The Supreme Court on Trial: A Perspective

James O. Monroe Jr.

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation

Available at: https://repository.uchastings.edu/hastings_law_journal/vol11/iss4/1

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
THE SUPREME COURT ON TRIAL: A PERSPECTIVE

By James O. Monroe, Jr.*

I beseech ye in the bowels of Christ, think that ye may be mistaken.—Cromwell.¹

The Supreme Court of the United States and its decisions under Chief Justice Earl Warren have been the subject of extensive criticism. While the body of criticism began shortly after the school segregation cases of 1954, it became more articulate, scholarly, and "respectable" after 1957 and has continued into 1960. It is time now that we try to see it in proper perspective.

The public and the legal and scholarly professions must view the criticism of the Court as involving most startling accusations.

One way to achieve perspective—to evaluate the charges, the accused, the accusers, and the defense—is to treat the matter as one of allegations and evidence, with the readers as jurymen. Other ways may be better, but in the court of public opinion, the allegations have been made: let them so be examined.

I. The Main Alleged Offenses

Tabulated below are the cases² most prominently or critically discussed in the criticism of 1958–59. For each is given the style, the issue, the government involved (S—state or F—Federal), the type of case (civil or criminal), the gist of the holding (all too briefly but stripped of connotations), the basis relied on for decision (Roman numerals referring to constitutional amendments, "stat" meaning a statute, "proc" meaning procedure, "evid" meaning evidence), and the last three columns checking whether or not the case was mentioned respectively in three important documents: ACC—the 1958 report of the Anti-Communist Committee of the American Bar Association; CJR—the 1958 (State) Chief Justices Report; and BRC—the 1959 (A.B.A.) Bill of Rights Committee Report.

These are the cases on which the current criticism was put forward.

---

* Circuit Judge, Illinois Circuit Judge; A.B. 1939, LL.B. 1942, Univ. Ill. Thanks for aid in research are due J. F. Schlafly of the Illinois bar; Harold Meek (of the Missouri bar), news editor, Irving Dilliard, former editorial editor, and the reference library staff, St. Louis Post-Dispatch; and Dean Russell N. Sullivan, Bernita Davies, Pauline Carleton, and Dorothy Foulk, law librarians, Marian Martin, assistant to the dean (all of the College of Law), Professors Jack Peltason and Charles Hagan, of the political science department, and Sharon Rosenholtz, student, all at the University of Illinois. But all opinions expressed are the writer's, with which any of them may or may not agree.

¹ Quoted by Dilliard, in Introduction to Learned Hand, The Spirit of Liberty, xxiv (1952).
² Footnote 2 on page 372.
<table>
<thead>
<tr>
<th>Case</th>
<th>On which Raised</th>
<th>ISSUE</th>
<th>Critical or Decisive</th>
<th>Govt.</th>
<th>Type</th>
<th>Holding</th>
<th>Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brown</td>
<td>Right to attend school</td>
<td>Segregation</td>
<td>S</td>
<td>Civ</td>
<td></td>
<td>Segregated schools are inherently unequal; laws denying Negroes attendance at white schools deny equal protection.</td>
<td>XIV</td>
</tr>
<tr>
<td>Nelson</td>
<td>State right to enact Employment</td>
<td>Preemption</td>
<td>S</td>
<td>Cr</td>
<td></td>
<td>Congress having preempted field, conviction under void Pa. anti-subversion act properly reversed by Pa. Sup. Ct.</td>
<td>F Stat x x x</td>
</tr>
<tr>
<td>Slochower</td>
<td>Employment</td>
<td>Inferences</td>
<td>S</td>
<td>Civ</td>
<td></td>
<td>Summary dismissal from N. Y. City professorship for refusing answers re communist party held improper.</td>
<td>XIV</td>
</tr>
<tr>
<td>Schware</td>
<td>Law license</td>
<td>Inference</td>
<td>S</td>
<td>Civ</td>
<td></td>
<td>Innocent aliases, past communist membership, arrest w/o conviction don't show bad character precluding license.</td>
<td>Evid</td>
</tr>
<tr>
<td>Konigsberg</td>
<td>Law license</td>
<td>Inference</td>
<td>S</td>
<td>Civ</td>
<td></td>
<td>Good character and loyalty proven not rebutted by refusal to answer re communist party or editorial criticisms of government.</td>
<td>Evid</td>
</tr>
<tr>
<td>Sweezy</td>
<td>Contempt</td>
<td>Authority to question</td>
<td>S</td>
<td>Cr</td>
<td></td>
<td>Questions re teachings, beliefs, lectures, wife's politics (asked under Atty. Genl's limited authority) violate academic, speech freedom.</td>
<td>I XIV x x</td>
</tr>
<tr>
<td>Raley</td>
<td>Contempt</td>
<td>Entrapment</td>
<td>S</td>
<td>Cr</td>
<td></td>
<td>Questioner's advice witness could rely on Ohio privilege—when immunity statute vitiated it, held State entrapment.</td>
<td>XIV</td>
</tr>
</tbody>
</table>

(All the foregoing State-Federal cases involve ideological or subversion matters pursued by State agencies.)

| Moore      | Murder, Rape, R ape | Right to Counsel Appeal | S                  | Cr    |      | Where counsel was essential to protection re sentence on plea of guilty, murder conviction reversed (after 12 years). | XIV   |
| Griffin    | Armed Robbery      | Right to Counsel Appeal | S                  | Cr    |      | State must either furnish free transcript, so indigent defendant has same appeal right as others, or (apparently) release on habeas corpus. | XIV   |
| Eskridge   | Murder             | Right to Counsel Appeal | S                  | Cr    |      | Same rule applied to conviction 20 years old. | XIV   |
| Lambert    | Felony Registration | Scienter               | S                  | Cr    |      | Conviction for not registering under law defendant did not know about held invalid. | x     |
| Comm. Party| Registration requirement | Perjury | F                  | Civ   |      | Finding that party is communist-action organization reversed for hearing on whether key witnesses were perjuriers. | F proc |

III. CIVIL LIBERTIES (Subversion)

(State Due Process)
<table>
<thead>
<tr>
<th>Case</th>
<th>On which Raised</th>
<th>ISSUE</th>
<th>Critical or Decisive</th>
<th>Govt.</th>
<th>Type</th>
<th>Holding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yates</td>
<td>Advocating</td>
<td>Organizing free speech</td>
<td>F</td>
<td>Cr</td>
<td>Reversed convictions for advocacy of revolution “divorced from action.”</td>
<td></td>
</tr>
<tr>
<td>Service</td>
<td>Employment</td>
<td>Procedure</td>
<td>F</td>
<td>Civ</td>
<td>Summary dismissal in violation of Dept's own rules and without reading record held improper.</td>
<td></td>
</tr>
<tr>
<td>Watkins</td>
<td>Contempt</td>
<td>Pertinency</td>
<td>F</td>
<td>Cr</td>
<td>Questions not pertinent to inquiry improper. “Unamerican” means nothing. Witness with no other guide to pertinency may refuse answers.</td>
<td></td>
</tr>
<tr>
<td>Sacher</td>
<td>Contempt</td>
<td>Pertinency</td>
<td>F</td>
<td>Cr</td>
<td>Committee investigating witness recanting can't inquire re Federal law practice. Conviction for refusal to answer reversed.</td>
<td></td>
</tr>
<tr>
<td>Flaxer</td>
<td>Contempt</td>
<td>Timeliness, purgation</td>
<td>F</td>
<td>Cr</td>
<td>Conviction for failure to produce union lists under ambiguous order reversed.</td>
<td></td>
</tr>
<tr>
<td>Yates²,₈</td>
<td>Contempt</td>
<td>Punishment</td>
<td>F</td>
<td>Cr</td>
<td>Refusal re 11 questions in same hearing is 1 contempt not 11. On second review, pretrial time allowed on sentence.</td>
<td></td>
</tr>
<tr>
<td>Jencks</td>
<td>False affid.</td>
<td>Cross-Exam, Discovery</td>
<td>F</td>
<td>Cr</td>
<td>Conviction based on testimony of witness without allowing defense to examine his reports for cross examination (impeachment) reversed.</td>
<td></td>
</tr>
<tr>
<td>Kent</td>
<td>Passport</td>
<td>No non-comm. affidavit</td>
<td>F</td>
<td>Civ</td>
<td>Right to travel part of liberty. State Secy not authorized to refuse passport at his discretion. Refusal for no affidavit reversed.</td>
<td></td>
</tr>
<tr>
<td>Dayton</td>
<td>Passport</td>
<td>Associations</td>
<td>F</td>
<td>Civ</td>
<td>Refusal of passport for associations considered subversive on basis of undisclosed file reversed.</td>
<td></td>
</tr>
<tr>
<td>Bonetti</td>
<td>Deportation</td>
<td>“at any time after”</td>
<td>F</td>
<td>Civ</td>
<td>Communist member before present U.S. entry, though “at any time after” prior entry: held no basis for deportation.</td>
<td></td>
</tr>
<tr>
<td>Witkovich</td>
<td>Deportation</td>
<td>Right to question</td>
<td>F</td>
<td>Cr</td>
<td>Statute construed as not authorizing Atty. Genl. to query deportee re unrelated matters as he sees fit. Conviction for nonanser reversed.</td>
<td></td>
</tr>
<tr>
<td>Artukovic</td>
<td>Extradition</td>
<td>Political asylum</td>
<td>F</td>
<td>Civ</td>
<td>Yugoslav alien remanded for hearing re extradition for “political” offense. Asylum in effect denied.</td>
<td></td>
</tr>
</tbody>
</table>

(Other cases mentioned in the three reports seemed not to be the basis of the comments.)
II. The Allegations

Reaction to these decisions was vigorous in three fields.

1. Segregation. In the year between the Court's historic decision (May 17, 1954) and its final decree (May 31, 1955), the South's best legal talent prepared to evade, stall and fight. Timing considerations, once considered a gradualist approach to ultimate desegregation, "now appeared but a calculated effort to convince the nation that the Supreme Court decision cannot be enforced." White "citizens councils," given color of authority by a "Southern Manifesto," led a movement of massive resistance, and violence flared. Discriminatory assignments, spurious closing or abolition of public schools forebode a decade of prolific litigation testing such evasions. School children of both races were innocent victims of the new tragic era.

At least 89 review articles on the subject appeared in the three years following Brown. Questions involving the whole concept of judicial review, the wisdom and morality of the decision, the Court's authority to rule as it

Reference on p. 369.

2 For brevity, these cases are hereinafter cited by short style only, with volume-page citations given only once, here, in the table order, as follows:


4 Rowan, Go South to Sorrow 213 (1957).
did, and the “unconstitutionality” of the ruling ran through a Southern symposium on the subject. While the law review material was at least scholarly (some thorough, brilliant and impartial) much of the criticism was quite undocumented. The Augusta, Ga., Courier called the Justices “nine crazy men . . . dangerous tyrants,” and an Arizona Supreme Court judge said he viewed the present court as “a greater danger to our democratic form of government and the American way of life than all forces aligned against us outside our boundaries.” The body of opinion described and samples quoted indicate the extent and variety of the criticism.

2. State-Federal relations. The State Chief Justices’ Conference Committee report of August, 1958, led the criticism in this field. It mentioned a “new need to urge” “judicial self-restraint” and, except for recognizing the court’s recent more liberal view as to the validity of state taxation, found that “need” in state-federal relation cases as follows: “State anti-subversive acts have been practically eliminated by . . . Nelson.” “Restrictive action under the fourteenth amendment is to be found in Sweezy . . .” “Konigsberg . . . seems to us to reach the high water mark . . . in overthrowing the action of a state and in denying to a state the power to keep order in its own house.” In Moore, “the majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the state might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail.” Griffin involved “practical problems . . . almost unlimited . . .[,] a vast increase in criminal appeals and a huge case load for appellate courts . . . [:] not a reassuring prospect.” Concluding, the report said:

---

9 E.g., Leflar and Davis, Segregation in the Public Schools—1953, 67 Harv. L. Rev. 377 (1954), all but predicting the decision.
12 Id. at 16.
13 Id. at 16.
14 Id. at 19.
15 Id. at 27.
16 Id. at 29.
17 Id. at 34.
We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint.

With chief justices from California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia and Hawaii opposed, those from Nevada and North Dakota taking no part, and Connecticut, Indiana and Arkansas not represented, the committee report was adopted, 36–8.16

3. Civil liberties (subversion): The chief items here are the American Bar Association Committee Report17 on communist tactics and strategy and the action of the Association’s House of Delegates.18

The committee listed eleven current communist tactics, four “fallacies” regarding communism, and quoted J. Edgar Hoover’s recital of warning against “an unfortunate trend of judicial decisions . . . which strain and stretch to give the guilty not the same but vastly more protection than the law-abiding citizen.”

It urged consideration of legislation or judicial construction on ten points involved in the cases:19 1) to let (congressional) investigators judge the pertinency of their own questions (Watkins, Sacher, cf. Sweezy, Raley); 2) to allow investigation of subversives as freely as of businessmen and labor leaders (ibid); 3) to let states enforce anti-subversive laws (Nelson); 4) to punish teaching or advocating violent overthrow of the government—evidently even though “divorced from action” to that end (Yates); 5) to punish current communist organizational activity, instead of (as under Yates) defining “organize” to mean the original 1945 party organization; 6) to permit dismissal of subversives from nonsensitive positions (Cole); 7) to permit discharge of public employees for refusal to testify regarding communism (Slochower); 8) to permit wide questioning of aliens awaiting deportation (Witkovich), and deportation of aliens for Communist party membership after a prior entry (Bonetti); 9) to permit denial of passports for refusal to sign a non-communist affidavit; and 10) to let states bar persons from law practice on the basis of past Communist party membership (Schware) or refusal to testify regarding communist activity (Konigsberg).

After some debate but little modification, the A.B.A. House of Delegates at its 1959 mid-term meeting (acting on the Committee Report) passed five resolutions:20 1) that the A.B.A. disapprove proposals to limit any jurisdiction vested in the Court; 2) that investigating committee

16 Id. at preface.
19 104 Cong. Rec., op. cit. supra note 17, at 19137.
purposes and powers be clearly defined (*Watkins*); 3) that witnesses be given in writing the precise terms of the investigating committee authority (*ibid*); 4) that whereas recent security decisions "have been severely criticized and deemed unsound by many responsible authorities," legislation be promptly enacted to:

a. Redefine "organize" to include current recruiting, regrouping and expansion of the Communist party (*Yates*).

b. Allow conviction for advocacy of violent overthrow of government or teaching its desirability or necessity (so that) "the nation need not be forced to delay the invoking of the judicial process until such time as the resulting damage has already been wrought" (citing *Yates*); *i.e.*, such teaching or advocating, divorced from action, should be made criminal.

c. Permit as a condition of government employment that the employee not refuse to answer an authorized agency regarding subversive activities or other loyalty matters (*Cole*).

d. Allow deportation for Communist party membership at any time after (any) entry (*Bonetti*) and wide questioning of aliens awaiting deportation (*Witkovicz*).

e. Require labeling of political propaganda here by agents outside the country.

The last resolution was a commendation for congressional security committees.

The temper and view of the A.B.A. leaders were found in the debate. "Decisions of the courts should be subjected constantly to professional criticism. . . . [T]he weapon of professional criticism is the biggest weapon we have to keep that Court . . . within the proper course of constitutional government."21 "We owe it as a duty and responsibility of our high offices as officers of the court not to criticize the court, necessarily, but to criticize decisions that any youngster in law school knows are wrong."22 "Isn't it time that we ask the Court to read the law and interpret the law and quit writing ideological opinions?"23

Roy Cohn (one of the late Senator McCarthy's associates) and Thomas Bolan supplied a scholarly background24 to give the A.B.A. criticisms credibility.

Criticism more general (though some mentioned or apparently referred to the three fields) was plentiful, coming mostly from the political right. Senator Eastland25 scaled the justices on 15 years' decisions for what

---

21 *Id.* at 408.
22 *Id.* at 406.
25 St. Louis Post-Dispatch, July 23, 1958, editorial.
he called "the apparent fondness of the Supreme Court majority for the communist cause." Senator Bricker\textsuperscript{26} said the Justices had a "lust for power" delegated to other branches of government. Senator McClelland\textsuperscript{27} accused the court of an "instability" that "threatens the very foundations of our republic;" certain decisions, he said, "have usurped the legislative power of Congress, and favored communist and criminal elements."

Representative Mason\textsuperscript{28} said the Court "casts aside" cherished precedents and "brazenly" substitutes "Socialist doctrines." Representative Brooks\textsuperscript{29} proposed abolishing the Court and setting up a 17-man tribunal of state judges.

The Roman Catholic American hierarchy\textsuperscript{30} observed that "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 . . . . We therefore hope and pray that . . . novel [interpretations] . . . adopted by the Supreme Court will in due process be revised." An American Legion national commander accused the Court of "hamstringing" both federal and state governments in the fight against communism.\textsuperscript{31}

One book, splattering critical buckshot all over the field and showing a fine concern over Chief Justice Warren's chocolate brown suit (worn at London when presumably formal attire was in order), was called \textit{Nine Men Against America}\textsuperscript{32}—including apparently even the dissenters in any cases involved.

The A.B.A. President could quibble about whether his group had "attacked" or "maligned" the Court. But they had certainly become chief counsel or complaining witnesses before the court of public opinion in a case of serious charges against the Court on all three counts mentioned here.

The remedy suggested was bills to implement the whole body of criticism, and these were many.\textsuperscript{33} They included constitutional amendatory, statutory, or resolution proposals:

1. To alter the Constitution itself, by redefining treason, and by fixed rules of interpretation for state and federal legislation.

2. To affect the Court—to limit its appellate jurisdiction; to give such

\textsuperscript{26} \textit{Id.}, Sep. 17, 1958, p. 22a.
\textsuperscript{27} \textit{Id.}, Mar. 10, 1959, p. 9a; Mar. 14, 1959, editorial.
\textsuperscript{28} \textit{Id.}, Feb. 1, 1959, editorial.
\textsuperscript{29} \textit{Id.}, July 6, 1959, p. 7a.
\textsuperscript{30} Quoted in Cohn and Bolan, \textit{The Supreme Court and the A.B.A. Report and Resolutions}, 28 \textit{Fordham L. Rev.} 233, 286 (Summer 1959).
\textsuperscript{31} St. Louis Post-Dispatch, Apr. 27, 1959, p. 4a.
\textsuperscript{32} \textit{Gordon, Nine Men Against America} (1958).
jurisdiction in some fields to the Senate; to provide for popular election of federal judges; to provide for their appointment by the highest state court judges; to provide for Supreme Court justices fixed terms of office; and to prevent them from running for President or Vice-President.

3. To alter substantive law—redefining “organize” and types of advocacy of overthrow of the government as they affected communist teaching; reciting Congressional intent to deal “effectively” with the communist conspiracy; refusal of passports on the basis of beliefs, associations, or disciplines; and dismissal on security grounds from government jobs in even non-sensitive employment.

4. To affect the federal system—providing concurrent state and federal jurisdiction regarding subversion; giving state courts control over subversion; prohibiting federal courts from considering state administration of educational systems; and preventing federal interference with the states regarding health, morals, education, transportation, and elections.

5. To modify procedure—overruling the Jencks case, making confessions admissible though the accused had been held incommunicado and not taken before a hearing court or magistrate, and making other evidence such as wire-tapping admissible.

In all there were more than 70 such proposals in a short period.

III. The Defense

Friends of the Court filed answers and briefs, in all three fields.

1. Segregation. To answer the Southern Manifesto came more than 100 leaders of the American bar, who declared that the then recent attacks on the Court were “so reckless in their abuse, so heedless of the value of judicial review, and so dangerous in fomenting disrespect for our highest law that they deserve to be repudiated by the legal profession and by every thoughtful citizen.” They pointed out that the Brown case was not usurpation on a fourteenth amendment not mentioning schools nor implemented by Congress, but was based on the general requirements of the equal protection clause which had to be resolved by the Court; the school decisions were part of an accepted trend, they said, made with utmost deliberation and with generous allowance for local adjustment, there to be “complied with in good faith.”

The problems of resistance, violence, and discriminatory devices are part of the current scene, but seem, perhaps, to be working out all too slowly and gradually.

Timing of the August, 1958, criticisms was noted as unique. On call in

85 Id. at 1142.
Congress the week of August 18 was a "states rights" bill, regarded as a broad attempt to cripple the Court. (Gov. Orval Faubus, leader of the "resistance" to desegregation, was facing his second school-opening crisis in Little Rock.) On August 20, too soon for inclusion or even consideration of background papers by a professional staff, the State Chief Justices' conference report was made public. The next day, the A.B.A. Anti-Communist Committee Report was released and was read into the Congressional Record August 22. That was the week of critical Senate debate on the "states rights" bill. That same week Gov. Faubus used the Chief Justices' report in addressing a special session of the Arkansas Legislature.

Why was the State Chief Justices' Report so handled, asked Professor Alexander Bickel of Yale: "Assuming that the Chief Justices had something intellectually coherent to say, and that it was their place to say it, why just now? Why in August, 1958?" Dean Griswold of Harvard Law School, in an address entitled "Fools Rush In," declared, "I am sorry it was issued when it was—just at the time of the latest Little Rock developments—and that it was thought wise to put it out as a sort of an encyclical."

Paul Freund of Harvard said precisely why: The "storm" over the Court "springs, of course, mainly from the decisions in the school segregation cases"; the cases actually cited by the critics were, in comparison to the segregation decisions, "as popguns to the crack of doom"; and the school cases (not mentioned) were "the precipitating cause of these current onslaughts." California Justice Carter summed up: "Running through this report is an obvious resentment against the Supreme Court for its decisions in the segregation cases." And though voiced by the State Chief Justices, the current anti-Supreme Court agitation stemmed, it was said, from the dixiecrats' dislike for Brown.

2. State-Federal relations. Answering the State Chief Justices' Report directly were the dissenters of their own group. Joseph Weintraub (N.J.): it was "unfortunate" that the prestige of their body was placed behind "so
serious an indictment.” Francis B. Condon (R.I.):48 the judges’ conference was consultative, “not an organization to sit in judgment on the highest court in the land.” Charles Alvin Jones (Pa.):49 “these strictures . . . are entirely uncalled for and certainly are not justified on the basis of the decisions, which the report cites for criticism.”

Dean William B. Lockhart of the University of Minnesota Law School50 called the report an “indictment . . . not justified,” which, he said, “coming from a responsible source like the Conference of Chief Justices, tends among the uninformed to be taken as proof of guilt, and becomes among the irresponsible a valuable weapon in their arsenal”; the Court has actually “given greater effect, not less effect, to state power during the last 20 years . . . [and] cannot justly be accused of lack of proper judicial restraint or a tendency to overextend federal power in disregard of state interests.” If federal power had been increased, it was made clear51 that “the states, the White House and Congress all have been parties” to the trend, and “it is silly to blame the Supreme Court.”

Of 351 Federal district and appeal judges polled52 on their view of the State Chief Justices’ conclusions, only 128 (36%) responded: 59 agreed, 50 disagreed, and 19 expressed no view; 223 (64%) did not respond. While a critical analysis showed 59/109 as agreement by 54% of those giving any opinion, a figure just as valid would be that only 59/351 of those polled, only 17%, would express agreement, even anonymously.

3. Civil liberties (subversion): Two committees of standing answered the A.B.A. Anti-Communist report and the A.B.A. resolutions. The New York City Bar Committee on Federal Legislation said53 the resolutions had caused “concern and confusion.” The A.B.A.’s own Bill of Rights Committee issued a 10,000-word report, analyzing the cases involved as not at all untoward, and stating54 that “on balance, this committee is unable to see any indication that the security of the nation or of the states has been impaired by the Supreme Court.”

There were strong individual dissenters in the A.B.A. House of Delegates; among them two former State bar presidents and an eminent American bar leader.55

48 Ibid.
50 Does the United States Supreme Court Now Lack Appropriate Judicial Restraint?

27 HENNEPIN LAW. 83 (March 1959).
51 St. Louis Post-Dispatch, Aug. 27, 1958, editorial.
53 Quoted by COHEN AND BOLAN, op. cit. supra note 8, at 235.
54 Committee draft, p. 30. After disparaging comments by four past presidents of the Association, its House of Delegates voted to “receive” the report and to instruct the President to reiterate the House’s position of February, 1959, see notes 20–23 supra. 45 A.B.A.J. 1102 (1959).
Warren Olney III, director of the administrative office of the United States Courts, resigned from the A.B.A. saying that the delegates' action was “so discreditable” that he did “not want to be identified with the organization any longer.”

The Executive Board of the A.B.A.'s rival, the National Lawyers' Guild, recognized the right to criticize but took issue squarely:

The recent attack... in which the A.B.A. has now joined transcends the bounds of mere criticism. It constitutes a grave threat to the civil rights and liberties of the people. It is marked by an alliance between opponents of civil liberties and of [sic] the segregationist critics of the court.

... [The Association] relied on bare unproven assertions which have been the commonplace of the most outspoken opponents of civil liberties, who have used their equation of communists with danger to the internal security as a cloak for a major attack on the Bill of Rights.

The A.B.A. made no attempt to justify its reliance on this equation, nor did it make any attempt to analyze the decisions of the Court in terms of legal soundness, the requirements of the Constitution or their social wisdom. It did not demonstrate the manner in which these decisions purport to weaken internal security. It did not even attempt to establish the existence of any danger to internal security which the Recommendations are allegedly designed to prevent.

... When such strong forces seek a reversion to McCarthyism,... a special responsibility is placed upon the lawyers of this country... to make sure that the people of the country are not misled by rabble-rousers.

Itemizing, the Guild covered the issues. Re Nelson: “It is not in the interest of the federal security to give politicians in thousands of counties the opportunity to restrict the civil liberties and political freedoms of people by outcries of communism.” Re Yates:

The A.B.A.'s proposal adds to the existing confusion and disregard of First Amendment values. The plain effect of the A.B.A. recommendations is to remove the Smith Act from even the limited application of First Amendment requirements by which the statute was construed in Yates as well as in Dennis. ... The statute proposed by the A.B.A. is unconstitutional.

Re Cole (cf. Service): “There is no evidence of disloyalty by government employees which makes legislation necessary. Nor would the proposed law make for more loyalty. What it does is to deprive government employees of the Constitutional rights which their fellow citizens possess. ...” Re the investigation cases (Watkins, Sacher, cf. Sweezy, Raley): “It is a viola...
tion of the Constitution to permit any committee to invade the freedom of speech and press, and the privacy of ideas and opinions. No amount of rewriting can alter that defect if the Committee—or any new committee, such as Recommendation IV . . . proposes—is empowered to inquire into witnesses' politics, political opinions or political associations. No legislative purpose can be served by such a committee or such investigations, since that is an area outside the domain of government.” On the passport regulations63 the Guild declared, “a year has passed and the results do not indicate any need for legislation to reestablish the former restraints.” Re Bonetti:63 “To deport persons for nothing more than their political belief is itself contrary to the spirit of the Bill of Rights. . . . If [aliens'] activities are criminal, let them be prosecuted, but if legal they should be free to all people.” Re Witkovich:64 “reasonable and sensible.” Finally, the Guild threw the charge right back at the A.B.A.:65

Internal security is endangered, to the lasting damage of the country, when government encroaches upon the area of the people's domain of political opinion and association, and the A.B.A. multiplies that danger when it permits and even encourages that invasion.

Members of the Court appeared pro se. Mr. Justice Harlan said,66 “. . . [M]uch of the criticism has been thoughtful and worthwhile. A large part of it, however, I am sorry to say, has been ill-informed and unworthy on the part of some who should know better.” Mr. Justice Whittaker said criticism was bound to come from the nature of the controversies, and that it was nothing new.67 Mr. Chief Justice Warren resigned from the A.B.A. and was said to have begun avoiding legal groups.68 Mr. Justice Douglas directed an article “On Misconception of the Judicial Function and the Responsibility of the Bar:”69

Often there are segments of society which want courts to be agencies of retribution, not dispensers of justice. It is against these groups that the bar must be opposed. It is to them that the bar should offer lectures and classes on the true Americanism of our Constitution and Bill of Rights.70 It is the very essence of a government of laws . . . that the law . . . be applied equally to all. . . . The provisions of our Constitution have the

---

62 Id. at 34.
63 Id. at 33.
64 Id. at 33.
65 Id. at 35.
66 St. Louis Post-Dispatch, Nov. 26, 1958, p. 12d.
68 Id., July 14, 1959, editorial section, p. 3.
70 Id. at 231
same scope for everyone. But . . . after reading some commentators who proclaim that at least in security cases the courts should use an abbreviated form of due process of law, I wonder whether the hysteria of a few has not made new demands on us.\textsuperscript{71}

New demands did come from one liberal source, Professor Harrop Freeman of Cornell University College of Law,\textsuperscript{72} who not only defended the Court for the decisions criticized by the A.B.A. but urged that it should go farther along libertarian lines. The remedies proposed, \textit{i.e.}, the bills affecting the Court, were deplored as "a weird and indefensible result . . . not to be countenanced."\textsuperscript{73}

\textbf{IV. Recess: The Plenitude and Propriety of Criticism}

Before passing on the allegations or the defense, let us pause. Let us think, and if possible think clearly—historically and logically.

Criticism of the Court has been extensive throughout its history.

In 1794 state resistance to federal court process\textsuperscript{74} appeared when a Georgia legislative body declared that any federal officer attempting to execute federal court process against the state should be hanged.\textsuperscript{75} Three early cases\textsuperscript{76} provoked proposals to impeach the judges and another proposal to repeal the Circuit Court system.\textsuperscript{77} John Marshall's prestige prevailed in the furor over \textit{Marbury v. Madison}.\textsuperscript{78} But later, Justice Chase was impeached and almost convicted; shouts of treason were heard and various limits on the judiciary were suggested.\textsuperscript{79} During the maritime controversy with England, Jefferson's embargo was made a dead letter by state resistance, despite judicial blessing.\textsuperscript{80} For all his prestige, Marshall backed down on a state-federal controversy over priority of Pennsylvania and United States claims, using a technicality to dismiss the national government's case and leave the money with Pennsylvania.\textsuperscript{81}

\textsuperscript{71} Id. at 227.
\textsuperscript{72} Civil Liberties and You—\textit{the 1959 Test of American Democracy}, 10 SYRACUSE L. REV. 1 (Fall 1958).
\textsuperscript{73} St. Louis Post-Dispatch, May 4, 1959, editorial.
\textsuperscript{74} Chisholm \textit{v.} Georgia, 2 U.S. (2 Dall.) 419 (1793).
\textsuperscript{75} Quoted in \textit{1 Boudin, Government by Judiciary} 129 (1932).
\textsuperscript{76} Bas \textit{v.} Tingy, 4 U.S. (4 Dall.) 37 (1800); U.S. \textit{v.} Williams, Fed. Case No. 17,708 (1799); Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).
\textsuperscript{78} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{79} Baker, supra note 77, at 316.
\textsuperscript{80} Id. at 317–20.
\textsuperscript{81} Id. at 320–21; Miller \textit{v.} Nicholls, 17 U.S. (4 Wheat.) 311 (1819); U.S. \textit{v.} Nicholls, 4 Yeates 251 (1803). A like blow to federal prestige came with U.S. \textit{v.} Peters, 9 U.S. (5 Cranch) 115 (1809), also involving Marshall. See Baker, supra note 77, at 322.
Federal court invalidation\(^8\) of a Georgia statute regarding legislative land grants to speculators was called “shocking” and was said to be based on Marshall’s “personal biases.”\(^3\) A holding\(^4\) that a United States treaty superseded a Virginia statute brought flat defiance from Virginia judges.\(^5\) The United States Supreme Court’s power to review state court decisions\(^6\) was called “a most monstrous and unexampled doctrine;” and Virginia Judge Roane (who issued this noted statement) urged a constitutional amendment to curb or abolish the Court.\(^7\) \textit{McCulloch v. Maryland}\(^8\) brought to the Court strong censure from press, judges, legislatures, and former President Jefferson.\(^9\) When Kentucky land laws were invalidated,\(^9\) Henry Clay added his voice.\(^1\) When the United States failed to come through on its promise to abrogate Indian titles in Georgia, and Georgia retook the ceded land formerly given to the United States in partial return for such a promise, an Indian’s state court murder conviction on tribal land resulted in writ of error to the United States Supreme Court on the ground that the state court lacked jurisdiction; but the state hanged the man anyway. Story called the action “intemperate and indecorous,” but others knew it was plain nullification.\(^2\) When Marshall issued a writ\(^8\) ordering the release of two missionaries in the key territory, convicted for not securing a Georgia license, President Jackson is said to have retorted: “John Marshall has made his decision, now let him enforce it.”\(^4\) Jackson, of course, vetoed the National Bank Charter on grounds opposed to \textit{McCulloch v. Maryland}, and the country reelected him.\(^5\)

Chief Justice Taney’s period brought as much criticism as that during Marshall’s time. The \textit{Charles River Bridge}\(^6\) case was a matter of “increased disgust” to Chancellor Kent and others.\(^7\) After \textit{Kendall v. United States},\(^8\) President Van Buren asked Congress to divest federal

\(^8\) Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).
\(^3\) Baker, \textit{supra} note 77, at 394.
\(^4\) 14 U.S. (1 Wheat.) 304 (1816); Martin v. Hunter’s Lessee, 11 U.S. (7 Cranch) 602 (1813).
\(^5\) Baker, \textit{supra} note 77, at 395.
\(^7\) Baker, \textit{supra} note 77, at 396.
\(^8\) 17 U.S. (4 Wheat.) 316 (1819).
\(^9\) Baker, \textit{supra} note 77, at 396–98.
\(^11\) Baker, \textit{supra} note 77, at 399.
\(^12\) Id. at 402.
\(^14\) Baker, \textit{supra} note 77, at 403.
\(^15\) Id. at 404.
\(^17\) Baker, \textit{supra} note 77, at 478.
\(^18\) 37 U.S. (12 Peters) 524 (1838).
courts of mandamus power. A fight between a federal assignee in bankruptcy and a court which attached the property sought brought another explosive situation. State-federal rows over slavery and the fugitive slave laws were many. When judicial decision made it more difficult for states to help runaway Negroes, the states responded with personal liberty laws, making it almost impossible to enforce the fugitive law. Sumner of Massachusetts said, "The Court cannot control our duty as to legislation. . . ." The Dred Scott case, its precursor, and others involving escaped negroes brought repeated abuse. The Taney Court was called "a silk gowned fogeydom, a good portion of it imbecile with age." Legislatures declared the void and invalid character of Supreme Court mandates and spoke of "a duty" to disregard its decisions. Political recriminations included proposals to reorganize the Court. The Dred Scott case itself provoked a tornado of abuse and invective, including word that it was the product of "five slave holders and two or three doughfaces," "a platform of historic falsehood," a "wicked and false judgment," "assassination of a race," the "plea of a tricky lawyer and not the decree of an upright judge." Lincoln, debating with Douglas, said that the Court had overruled other decisions, and that his party would "do what we can to have it overrule this." After the Merryman conflict with Lincoln, Taney was accused of taking sides with traitors, and even after his death, it was said that "his name is to be hooted down the page of history." Ex parte Milligan was said to have "no moral force," and was called "a new and most mischievous weapon in the hands of those who oppose the great Union party." Proposals were heard to swamp the court with additional members, to eliminate the Court itself, and to require the concurrence of eight of the justices for certain holdings.

From reconstruction through the turn of the century, criticism of the
Court continued. The Court’s rebuff of attempts to bar former rebels from the ministry\textsuperscript{113} and from the practice of law\textsuperscript{114} met with proposals for court rules to accomplish the same result.\textsuperscript{115} On \textit{Ex parte McCordl\textsuperscript{e} the Court backed down again, delaying an appeal decision until a bill to restrict the Court’s appellate jurisdiction became law.\textsuperscript{117} The revised decision in the legal tender cases\textsuperscript{118} was said to provoke “the indignant contempt of thinking men”; it was called “a weak decision . . . almost ridiculously inconsistent with the traditional interpretation of the constitution.”\textsuperscript{119} The revised decision in the income tax case holding the law invalid,\textsuperscript{120} was called a “wound inflicted on the American people,” a “triumph of selfishness over patriotism,” and Bryan said the Court took its stand “with the wealthy against the poor.”\textsuperscript{121} The sixteenth amendment, of course, followed.

The early twentieth century, characterized by new social and economic legislation, brought many decisions adverse to enactments such as minimum wage laws, maximum hours laws, child labor laws, and statutes to outlaw the “yellow dog” contract and restrict injunctions against picketing.\textsuperscript{122} Labor and social leaders revolted against the Court and one critic said it was exercising “political and not judicial power.”\textsuperscript{123} Theodore Roosevelt called one decision\textsuperscript{124} “the most galling of tyrannies.”\textsuperscript{125} Senator George Norris was an outstanding critic of the Court.\textsuperscript{126} Congressional veto of Court decisions, popular election, fixed terms, and a requirement of a two-thirds Court vote to invalidate congressional acts were among the suggested remedies.\textsuperscript{127}

\begin{enumerate}
\item\textsuperscript{113} Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).
\item\textsuperscript{114} \textit{Ex Parte} Garland, 71 U.S. (4 Wall.) 333 (1866).
\item\textsuperscript{115} Baker, supra note 77, at 491.
\item\textsuperscript{116} 73 U.S. (6 Wall.) 50 (1867).
\item\textsuperscript{117} Baker, supra note 77, at 492.
\item\textsuperscript{118} Knox v. Lee, and Parker v. Davis, 79 U.S. (12 Wall.) 457 (1870). The first ruling was Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869). Between the two decisions, one new justice replaced a retiring member, and one new judgeship was created; so there were two new members of the Court. If the appointing President knew in advance how the new justices would decide, this is the first noted instance of court “packing.” See Ratner, \textit{Was the Supreme Court Packed by President Grant?} 50 Pol. Sci. Q. 343, 351 (1935). But cf. Fairman, \textit{Mr. Justice Bradley’s Appointment to the Supreme Court and the Legal Tender Cases}, 54 Harv. L. Rev. 977, 1128 (1941).
\item\textsuperscript{119} Baker, supra note 77, at 492–93.
\item\textsuperscript{120} Pollock v. Farmers’ Loan and Trust Co., 157 U.S. 429 (1895) ; 158 U.S. 601 (1895).
\item\textsuperscript{121} Baker, supra note 77, at 493–94.
\item\textsuperscript{123} Baker, supra note 77, at 495 (quoting Boudin).
\item\textsuperscript{124} Lochner v. New York, 198 U.S. 45 (1905).
\item\textsuperscript{125} Baker, supra note 77, at 564.
\item\textsuperscript{126} Id. at 565.
\item\textsuperscript{127} Id. at 565–566.
\end{enumerate}
President Franklin Roosevelt's proposal to change the Court's orientation by naming more judges, or, as critics said, to "pack the Court," brought on the famous 168 days in which his legislative proposal failed, but reorientation was accomplished. This story, still fresh and vivid to students of the Court, and to the observant public, needs no retelling here.\footnote{128 See Also Asp and Catledge, The 168 Days (1937); Corwin, Court over Constitution (1938); Curtis, Lions under the Throne (1947); Jackson, The Struggle for Judicial Supremacy (1941); Lawrence, Nine Honest Men (1936); Lawrence, Supreme Court or Political Puppets (1937); Pearson, Nine Old Men (1936); Symposium of American Historical Association, The Constitution Reconsidered (Read ed. 1938).}

Criticism, if constructive, may be as proper as it has been plentiful. Mr. Justice Brewer said in 1898:\footnote{129 Nat'l Corp. Rep. 848, 849 (1898), quoted in Cohn and Bolan, supra note 8, at 241.}

It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. . . . True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticisms than no criticism at all.

Mr. Justice Black has observed\footnote{130 Bridges v. California, 314 U.S. 252, 270 (1941).} that "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." Mr. Justice Frankfurter, dissenting in the same case,\footnote{131 Id. at 289.} said, "[J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt." Mr. Justice Stone declared that "the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment on it."\footnote{132 Quoted in Mason, The Supreme Court from Taft to Warren 205 (1958).} Books by Mr. Justice Jackson\footnote{133 Jackson, The Struggle for Judicial Supremacy (1941).} and by Mr. Justice Douglas\footnote{134 Douglas, An Almanac of Liberty (1954).} have themselves contained much implicit criticism. Mr. Justice Black upheld the right to criticize his own Court, when criticism was one of the very matters involved in whether the critic should be licensed to practice law so that he could become an officer of the Court:\footnote{135 Konigsberg v. State Bar of California, 353 U.S. 252, 269 (1957).} "Courts are not, and should not be, immune to such criticism."

\textbf{V. Thoughts in Chambers: Kinds of Criticism}

Plentiful and proper as criticism of the Court has been, it is still not merely worthwhile but highly necessary to consider the \textit{kinds} of criticism.
and the nature and value of each. If, as Justice Brewer said, "all sorts of criticism are better than no criticism at all," the beginning of wisdom is not fear of criticism, but understanding and appraisal of the various sorts.

The essence of this process is "to see ourselves as others see us." One cannot read the allegations, the defense, or the history without gathering at once what anyone with gumption knows—that lawyers are advocates by profession, training, and developed predilection; that judges (state and federal) are lawyers subject to the same advocacy habit and way of thought; and that the prosecutors and defenders on the allegations here have (perhaps necessarily) taken adversary positions. And if real illumination of the Supreme Court's role and function is to be gained, one must consider the advocates but also look to those studying the Court, its work, and its products, as an institution—that is, one must look to the law professors and political scientists. They represent no special interests and have the great advantage of detachment. While even they find it difficult to catalog all the types of criticism, a detached analysis might show that certain types stand out.

(Criticism primarily on form, viewed favorably as purism or unfavorably as pettifoggery, seems more concerned with how the bat is gripped than with who gets hit or why, and is not considered here.)

1. Libel, slander, diatribe and tirade are, of course, a category by themselves. But they may be considered as ranting or catcalls outside the courthouse, inadmissible in evidence, improper as argument, and valueless in determining the merits of the case.

2. Something similar, couched in more professional terms, may, however, slip into the testimony or argument. One political scientist has helpfully listed what he calls the clichés of commentary: "Independence of the judiciary," "follows the election returns," "continuous constitutional convention," "authoritative faculty in economics," "judicial oligarchy," "defender of vested rights," "destroyer of vested rights," "custodian of enduring values," "citadel of privilege." These, he says, are "not only available and traditionally approved, but can be used ... 'with all the sincerity and assurance that honest partisanship can confer on pious fraud.'"

3. Defense of a position against the Supreme Court's view may be another type. When state chief justices or lower court federal judges criticize the high Court, it is important to realize that it is their opinions that the Supreme Court is overturning when it reverses or remands. Even detached judges may take pride in their work, and intellectual pride is a

138 Ibid.
very tender thing. A lower court judge's defense of his position and reliance on the weight of authority among other lower courts, against the Supreme Court's reversal of his decision, is of course nothing new. Justice Holmes himself indulged it when he was on the Massachusetts court.\textsuperscript{139} The lower court judges claiming the weight of authority may deplore an opinion of the Supreme Court which takes the opposite view. And criticism of the courts, coming from lawyers whose views before the Court have not prevailed\textsuperscript{140} may warrant the same type of consideration.

4. Criticism based solely on the results of decisions may lead to obvious inconsistencies. When the Court, impelled by what it considered the required constitutional interpretation, was ruling against state and federal governments (on behalf of business and conservative social and economic interests), leaders of the bar were outspoken in the Court's defense.\textsuperscript{141} When the Court, impelled by what it considered the required constitutional interpretation, was ruling against state and federal governments (on behalf of the individual and liberal social and economic interests), leaders of the bar had become outspoken in the Court's criticism.\textsuperscript{142}

In 1936 and 1937 David Lawrence, for instance, wrote two books\textsuperscript{143} defending the Supreme Court, then conservative, as "Nine Honest Men;" yet today he is one of the Court's outstanding critics. Brent Bozell, of the conservative \textit{National Review}, another who changed his mind since 1937, defended such shifts in position as follows:\textsuperscript{144}

The Supreme Court, before Roosevelt tried to pack it, was insisting on strict adherence to the Constitution. Most of us opposed political efforts to compel the Court to deviate from the Constitution. Today, however, the Supreme Court is violating the Constitution in case after case.

The other side of the coin is apparent in the shift of liberals who criticized the Court when it was conservative and defended it when it was more liberal.\textsuperscript{145}

A perceptive reading of the allegations and the defense permits the conclusion that both are based primarily on the result in the particular cases involved. In terms of the result, the conservative and liberal minds have met head on. The signposts lead only to the right or to the left. And

\textsuperscript{139} \textsc{Holmes-Pollock Letters} 40 (Howe ed. 1941).
\textsuperscript{140} Ross Malone, A.B.A. President during the House of Delegates Action, had, as a member of the New Mexico Board of Bar Examiners, seconded the motion denying Schwabe's permission to take the bar examination. See Schwabe v. New Mexico, 353 U.S. 232, 235 (1957).
\textsuperscript{142} \textit{Supra} notes 17-18.
\textsuperscript{143} \textsc{Lawrence, Nine Honest Men} (1936), and \textsc{Supreme Court or Political Puppets?} (1937).
\textsuperscript{144} Quoted in \textsc{Cahill}, \textit{op. cit. supra} note 137, at 3.
\textsuperscript{145} See \textsc{Cohn and Bolan}, \textit{op. cit. supra} note 8, at 251-55.
the road ahead to enlightenment (not to say to a unified and rational America) is blocked by intractibility and intransigence.

5. Criticism or evaluation of criticism based on the role and function of the Court is more enlightening.

The first step toward enlightenment is realism. The literature of the law is almost endless, and catalogued to the full extent that technical expertise, word and phrase mongering, and high-priced digests and annotations can accomplish. Precedent for almost anything can be found.\(^4\) And realism requires the clear understanding that judges in making a choice of precedents are exercising value judgments.\(^4\) There was far more than mere amusement in the recent clowning of Professor Karl Llewellyn, when he said:\(^4\)

Do you want to know how to construe statutes? I'll tell you how to construe statutes. "Every statute in derogation of the common law is to be strictly construed." Right? Right. "Every remedial statute is to be liberally construed." Right? Right. But, every statute in derogation of the common law is remedial; every remedial statute is in derogation of the common law. How do you construe statutes? (With arms flung out wide and fingers pointing to the two opposite walls of the hall): That way.

How the choice of precedents is to be made is vastly important. The "four-square" theory or approach, by which the court has "only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former," has been challenged as "a serious misrepresentation of the nature of the judicial process [because] constitutional interpretation is much more complicated" than this. The Constitution on its face is composed only of words—and words have many meanings.

a. Meaning can be derived from "the intent of the framers"; but the framers of the Constitution were a heterogeneous lot, and this approach may achieve little more than the intent of the opinion writer.\(^5\)

b. Meaning can be derived from definitions of words as used at the time of the Constitution's original draft; but this involves some doing, and implies a new historical dictionary.

Perhaps the most serious objection to both methods, however, is the extent to which they propose to make a nation the prisoner of its past, and reject

---

\(^4\) COMMAGER, The Higher Law, in THE CONSTITUTION RECONSIDERED 233 (Read ed. 1938).
\(^5\) See Frankfurter, Supreme Court in XIV ENCYCLOPEDIA OF THE SOCIAL SCIENCES 474, 480 (1935).
\(^148\) Lecture, University of Illinois College of Law, Dec. 10, 1959, heard personally by the writer.
\(^151\) Id. at 55, 56.
any method of constitutional development save constitutional amendment. Both reject the legitimacy of amendment by consensus or usage. Both deny the possibility that evolution in moral standards or political ideology can be given effect in the Constitution without changing its language.\textsuperscript{152}

After all, said Marshall,\textsuperscript{153} the Constitution was "intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs."

c. So, meaning can be derived by a process "which gives to the words of the Constitution their current meaning."

The American constitutional system has given the Supreme Court the responsibility of acting as a kind of national conscience. This function calls for something more than historical analysis or application of judicial precedents. It calls for a creative awareness of the values and the problems of the times in which we live.\textsuperscript{154}

That is to say, "the various crises of human affairs" today, just as well as in Marshall's time.

The second step is to realize that the actions of courts are a part of the governmental and political process. Charles Warren, Charles Beard, Louis Boudin, Robert Jackson and many others have made this abundantly clear.

Of course, most political scientists and legal scholars do not believe that "the law" is an external objective phenomenon that controls judges. The traditional explanations of judicial behavior are no longer in good standing among sophisticates. Yet judges will not admit to judicial legislation and the official explanation of public men and practicing lawyers is that the law is independent of the judge and controls his behavior. This explanation is ideological, not theoretical, and although it affects conduct, it does not describe the behavior of public men, practicing lawyers, or deciding judges. . . . Whether the judge speaks for an interest supported by the entire community or for an interest supported by a small portion, it is necessary to describe his activity as participation in the group struggle.\textsuperscript{155}

To recognize that judges represent values and make choices is not to recognize that they are free to choose as they want. But then neither are legislators free. Both judges and legislators are required by the community to behave in certain ways. Both are required to explain their conduct and justify it in terms of some long-range considerations other than personal preferences.\textsuperscript{156}

The third step is to realize that the judicial role or function regarding legislation is a limited one. While a court may invalidate statutes, it cannot substitute: it can say a law violates the Constitution and is to have no

\textsuperscript{152} Id., at 57.
\textsuperscript{153} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
\textsuperscript{154} Pritchett, supra note 150, at 62–63.
\textsuperscript{155} PETLASON, FEDERAL COURTS IN THE POLITICAL PROCESS 4 (1955).
\textsuperscript{156} Id., at 5.
effect, but it cannot say (except for the Constitution, which it did not enact) what any other law should be. To the extent its holding may revitalize the common law, even this is not legislating—the common law was always judicial. And a court's bar against a statute no more enacts law than an executive's veto. "Too many people . . . [have] said too often that judges not only do but must legislate." Notes In any sense that the function appears legislative, it is strictly a negative sense.

The fourth step is to realize that the Court's role and function are necessary and vital. "The plain fact is that the Constitution does not interpret itself and history, more than logic, has confided much of that function in the Supreme Court of the United States." The Court must act. And the high place of the Court, the written, permanent, and public aspect of its pronouncements, and the nature of precedent and interpretation require that it act with care. As Justice Jackson has said, if the Court reviews and approves an incident, "that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image."

The fifth step is to consider who but the Court is to interpret the Constitution. "It is not necessary to prove that the Supreme Court never made a mistake; but if the power is to be taken away from them it is necessary to prove that those who are to exercise it would be likely to make fewer mistakes." If the silent Calvin Coolidge had said nothing else, these words alone may show that reticence engenders responsibility. If we are stuck with the Court and the doctrine of judicial review, it is yet to be shown that some other process would be better.

These steps assure us that in constitutional interpretation, as in many other things, we passed the age of innocence long ago. But we can know of the Kinsey Report without adopting it as a guide: we still have the Bible, Dante, Shakespeare, Frost, and many other wonderful things. We still have the Constitution. Since we are beyond innocence, we should be mature. And maturity involves not an avoidance of value judgments, but consideration of how to make them and when.

Maturity, then, is the last step. Marshall in the past, and Pritchett today, suggest that maturity requires current construction in terms of current meanings. Mearns says, "It is not a problem of whether the mem-

157 Cahill, op. cit. supra note 137, at 19.
158 See cogent examples of the Supreme Court's view swept aside on such issues as slavery, legal tender, income tax, anti-trust regulation, intergovernmental immunities, and child labor, in Peltason, op. cit. supra note 155, at 63.
159 Cahill, op. cit. supra note 137, at 19.
161 Coolidge, quoted in Warren, Congress, the Constitution and the Supreme Court 174 (1936).
bers of the Court should be active or restrained, but the more difficult one of when it can safely exercise that self-restraint. Midst the increasing dynamism of government, with its increased effort to bring about the good life through legislative action, there will be a corresponding increase in the occasions where civil liberties will be endangered and the processes of democracy opened to legislative infringements.” The good life (as lawmakers see it) and civil liberties (for even odd minorities) are both important, of course. But Mearns implies strongly that court protection against legislative action, vital to the American economy when business was burgeoning and people could move West, is equally vital to individual liberty today, when business and government are big, and people can move nowhere. “What,” he asks, “is a Court which truly believes in the principles of a free and open society, legitimately to do to further these principles?”

Mr. Justice Douglas has one answer: Follow the Constitution, in current meaning. That is, of course, a highly general value judgment, but no more so than those exercised during—for conservatives—the “good old days” when the Supreme Court was invoking the Constitution against business regulatory statutes. And it explains his position on the side of the libertarians: Judges are not sworn to uphold statutes. “Any American court is supposed to be pro-First Amendment, pro-Fourth Amendment, pro-Fifth Amendment, pro-Fourteenth Amendment, and so on, for it is the Constitution the judges are sworn to defend.”

While we are concerned here only with criticism of the Court, we should in passing make a distinction which is today quite important.

To criticize the Court or call its decisions wrong is an exercise of free speech. To seek changes in the declared law through constitutional processes is an intrinsic civil right. To talk of revolution is historic and, in the abstract, permissible.

But: To say that the Court’s decisions are not the law of the land is to counsel virtual anarchy. To interpose against them invalid local arrange-

---

163 Ibid.

164 See note 122, supra. Conservative critics who favored decisions invalidating state social and economic legislation and deplored the later trend to sustain similar Congressional legislation might refer to Holmes: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states.” Collected Legal Papers, 295–96 (1921). Is this view not cogent today?

165 On Misconception of the Judicial Function and the Responsibility of the Bar, 59 Col. L. Rev. 227 (Feb. 1959). The “overriding responsibility of this Court is to the Constitution. ... The proponent before the Court is not the petitioner but the Constitution of the United States.” Chessman v. Teets, 354 U.S. 156, 165 (1957), opinion by Mr. Justice Harlan.
ments (backed by state troops, or not) is to approach nullification. To set up or sanction state or federal police or administrative improprieties or trial irregularities in defiance of the declared law is perverse. To incite or commit unprovoked violence to thwart decrees may be contempt, disorder or rebellion—at least as grave as a lecture on world peace.

These fruits of criticism we must pass, however, and get back to the case against the Court.

VI. The Evidence Submitted

With the allegations and defense clearly stated, with the precedents before us, with some criteria for evaluating criticism, what does the evidence show? Has the Supreme Court really ruled unwisely, immorally, unconstitutionally? Has it really been a danger to democracy? Has it lacked judicial self-restraint? Has it really weakened security? Has it been guilty of any lust for power, instability, usurpation, socialist doctrines, novel interpretations hamstringing the government? Is it really “against America”? Should it be curbed?

Partisan answers to these questions may be inevitable. Each side claims reliance on the Constitution, rationalizes its own view and scoffs at the other’s: understood major premises and a common frame of reference are unavailable. In such a case, attempts to say which side is right may have little effect—in the court of public opinion readers are jurors, not litigants; and no writer has jurisdiction over minds.

Still we can, and must review the evidence—both that already submitted and the new evidence appearing since the allegations. This, of course, consists first of the decisions\(^{166}\) alleged to be so bad for the country.

*Brown* simply took the Constitution at its word:\(^{167}\)

> No state shall make or enforce any law [which shall abridge the privileges or immunities of citizens ...] nor deny to any person within its jurisdiction the equal protection of the laws. ... Education is perhaps the most important function of state and local governments [], ... the very foundation of good citizenship [], ... a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment [], ... a right which must be made available to all on equal terms. ... To separate them ... because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. ... Any language in *Plessy v. Ferguson* contrary to this finding [of one of the courts below] is rejected. ... [Though tangible facilities be considered equal,] separate educational facilities are inherently unequal.


The holding was of course directly in line with a long-growing trend, and eminent Southern legal scholars had all but predicted the decision.\textsuperscript{168} Of course, too, change was inevitable for the South. But there had been great change before—slavery and secession, independence and defeat, emancipation and reconstruction, redemption and reunion, white home rule under the Klan and Jim Crow and \textit{Plessy}, and gradualism under the later cases.

If the essence of education is its effect on the mind, the case simply showed that equal protection meant literally that—including protection from a state-enforced inferiority complex for an entire race; this was almost literal interpretation. And if the Constitution was and is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," the current meaning and interpretation had to be not that of \textit{Plessy}, viewing equality as physical only for late chattels, but of \textit{today} viewing all persons as free human souls—complete with psychological considerations.

In \textit{Nelson}, a conviction under a \textit{state} statute for an alleged offense involving \textit{federal} subversion, was reversed by the \textit{state's own court} (the high Court merely affirming that reversal) because: Congress having preempted the field, "such prosecutions should be exclusively within the control of the Federal Government." As J. Edgar Hoover has said, the intervention of local superstructures "cannot be if our internal security is to be best served";\textsuperscript{169} the state procedure and punishment were different from the federal, making possible "incompatible or conflicting jurisdictions"; and "a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."\textsuperscript{170} So much for the conflicting government interests. Considering civil liberties, did federal or state security really require or warrant supplementary state laws, possibly unleashing "politicians in thousands of counties" for enterprises based on "outcries of communism"?\textsuperscript{171} Or was American security today inherently a federal matter in which "the federal government is taking good care of itself"?\textsuperscript{172}

In \textit{Slochower} the accused had already told of his past Communist party membership, and city authorities knew of this. Neither he nor they knew that (further) refusal to answer investigative queries would result in automatic discharge. He had 27 years college teaching experience and tenure by state law. The Court said he must comply with reasonable, nondiscrimi-

\textsuperscript{169} Quoted 350 U.S. 497, 507 (1956).
\textsuperscript{170} Id. at 504.
\textsuperscript{171} Report of Executive Board, 19 Law. Guild Rev. 30 (Spring 1959).
\textsuperscript{172} A.B.A. Bill of Rights Committee Report, committee draft, p. 5.
natory employment terms, but the privilege against self-incrimination (V-XIV) barred discharge under a law "patently arbitrary and discriminatory" because it inferred some guilt or academic unfitness from mere silence. If the holding remanding the cause was a moral victory, it was also Pyrrhic: on call for rehearing, he resigned. Background query: should or should not a good college teacher be barred because he is an ex-communist? Chief query: Should guilt be inferred from silence? Fact query: Was state power or security weakened by this holding?

In **Schware**, a poor but intelligent and socially sensitive New York immigrant boy had taken an Italian alias to avoid anti-Semitic prejudice; he had joined the Communist party but resigned in disgust at the Nazi-Soviet pact; he had been arrested but never convicted. He served honorably as a World War II paratrooper, worked his way through law school with good marks and exemplary conduct, and disclosed all his background. His good character was proved by students, professors, businessmen and a rabbi, his patriotism and religion by acts and correspondence. The Court said that the self-protecting innocent alias was not wrongful, that ex-communism did not imply present bad character, that arrest without conviction meant nothing (failure to press charges even perhaps implying innocence): hence New Mexico must permit him to take the bar examination. Query: which are more important in a lawyer—intelligence, social sensitivity, the social courage to join an unpopular cause and the gumption and guts to quit it; or pure, unsullied (untried and uncommitted) conformity?

In **Konigsberg**, an Austrian immigrant taught history and literature, won a master's degree, worked for state government agencies, and served through the E.T.O. ultimately as a captain, and chief orientation officer for the entire Seventh Army, explaining *inter alia* the advantages of democracy over totalitarianism. His California law school record was good and 42 witnesses (priest, rabbi, lawyers, doctors, businessmen, and social workers) attested his good character. But: he had written editorials criticizing the Korean War, big business, the California Tenney committee on subversion, and **Dennis**. And he refused to say whether he had been a member of the Communist *party*. He said categorically "I do not [advocate unlawful overthrow of the government], I never did or never will." This was undisputed, and one of his editorials condemning such advocacy supported his testimony. He categorically denied being a communist philo-

---


sophically, but said the Party was legal in California and what party he belonged to was none of the bar committee's business. His alleged attendance at a communist meeting was unproved. Holding his good moral character and non-advocacy of revolution were proved and not discredited by his editorial writings or refusal to answer as to the party, the Court held him eligible for a license to practice law: "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which were apparently the basis for the Committee's action."\footnote{175}

Of the two cases, the A.B.A. Bill of Rights Committee said: \footnote{170} "weakening of national security by these decisions is hard to perceive."

In Sweezy the accused said he had never been a communist nor advocated overthrow of the government nor been in any such movement. He would not answer questions about the Progressive party, his wife's connection with that or with communists, his lectures on socialism, his possible advocacy of Marxism or his political opinions or beliefs—all on grounds the questions were not pertinent to a subversion inquiry, and that they violated the first amendment. On contempt conviction below he was ordered to jail until he answered. The Court said,\footnote{177} "[T]here unquestionably was an invasion of [his] liberties in . . . academic freedom and political expression—areas in which government should be extremely reticent to tread."

The A.B.A. Bill of Rights Committee found\footnote{178} "no demonstration that the Supreme Court, in weighing as it has the individual immunities of the persons questioned and the public interests of the states, has impaired the national security or that of the states."

\textit{Raley} simply said that, when a state commission advised witnesses that they could rely on the (Ohio) constitutional privilege against self-incrimination but did not tell them about an immunity statute which vitiated the privilege, answer refusals rendered unlawful by the immunity statute were the result of virtual entrapment and could not support convictions for contempt.

\textit{Moore} was the case of a seventeen year old negro of limited education and mentality, who was told by a Kalamazoo sheriff in effect that possible mob violence was imminent, and that if he was guilty he might so plead and "might better be getting away before trouble." In such a case his waiver of the right to counsel regarding degrees of murder and questions beyond his comprehension was considered not intelligently made and, hence, of no effect. The meat of the decision is the sheriff's virtual inducement of the plea by the fear planted in the defendant's mind.

\footnote{175} Id. at 273–74.
\footnote{170 Op. cit. supra note 172, p. 13.}
\footnote{177 354 U.S. 234, 250 (1957).}
\footnote{178 Op. cit. supra note 172, at 22. Cf. Uphaus v. Wyman, 360 U.S. 72 (1958), contempt conviction affirmed where academic freedom and political expression were not so closely knit.}
In *Griffin*, where a prompt petition was filed establishing trial defects meriting reversal, but unavailable on appeal because the defendant was too poor to buy a stenographic report of the trial—alleging a denial of equal protection—it was held that "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." This is new law, and there may be convicts "in numbers unknown to us" who might seek relief under it; but appellate reforms and sensible, economic modes for securing review may be used so that "the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process."

In *Eskridge*, the same rule was applied under a Washington statute providing for a free transcript if in the trial judge's opinion "justice will thereby be promoted." On a petition for transcript alleging substantial trial errors, the trial judge (sic) found the defendant had had "a fair and impartial trial." The state supreme court denied his mandamus request and struck his appeal because he had not filed a transcript. A federal court denied habeas corpus. On review, the Court followed *Griffin* even though the *Eskridge* conviction had been in 1935.

In *Lambert*, the Court recognized that ignorance of the law is no excuse in many cases and that the police power gave broad latitude to declare offenses exclusive of knowledge. But under a unique city ordinance based on mere presence in the city requiring convicted felons to register (giving police a convenient list of suspects), either proved knowledge or an opportunity to register after being informed were in effect required before conviction. Though the defendant had been convicted in the same city and lived there seven years before the nonregistration offense, there was no proof of knowledge of the law. Distinguishing laws such as those requiring registration for a draft or to drive a car (incumbent on most citizens), the court viewed this registration law imposed on a special few as one "which punished conduct which would not be blameworthy in the average member of the community," a law "too severe for that community to bear," hence violating due process.

In *Communist Party*, the Subversive Activities Control Board's finding that the Party was subversive was based largely on testimony of persons suspected of perjury—Matusow, Crouch and Johnson. This covered 668 pages of the transcript, and was cited 85 times by the Board. The government refused to stipulate for striking it, and all the Court did was to send

---

181 Id. at 24.
the case back for hearing on whether it should be stricken or discounted. The Court "cannot pass upon a record containing such challenged testimony," and the holding was simply "because the fair administration of justice requires it." The delay was considered "regrettable" but the Board's finding even when finally approved would simply "make one more formal record of what every educable American must already know": "the malign character of the Communist Party." With an effect at best redundant, delay was considered a small price for a high judicial standard making "certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted."

_Yates_ involved point of view. In security terms alone, any talk of revolution, any organizational work for a revolutionary party is bad and Smith Act prosecutions are good; decisions limiting such prosecutions make a shambles of the act and weaken security; to permit prosecution only when the talk urges action, and not when teaching even with evil intent is divorced from action, is a "gossamer fine distinction." It would follow that the historic distinction between talk and incitement is obsolete, and that an abatement of Smith Act prosecutions _after Yates_ was a weakening of security caused by _Yates_. It would follow too that an act to ban such talk and organization of (=for?) any such party ought to be liberally construed to achieve the remedy; and the "organizing" condemned would not be limited to that of original party formation in 1945, barred by the statute of limitations, but would include current recruitment. And on these terms, if _Yates_ was an improper call of foul against the varsity team, weakening security in national efforts, then _Nelson_ was a bad call against the freshmen, impeding the state team. For on these terms the job is too big for the mere nation, and states can and ought to help, because there "aren't enough people to do the work."

Argument with confirmed exponents of such a view is fruitless: every premise is their own; every inference is tenable; and only a slip exposes such extremism—when, e.g., they criticize a 1956 decision for not citing a 1957 work.

But other premises are possible. The security of the United States and free American institutions include free speech. This is secured by the first amendment. While speech inciting to revolution with a "clear and present danger" that the action urged may be carried out is unlawful and unpro-

---

186 See these views ably stated in Cohn and Bolan, _The Supreme Court and the A.B.A. Report and Resolutions_, 28 FORDHAM L. REV. 233, 284 (Summer 1959).
187 _Slochower_ (1956) is criticized by Cohn and Bolan because the opinion "ignored" _Hook, Common Sense and the Fifth Amendment_ (1957). _Id._ at 262 n. 196.
tected by the first amendment, such speech "divorced from action," even though uttered with evil intent, is protected by the first amendment. Though a statute to make unlawful such speech directing clear and present action is valid, its application to a case where the speech does not direct clear and present action is not. A jury given this distinction could find the defendant guilty—but a guilty verdict by a jury not instructed to keep the distinction in mind must be set aside. 188

The distinction is not only historic; it is valid and vital. Lacking it, witness what can happen. Any speech advocating violent overthrow of the government is unlawful. The Supreme Court is part of our government. "Outside of the courtroom, certain inferences not only may, but logically must, be drawn..." Talk that the Court "has frequently ignored precedent and employed fallacious reasoning," 189 even though divorced from action to overthrow the Court, involves an inference that the Court ought to be overthrown. "Who is 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?" 190 On such reasoning does Roy Cohn's quite scholarly article advocate overthrow of the Court, hence (part of) the government, in violation of the Smith Act?

Those believing in the first amendment, honoring the Court for its protection of liberties preserved by the first amendment, and feeling no overweening need for legislation construable as infringing it have found no weakening of security in any of the three key subversion cases. As decided, none of the three involved the invalidity of any statute. The first involved evidence and procedure; the other two statutory construction. If there is complaint about Communist Party, the critics might urge the government to get better evidence than perjury when it wants a political party to register its own subversion. If there is complaint about Nelson, they might ask Congress to draft a statute expressly authorizing states to act regarding national as well as state subversion. Their quarrel should be with Congress, not with the Court. If the complaint is about Yates, and if Congress cannot draft a constitutional statute to condemn speech apart from action, their quarrel is with the first amendment.

Cole involved a statute authorizing the President to extend the 1950 Security Act to such departments not as he may "deem necessary" but as he may "deem necessary in the best interests of national security." 191 A food inspector in the New York office of the Health-Education-Welfare Department held a nonsensitive job not involving national security. The

188 Basically, this is Yates.
189 COHEN AND BOLAN, op. cit. supra note 186, at 255, 261. Emphasis is added.
190 Id. at 266, from National Review, March 15, 1958, quoting from AM. J. OF PSYCHIATRY.
security power is essentially that of Congress; delegations of power are strictly construed; the executive's discretion is viewed jealously; and what extension was in the best interests of national security was a question of fact, not of the President’s uncontrolled discretion—just as another President’s seizure of the steel mills when American boys were dying in Korea was a question of fact and power, not uncontrolled discretion. Thus Cole could not be fired under the 1950 act as extended, and retained his veteran’s preference.

Service likewise involved a statute and regulations and procedure. After security clearances in 1945, 1946, 1947, 1949, and 1950 and post-audit approval by the State Department head, the case was closed under the regulations—there being no appeal to the Loyalty Board except by the employee, from a finding adverse to him. Nonetheless, the Board acted and found not disloyalty but reasonable doubt. The Secretary, under an appropriation rider saying he might “in his absolute discretion terminate ... whenever he shall deem such termination necessary or advisable in the interests of the United States,”192 fired Service. Though department rules required that a decision be made after considering the complete file, arguments, briefs and testimony—the Secretary consulted none of these. The case may mean that an appropriation rider does not supersede department procedures; that summary discharge without following the rules is precluded. In substance it may imply that the country’s interests may rest on department morale free from fear of arbitrary discharge as much as they rest on a department head’s untrammeled power. At any rate, “how the national security would have been weakened by following departmental regulations does not appear.”193

In Watkins the accused told a House un-American activities inquiry that though he had in UAW union work cooperated with communists and taken part in their activities so that “some persons may honestly believe that [he] was a member of the party,” he had never been a card-carrying member of the party, had never accepted discipline and had fought them so bitterly for compliance with the Taft-Hartley Act that further cooperation became impossible. He said that the distinction between his frank admission of voluntary cooperation and his clear denial of membership was made from no other motive than “the simple fact that it is the truth.” Still it was important to him. For as others might well have honestly (but wrongly) believed him a party member, so he considered he too might be mistaken about others. So he said he would answer any questions about himself, or about persons he knew to be Communist party members and believed still were. He refused answers about other past associates, about persons who

may have been Communist party members or otherwise engaged in party activity but to his “best knowledge and belief have long since removed themselves from the communist movement.” His refusal was based not on the fifth amendment, but on his belief that such questions were not relevant to the committee’s work, and that the committee had no right to make public exposure of such persons.

The Court noted Congress’ broad power to investigate regarding the social, economic or political background of existing statutes or of needed statutes; its lack of power to expose private affairs for law enforcement purposes (executive), or for resolving individual cases (judicial), or for aggrandizing the investigators, or for punishing those investigated, or for any other purpose unrelated to legislative functions. It noted the duty of individuals to testify when questions were within the congressional province—but it also noted their protections against self-incrimination, unlawful search and seizure, and abridgement of speech, press, religion or political belief and association.

With these guides the Court traced the history of contempt and said simply that “un-American” meant nothing, that the committee resolution gave no clue to the pertinence of questions, and that the chairman’s remarks to Watkins gave no further clue on which to determine the pertinence of the question. “Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance.” Hence Watkins simply got the benefit of the doubt and his refusal was not contemptuous. (A dissent treated his refusal as invoking the constitutional privilege of others he was protecting—which only they could do.) As the A.B.A. Bill of Rights Committee explained, all the case requires is an explanation of pertinency “of sufficient clarity to comply with the due process clause.”¹⁰⁴ Any quarrel about the case on this analysis would be with Congress or Congressmen handling investigations—not with the Court.

What strikes one as the most poignant aspect of the case is the dramatic showing of how in such investigations witnesses can honestly—but mistakenly—ruin other people’s lives, and how one witness (subject by past actions to undue inference) would not himself be a party to inferring guilt from associations.

(Sweezy, of course, was Watkins at the state level.)

Sacher, Flaxer, and the Yates sequel cases, while reflecting the temper of the Court, were merely evidentiary or procedural refinements.

In Sacher, when a Senate Judiciary Internal Security subcommittee was investigating the recanting of former witnesses, there arose the subject of legislation to bar communists from federal practice—a subject outside

¹⁰⁴ Id. at 18.
the scope of the committee’s inquiry. Sacher’s refusal to answer questions regarding his past or present membership in the party or its lawyer section was held proper and his contempt conviction was reversed under Watkins; and when the court of appeals again affirmed, the Supreme Court directed dismissal of this indictment.

Flaxer, a union official, was asked October 5, 1951, if he could produce certain records. He said a list of members could be compiled within a week, that the information was available to him, and that he had not produced it or the records.194a

Arens: Will you produce it pursuant to the order of the chairman of this session within 10 days from today?
Flaxer: I will have to take that under consideration.
Senator Watkins: That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

Though he might have been excused on the ground that there was no such list yet compiled, and that the committee had given him another ten days, he was indicted for contempt as of October 5. Reversing the conviction, without dissent, the Court held:195 “We cannot say that petitioner could tell with a reasonable degree of certainty that the Committee demanded the lists this very day, not 10 days hence.”

The Yates sequel cases merely said that, in one trial, the refusal to answer eleven questions was one contempt—not eleven; and, on review again, the Court allowed the contemnor the time she had already served.

Jencks was more far-reaching. In a criminal prosecution for filing a false non-communist affidavit, a witness testified to certain conversations with Jencks, but said he could not remember what he had put in his written reports to the FBI about those conversations. It was held that for cross-examination Jencks was entitled to see those reports to decide whether to use them for his defense. A prior inconsistent statement of a witness is traditionally a basis for impeaching him, i.e., showing that he had said out of court something different from what he says now in court, and that hence he may be lying or remembering badly now; hence his testimony is (at least) less worthy of belief than it would be without this impeachment. Said the Court:196 “Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense . . . . Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness . . . . [T]he defense must initially be entitled to

194a 358 U.S. 147, 149 (1958).
195 Id. at 151.
see them [the reports] to determine what use may be made of them. Justice requires no less.” Conceding the value of protecting confidential government documents, the court quoted Judge Learned Hand that “prosecution necessarily ends any confidential character. . . . The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.”

A Clark dissent said that unless Congress changed the rule, “. . . those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.”

A statute passed after the decision virtually adopted the majority ruling.

In Kent and Dayton passport refusals were set aside because the State Department had been given no statutory criteria on which to exercise the refusal power. Traditionally, passports had been highly valuable as extralegal “courtesy cards” evidencing citizenship and honored by protection in friendly nations. They were not required for exit or entry until 1952. Since then they have been required for both. The right to travel is (concededly in the case) a part of “liberty” not to be lost without due process of law; and war measures were not involved. Rockwell Kent and Walter Brieih refused to sign non-communist affidavits when they sought passports. Kent was refused because of alleged communist adherence and writing (evidenced by a book he had written), Brieih because of connection with alleged communist causes. The Court said these associations (not crimes) and the refusal to respond to inquiry into their beliefs were no basis for refusal to issue passports. Even if passport issue were discretionary, such a discretion had not been granted by Congress, said the Court, avoiding a decision on constitutionality of the statute and treating the refusal orders as violations of the fifth amendment as applied. Dayton, who denied communism past or present and most subversive connections, was refused on the basis of a file (kept confidential from him) supposedly connecting him with the Rosenberg spy ring. Treating this as association at most, the Court followed Kent.

What national harm could come from letting Rockwell Kent attend the phoney Helsinki “Peace” Conference (and so expose himself further as a dupe or sputnik) does not appear. The harm to individuals from an uncontrolled department power to restrict the right to travel did appear, to the Court. Whether a statute granting that power to be exercised on the

---

197 Id. at 671.

basis of political beliefs or associations would be valid was not reached. If the statute which was construed was not explicit enough, it was written by Congress—not by the Court.

In *Bonetti* the accused was ordered deported under a 1918 Anarchist act amended in 1950, which provided for deportation of any alien who had been "after entering the United States, a member of the Communist party." He had entered the United States in 1923, thereafter joined the Communist party, quit in 1936 and never rejoined, and left the country in 1937, abandoning all citizenship rights. He entered in 1938 as a quota immigrant and had lived here since, except for one day's visit to Mexico in 1939. After the 1938 entry he had never been a communist. What the Court in effect said was that the 1923 entry and what transpired after that were wiped out by the 1936 exit abandoning citizenship; that the entry involved now was the 1938 entry—with no communist membership after that, hence no deportation for that reason was possible. A substance interpretation, rather than one merely grammatical, thus was used. The Court found this the "only fair and reasonable construction that... cloudy provisions will permit;" and in any event the case was novel on its facts and not likely to recur.199

*Witkovich*, an alien ordered deported, was indicted and convicted for failing to answer the Attorney General's questions on deportation and availability for departure and "such other information, whether related or not related to the foregoing, as the Attorney General may deem fit and proper." The Court did not hold the statute unconstitutional, but said that "to hold that the statute intended to give an official the unlimited right to subject a man to criminal penalties for failure to answer absolutely any questions the official may decide to ask would raise very serious constitutional questions."200 In other words, the first amendment covers deportees as well as citizens. Said the Bill of Rights Committee,201 (if the case involved security at all) "to the extent that there may be a danger, it is a danger flowing from the policy of the Bill of Rights."

VII. Motion to Reconsider: Newly Discovered Evidence

Since the chief current criticisms of August 1958 one term of court has passed and part of another. The decisions of this period must be considered as additional evidence for use in evaluating the criticism and the critics. Briefly, it shows that the Court has neither given way in the face of the criticism nor taken any umbrage at it; for the late decisions as a whole seem neither more security-minded nor more libertarian than those before August, 1958.

---

In the segregation field, less than six weeks after the critical blasts of 1958, the Court unanimously reaffirmed *Brown*, and said recalcitrant state officials could not delay rational desegregation plans by legislative devices and state-induced "trouble." Persons interested not in evasion or trouble but sane adjustment under *Brown* were likewise protected against shotgun investigations aimed at the N.A.A.C.P. And the Court's thwarting of Alabama's attempts to stop the N.A.A.C.P. through injunction, ouster, and a $100,000 fine for not revealing its rank and file members was pinned down against further stubbornness by the Alabama Supreme Court. A Negro was not bound to resist and await arrest to test his right to desegregated bus service—he could test it by declaratory judgment. However, a non-discriminatory and reasonable literacy test for voting was upheld. And new barratry laws, though directed obviously at the N.A.A.C.P., were at least to be heard in state courts before being banned by the federal.

In the field of *State due process* there were strong holdings based on individual liberties against unconstitutional state action, and equally strong holdings for the state against individual contentions of unconstitutionality.

The right to counsel was deemed vital for a defendant who after a hung jury mistrial was placed in solitary confinement, whose lawyer withdrew and who had no time to get a new lawyer for the second trial, so that his conviction there was reversed. A murder conviction was reversed because based on a confession induced by duress, fatigue, and falsely induced sympathy for the defendant's policeman friend (who falsely claimed he was in trouble for knowing the defendant). A robbery confession given by one apparently insane required reversal of the resultant conviction. Another such decision involving coercion was sent back to the district court so it could examine the record—not rely on state court recitals. And a conviction based on the evidence of a prosecution witness who had been promised consideration (and who the assistant state's attorney knew was lying when he said he hadn't) was reversed. One convicted of murder who alleged 415 constitutional errors in a sensational and widely publicized case was held entitled to review, despite his escape pending motion for new trial.

---

which by Indiana law might cost him review.\textsuperscript{214} \textit{Griffin} was reasserted.\textsuperscript{215}

Three double jeopardy cases went against the accused. Prior federal court acquittal of robbing a federally insured lending agency was held no bar to state court conviction on the same act for armed robbery.\textsuperscript{216} State court \textit{conviction} for conspiracy in Illinois to destroy property of another (telephone facilities in Mississippi, Tennessee and Louisiana) was held no bar to federal \textit{conviction} on the same act of agreement for conspiracy to destroy federal communications.\textsuperscript{217} And when a robber seized a victim's car at gunpoint, forced him to flee with him, shot him, and took off in the car, a state conviction for murder (with life sentence) was no bar to state conviction on the same facts for kidnapping (with death sentence).\textsuperscript{218}

The prohibition against unlawful search was held no bar to conviction for refusal to admit a rat inspector without a warrant to premises where rat refuse lay heaped outside.\textsuperscript{219} And a similar view on refusal to admit a housing inspector was noted.\textsuperscript{220} The Uniform Act to secure out of state witnesses was upheld.\textsuperscript{221} Witnesses under immunity by statute were held bound to testify.\textsuperscript{222} And witnesses in a secret investigation of bar irregularities were held bound to testify though their counsel were, except on call, excluded from the proceedings.\textsuperscript{223}

In federal due process, it was much the same. There was neither submission by the Court to the views of critics nor vindictive over-extension of its previously stated views.

A Mann Act conviction was reversed under a common law rule that a wife cannot testify against her husband without consent of both.\textsuperscript{224} Court martial trial for civilian army employees overseas was again barred.\textsuperscript{225} One shot wounding two federal officers was held to be but one assault,\textsuperscript{226} and punishment after a bank robbery conviction was held not to be aggravated by another conviction on the same facts for receiving the proceeds.\textsuperscript{227} Conspiracy to murder June 10, 1949 (almost four years after the ceasefire and 2½ after official cessation of hostilities December 31, 1946, but before

\textsuperscript{218} Williams v. Oklahoma, 358 U.S. 576 (1959).
\textsuperscript{219} Frank v. Maryland, 359 U.S. 360 (1959).
\textsuperscript{222} Mills v. La., 360 U.S. 230 (1959).
\textsuperscript{225} Kinsella v. Singleton, 361 U.S. 234 (1960), and companion cases.
official termination of the "war"—1951 with Germany, 1952 with Japan) was held to be "in time of peace" hence not triable by court martial.\(^{228}\) Kidnapping, though a noncapital offense if the victim allegedly is unharmed, may (when nothing is alleged either way regarding harm) be a capital offense. Hence, a conviction of kidnapping on information, possible only for noncapital offenses, was reversed.\(^{229}\) Indictment for interfering with interstate sand shipments could not support conviction for interfering with steel.\(^{230}\) A conviction based on arrest and search without warrant with no more cause than certain undisclosed information was reversed and treated as arrest on suspicion only.\(^{231}\) These were libertarian holdings.

On the other hand, the Jencks rule was carefully restricted: a conference memo considered not within the rule was denied to the defendant;\(^{232}\) when the same information sought had already been given, application under Jencks was denied;\(^{233}\) and it was held that grand jury minutes of testimony could in the trial judge’s discretion be denied.\(^{234}\) The purchase and receiving of narcotics was held to be two offenses, not merged, and hence subject to consecutive term sentences.\(^{235}\) An arrest without warrant on a general description by a paid informer was held proper.\(^{236}\) These were conservative.

The same balance of interests appeared regarding civil liberties and security.

In nonsensitive employment (cf. Cole), a dismissal was reversed because regulations were not followed and the right to cross examine was denied;\(^{237}\) the same result was reached in private employment requiring security checks.\(^{238}\) The right to criticize the law (Smith Act) and cases interpreting it (Dennis) was upheld against claims of impugning the court and judge.\(^{238}\) Freedom of the press in questioned areas was again asserted.\(^{239}\) The right to travel was upheld for one convicted (of entering a Pacific atom testing area) whose appeal bond had been conditioned on not leaving U. S. jurisdiction.\(^{240}\)

\(^{228}\) Lee v. Madigan, 358 U.S. 228 (1959).
\(^{239}\) In re Sawyer, 360 U.S. 622 (1959).
\(^{241}\) Reynolds v. U.S., 267 F.2d 235 (9th Cir. 1959).
But on a statement giving complete immunity, refusal to answer before a grand jury supported a criminal contempt charge.\textsuperscript{242} Time factors in immigration were again related to substance rather than grammatical construction, this time against the individual \textit{(cf. Bonetti)}. One Tak entered lawfully in 1951 and left; in 1952 he entered unlawfully and served from 1953 to 1955 in the armed forces. In seeking naturalization on more than 90 days service “having been lawfully admitted:” it was held that he had no such service after the key entry involved since that one was unlawful.\textsuperscript{243}

Three key decisions have kept the controversy alive and timely: In one a congressional committee witness who refused to answer regarding his connections, if any, with communism was held properly convicted when a prepared memo showed he knew the pertinency of the questions to an inquiry into subversion in education, when he expressly disclaimed reliance on the fifth amendment, and when his claim was an attack on the Committee’s exposure for exposure’s sake. Justices Black, Douglas, Brennan and Chief Justice Warren dissented on the ground that this was the Committee’s prime (and improper) purpose.\textsuperscript{244}

In another case a sponsor of World Fellowship, Inc., a New Hampshire discussion group which had some speakers who had been connected with allegedly subversive organizations, refused to give (not the names of speakers, but) the names of guests. It was held that \textit{Nelson} did not apply because Congress had not occupied the whole field, that the state (with a statutory right to inspect camp guest registers) had a right to know subversives in the state, and that no question of academic or political freedom was involved. Again there was a strong dissent.\textsuperscript{245} This case is still before the courts.\textsuperscript{246}

In February, 1960, the Court in recess conference continued three cases involving the Communist party and membership in it and set them for argument October 10.\textsuperscript{247} So that, at least regarding the issue of liberty and subversion, the Court’s reaction to criticism is still an open matter.

\textbf{VIII. Jury Instructions: A Reader’s Guide}

A writer as “judge” in the court of public opinion cannot direct a verdict. But jurymen need instructions and readers deserve a guide. Hence, in lieu of conclusions, these “instructions.”\textsuperscript{248}

\begin{itemize}
  \item \textsuperscript{243} Tak Shan Fong v. U.S., 359 U.S. 102 (1959).
  \item \textsuperscript{244} Barenblatt v. U.S., 360 U.S. 109 (1959).
  \item \textsuperscript{245} Uphaus v. Wyman, 360 U.S. 72 (1959).
  \item \textsuperscript{246} Concord (N.H.) Daily Monitor, April 1, 1960, p. 1.
  \item \textsuperscript{247} One is Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956); the others involve appeals by Junius Scales and John Francis Noto. See St. Louis Globe-Democrat, Feb. 9, 1960, editorial.
  \item \textsuperscript{248} Apologies to Victor Hemphill (former Illinois Circuit Judge) deceased, author of \textit{Illinois Jury Instructions}.\end{itemize}
The instructions and this article are meant to aid, not influence. Readers should heed both sides of the case, and the credibility of those discussing the Court and the validity of what they say are for readers alone to judge— for all Americans have a right to their views on American institutions. Anything in this paper tending to impair the reader's task may of course be ignored.

The issue is whether the Court has weakened American security or has been lacking in restraint, or whether it has preserved American freedom.

If the complaint itself presented no offense against the American people, if it was untimely, if it lacked particulars, if it was maliciously prosecuted, or if it was unproved—you may dismiss it and exonerate the Court. If it met these tests, you may condemn the Court.

The Court must use due care in its work, that care required of reasonably prudent men—given their awesome responsibilities and multifold burdens, chosen for special skills but withal fallible human beings. Substantial performance may or may not be enough. If it has willfully misused its office, this is a grievous fault for which you may wish to write your congressman. Likewise if it has been careless—for American government or American individuals may be unduly harmed by judicial results, though no judge so intended. In evaluating what the Court has done, consider that it must decide cases, and thus has to say something.

But critics must also use due care; that care required of reasonably prudent men concerned with public affairs but obliged to look toward the ultimate good of their country. You may consider the wisdom of what the critics say and whether they should have said anything, for they are not faced with specific cases to explain and decide. If critics of high standing have spoken for personal ends, you may abate the prosecution. If they were used, misled, or if they directed attention to certain cases to obscure resentment at others, you may weigh what that means. You may consider what advice they had available, what they accepted or refused, what evidence they weighed or ignored, and whether they acted in good faith. If they acted in fear of sudden danger, you may excuse extreme positions so occasioned; but you may survey the whole American scene in finding whether such fears were warranted.

If both the Court and the critics have been willful, or if both have been careless, you may bar the critics if their own fault helped bring on the current crisis; or you may weigh the Court's fault with the fault of the critics.

If the Court has been a nuisance, you must balance what harm it has done with what good it has done. If the critics have been a nuisance, you may not deny them the right to speak, but you may hold your ears, grimace, or turn away.
Neither the Court, the critics, the defenders, nor this writer can give a guaranty to be right. But, given the problems of both government and individual and the tests facing America today, we had all better be right more often than not.

The critics have the burden of proof. The charges are serious. And clear and convincing evidence should be needed to sustain them. In this kind of case, you may consider all the evidence adduced here, and all else the Court (and critics) have done or said. If the Court has taken flight, this may indicate guilt; if it has stood fast, this may indicate courage—either involves responsibility. You must heed what some Court members have said in defense; but the silence of others is no admission of fault nor of any agreement with critics or defenders. False or frenetic witnesses may be ignored. You may consider custom and usage, the value of precedent, and the desirability of progress.

Regarding damages, you may ask if America is stronger or weaker because of the Warren Court, or because of the critics. You may ask if the Court or the critics have enhanced or impaired desirable government functions, essential individual freedoms, or vital constitutional processes.

On all the evidence, and guided by these instructions—whether you really heed them or not—you may find the Court at fault, the critics at fault, or neither at fault. Which way you decide is exceedingly important. The future of the American form of government may turn upon your decision.