

December 1924

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Recommended Citation

Conner Hall, *Judicial Abdication*, 31 W. Va. L. Rev. (1924).

Available at: <https://researchrepository.wvu.edu/wvlr/vol31/iss1/5>

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JUDICIAL ABDICATION.

BY CONNOR HALL*

The suggestion recently put forward that the United States Supreme Court should decline to follow its own judgment and hold an act of Congress invalid whenever two or more justices feel a "rational doubt" of its invalidity, indicates a strange misconception, not merely of the judicial function, but of fundamental principles of constitutional government. The proposal is thus stated, (*American Bar Association Journal*, November, 1923, page 692):

"The Supreme Court has many times declared itself bound by this rule but never more strongly than in the recent Minimum Wage decision in which it was said 'that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt,' and that 'only clear and indubitable demonstration' that a statute is in conflict with the Constitution will justify its being declared invalid.

* * * * *

"It is no new suggestion that if the Court would give real and sympathetic effect to this rule by declining to hold a statute unconstitutional whenever several of the justices conclude that it is valid—by conceding that two or more being of such opinion in any case must necessarily raise a 'rational doubt'—an end would be made of five to four constitutional decisions and great benefit would result to our country and to the Court.

"To voluntarily impose upon itself such a restraint as this would add greatly to the confidence of the people in the Court and would very certainly increase its power for high service to the country. Anyone at all acquainted with the temper of the people in this grave matter must fear that if the rule is not observed in some such manner, a greater restraint may be imposed upon the Court by Congress or by the people, probably to the serious detriment of the nation."

If this is a proper method of decision, where is the stopping

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place? The appeal to the Supreme Court will have come, usually from the Circuit Court of Appeals, composed of three, or the State Supreme Court, composed of five, seven, or even nine judges. If a statute has been sustained by the lower court, then two, three, five, seven or even nine judges had, to say the least, a "rational doubt" of its invalidity. These judges, often in fact are, and in every case must be presumed, to be trained lawyers and reasonable men; at least two of them are such, let us say. Why in these circumstances would not the Supreme Court find itself bound by its self-imposed restraints? It is hard to see why the tribunician veto would not be equally applicable. If a statute must be held valid, merely because two trained lawyers and reasonable men remain unconvinced, then there is nothing in the nature of things to say that these two trained lawyers and reasonable men must belong to the United States Supreme Court. Such men are found, equally in the Circuit Courts of Appeals and in the State courts. In fact, it would not be hard to pick out from some of these other courts two men superior to two who might be picked from the Supreme Court.

If the Circuit Court of Appeals and the state Appellate Courts adopted similar methods of decision, they would, likewise, at the very beginning of an appeal find themselves at the end of a blind alley. If a District judge has upheld a statute and hence shown a "rational doubt" of its invalidity, then the three should accept this as conclusive. If the Supreme Court is to be stayed by the doubt of two of its members, the three members of the Circuit Court of Appeals should feel equal respect for the opinion of the one district judge. Here would be an end of appeal on all constitutional questions where the lower court had sustained the statute; and, instead of following the guide of the Constitution, we should be floundering in a welter of metaphysical introspections. And, if this is proper process, it would be so not merely on constitutional questions, but would extend over a large part of the entire field of law. For example: An appeal is taken upon the ground that the verdict of the jury is not supported by evidence, and the ordinary rule is that it will be held to be supported by evidence if a reasonable man might have taken the same view as the jury. Or, if the complaint is made that the lower court abused its discretion, then the question, in substance, becomes: did the judge of the lower court act in such a way as a reasonable man might have acted? And, not merely on judicial procedure, but in the field of substantive laws we have the same. A promoter is indicted for

using the mails to defraud. He defends upon the ground that he honestly believed that his scheme would be successful and prove profitable for the investors. Manifestly the court cannot accept his mere say so, and the question then becomes: could a reasonable man so honestly have believed? We might, in the same manner, multiply illustrations from every branch of the law. Now, when these questions are raised in the Appellate Court, is that court obliged to reason that inasmuch as a trained lawyer and reasonable man in the lower court has accepted the verdict of the jury, we, the appellate court, are bound to conclude that a reasonable man could take that view of it; or, is it bound to say that it is impossible that the judge of the lower court should have abused his discretion, inasmuch as he is presumed to be, and in fact, usually is a reasonable man? And, in case of a criminal indictment, if the lower court is impressed with the honesty of the defendant's claim, does that end the matter forever? It would upon the reasoning now urged for the adoption of the Supreme Court. The *reductio ad absurdum* might be carried out in great detail; in fact, the only natural limits are the boundaries of the law itself. The fundamental fallacy of the proposition put forward is in assuming that there is some absolute irrefragible standard of rational doubt and that the mind of a justice of the Supreme Court, as the mind of a reasonable man and trained lawyer, may be accepted as that absolute standard. It is, of course, elementary and obvious that there is no such absolute standard. When the court says that it will not declare an act invalid so long as there is a reasonable doubt of its invalidity, it is referring, of course, not to the rational doubt of any one man, though he be the most profound lawyer, the clearest thinker and the most eminent writer, or any two such; it refers, and of course can refer to nothing except the standard set up by the Constitution itself—that is, the opinion of the Supreme Court, expressed in the ordinary way. And for the justices of this Court to disavow their functions and leave the matter to be determined by the doubts of two or any other minority of their membership, would be another and a notable contribution to current politico-moral cowardice, an abdication of their powers, for which they would deserve, and it is to be hoped would suffer, impeachment.

In the popular mind there exists misapprehension as to judicial declaration of the unconstitutionality of a statute. The court never seeks such a task. It never sets about in a quasi legislative or supervisory manner to decide that the act of any Legislature

or Congress is invalid. The issue arises in a very different manner. An individual having a grievance comes into the court and has his opponent summoned to answer him. One or the other sets up a statute as controlling or, at least, affecting the controversy. The other replies that this statute, or so-called law, is in conflict with the Constitution, which is the supreme law, and that the statute must therefore be regarded as no law at all, so far as it conflicts with the Constitution in the decision of the particular case. If the case can be decided without holding the act unconstitutional, the court will adopt that course. But, if the individual can obtain his rights in no other manner than by the declaration of the invalidity of the statute, then, if it be invalid, he is, under the Constitution, entitled to such declaration. And for the Supreme Court, which has been established as the final protector of his rights, to turn him away when a majority of its members are of the opinion that he is entitled to what he asks, merely because a minority have some doubt about the matter, is to tyrannize over the individual and deprive him of his life, liberty or property, in order to temporize with vote-catching legislative demagogues and their time-serving panders.

And for what? In order that that sacred thing called an act of Congress (even though passed without authority and contrary to their sworn duty) may not be touched. The court is to move nervously, timorously, and even apologetically, in the performance of its duty for fear of offending the legislative branch. To read some of the discussions one would think that the court were proposing to reverse a decree of Divine Providence and were about to set at naught the laws of nature or absolute truths. Whence arose this conception of the infallibility of Congress? What meat has this legislative Ceasar been feeding upon? At a time when the character and the ability of the legislative branch of the government has sunk to one of its lowest points we find persistently put forward claims necessarily based upon the implication that Congress is, if not quite, at least well nigh infallible. Of course, it is expressed in a different manner. It is said that the court should not upset what the representatives of the people have done. Is not the Supreme Court, too, a representative of the people, chosen indirectly, but none the less a creature of the instrument of government set up by the people themselves and selected indirectly by themselves? We venture the assertion that if the inquiry were made through the country, either in New York, New Orleans, Dakota or Minnesota, whether Congress was regarded as represent-

ing the best of the national life, the answer would not be flattering to the vanity of Congressmen and the Federal judges need not fear, even in the popular mind, any comparison with Congressmen as creditable representatives of the nation. It is strange that there should be such noisy protest over the Court's declaring an act of Congress invalid by five to four decisions, when we consider the manner in which so many of these acts are passed. Complaint is made in a tone implying that an act of Congress is some perfected entity, arrived at after long and mature deliberation of all the representatives of Congress and combining in itself all the concentrated wisdom of all the Congressmen and Senators, if not indeed of the entire body of our people. How far this is from the fact. It would be interesting if some one of the thousands of clerks now maintained at Washington, by Congressional extravagance and Congressional taxation of an over-burdened people were set to work to ascertain by what percentage of the membership of Congress the various statutes have been enacted. A quorum is one-half and one more, and an act may be passed by one-half of that quorum and one more, so that it is possible to have an act of Congress pass either house by a vote of one-fourth of the membership, plus three-fourths, or, let us say plus one vote. And it is the act of a body which proceeds in this manner that is sacred from reversal by a majority of all the members of a court who patiently sit, hear and consider everything that can be said and a single one of whose members is rarely absent. Would the admirers of Congressional wisdom and the detractors of the courts be willing to suggest that Congress adopt a similar method—that is, if two-ninths of the membership of Congress doubts the wisdom of any particular legislation, then the Congressional hand is to be stayed? If the Supreme Court were no more faithful to its duties than Congress, many of its decisions would be rendered, not five to four, but three to two, as many statutes are enacted.

This is to be said for Communists, Anarchists, Socialists and others who (unwittingly aided by some well-meaning men) are hostile to American institutions. They have the intelligence to see that the Supreme Court is the keystone of the arch, and when the power to protect the individual by the enforcement of the Constitution as the supreme law is gone, then the constitution is ended. For, whenever the court is disabled from applying the Constitution as that which it purports to be, the supreme law over all other laws, then the last bar to any action by the Legislature is removed. Bills of rights, individual guarantees, all the protections of Constitu-

tional principles are swept away at one stroke. When these proponents of Legislative despotism are brought face to face with their substitute for the court, all the wind is taken out of their sails. They criticize the court, never once discussing the merits or demerits of Congress, whose powers and functions are to be immensely broadened; the comparison is always with some perfection, not expressed indeed, but always implied. The discussion is not a comparison between the Supreme Court as a lawfully constituted representative of the people, and Congress, another lawful representative of the people, but the court is criticized by this necessarily implied standard of perfection and the body which is to absorb its functions, is not examined. An examination of its shortcomings and its arbitrary actions on many occasions in the past, its demagoguery, its false slogans and the ignorance and inexperience of many of its members would at once expose the hollowness of the whole claim. The conduct of government, the application of law, decisions of controversies are practical matters and should be dealt with in a practical manner. The Supreme Court should not be discussed as in *vacuo* and condemned because it falls short of perfection, and then there be immediately substituted in its place, without question and without examination, a body which upon an honest examination, it is submitted, must fall far below the Supreme Court, in its past record, and its present character for ability and devotion to public duty. To adopt or to favor such self-emasculation by the Supreme Court, is not to support the Constitution, but to surrender it at once. We are reminded of the gambler who committed suicide for fear he might be killed in a duel.

Out of the same mistaken notion has come the suggestion that minority judges should not vote, or, at least, should refrain from publishing dissenting opinions. This suggestion is based upon the supposed duty or expediency of indulging a misconception in the public mind as to the nature of a judicial decision. That supposed misconception is that there is something absolute about a decision of law; that it must be one way or the other way; that it must be right or it must be wrong—that is, that it is mystical, magical, an expression of Divine will in the particular instance. When the Homeric sooth-sayers and heroes had a knotty problem, frequently they would place lots in an urn, the urn was shaken round, and the manner in which the lots fell was accepted as a decision—that is, as indicating the will of the gods. It would, of course, have been utterly incongruous with this view that part of the lots would have indicated one view and part another; all should fall

one way. It is absolute, fatalistic, final, irrevocable doom. The beam shot upward and Apollo left him; Hector must die and Troy fall. But the decision of a court, under a rational system of law, is no such magical thing; it is the result of judgment, of reasoning—that is, of the balancing of one principle by another conflicting principle, and the marking out of that wise middle course dictated by the action of the human mind upon many differing considerations. It is not crap-shooting justice. The decision of a lawsuit, particularly by the court of last resort upon a constitutional question, is only a little more particularized expression of public policy. It is not sooth-saying, it is not casting of lots, it is reaching as nearly as possible the right course. And, when we look at the result of decisions over a long period of time, they may be entirely right or they may approach that right line with a greater or less degree of approximation. There is no dead-line, on one side of which all is right and on the other side of which all is wrong. The suggestion that minority judges should refrain from publishing dissenting opinions is based upon this idea of the absolute rightness or absolute wrongness of a particular judgment. The proposer would have the courts to indulge this mistaken notion and thus promote it. On the contrary, it is the duty of lawyers and well-informed laymen to remove this, as well as other misconceptions as to the nature of law and the functions of the court. In a democracy, where all questions come at last to be agitated, if not decided, before the people, it is essential that the leaders should have the courage to speak according to their true vision, even upon matters somewhat abstruse. They, of course, will not be understood by all, but there are many who will understand, and, with continued discussion and thought, the circle will ever widen; whereas, the indulgence of mistaken notions lays the foundations for other mistaken notions and for the entire misunderstanding and misconception of the nature of our government, the Constitution and the function of the courts, and lays them all open to the attack of the ignorant or the malicious.

On the contrary, it is always the right, and often the duty of a judge, who does not agree with the majority upon a constitutional question, to set forth his views fully. If the action of the court ended with the rendition of a decision in a particular case, there would be no necessity or even propriety in this. But, the decision upon one case becomes the foundation for decisions upon many similar cases in the future. It may be that in a particular case the majority is right; but, it might be that in the next case which

arises, the principle upon which the previous case was decided would be carried to unwarranted lengths. It is at this point that dissenting opinions become valuable; they serve to qualify, to modify the principle stated by the majority, to point out its limitations and to call attention to conflicting principles. It is only by such discussions, by such statement of opposing views, that the great body of constitutional or any other law is finally settled. We might cast lots from the urn in a million cases without ever formulating any true principles. In the same way, if no dissenting opinions were ever written, the proper settlement of legal principles would be delayed much longer, if, indeed, important defects did not always remain. The Common Law was not developed by any such straight-jacket methods. In the English reports, whence we draw our principles, we find the several judges expressing their individual opinions, either for or against the judgment of the court. And, even those in favor of the judgment may differ in their reasons—in fact, while there may be a leading, there is no court or majority opinion. Such opinions are probably more accurate and less misleading than a single opinion, written either for the entire court or for a majority. A single opinion seldom accurately expresses, in its entirety, the views of all those said to concur in it. The others concur in the judgment and, in a general way, in the opinion; but, if they took the trouble to write out their own opinions, we would find material variations. When the reports of various opinions in one case are consulted, as a guide in future cases, the lawyer may be perplexed to find the true rule out of the numerous expressions, but, at least he is not misled by a supposed finality and unanimity which, in fact, does not exist. It has been well said that law is a compromise between the logical and the practical. The settling of the proper line of that compromise goes on continually. Human activities are changing every moment. Business today is not done in exactly the same way as yesterday. The activities of one generation are materially different from those of another. To continue the formulation of correct legal principles and to apply them constantly to this shifting, changing business of human life, requires all the wisdom, all the thought that can be contributed by all. If the contributions of a minority are to be rejected only because they are a minority, one of the most valuable and material parts will be lost. We have at hand a very apt illustration in the course of Mr. Justice Brewer.

In *Nishumura Ekiu v. United States*, 142 U. S. 651, the Supreme Court by a majority vote held that the determination of the facts

prerequisite to the exclusion of an alien might be finally determined by an executive officer. Against this doctrine Mr. Justice Brewer dissented, and, with what might almost be regarded as opinionated persistence, he not only continued to dissent in *Lem Moon Sing v. U. S.*, 158 U. S. 538, 550, but, in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 732, he wrote an elaborate and vigorous opinion. He persisted in *Fok Yung Yo v. U. S.*, 185 U. S. 296; in *Chin Ying v. U. S.*, 186 U. S. 202; and the Japanese Immigrant case, 189 U. S. 86, 102. No one who has followed the history of these and similar cases can doubt that the strong and independent course of Judge Brewer contributed to the final establishment of the doctrine now happily settled, that, whenever a substantial claim of citizenship is made by the alleged alien, about to be deported, he is entitled, under the Fifth Amendment, to have such claim judicially determined. *Ng Fung Ho v. White*, 259 U. S. 276; *U. S. v. Bilokumsky*, 44 Sup. Ct. 54.

The Supreme Court has no call for weak-kneed apologies, and temporizing can only weaken it. Like the entire Constitution, it requires only comprehensive understanding and clear, intelligible and courageous explanation.