Brandeis on Democracy

Strum, Philippa

Published by University Press of Kansas

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Brandeis regarded democratic government as necessary because, without it, human fulfillment was impossible. The goal was the individual; the method was the organized community; the two were inextricably connected.

Government presented the same problem as all organizations: its effectiveness was dependent on its maintaining a size substantial enough to permit it to perform its functions, but it inevitably would be subject to the tendency to grow too big and too powerful. Brandeis was enthusiastic about the federal system because it kept many governmental powers in the states rather than in Washington and because the state governments could serve as laboratories for the constantly needed experimentation with public policies that were responsive to a changing society. He occasionally shocked young people eager to participate in the federal government by advising them to return to their states to ensure that the nurseries of democracy were functioning properly. Enthusiastic though he was about the presidencies of Woodrow Wilson and Franklin Roosevelt, he was opposed to those of their policies or actions that he considered to concentrate excessive power in their hands.

He would have liked to see the society's economic problems solved through voluntary action by individuals and organizations such as unions and corporations, but he recognized that in the modern world, there were already too many entrenched bastions of power for that to be possible. Government action was needed, all the more so after the economic crisis of the Depression. Nonetheless, all of his prescriptions were designed to minimize governmental involvement as much as possible. He dissented in the Myers case (below) and voted against the National Industrial Recovery Act of 1933, in both cases because he considered that to do otherwise would be to endorse dangerous concentrations of power in the executive. He returned to his theme of human fallibility and the recognition that the most talented and best-intentioned people must not be given more power than a human being
could be expected to exercise intelligently. This limitation extended to the Supreme Court as well as to the other branches of government.

**MYERS v. UNITED STATES, 1926**

President Woodrow Wilson removed Frank Myers, a postmaster, without requesting the Senate's consent. The Court upheld the dismissal, and Brandeis wrote a lengthy dissent reflecting his fear of unaccountable power in any hands, including those of a president whose policies he supported. Separation of powers and checks and balances were as important to him as was federalism in helping to guarantee that governmental power would not be dangerously concentrated.

The Constitution gives the president power to appoint officials of the executive branch with the "advice and consent" of the Senate, which effectively means securing Senate confirmation of his nominees, but says nothing specific about the removal power. The question was whether the president's power as chief executive implied his right to remove officials, or whether Congress had the authority to define the terms, including possible removal, under which the Senate would agree to appointments. Brandeis's view was adopted by the Court some years later (1934) in Humphrey's Executor v. United States, which effectively overruled Myers on the basis of his reasoning.

**MR. JUSTICE BRANDEIS, dissenting.**

Postmasters are inferior officers. Congress might have vested their appointment in the head of the department. The Act of July 12, 1876, provided that "postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law." That statute has been in force unmodified for half a century. Throughout the period, it has governed a large majority of all civil offices to which appointments are made by and with the advice and consent of the Senate. May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place? . . .

The sole question is whether, in respect to inferior offices, Congress
may impose upon the Senate both responsibilities, as it may deny to it participation in the exercise of either function.

In *Marbury v. Madison*, it was assumed, as the basis of decision, that the President, acting alone, was powerless to remove an inferior civil officer appointed for a fixed term with the consent of the Senate; and that case was long regarded as so deciding. In no case, has this Court determined that the President's power of removal is beyond control, limitation, or regulation by Congress. Nor has any lower federal court ever so decided. This is true of the power as it affects officers in the Army or the Navy and the high political officers like heads of departments, as well as of the power in respect to inferior statutory offices in the executive branch. Continuously for the last fifty-eight years, laws comprehensive in character, enacted from time to time with the approval of the President, have made removal from the great majority of the inferior presidential offices dependent upon the consent of the Senate. Throughout that period these laws have been continuously applied. We are requested to disregard the authority of *Marbury v. Madison* and to overturn this long established constitutional practice . . .

The ability to remove a subordinate executive officer, being an essential of effective government, will, in the absence of express constitutional provision to the contrary, be deemed to have been vested in some person or body. But it is not a power inherent in a chief executive. The President's power of removal from statutory civil inferior offices, like the power of appointment to them, comes immediately from Congress. It is true that the exercise of the power of removal is said to be an executive act; and that when the Senate grants or withholds consent to a removal by the President, it participates in an executive act. But the Constitution has confessedly granted to Congress the legislative power to create offices, and to prescribe the tenure thereof; and it has not in terms denied to Congress the power to control removals. To prescribe the tenure involves prescribing the conditions under which incumbency shall cease. For the possibility of removal is a condition or qualification of the tenure. When Congress provides that the incumbent shall hold the office for four years unless sooner removed with the consent of the Senate, it prescribes the term of the tenure . . .

The end to which the President's efforts are to be directed is not the most efficient civil service conceivable, but the faithful execution of the laws consistent with the provisions therefor made by Congress. A power essential to protection against pressing dangers incident to disloyalty in the civil service may well be deemed inherent in the execu-
tive office. But that need, and also insubordination and neglect of duty, are adequately provided against by implying in the President the constitutional power of suspension. Such provisional executive power is comparable to the provisional judicial power of granting a restraining order without notice to the defendant and opportunity to be heard. Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the President. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government.

To imply a grant to the President of the uncontrollable power of removal from statutory inferior executive offices involves an unnecessary and indefensible limitation upon the constitutional power of Congress to fix the tenure of inferior statutory offices. That such a limitation cannot be justified on the ground of necessity is demonstrated by the practice of our governments, state and national...

The assertion that the mere grant by the Constitution of executive power confers upon the President as a prerogative the unrestricted power of appointment and of removal from executive offices, except so far as otherwise expressly provided by the Constitution, is clearly inconsistent also with those statutes which restrict the exercise by the President of the power of nomination. There is not a word in the Constitution which in terms authorizes Congress to limit the President's freedom of choice in making nominations for executive offices. It is to appointment as distinguished from nomination that the Constitution imposes in terms the requirement of Senatorial consent. But a multitude of laws have been enacted which limit the President's power to make nominations, and which, through the restrictions imposed, may prevent the selection of the person deemed by him best fitted. Such restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government. Every President has approved one or more of such acts. Every President has consistently observed them. This is true of those offices to which he makes appointments without the advice and consent of the Senate as well as of those for which its consent is required...

The practical disadvantage to the public service of denying to the President the uncontrollable power of removal from inferior civil offices would seem to have been exaggerated... for he can, at any time, exercise his constitutional right to suspend an officer and designate some other person to act temporarily in his stead; and he cannot, while
the Senate is in session, appoint a successor without its consent. On the other hand, to the individual in the public service, and to the maintenance of its morale, the existence of a power in Congress to impose upon the Senate the duty to share in the responsibility for a removal is of paramount importance. The Senate's consideration of a proposed removal may be necessary to protect reputation and emoluments of office from arbitrary executive action. Equivalent protection is afforded to other inferior officers whom Congress has placed in the classified civil service and which it authorizes the heads of departments to appoint and to remove without the consent of the Senate. The existence of some such provision is a common incident of free governments. In the United States, where executive responsibility is not safeguarded by the practice of parliamentary interpellation, such means of protection to persons appointed to office by the President with the consent of the Senate is of special value.

Until the Civil Service Law, January 16, 1883, was enacted, the requirement of consent of the Senate to removal and appointment was the only means of curbing the abuses of the spoils system... the removal clause... had been recommended by Mr. Justice Story as a remedial measure, after the wholesale removals of the first Jackson administration. The Post Office Department was then the chief field for plunder. Vacancies had been created in order that the spoils of office might be distributed among political supporters. Fear of removal had been instilled in continuing office holders to prevent opposition or lukewarmness in support. Gross inefficiency and hardship had resulted...

The first substantial victory of the civil service reform movement, though a brief one, was the insertion of the removal clause in the Currency bill of 1863... It was in the next Congress that the removal clause was applied generally by the Tenure of Office Act. The long delay in adopting legislation to curb removals was not because Congress accepted the doctrine that the Constitution had vested in the President uncontrollable power over removal. It was because the spoils system held sway...

The separation of the powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial...

Checks and balances were established in order that this should be "a government of laws and not of men." As [Representative] White...
said in the House, in 1789, an uncontrollable power of removal in the Chief Executive “is a doctrine not to be learned in American governments” . . . The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide; and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals. Limiting further executive prerogatives customary in monarchies, the Constitution empowered Congress to vest the appointment of inferior officers, “as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” Nothing in support of the claim of uncontrollable power can be inferred from the silence of the Convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected. In America, as in England, the conviction prevailed then that the people must look to representative assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.

ASHWANDER V. TENNESSEE VALLEY AUTHORITY, 1935

Although this case involved the power of the TVA to construct the Wheeler Dam, Brandeis considered the main issue to be the way the case had reached the Court. It had been brought as a stockholders’ suit, a way of getting the courts to rule on the legitimacy of a statute that embodied a policy with which the plaintiffs disagreed. Brandeis would have upheld the TVA’s authority without reaching the constitutional issue, because the plaintiffs had no real financial—as opposed to policy—interest in the case, and took the occasion to delineate what he considered to be the scope of the Court’s authority in constitutional
cases. It was his attempt to articulate the limited nature of judicial review, and it has been cited extensively in subsequent litigation.

MR. JUSTICE BRANDEIS, concurring.

The Court has frequently called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions . . .

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:

1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding, declining because to decide such questions "is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

2. The Court will not "anticipate question of constitutional law in advance of the necessity of deciding it."

3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right. Thus, the challenge by a public official interested only in the performance of his official duty will not be entertained . . .
6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." [Crowell v. Benson, 285 U.S. 22, 62]

LETTER TO ELIZABETH BRANDEIS RAUSHENBUSH,
NOVEMBER 19, 1933

As had been the case during the Wilson administration, Brandeis was deeply involved in the New Deal. He invited a large number of the major policymakers to the weekly teas at his home that quickly became a regular part of Washington life. Mrs. Brandeis made certain that each person had an allotted time with the justice, and the list of members of Congress, executive branch officials, younger bureaucrats, labor leaders, diplomats, and journalists who spoke with him included the most powerful people in Washington. While he used the occasions to learn from them, he also made certain that they understood what he thought the government ought to be doing next. He did the same thing in a more concentrated way through Felix Frankfurter, Frankfurter’s protégés Thomas Corcoran and Benjamin Cohen, and Brandeis’s former clerk James Landis, the last three New Deal officials engaged in drafting much of the New Deal’s most important statutes such as the Public Securities Act of 1933, the Securities Exchange Act of 1934, the Holding Company Act of 1935, and the Social Security Act of 1935. He had detailed ideas about how to pull the country out of the Depression and prepare it for the second half of the twentieth century, and he used every opportunity to urge them upon policymakers. His daughter, one of the creators of the Wisconsin unemployment plan that was the model for the federal Wagner Act, was working with a group of progressives planning to issue a manifesto about governmental policy. The manifesto never emerged, but the Brandeis letter provides additional details about what he thought the government should do.

Curb of bigness is indispensable to true Democracy & Liberty. It is the very foundation also of wisdom in things human.
"'Nothing too much'"

I hope you can make your progressives see this truth. If they don't, we may get amelioration, but not a working 'New Deal.' And we are apt to get Fascist manifestations. Remember, the inevitable ineffectiveness of regulation, i.e. the limits of its efficiency in regulation.

If the Lord had intended things to be big, he would have made man bigger—in brains and character.

My "'running waters'" suggestion was this. My idea has been that the Depression can be overcome only by extensive public works.

(a) that no public works should be undertaken save those that would be effective in making the America of the future what it should be.

(b) that we should avail of the present emergency to get those public works which Americans would lack the insight & persistence to get for themselves in ordinary times.

These public works are, for every state,

(1) afforestation
(2) running water control
(3) adult education
(4) appropriate provision for dealing with defectives and delinquents.

By "'running Water Control'" I mean this:

In this country, where the rain fall is, in the main, between 35 and 50 inches, and the country largely blessed with hills or mountains, it is absurd to permit either floods or droughts, or waste of waters. We should so control all running waters, by reservoirs, etc., so

(a) as to prevent floods & soil erosion
(b) to make it possible to irrigate practically all land
(c) to utilize the water for power & inland navigation
(d) & for recreation

Every state should have its lakes and ponds galore. Doubtless, you will recall much discourse of mine on this subject.

HARRY SHULMAN, "MEMORANDUM OF TALK WITH L.D.B.—DECEMBER 8, 1933"

Shulman had been Brandeis's law clerk during the Supreme Court's 1929-1930 term and subsequently became a professor at Yale Law School. Like all of Brandeis's clerks, he was a graduate of Harvard Law School and a protégé of Felix Frankfurter, to whom he sent this memo-
Harry Shulman, “Memorandum of Talk with L.D.B.” / 195

L.D.B. asked . . . “do you want to know my program for recovery?” I expressed enthusiasm and he proceeded to tell it to me “in a few words”:

The object is to make men free. The Government is to impose limitations in order to achieve that object. And in determining what to do we should profit by our experience. This depression, unlike previous ones, was not caused by flood, famine, plague or other public calamity. It came about because of the failure of the Government to impose controls to prevent a breakdown.

First, I would take the Government out of the hands of the bankers. I would do that by opening the postal savings department to all depositors without limitation of amount. I would establish in the post office also a checking department, so that the post office could be used for commercial accounts. I should also make the postal department the agency for the issuance of securities. By appropriate federal taxation, I would split up the banking business into its separate parts and prohibit any bank from doing any more than one kind of banking business, so that there would be separate savings banks, commercial banks, investment banks, etc. This would avoid the evil of great concentration of financial power in the hands of bankers.

Secondly, by appropriate federal taxation I would limit the amount of property which any person could acquire or pass down upon death. I would fix the maximum at, say, a million dollars, although that may be too high.

Thirdly, by appropriate federal excise taxes I would limit the size of corporations. I would do it not only with respect to corporations to be formed in the future, but also for existing corporations. [Here I interjected a statement about the renewed agitation for federal incorporation. Both L.D.B. and Mrs. B. quickly frowned upon it. I would leave a lot of power to the states, said L.D.B. and have the federal government help and direct the States by appropriate taxation. The federal government must not become too big just as corporations should not be permitted to become too big. You must remember that it is the littleness
of man that limits the size of things we can undertake. Too much bigness may break the federal government as it has broken business.]

Fourthly, I would establish a system of unemployment compensation similar to that adopted in Wisconsin. The system should be operated by the states but the federal Government by appropriate taxation and exemption from taxation should furnish the force which would compel the establishment of such systems. The purpose of unemployment compensation would be to bring stability, and it is the lack of this stability which has been a very important factor in the depression. The compensation system should be so framed that the business man will have to take into account the welfare of his employees as well as his investment when making plans for the future. The compensation system would not give us 100% stability but it will give it to us within a ten or fifteen per cent margin, and the resulting maintenance of purchasing power will tend to prevent the collapse which we are experiencing. I would do other things, of course, but these are the main points.

I suggested to L.D.B. that the first response, particularly to the third point, would be that it was attempting to do the impossible, to turn the clock back. His reaction was immediate and spirited: why shouldn't we turn the clock back? We just turned the clock back on a "noble experiment" [Prohibition] which was unanimously adopted in the country and was being tried for some time. At any rate whether the program can be executed or not is a separate question. To have that objection raised only confuses the proponent and directs his mind away from the real issue. First, we must determine what it is desirable to do and then we can find ways and means to do it. If Roosevelt would come out with this kind of a developed program, and if we could get spirit behind it, it could easily be put over.

At this point Mrs. B. pulled the Justice's trouser and I understood that time was up.