

1959

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### Recommended Citation

Roy M. Cohn and Thomas A. Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 Fordham L. Rev. 233 (1959).

Available at: <https://ir.lawnet.fordham.edu/flr/vol28/iss2/3>

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## The Supreme Court and the A.B.A. Report and Resolutions

### Cover Page Footnote

Members of the New York Bar.

# THE SUPREME COURT AND THE A.B.A. REPORT AND RESOLUTIONS

ROY M. COHN\*

THOMAS A. BOLAN\*

## INTRODUCTION

ON February 24, 1959, the House of Delegates of the American Bar Association, acting on the report and recommendations of its Special Committee on Communist Tactics, Strategy and Objectives, passed five resolutions dealing directly or indirectly with decisions of the United States Supreme Court on matters of internal security.<sup>1</sup>

In its report, the Special Committee stated that the Supreme Court, in many cases, had unnecessarily limited national and state security efforts, thus encouraging increased communist activity in the United States; that the "paralysis of our internal security grows largely from construction and interpretation centering around technicalities emanating from our judicial process . . .";<sup>2</sup> and that the majority of the Supreme Court has failed "to recognize the underground forces that are at work and to appreciate how these decisions affect our internal security."<sup>3</sup> The Committee summarized twenty-four cases "criticized by the public, public officials, and the bar in varying degrees as illustrative of how our security has been weakened . . ."<sup>4</sup> Its report also contained a detailed analysis of communist tactics and strategy, stating that it is a fallacy to assume that communist power in the United States is diminishing because the party is dwindling in numbers, and concluded that the "danger and the menace of communism are worse than ever."<sup>5</sup>

Using its report as a basis, the Committee submitted to the House of Delegates<sup>6</sup> five resolutions which were adopted by the House with but a few minor changes. Under its procedures, the House of Delegates did not and could not have approved the report itself.<sup>7</sup>

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\* Members of the New York Bar.

1. For the full text of the resolutions and the debate preceding their adoption see 45 A.B.A.J. 406-10 (1959) [hereinafter cited as A.B.A. Resolutions]. The full text of the report may be found in 105 Cong. Rec. A1470-81 (daily ed. Feb. 25, 1959) [hereinafter cited as A.B.A. Report].

2. A.B.A. Report at A1472.

3. *Id.* at A1473.

4. *Ibid.*

5. *Id.* at A1480.

6. The Board of Governors, in transmitting to the House of Delegates its approval of these resolutions, issued a statement saying "that its [the Board of Governors] action did not 'in any way intend to indicate censure of the Supreme Court of the United States.'" N.Y. Times, Feb. 22, 1959, p. 1, col. 3.

7. In approving the resolutions, the Board of Governors said: "The recommendation

The resolutions and their prefatory language may be summed up as follows:<sup>8</sup>

(1) While members of the Association view some of the decisions of the Supreme Court as unsound and incorrect, the Association disapproves proposals to limit any jurisdiction vested in the Court. Where decisions of the Court weaken internal security, remedial legislation should be enacted by Congress, including a pronouncement that state statutes proscribing sedition against the United States shall have concurrent enforceability.

(2) Declarations by the Supreme Court to the effect that the House of Representatives has not been specific enough in defining the authority of the House Un-American Activities Committee have impeded the work of Congress, and the House of Representatives should, therefore, clarify its delegation of authority to this Committee.

(3) Subpoenas issued by congressional committees should be accompanied by a written copy of the precise terms of the committee's basic authority.

(4) Recent decisions of the United States Supreme Court have created problems of safeguarding national and state security and have been severely criticized as unsound by many responsible authorities. These problems are best resolved by a careful study of each decision and the prompt enactment by Congress of legislation to remedy any defect in existing law revealed by these decisions. In order to eliminate obstacles to the preservation of our internal security, legislation should be enacted in the following areas:

(a) Amendment of the Smith Act to define the word "organize" as including activities of an organizational nature;

(b) amendment of the Smith Act to make it a crime intentionally to advocate or teach the necessity of violent overthrow of the United States Government;

(c) establishment of the right of each branch of the Government to require as a condition of employment that an employee shall not refuse to answer a query as to subversive activities or as to any other matter bearing upon his loyalty;

(d) the executive branch should be permitted to deport any aliens who were or became communists at any time subsequent to entry into the United States; to enforce reasonable restrictions on aliens awaiting deportation to prevent them from engaging in activities on which their deportation order was based with the right to interrogate them concerning subversive associates or activities; and

(e) political propoganda by agents of foreign principals be labeled for what it is where such agents are outside the United States but nevertheless directly or indirectly disseminating such propoganda within the United States.

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for approval, in the case of this report as in the case of all other reports of Association Sections and Committees, does not constitute endorsement of statements in the report itself, such statements being those of the individual members of the Committee." Malone, *The Communist Resolutions: What the House of Delegates Really Did*, 45 A.B.A.J. 343, 346 (1959).

8. A.B.A. Report, at A1471-72.

(5) The Sub-Committee on Internal Security of the Senate Judiciary Committee and the House Un-American Activities Committee have performed a great service to the nation and continuation of their work is essential. Said committees should maintain close liaison with the Attorney General and intelligence and security agencies.

The resolutions of the House of Delegates were greeted favorably in many quarters but met with a storm of disapproval in others. Joseph L. Rauh, Jr., former National Chairman of the Americans for Democratic Action termed the resolution "a disgrace to the legal profession."<sup>9</sup> Warren Olney III, Director of the Administrative Office of the United States Courts, resigned from the A.B.A., stating that the action taken was "'so discreditable to the Association that I do not want to be identified with the organization any longer.'"<sup>10</sup> He charged that the delegates' action was "'inconsistent with their professional obligations, as lawyers, to the courts.'"<sup>11</sup>

The American Civil Liberties Union stated that the report on the Supreme Court was "'unprofessional and irresponsible'" and showed a "'surprising disregard for fundamental human rights.'"<sup>12</sup> It maintained that the American Bar Association "'has done a serious disservice upon the internal security of our country, the rights of people within it, and the concept of equal justice under the law as enunciated by the Supreme Court of the United States.'"<sup>13</sup> The Union denounced the report as "'unworthy of the intellectual standard the bar should represent and the standards of professional ethics required by the A.B.A.'"<sup>14</sup> It also stated that the House of Delegates had ignored the fact that the Special Committee was "'dominated by members intimately identified with the Federal security program.'"<sup>15</sup>

The Committee on Federal Legislation of the New York City Bar Association concluded that the A.B.A. resolutions had caused "concern and confusion" and had left an unfortunate "impression that recent decisions have endangered our security and that the Court has been insufficiently mindful of security needs."<sup>16</sup> It also criticized the A.B.A. for not mentioning that some Supreme Court decisions involving com-

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9. N.Y. Post, March 2, 1959, p. 19, cols. 1-2.

10. N.Y. Times, April 9, 1959, p. 17, col. 3.

11. Ibid.

12. N.Y. Times, April 19, 1959, p. 1, col. 3.

13. Id. at 82, col. 8.

14. Id. at 82, col. 1.

15. Id. at 1, col. 3.

16. Report of the Committee on Federal Legislation on the American Bar Association Recommendations Concerning Legislation to Alter the Effects of Recent Decisions of the Supreme Court of the United States, 14 Record of N.Y.C.B.A. 241 (1959) [hereinafter cited as 14 Record].

munism were favorable to the Government.<sup>17</sup> The National Lawyers Guild warned that the A.B.A. action constituted "a grave threat to the civil rights and liberties of the people."<sup>18</sup>

An expected source of criticism was the Communist Party which denounced the members of the Special Committee as "witch-hunters" and "reactionary corporation lawyers."<sup>19</sup>

In the face of this controversy, the President of the American Bar Association admonished that labeling of the resolutions of the House of Delegates as an attack upon the Supreme Court was "wholly unjustified and contrary to fact."<sup>20</sup> The Attorney General of the United States was quoted as stating that he did not consider the Association resolutions as an attack upon the Court.<sup>21</sup> Members of the New York State Bar Association also recently became "embroiled" in a controversy as to whether the A.B.A. had expressed criticism of the Supreme Court.<sup>22</sup> The A.B.A. Committee on the Bill of Rights has announced its disagreement with the conclusions of the Special Committee.<sup>23</sup>

A reading of the report and accompanying resolutions compels the conclusion that the A.B.A. did in fact criticize the Supreme Court, not as an institution, but rather as the author of poor decisions. Insofar as it relates to Supreme Court decisions, an accurate and simple summary of the Special Committee's report would be that the Committee disapproved of certain Supreme Court decisions and, because of their adverse affect on our internal security efforts, the Committee believed that these decisions should be remedied by legislation. The authors of this article believe that the report and the resolutions of the American Bar Association are justified. The type of criticism which has been generally aimed at the A.B.A. illustrates a double standard in thinking prevalent among some liberal quarters today which has frequently manifested itself in Supreme Court rulings as well. It consists of the application of one set of rules for the liberal side and another for those of different persuasions. It is particularly employed when any problem arises in connection with "civil liberties," particularly in the area of subversion.

The purpose of this article is to demonstrate that there is nothing unusual or improper about the manner in which the A.B.A. criticized the

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17. *Id.* at 247.

18. Report of the National Lawyers Guild on the Recommendations of the American Bar Association in Hearings before the Subcommittee on Proposed Antisubversion Legislation of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., pt. 1, at 235 (1959) [hereinafter cited as Senate Hearings].

19. Shields, *Witchhunters Steer Bar Association Against Liberty*, *The Worker*, March 22, 1959, p. 7, cols. 1-5.

20. Malone, *supra* note 7, at 346.

21. *N.Y. Herald Tribune*, April 23, 1959, p. 8, col. 2.

22. See *N.Y. Times*, June 28, 1959, § 1, p. 53, col. 3.

23. *N.Y. Times*, Aug. 13, 1959, p. 29, col. 8. See also *N.J.L.J.*, Aug. 20, 1959, p. 1, col. 2.

Supreme Court, and further that, on the merits, such criticism was completely warranted. An historical review of Supreme Court criticism will demonstrate the lack of impropriety or uniqueness in the A.B.A. action. A survey of the cases which the resolutions seek to remedy, as well as others mentioned in the Special Committee's report, will demonstrate that the A.B.A.'s conclusions do have a solid basis.

#### I. CRITICISM OF THE SUPREME COURT

The Supreme Court as an institution under our form of government should not be altered since the Court serves as a vital check on any abuse of power by the other two governmental branches and by the states. Impatience with certain holdings is certainly no justification for taking drastic action against the Court's basic structure. Any deficiencies in decisions may be cured by corrective legislation or constitutional amendment, if necessary.

However, this does not mean that the Supreme Court should remain immune to criticism. Appointment to this bench does not per se confer infallibility upon any individual. To deprive laymen and lawyers of the right to analyze and reprove policy-making pronouncements of the Supreme Court would be an undue curtailment of free speech. It is submitted that those who have spearheaded the attack on the A.B.A. resolutions are guilty of employing a double standard. When the Court-packing program was in focus in 1937, certain liberal elements countenanced criticism of the Supreme Court which renders that of the A.B.A. pale by comparison. Typical of the attacks upon the Court during that era was the following statement of President Franklin D. Roosevelt on March 9, 1937:

The court in addition to the proper use of its judicial functions has improperly set itself up as a third house of the Congress—a superlegislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the court and the court from itself. . . .

Our difficulty with the court today rises not from the court as an institution but from human beings within it.<sup>24</sup>

At that time, these liberals sought basic structural changes in the Supreme Court, espousing a short range view which demanded drastic, irrevocable action because of temporary impatience. All that we urge is the right to disagree with the Supreme Court, not the power to destroy it, as indeed was being advocated by many of the present-day defenders of the Court.

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24. Quoted in Lawrence, *Today in National Affairs*, N.Y. Herald Tribune, March 6, 1956, p. 25, cols. 1-2.

A. *Criticism of the Court (1789-1920)*

The history of the Supreme Court is replete with controversy, and rarely has it not been under fire.<sup>25</sup> As far back as 1794, the Court's decision in *Chisholm v. Georgia*,<sup>26</sup> holding that the Constitution gave the federal judiciary power to summon states in contract actions, "fell upon the country with a profound shock."<sup>27</sup> The House of Representatives of Georgia reacted by passing a bill providing that any federal officer who attempted to execute process in the case was "guilty of felony, and should suffer death, without benefit of clergy, by being hanged."<sup>28</sup> Shortly thereafter, the Court was vigorously assailed "in most poignant anathema" for upholding the Alien and Sedition Laws.<sup>29</sup>

Thomas Jefferson's first presidential term can be characterized as chiefly a struggle against the Supreme Court. Jefferson stated that it was a "very dangerous doctrine to consider the judges the ultimate arbiters of all constitutional questions,"<sup>30</sup> referring to the Court as "subtle sappers and miners, constantly working underground to undermine the foundations of our confederated fabric . . .'"<sup>31</sup>

President Andrew Jackson made assaults upon the Supreme Court an element of Jacksonian democracy.<sup>32</sup> In voicing defiance of one Supreme Court ruling, Jackson is reputed to have said, "John Marshall has pronounced his judgment: let him enforce it if he can."<sup>33</sup>

In 1834, the Supreme Court was depicted as the "great engine" of Congress, consecrating the latter's unconstitutional laws.<sup>34</sup> President

25. See Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1, 161 (1913), for a detailed account of the numerous attacks on the appellate jurisdiction of the Court during the period from its inception up through 1913.

26. 2 U.S. (2 Dall.) 415 (1793).

27. 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1932).

28. Quoted in 1 Boudin, *Government by Judiciary* 129 (1932).

29. Speech of Henry Lee before Congress, Jan. 23, 1801, quoted in Warren, *Congress, the Constitution and the Supreme Court* 121 (rev. ed. 1935).

30. Foley, *Jeffersonian Cyclopedia* 845-46 (1900).

31. Warren, *op. cit. supra* note 29, at 196. Violent attacks were made on the Court for its decisions in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), upholding the congressional charter of the Bank of the United States, and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), which affirmed federal writs of error to state court judgments.

32. "The Congress, the Executive and the Court must each for itself be guided by its own opinion of the constitution . . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve." 2 Richardson, *Messages of the Presidents* 582 (1896).

33. Quoted in 1 Bryce, *The American Commonwealth* 269 (3d ed. 1895).

34. Statement of Congressman Warren R. Davis of South Carolina, Chairman of the House Judiciary Committee, quoted in Warren, *op. cit. supra* note 29, at 197.



Martin van Buren "complained bitterly of the encroachments of the Supreme court, and declared that it would never have been created had the people foreseen the powers it would acquire."<sup>35</sup>

The most violent onslaught against the Court took place during the ten-year period after the passage of the fugitive slave law in 1850. The famous Lincoln-Douglas debates revolved mainly about the *Dred Scott*<sup>36</sup> decision. Lincoln maintained that while the decision controlled Dred Scott, he, Lincoln, would not be bound by it.<sup>37</sup>

In 1873, the Court was censured for being too conservative and pro-monopoly, while a few years later it was deemed in turn radical, anti-corporation, and anti-railroad.<sup>38</sup> In 1884, the Court's decision<sup>39</sup> declaring legal tender laws constitutional in both peace and war was assailed for foisting upon the country, dishonest, oppressive and unconstitutional legislation.<sup>40</sup> Labor, for its part, was denouncing the Court in 1908 for allegedly favoring capitalists and employers.<sup>41</sup>

In 1912, Gustavus Myers, author of a history of the Supreme Court, depicted the latter as the stronghold of "'reactionary' capitalism."<sup>42</sup> Senator Robert M. La Follette, in a stinging rebuke, asserted that:

The regard of the Courts for fossilized precedent, their absorption in technicalities, their detachment from the vital living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes, have brought our Courts into conflict with the democratic spirit and purpose of this generation. Moreover . . . by presuming to read their own views into statutes without regard to the plain intention of the legislators they have become in reality the supreme law-giving institution of our government.<sup>43</sup>

### B. *Criticism of the Court (1920-1937)*

Liberals today who condemn any criticism of the Supreme Court are those who a few years ago sought to destroy its role in our government. Little research is needed to unearth evidence of this during the period between 1920 and 1937.

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35. 1 Bryce, op. cit. supra note 33, at 268 n.2.

36. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

37. See 1 Boudin, op. cit. supra note 28, at 29-33. In commenting on this case, the New York Tribune charged that the Court had "rushed into politics" and that the decision was "entitled to just as much weight as would be the judgment of a majority of those congregated in any Washington barroom." Quoted in Williams, *The Law of the Land*, National Review, Dec. 22, 1956, p. 16.

38. Warren, op. cit. supra note 29, at 269.

39. *Legal Tender Case*, 110 U.S. 421 (1884).

40. Bancroft, *The Constitution Wounded in the House of Its Guardians*, cited in 1 Boudin, op. cit. supra note 28, at 23.

41. Warren, op. cit. supra note 29, at 269.

42. Quoted in Palmer, *Causes of Dissents: Judicial Self-Restraint or Abdication*, 34 A.B.A.J. 761, 763 (1948).

43. *Ibid.*

In the early 1920's, the Court was taken to task for its alleged suppression of freedom of speech.<sup>44</sup> During this same period, labor leaders, radicals, and sociologists challenged the right of the Court to render any decision regarding the validity of a federal statute.<sup>45</sup> In 1924, Norman Thomas advocated curtailment of the power of the Supreme Court because it had declared anti-injunction legislation unconstitutional.<sup>46</sup> That same year, the Supreme Court Justices were being accused by liberals of invoking "their own social and economic views as against the social and economic views of the majority of Congress."<sup>47</sup>

In 1930, Senator William E. Borah of Idaho alleged that the Supreme Court had become, under the fourteenth amendment, the "economic dictator in the United States,"<sup>48</sup> while Louis Boudin was writing in 1932 that "*there is a steady course of absorption of power by the United States Supreme Court at the expense of all other departments of government and of the people themselves.*"<sup>49</sup>

In May 1935, the Attorney General of the United States wrote President Roosevelt that "apparently there are at least four justices who are against any attempt to use the power of the Federal Government for bettering general conditions, except within the narrowest limitations."<sup>50</sup> President Roosevelt, in turn, sarcastically referred to the Court as belonging in "the horse-and-buggy days."<sup>51</sup>

Louis Boudin again wrote in 1937 that the Supreme Court was "a law unto itself" and had "diminished our civil rights by giving to the Constitution a narrow interpretation—often flying in the face of established legal principles and the clear language of the document."<sup>52</sup> He added that the Court had deprived remaining civil rights of any real content by preventing the federal government from protecting them.<sup>53</sup>

Certainly, the criticism of the Supreme Court as found in the report of the A.B.A. Special Committee is mild in comparison to some of these pronouncements by noted liberals. Not only is the criticism much milder, but the remedy proposed by the A.B.A., amendatory legislation, is much less drastic than some of the measures championed by liberals in the past. For example, Senator La Follette proposed a constitutional

44. See Warren, *op. cit.* supra note 29, at 270.

45. *Id.* at 129.

46. *Id.* at 132 n.1.

47. The Red Demon of Judicial Reform, *New Republic*, Oct. 1, 1924, p. 110.

48. Quoted in the *N.Y. Times*, Feb. 12, 1930, p. 18, col. 3.

49. 2 Boudin, *op. cit.* supra note 28, at 548-59.

50. Milton, *The Use of Presidential Power, 1789-1943*, at 277 (1944).

51. Taylor, *Grand Inquest, The Story of Congressional Investigations 68* (1955).

52. Boudin, *The Supreme Court and Civil Rights, Science & Soc'y* 274, 309 (Spring 1937).

53. *Id.* at 309.

amendment providing that a federal statute held unconstitutional by the Court and enacted by Congress a second time by at least a two-thirds majority could not thereafter be held unconstitutional.<sup>54</sup> When Supreme Court decisions met with President Franklin D. Roosevelt's disapproval, he unsuccessfully attempted to "pack the Court" in 1937 by proposing legislation which would permit him to nominate an additional Justice for each Justice who did not retire at the age of seventy, the Court not to exceed fifteen members.<sup>55</sup> Six of the Justices then on the Court were over seventy.

In the light of this history, it is clear that present liberal support of the Supreme Court is due mainly to the latter's issuance of favorable pronouncements.<sup>56</sup> When decisions were objectionable, however, these same elements were quick to criticize the Court and propose extreme remedies to curtail its influence. Mr. Justice Black, when a Senator, supported President Roosevelt's Court-packing plan.<sup>57</sup> Indeed, the history of criticism aimed at the Court shows that "those who have attacked the Court for a decision to-day have often been the very persons to praise it for another decision to-morrow."<sup>58</sup> The Supreme Court has been denounced so frequently that it is almost true that "one ordinarily need go no further than his favorite historical character to find some juicy tidbit of invective."<sup>59</sup> History, therefore, reveals nothing that is unusual in the manner or tone of the A.B.A. criticism.

### C. *The Justices and Criticism of the Court*

Members of the Supreme Court have often declared that criticism of the Court is beneficial and not harmful.<sup>60</sup> As Mr. Justice Brewer stated in 1898:

It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subjected to the freest criticism. . . . True, many criticisms may be, like their author, devoid of good taste, but better all sorts of criticism than no criticism at all.<sup>61</sup>

54. Warren, *Congress, the Constitution and the Supreme Court* 138 (1925).

55. Milton, *op. cit. supra* note 50, at 278.

56. See, e.g., Westin, *When the Public Judges the Court*, N.Y. Times, May 31, 1959, § 6 (Magazine), p. 16.

57. Palmer, *The Court and the Popular Will: What Is Their True Function in Our Legal System?*, 35 A.B.A.J. 101, 104 n.18 (1949).

58. Warren, *op. cit. supra* note 54, at 270-71.

59. Dunsford & Childress, *Attacks on the Supreme Court*, 4 Catholic Law. 57 (1958).

60. Chief Justice Warren of the present Court apparently does not subscribe to this view, it having been reported that he has resigned from the American Bar Association because of its adverse criticism of the Court. See N.Y. Herald Tribune, April 23, 1959, p. 8, cols. 1-2. See also Malone, *The President's Page*, 45 A.B.A.J. 317, 324 (1959).

61. 15 Nat. Corp. Rep. 848, 849 (1898).

In *Bridges v. California*,<sup>62</sup> Mr. Justice Black maintained that to assume that respect for the judiciary could be obtained by insulating judges from published criticism was an erroneous appraisal of the character of American public opinion.<sup>63</sup> He observed that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."<sup>64</sup> Mr. Justice Frankfurter, dissenting in the same case, pointed out that because of their judicial office, judges may become oblivious of their common human frailties and fallibilities, and have, at times, even been martinets on the bench.<sup>65</sup> "Therefore," he claimed, "judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."<sup>66</sup>

Along the same lines, Mr. Justice Stone denied that criticism of judicial action bespoke lack of respect for the courts. On the contrary, he urged that "where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment on it."<sup>67</sup> Mr. Justice Jackson wrote that "acceptance of criticism by the profession" is one of the most important criteria in determining a decision's "real weight in subsequent cases."<sup>68</sup>

Needless to say, some of the most vigorous attacks on Supreme Court decisions have come from dissenting members of the Court itself, "whose right to criticize the actions of the judicial department are no less and no greater than that of the humblest American citizen."<sup>69</sup> A few quotations from the opinions of some recent members of the Court will suffice to show that the Justices have frequently shown little or no restraint in criticizing their own colleagues.<sup>70</sup>

Mr. Justice Frankfurter has referred to "the careful ambiguities and silences of the majority opinion";<sup>71</sup> depicted one decision as "purely destructive legislation";<sup>72</sup> and with respect to another claimed that "the Court's opinion has only its own reasoning to support it."<sup>73</sup> Mr. Justice

62. 314 U.S. 252 (1941).

63. *Id.* at 270.

64. *Ibid.*

65. *Id.* at 289.

66. *Ibid.*

67. Quoted in Mason, *The Supreme Court From Taft to Warren* 205 (1958).

68. Jackson, *The Supreme Court in the American System* 13 (1955).

69. 45 A.B.A.J. 367 (1959) (editorial).

70. See Palmer, *Dissents and Overrulings: A Study of Developments in the Supreme Court*, 34 A.B.A.J. 554 (1948).

71. *Bridges v. California*, 314 U.S. 252, 279 (1941).

72. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 179 (1942).

73. *Davis v. United States*, 328 U.S. 582, 603 (1946).

Black once accused the majority of "judicial amendment" of the Constitution.<sup>74</sup> In another case, he saw the majority acting as a "super-legislature"<sup>75</sup> ignoring a "century and a half of constitutional history and government."<sup>76</sup> On another occasion, he accused the Court of avoiding "orderly analysis and discussion,"<sup>77</sup> wresting quotations "from their setting and context,"<sup>78</sup> and concluded that "the general principle that nothing added to nothing will not add up to something holds true in this case."<sup>79</sup> Mr. Justice Black characterized a Frankfurter dissent as resting on "the writer's personal views on 'morals' and 'ethics.'"<sup>80</sup> Black charged that for "judges to rest their interpretation of statutes on nothing but their own conception of 'morals' and 'ethics' is, to say the least, dangerous business."<sup>81</sup>

Mr. Justice Douglas once declared that a majority opinion was "written on a hypothetical state of facts, not on the facts presented by the record,"<sup>82</sup> and referred to a part of the opinion as "neither good sense nor good law. Such a result makes the way easy for the traitor, does violence to the Constitution and makes justice truly blind."<sup>83</sup> Mr. Justice Clark has complained that the Court "disregards its plain responsibilities" and avoids constitutional issues by use of "a pretext",<sup>84</sup> and in another case said that the Court "should not be 'that blind' court . . . that does not see what '[a]ll others can see and understand. . . .'"<sup>85</sup>

Criticism of the Supreme Court by its own members has not always been confined to official opinions. In one of his recent works, Mr. Justice Douglas alleges that the Supreme Court at times "has even been swept by hysteria, becoming little more than an executor for those who preached intolerance."<sup>86</sup> He adds that the greatest claim to judicial supremacy made by the Supreme Court was on behalf of "vested interests that were callous to human rights."<sup>87</sup>

74. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938).

75. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 788 (1945). Mr. Justice Brandeis was the first member of the Court to refer to his brethren as a "super-legislature." *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924) (dissent).

76. 325 U.S. at 789.

77. *Associated Press v. United States*, 326 U.S. 1, 33 (1945).

78. *Ibid.*

79. *Ibid.*

80. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 673 (1944).

81. *Ibid.*

82. *Cramer v. United States*, 325 U.S. 1, 48 (1945).

83. *Id.* at 67.

84. *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 127-28 (1956).

85. *Greene v. McElroy*, 79 Sup. Ct. 1400, 1427 (1959) (dissent).

86. Douglas, *An Almanac of Liberty* 104 (1954).

87. *Ibid.*

Mr. Justice Jackson became involved in a public feud<sup>88</sup> with Mr. Justice Black over the latter's participation in *Jewell Ridge Coal Corp. v. Local 6167, UMW*.<sup>89</sup> Jackson also charged that the 1937 Court was guilty of "usurpation," "unwarranted interferences with lawful government activities," and "tortured construction of the Constitution."<sup>90</sup>

As Mr. Justice Frankfurter has said: "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions."<sup>91</sup> The Court should not be any more above criticism than are other branches of the Government. Men entrusted with the responsibility of public office "incur the possibility of criticism and unfavorable review of their public and official actions."<sup>92</sup> As one writer has aptly commented:

An institution is only as good as the men who manage it and in many countries, the instruments of justice and right have been corrupted if not by money then by the corrosive activities of incorrectly oriented men . . . . In a country of free men, no institution of government must never be criticized.<sup>93</sup>

## II. ASSERTION BY THE COURT OF ITS PERSONAL VIEWS AND DISREGARD OF STARE DECISIS

There are those who maintain that the present Supreme Court is preserving the civil liberties guaranteed by our Constitution. Such statements usually mean nothing more than that the individuals making them happen to agree with the Supreme Court's notion of what constitutes these "civil liberties." Constitutional "guarantees" do not enter into the picture at all, because the language of the Constitution necessarily yields to the views of a majority of five members of the Supreme Court. A man who is today "guaranteed" by the Constitution against going to prison may wind up in jail tomorrow if five judges believe that is where he belongs.

Nothing is more evident from a study of Supreme Court decisions than the truth of Charles Evans Hughes' statement that "the Constitution is what the judges say it is."<sup>94</sup> Many others learned in the law have readily accepted this principle.<sup>95</sup> Mr. Justice Harlan has explained: "If

88. Palmer, *supra* note 70, at 555.

89. 325 U.S. 161 (1945).

90. Jackson, *The Struggle for Judicial Supremacy* 189 (1941).

91. *Bridges v. California*, 314 U.S. 252, 289 (1941).

92. 45 A.B.A.J. 262 (1959) (editorial).

93. Sokolsky, *The Bar's Report On Reds and Court*, N.Y. Journal-American, March 7, 1959, p. 20, cols. 7-8.

94. Charles Evans Hughes, *Addresses and Papers* 185-86 (2d ed. 1916).

95. "The Constitution has ceased to be the measure of the Judicial Power or any check or limit to the judges' exercise of the power to declare legislation unconstitutional. The Judges have in fact become superior not only to the Legislature but to the Constitution

we [the Court] don't like an act of Congress, we don't have much trouble to find grounds for declaring it unconstitutional."<sup>96</sup>

Article V of the Constitution provides that the latter may be amended only when two thirds of both Houses or two thirds of the state legislatures propose an amendment, which then must be ratified by three fourths of the states. However, five Justices may, and often have, accomplished the same result by the stroke of a pen.<sup>97</sup> A striking illustration of this occurred recently in two cases involving servicemen's wives who had been convicted by military courts-martial of murdering their husbands while overseas. On June 11, 1956, the Supreme Court upheld their convictions, stating that the trial of a civilian-dependent of a serviceman by a court-martial for offenses committed overseas did not violate the Constitution.<sup>98</sup> However, this very same Constitution, not a word changed, almost one year later gave defendants their freedom, the Court holding on rehearing that their trials were unconstitutional.<sup>99</sup> Nothing new had been added or changed.<sup>100</sup> The only thing that had changed was the composition of the Court and the mind of one of its members.<sup>101</sup>

Since the judicial determination of close constitutional questions depends in large measure upon the composition of the Court at the time the issue is argued, it is obvious that chance plays a great role in our Government.<sup>102</sup> This point has been convincingly made as follows: "Mr. Justice A dies in February instead of March. President B appoints his successor. Had

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itself, since the Constitution is what the judges say it is." Foreword to 1 Boudin, *Government By Judiciary* at vi (1932). (Original italics omitted.) "[T]he only check on our own exercise of power is our own sense of self-restraint." Mr. Justice Stone dissenting in *United States v. Butler*, 297 U.S. 1, 79 (1936). Due process "is a matter which in the last analysis depends upon the Court's own discretion and nothing else." Corwin, *The Constitution and What It Means Today* 254 (12th ed. 1958).

96. Quoted in Foreword to Mason, *The Supreme Court from Taft to Warren* at vii (1958).

97. "[T]he court, in interpreting the Constitution, may and does, positively amend or change it." Frederick R. Coudert, quoted in 2 Boudin, *Government by Judiciary* 373 (1932). (All italicized in original.)

98. *Reid v. Covert*, 351 U.S. 487 (1956); *Kinsella v. Krueger*, 351 U.S. 470 (1956).

99. *Reid v. Covert*, 354 U.S. 1 (1957).

100. See analysis of decision in McLaren, *Constitutional Law: Military Trials of Civilians*, 45 A.B.A.J. 255 (1959).

101. Many other instances could be cited to show how a change in personnel has resulted in a complete switch in constitutional interpretation. See, e.g., *Jones v. Opelika*, 316 U.S. 584, rev'd on rehearing, 319 U.S. 103 (1943).

102. Mr. Justice Frankfurter has admonished his colleagues: "Especially ought the Court not reinforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors." *United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (dissent).

he lived a month longer, President C would have appointed his successor, the case of *Smith v. Jones* would be decided the other way, and the future course of history be changed."<sup>103</sup> The details of our judicial history "show how decisions of the gravest political consequence, decisions affecting the welfare of the people and the destinies of the country, frequently depended on the will or whim of some one Man, or on the accident of whether this or that Man happened to sit in the seat of power."<sup>104</sup>

The element of chance is present, of course, because five individuals decide each Supreme Court case. Each member brings to the bench his own personal habits of mind as well as his ethical, political, social and economic attitudes. To these must be added his legal training and personal conception of the function of a Supreme Court Justice. All of these factors, of course, vary greatly from man to man, and "how the Constitution will be interpreted by these men depends in part upon what kind of men they are and how the world looks to them."<sup>105</sup> Personal feuds within the Court itself will sometimes influence decisions,<sup>106</sup> while even the political leanings of law clerks selected by the Justices may have a considerable bearing on the cases heard by the Court.

Although the personal viewpoints of the individual Justices cannot help but affect their opinions somewhat, the Justices are expected to regard the law impartially. Mr. Justice Holmes, among others, scored any deviation from this strict requirement of objectivity:

I have not yet adequately expressed the more than anxiety that I feel at the every increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred.<sup>107</sup>

In recent years, members of the Supreme Court, more than ever before, have allowed their own personal views to influence or dictate the Court's decisions. This is due primarily to an abandonment during the past two decades of the rule of *stare decisis*.<sup>108</sup> Mr. Justice Douglas,

103. Whitney, *The Insular Decisions of December, 1901*, 2 Colum. L. Rev. 79 (1902).

104. Foreword to 1 Boudin, *Government By Judiciary* at viii (1932).

105. Pritchett, *The American Constitution* 48 (1959).

106. See, e.g., Schlesinger, *The Supreme Court: 1947*, *Fortune*, Jan. 1947, p. 73.

107. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (dissent). Note also his dissenting statement in *Lochner v. New York*, 198 U.S. 45, 75 (1905) that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."

108. The status of the doctrine today has been termed "very shaky indeed." Corwin, *The Constitution and What It Means Today* 192 (7th ed. 1947). In the entire history of the Court before 1932 only 29 reversals of previous decisions had taken place. Gordon,



apparently echoing the sentiments of some of his brethren, has stated that stare decisis has "little place in American constitutional law."<sup>109</sup> In 1953, Mr. Justice Jackson voiced what thus continues to be a major criticism of the Court:

Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression . . . that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles.<sup>110</sup>

The doctrine of stare decisis had previously greatly reduced the assertion of personal opinions in judicial decisions and rendered a measure of stability to the law. In disregarding it, the Court has run roughshod over precedent and thoroughly revamped our constitutional law.<sup>111</sup> In so doing, the Court has created considerable uncertainty in the law<sup>112</sup> causing its prestige to be greatly diminished.<sup>113</sup> Moreover, the frequency of dissents has also contributed to a lessening of respect for the Court.<sup>114</sup>

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Nine Men Against America 149 (1958). Mr. Justice Douglas asserts that during the period between 1937 and 1947 the Supreme Court overruled 30 decisions, 21 involving constitutional questions, with the great majority of them having been decided within the previous 20 years. Douglas, *An Almanac of Liberty* 48 (1954).

109. Douglas, *We the Judges* 429 (1956).

110. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (concurring opinion).

111. See, e.g., Corwin, *op. cit. supra* note 108, at 254.

112. "Under our constitutional system, moreover, an indiscriminating disregard of stare decisis by our Supreme Court in the interests of particular classes, groups, or philosophies has a peculiarly deleterious and disturbing effect." *Precedent and Certainty in Law and Life*, 34 A.B.A.J. 919, 920 (1948) (editorial). (*Italics omitted.*)

113. "Respect for courts must fall when the public and the profession come to understand that decisions are to have only contemporaneous value and that nothing that has been said in prior adjudication has force in a current controversy." Schwartz, *The Supreme Court, Constitutional Revolution in Retrospect* 353 (1957).

114. "The present fragmentation of the Court diminishes its prestige and substitutes for what was once regarded as the sacred oracular voice of an impersonal institution a babel of confused and jangling human tongues. It introduces a strong element of instability and unpredictability into the law that causes great concern and perplexity to counsel charged with the responsibility of advising clients and to the lower courts." Palmer, *Present Dissents: Causes of the Justices' Disagreements*, 35 A.B.A.J. 189 (1949). Lack of unanimity "is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure that they will not be caught." Hand, L., *The Bill of Rights* 72 (1958). The increase in dissents is indicated by the following percentages of non-unanimous opinions per term; 1910, 13%; 1920, 17%; 1930, 11%; 1935, 16%; 1940, 28%; 1943-1944, 58%; 1945, 56%; 1946, 64%; 1951, 80%; 1952, 71%; 1953, 64%; 1954, 60%; 1955, 58%. Palmer, *Dissents and Overrulings*:

It is not suggested by any means that the Court should never overrule previous decisions, but it is submitted that such action should be taken only under extraordinary circumstances, such as radically changed conditions brought about by a long passage of time. The only criterion for overruling used by certain members of the present Court seems to be merely their disagreement with a previous decision.

Disregard of precedent is a particular tendency of Justices Black, Douglas, Warren and Brennan who are said to adhere to that school of thought which believes that a judge should decide a case by first determining in his own mind what the law should be and then examining precedent for such use as may be made of it.<sup>115</sup> Under this view, the judge becomes a substitute for the legislator and decides what is best for the community.<sup>116</sup>

The danger of having the Court, or rather five Justices, presume to decide whether a law is good or bad for the people is, of course, obvious. In the first place, such procedure runs contrary to the principles of representative democracy, on which our nation is founded, and usurps the prerogatives and functions of the legislature. In the second place, mere ascendancy to the bench does not automatically endow a Justice with superior wisdom. Justices, like other human beings, may be careless with facts and reckless with opinions.<sup>117</sup>

The case of *Schwartz v. Board of Examiners*,<sup>118</sup> cited in the A.B.A. Special Committee's report,<sup>119</sup> is but one of many cases where the Court substituted its own personal policy-making views for the judgment of those whose function it is to make policy. In this case, the Court stated that New Mexico had no right to deny a man, otherwise qualified, admission to the bar because he had been a member of the Communist Party, used aliases, and had a record of arrests. While reasonable men may differ as to the applicant's fitness under these circumstances, surely it

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A Study of Developments in the Supreme Court, 34 A.B.A.J. 554 (1948); Schwartz, *op. cit.* supra note 113, at 357, 402.

115. Schlesinger, *supra* note 106, at 201; Shannon, Earl Warren: Center of the Storm, N.Y. Post, May 17, 1959, § 2 (Magazine), p. 2.

116. It is easy for a jurist to believe that it is necessary to assume such a role if, for example, he has so little regard for the common sense of the American people that he can say that they are too quick to identify anyone who supports equal rights for Negroes as a communist because that happens to be a part of the Communist Party line. Douglas, *The Right of the People* 93 (1958).

117. For example, Mr. Justice Douglas states in his *Almanac of Liberty* that during 1952, in New York City alone, there were at least 58,000 orders issued allowing wiretaps. Douglas, *Almanac of Liberty* 355 (1954). As a matter of fact, only 480 orders were so issued. See Silver, *Legalized Wire-tapping Necessary to Combat Streamlined Efficiency of Organized Crime*, Harv. L. Record, Feb. 27, 1958, p. 3, col. 3.

118. 353 U.S. 232 (1957).

119. A.B.A. Report at A1474.

was improper for the Court to interfere with New Mexico's judgment in the matter.<sup>120</sup>

Some of the present Justices apparently believe that the Communist Party is merely another political organization and that many of its members are simply harmless, misguided idealists.<sup>121</sup> Dealing sympathetically with a Party member is not difficult when one has such views. Since these Justices also do not feel bound by precedent and believe that they are the final judges of what is good for the community, all the more readily does the Communist Party member become the beneficiary of a favorable decision.

An analysis of Supreme Court decisions as of 1958 reveals the favored treatment received by communist or subversive defendants at the hands of certain Justices. As of the time the survey was made, Mr. Justice Black had participated in 71 decisions involving communists or internal security matters, and each time ruled against the Government; Mr. Justice Douglas was anti-Government in 66 out of 69 such cases; Chief Justice Warren in 36 out of 39; and Mr. Justice Brennan in 18 out of 20 cases.<sup>122</sup> The Government's "batting average" has not improved since.

The Committee on Federal Legislation of the New York City Bar Association, in commenting on the report of the A.B.A. Special Committee, stated that the Court's decisions in four cases<sup>123</sup> "demonstrate graphically that the Court is fully mindful of the nation's stake in protection against Communism"<sup>124</sup> and depicted as "outstanding"<sup>125</sup> the decision in *United States v. Ullmann*,<sup>126</sup> which upheld the constitutionality

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120. Along the same line is the case of *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957), wherein the Court said it was improper for California to refuse an applicant admission to the bar because he had declined to answer questions as to present and past communist membership.

121. Mr. Justice Douglas has referred to communists as "peddlers of unwanted ideas. They were more thoroughly investigated and exposed than any group in our history. They were the most unpopular people in the land. . . . Yet the Court sanctioned the suppression of speech which Congress determined to be 'dangerous.'" Douglas, *The Right of the People* 51 (1958). See also *Dennis v. United States*, 341 U.S. 494, 589 (1951) (Douglas, J., dissenting). Mr. Justice Black contends that people have a right "to join organizations, advocate causes and make political 'mistakes' without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation." *Barenblatt v. United States*, 360 U.S. 109, 144 (1959) (dissent).

122. 104 Cong. Rec. 12121-22 (daily ed. July 10, 1958) (remarks of Senator Eastland).

123. *Lerner v. Casey*, 357 U.S. 468 (1958); *Beilan v. Board of Educ.*, 357 U.S. 399 (1958); *Yates v. United States*, 354 U.S. 298 (1957); *Ullmann v. United States*, 350 U.S. 22 (1956). See 14 Record at 248.

124. 14 Record at 249.

125. *Id.* at 247.

126. 350 U.S. 422 (1956).

of a recently-enacted immunity statute. The A.B.A. Special Committee, of course, did not allege that there were no internal security cases decided in favor of the Government, but instead asserted that in "many" cases, the Court's decisions had adversely affected our internal security efforts.<sup>127</sup>

In any event, there is nothing "graphic" about the four cases cited by the Committee on Federal Legislation, nor is there anything "outstanding" about the *Ullmann* case. Inasmuch as immunity statutes of the type involved in *Ullmann* had repeatedly been sanctioned since the 1896 Supreme Court decision in *Brown v. Walker*,<sup>128</sup> it would have indeed been astounding had the Court not decided in favor of the Government. Moreover, in *Beilan v. Board of Educ.*<sup>129</sup> and *Lerner v. Casey*,<sup>130</sup> both decided by 5-4 margins, the Court had its 1951 decision in *Garner v. Board of Pub. Works*<sup>131</sup> as a square precedent. It is to be noted that Justices Douglas and Black voted against the Government in each of these three cases, that Chief Justice Warren voted against the Government in two of the three, and Justice Brennan in the two in which he participated.

The fact that each of the Justices voted with the majority in some cases cited in the A.B.A. report is not a factor of any significance. It would indeed be remarkable if there was a Justice who never found a communist defendant with a valid legal point. This surely would tend to indicate a prejudice on his part. What is remarkable is that there are four justices who practically never vote for the Government in security cases.

Apart from the specific field of internal security, the Court has also been extreme, but to a lesser degree, in the area of "civil liberties." Of course, if a Justice personally believes that "the police have always been less inclined to use their wits than their fists,"<sup>132</sup> then he is apt to sympathize readily with a defendant who claims to have been victimized by the police. An analysis of fifty civil liberty cases decided by the Court during the 1957-58 term reveals that Mr. Justice Douglas voted against the Government in 49, Mr. Justice Black in 45, Mr. Chief Justice Warren in 42 (out of 48) and Mr. Justice Brennan in 40 (out of 48) of such cases.<sup>133</sup> These extreme ratios suggest the imposition of personal views.

127. See A.B.A. Report at A1470. Although the A.B.A. Report cited some twenty-four cases to illustrate the pattern of the Court's decisions, the legislation recommended by the Special Committee was aimed at only six of them.

128. 161 U.S. 591 (1896).

129. 357 U.S. 399 (1958).

130. 357 U.S. 468 (1958).

131. 341 U.S. 716 (1951).

132. Douglas, *An Almanac of Liberty* 240 (1954).

133. Pollitt, *Should the Supreme Court be 'Curbed'? A Presentation of Civil Liberties Decisions in the 1957-58 Term*, N.C.L. Rev. 17, 53-54 (1958).

As a result of the conduct of the Supreme Court during the past two decades, the situation has reached a stage where:

[T]he judicial process [is] a thing of mere utility and force, tempered with emotion, whim and intuition. The man in the street can feel the sands shifting under him. There is no more certainty in the law since consistency is not to be expected at the summit of the law. There are no more permanent rights, no more unalienable rights, no more natural rights. . . ."<sup>134</sup>

Retirement of some of the present Justices and their replacement by those who adhere more to the traditional role of a judge appear to offer the best hope for a reversal of this trend.<sup>135</sup>

### III. THE USE OF THE "LIBERAL DOUBLE STANDARD"

We have already seen that many liberals now staunchly protesting any criticism of the Court, as an institution or otherwise, sought to de-vitalize it when objectionable decisions were made. This reaction to the A.B.A. report and resolutions is not the only example of their use of a double standard. For example, members of the American Civil Liberties Union would be the first to condemn those who contend that a program or principle must be bad because Communists support it. Yet, the Union has criticized the A.B.A. report because the Committee that prepared it was "'dominated by members intimately identified with the Federal security program.'"<sup>136</sup> The report, of course, should be considered on its merits, and an attack of this nature is highly improper. Inasmuch as the report deals with internal security decisions, it is only logical and proper that experts in that field should have participated in its preparation.

Many liberals applaud the decision of the Supreme Court in such cases as *Watkins v. United States*<sup>137</sup> which severely restricted the power of

134. Sermon by Rev. Robert Gannon, S.J., Red Mass of the Catholic Lawyers Guild of the Diocese of Brooklyn, Sept. 18, 1958, in 105 Cong. Rec. A31, 32 (daily ed. Jan. 9, 1959).

135. It has been suggested that the failure to appoint men with judicial experience has been responsible to a great extent for the wayward course the Court has taken. Of the twelve appointments made during the period between 1937 and 1953, eight of the Justices had no previous judicial experience at all, one had previous experience in a police court and another in a recorder's court, and only two, Justices Vinson and Minton, had any experience to speak of. President Eisenhower has reversed this trend, and his last four appointments have had at least some judicial experience. Promotions from lower courts would indeed seem to be beneficial not only for the Supreme Court, but for federal courts of appeal as well. Of 54 appointments to appellate courts by President Roosevelt, only 18 were from lower courts; President Truman had 15 out of 27; and of President Eisenhower's first 22 appointments, only 7 were from lower courts. Miller, *The Selection of the Federal Judiciary: The Profession is Neglecting Its Duty*, 45 A.B.A.J. 445, 447 (1959).

136. Quoted in N.Y. Times, April 19, 1959, p. 1, col. 3.

137. 354 U.S. 178 (1957).

Congress to investigate subversion. However, in the 1920's, when suggestions were made to curtail congressional investigations of the Teapot Dome scandal, they were most articulate in their opposition.<sup>138</sup> The following statement of Woodrow Wilson from his *Congressional Government* was often quoted:

Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. . . . The informing function of Congress should be preferred even to its legislative function.<sup>139</sup>

Such phrases as "the right to privacy" or "exposure for the sake of exposure" were either shunned or criticized. In 1926, in supporting the investigating power of Congress, Professor James M. Landis could thus write:

It may well be that the effect of such an investigation as that of Attorney General Daugherty in 1924 is to impeach him at the bar of public opinion; and that realizing the investigation would have such an effect, a purpose to do so was made manifest by the Senate. But it is no answer to say . . . that 'the Senate has no power to impeach any federal officer at the bar of public opinion, no matter what possible good may come of it.' Impeachment . . . represents only the reaction of public opinion to the facts elicited by a Senate inquiry. Such a reaction may over-awe the Chief Executive and compel him to exercise his power of removal. In default of such action Congress can do as it may deem necessary.<sup>140</sup>

In that same era, Mr. Justice Brandeis was asked privately whether he thought it would be a good idea for a newspaper to comment editorially that individual rights were being transgressed in the Teapot Dome investigation. Brandeis replied in the negative, stating that "the needful results of Congressional inquiries can be 'achieved only by complete freedom and pursuit.'" <sup>141</sup>

The extensive scope of legislative investigating power was delineated by Louis Boudin who wrote that there is "practically nothing of any importance that occurs in the life of the nation or of the state that is not of legislative concern."<sup>142</sup>

Judge Learned Hand<sup>143</sup> has referred very emphatically to a double

138. See, e.g., Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691 (1926).

139. Wilson, *Congressional Government* 195-98 (Meridian ed. 1956).

140. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 220-21 (1926).

141. Quoted in Krock, *In the Nation*, *The Civil Liberty Issue in Congressional Inquiries*, N.Y. Times, June 28, 1957, p. 22, col. 5.

142. 2 Boudin, *Government by Judiciary* 312 (1932). Boudin criticized *Kilbourn v. Thompson*, 103 U.S. 168 (1881), relied upon by the Supreme Court in the *Watkins* case, as "utterly unwarranted by the Constitution." *Id.* at 315.

143. Hand, *The Bill of Rights* (1958).

standard which has been employed by the Supreme Court. When any question of interference with civil liberties is involved, the Court is quick to intervene, but when alleged infringement of property rights is the issue, the Court has been considerably less than enthusiastic. He notes:

I cannot help thinking that it would have seemed a strange anomaly to those who penned the words in the Fifth to learn that they constituted severer restrictions as to Liberty than Property. . . . I can see no more persuasive reason for supposing that a legislature is *a priori* less qualified to choose between 'personal' than between economic values; and there have been strong protests, to me unanswerable, that there is no constitutional basis for asserting a larger measure of judicial supervision over the first than over the second.<sup>144</sup>

Numerous examples could be cited illustrating the different standards used by Supreme Court members in dealing with problems relating to subversion on the one hand, and non-subversive problems on the other. In writing about the Teapot Dome investigations, Mr. Justice Frankfurter defended this congressional inquiry despite the attendant abuse of individuals.<sup>145</sup> He made several pertinent observations:

Undoubtedly, the names of people who have done nothing criminal or wrong, or nothing even offending taste perhaps, have been mentioned in connection with these investigations. . . . The question is not whether people's feelings here and there may be hurt or names 'dragged through the mud,' as it is called. The real issue is whether the danger of abuses and the actual harm done are so clear and substantial that the grave risks of fettering free congressional inquiry are to be incurred by artificial and technical limitations upon inquiry. . . . [C]ongressional inquiry ought not to be fettered by advance rigidities, because in the light of experience there can be no reasonable doubt that such curtailment would make effective investigation almost impossible. . . .

Whatever inconveniences may have resulted are inseparable incidents of an essential exertion of governmental power, and to talk about these incidents is to deflect attention from wrongdoing and its sources. . . .

The procedure of congressional investigation should remain as it is. No limitations should be imposed by congressional legislation or standing rules. The power of investigation should be left untrammelled. . . . The safeguards against abuse and folly are to be looked for in the forces of responsibility which are operating from within Congress, and are generated from without.<sup>146</sup>

Notice how the right of the individual is minimized: while innocent people may be harmed, the paramount consideration is that the investiga-

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144. Id. at 50-51. Supporting Judge Hand's position, among other cases, is a recent Supreme Court decision summarily reversing, without opinion, a judgment in favor of a farmer who had been fined by a federal agency for raising wheat in violation of a government statute, which wheat was used to feed his own cattle. *United States v. Haley*, 358 U.S. 644 (1959), reversing 166 F. Supp. 336 (N.D. Tex. 1958). The Court obviously felt that a farmer does not have a constitutional right to plant what he pleases on his own property, even though the product never leaves the farm.

145. Frankfurter, *Hands Off the Investigations*, *New Republic*, May 21, 1924, p. 329.

146. Id. at 330-31.

tion continue unhampered. In 1957, this same Justice concurred in the *Watkins* decision<sup>147</sup> which severely restricted congressional investigations of subversion and threatened the very existence of the House Un-American Activities Committee.

When Mr. Justice Black was a Senator and the head of a committee investigating corporations, he thus championed the penetrating publicity accorded legislative investigating hearings:

Just as persons and firms have been reluctant to exhibit their papers before the hearings, so they now reveal the same resistance to answering questions. . . . Of course many merely insist that the question relates to personal and private matters. . . . This sort of thing taxes severely the patience of an investigator. It accounts often for what newspaper enemies of investigation refer indignantly to as the bullying and badgering of witnesses. . . . Public investigating committees have always been opposed by groups that have or seek special privileges. The spokesmen of these greedy groups never rest in their opposition to exposure and publicity. . . .<sup>148</sup>

Black thus maintains it is correct to expose the businessman to "the rays of pitiless publicity," but on the question of exposing communists, he believes that "exposure for the sake of exposure" is wrong.<sup>149</sup>

The reaction of some members of the present Court to the Government-enforced evacuation of thousands of Japanese-American citizens from their homes and businesses during the early days of World War II is in marked contrast to their treatment of communist subversives today. In *Korematsu v. United States*,<sup>150</sup> Mr. Justice Black wrote an opinion, concurred in by Justices Douglas and Frankfurter, sustaining the conviction of a native-born American citizen whose only offense was to remain at his home. This harsh handling should be compared with the lenient treatment accorded to communists by the Court today.<sup>151</sup>

This double standard is simply a reflection of the present type of thinking which thoroughly permeates many liberal minds today. It is especially reflected in matters involving the fifth amendment. As Professor Sidney Hook has said, "there seems to be a double standard of legal and moral bookkeeping involved in the judgment and sometimes

147. 354 U.S. 178 (1957).

148. Black, *Inside a Senate Investigation*, Harper's Magazine, Feb. 1936, pp. 283-86.

149. See, e.g., *Watkins v. United States*, 354 U.S. 178 (1957). In the Senate hearings held prior to the confirmation of his appointment to the Supreme Court, Mr. Justice Brennan stated that the investigation and exposure of communists constituted a "vital function" of Congress. *N.Y. Times*, Feb. 28, 1957, p. 16, col. 4. Yet, since joining the Court, he has regarded every exposure of subversives by legislative committees as "exposure for exposure's sake." See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. United States*, 360 U.S. 72 (1959); *Watkins v. United States*, 354 U.S. 178 (1957).

150. 323 U.S. 214 (1944).

151. It is interesting to note that J. Edgar Hoover opposed the relocation of the Japanese-Americans. He wrote the Attorney General and the President that "the whole operation was based not on public interest but on political pressure and hysteria." Gordon, *Nine Men Against America* 59-60 (1958).



the treatment of Fifth Amendment cases, depending upon the individuals involved."<sup>152</sup> Editorial support is tendered Supreme Court decisions which decry the drawing of inferences from invocation of the fifth amendment when questions relate to Communist Party membership, but when a labor leader claims this constitutional privilege on non-subversive matters, his removal from office is demanded because of the cloud of suspicion thus arising from his use of the amendment.<sup>153</sup>

When subversives are the targets of congressional committees, liberals loudly denounce "exposure for exposure's sake." However, they remain silent when the chief counsel of a senate investigating committee refers to a national labor figure in the following language:

But I'm not harrassing him. This is an important thing. The only way to get people to do the job—the courts, the Justice Department, the Congress—is to keep the pressure on. And keep it on *him*. This is not maybe the purpose of a congressional committee. But I think he's a very evil influence in the United States, a tremendous power, and I just think that something has got to be done about it. If no one else is going to do it, we will.<sup>154</sup>

Many Americans have been duped by the outpourings of the efficient communist propaganda machine.<sup>155</sup> J. Edgar Hoover thus appraises the effect of this delusion:

To me, one of the most unbelievable and unexplainable phenomena in the fight on communism is the manner in which otherwise respectable, seemingly intelligent persons, perhaps unknowingly, aid the Communist cause more effectively than the Communists themselves. The pseudoliberal can be more destructive than the known Communist because of the esteem his cloak of respectability invites.<sup>156</sup>

#### IV. RECENT SUPREME COURT DECISIONS AFFECTING INTERNAL SECURITY

A brief review of some recent Supreme Court decisions, particularly those at which the A.B.A. resolutions are aimed, will demonstrate that the Court has frequently ignored precedent and employed fallacious reasoning in asserting its own personal, and often policy-making, views.

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152. Letter to the N.Y. Times, May 10, 1957, p. 26, col. 6.

153. N.Y. Times, March 28, 1957, p. 30, col. 1 (editorial).

154. Quoted in Martin, *The Struggle to Get Hoffa* (pt. 4), *The Saturday Evening Post*, July 25, 1959, pp. 30, 86.

155. See, e.g., the testimony of John W. Hanes, Jr., Administrator, Bureau of Security and Consular Affairs, Department of State, in Senate Hearings at 276. Mr. Hanes described how a clever campaign by the Communist Party against the State Department policy of refusing passports to communists achieved respectability when some sincere people "became disturbed by the argument that the regulations permitted the Secretary of State arbitrarily to restrict a citizen's rights." *Ibid*.

156. Quoted in testimony of Edgar C. Bundy in Hearings on the Limitation of the Appellate Jurisdiction of the United States Supreme Court Before the Subcommittee on Internal Security of the Senate Committee on the Judiciary, 85th Cong., 2d Sess., pt. 2, at 184 (1958) [hereinafter cited as 1958 Senate Hearings].

A. *Jencks v. United States*

The defendant, a union president, was convicted of filing a false non-communist affidavit. At his trial, he had requested that certain F.B.I. reports submitted by two government witnesses be turned over to the court for inspection to determine their impeachment value. Because no showing had been made that the reports of the witnesses were inconsistent with their trial testimony, the request was denied.

The Supreme Court reversed Jencks' conviction,<sup>157</sup> holding that the defendant himself is entitled to unrestricted inspection of any statements or reports "touching the evidence and activities"<sup>158</sup> about which a witness has testified. The Court further declared that if the Government did not produce such statements or reports, then the indictment should be dismissed.<sup>159</sup>

It had been a well-established practice in the federal courts that a pre-trial statement of a witness would not be turned over to a party until (1) there had been a showing of inconsistency, and (2) after the judge had inspected the statement to determine its relevancy.<sup>160</sup>

In attempting to bolster its decision, the *Jencks* Court quoted from *Gordon v. United States*<sup>161</sup> to the effect that similar requests there (1) did not entail a broad fishing expedition, and (2) were related to statements by persons offered as witnesses.<sup>162</sup> The Court construed the *Gordon* case as holding that these were the only prerequisites for the production of a witness' statement. Mr. Justice Clark, in his dissent, correctly pointed out that the *Gordon* quotations were "lifted entirely out of context."<sup>163</sup> Immediately preceding them, the *Gordon* Court had acknowledged that by a proper cross-examination, "defense counsel laid a foundation for his demand by showing that the documents were . . . contradictory of his [the witness'] present testimony . . ."<sup>164</sup>

The Supreme Court noted with approval Judge Learned Hand's statement in *United States v. Andolschek*<sup>165</sup> declaring that "prosecution necessarily ends any confidential character the documents may possess." However, the Second Circuit rule was as clear as it was elsewhere before the *Jencks* case.<sup>166</sup> As expressed by Judge Hand himself, "statements

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157. 353 U.S. 657 (1957).

158. *Id.* at 668.

159. *Id.* at 672.

160. *Gordon v. United States*, 344 U.S. 414 (1953); *Goldman v. United States*, 313 U.S. 129 (1942).

161. 344 U.S. 414 (1953).

162. *Id.* at 419.

163. 353 U.S. at 680 n.2.

164. 344 U.S. at 418.

165. 142 F.2d 503, 506 (2d Cir. 1944).

166. See, e.g., *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v.*

of witnesses taken by one party in preparation for trial need not be disclosed to the opposite party, unless the judge holds on inspection that their contents is [sic] relevant."<sup>167</sup> The *Jencks* case, as is typical of many recent Supreme Court decisions, produced tremendous confusion, especially on the question of whether or not a defendant was entitled to receive, prior to the start of trial, the previous statements of prospective witnesses.

Congress promptly took action to remedy the decision. It agreed basically with the Court's new rule that a defendant should be entitled to a witness' pre-trial statement concerning the subject matter of his testimony, but statutorily revised and limited the effect of the Court's holding as follows:<sup>168</sup>

- (1) The Government need only produce "written reports" or "substantially verbatim" transcripts of oral statements;
- (2) If any report contains matter related to the witness' testimony and matter not related to his testimony, the trial judge, after inspection and before the defendant sees it, must remove the unrelated material;
- (3) The reports need not be produced until after the witness has testified at the trial;
- (4) The penalty for non-production of the report is striking out the witness' testimony or a mistrial at the judge's discretion.

#### B. *Cole v. Young*

In 1950 Congress subjected the employees of eleven specified federal departments and agencies to a new security program and provided that the law might be extended to "such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security."<sup>169</sup> Pursuant to this authority,

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De Normand, 149 F.2d 622 (2d Cir. 1945); *United States v. Simonds*, 148 F.2d 177 (2d Cir. 1945); *United States v. Ebeling*, 146 F.2d 254 (2d Cir. 1944); *United States v. Krulwich*, 145 F.2d 76 (2d Cir. 1944); *United States v. Cohen*, 145 F.2d 82 (2d Cir. 1944).

167. *United States v. Coplon*, 185 F.2d 629, 638-39 (2d Cir. 1950). Judge Hand added that "while it is true that this deprives the party who is denied inspection of any opportunity to dispute the judge's conclusion, that is unavoidable." *Id.* at 639.

168. 18 U.S.C. § 3500 (1958). This statute was recently upheld in *Palermo v. United States*, 79 Sup. Ct. 1217 (1959). The *Jencks* decision was further modified in *Pittsburgh Plate Glass Co. v. United States*, 79 Sup. Ct. 1237 (1959), and *Galax Mirror Co. v. United States*, 79 Sup. Ct. 1237 (1959), both being 5-4 decisions wherein the Court held that the *Jencks* rule did not apply to the production of a witness' grand jury testimony.

169. 64 Stat. 476-77 (1950), 5 U.S.C. § 22(1)-(3) (1958). This statute gives a federal employee the right to a written statement of any charges against him and the right to a hearing. The decision by his agency head is conclusive and final. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 555, as amended, 5 U.S.C. § 652 (1958), and the Act of June 27, 1944, 58 Stat. 390, 5 U.S.C. § 863 (1958), which are not affected by this decision, permit the discharge of an employee on loyalty grounds, but, among other procedural rights, enable the employee to appeal to the Civil Service Commission.

the President issued a 1953 order extending the provisions of the 1950 statute "to all other departments and agencies of the Government."<sup>170</sup> The loyalty security program was thus enlarged to include all federal employees.

Under this order, Cole, an inspector in the Department of Health, Education and Welfare, was discharged by his agency head on loyalty grounds, his employment having been found to be not "clearly consistent with the interests of national security."<sup>171</sup> Cole had a statutory right to answer the charges and to have a hearing, but declined to use it. In going against the plain wording of the statute, the Supreme Court ruled that Cole's discharge was improper, holding that Congress did not intend to authorize the President to discharge employees in "non-sensitive positions."<sup>172</sup> Yet the legislative history of the statute, ignored by the Court, shows clearly that Congress sought to entrust the President with this broad power.<sup>173</sup>

By this decision, the Court clearly substituted its judgment for that of the President. Congress authorized the President to extend the security program whenever he deemed it "in the best interests of national security" to do so. The Court concluded that national security would not be served by an extension of the program to persons in "non-sensitive" positions, thus unduly intruding into an area in which it did not belong.

The reasoning of the Court is unrealistic. A person in a non-sensitive position, for example, a cleaning woman, might perpetrate acts of espionage resulting in incalculable harm. As a matter of fact, a number of government employees named as members of communist espionage rings either got their start in, or actually operated out of, such "non-sensitive" agencies as the Work Projects Administration, the Agricultural Adjustment Administration, the National Youth Administration, and the like.<sup>174</sup>

It is recognized that reasonable men may differ on how far the governmental security program should be applied, but it is submitted that this is the prerogative of the legislative and executive branches of the Government, and not the judiciary.

### C. *Kremen v. United States*

In its report, the A.B.A. Special Committee intimated that the Supreme Court was reversing convictions of communists on technicalities. Interpretation of this phase of its report has led to the charge that the

170. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953), as amended by Exec. Order No. 10491, 18 Fed. Reg. 6583 (1953).

171. 351 U.S. 536, 540 (1956).

172. *Id.* at 557.

173. *Id.* at 567 (Clark, J., dissenting).

174. Hearings on Communist Party Espionage in the United States Government Before the House Un-American Activities Committee, 80th Cong., 2d Sess. 513-14 (1948).

Committee has described "due process" as a technicality.<sup>175</sup> Such criticism is manifestly unjust. What the Committee actually suggested was that under the cloak of "due process," technicalities were being used to free communist defendants. "Due process" is not a technicality but neither is every technical deficiency a deprivation of due process.

*Kremen v. United States*<sup>176</sup> is illustrative of the use of hazy technicalities to free subversives. Certain communist leaders, fugitives from justice, were located by the F.B.I. in a secluded four-room cabin in California, along with the defendants Kremen, Coleman and another.<sup>177</sup> The F.B.I. possessed arrest warrants but no search warrants. Shortly after the arrest, a search of the cabin and a seizure of its entire contents were made, with the latter sent to the F.B.I.'s office in San Francisco for further examination. The defendants were subsequently convicted of harboring fugitives and of conspiring to commit that offense.

The Supreme Court reversed their conviction on the sole ground that "the seizure of the entire contents of the house and its removal some 200 miles away to the F.B.I. offices for the purpose of examination are beyond the sanction of any of our cases."<sup>178</sup> Not one case was cited by the Court in support of its opinion, nor did the Court state how and to what extent the seizure was "beyond the sanction" of previous cases. No previous case had ever held that the validity of a seizure depended on the quantity of items seized. There is no question that the arrests here were valid, and certainly the Supreme Court had previously permitted a complete and thorough search of a home as an incident to a valid arrest.<sup>179</sup>

The removal "some 200 miles away to the F.B.I. offices," the Court felt, was improper. It is difficult to understand what difference it would have made on the question of defendants' guilt whether articles had been removed but one mile away or even examined on the premises itself. Certainly, the technicality that the nearest F.B.I. office happened to be 200 miles away should not be a basis for reversal.

As the dissenting opinion pointed out,<sup>180</sup> only a fragmentary part of the items seized had been admitted into evidence and at most constituted harmless error since there was otherwise ample evidence of guilt. The majority opinion was absolutely silent on this point, leaving one to specu-

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175. Quoted in *N.Y. Times*, April 19, 1959, p. 82, col. 1.

176. 353 U.S. 346 (1957).

177. See *Kremen v. United States*, 231 F.2d 155 (9th Cir. 1956), for a full statement of the facts.

178. 353 U.S. at 347. The Court set forth in a ten-page appendix an inventory of the seized items, most of which were of a purely personal nature.

179. See, e.g., *Harris v. United States*, 331 U.S. 145 (1947) (three and a half room apartment).

180. 353 U.S. at 348.

late that the Court possibly feels that if any illegally seized material is received in evidence, no matter how insignificant, a reversal is mandatory.

#### D. *Fifth Amendment Cases*

A clear example of the change which has occurred in the Supreme Court's attitude may be found in fifth amendment cases. Until the communists began to invoke the fifth amendment en masse in congressional investigations about a decade ago, the Court saw nothing wrong in rebuking those who invoked this constitutional privilege. As far back as 1896, the Supreme Court referred to such an individual as a "self-confessed criminal."<sup>181</sup>

Today, the Supreme Court approves Dean Griswold's statement that the fifth amendment is "one of the great landmarks in man's struggle to make himself civilized."<sup>182</sup> During the earlier part of this century when the privilege was utilized by non-communists, e.g., officers of large corporations, many liberals favored eliminating the fifth amendment. Mr. Justice Cardozo, in 1937, asserted that the fifth amendment could be destroyed without impairing the administration of justice.<sup>183</sup> The Supreme Court had previously pointed out that this privilege is not recognized in other countries and "is nowhere observed among our own people in the search for truth outside the administration of the law."<sup>184</sup>

Typical of this attitude was the 1926 statement of the Eighth Circuit Court of Appeals that honest men do not remain silent when their motives are assailed.<sup>185</sup> In 1936, Mr. Justice Black approved the remark of Woodrow Wilson that "if there is nothing to conceal then why conceal it? . . . [W]e believe it a fair presumption that secrecy means impropriety."<sup>186</sup> Yet in 1955, Chief Justice Warren referred to the possibility of a stigma being attached to invocation of the fifth amendment "in these times" as though something novel was occurring in our history.<sup>187</sup>

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181. *Brown v. Walker*, 161 U.S. 591, 605 (1896).

182. *Griswold, The Fifth Amendment Today* (1955), cited in *Ullmann v. United States*, 350 U.S. 422, 426 (1956).

183. *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

184. *Twining v. New Jersey*, 211 U.S. 78, 113 (1908). Judge Jerome N. Frank did not consider the fifth amendment as one of the more important guarantees. *United States v. St. Pierre*, 132 F.2d 837, 847 (2d Cir. 1942) (dissent). In 1933, Judge Samuel Seabury urged that the "privilege should be made inapplicable to cases where the subversion of the very processes of government is involved . . ." Seabury, Foreword to *Herwitz & Mulligan, The Legislative Investigating Committee*, 33 *Colum. L. Rev.* 1, 2 (1933).

185. *United States v. Mammoth Oil Co.*, 14 F.2d 705, 729 (8th Cir. 1926).

186. Quoted in *Black, Inside a Senate Investigation*, *Harper's Magazine*, Feb. 1936, at 172.

187. *Emspak v. United States*, 349 U.S. 190, 195 (1955). Here the Court reversed a contempt conviction of a witness appearing before the House Un-American Activities Committee. After the witness had charged that the Committee "was trying perhaps to

Judge Frank's dissent in *United States v. St. Pierre*<sup>188</sup> illustrates the change in thinking that has taken place during the past few years. In this dissent, written in 1942, he comments that judges who did not comply with the demand to eliminate the fifth amendment "by emasculating interpretations" were deemed to be "reactionary"!<sup>189</sup>

Present views regarding the fifth amendment have reached such an opposite extreme that those who invoke it are regarded by some as heroic defenders of the Constitution.<sup>190</sup>

We are now advised that it is improper to draw any unfavorable inferences from invocation of the amendment. The fallacy in this attitude is that its admonition is not confined to use in the courtroom. The rules of law which may prevent men from going to jail are not binding on a citizen's own appraisal of another's guilt or innocence. For example, a man may be innocent in the eyes of the law because the statute of limitations prevents his prosecution, but a citizen is not compelled to so regard him in the face of damning evidence of guilt.

Outside of the courtroom, certain inferences not only may, but logically must, be drawn from invocation of the fifth amendment. For example, if a man is asked whether or not he has ever been a member of the Communist Party and properly invokes the fifth amendment, the only possible logical conclusion is that he has been a member of the Communist Party. A negative answer could not conceivably tend to incriminate him. Whether or not there should also be an inference that he has committed a crime (by having been a Communist Party member) is another matter.

Dean Griswold's only answer to the position here taken<sup>191</sup> is that hypothetically a person invoking the privilege as to Communist Party

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frame people for possible criminal prosecution," 349 U.S. at 195, the following dialogue occurred:

'Mr. Moulder. Is it your feeling that to reveal your knowledge of [individuals witness asked to identify] . . . would subject you to criminal prosecution?

Mr. Emspak. No. I don't think this committee has a right to pry into my associations. That is my own position.' Id. at 195-96.

The Government maintained that the witness' answer constituted an effective disclaimer of the privilege against self-incrimination, but the Court ruled that his reply was equivocal. It said the Committee should have been ready to recognize a "veiled claim of the privilege." Id. at 195.

188. 132 F.2d 837 (2d Cir. 1942).

189. Ibid.

190. As Professor Hook observes, "those invoking the fifth amendment enjoy a rhetoric of defense . . . so grandiose that one would imagine honest heretics, instead of evasive conspirators, were being questioned." Hook, *Common Sense and the Fifth Amendment* 104-05 (1957).

191. Even those liberal in their views on the fifth amendment concede that fear of prosecution for perjury in truthfully denying Communist Party membership is not a valid basis for its invocation. See, e.g., Taylor, *Grand Inquest, The Story of Congressional Investigations* 203 (1955); Griswold, *The Fifth Amendment Today* 19 (1955).

membership may not have been a Party member but may have been affiliated with communist fronts, and if he denies party membership he may have "to undertake to state and explain" his membership in said fronts.<sup>192</sup> However, Dean Griswold does not say why this person could not and should not deny party membership and then invoke the privilege when questioned on the fronts.<sup>193</sup>

Consonant with its position that no unfavorable inferences should be drawn from an invocation of the fifth amendment, the Court held in *Slochower v. Board of Educ.*<sup>194</sup> that it was violative of the due process clause for New York City to discharge a professor who had invoked the amendment when questioned about Communist Party membership by a Senate committee. Inasmuch as state action should not be deemed a deprivation of due process where reasonable men differ as to the propriety of said action,<sup>195</sup> the *Slochower* Court, in effect, ruled that it is unreasonable to draw any unfavorable inferences from invocation of the fifth amendment.<sup>196</sup> The fact is, of course, that reasonable men, such as former President Herbert Hoover who said that communist spies and traitors utilizing the fifth amendment should be deprived of their right to vote,<sup>197</sup> do differ on the implications arising from its invocation. Numerous pronouncements by many liberals against the fifth amendment prior to its wholesale adoption by Communist Party members attest to this.

It is to be noted that the Supreme Court in recent 5-4 decisions has reaffirmed the right of a state to receive answers from its employees to questions dealing with Communist Party membership.<sup>198</sup> The Court,

192. Griswold, *op. cit. supra* note 191, at 19.

193. It has been held that a witness may deny under oath that he committed the crime being investigated and during the same interrogation properly invoke the privilege when questioned on details of the crime. *People ex rel. Taylor v. Forbes*, 143 N.Y. 219, 38 N.E. 303 (1894). See also *United States v. Grunewald*, 353 U.S. 391 (1957). The doctrine of waiver only applies where a man has incriminated himself, in which case he may be compelled to give details of the incriminating admission, provided that by so doing, he does not further incriminate himself. *Rogers v. United States*, 340 U.S. 367, 373 (1951).

194. *Slochower v. Board of Educ.*, 350 U.S. 551 (1956).

195. See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949).

196. Cited with approval was Dean Griswold's work on the fifth amendment, *op. cit. supra* note 191, but ignored were Sidney Hook's devastating critique, *op. cit. supra* note 190, and Williams, *Problems of the Fifth Amendment*, 24 *Fordham L. Rev.* 19 (1955), which presents a fine rebuttal of current misconceptions of this subject.

197. "Many of these [communist] spies and traitors when exposed sought sanctuary for their infamies in the Fifth Amendment. Such a plea of immunity is an implication of guilt. Surely these people should not have the right to vote or hold office, for thereby they use these privileges of free men against the safeguards of freedom." *N.Y. Herald Tribune*, Aug. 11, 1954, p. 6, col. 4.

198. *Lerner v. Casey*, 357 U.S. 468 (1958); *Beilan v. Board of Educ.*, 357 U.S. 399 (1958).



splitting hairs, concluded that if adverse action taken by the state is based on a refusal to answer, rather than on the invocation of the fifth amendment, then such action is proper. In view of these decisions, there is a possibility that the Court would uphold legislation, such as is recommended by the A.B.A. (Resolution 4(c)),<sup>199</sup> requiring, as a condition of employment, that federal government employees answer all questions on loyalty put to them by Congress or any federal agency. Employees who refuse to answer questions pertaining to their loyalty do not belong in the Government.

### E. *Yates v. United States*

It is unlawful under the Smith Act<sup>200</sup> for any person (1) to advocate or teach the duty and necessity of overthrowing the Government of the United States by force and violence or (2) to organize any group of persons who so advocate or teach. In *Yates v. United States*,<sup>201</sup> Communist Party leaders were convicted of conspiring to commit these prohibited acts with the intention of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The conspiracy was alleged to have commenced in 1940 and continued on through the date of the indictment in 1951.

The trial court had instructed the jury that the word "organize" includes "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization."<sup>202</sup> The trial court also instructed the jury that the Smith Act would be violated if a person, with the specific intent to cause or bring about the overthrow and destruction of the Government by force and violence as speedily as circumstances would permit, advocated the necessity and duty of such overthrow.<sup>203</sup>

The Supreme Court held both instructions were erroneous and awarded new trials to nine defendants, acquitting the remaining five.<sup>204</sup>

#### 1. The "Organizing" Provision

The Court held that the "organizing" provision of the Smith Act is limited to acts involving the initial organization of a seditious group and not to any activities thereafter; and ruled that inasmuch as the Com-

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199. A.B.A. Resolutions at 408.

200. 18 U.S.C. § 2385 (1952).

201. 354 U.S. 298 (1957).

202. *Id.* at 304.

203. *Id.* at 313-14 n.18.

204. In his dissent, Mr. Justice Clark stated that this was the first time in history that the Supreme Court had ever ordered an acquittal solely on the facts. 354 U.S. at 346.

unist Party had been reorganized in 1945, a 1951 indictment had been barred by the statute of limitations in 1948.<sup>205</sup>

The Smith Act, passed in 1940, was aimed particularly at the Communist Party. Since the United States Communist Party was originally organized in 1919, under the Court's interpretation, the organizing provision from the outset thus had no application to the Communist Party. Assuredly this was not the intention of Congress. The Court, admitting that the legislative history of the Smith Act shows that "concern about communism was a strong factor,"<sup>206</sup> attempted to demonstrate that this particular provision of the Act was not written with reference to the Communist Party by quoting a 1935 statement of Representative John W. McCormack which, on the contrary, would indicate clearly that the bill purported to include communists, but not only communists.<sup>207</sup>

The Court dismissed dictionary definitions of the word "organizing" because they show "the term is susceptible of both meanings attributed to it by the parties here."<sup>208</sup> The Government, of course, did not contend that the term was not susceptible of also meaning "establish," "found" or "bring into existence," (as contended by the defendants),<sup>209</sup> but maintained that this was not the only meaning of the word.

The *Yates* interpretation of the "organizing" provision of the Smith Act has virtually stopped all activity by the Department of Justice under this section.<sup>210</sup> If Communist Party subversives are to be effectively prosecuted, it is vital that Congress adopt the A.B.A.'s recommendation (Resolution IV(a)) and amend the Smith Act to define "organize" as including recruitment and other organizational activities.<sup>211</sup>

## 2. The "Advocacy" Provision

The Court held that advocacy of the forcible overthrow of the Government is not a violation of the Smith Act if it is "divorced from any

205. *Id.* at 310-12.

206. *Id.* at 307.

207. "And by the way, this bill is not alone aimed at Communists; this bill is aimed at anyone who advocates the overthrow of Government by violence and force." *Ibid.* See Hearings on H.R. 4313 and H.R. 6427 Before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 1st Sess., ser. 5, at 3 (1935). The Court completely disregarded a later statement made by this same legislator in 1939 during a debate on the Act: "[A] communist is one who intends knowingly or willfully to participate in any actions, legal or illegal, or a combination of both, that will bring about the ultimate overthrow of our Government. He is the one we are aiming at. . . ." 84th Cong. Rec. 10454 (1939).

208. 354 U.S. at 305-06.

209. *Id.* at 304.

210. Testimony of Lawrence E. Walsh, Deputy Attorney General, Department of Justice, Senate Hearings at 407.

211. A.B.A. Resolutions at 408.

effort to instigate action to that end."<sup>212</sup> Specifically, the Court ruled that it is not enough to advocate the necessity of violent overthrow of the Government and to advocate that it is one's duty to violently overthrow the Government, even though the advocator intends by his advocacy to violently overthrow the Government. The advocacy must be accompanied by an urging "to do something, now or in the future."<sup>213</sup> Anything short of this, the Court ruled, was merely advocacy of an "abstract doctrine."<sup>214</sup>

Following the Court's reasoning, if an individual, for the purpose of having a police chief assassinated, stated that the assassination of the police chief was necessary and further that it was the duty of his listeners to assassinate the police chief, he would not be advocating action, but would be merely advocating "an abstract doctrine," and therefore, would be doing nothing criminal. Could it be said that the police chief would be unreasonable in concluding that the advocator had seriously jeopardized his well-being?

Indeed, as the Court conceded, the distinction between advocacy in the abstract with evil intent and advocacy which incites to action is "often subtle and difficult to grasp."<sup>215</sup>

Earlier, in *Dennis v. United States*,<sup>216</sup> in upholding the Smith Act, the Court ruled that the constitutional test was whether or not the defendant's advocacy had created a "clear and present danger"<sup>217</sup> of overthrowing the Government. Yet, in the *Yates* case, the Court remained silent as to this principle. In any event, it is clear that the Court in *Yates* did not override the ruling of the *Dennis* case that the advocacy need not stir one to immediate action to be deemed criminal.<sup>218</sup> Rather, the Court, by some peculiar reasoning, interpreted the *Yates* trial court as permitting the defendants to be convicted in the absence of any incitement to action, present or future.<sup>219</sup> The Court stated that the *Yates* trial judge was in error in not giving the *Dennis* charge (which the Government had requested that it do), although it would appear that in substance the charges were the same.

212. 354 U.S. at 318.

213. *Id.* at 325.

214. *Id.* at 312.

215. *Id.* at 326.

216. 341 U.S. 494.

217. *Id.* at 503.

218. 354 U.S. 298, 320-21, 324-25.

219. "The Supreme Court did not repudiate the Smith Act but in interpreting it performed an extraordinary feat of psychological acrobatics. This feat consisted of a gossamer-fine distinction between 'advocacy of abstract doctrine' and 'advocacy directed at promoting unlawful action.' . . . And so we come back to our original question—that of the relationship of the idea (whether qualified as 'abstract' or not) to the act. . . . Who is

Legislation to clarify this issue is in order. The A.B.A.'s recommendation (Resolution IV(b)) is that the Smith Act be amended to make it a crime to advocate intentionally the violent overthrow of the Government.<sup>220</sup> The Court has already stated that legislation punishing advocacy without incitement would be in a clearly marked "constitutional danger zone."<sup>221</sup> Nevertheless, this pronouncement would not affect the propriety of amending the Smith Act to make it perfectly clear that intentional advocacy of any action, present or future, to overthrow the Government is criminal. Such an amendment would eliminate any future doubts or problems revolving about "subtle and difficult" distinctions in this area.<sup>222</sup>

#### F. *United States v. Witkovich*

An alien against whom a final order of deportation has been outstanding for over six months is, pending eventual deportation, subject to supervision under regulations prescribed by the Attorney General.<sup>223</sup> Such regulations may require the alien to give information under oath "as to his habits, associations and activities," and other matters that the Attorney General determines to be fit and proper; refusal to do so is a crime.<sup>224</sup>

The defendant, who had been under a deportation order for over six months, was indicted for refusing to answer questions put to him by the Attorney General under this statute, including queries as to whether he was presently a member of the Communist Party and had attended Communist Party meetings since the issuance of his deportation order.

Despite plain statutory language, the Supreme Court ruled that the Attorney General was entitled to interrogate an alien only as to those matters which would reflect on the latter's availability for deportation; and questions concerning Communist Party activity were not in this category.<sup>225</sup>

In justifying its strained construction of the statute, the Court indicated that it might be unconstitutional to "inhibit" the subversive

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capable of drawing the fine distinction between the state of mind of one who teaches the commission of a crime as a mere 'abstract principle' . . . and the state of mind of one who . . . instigates its commission?" Editorial comment of the American Journal of Psychiatry as quoted in the National Review, March 15, 1958, p. 247.

220. A.B.A. Resolutions at 408.

221. 354 U.S. at 319.

222. The Department of Justice contends that such amendatory legislation is not needed. See Senate Hearings at 407-08.

223. 66 Stat. 208 (1952), 8 U.S.C. § 1252(d) (1952).

224. 66 Stat. 208 (1952), 8 U.S.C. § 1252 (1952).

225. 353 U.S. 194 (1957).

activities of an alien who has been ordered deported for such activities.<sup>226</sup> Yet, the Attorney General merely sought information as to the alien's Communist Party activities in order to determine the nature of the supervision, if any, that might be required. It is difficult to understand how imposition of any restrictions on an alien's subversive activities would be unconstitutional in view of Congress' broad powers concerning aliens.<sup>227</sup> If Congress may deport aliens, have them fingerprinted and jailed, then why not a congressional right to restrain their activities?<sup>228</sup>

The *Witkovich* decision thus places the alien under an order of deportation in a better position than other aliens who must report to the Attorney General when required to do so. In other words, the Attorney General may require an alien to report and answer questions concerning communist activities, but once the alien is ordered deported, he may not be required to so report. It is evident that Congress intended the Attorney General to supervise alien deportees whose past records reveal dangerous activity. Communist nations frequently refuse re-entry to their nationals in order to enable them to continue their subversive activities in the United States, and Congress undoubtedly had this in mind in passing Section 1252(d).

Legislation permitting the Attorney General to restrict and prohibit the subversive activities of an alien awaiting deportation, and to interrogate him concerning the same, as recommended by the A.B.A. (Resolution IV(d)), is imperative as an additional safeguard for our internal security.<sup>229</sup>

#### G. *Bonetti v. Rogers*

Petitioner, an alien, arrived in the United States in 1923, was a member of the Communist Party, and in 1937 left the United States, abandoning all rights of residence. In 1938 he was readmitted to the United States; there was no evidence that he was thereafter a Communist Party member. The Government sought to deport Bonetti under a statute providing in effect that an alien is deportable if he becomes a communist at any time after his "entering" the United States.<sup>230</sup>

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226. *Id.* at 201.

227. See 353 U.S. at 204-05 (Clark, J., dissenting). In *Carlson v. Landon*, 342 U.S. 524 (1952), the Court approved detention of an alien during the determination of his deportability.

228. See, e.g., 66 Stat. 208 (1952), 8 U.S.C. § 1252(a) (1952) (apprehension and deportation of aliens); 66 Stat. 224 (1952), 8 U.S.C. § 1302 (1952) (registration and fingerprinting of aliens).

229. A.B.A. Resolutions at 408.

230. Anarchist Act of 1918, ch. 186, § 1, 40 Stat. 1012, as amended, ch. 251, 41 Stat. 1008 (1920), as amended, ch. 439, § 23(a), 54 Stat. 673 (1940), as amended, ch. 1024, § 4(a), 64 Stat. 1008 (1950), repealed by Immigration and Nationality Act of 1952, 66

Stating that the language of the statute was ambiguous, the Court ruled that the word "entering" referred to an "adjudicated lawful admission"<sup>231</sup> which, for Bonetti, was the 1938 entry since he had previously abandoned all his rights under the 1923 entry.<sup>232</sup>

The dissenting opinion of Mr. Justice Clark<sup>233</sup> very convincingly establishes that it was Congress' intent that an alien should be deported if he became a Communist Party member after *any* entry. Otherwise, an alien could defeat the purpose of the Act merely by leaving the country and re-entering. In *United States ex rel. Volpe v. Smith*,<sup>234</sup> the Court had earlier held that the word "entry" included "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."

The majority opinion acknowledged that the effect of its decision is limited since as of June 27, 1952, any alien who has ever been a Communist Party member is excludable, and if he enters when excludable, he is deportable even though not deportable if he had not left the country.<sup>235</sup>

However, the Court's decision seems to give an unmerited advantage to an alien who, by design or chance, left the United States after discontinuing membership in the Communist Party. The alien who remains in the United States after leaving the Communist Party is deportable, but the traveling alien is not. The A.B.A.'s recommendation that legislation be enacted to provide that aliens who became communists at any time subsequent to their entry into the United States be deported (Resolution IV(d)) is thus in order.<sup>236</sup>

#### H. *Watkins v. United States*

The Supreme Court reversed the contempt conviction of Watkins, who, as a witness, had refused to reveal to the House Un-American Activities Committee whether certain individuals had been known to him as members of the Communist Party.<sup>237</sup> Watkins had previously

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Stat. 279 (1952), 8 U.S.C. §§ 132—137-10 (1952). However, the order of deportation here was issued prior to the date the Act of 1952 became effective. See 356 U.S. at 695 n.6.

231. 356 U.S. at 696-97.

232. *Id.* at 698.

233. *Id.* at 700-03.

234. 289 U.S. 422, 425 (1933).

235. 356 U.S. at 698-99.

236. A.B.A. Resolutions at 408. An argument proffered against such legislation is that it would deter alien ex-communists from cooperating with the Government since to do so might result in their deportation. See testimony of Robert Fisher, Senate Hearings at 249-50.

237. 354 U.S. 178 (1957).

admitted cooperating with the Communist Party but denied ever having been a card-carrying member.<sup>238</sup>

Watkins refused to answer the Committee's questions because, as he claimed, no "law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement."<sup>239</sup> Relying on the first amendment, he charged that the questions were not relevant to the work of the Committee, which had no right "to undertake the public exposure of persons because of their past activities."<sup>240</sup>

The Supreme Court held that a witness need not answer questions posed by a congressional committee unless the subject matter of the investigation appears with "undisputable clarity" or the committee describes "what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it."<sup>241</sup> Since the Court ruled that the subject under inquiry had not been elucidated, Watkins, therefore, did not have to answer the Committee's questions.

Watkins himself, however, never maintained that he was ignorant of the subject matter of the investigation. He was willing to talk about his own activities and those of people he believed still in the Communist Party, but based his refusal to answer the questions in issue on the ground that no law required him to identify past Communist Party associates. The Supreme Court did not deal with this objection.

The Court also stated that due process requires that any element of a criminal offense be expressed with clarity, and that the "'vice of vagueness' must be avoided here as in all other crimes."<sup>242</sup> However, this rule applies to the definition of a crime; there is nothing vague about the statute involved in *Watkins* which renders criminal a refusal to answer any query pertinent to the subject under inquiry. Furthermore, pertinency or relevancy has always been considered a question of law for a court to decide, and not a question of fact. Congressional committees were presumed to be asking pertinent questions, and a witness who refused to answer did so at his own peril.<sup>243</sup>

Requiring an investigator to explain to a witness "the connective reasoning" whereby the question propounded relates to the topic under inquiry evinces little knowledge of the process of fact-finding. If an

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238. *Id.* at 183.

239. *Id.* at 185.

240. *Ibid.*

241. *Id.* at 214-15.

242. *Id.* at 209.

243. *Sinclair v. United States*, 279 U.S. 263, 299 (1929).

interrogator must explain with detailed reasoning why each question objected to is pertinent to the inquiry, he may just as well quit before starting. Such explanations would not only hinder and delay the questioning, but would destroy any effective investigative technique. For an interrogator to reveal specifically what he has in mind would often cue a hostile witness to adopt evasive tactics which he otherwise might not employ. Furthermore, since investigators are looking for information, their questions, of necessity, must frequently be of an exploratory nature. It is unreasonable to expect them to pinpoint in advance the areas in which "paydirt" may be struck. As Mr. Justice Frankfurter contended in 1924, "advance rigidities" would "make effective investigation almost impossible."<sup>244</sup>

Besides holding that the House Un-American Activities Committee's action in the *Watkins* case was improper, the Court, in very strong language, expressed its belief that no investigation by the Committee would be valid. The Court maintained that instructions by the House of Representatives to an investigating committee must "spell out that group's jurisdiction and purpose with sufficient particularity,"<sup>245</sup> and indicated that the resolution authorizing the House Un-American Activities Committee was too vague. The Court said it would "be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'?"<sup>246</sup> So emphatic was the Court's language that the *Watkins* case has been interpreted as having turned on the "readily demonstrable proposition that the committee's investigatory authorization was unconstitutionally broad."<sup>247</sup>

The Court declared that it was not its function to prescribe rigid rules for congressional drafting of resolutions establishing investigating com-

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244. Frankfurter, *Hands Off the Investigation*, *New Republic*, May 21, 1924, p. 329. In condemning the proposition that a congressional committee must give notice of the purpose of its inquiry, James A. Landis wrote: "That . . . [the committee] must announce a precise choice before adducing evidence necessary for a proper judgment, is to insist upon leaping before looking, to require of senators that they shall be seers." Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 *Harv. L. Rev.* 153, 221 (1926).

245. 354 U.S. at 201.

246. *Id.* at 202. The Court went on to assert that "no one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make." *Id.* at 204.

247. Pritchett, *The Political Offender and the Warren Court* 39 (1958). Yet, the authorizing resolution of the House Un-American Activities Committee is no broader than that of many other congressional committees. The Committees on the Armed Services have been given jurisdiction over "common defense generally." *Legislative Reorganization Act of 1946*, ch. 753, §§ 102, 103, 60 Stat. 815, 824. The Senate and House Committees on Interstate and Foreign Commerce have jurisdiction over "interstate and foreign commerce generally." *Legislative Reorganization Act of 1946*, ch. 753, §§ 102, 103, 60 Stat. 817, 826.



mittees, averring that this was a matter "peculiarly within the realm of the legislature, and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected."<sup>248</sup> In effect, the Court is saying to Congress: "You go ahead and make your own rules, and we won't interfere unless we think we should interfere."

In the course of its opinion, the Court made many unnecessary, inaccurate, and poorly reasoned statements. For example, it stated: "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible . . .,"<sup>249</sup> and contended that "to expose for the sake of exposure" is improper.<sup>250</sup> Yet there was not a shred of evidence of any motive of personal aggrandizement on the part of the investigators, of punishment of a witness, or of exposure for exposure's sake. The Court apparently felt that here was an opportunity to express its own personal views regarding congressional investigations of communism.

In attempting to contrast our congressional committees with the Royal Commissions of Inquiry, the Court stated that the latter's "success in fulfilling their fact-finding missions without resort to coercive tactics is a tribute to the fairness of the process to the witnesses and their close adherence to the subject matter committed to them."<sup>251</sup> The Court thus demonstrated its ignorance of the operations of such commissions. Among other things, a royal commission investigating subversion has the power to (1) arrest and jail witnesses; (2) hold witnesses without bail and incommunicado for many days and until after they are questioned; (3) compel witnesses to testify and impose sanctions for refusing to testify; (4) search witnesses' homes and seize their papers; (5) forbid a witness to have his lawyer present at a hearing; and (6) require all concerned including witnesses to take an oath of secrecy.<sup>252</sup>

Congressional committees, of course, have none of these powers. Furthermore, "royal commissions are not subject to or under the control of the Courts, Parliament or the Cabinet, and a commission is the sole judge of its own procedure."<sup>253</sup>

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248. 354 U.S. at 205.

249. *Id.* at 187.

250. *Id.* at 200.

251. *Id.* at 192.

252. Report of the Canadian Royal Commission, June 27, 1946, pp. 649-84, and English authorities cited therein, and the Report of the Australian Royal Commission, August 22, 1955, pp. 437-53, summarized in the testimony of Dean Clarence Manion in 1958 Senate Hearings at 585-86.

253. Testimony of Dean Clarence Manion, 1958 Senate Hearings at 586.

The Court was critical of investigators who revert "to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present."<sup>254</sup> But certainly the past often reflects, and frequently is, the only key to the present.

Contrary to the Court's insinuations, the records of the Senate Internal Security Subcommittee and the House Un-American Activities Committee have indeed been those of accomplishment,<sup>255</sup> and they have well merited the praise tendered by the A.B.A. (Resolution V).<sup>256</sup>

The Court stated that the decade following World War II saw the emergence of a type of congressional inquiry unknown before in American history, and a "new phase of legislative inquiry [that] involved a broad-scale intrusion into the lives and affairs of private citizens."<sup>257</sup> Thus, questioning a man about communist activity is a "broad-scale intrusion" into his life and affairs, but ruthlessly questioning a man about his private business affairs, as was done in pre-World War II inquiries, does not fall into this category. While the Court laments that persons named before congressional committees as Communist Party members are placed in the "glare of publicity,"<sup>258</sup> one need only recall Mr. Justice Black's earlier statement that unscrupulous business men should be so exposed to wonder at the Court's present concern.<sup>259</sup>

The Court also indicated that because Communist Party members have been exposed to public stigma, people who might otherwise advance unorthodox views would not do so for fear of like treatment in the future.<sup>260</sup> The Court held congressional investigators responsible for initiating this reaction. Again, one might ask what is so wrong about

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254. 354 U.S. at 204.

255. Some twenty-four new laws were enacted by Congress and forty-eight revisions in administrative regulations were effected as the result of the recommendations of the Senate Subcommittee on Internal Security. Staff of Legislative Reference Service of the Library of Congress, 85th Cong., 2d Sess., *Legislative Recommendations by the Senate Internal Security Subcommittee and Subsequent Action Taken by the Congress and the Executive Agencies* (Comm. Print 195). The 1958 report of the House Un-American Activities Committee reveals that thirty-five legislative measures sponsored by the Committee had been enacted into law and thirteen policy recommendations had been implemented by the executive branch of the Government. *N.Y. Times*, March 8, 1959, p. 38, cols. 3-4.

256. See A.B.A. Resolutions at 409-10.

257. 354 U.S. at 195.

258. *Id.* at 197.

259. See p. 254. Mr. Justice Black's words returned to haunt him in the majority opinion of *Barenblatt v. United States*, 360 U.S. 109, 112 (1959). Black dissented in this case.

260. 354 U.S. at 197-98.

discouraging people from joining organizations which seek to enslave the whole world?

A friendly analysis explains that what the Court has done in *Watkins* "is to try a little psychological warfare on Congress, to see whether it cannot be frightened or shamed into taking a more responsible view of its powers."<sup>261</sup> It would seem that the warfare was more annihilatory than psychological.

Fortunately, in *Barenblatt v. United States*,<sup>262</sup> decided by a divided Court after the A.B.A. resolutions were passed, the deadly direction of the *Watkins* case was completely reversed. In upholding the contempt conviction of a witness appearing before the House Un-American Activities Committee, the Court, instead of deriding congressional investigators, emphasized the threat of world communism, admitting that it would have to ignore international affairs to assume that the Communist Party was an ordinary political party. Most importantly, the Court upheld the authority of the House Un-American Activities Committee to investigate communism.<sup>263</sup> There would now seem to be no need to rewrite the Committee's basic authorizing resolution, as recommended by the A.B.A. (Resolution II) before the reversal of *Watkins*.<sup>264</sup> Since the *Barenblatt* case also delineated less rigid requirements for elucidating the pertinency of the Committee's questions,<sup>265</sup> there is thus also less need for the A.B.A. recommendation that each witness be furnished with a copy of the Committee's basic authority along with his subpoena (Resolution III).<sup>266</sup>

### I. *Sweezy v. New Hampshire*

*Sweezy* was convicted of contempt for refusing to answer certain questions concerning university lectures he had delivered and his knowledge of the Progressive Party. The questions were posed by the Attorney General of New Hampshire, who had been appointed by the state legislature as a one-man committee to investigate subversion. In affirming the contempt conviction,<sup>267</sup> the Supreme Court of New Hampshire had held that the Attorney General was operating within his

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261. Pritchett, *The Political Offender and the Warren Court* 47 (1958).

262. 360 U.S. 109 (1959).

263. *Id.* at 117-18.

264. See A.B.A. Resolutions at 407-08.

265. 360 U.S. at 123-25. The Court pointed out that the subject matter of the instant inquiry had been identified at the outset as an investigation into communist infiltration in the field of education. In view of the submission of a memorandum of constitutional objections prepared by *Barenblatt*, the latter must have been aware of this subject. *Id.* at 116-22.

266. See A.B.A. Resolutions at 408.

267. 100 N.H. 103, 121 A.2d 783 (1956).

authority since the questions relating to the defendant's lectures might tend to indicate whether he was a subversive person; and the questions concerning the Progressive Party might reveal it to be a subversive organization.

In reversing the conviction,<sup>268</sup> the United States Supreme Court held that the discretion granted the Attorney General to investigate subversion was so broad that it was impossible for the Court to determine whether or not the state legislature was interested in the information which the Attorney General had sought.<sup>269</sup> It was of no consequence to the Court that the legislature had already twice ratified the Attorney General's conduct by authorizing a continuation of his investigation in the same "form" and "manner."<sup>270</sup> Since the highest court of New Hampshire had already ruled that the Attorney General was directed to inquire as he did, the Supreme Court should have been bound by this finding, for it is improper for the Court to overturn state action in the absence of a deprivation of constitutional rights.

The Court again made a number of statements extraneous to its ruling. It said: "We believe that there unquestionably was an invasion of petitioners' liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."<sup>271</sup> The Court attempted no definition of "academic freedom."

The Court also proclaimed that "to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."<sup>272</sup> This reasoning suggests that although those who teach the children of the nation exercise a vital function, no inquiry should be made as to their qualifications or the contents of their teaching. The Court offers no sound reason why "intellectual leaders" should be free of the reasonable restraints imposed upon all other men. Instead, it uttered a very ominous threat for future state investigations of subversion in education: "We do not now conceive of any circumstances wherein a state interest would justify infringement of rights . . ."<sup>273</sup> in the areas of "individual political freedom"<sup>274</sup> and "freedom in the community of American universities."<sup>275</sup>

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268. 354 U.S. 234 (1957).

269. *Id.* at 253-54.

270. *Id.* at 269 (dissent). As Professor Roger C. Cranton observed, "to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible." Quoted in *What 36 State Chief Justices Said About the Supreme Court*, U.S. News and World Report, Oct. 3, 1958, p. 97.

271. 354 U.S. at 250.

272. *Ibid.*

273. *Id.* at 251.

274. *Id.* at 250.

275. *Ibid.*

Fortunately, this threat has been diminished, and the effect of the *Sweezy* case minimized to a considerable extent, by the recent decisions in the *Barenblatt* case and *Uphaus v. Wyman*,<sup>276</sup> which sustained a contempt conviction arising from the same investigation of the New Hampshire Attorney General as had been involved in the *Sweezy* case. Uphaus refused to supply the guest list of a summer camp run by the New Hampshire World Fellowship Center, of which he was executive director. The Court declared that the nexus between the World Fellowship Center and subversive activities disclosed by the record justified the Attorney General's investigation. It held that the governmental interest of self-preservation "outweighs individual rights in an associational privacy . . ." <sup>277</sup> and ruled that *Pennsylvania v. Nelson*<sup>278</sup> did not preclude state investigation and prosecution of sedition against the state itself.<sup>279</sup>

The *Barenblatt* case specifically held that the power of Congress to investigate the Communist Party is not to be denied because the field of education might be involved,<sup>280</sup> for Congress is not "precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls."<sup>281</sup>

#### J. *Pennsylvania v. Nelson*

The defendant, an acknowledged member of the Communist Party, had been convicted under the Pennsylvania Sedition Act of knowingly advocating the overthrow of the Government of the United States by force and violence. The United States Supreme Court, affirming<sup>282</sup> the Supreme Court of Pennsylvania, which reversed the conviction,<sup>283</sup> held that the Smith Act of 1940 had superseded the Pennsylvania Sedition Act and based its decision on three grounds: (1) that Congress intended to be the exclusive occupant of the field of sedition; (2) that federal interest is so dominant in the field of sedition that it precludes state laws on the same subject; and (3) enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.<sup>284</sup>

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276. 360 U.S. 72 (1959).

277. *Id.* at 80.

278. 350 U.S. 497 (1956).

279. 360 U.S. at 76.

280. 360 U.S. at 129.

281. *Id.* at 112.

282. 350 U.S. 497 (1956). Thirty-five states unsuccessfully petitioned the Court to reconsider its decision. Testimony of Frank B. Ober, Senate Hearings at 64.

283. *Commonwealth v. Nelson*, 377 Pa. 58, 104 A.2d 133 (1954).

284. 350 U.S. at 502-10.

## 1. Congressional Intent

The Court asserted that Congress intended to eliminate state prosecutions in the field of sedition,<sup>285</sup> but did not cite a single passage from any pertinent statutes indicating such an intention. Nor did the Court, in support of its position, refer to any hearings or reports of congressional committees, or any statements made by sponsors of pertinent bills, or any speeches delivered by members of Congress during the ensuing debates on the bills. No such references were made since all available evidence would have completely contradicted the Court. For example, during the debate on the Smith Act, its sponsor, Congressman Smith, declared that his bill "had nothing to do with state laws."<sup>286</sup> He is also on record as stating that Congress never "had the faintest notion of nullifying the concurrent jurisdiction of the respective sovereign states to pursue also their prosecutions for subversive activities."<sup>287</sup>

Section 3231 of Title 18, United States Code, of which the Smith Act is part, provides:

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

The Supreme Court in *Sexton v. California*<sup>288</sup> had earlier interpreted this section as signifying that the states may enact concurrent legislation in the absence of explicit congressional intent to the contrary. Speaking for the majority in the *Nelson* case, Chief Justice Warren, ignoring altogether the *Sexton* decision, claimed that the paragraph preserving the states' jurisdiction merely limited the jurisdiction granted the federal courts.<sup>289</sup> He cited nothing to substantiate this conclusion.

The Court mentioned two cases<sup>290</sup> for the proposition that broad treatment of any subject within the federal power bars supplemental action by states, but both cases dealt with state legislation conflicting with a comprehensive federal regulatory scheme or plan. The Smith Act does not create any statutory or administrative regulations and "there is, consequently, no question as to whether some general con-

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285. *Ibid.*

286. 84 Cong. Rec. 10452 (1939).

287. Quoted in *Commonwealth v. Nelson*, 377 Pa. 58, 90, 104 A.2d 133, 148-49 (1957) (dissent). The Court also ignored the fact that state sedition statutes were already existing when the Smith Act was passed and that some forty-two were in existence at the time of its decision. Yet Congress at no time took steps to limit state action in this area. See 350 U.S. at 514-15 n.4 (dissent).

288. 189 U.S. 319, 324-25 (1903).

289. 350 U.S. at 501.

290. *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947); *Charleston & W.C. Ry. v. Varnville Furniture Co.*, 237 U.S. 597 (1915).

gressional regulatory scheme might be upset by a coinciding state plan."<sup>291</sup>

## 2. The "Dominant" Federal Interest in the Field of Sedition

The Court held that federal interest in internal security is so dominant as to bar state laws.<sup>292</sup> Again, there are no continuing regulations emanating from the Smith Act with which state sedition laws might interfere, as could be true, for example, in a situation involving federal regulation of foreign affairs or coinage.

A clear-cut precedent for state sedition statutes is found in *Gilbert v. Minnesota*<sup>293</sup> where the federal interest in raising armies did not prevent the Court from allowing Minnesota to punish persons who interfered with enlistments, even though a comprehensive federal criminal law prohibited identical activity. The *Gilbert* Court maintained that a state "has power . . . to restrain the exertion of baleful influences against the promptings of patriotic duty to the detriment of the welfare of the Nation and State. To do so is not to usurp a National power, it is only to render a service to its people . . ."<sup>294</sup>

To circumvent this precedent, Chief Justice Warren asserted that the *Gilbert* Court had construed the Minnesota statute as a local police measure rather than as one relating to the raising of armies for national defense.<sup>295</sup> A reading of the case clearly shows, however, that the *Gilbert* Court had interpreted the statute only alternatively and that its main holding was that states have a concurrent interest in, and therefore a concurrent jurisdiction over, matters dealing with the armed forces.

The argument for invalidating a state statute in *Gilbert* was much stronger than in the *Nelson* case, inasmuch as the Constitution expressly gives Congress the power to raise armies. No such exclusive power is granted with respect to sedition.

## 3. The Danger of Conflict

As sole support for its claim that state sedition acts present a serious danger of conflict with administration of the federal program, the Court cited statements by President Roosevelt and by J. Edgar Hoover which

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291. 350 U.S. at 514 (dissent). See also *Kelly v. Washington*, 302 U.S. 1 (1937), where the Court in upholding a state statute stated: "The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be reconciled or consistently stand together." *Id.* at 10.

292. 350 U.S. at 504.

293. 254 U.S. 325 (1920).

294. *Id.* at 331.

295. 350 U.S. at 501.

urged, in substance, that any espionage or sabotage information obtained by the states should be turned over promptly to the F.B.I.<sup>296</sup> These statements, however, merely reflect the necessity of cooperation between the states and the federal government which J. Edgar Hoover has always favored.<sup>297</sup>

The Court completely disregarded arguments proffered by the Department of Justice in an amicus curiae brief which pointed out that administration of existing state sedition laws had yet to impair federal enforcement of the Smith Act.<sup>298</sup> The Department counseled that:

The significance of this absence of conflict in administration or enforcement of the federal and state sedition laws will be appreciated when it is realized that this period has included the stress of wartime security requirements and the federal investigation and prosecution under the Smith Act of the principal national and regional Communist leaders . . . [T]he Attorney General of the United States recently informed the attorneys general of the several states . . . that a full measure of federal-state cooperation would be in the public interest.<sup>299</sup>

Thus we have the Court overturning a state statute partly because it feared a possible conflict in the administration of the federal and state statutes, even though those charged with their administration had no such apprehension. Clearly the Court has interfered where it should have not.

As the *Nelson* decision remains objectionable, Congress should act on the A.B.A.'s recommendation that legislation be passed embodying Congress' intention that state statutes proscribing sedition against the United States shall have concurrent enforceability (Resolution I).<sup>300</sup> It is of great importance to the nation that all available competent manpower be utilized for the detection and prosecution of subversion.

296. *Id.* at 506.

297. In 1936, Hoover declared: "The Federal Bureau of Investigation believes that the secret of crime eradication lies not in a national police force but in solidarity and the combined linking of all law enforcement agencies. It believes in a close-knit cooperation, each unit capable of handling its peculiar problems, but also, when necessary, of mobilizing its efforts in a concerted drive against the criminal element of this country." Quoted in Whitehead, *The F.B.I. Story* 150 (1956).

298. Quoted in *N.Y. Times*, Sept. 15, 1955, p. 19, cols 1-4. See also 350 U.S. at 518.

299. Brief for the Department of Justice as Amicus Curiae, pp. 30-31. Deputy Attorney General Lawrence E. Walsh recently testified that whatever conflicts exist between state and federal law enforcement agencies are of a minor nature, adding that there "aren't enough people to do the work." Senate Hearings at 402.

300. A.B.A. Resolutions at 407. In a later case, *Uphaus v. Wyman*, 360 U.S. 72, 76 (1959), the Court held that the *Nelson* decision had not "stripped the States of the right to protect themselves," thus upholding state laws prohibiting seditious acts against the state itself. The Court referred to the *Nelson* case as holding precisely that the Smith Act superseded enforceability of the Pennsylvania Sedition Act which proscribed the same conduct, "knowing advocacy of the overthrow of the United States by fear and violence. . . ." 360 U.S. at 76.



## V. THE EFFECT OF SUPREME COURT DECISIONS ON INTERNAL SECURITY EFFORTS AND COMMUNIST PARTY ACTIVITIES

The Committee on Federal Legislation of the New York City Bar Association reports that the A.B.A. Special Committee "offers no support for its charges" that recent Supreme Court decisions have "encouraged an increase in Communist activity in the United States or . . . have caused a 'paralysis of our internal security.'"<sup>301</sup> On the contrary, there is abundant evidence to justify the conclusions of the A.B.A. Committee.

Fifteen Smith Act conspiracy indictments were filed prior to the *Yates* case. Out of 30 pre-*Yates* defendants who went to trial, 28 were convicted, and each conviction was affirmed on appeal. Of 84 post-*Yates* defendants who went to trial, 76 were convicted, but all convictions were reversed on appeal. Adding the indictments dismissed against 19 defendants who were not tried and that against one defendant who had a "hung" jury makes a total of 96 defendants who directly benefited from the *Yates* decision. Of these 96, all have been freed, except six who have been retried and convicted in Denver and whose appeal is pending, and six defendants in Cleveland who have yet to be retried. The trial time spent by the Government in cases reversed because of the *Yates* decision totals 4½ years. After all this time, to say nothing of the hours spent in preparation for trial, the net result of the *Yates* case is that 84 leaders of the Communist Party have gone scot-free and 12 more may well be on their way to freedom. The sentences that had been imposed on these freed Communist Party leaders total 312 years. It would indeed seem that our "security has been weakened" not only by putting back into circulation these leaders of the communist conspiracy, thus leaving them free to continue to work for the ultimate enslavement of the United States, but also by making further prosecutions an extremely hazardous venture. The *Yates* decision has in truth rendered the Smith Act almost unusable for the conviction of communists. No new Smith Act conspiracy indictments have been filed since it was handed down. Of course, not only have federal prosecutions been crippled, but the Court, through the *Nelson* case, has prevented the states from initiating similar prosecutions on the ground that the now emasculated Smith Act has pre-empted the field.

The following tabulation of the history of these indictments demonstrates that the Supreme Court has indeed made, as one federal judge has said, "a virtual shambles"<sup>302</sup> of the Smith Act.

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301. 14 Record at 255.

302. Judge Richards H. Chambers in *Fujimoto v. United States*, 251 F.2d 342 (9th Cir. 1958).

	<i>Indictments</i>	<i>Acquittals</i>	<i>Convictions</i>	<i>Ultimate Disposition</i>
			<u><i>Pre-Yates</i></u>	
1.	New York (S.D.): 12 indicted (1 not yet tried, too ill)		11 on 10/14/49 (6½ mos. trial)	Aff'd, <i>United States v. Dennis</i> , 341 U.S. 494 (1951).
2.	Baltimore: 6 indicted		6 on 4/1/52 (2½ mos. trial)	Aff'd, <i>Frankfeld v. United States</i> , 198 F.2d 679 (4th Cir. 1952), <i>cert. denied</i> , 344 U.S. 922 (1953).
3.	New York (S.D.): 21 indicted* (1 died)	2	11 on 1/21/53 (9 mos. trial)	Aff'd, <i>United States v. Flynn</i> , 216 F.2d 354 (2d Cir. 1954), <i>cert. denied</i> , 348 U.S. 909 (1955).
			<u><i>Post-Yates</i></u>	
	New York (S.D.): 7 indicted (remaining from above 21*)	1	6 on 7/31/56 (3½ mos. trial)	Rev'd, <i>United States v. Jackson</i> , 257 F.2d 830 (2d Cir. 1958); all ordered acquitted.
4.	Los Angeles: 15 indicted (1 not tried, too ill)		14 on 8/5/52 (6 mos. trial)	Rev'd, <i>Yates v. United States</i> , 354 U.S. 298 (1957); 5 ordered acquitted; 9 new trials; indictments dismissed at Government's request, 12/2/57.
5.	Honolulu: 7 indicted		7 on 6/19/53 (7½ mos. trial)	Rev'd, <i>Fujimoto v. United States</i> , 251 F.2d 342 (9th Cir. 1958); all ordered acquitted.
6.	Pittsburgh: 6 indicted (1 not tried, too ill)		5 on 8/20/53 (9½ mos. trial)	Rev'd, <i>United States v. Mesarosh</i> , 352 U.S. 1 (1956); indictment dismissed at Government's request, 9/13/57.
7.	Seattle: 7 indicted (1 died)	1	5 on 10/10/53 (5½ mos. trial)	Rev'd, <i>Huff v. United States</i> , 251 F.2d 342 (9th Cir. 1958); all ordered acquitted.
8.	Detroit: 6 indicted		6 on 2/16/54 (3½ mos. trial)	Remanded for reconsideration in light of <i>Yates</i> , <i>Wellman v. United States</i> , 354 U.S. 931 (1957); <i>rev'd on retrial</i> , 253 F.2d 601 (6th Cir. 1958); indictment dismissed at Government's request, 9/16/58.

<i>Indictments</i>	<i>Acquittals</i>	<i>Convictions</i>	<i>Ultimate Disposition</i>
<u>Post-Yates</u> (continued)			
9. St. Louis: 5 indicted		5 on 5/28/54 (4 mos. trial)	Rev'd, <i>Sentner v. United States</i> , 253 F.2d 310 (8th Cir. 1958); indictment dismissed at Government's request, 10/10/58.
10. Philadelphia: 9 indicted		9 on 8/13/54 (4½ mos. trial)	Rev'd, <i>United States v. Kuzma</i> , 249 F.2d 619 (3d Cir. 1957); 4 ordered acquitted; 5 new trials, 11/13/57; indictment dismissed at Government's request, 5/15/58.
11. Cleveland: 11 indicted	5	6 on 2/10/56 (3 mos. trial)	Rev'd, <i>Brandt v. United States</i> , 256 F.2d 79 (6th Cir. 1958); awaiting new trial.
12. New Haven: 8 indicted ("hung" jury on one def.)	1	6 on 3/29/56 (5 mos. trial)	Rev'd, <i>United States v. Silverman</i> , 248 F.2d 761 (2d Cir. 1957); all ordered acquitted; <i>cert. denied</i> , 355 U.S. 942 (1958).
13. Denver: 7 indicted		7 on 5/25/55 (2 mos. trial)	Rev'd, <i>Bary v. United States</i> , 248 F.2d 201 (10th Cir. 1957); indictment re: 1 def. dismissed at Government's request, 1/27/59; 6 reconvinced, 3/12/59; appeal pending.
14. San Juan, P.R. 11 indicted			Indictment dismissed at Government's request, 1/10/58.
15. Boston: 7 indicted (1 died)			Indictment dismissed at Government's request, 11/8/57.

Another illustration of the paralysis of our internal security is seen in the results flowing from the decision in *Kent v. Dulles*.<sup>303</sup> The Court there held that the Secretary of State could not deny passports to communists or persons going abroad to further communist causes, or even require non-communist affidavits from applicants. John W. Hanes, Jr., Internal Security Administrator of the Bureau of Security and Consular Affairs of the State Department, has testified that since this decision,

303. 357 U.S. 116 (1958).

some 1,150 persons with known communist affiliations have obtained passports, among them an increased number of hard-core communists.<sup>304</sup> He stated that "this is a gap in our defense which our enemies have not been slow to take advantage of. Since the Supreme Court decision in June 1958, many leading Communists have been able to travel to the Soviet Union because of the easing of restrictions in the issuance of American passports."<sup>305</sup> These communists are thus free to go abroad to be instructed in plotting the downfall of the United States through subversion, unhampered by any check on their activities. As discussed earlier, the *Witkovich* case prohibits the Attorney General from questioning subversive aliens who have been ordered deported as to their subsequent subversive activities. Certainly our internal security has been weakened by these decisions.

The sweeping language of the *Watkins* case initially threatened to end completely all effective congressional investigation of subversion. Because of this decision, the investigations of the Senate Internal Security Subcommittee practically came to a standstill, while the House Un-American Activities Committee operated under the severest handicap.<sup>306</sup> Fortunately, the *Barenblatt* case<sup>307</sup> has overruled *Watkins* in a number of substantial ways, and it is to be hoped that the paralyzing restrictions of the latter will be eased.

To sum up briefly, the recent decisions of the Supreme Court have crippled our internal security efforts by, for example, rendering the Smith Act ineffective, restricting prosecution of subversives by the states, permitting subversives to travel abroad, preventing the supervision of subversive aliens, and severely curtailing the power of Congress to investigate subversion.

Supreme Court decisions also have abetted an increase in communist activity in the United States. The *Yates* decision is hailed by a communist leader as "the greatest victory the Communist Party ever had" and as a case which would "result in the rejuvenation of the Communist Party in America."<sup>308</sup> J. Edgar Hoover has frequently attested to the accuracy of this prophecy. In his year-end report to the Attorney General, he stated that the American Communist Party during 1957 "emerged from hiding with new confidence and determination," one

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304. Testimony of John W. Hanes, Jr., Senate Hearings at 278.

305. *Id.* at 279.

306. See Rusher, Can Congressional Investigations Survive *Watkins*?, *National Review*, Sept. 7, 1957, p. 201. Congressional investigations of communism are a vital need. As J. Edgar Hoover has admonished: "[W]e may not learn until it is too late to recognize who the communists are, what they are doing, and what we ourselves, therefore, must do to defeat them." Foreword to Hoover, *Masters of Deceit* at vii (1958).

307. 360 U.S. 109 (1959).

308. Quoted in Gordon, *Nine Men Against America* 143 (1958).

reason for its increasing boldness being a continued success in “invoking legal technicalities and delays.”<sup>309</sup> Exploitation of Supreme Court decisions has, beyond any doubt, encouraged this increased Communist activity.

#### VI. OTHER CRITICS OF THE COURT

The American Bar Association has not been alone in criticizing recent decisions of the United States Supreme Court. On August 23, 1958, meeting in Los Angeles, California, the Conference of State Chief Justices, in an unprecedented move, overwhelmingly approved a highly critical report which expressed grave concern over the Supreme Court's exercise of “almost unlimited policy making powers” and stated that recent decisions raised considerable doubt as to whether ours is a government of laws or of men.<sup>310</sup> Impelled to speak out to uphold “respect for law,”<sup>311</sup> the jurists, including the eminent Chief Judge of the New York Court of Appeals, Albert Conway, approved the following resolution:

Resolved: . . . That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and State powers, respectively, and as to the validity under the Federal Constitution of the exercise of powers reserved to the States, exercise one of the greatest of all judicial powers—the power of judicial self-restraint—by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.<sup>312</sup>

Judge Learned Hand of the Second Circuit Court of Appeals has scored the Supreme Court's encroachment on the legislative domain as “a patent usurpation” of power,<sup>313</sup> declaring that he never has been able to understand on what basis the Court asserted or could assert its notions of what was good for the community, “except as a coup de main.”<sup>314</sup> One cannot “frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority.”<sup>315</sup> Hand contends that “it certainly does not

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309. Quoted in the *National Review*, Jan. 11, 1958, p. 29.

310. What 36 State Chief Justices Said about the Supreme Court, *U.S. News & World Report*, Oct. 3, 1958, pp. 92, 102.

311. *Id.* at 94.

312. *Id.* at 92.

313. Hand, *The Bill of Rights* 42 (1958).

314. *Id.* at 55.

315. *Ibid.*

accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve."<sup>316</sup> He decries judicial intervention in due process cases unless it appears that the statutes concerned are not "honest choices between values and sacrifices honestly appraised."<sup>317</sup>

Other jurists, state and federal, have been less restrained in voicing their disapproval of the Court.<sup>318</sup>

Professor Edwin S. Corwin, noted authority on constitutional law, has described the *Watkins* and *Yates* decisions as "irresponsible" and "vicious nonsense," and the *Cole* holding as "weird."<sup>319</sup> He asserts that "the country needs protection against the aggressive tendency of the Court."<sup>320</sup> Other legal experts have also criticized the recent propensities of a Supreme Court which, as one observer remarked, "has embarked upon a campaign to effectuate the personal preferences and philosophies of its members."<sup>321</sup>

316. *Id.* at 73.

317. *Id.* at 66.

318. For example, Honorable M. T. Phelps, senior justice of the Arizona Supreme Court declared: "It is the design and purpose of the Court to usurp the policy-making powers of the Nation. . . . I honestly view the Supreme Court, with its present membership and predilections, a greater danger to our democratic form of government and the American way of life than all forces aligned against us outside our boundaries." Quoted in 104 Cong. Rec. 12120 (daily ed. July 10, 1958). United States District Court Judge George Bell Timmerman has asserted the Supreme Court is a "hierarchy of despotic judges that is bent on destroying the finest system of government ever designed." Quoted in *N.Y. Times*, July 26, 1957, p. 6, col. 7. Of the 128 out of 351 active federal judges who replied to questionnaires mailed them, 54% agreed that the Supreme Court "too often has tended to adopt the role of policy maker without proper judicial restraint." *How U.S. Judges Feel About the Supreme Court*, *U.S. News & World Report*, Oct. 24, 1958, p. 36. That criticism of the Supreme Court by other judges is nothing new may be seen in the following statement of Chief Justice Roane of Virginia concerning an opinion of John Marshall: "A most monstrous and unexampled decision. It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the upright and eminent judges are not exempt." Quoted in Freund, *The Supreme Court Crisis*, 31 *N.Y.S.B. Bull.* 66 (1959).

319. Letter from Edwin S. Corwin to the *N.Y. Times*, March 16, 1958, § 4, p. 10E, col. 6.

320. *Ibid.*

321. Testimony of Lloyd Wright, former Chairman of the Commission on Governmental Security, Senate Hearings at 461. Wright continued: "As Prof. Herbert Wechsler of the Harvard Law School recently demonstrated in his Oliver Wendell Holmes lectures at the school, the Court has failed to adhere to principle or to support its decisions with reason. Often its conclusions are handed down without opinion and sometimes without argument. Precedent is ignored and discarded, and decisions have been delayed and postponed in what appears to some observers to be a calculated campaign of waiting until public opinion is ripe to receive some new policy—timing that would be admirable in a political statesman but ill-becomes a judge.

## CONCLUSION

The present members of the Supreme Court have assumed an unrealistic attitude towards the Communist Party in the United States. They have ignored warnings of former Communist Party members, congressional committees, the F.B.I. and other governmental agencies, and have instead imposed their own views on the nation in the form of policy-making decisions beneficial to the Communist Party and its members. Particularly disturbing has been the Court's disregard of precedent. The frequency with which the Court has overturned previous decisions has led to great instability and confusion in the law. The value of the Supreme Court is greatly diminished when its decisions are predicated upon what five justices personally happen to feel is best for the country.

Furthermore, in its rulings involving communists, it is clear that the Court has frequently employed a double standard. Such use by the Court is typical of many liberal leaders of the nation. They have constantly switched principles depending on what happens to have been at stake. When the Court handed down rulings which they disfavored, these liberals were quick to condemn the Court, but now breathe fire at any hint of criticism.<sup>322</sup> It is illogical to maintain, as some now do, that legislation remedying Supreme Court decisions constitutes an attack on the Court as an institution.<sup>323</sup>

When members of the bar disagree with Supreme Court decisions, it is their right, and indeed their duty, to criticize these decisions and to suggest appropriate remedies. Hence, the report and resolutions of the American Bar Association are completely justified.

As pointed out by the Association, the remedy for poor decisions lies not in drastic curtailment of the Court's jurisdiction, but rather in enacting appropriate legislation to cure those statutory deficiencies which the

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"Dean Erwin Griswold of the Harvard Law School has been an outspoken critic of some aspects of the internal security system, but he, too, has taken the Court to task for its current practice of delivering broad statements of law unrelated to the case before it, causing confusion and doubt.

"The efforts of the States to combat the peril of the Communist conspiracy have been weakened or destroyed by a line of decisions in the Supreme Court of the United States similar in all respects to the decisions which have emasculated the Federal security system." *Id.* at 461-62.

322. On the other hand, it may be said with some justification that there are conservatives who now strive to limit the jurisdiction of the Court who were among its strongest defenders when President Roosevelt attempted to pack it. See, e.g., Westin, *When the Public Judges the Court*, *N.Y. Times*, May 31, 1959, § 6 (Magazine), p. 16. When the progressives made their onslaught on the Court, "it was considered by the conservatives as little short of treason to question the legitimacy of . . . [the Court's] power or to criticize the manner of its exercise." 1 Boudin, *Government by Judiciary* 1 (1932).

323. See, e.g., testimony of Joseph L. Rauh, Jr., *Senate Hearings* at 214. See also statements of Senators Thomas C. Hennings and Jacob K. Javits. *Id.* at 507-08, 513.

Court maintains exist. Many of the cases decided adversely to internal security efforts have turned on the Supreme Court's interpretation of a particular statute, thus leaving the door open for Congress to correct any erroneous construction. There are presently pending numerous bills in Congress which endeavor to rectify Supreme Court decisions on subversion. It is hoped that Congress will not procrastinate in passing the more imperative of these. It is realized, however, that even the passage of new legislation may not be sufficient to thwart a Supreme Court bent, for example, on destroying the basic purpose of the Smith Act. But, on the other hand, there is no guarantee that the Supreme Court would regard as constitutional legislation restricting its jurisdiction. A constitutional amendment is always available, if all else fails.

As in the past, changes in the composition of the Court are altering the trend of its decisions. Many of the A.B.A. proposals may no longer be necessary in view of the recent *Barenblatt* and *Uphaus* cases. The two latest additions to the Court, Justices Whittaker and Stewart, have generally sided with the Government in subversion cases, and it is possible that with other replacements many of the bases for the current complaints against the Court will soon disappear. At present, the Court is being criticized for its decisions in the field of subversion. Twenty years from now it will be excoriated for its pronouncements in some other area.

Sentiments expressed in another setting accurately reflect the views held by many today:

Reluctant as we are to criticize our supreme judicial tribunal, we cannot but observe that when the members of that tribunal write long and varying opinions in handing down a decision, they must expect that intelligent citizens of a democracy will study and appraise these decisions. . . . [Traditional] . . . sanctions of our law, life and government are challenged by a judicial propensity which deserves the careful thought and study of lawyers and people. . . . [If the Supreme Court's philosophy] . . . is to prevail in our Government and its institutions, such a result should, in candor and logic and law, be achieved by legislation adopted after full, popular discussion and not by the judicial procedure of an ideological interpretation of our Constitution.

We therefore hope and pray that . . . novel [interpretations] . . . adopted by the Supreme Court will in due process be revised. To that end we shall peacefully and patiently and perseveringly work.<sup>324</sup>

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324. Statement of the American Hierarchy, Nov. 20, 1948, in *Catholic Mind*, Jan. 1949, pp. 58, 62-64.