



UNITED STATES
COMMISSION ON
CIVIL RIGHTS

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The proposed legislation to provide for fair employment practices in the Senate and the House of Representatives, in particular S. 1165, is introduced in the context of criticism leveled against Congress for excluding itself from a long list of civil rights and regulatory legislation passed in recent years. Critics of this practice commonly recur to the concern that laws passed by republican legislatures should apply to all citizens equally, and that republican lawmakers should not presume to establish themselves as a privileged class. As I shall explain below, this concern is not only persuasive theoretically, but is well-established in the American political tradition not only in the Constitution itself, but in the writings of its framers.

Although the introduction of S. 1165 and the present hearings represent an acknowledgement by Congress of the merits of the substance of its critics' charges, the course it has chosen here to meet this criticism by no means meets the particulars of the argument for equal obligations to the laws. In brief, Congress in this bill does not propose to rescind congressional exclusion, but rather to establish it more securely in place by means of the ingenuous stratagem of substituting a different law for itself alone over which it has exclusive control as to interpretation and execution.

At issue here is more than instances of congressional hubris, however egregious. More to the point, we face here the most fundamental of civil rights issues, to wit,—the equal rights of citizenship proper to a regime in which the true sovereigns are its free people. After all, the rule of law is proper to democratic government precisely because law establishes a common measure of action applicable to rich and poor alike, to the learned and the ignorant, the celebrated and the obscure, to representative and elector, to those of all races and creeds equally.

The proper democratic relation between representative and elector is delineated most clearly and authoritatively by James Madison in the 57th *Federalist*, one of a series of papers replying to objections raised against the manner in which the Constitution of 1787 institutes a House of Representatives. The charge Madison takes up in *Federalist 57* is that the Congress will be composed of “a class of citizens which will have least sympathy with the mass of the people, and be most likely to aim at an ambitious sacrifice of the many to the aggrandizement of the few.” In other words, the objection raises the

spectre “of a pretended oligarchy,” and in principle “strikes at the very root of republican government.”

This possibility arises from the difficulty that “the elective mode of obtaining rulers is the characteristic policy of republican government.” It would be possible, after all, to select (not to choose) representatives by lot. But Madison, in a celebrated passage, defends the election of representatives on grounds that:

the [proper] aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

The desirability of obtaining for representatives those with unequal (superior) qualifications for office raises starkly the question of how to retain political equality between the people and an elected legislative body. This difficulty is heightened, as Madison wryly intimates, when one admits that the enjoyment of power may come to supercede political excellence, or according to the possibility that the votes of well meaning citizens may be obtained fraudulently by candidates with base ambitions by no means consonant with the common good.

Madison goes on to recite the circumstances of popular election instituted in the Constitution which work to deter oligarchy. Among these are a genuinely popular suffrage and the absence of qualifications of wealth, birth, religious faith, or civil profession for candidates for office. Furthermore, the situation of the representative once elected offers motives which should bind him to the electorate. These include gratitude and self-interest: gratitude for the trust and esteem of the electors, and the self-interested pursuit of measures which one hopes will gain them further esteem. Furthermore, Madison remarks that the certainty of frequent elections which may result in one’s defeat operate so as to “support in the members an habitual recollection of their dependence on the people.” Thus the fear of defeat works to engender respect for the people and their opinions, offering an incentive for the responsible representative to try to persuade constituents of the merit of his opinions as well as to listen to their arguments.

But, Madison writes, the ultimate circumstance which restrains members of Congress from oligarchy is:

that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments of which few governments have furnished examples; but without which every government degenerates into tyranny.

Of such great importance is this principle that Madison suggests the ultimate sanction against its transgression is the people’s recourse to their natural right of revolution:

If it be asked, what is to restrain the [Congress] from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius

of the whole system; the nature of just and constitutional laws; and, above all, the vigilant and manly spirit which actuates the people of America—a spirit which nourishes freedom, and in return is nourished by it. If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate anything but liberty.

Considering the importance of the principle at issue for the preservation of our democratic institutions, it would seem to be at the least incumbent on the Congress to give an account of the necessity of continued congressional exclusion so that the people might judge whether it is a truly necessary violation of democratic principles. One argument which I have heard made in this connection is that applying, for example, civil rights laws to Congress would enable the Executive Branch to so harass Congress in executing the laws as to thereby constitute a violation of the separation of powers. According to this account, the separation of powers would require Congress to insulate itself from any possibility of executive enforcement of laws against it.

This objection, however, is based upon a faulty understanding of the separation of powers, which, far from requiring an absolute insulation of the branches from the influence of the others, actually works precisely by allowing the branches to interact one with another. Furthermore, there is no necessity here for Congress to fear, even in the event of a concerted executive attack upon Congress. Congress can always simply change or repeal the laws, either to clarify them so as to narrow the executive's prerogative in their enforcement, or to eradicate them from the statute books. After all, if complying with a law is inconvenient and onerous for Congress, a fair conclusion might be that the same law is inconvenient and onerous for others.

Finally, it cannot be, that as powerful as Congress is in this city, and as much as people fear it, that Congress should not trust the executive and the courts to apply the laws to them with equal prudence and discretion as they do to the people at large. Indeed, if anything the opposite should be feared: that the bureaucrats entrusted with enforcing civil rights laws in the several federal agencies would shrink from applying those laws with the appropriate rigor against the very congressmen who control their budgets, their jobs, and, by virtue of their power of investigation, even their reputations and their freedom.

But this difficulty would never make it preferable for Congress to claim for itself the executive and the judicial, as well as the legislative, power with respect to its own actions. For this true and significant violation of the separation of powers is part and parcel of this bill, which I would beg the Congress to reconsider. Let us be clear that the present bill not only intends a separate law for Congress alone, but also would establish a purely congressional enforcement mechanism and judicial body. The latter body is made "necessary" in part because the proposed bill purposes to "apply the standards and principles of certain Federal civil rights, labor, safety, and health laws to congressional employees" rather than the very laws themselves. The executive body also will be allowed a great and undue measure of interpretation since "the principles and standards" of said laws shall be applied to "each congressional employee" under the mysterious qualification "to the greatest extent applicable."

The collapsing of legislative, executive, and judicial powers in this bill, along with its vagueness of purpose and latitude of application, makes Congress the very worst sort of judge in its own cause with respect to the present business. There is no real law here, but merely an occasion for particular determinations to be made with respect to individual cases.