


6-1936

Congress and the Courts

Silas H. Strawn
Member, Chicago Bar

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Courts Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Strawn, Silas H. (1936) "Congress and the Courts," *Indiana Law Journal*: Vol. 11: Iss. 5, Article 4.
Available at: <http://www.repository.law.indiana.edu/ilj/vol11/iss5/4>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

CONGRESS AND THE COURTS

By SILAS H. STRAWN*

While in the promotion of peace and the general welfare of all the people in the world, we are interested in the forms of government under which the different nations function, our vital concern at this time is in the government of the United States.

It avails nothing to criticize the systems of government adopted or imposed upon other countries or to decide whether those systems are adaptable to the temperaments of their people and the conditions there obtaining. At the moment our problem is whether those systems are compatible with the spirit of the American people and whether they are a better guaranty of our happiness and prosperity

It may be well in these contentious days briefly to survey the situation, in order that we may more understandingly decide whether we are satisfied with our scheme or whether we should abandon it and adopt some Europeanism.

To arrive at an accurate conclusion we should compare our plan with the governments of other countries, perhaps some of those whence our ancestors fled to come here and establish a government "of the people, by the people and for the people" of the United States.

I submit that history and experience have demonstrated that a government under which the people have freedom of action and may exercise their individual initiative is the only system that has had wide political acceptance among nations. It is the base of all great advances in civilization.

In the large majority of the countries of the world there still is some degree of private initiative, protected by political freedom, functioning under parliamentary systems more or

* Of the Chicago Bar, former president of the American Bar Association, the Illinois State Bar Association and the Chicago Bar Association.

less liberal. The notable exceptions are the Soviet Union, under the dictatorship of a small minority, and Germany and Italy, where political dictatorships have brought with them autocratic control over the nation's governmental functions and economic forces.

It is asserted by some of our citizens that our system of permitting every man to enjoy the blessings of liberty and to pursue his vocation and business in his own way and for his own benefit, subject only to due regard for the rights of others, is wrong; that our activities should be regimented, that the federal government should have bureaucratic control over our entire economic and social life, and that we must have an arbitrarily enforced, planned economy

Necessarily a planned economy postulates an executive vested with dictatorial power to enforce it. Individual freedom of action cannot be tolerated. Although there are differences in the methods employed by the Soviets, the Fascists and the Nazis, they are all alike in that the power of their dictators rests upon a small, highly organized party, which, by the use of force, suppresses all opposition and forbids all criticism.

The common feature of dictatorships is to put an end to freedom of speech, freedom of the press, freedom of assembly and freedom of action for common ends.

From time to time ever since the reign of Diocletian the people of different countries have experimented with autocracies, dictators and regimentation, none of which has long endured. Yet, with all the experience of history, some of our citizens are considering whether our people are capable of governing themselves or whether we should have a dictator. Whether that dictatorship is called Fascism, Nazism or Communism, the record is clear that it portends degradation, poverty, misery and ultimate collapse.

Rebelling against the dictatorship of King George, the framers of our Federal Constitution determined to create a real democracy, a government of discussion and persuasion rather than one of dictation and force. Their basic principle was that the final authority should always rest with the people. It is unthinkable that any American, whether by na-

tivity or adoption, should want to abandon the blessings of liberty which we enjoy under our form of government and return to a dictatorship which was intolerable to our ancestors.

The principles upon which our Government is founded are stated in the Constitution. The Constitution gives us no rights. It simply guarantees us protection in the rights which Nature gave us. The theory upon which our Government was conceived was that the Government is but the agent and not the master of the people.

To carry out this plan our forefathers divided the Government into three departments, that each should be a check upon the others. The *legislative*, or the Congress, whose function is to pass such laws as the people, through their senators and representatives, deem wise and necessary; the *executive*, the President, whose duty it is to execute the laws as passed by the Congress, and the *judicial*, consisting of the Supreme Court and such other courts as Congress may determine.

It was never intended that one branch of the Government should divest itself of its functions or delegate its authority to another branch. The Supreme Court repeatedly has said that the Congress is not permitted to abdicate nor transfer to others the essential legislative functions with which it is vested, that the Congress cannot delegate its legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation or restoration of trade and industry; that the Constitution cannot be stretched so as to permit unrestricted experimentation in economic and social theories. It was the idea of the founders that the rights preserved by the Constitution should not be usurped, taken away, or given up, except by and with the consent of the people in the manner provided by the document itself.

In the recent Jones case, Mr. Justice Sutherland said

“Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces, and one or the other must of necessity perish whenever they are brought into conflict. To

borrow the words of Mr. Justice Day—there is no place in our constitutional system for the exercise of arbitrary power.

“The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government.”

It is suggested by some that the Constitution is obsolete and that it should be amended so as to deprive the courts of the duty of deciding whether acts of Congress are constitutional and vest those powers in the Congress itself.

Our forefathers never intended that the Constitution as originally drafted would meet all the requirements of a complex society resultant upon the development of this country. Accordingly, they provided the manner in which amendments should be made, by referendum to the people.

There are now pending before the present Congress some fifty-five bills which seek to restrict the power of the courts in declaring congressional legislation to be unconstitutional. Some of the bills require the unanimous judgment of the Supreme Court to hold as void an act of Congress. Other bills would require a seven to two vote.

I submit that the legislation contemplated by the various bills is not only dangerous but revolutionary. It goes to the very foundation of our government. We must seriously consider whether we are willing to trust Congress with unlimited, uncontrolled, final power and with the supreme authority to judge the extent of its own powers, not only over the rights of individuals but over the rights of the states as well.

It seems to me that any patriotic American will concur in the expression of Mr. Charles Warren in his recent book, “Congress, the Constitution and the Supreme Court”

“Each American citizen must consider whether he is willing to trust Congress with such proposed unlimited, uncontrollable, final power, and with the supreme authority to judge the extent of its own powers, not only over the rights of individuals but over the rights of the states. He will certainly conclude that rights of liberty, of property and of state sovereignty are more likely to be guarded by a majority of a court than by a majority of a Congress—a Congress which may be swayed at any particular time by political, sectional or class appeal—

a Congress which may be influenced 'by the power and wealth of vested interests on one day and by the passing whim of popular passion on another day'—a Congress which may be looking to see the influence of its decisions on party success and personal chances of re-election. He will certainly conclude that if any body of men is to possess final and uncontrolled power of ultimate judgment as to his constitutional rights, and as to the constitutional restriction imposed on the Legislature and the Executive, such power can be more safely lodged in Judges not dependent for election on partisan issues in passionate political campaigns but guided only by their conscience and the Constitution, uninfluenced by hope of popular or Executive favor, undisturbed by fear as to their tenure of office, so long as they are honest, and under no obligation to Executive or Congressional desire or dictation."

I remember that the late President Coolidge, in an address made before the Chamber of Commerce of the United States, said.

"It is not necessary to prove that the Supreme Court never made a mistake, but if the power is to be taken from them, it is necessary to prove that those who are to exercise it would be likely to make fewer mistakes."

As I have said before, the right to amend the Constitution or to change our fundamental form of government rests with the people. The Constitution cannot be ignored or subverted by the Congress. With our hundred and fifty years' record of splendid achievement, I do not believe that the people of the United States are ready to scrap the Constitution and to embrace some European form of government which history records has always led to poverty and chaos. Our people are not willing to bring about in this country the miserable conditions, low standards of living and the tyrannical governmental domination from which our forefathers fled when they came to this country

I submit that our Supreme Court and the other courts have, on the whole, rendered decisions which in the long run have been beneficial to the people and that our welfare is very capably protected by them.

INDIANA LAW JOURNAL

Published Bi-Monthly October to August, inclusive, by the
Indiana State Bar Association

OFFICERS AND BOARD OF MANAGERS OF THE INDIANA STATE BAR ASSOCIATION

FRED C. GAUSE, *President*.....Indianapolis
ALBERT H. COLE, *Vice-President*.....Peru
THOMAS C. BATCHELOR, *Secretary-Treasurer*.....Indianapolis

BOARD OF MANAGERS

1st District Ray C. Thomas, Gary	7th District John S. Hastings, Washington
2nd District John W. Kitch, Plymouth	8th District Benjamin E. Buente, Evansville
3rd District Ben C. Rees, La Porte	9th District Charles A. Lowe, Lawrenceburg
4th District Abram Simmons, Bluffton	10th District Will F. White, Muncie
5th District Donald F. Elliott, Kokomo	11th District Bartlett H. Campbell, Anderson
6th District A. J. Stevenson, Danville	12th District Joseph G. Wood, Indianapolis
Member-at-Large—Wilmer T. Fox, Jeffersonville	

ALFRED EVENS, *Editor*

THOMAS C. BATCHELOR, *Business Manager*

Faculty Board of Editors

Robert C. Brown	Frank E. Horack
Milo J. Bowman	James J. Robinson
Bernard C. Gavit	Hugh E. Willis

Student Board of Editors

Harry P. Cooper, *Chairman*

Harry A. Alpert	Otto E. Grant
Charles Z. Bond	Selwyn Husted
Harry Brownstein	Benjamin Saks
David Cohen	William Henry Snyder
Hilbert S. Cofield	Matthew E. Welsh
	Luke White

The Indiana State Bar Association does not assume collective responsibility for
matter signed or unsigned in this issue.