 by Mr. Chief Justice Hughes:

> I think that it is safe to say that about 60 percent of the applications for certiorari are

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[25] Act of March 3, 1803, c. 40, 2 STAT. 244.

[26] Act of Feb. 16, 1875, c. 77, 18 STAT. 350.

[27] Act of March 3, 1891, c. 517, 26 STAT. 826.

[28] Act of Feb. 13, 1925, c. 229, 43 STAT. 936 (codified in scattered sections of 28 U.S.C.). For complete discussion see Frankfurter and Landis, *The Supreme Court Under The Judiciary Act Of 1925*, 42 HARV. L. REV. 1 (1928).

> wholly without merit and ought never to have been made. There are probably about 20 percent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder falling short, I believe, of 20 percent, show substantial grounds and are granted.[29]

The accuracy of this statement has been borne out by each term of Court and is no less true even today. Of the 803 petitions for certiorari not in forma pauperis carried on the appellate docket which were acted on in the 1956 Term, 139, or 17.3 per cent, were granted. On the miscellaneous docket the number of petitions for certiorari acted upon number 622 of which thirty-eight, or 6.1 per cent, were granted. These figures indicate that a substantial amount of the Court's time is consumed by frivolous petitions which should never be presented to the Court.

While changes have been taking place in the procedural aspects of the Supreme Court business, there have also been significant changes in the nature of the substantive business of the Court. The two are not entirely unrelated and to a large degree may be traceable to an increase in federal legislation over the past quarter century. There has most definitely been a substantial shift from general common-law matters to the litigation of matters in the public law domain. In the 1930 Term, of the ninety-five petitions for certiorari in common-law cases, ten were granted. In the 1955 Term, of the fifty-two petitions for certiorari in common-law cases, only one was granted. The changing nature of litigation before the Court only reflects the changing pattern of our national political, economic and social life.

[29]Hughes, *Address to the ALI*, 20 A.B.A.J. 341 (1934).

The public law nature of the business of the Court is further reflected in the fact that of the 145 cases argued before the Court during the 1956 Term, the Government participated in ninety-two. The Government was petitioner or appellant in thirty cases; it was respondent or appellee in sixty cases; and it appeared as amicus curiae in two cases. The statistics published in the annual report of the Solicitor General indicate that the Government participated in 37 per cent of all cases docketed, and in 64 per cent of all cases argued.

Conclusion

A survey of the operation of the Supreme Court in constitutional government necessarily reflects its growth and adaptation to serve the changing needs of an expanding nation. One of the virtues of the American system is its flexibility and adaptability to changing needs. To understand the many refinements in the operation of our system it is necessary to evaluate the political, social, and economic pressures of the various periods of American history. American constitutional law has mirrored the needs of a developing social order. Over the past 170 years the scope of federal powers has changed to meet new problems created by technological advances, an expanding economy, and a growing population. While the concept of federal powers has changed, the Constitution has remained virtually the same with the important exception of the fourteenth amendment which imposes additional limitations on state action. Throughout all of the changes which have transpired, the Supreme Court has carried out a significant role in the resolution of conflicts in our federal system and is well recognized as an indispensable third branch of government.