FEDERAL BUREAU OF INVESTIGATION

SUPREME COURT

PART 6 OF 14

FILE NUMBER : 62-27585

FILE DESCRIPTION

BUREAU FILE

SUBJECT Supreme Court

FILE NO. 62-27585 (Part 6)

Release 3

0-20 (Rev. 7-18-58)

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UPI -14

(SUPREME COURT)

LOS ANGELES--CHIEF JUSTICES OF NINE STATES CHIDED THE UNITED STATES SUPREME COURT TODAY FOR ENGAGING IN "POLICY-MAKING" DECISIONS WHICH HAVE RAPIDLY EXTENDED FEDERAL POWER IN THE PAST 25 YEARS.

THE CRITICISM OF THE HIGH COURT WAS CONTAINED IN A 31-PAGE REPORT TO THE 10TH ANNUAL CONFERENCE OF CHIEF JUSTICES MEETING AT THE HUNTINGTON-SHERATON HOTEL IN NEARBY PASADENA.

"IT HAS LONG BEEN AN AMERICAN BOAST THAT WE HAVE A GOVERNMENT OF LAWS AND NOT OF MEN," THE JUSTICES SAID. "WE BELIEVE THAT ANY STUDY OF RECENT DECISIONS OF THE SUPREME COURT WILL RAISE AT LEAST CONSIDERABLE DOUBT AS TO THE VALIDITY OF THAT BOAST."

"WE FIND THAT IN CONSTITUTIONAL CASES UNANIMOUS DECISIONS ARE COMPARATIVE RARITIES, AND THE MULTIPLE OPINIONS...ARE COMMON OCCURRENCES. WE FIND NEXT THAT DIVISIONS IN RESULT ON A 5 TO 4 BASIS ARE QUITE FREQUENT."

THE REPORT, PREPARED BY A SPECIAL COMMITTEE ON FEDERAL-STATE RELATIONSHIPS, SAID IT WAS STRANGE THAT THE SUPREME COURT HAD BEEN ABLE TO GAIN ITS "IMMENSE AND DOMINANT POWER" UNDER THE CONSTITUTION WHICH PROVIDES FOR A SYSTEM OF CHECKS AND BALANCES.

"WE ARE CONCERNED SPECIFICALLY WITH THE EFFECT OF JUDICIAL DECISIONS UPON THE RELATIONS BETWEEN THE FEDERAL AND STATE GOVERNMENTS," THE COMMITTEE SAID.

"HERE WE THINK THAT THE OVERALL TENDENCY OF DECISIONS OF THE SUPREME COURT OVER THE PAST 25 YEARS OR MORE HAS BEEN TO PRESS THE EXTENSION OF FEDERAL POWER AND TO PRESS IT RAPIDLY."

THE REPORT WAS SIGNED BY CHIEF JUSTICE FREDERICK W. BRUNE, MARYLAND; ALBERT CONWAY, NEW YORK; JOHN R. DETHMERS, MICHIGAN; WILLIAM H. DUCKWORTH, GEORGIA; JOHN E. HICKMAN, TEXAS; JOHN E. MARTIN, WISCONSIN; WILLIAM C. PERRY, OREGON; TAYLOR H. STUKES; RAYMOND S. WILKINS, MASSACHUSETTS AND MARTIN A. NELSON, ASSOCIATE JUSTICE OF MINNESOTA.

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REC- 40 62-275851-A

NOT RECORDED
167 SEP 2 1958

EX-128

58 SEP 5 1958

WASHINGTON CAPITAL NEWS SERVICE

0-19 (Rev. 7-18-58)

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Supreme Court Critics

Much is being said and written these days in deprecation of a decline in public respect for and support of the Supreme Court and its decisions. That there has been such a decline is hardly open to question. It is reflected in the current efforts in Congress to modify and even to overturn recent rulings by the court. It manifests itself, often in ugly form, in bitter opposition in the South to the school decision. Severe criticism of the court is freely expressed by many lawyers and lower Federal judges, although this is seldom heard publicly.

In short, for a variety of reasons, some of which may be valid and some of which may not be, the prestige of the court has suffered. It no longer speaks with an authority which derives from full public confidence in the detached and disinterested nature of its pronouncements.

Those who deplore this state of affairs say that a first duty of the good citizen is to respect and support the rulings of the court. But this, we suggest, misses the main point, which is that the decisions of the court, in and of themselves, must be such as to command public respect. And it is self-evident, we believe, that the court itself has failed on this score.

One of the strongest items of proof in support of this belief is a remarkable resolution just submitted to the annual Conference of (State) Chief Justices. The resolution was drafted by a committee of nine chief justices, including the highest judicial officers in such States as New York, Michigan, Wisconsin, Oregon and Massachusetts. These jurists say that any study of recent decisions of the Supreme Court will raise at least considerable doubt that "we have a government of laws, not of men." They believe that the Supreme Court "too often has tended to adopt the role of policy maker without proper judicial restraint. . . ." And they say that "in the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role."

These are not the words of some excited demagogue. They reflect the considered judgment of men who have attained the highest judicial stature in their respective States. For our part, we think the criticisms which they put forward are justified, and there is no room for substantial doubt that the sentiments which they express are closely identified with the sentiments which have prompted the so-called "attacks" on the court both in and out of Congress.

File

Wash. Post and Times Herald
Wash. News
Wash. Star A12
N. Y. Herald Tribune
N. Y. Journal-American
N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

Date AUG 22 1958

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167 SEP 4 1958

52 SEP 4 1958

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8-23-58

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DAVID LAWRENCE

The Supreme Court Is Rebuked

Ten State High Justices' Criticism Of Legislative Trend Is Cited

The chief justices of the highest court in each of nine States—seven of them in the North—have just issued the most penetrating criticism of the decisions of the Supreme Court of the United States that has emanated from any source in recent years. They were joined by one associate justice.

Coming as it does at the very time when the Senate and the House here have been debating whether to pass laws to restrict the jurisdiction of the Supreme Court and in some instances to reverse some of the points on which the court has erroneously interpreted the intent of Congress, the wording of the document is of more than passing interest.

The report of the Committee on State-Federal Relationships was made public at Pasadena, California, where the annual meetings of the Conference of Chief Justices and of the American Bar Association are being held. The chief justices of Massachusetts, New York State, Michigan, Wisconsin, Oregon, Minnesota and Maryland can hardly be charged with a "Southern bias." Indeed, the report of the chief justices did not mention the "segregation" issue at all but dealt solely with the abuse of the rights of the States by the Supreme Court of the United States. The document says in part:

Wash. Post and Times Herald
Wash. News
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N. Y. Herald Tribune
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Date AUG 22 1958

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NOT RECORDED
167 SEP 9 1958

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"We are now concerned specifically with the effect of judicial decisions upon the relations between the Federal Government and the State governments. Here we think that the over-all tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of Federal power and to press it rapidly.

"There have been, of course, and still are very considerable differences within the court on these matters, and there has been quite recently a growing recognition of the fact that our Government is still a Federal Government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government. . . .

"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. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the Federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances, no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

"We are not alone in our view that the court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights. We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises.

"It is strange, indeed, to reflect that, under a Constitution which provides for a system of checks and balances and of distribution of power between national and State governments, one branch of one Government—the Supreme Court—should attain the immense and, in many respects, dominant power which it now wields. . . .

"It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

"We find next that divisions in result on a 5-to-4 basis are quite frequent. We find further that, on some occasions, a majority of the court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual justices who happen to unite on one outcome or the other of the case before the court.

"... It seems strange that, under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from 1 year to 75, or even 95 years. . . .

"The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be. If reasonable certainty and stability do not attach to a written constitution, is it a constitution or is it a sham?

"These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views as to what is wise or desirable do not unconsciously override more dispassionate consideration of what is or is not constitutionally warranted. . . .

"It is our earnest hope which we respectfully express, that that great court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise."

The ten justices declare, moreover, that at times the Supreme Court justices seem to "manifest an impatience with the slow workings of our Federal system" and an unwillingness to wait for Congress "to make clear its intention to exercise the powers conferred upon it by the Constitution."

The report says also that the Supreme Court seems to be impatient with the "slow processes of amending the Constitution which that instrument provides," and that it should be adhering to "the limitations of judicial power," instead of "merely giving effect to what it may deem desirable."

This is a scathing rebuke of the present Supreme Court, though the criticism does go back in some instances to previous personnel as well. There can be no doubt that many men of the highest judicial experience in America have begun to question whether the attitude of the present court isn't really legislative instead of judicial.

0-19 (Rev. 7-18-58)

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States' Jurists Vote High Court Censure

By LAWRENCE E. DAVIES
Special to The New York Times.

PASADENA, Calif., Aug. 23—A resolution and a report highly critical of the United States Supreme Court as lacking in judicial self-restraint and invading the field of legislation were adopted by the Conference of Chief Justices today. The vote was 36 to 8.

The action was taken after members of a minority jumped to the high court's defense.

Chief Justice Charles Alvin Jones of Pennsylvania accused the Committee on Federal-State Relationships as Affected by Judicial Decisions, headed by Chief Judge Frederick W. Brune of Maryland, of "beating around the bush."

He charged that the real basis for the report's com-

Continued on Page 42, Column 1

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Date AUG 24 1958

REC- 65 62-27585-A

NOT RECORDED
167 AUG 28 1958

EX-138

57 SEP 2 1958

JURISTS ENDORSE COURT CRITICISM

Continued From Page 1, Col. 5

plaints about the Supreme Court was not any decision mentioned in the committee's report. Instead, he declared, it was the school segregation issue.

The segregation question, he said, was "quietly embedded in the resolution you are asked to adopt."

"You might as well face that fact," he said.

Chief Justice Joseph Weintraub of New Jersey joined in the attack by saying it was unfortunate that the prestige of the conference of chief justices should be placed behind so serious an indictment."

"Any man or group of men," he went on, "who choose to place themselves above the constituted authority as determined by the Supreme Court or to flout the basic rights as that court authoritatively finds them is sure to find comfort and support in the sweeping reflections upon the Supreme Court in this report."

Justice Weintraub told the conference members that they might disagree with Supreme Court members' decisions "but we cannot impute to them anything less than conscientious devotion to duty as they see it."

Justices Join in Attack

Others joining in the attack on the report were Chief Justice Phil S. Gibson of California and Chief Justice Francis B. Condon of Rhode Island.

Justice Condon said the Conference of Chief Justices was "a consultative organization—not an organization to sit in judgment on the highest court in the land."

Justice Gibson said the decisions mentioned in the committee report dealt for the most part with the "protection of the fundamental rights of the individual against the power of government."

An unsuccessful attempt was made by Chief Justice Robert B. Williamson of Maine to have a paragraph of the resolution stricken. He was disturbed, he said, by phrases such as "judicial self-restraint." These phrases occurred in a section of a resolution widely looked upon as asking the nation's highest tribunal to mend its ways.

Chief Justice Theodore G. Garfield of Iowa noted Justice Jones' charge that disagreement with and criticism of the Supreme Court's decision in the school integration case was the real reason behind the Brune committee's report.

Statement Disputed

"I find nothing in it," Justice Garfield said, "to justify that statement. I don't feel that in voting for the resolution I'm motivated by disagreement with the result in the school integration decision."

The resolutions committee itself was headed by Chief Justice Levi S. Udall of Arizona.

Judge Brune in a brief defense of the critical report asserted that no personal attacks on the honor or integrity of members of the Supreme Court had been intended by his committee of ten state chief justices.

Voting against the resolution and thus against the report on which it was based were Chief Justices or their representatives of California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia and Hawaii. Those from Nevada and North Dakota abstained. Absent from a final business session in the Huntington-Sheraton Hotel here were Connecticut and Indiana. Arkansas was not represented at the annual meeting at all because of illness.

Chief Judge Albert Conway of the New York Court of Appeals was elected president of the Conference of Chief Justices. Other officers elected were Justice McGehee, first vice-president, and Judge Brune, second vice president.

New members elected to the executive council for two-year terms were Chief Justice John B. Fournet of Louisiana and Chief Justice John E. Martin of Wisconsin.

TEXT OF THE REPORT

Resolved:

1. That this conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That in the field of Federal-state relationships the division of powers between those granted to the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the amendments thereto.

3. That this conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound and should be more diligently preserved.

4. That this conference, while recognizing that the application of constitutional rule to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.

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

6. That this conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

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36 Top State Justices Hit High Court

Resolution Attacks Policymaking; 8 Jurists Oppose It

LOS ANGELES, Aug. 23 (UPI)—Chief justices of most of the 48 states overwhelmingly adopted a resolution today which criticizes the United States Supreme Court. One dissenter called it a "smoke screen" favored by those who oppose Federal decisions on integration.

The resolution was endorsed by a roll-call vote of 36-8 by justices attending their annual conference. It approved a 31-page report drafted by a committee of 10 state justices.

The report, highly critical of the Supreme Court for what it said was encroachment in assuming the role of policymaker, said the highest court of the land often had failed to exercise "proper judicial restraint."

In a lengthy speech against the resolution, Chief Justice Charles A. Jones, of Pennsylvania, said it was a smoke-screen for "persons who do not like the Federal decisions on integration."

However, other justices, some from northern and far western states where integration is no issue, took the floor to deny this.

[The Associated Press said 50 representatives were expected at the conference—one from each state and the jurists from Puerto Rico and Hawaii. However, four chief justices were absent: those from Connecticut, Indiana, Puerto Rico and Arkansas.

[The roll call of the justices' vote on the censure resolution:

[Opposed: Phil S[illegible] Gibson, Calif.; Joseph Weintraub, New Jersey; Jones; Francis B. Condon, Rhode Island; Roger L. McDonough, Utah; Walter H. Cleary, Vermont; Frank C. Haymond, West Virginia; Philip L. Rice, Hawaii.

[All others present voted for the resolution.]

Chief Justices Milton B. Badt, of Nevada, and Gudmundur Grimson, North Dakota, abstained.

The resolution, in supporting the findings of the committee which prepared the report, requested the Supreme Court to exercise self-restraint "to the end that our system of federalism may continue to function with and through the preservation of local self-government."

The chairman of the committee which prepared the report was Chief Judge Frederick W. Brune of Maryland.

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167 SEP 9 1958

File

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N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

Date AUG 24 1958

63 SEP 9 1958 F 25

The Fall From Grace

THE U.S. SUPREME Court, after basking for generations in affection and respect, is now the focal point of a gathering mass of public indignation.

The grumblings at the grass roots are finding authoritative expression. Criticism is coming not alone from the South but from all over the nation. It is coming from the average citizen as well as from men learned in law and history.

The anticourt chorus almost came to a head in the session of Congress just ended. Several bills aimed at curbing the power of the body worked up considerable support.

Over the weekend came the most convincing criticism yet. It was in the form of a resolution passed with only eight dissenting votes by the Conference of Chief Justices.

The resolution approved by the senior jurists of the states' judicial systems charged the Supreme Court with assuming an unrestrained policy-making role and usurping rights belonging to the states. It further accused the court of a lack of patience in not waiting for Congress to make clear the powers conferred by the Constitution.

All this cannot be charged off, as some would like to do, as demagogic discontent. It cannot be laid entirely to Southern dissatisfaction with the school desegregation decisions. It goes deeper than that.

The end is not in sight. Some reform must come. Whether it will originate from within or without the court is the question.

THE ATLANTA JOURNAL
Atlanta, Georgia
8/25/58
Editor: JACK SPALDING

62-22585-A

NOT RECORDED
16 SEP 9 1958

57 SEP 9 1958 F75

0-20 (Rev. 7-16-58)

Mr. Tolson
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UPI-130

(COURT)

CHAIRMAN EMANUEL CELLER OF THE HOUSE JUDICIARY COMMITTEE ACCUSED THE CONFERENCE OF STATE CHIEF JUSTICES TODAY OF "UNBECOMING" AND "UNJUSTIFIED" ACTION IN CRITICIZING THE UNITED STATES SUPREME COURT.

THE NEW YORK DEMOCRAT SAID THE CRITICAL RESOLUTION ADOPTED BY THE CONFERENCE LAST WEEKEND "CAN ONLY UNDERMINE THE RESPECT FOR THE FINAL AUTHORITY OF THE SUPREME COURT WHICH IS SO ESSENTIAL TO ORDERLY GOVERNMENT."

"THE ENDORSEMENT BY THE CONFERENCE OF CHIEF JUSTICES OF THE CURRENT WAVE OF CRITICISM AGAINST THE SUPREME COURT SHOWS A MARKED DISREGARD FOR THE JUDICIAL SELF-RESTRAINT WHICH THE CONFERENCE URGED THE SUPREME COURT TO OBSERVE," CELLER SAID IN A STATEMENT.

"CERTAINLY EACH ONE OF US IS FREE TO DISAGREE WITH PARTICULAR DECISIONS OF THE SUPREME COURT, BUT A BROADSIDE ATTACK UPON THE COURT'S HANDLING OF ALL MATTERS INVOLVING FEDERAL-STATE RELATIONSHIPS IS TOTALLY UNJUSTIFIED BY THE RECORD."

CELLER ALSO SAID IT WAS "ESPECIALLY UNBECOMING" FOR THE CONFERENCE, CREATED TO DEAL WITH ADMINISTRATIVE PROBLEMS OF THE STATE COURTS, "TO TAKE UPON ITSELF TO SIT IN JUDGMENT ON THE HIGHEST COURT OF THE LAND."

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EX. - 136

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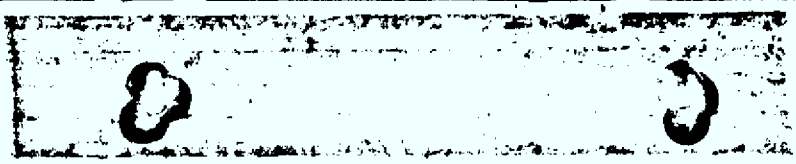
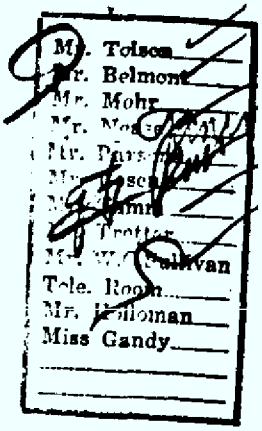
WASHINGTON CAPITAL NEWS SERVICE





Supreme Court Policy

It is a most extraordinary state of affairs when the chief justices of the state supreme courts make a formal and detailed protest against actions of the Supreme Court of the United States.

What the state chief justices said probably was less news in the South than elsewhere, for the South has been hearing the same kind of attack four years. It is a major event from coast to coast when these veterans of the bench examine the nation's highest court and find it faulty.

"Recent decisions raise considerable doubt as to the validity of the American boast that we have a government of laws and not of men," the highest judicial officers of the states said.

The court in Washington has been usurping constitutional rights of the states and during the last 25 years has rapidly extended powers of the central government, the state justices asserted.

We consider it significant that these 11 pages of objections, from justices who know proper procedure in appeals at the upper level of the judicial system better than anyone else, should come after debate in which the decision on racial integration in public schools was discussed.

Defenders of the national Supreme Court asserted, in effect, that the attack was essentially a protest against the school decision, with all the general words about principles thrown in as wrappings for the package.

This attitude was overwhelmingly defeated in the final vote. The result is outright objection to Supreme Court methods in acting as a policy maker for the Government.

This is, of course, the heart of the difficulty in the school decision. Our plan of Government calls for Congress to make policy and any attempt to get Congress to take over school attendance management would have been decisively defeated. But the Supreme Court undertook to make a change in national policy anyway.

It also is the general objection to basing high court rulings on sociology books and psychology books instead of law books.

There must be, at least by implication, a fundamental objection to lifting men with little judicial experience, if any, to the most powerful court in the country, in place of promoting sound judges from the lower courts.

The nationwide impact of this resolution from Pasadena comes from two sets of figures. It was written by the committee on Federal-state relationships of the Conference of Chief Justices. There are 10 committee members, of whom six are from the North and West.

This committee report was adopted by a vote of 36 to 8, which means it would have carried if the South's chief justices had abstained from voting. A clear majority of the non-Southern chief justices finds the time has come to speak out about Supreme Court abuses.

We now have a national, rather than a regional, question of policy making under our Constitution.

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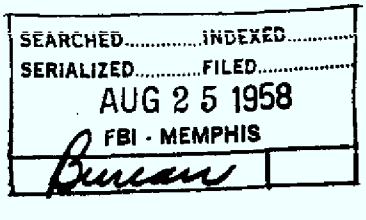

...tions make international law in time of peace
...d ...k all laws in time of war.

HERA
William Randolph Hearst / Monday, August 25, 1958

U.S. Supreme Court

Sharp criticism of the United States Supreme Court by the Conference of Chief Justices of many states, in Pasadena, is a healthy indication of the rising tide of sentiment throughout the nation against some of the decisions of the high court affecting Communism and security issues.

One of the most recent of these amazing 5-4 Supreme Court decisions ruled that the secretary of state has no statutory right to refuse passports to persons because of "beliefs and associations."

The effect, of course, was that the gate has been opened to every enemy of the United States residing in this country, including Communists, fellow travelers, and others who are subversives, to thumb their noses at the State Department, demand and obtain passports and go around other countries doing their utmost to harm this nation.

The Conference of Chief Justices in their 10th annual meeting here issued the sharply critical report by its Committee on Federal-State Relationships as affected by Judicial Decisions which was officially approved by the conference.

The Supreme Court was curtly reminded that it should "exercise one of the greatest of all judicial powers—the power of self restraint"—in a resolution also adopted. The committee report in part said:

"We believe that . . . the Supreme Court too often has tended to adopt the role of policy maker without proper judicial restraint."

This has been a rather common complaint, that the Supreme Court has now become, through its radical decisions, a policy maker and almost a law maker, usurping the powers for which we elect leading citizens to Congress.

The committee's report asserted that:

"It has long been an American boast that we have a government of laws, not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast."

While the committee made it plain that the state Chief Justices are primarily concerned with "the effect of judicial decisions upon the relations between the federal and state governments," and states rights and the encroachment of federal power upon the states, there was no mistaking the fact that the entire field of Supreme Court decisions was under fire.

The conference chairman, Chief Justice John R. Dethmers, of Michigan, warned that "too much policy making by the federal courts may eventually prove destructive to our way of life."

In view of the reverence which the people have felt for their Supreme Court throughout a long and historic past, it would be unfortunate indeed if its actions during recent months, and in the future, would put a yoke upon the neck of a free land.

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Letters to th

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0-19 (Rev. 7-18-58)

The Washington Merry-Go-Round

Courage Shown In Vote on Court

By Drew Pearson

UNFORGETTABLE scenes were stamped on the minds of Senators as the last weary days of the 85th Congress dragged to a close. Most poignant of all was the 41-40 vote to table the resolution curtailing the powers of the Supreme Court. As the vote was announced John McClellan of Arkansas trembled. Perspiration stood out on his forehead. He was white with anger . . . Twenty years before, another Arkansas Senator had stood on the Senate floor also arguing that the power of the Supreme Court must be curbed. As majority leader, Joe Robinson of Arkansas was loyal to his chief in the White House, and when President Roosevelt introduced his court-packing bill, Robinson fought for it. His heart, however, was never in his argument. His heart was with his southern friends, Senator "Jimmy" Byrnes of South Carolina, Harry Byrd of Virginia, Walter George and Dick Russell of Georgia.

Pearson

So Robinson, overworked and heartsick, died during the court battle. His heart failed him . . . Last week John McClellan, tired from the long Hoffa hearings, looked as if he might collapse as the one-vote margin to preserve the independence of the court was announced . . . Senator Strom Thurmond of South Carolina was not so emotional. But behind his flashing eyes and stern features you could see the same emotions that must have welled up in another famous South Carolinian, John C. Calhoun, as he championed "nullification" . . . Byrd of Virginia looked calm. Twenty years before he had battled against Roosevelt to keep the Supreme Court independent. Three years before he had joined with all of Virginia in paying tribute to John Marshall, who as Chief Justice had established, in his fight with Jefferson, the independence of the Supreme Court.

Grandson of a slave-holder, Sen. Tom Hennings of Missouri, whose great grandfather held more slaves than any other plantation owner in Georgia and whose grandfather was an officer in the Confederate Army, led the Senate argument for the court. "In these late days of the session," he said, "the Senate may be doing something which will plague not only the Senate, but the people of the country, other Senates and other Congresses for years to come," . . . Sen. John Carroll of Colorado supported Hennings.

Silent Republicans. The debate was chiefly between Democrats. Republicans voted overwhelmingly against the court, but stayed on the sidelines during debate. Obviously they relished this as a North-South Democratic battle, one which would play up the split inside the Democratic Party . . . Unkindest vote of all came from Sen. Kuchel of California, Republican. He threw in his lot with the enemies of Chief Justice Warren, though it was Warren, when Governor of California, who appointed Kuchel to the Senate . . . Margaret Chase Smith of Maine, the only lady, lined up against the court which had supported her in various decisions on McCarthyism . . . Gore of Tennessee took the easy course; his colleague Kefauver the hard course. Kefauver's vote for the court was one of only three from the South. Gore had just been assured of reelection. Kefauver comes up for reelection in 1960. His vote took real courage. So did the votes of Johnson and Yarborough, of Texas.

What is courage? The word "courage" was tossed around the Senate floor like a basketball. Almost every Senator was complimenting almost every other Senator on his great courage. Most of them had shown no great courage. It takes no courage for a Northern Senator representing a Negro bloc of big city voters to line up for civil rights or for the Supreme Court. In contrast, Kefauver-Yarborough-Johnson votes did take courage. Johnson even persuaded George Smathers of Florida, who was against the court, to pair with Mike Monroney of Oklahoma who, though for the court, was absent. This gave the one-vote margin needed for the court . . . Furthermore, Johnson had persuaded Sens. Bob Kerr of Oklahoma and Allen Frear of Delaware, both Democrats who would have voted against the court, to remain in the cloakroom and not vote. As the vote was taken, Democratic Whip Mansfield of Montana announced: "The Senator from Delaware (Frear), the Senator from Florida (Holland), and the Senators from Oklahoma (Kerr and Monroney) are absent on official business." This was not exactly true. Holland was in Florida campaigning frantically for his renomination, while Kerr and Frear were in the Senate cloakroom restlessly waiting.

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REVIEW and OUTLOOK

Judicial Self-Restraint

In the politest possible language, chief justices of the state supreme courts the other day offered some advice to the United States Supreme Court.

By an overwhelming vote of 36 to 8 the members of the Conference of Chief Justices, meeting in Pasadena, Calif., had these things to say:

"A fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution . . ."

"Our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound and should be more diligently preserved."

"The division of powers between those granted the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto."

The Conference of Chief Justices then went on to suggest where the justices think the United States Supreme Court has gone astray in some of its decisions affecting the relationships of the division of Federal and state powers. They admonished the Supreme Court to recognize that there is a difference between what the Constitution requires or allows and what members of the Supreme Court "may deem desirable or undesirable."

In short, the highest legal authorities of the states here are telling the Supreme Court that cases should be decided by what the Constitution says, and not by what the members think the Constitution should say. They are also warning the Court against continued whittling down of "local self-government" if the U.S. system of federalism is to "continue to function."

And what should the Supreme Court do in order to restore the upset balance the chief justices find? The answer to that was also a polite but plainly put condemnation: "Exercise one of the greatest of all judicial powers—the power of judicial self-restraint."

Now there are two factors that should be remembered about this lesson in law and admonishment to restraint. One is that the state chief justices are decidedly interested parties to the conflict between Federal and state powers. They are the guardians of what rights remain to the states, and they do not like to see them nibbled away for any reason. And, being men, they especially do not like to see other men upset their logic and their reasoning.

But the other factor is that this is not just the view of one chief justice in one state about one case. It is the considered opinion of 36 chief justices who come from all sections of the country and who have little else in common aside from their guardianship of their states against Federal encroachment. They are attacking a pattern they think is dangerous.

What they had to say will provide a great deal of ammunition to those who would take away some of the Supreme Court's powers. And from those who, conversely, think the Supreme Court can do no wrong ever, the chief justices will hear the cry that they themselves are guilty of judicial unrestraint in criticizing their higher brethren.

Both these results can surely be anticipated. But since, like the chief justices, all of us are interested parties—or should be—in retaining a proper Federal system of national and state powers, one other result of this plan for self-restraint should be hoped for.

And that is that the Supreme Court will read this report in the light of its decisions and judge where, in all the criticism, the error lies.

REC-15

Supreme Court Integration Decision Not Law Of The Land—Caldwell

TALLAHASSEE (UPI)—Former Gov. Millard F. Caldwell charged today that Americans are suffering from "civic and political hookworm."

Caldwell upbraided everyone from President Eisenhower down, raked the U. S. Supreme Court over the coals and declared many Americans are unwittingly contributing to the Communist cause.

The hookworm symptoms, he told a local civic club, are laziness, indecision, indirection, moderation and timidity.

The people, he charged, are "sitting on their hands" while the U. S. Constitution is being destroyed, left-wingers are pushing the country to bankruptcy and cancerous appeasement policies are advanced by friends of Russia.

"Although the country may have been shocked by the first unconstitutional Supreme Court decisions, by the first usurpations by Washington of states' rights, by the first proof of Soviet military science superiority, we have seen and heard so many signs of disintegration that we have been reconciled to frustration and failure," he declared.

"Some of us, even some lawyers, have said the Supreme Court's school integration decision is the supreme law of the land. And it is no such thing as every student of the Constitution knows," he said.

"A court decision not made pursuant to the Constitution is invalid. That the school decision was written in violation of the Constitution is as obvious as the nose on your face."

"Instead of living under a constitutional government, we are now subservient to a judicial tyranny."

Mr. Tolson
Mr. Belmont
Mr. Mohr
Mr. Parsons
Mr. Rosen
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Mr. Trotter
Mr. Nichols
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Mr. Holloman
Miss Gandy

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Jacksonville Journal
Jacksonville, Florida
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SUPREME COURT

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"Those who tell the American people we should sit down with the Kremlin to discuss our differences, that we should seek an understanding with the murderers of Moscow, that we should engage in free trade are doing nothing but undermining the future of the United States."

"You might just as well meet with the gangsters of Alcatraz to discuss law abiding citizenship, he declared.

"President Roosevelt sat down with Stalin and lost his shirt. President Eisenhower was out-maneuvered in the silly summit meeting."

"Everytime we have met the confidence men of the Kremlin, our pockets have been picked."

We should learn that an intelligent and courageous foreign policy plus a hard bitten preparation for both war and peace is our only safeguard."

BUT UNCLE SAM'S ATTORNEY GENERAL HAS ANOTHER VERSION

LOS ANGELES (UPI)—Atty. Gen. William P. Rogers said today the Supreme Court decision is the law of the land "for today and tomorrow and the future—for all regions and all people" and must not be evaded or defied.

"It must be our hope that persons who opposed the decision will see the wisdom and the compelling need, in the national interest, of working out reasonable ways to comply," Rogers said.

He discussed the high court's ruling before the American Bar Assn.

8th statement was Rogers' strongest to date on the integration crisis.

Rogers said the ultimate issue growing out of the court's original anti-segregation decision is "whether the law of the land is supreme or whether it may be evaded or defied."

He conceded that the court's decision had a "serious impact on certain sections of our country and was met with apprehension, resentment and even threat of defiance."

O-10 (Rev. 7-18-58)

The Washington Merry-Go-Round

Morse Blocked Two Court Bills

By Drew Pearson

The Supreme Court, now meeting in emergency session, probably doesn't know that it was the threat of a filibuster which saved the nine Justices from being rebuffed by Congress. The public also does not know how filibusters are born.

Pearson

When Senator Wayne Morse of Oregon appeared on the Senate floor on Saturday night just before adjournment, he wore a red rose. His colleagues knew that this was the signal that he was ready to talk various bills to death.

Noting the rose, lanky Lyndon Johnson of Texas, the Democratic leader, leaned over and asked Morse what was up.

"Lyndon," warned the Oregon liberal who has one of the longest talkathon records in history, "you're not going to get out of here until Wednesday. I have no intention of letting this Congress adjourn with its last acts an expression of lack of confidence in the Supreme Court."

Morse was referring to the Mallory bill aimed at overruling a Court of Appeals decision—affirmed by the Supreme Court—requiring police to arraign prisoners without delay. Morse also referred to a passport bill urged by John Foster Dulles, restoring State Department power, previously removed by the courts, to ban passports to any American.

Earlier in the day two backstage incidents had occurred which didn't leak out to the papers. William B. Macomber, assistant to Dulles, had called on Morse and asked him to remove his earlier objection to the passport bill.

"You've got a lot of guts," replied the fiery Oregonian. "Go back to Secretary Dulles and tell him that Wayne Morse will be talking against that bill until Wednesday. I feel awfully good. I've been out on the farm and I'm in good shape. I'm a little hoarse, but I'll be able to talk until Wednesday."

Carroll's Irish

About the same time, Sen. John Carroll of Colorado conferred with Morse. He and his fellow Democrat, Joe O'Mahoney of Wyoming, had gone into conference with the House of Representatives to iron out differences regarding the Mallory bill. O'Mahoney held the proxies of Illinois' Dirksen and Mississippi's Eastland in his pocket. Result: The House wrote new wording into the bill hamstringing the Supreme Court's ruling. Sen. Carroll refused to sign. Disappointed at the way O'Mahoney had surrendered, he came to Morse and they agreed to filibuster.

Later Carroll came back to Morse, reported that the "soft-core" Senate liberals urged him not to fight.

"I happen to have been here 14 years," chided the Oregonian. "I'm used to such appeasement. When you talk to Church (Idaho) or Clark (Penna.) that's what you get. But I can tell you that the only thing the Senate leaders understand is brute force—the brute force of time. We have to whip 'em with time. You've been softsoaped by the phony liberals who don't want to fight. Don't try to sell me their kind of malarkey. Are you going to fight or not?"

Carroll is a good fighter anyway, but this got his Irish up. He agreed to give two speeches, alternating with Morse, to keep the Senate in session for at least two days. Sen. Tom Hennings of Missouri, another Democrat, also agreed to give a speech, while Javits, Republican, former Attorney General of New York, came up with an important legal gimmick.

"Wayne," he said, "we can object to this House wordage under Rule 27, which forbids the introduction of new evidence in a conference report. We can make a point of order."

Carroll agreed to make the point of order, and the leaders were notified that objection would be made.

By this time it was 1:50 a. m. The Senate was grinding slowly, sleepily, toward the 4:1[illegible] a. m. hour when it finally adjourned. Senators had been listening to the pros and cons of Chicago's sewage syst[illegible] and its need for more L[illegible] Michigan water. Sen. Proxm[illegible] of Wisconsin was determin[illegible] that no more water leave t[illegible] harbors of Milwaukee, Gre[illegible] Bay, and Sheboygan. The [illegible] position still had the voter[illegible] pass the Mallory bill, but [illegible] quorum was dwindling. Ma[illegible] Senators, up for re-electi[illegible] were leaving town.

Harassed Lyndon Johns[illegible] came over to Morse and C[illegible] roll. "We're going to acce[illegible] your point of order," he sa[illegible] "you've won. We couldn't ge[illegible] a quorum here at 10 a. m."

That's how filibusters ar[illegible] staged—and sometimes p[illegible] vented. And that was how t[illegible] Supreme Court finally su[illegible] vived the attacks of the 85[illegible] Congress.

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167 SEP 8 1958

52 SEP 8 1958

0-19 (Rev. 7-18-58)

Angry Attacks Focus on Warren

By Marquis Childs

AS OLD AS government itself is the effort to find a tribunal—a man or group of men—above the passions of partisanship and the prejudices of the moment. The Supreme Court of the United States is the institution to which Americans have looked since the founding of the republic for the high endeavor of impartial judgment.

Childs

Yet the Supreme Court is a political institution. And in times of national strife and strain the Court and in particular the Chief Justice become the focus of angry political attack.

Earl Warren, the 14th Chief Justice of the United States, finds himself, at the climax of a career in which controversy has had little part, the center of a gathering storm. On May 17, 1954, he read two opinions of a unanimous court, holding that segregation of the races in the public schools was unconstitutional. This reversed the doctrine laid down in 1896 that the requirement of the Constitution for equality under law was met by "separate but equal" facilities for the two races.

"In the field of education," the Chief Justice said, "the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

In the South this meant a complete reversal of ancient custom and the opinion was the signal for a new outbreak of the feud between the North and the South that is nearly as old as the Court itself. In the drive of the Southerners in Congress, abetted by some Northern conservatives, to curb the jurisdiction of the court, Warren is the villain. He has been denounced again and again in demagogic language by Sen. James O. Eastland of Mississippi who has made himself leader of the movement to whittle away the jurisdiction of the Supreme Court.

IT IS A strange role for Warren since his is a serene temperament and his rise in politics has almost invariably been marked by reasonable moderation. The people of California three times elected him Governor of that state because, although he was a Republican, he appealed to Republicans and Democrats alike as one who would follow a middle-of-the-road course. First as Attorney General and then as Governor he had a great deal to do with directing the fantastic growth of his native state into constructive channels.

Warren was named Chief Justice by President Eisenhower five years ago, and the appointment was widely praised. Here was a man who could preside over the court with dignity and lead it toward moderation and away from bruising controversies resulting in four or five opinions.

As the crisis over integration developed into a great national issue this became the heart of the matter—whether the Chief Justice and the other eight justices have the judicial equipment and the judicial temperament or whether they are legislating their views in opinions on the Constitution.

OF THE nine justices on the court today only three had prior judicial experience before coming to the tribunal and they were all appointed by President Eisenhower. John M. Harlan had one year on the Circuit Court of Appeals in New York. William J. Brennan Jr. was an Associate Justice of the Supreme Court of New Jersey and held lower court positions in that state. Only Justice Charles Evans Whittaker followed the course many lawyers believe is the best preparation—he served as a Federal District Judge and then on the Eighth Circuit Court of Appeals.

The American Bar Association has just recommended that Federal judges be removed from politics. But the resolution making this recommendation did not say how it was to be done.

However desirable it may be in theory, it is highly unlikely that Congress would approve such a change. For in the selection of Federal judges, including the justices of the high court, both politics and the law have played a part. While there have been distinguished legal scholars on the court, such as Justice Felix Frankfurter today, the norm has been men like Warren who come to the law through the practice of politics. And while he is today a hated symbol for many Americans when this constitutional crisis has been resolved, as others have before it, the moderate lawyer-politician promises to continue to predominate.

SEP 15 1958

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0-19 (Rev. 7-18-58)

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Raps 'Tyranny' Of High Court

Robert Morris, former chief counsel of the Senate Internal Security subcommittee, charged yesterday that the U. S. Supreme Court majority had assumed legislative powers and was exercising judicial tyranny.

"Legislative safeguards against Soviet penetration have been made a shambles, all without judicial precedent, at the very time when Soviet strength is mounting to destroy us all," Morris told the Hoboken Rotary Club, adding;

"Congress should not abdicate from its responsibilities under the Constitution when judicial tyranny prevails as it does now. When a new Congress convenes, everyone should raise his voice and urge his Senators and Representatives to stand up against growing judicial dominion."

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Circumventing the Court

Will the State Department try to circumvent the Supreme Court passport decision? The recently released testimony of Loftus E. Becker, the Department's legal adviser, before the House Foreign Affairs Committee, indicates his belief that the Department can still arbitrarily refuse to issue passports despite the contrary Supreme Court ruling in June. If this is a fair conclusion to draw from Mr. Becker's testimony, and we believe it is, Secretary Dulles would be exceedingly ill-advised to work such a dubious end run into State Department passport strategy.

The Court held that the Secretary of State does not have the power to deny an American a passport on an undefined or arbitrary basis. Although the decision dealt specifically with two cases involving questions on passport applications about Communist Party membership and another case concerning a State Department finding that a person's presence abroad would advance the cause of the Communist Party, the Court's decision seemed to be broad enough to forbid any arbitrary basis for withholding passports.

If "the right of exit" is to be regulated, said the Court, this regulation "must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests." Surely this language encompasses the areas Mr. Becker mentioned in his testimony.

Mr. Becker said that the State Department can still deny a passport to a person whose presence abroad would seriously impair the conduct of United States foreign relations or would be inimical to the security of the United States. This view sharply contradicts the statement made by Deputy Under Secretary of State Murphy in July. Testifying before the Senate Foreign Relations Committee, which was then considering a passport bill requested by the State Department, Mr. Murphy said that the Department was powerless to prevent Communist agents from traveling abroad as a result of the Supreme Court decision.

As the Court itself indicated, the proper course for the State Department to take is to try to persuade Congress, as it did without success this summer, to spell out as clearly as possible the conditions for the issuance of passports. This newspaper believes there should be few restrictions on the right to travel; but whatever disagreement there may be over the number and severity of these rules, there surely is no justification for the position of seemingly outright defiance of the Supreme Court that Mr. Becker appears to have taken.

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Date SEP 7 1958

83 SEP 15 1958

0-19 (Rev. 7-16-58)

Court Squeaked Past—Thi

By Richard L. Lyons
Staff Reporter

THE SUPREME COURT emerged from its ordeal with the 85th Congress with its powers intact. But it was a near thing, as close as one of the Court's 5-4 decisions.

After three frantic days and nights of debate during the final week of the session, the Senate killed the whole package of bills designed to curb or reverse the Court. But the close votes showed the extent of anti-Court feeling which has spread through Congress during the last four years.

The Jenner-Butler bill to restrict the Court's review power was killed by the slender margin of 49-41. A drastic anti-Court states' rights bill known as HR 3 which had passed the House 241-155 was pigeonholed by the Senate by just one vote, 41-40.

THE CONGRESSIONAL attack on the Court has been building up for four years. It started with Southern anger at the school segregation decision in 1954. It gained support during the last two years from conservative Republicans disturbed by decisions upholding individual rights in Communist cases.

By this year, the coalition was strong enough to pry bills out of committee and force floor action in both Houses. They didn't have the votes to pass a bill, but they undoubtedly will try again next year.

In considerable part, the Court fight was an angry emotional outburst against decisions Congressmen didn't like. But there also was serious concern among some moderate members that the Court was going too far in various ways—that it was making law instead of simply interpreting it and was invading states' rights.

CRITICISM OF the Supreme Court is nothing new. Most strong Presidents have quarreled with it. Franklin D. Roosevelt tried to revamp its membership 21 years ago because the Court was killing his New Deal. But rarely has Congress gone so far. Only once, 90 years ago, has Congress limited the Court's power. Congress acted then not as the result of a decision, but to prevent one. It feared that if the Court were permitted to rule on a certain case it might invalidate one of the Reconstruction Acts.

There have been some suggestions that even though the bills failed this year, the criticism might cause the Court to trim its sails, at least try harder to avoid 5-4 decisions. That hasn't been apparent yet. While the Jenner-Butler bill was awaiting Senate action last June, the Court threw out, 5-4, State Department regulations denying passports to Communists.

The Court fight was embodied in four bills which made varying degrees of progress but were all buried together in the Senate in the closing days. Two relatively limited bills would have revived state anti-sedition laws struck down by the Steve Nelson case, and "clarified" the Mallory decision on the power of Federal police to question suspects before arraignment. The major assaults were contained in the Jenner-Butler bill and HR 3.

SEN. WILLIAM E. JENNER (R-Ind.) introduced his bill in 1957 after the Court had handed down a series of decisions with titles such as Nelson, which held that the Federal Government had pre-empted the field of prosecuting subversion against the United States and that the states must say out; Watkins, which held that a congressional committee must tell a witness the pertinence of questions; Konigsberg, which held that a state could not bar a lawyer from practice solely for refusal to testify about Communist affiliation.

Jenner told the Senate that these decisions and others have "just about demolished" the Nation's defenses against Communist subversion.

His proposed solution was a bill which would have stripped the Court of its authority to review almost all cases in the security-subversion field. This wouldn't have reversed the decisions Jenner was upset about, but it might have encouraged lower courts to do so.

The Justice Department, the American Bar Association and a host of law school deans and leading lawyers protested that the bill would create "legal chaos" by removing the final appeal which gives the law uniformity.

Jenner's bill sailed through the Senate Internal Security Subcommittee but was changed in the parent Judiciary Committee by Sen. John Marshall Butler (R-Md.). Instead of cutting off the Court's review power, he suggested changing existing laws to reverse the effects of various decisions.

The Committee adopted most of Butler's changes, and when the bill was sent to the floor in May the only part of the Jenner bill left was the section taking from the Court its power to review cases involving lawyers refused admission to state practice. The Committee felt that states should be the final judge of who practiced in their courts. Opponents said that this would permit states to bar lawyers of any race or other special class.

With Butler's changes, the bill also would make congressional committees the final judge of the pertinence of

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their questions (thus abolishing the historic power of courts to rule on pertinency); revive 42 state anti-sedition laws struck down by the Nelson decision, and make Communist prosecution easier by redefining Smith Act terms which the Court had read narrowly in the Yates case last year.

The Senate Democratic leadership refused to call up the Jenner-Butler bill for debate. It sat on the Senate floor like a time bomb for more than three months.

MEANWHILE, ON the House side Judiciary Chairman Emanuel Celler (D-N. Y.) was sitting on HR 3, which as its number indicates was introduced early on the first day of the 1957 session. The Jenner bill took the hardest direct poke at the Court, but if the opponents' prophecies were correct, HR 3 would have had more far-reaching effects.

HR 3 was introduced by Rep. Howard W. Smith (D-Va.), author of the Smith Act to prosecute subversion against the Federal Government. The Court had struck down the state sedition laws in the Nelson case because it decided that Congress had intended to give the Federal Government exclusive jurisdiction in the field by passing the Smith Act.

Smith's bill said that no Act of Congress should be construed as preempting a field unless it specifically so states, or unless there is such a conflict between state and Federal laws that they cannot stand together.

Opponents said that the bill would curb the Court's role of interpreting Acts of Congress. More important, since the bill was retroactive they feared that it might strike down or at least cause endless litigation over Federal regulatory programs in areas where uniformity is essential.

Congress rarely writes a specific preemption clause into a bill. Had HR 3 become law, opponents said, it might have undone 150 years of Federal regulation in every field and let the states set their own rules. Celler said it would "take us back to the Articles of Confederation." The Justice Department shuddered at the thought of the bill becoming law.

The Smith bill was finally blasted past Celler to the House floor where it was passed easily in July and was sent to the Senate. The Senate Judiciary Committee struck out the retroactive feature and sent it to the floor where it sat beside the Jenner-Butler bill.

BOTH HOUSES were also considering more limited bills which simply would have revived the state sedition laws. Still another was the Mallory bill providing that delay in arraignment alone would not be grounds to invalidate a confession.

Finally on the Tuesday before the Saturday night adjournment, Senate Majority Leader Lyndon B. Johnson called up the Mallory bill for debate. It was passed and sent to conference with the House by a vote of 65-12.

Jenner got his bill before the Senate Wednesday by offering it as an amendment to a minor bill which had been made the pending business.

The floor fight against the Jenner-Butler bill was led by Sen. Thomas C. Hennings Jr. (D-Mo.) and Sen. John A. Carroll (D-Colo.). Hennings said that the real purpose of the bill was to "visit retribution upon the Supreme Court for some of its past decisions and to put a foot in the door in anticipation of future attempts to strip the Court of its jurisdiction whenever there is disagreement with its decisions."

The Jenner bill was killed, 49-41, on a motion to table it, which means to postpone action indefinitely. Hennings hinted broadly that the liberals would launch a filibuster if the bill wasn't set aside.

THEN THE Nelson bill was brought up and Sen. John L. McClellan (D-Ark.) offered HR 3 as an amendment. Carroll's motion to table it was beaten, 46-39. Johnson promptly forced the Senate to adjourn overnight while he tried to pull things together.

After a day-long debate Thursday and nimble work in the cloakrooms by Johnson, the Senate voted, 41-40, to kill HR 3 by sending it back to committee. And since they were hooked together, the Nelson bill went with it.

But the last straw for the Court opponents was that even the Mallory bill flopped in the closing minutes of the session, after it had been guided through conference and was repassed by the House. Carroll made a point of order that the conferees, in trying to define "reasonable," had added new substance to the bill. The presiding officer upheld him. The Mallory bill and all the rest of them were dead. The Court fight was over for this year.

HERE IS the 49 to 41 roll call by which the Senate on Aug. 20 killed the Jenner-Butler bill to curb and reverse the Supreme Court. The vote was on a motion to table the bill.

Democrats For—30

Anderson (N. M.)	Kennedy (Mass.)
Bible (Nev.)	Kerr (Okla.)
Carroll (Colo.)	Lausche (Ohio)
Chavez (N. M.)	Magnuson (Wash.)
Church (Idaho)	Mansfield (Mont.)
Douglas (Ill.)	McNamara (Mich.)
Gore (Tenn.)	Monroney (Okla.)
Green (R. I.)	Morse (Ore.)
Hayden (Ariz.)	Murray (Mont.)
Hennings (Mo.)	Neuberger (Ore.)
Humphrey (Minn.)	O'Mahoney (Wyo.)
Jackson (Wash.)	Pastore (R. I.)
Johnson (Tex.)	Proxmire (Wis.)
Kefauver (Tenn.)	Symington (Mo.)
	Yarborough (Tex.)

Republicans For—19

Aiken (Vt.)	Langer (N. D.)
Beall (Md.)	Morton (Ky.)
Bush (Conn.)	Purtell (Conn.)
Case (N. J.)	Revercomb (W. Va.)
Case (S. D.)	Saltonstall (Mass.)
Cooper (Ky.)	Smith (N. J.)
Dirksen (Ill.)	Thye (Minn.)
Hoblitzell (W. Va.)	Watkins (Utah)
Javits (N. Y.)	Wiley (Wis.)
Kuchel (Calif.)	

Democrats Against—16

Byrd (Va.)	Long (La.)
Eastland (Miss.)	McClellan (Ark.)
Ellender (La.)	Robertson (Va.)
Ervin (N. C.)	Russell (Ga.)
Fulbright (Ark.)	Sparkman (Ala.)
Hill (Ala.)	Stennis (Miss.)
Johnston (S. C.)	Talmadge (Ga.)
Jordan (N. C.)	Thurmond (S. C.)

Republicans Against—25

Allott (Colo.)	Ives (N. Y.)
Barrett (Wyo.)	Jenner (Ind.)
Bennett (Utah)	Knowland (Calif.)
Bricker (Ohio)	Malone (Nev.)
Bridges (N. H.)	Martin (Iowa)
Butler (Md.)	Martin (Pa.)
Capehart (Ind.)	Mundt (S. D.)
Cotton (N. H.)	Potter (Mich.)
Curtis (Neb.)	Schoeppel (Kan.)
Dworshak (Idaho)	Smith (Maine)
Goldwater (Ariz.)	Williams (Del.)
Hickenlooper (Iowa)	Young (N. D.)
Hruska (Neb.)	

Not Voting—6

Announced in favor of tabling: Payne (R-Maine).
Announced opposed to tabling: Frear (D-Del.); Holland (D-Fla.); Smathers (D-Fla.).
Position not announced: Flanders (R-Vt.); Carlson (R-Kan.).

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SEN. JOHN MARSHALL BUTLER ... *rewrote Jenner's bill*

SEN. WILLIAM E. JENNER ... *made a major assault*

REP. HOWARD W. SMITH ... *Justice Department shuddered*

3

DAVID LAWRENCE

Supreme Court and 'Settled Law'

Wisdom Doubted of Altering Principles Long Established by Predecessors

The State of Arkansas has not "defied" the Supreme Court of the United States by closing the high schools in Little Rock. Nor has the State of Virginia committed any act of "defiance" by closing schools.

The Federal Government has not "defied" the States of Arkansas and Virginia by supporting plans that seek through the courts a means of reopening the public schools.

Each is acting within its own constitutional orbit. The exercise of legal rights to contest the validity of State or Federal action is not "defiance."

The Federal Constitution itself permits these legal procedures.

It is erroneously being preached that there is only a "moral question" involved and that the States of the South are disregarding it when they contest by legal means the orders of a Federal court requiring "integration" in the public schools. As for "moral questions," unfortunately the North has forgotten, but the South hasn't, that the very 14th Amendment on which the present Supreme Court is basing its rulings was born in unmorality and "ratified" in unmorality.

Although Abraham Lincoln had always held that the Southern States had never been out of the Union, Congress—after his death and three years after the War Between the States was over—insisted that the Southern States be excluded from representation in the House and Senate. So when the 14th Amendment was voted on, there was no representation in either House from many States in the Union.

Also, when the State legislatures in the South—subsequent to the war—ratified the 13th Amendment abolishing slavery but rejected the 14th Amendment, as they had a right to do, Congress caused the legislatures to be elected with most white voters excluded, and then, with Federal military commanders sitting alongside the presiding officers in the legislative sessions of the State legislatures, "ratification" of the 14th Amendment was compelled.

In case after case the Supreme Court of the United States has always evaded the issue of whether the 14th Amendment was constitutionally "ratified", and has said that this is a "political question" and not within its power to resolve.

Many people are saying that all this happened long ago and that it isn't feasible to turn the clock back now. The present Supreme Court, however, in its 1954 decision, did turn the clock back 58 years and nullified the "settled law" of the land on the question of "equal but separate" facilities which had been upheld by some of the most eminent men who ever sat on the high court, including its greatest liberals.

What is "settled law"? Abraham Lincoln defined it as something that has been initially decided by the Supreme Court when the issue was first raised, and then affirmed and reaffirmed in decisions for years afterwards.

Thus, it is "settled law" today that no State can be compelled to appropriate money or keep schools open or do any affirmative thing just because the Federal Government may want to see it done. The "settled" law on this point was proclaimed in a decision known as Hopkins vs. Clemson College, decided in 1911, when Justice Lamar wrote in behalf of the court:

"No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights."

But will this be accepted as "settled law" by the present Supreme Court of the United States in the Arkansas and Virginia cases? Can anything be considered "settled" when the highest court departs from legal precedents and decides cases on the basis of what is "desirable" — the philosophy that the end justifies the means? There was prophetic vision in a famous dissent by Justice Edward D. White of the Supreme Court, who later became Chief Justice, as he wrote:

"Teach the lesson that settled principles may be overthrown at any time, and confusion and turmoil must ultimately result . . .

"If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theater of political strife, and its action will be without coherence or consistency. . . .

"Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people."

That solemn warning was given in 1895, but only last month the same warning came from the chief justices of 36 States, who adopted a report, made after an exhaustive study by a committee of chief justices of the States, in which the recent decisions of the Supreme Court of the United States were severely criticized, particularly in the expansion of the 14th Amendment. The report, approved by the chief justices of three-quarters of the States of the Union, said:

"If reasonable certainty and stability do not attach to a written Constitution, is it a constitution or is it a sham?

"These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted."

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Daily Worker
The Worker
New Leader

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[redacted]'s Assistant Hits Highest Court

Assistant Attorney General Ralph M. Moody spoke to the Raleigh Kiwanis Club here Monday at the club's regular luncheon meeting in the Hotel Sir Walter.

Moody told the group that in his opinion the district Federal court would hold the Pearsall Plan constitutional. He referred to the U. S. Supreme Court as a "judicial oligarchy masquerading as democracy."

The News And Obser
Raleigh, N.C.
9-16-58.

RACIAL SITUATION

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Portrait Of a Court

By Max Lerner

I hope it is not too late to remark on how the Supreme Court showed up when it met last week and listened to the arguments about postponing the opening of the integrated schools in Little Rock.

No matter how much the Confederate twins—Governors Faubus and Almond—may twist and turn and squirm in their evasive tactics, they will in the end come up against a Supreme Court which has given a sign to the nation and the world. The sign was that the court will not equivocate and will not yield.

All the tricks of shutting the schools, holding plebiscites, reopening them as "private" schools with state "donations," "assignments" on a Jim Crow pattern—all will be of no avail. It is clear that the court as constituted today is sophisticated enough to strip away the mask of hypocrisy that covers the true intent of the white supremacists, and courageous enough to confront and defy the ugly visage of racial hatred.

If there were any doubt of this hitherto, a reading of the questions which the Justices put to the counsel for the Little Rock School Board at last week's hearing should dispel it. (Incidentally, I hope The New York Times will continue to give verbatim coverage to these historic Supreme Court hearings. If nothing else gains entrance to heaven for the publisher and editors of The Times, this should do it.)

* * *

One got from this particular session both a total portrait of the Supreme Court and a set of individual profiles as each of the Justices asked his questions or was silent.

I start with Justice Frankfurter because he is easily the most controversial and dramatic member of the court, as well as the oldest. A number of the bright young men who have written recently about the court have had fun with Frankfurter's way of treating the lawyers as if they were back in his old Harvard Law School class as students.

Statistically, Frankfurter is ahead of all his colleagues in the number of questions and comments he throws at the lawyers—so much so that former Chief Justice Vanderbilt of New Jersey used to advise young lawyers about what to do with the "Felix problem." Yet no one can deny that it was Frankfurter, last week, who kept firing questions showing up the role of Faubus in the whole Little Rock mess. He restated the argument of Richard Butler, the Little Rock School Board's lawyer, with the utmost clarity to show that the board had been doing pretty well until the governor stepped in with his militia.

Tele. Room
Miss Gandy

BAUM GARDNER

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Justice Hugo Black had relatively few questions—almost deliberately few, as if he were trying to contrast his restraint with Frankfurter's loquacity. But when he did talk, as he did several times, it was to say something sharp and stern, as in his questioning about Faubus' "sovereignty law" and Butler's attitude toward it.

The remaining Roosevelt appointee, Justice William O. Douglas, asked no questions at all, thereby living up to his habitual chariness in making comments in court. But there are no lawyers who are ignorant of where Douglas stands on almost every issue before the court or who have any doubt that he will express his views in his written opinions with the same breezy and drastic forthrightness that marks his whole public personality. Douglas is a walker, a mountaineer, a world traveler, a prolific writer of non-legal books—a man who lives with gusto and wants others to have a chance to fulfill themselves int heir own way.

* * *

The two Truman appointees still on the court—Justice Harold Burton and Tom Clark—were not silent in the questioning. One of the achievements of Chief Justice Warren is to have managed to keep them both in team-harness along with Black and Douglas on issues where in the past they might have aired their disagreements. They are both marginal men on the court. Neither of them is brilliant, yet both keep the lawyers guessing on how they will vote.

There remain the four Eisenhower appointees. Justice Harlan was active in the questioning, as befits a man whose grandfather had been the lone dissenter in the original "separate but equal" cases of Plessy vs. Ferguson. The younger Harlan is not the firebrand that his grandfather was and is unlikely to burn his name into constitutional history as the older man did. But he will be remembered for his recent opinion setting aside the conviction of Communists under the Smith Act.

As for Justices Brennan and Whittaker—the youngest members of the court, who had not been involved in the original school decision, little was heard from them the other day. But judging from Brennan's courageous decision on the FBI files, and the opinion by Whittaker on denaturalization proceedings, they will make themselves heard in the long run.

* * *

I have left Earl Warren to the end, partly because he is the Chief Justice, partly because his role in the whole integration controversy demands that he be discussed separately.

In his few years on the court, Warren has already shown himself one of the best Chief Justices in the court's history because of his shrewd and firm way of holding his colleagues together. But his friendly manner is deceptive, since it conceals a vein of iron. The iron showed pretty clearly when poor Richard Butler talked of the postponing of integration as involving only "personal and intangible rights" for the Negro children, and Warren drove over *the fleeting unfortunate phrase* like a tank. It showed also when he wondered out loud whether the Negro youngsters' school days would be over before the postponement was.

Warren is today the center of swirling and intense currents of controversy. He will need all his coolness and resourcefulness and courage to ride out the storms still ahead, and so will his colleagues. I think they will hold together, even the prima donnas among them. It is a great Supreme Court we have today, and it is not less great because it has had to move into the vacuum of leadership which the Administration has left.

"IS IT A CONSTITUTION OR IS IT A SHAM?"

(The question, "Is it a constitution or is it a sham?" was asked at the Conference of State Chief Justices in a report approved last month by a vote of 36 to 8. It severely criticized recent decisions of the Supreme Court of the United States.

When the Chief Justices of three quarters of the States of the Union declare that the present Supreme Court is overstepping its bounds, such a pronouncement is well worth the attention of the American people.

Because of the Supreme Court's ruling last week disregarding the Tenth Amendment to the Constitution, added significance attaches to the following excerpts from the conclusions reached by the 36 State Chief Justices.—David Lawrence, Editor)

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. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical nonreviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. See Judge Learned Hand on the Bill of Rights. We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and State governments one branch of one government —the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields. . . .

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. . . .

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. . . .

The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be. If reasonable certainty and stability do not attach to a written constitution, is it a constitution or is it a sham?

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. But to err is human, and even the Supreme Court is not divine.

It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of State action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution. . . .

Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

Loyalty to the Consitution

Atty. Gen. Rogers says every private citizen "who owes allegiance to the United States" has the duty to obey the constitution as it is interpreted by the supreme court.

The specific clause of the constitution to which this unimpeachable generality supposedly refers, reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This is in the constitution by virtue of force. Yet with all the powers that existed to put this, or anything else, therein; and with all the fanaticism, hate and vengefulness that then raged, this amendment was NOT made to read:

> "No state shall make or enforce any law for segregation by color in public schools or elsewhere, or which shall abridge the privileges or immunities of citizens . . . nor deny to any person within its jurisdiction the equal protection of the laws, or relief from any sense of sociological or psychological inferiority asserted by him or on his behalf."

Many segregationists, perhaps all, feel they are obeying (we suppose Mr. Rogers really means "honoring") the constitution as it was, and still stands written; and many who are not segregationists would say the same on their behalf.

If they do not honor a clause of the constitution as written by the court (what amounts, in their eyes, to a "Twenty-Third Amendment"), it is not in disrespect to the United States, the constitution, or the supreme court as an institution and as a symbol of the judicial branch.

When Mr. Rogers speaks of the founding fathers, he should recall how they expressed themselves (in the constitutional convention) on the subject of the supreme court as "judges of policy of public measures," as distinguished from duties and rights relative to "exposition of laws, which involves the power of deciding on constitutionality."

The constitution as interpreted by the supreme court, with application to a state law; and the constitution as rewritten by the court to express a public policy, or supposed policy, or to initiate one, can be quite different things. The distinction sometimes can be found in the nature, language, premises and logic of a controversial decision—either internally, or against the backgrounds of intent, past decisions, established judicial principles, etc. Many able lawyers, whose "allegiance to the United States" is unquestionable, and will remain have found this distinction in the segregation decision.

BAUMGARDNER
THE TIMES-PICAYUNE
NEW ORLEANS, LA.
9-21-58
Page 2, Sec. 2, Col
GEORGE W. HEALY J
Editor

Roscoe Drummond Reports

Why the Supreme Court's Rulings Are 'Law of Land'

WASHINGTON.

In the course of his recent "Constitution Week" proclamation Gov. J. Lindsay Almond urged all Virginians to "restudy the concepts of our fundamental law to the end that each of us rededicate ourselves to the vital principles of government upon which this nation was founded."

Drummond

This is a good idea for everybody, not just Virginians.

One reason it is a good idea is that in the matter of non-discrimination in the use of public facilities—transportation, parks, playgrounds, public schools—there are Constitutional principles which need to be better understood.

It has been four years now since the Supreme Court handed down the school integration decision. Until Attorney General William Rogers spoke out last week I do not recall that any high Administration official had come forward with a full-length support of the role of the Court and a reasoned appeal to carry out its mandates.

This has been a serious lack because it has left the field almost entirely to those whose aim has been to confuse the issue. For example, the attorney for the Little Rock School Board argued—unsuccessfully—that the Supreme Court should delay resumption of integration there because the statements of Gov. Faubus as to what was and was not the law had "confused" the people of Arkansas.

All this makes it useful, indeed, to restudy the principles and provisions of the Constitution and to examine some questions the answers to which may have become obscured.

QUESTION—Is a Supreme Court decision law?

ANSWER—The United States Constitution is "the supreme law of the land." Those are the words of the Constitution.

When there is a dispute over whether any law or any action, state or Federal, violates the Constitution, the Supreme Court is the final arbiter. The Supreme Court does not pass laws but no law can be contrary to the Constitution and the court finally determines when the Constitution has been violated. It has determined unanimously that separate schools are not to be forced upon any group of citizens, in this instance Negro citizens.

A Supreme Court decision is binding on every unit of government to which it applies. The Supreme Court can rule an act of Congress unconstitutional and has many times. It can decide that an act of the President is unconstitutional and did so when President Truman seized the steel mills. It can decide that state and local laws are unconstitutional and has done so several times in cases of segregated transportation, playgrounds and schools.

QUESTION—By what authority does the court exercise this power?

ANSWER—By the authority of the Constitution and the Congress.

The Constitution places supreme judicial authority in the Federal judiciary and this role of the Supreme Court was recognized by Congress in its first Judiciary Act of 1789 passed, as Attorney General Rogers points out, at a time when the framers of the Constitution were among the most prominent members of Congress. This act specifically affirms the authority of the court to determine when state law violates the Constitution.

QUESTION—Is all opposition to the Supreme Court illegal?

ANSWER—Of course not. Criticism of Supreme Court decisions is perfectly proper, perfectly legal. It is only refusal to obey the courts which is improper and illegal. For example, it is illegal to refuse to obey a court order to admit an applicant to the public schools on grounds of race. It is legal—although more and more people are having second thoughts on the wisdom of this action—for a state to close its schools to avoid integration. The Constitutional recourse from a Supreme Court decision is to work to amend the Constitution.

QUESTION — Do Supreme Court decisions against compulsory segregated public facilities rest on racial equality?

ANSWER—The issue of racial equality is irrelevant. The decision rests on the concept of equality of citizenship.

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DAVID LAWRENCE

Curbing Supreme Court Opinions

Jurist Proposes Tribunal to Define Constitution as Guide for Court

Judge Norman F. Arterburn of the Supreme Court of Indiana has come forward with a novel solution to the controversy that has arisen as a result of recent decisions of the Supreme Court of the United States.

The Indiana jurist, who has served a term as chief justice under the rotating system in Indiana, was responsible for the resolution, presented a year ago at the Conference of State Chief Justices, which resulted in a comprehensive report approved last month by 36 of the State Chief Justices, criticizing decisions of the Nation's highest court. He recommends now that there should be a new court set up by constitutional amendment which would be known as the "Court of Constitutional Definition."

In a letter to this correspondent, Judge Arterburn presents a plan which, if it had been in effect in 1954, would have prevented the present dispute on the legalities of the segregation-integration question from developing at all. His letter makes no mention of this issue but is confined solely to recent reversals of its own rulings by the Supreme Court of the United States in cases concerning Federal-State relationships.

"Not only lawyers, but thinking laymen all over the Nation," writes Judge Arterburn, "are disturbed by the tendency to regard the individual philosophy of the judges of the United States Supreme Court as the 'law of the land' and a substitute for stable and fixed principles of construction and interpretation of the Constitution. When long-established decisions and precedent are overturned, we lawyers and judges find ourselves in an uncharted sea with nothing to guide us, subject to the vagaries of a dislocated compass. . . .

"The framers of our Constitution did not conceive of the organic structure of our Government as a piece of putty that could be molded and shaped as times changed until it no longer resembled the original framework. They felt they were building a structure of solid permanency with the opportunity to remodel or make additions through the amending clause only. There has, however, developed in this country a legal theory that the Constitution should be stretched to meet any contingency resulting from changes in economic and social progress. Those groups use the catchphrases and cliches of a 'living instrument,' 'growing with the times.' The framers of the Constitution would have made provisions for such 'stretching' if they had intended the Constitution to be altered other than through the amending clause. . . .

"The United States Constitution does say the 'Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby . . .'

"It does not say the decisions of the United States Supreme Court on such questions shall be the supreme law of the land. The exercise of such a power is one usurped by the court and, in effect, gives to the judiciary a veto power over the acts and functions of all other departments and agencies of the Government. Although the right to be the final arbiter of what the Constitution means is without any expressed grant in the Constitution, it is, nevertheless, a constitutional principle now so firmly imbedded in our legal and political thinking that its permanency cannot at this time be seriously questioned, regardless of its merits. I do not mean to intimate that I feel the principle should be eliminated or is without merit. My comment is that it is time that we gave consideration to the means and methods by which the perversion of this principle may be properly checked and held within reasonable bounds.

"A decision of the Supreme Court which for the first time defines and interprets the Constitution becomes for all purposes a part of the Constitution as if written therein. Any attempt to change such a meaning by the United States Supreme Court thereafter has the same effect as amending the Constitution, although not done in the method and manner provided in the Constitution. I contend that the United States Supreme Court has usurped a right to amend the Constitution by changing its established interpretation and this is done in violation of the constitutional provision for amending the same set up for the protection of the States and the citizens thereof. Something more than 'viewing with alarm' is needed in this crisis since stable constitutional government is imperilled."

Judge Arterburn feels that the membership of such a new court should consist of a judge or former judge of a United States court, a member or former member of Congress, a Governor or former Governor of a State, a judge or former judge of the highest court of appellate jurisdiction of a State, and one person who, within 10 years, has not held any office in the Federal or any State government and who would be chosen by a majority vote of the other members and be made chief justice of the court.

The assumption is that this would afford an opportunity for a person of outstanding legal ability to be chosen. The procedure would be that, when a question of interpretation or meaning of the Constitution arose, the "Court of Constitutional Definition" would determine the proper meaning and certify its opinion to the United States Supreme Court, which would then incorporate the opinion within its own ruling and decide the case in accordance with the interpretation given by the special court.

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Daily Worker
The Worker
New Leader

Date SEP 24 1958

53 SEP 30 1958

INTERVIEW WITH GOV. ALMOND

'Is Court Supreme? No!'

By DONALD MAY

RICHMOND, Sept. 26—"The Supreme Court is not supreme. That's a silly and dangerous philosophy."

The man speaking, big hands folded on his long oak office table, his tone that of urgently wanting to convince, was J. Lindsay Almond Jr., Governor of Virginia.

"The Constitution says 'this Constitution and the laws of the United States which shall be made in persuance thereof,' shall be supreme. There's a big difference."

REFEREE?

"But isn't the court the referee of what the Constitution says?" asked one of two reporters at a private interview.

With urgency, a finger pointing — "Yes, but to construe and apply, not to amend.

"We're deeply convinced of our constitutional argument. The 14th amendment was NOT intended to apply to schools."

"Are you saying as a principle of government that when the court makes a ruling which is gravely wrong the people have a basic right not to follow it?"

J. LINDSAY ALMOND

"When all history shows it is wrong . . . they don't have to accept it.

FEELING

"There are areas where people feel very strongly. It would be generations before they would accept integration.

"They won't elect officials who allow integration. Their juries wouldn't convict me if I violated compulsory school attendance laws. You would have hundreds and hundreds of parents who would say 'no!'

"You see, if we say we'll try it—if we say integration is the law of the land—we still couldn't do it in those areas.

"The only way to settle this is by a new constitutional amendment."

TRAGEDY

Earlier yesterday the governor told a press conference "the supreme tragedy is that poor people, white and colored, need public education and may be without it." He said he has "no timetable" for reopening schools.

In his office "Virginia can hold the line if it has the support of its people."

Then, a statement he has made before — "It is a question of authority versus power. They (the Federal government) have power, maybe enough to cram it down our throats."

0-19 (Rev. 7-18-58)

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BAUMGARDNER

Usurping Courts

It was refreshing to read "The Highest Law" as so ably and logically written by John F. Satterlee in your issue of Sept. 25.

If the doctrine of Attorney General Rogers "Resistance to Court spells anarchy" be accepted as a truth, then may I ask where does the power of our Supreme Court differ from that of the Russian Kremlin? Is it not true that even our Justices have differed from each other frequently?

Has not the present Court resisted previous Courts when they reversed existing decisions? This being true, surely Mr. Rogers would not conclude that the present Supreme Court is composed of anarchists.

Governing power comes from the majority consent of the governed. When any court usurps power from its own power rather than from the congressional representatives of the people, that court looses the confidence and support of the governed.

WARREN J. WATROUS.
Martinsville, Va.

Wash. Post and Times Herald A14
Wash. News
Wash. Star
N. Y. Herald Tribune
N. Y. Journal-American
N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

SEP 30 1958
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DAN GARDNER

The Court Closes the Door

THE Supreme Court has removed the last, faint suspicion that it might relent on integration; or that it might countenance any of the various schemes for "getting around" its rulings.

It not only rejected the anti-integration maneuvers of Arkansas but telegraphed its punches to other states which are similarly inclined. "Deliberate speed" permits time allowances for mechanical arrangements, but admits no delays merely to satisfy the antagonistic sentiments of the communities involved.

Other ways to avoid admission of Negroes to the schools doubtlessly will be tried but legally, on the basis of this decision, they are doomed to fail.

Even more importantly, the court dealt head-on with the question raised by Gov. Faubus as to whether the opinions of the Supreme Court are the "law of the land" which the Governor and the citizens of Arkansas are bound to obey.

In this connection it cited Article VI of the Constitution which says that "This Constitution . . . shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It points out that Arkansas officials including the governor are sworn to support the Federal Constitution and, in effect, holds them in violation of that oath.

Also cited is the opinion of Chief Justice John Marshall, speaking for the unanimous court in 1803: "It is emphatically the province and duty of the judicial department to say what the law is." That principle has, as the court observed yesterday, "been respected by this court and the country as a permanent and indispensable feature of our constitutional system," for the last century and a half.

Doubt is justified that those who have questioned Supreme Court authority ever intended anything beyond a delaying action. Without a judicial system acting as "referee" of domestic differences, orderly government would not be possible.

The question remains: How is the court to enforce its orders? This problem has arisen only rarely in our history. When state authorities default on or defy a Supreme Court order, enforcement is an obligation of the executive branch of Government—the President. He obviously intends to fulfill that obligation holding, correctly in our opinion, that he has no legal alternative.

It is to be hoped that resisting state officials will now be able to say to their people that they have exhausted all legal recourse, that they must now accept the validity of the decision and try to live with it. In a government based on respect for law it should be possible to work out of this situation without further resort either to violence or the use of troops.

Wash. Post and Times Herald
Wash. News 24
Wash. Star
N. Y. Herald Tribune
N. Y. Journal-American
N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

Date SEP 30 1958

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BAUM GARDNER

Closing the Door

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It not only rejected the anti-integration mameauvers of Arkansas but telegraphed its punches to other states which are similarly inclined. "Deliberate speed" permits time allowances for mechanical arrangements, but admits no delays to satisfy the opposition of the communities involved.

Other ways to avoid admission of Negroes to the schools doubtlessly will be tried but legally, on the basis of this decision and as long as the Supreme Court is composed of a majority with the present view, they seem doomed to fail.

• • •

The Court dealt head-on with the question raised by Governor Faubus as to whether the opinions of the Supreme Court are the law of the land which the governor and the citizens of Arkansas are bound to obey.

In this connection it cited Article Six of the Constitution which says that:

"This Constitution . . . shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

It points out that Arkansas officials including the governor are sworn to support the Federal Constitution and, in effect, holds them in violation of that oath.

Also cited is the opinion of Chief Justice John Marshall speaking for the unanimous court in 1803:

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THE HOUSTON PRESS
9/30/58
Houston, Texas
Editor: GEORGE CARMACK

52 OCT 31 1958

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NOT RECORDED
133 OCT 30 1958

THE COURT AGAIN

The Supreme Court has finally handed down an opinion confirming its ruling of September 12 on the Little Rock school situation. In other words, it decided how it was going to rule, and then searched for reasons to justify the action.

From what has been published of the 17-page opinion, it appears the Supreme Warren Court spent considerable time setting itself up as the "supreme law of the land." Since it has taken it upon itself to change interpreation of laws to meet changing sociological conditions, and has declared itself the supreme lawmaker of the land, Congress had better protect itself. Congress has previously felt it should legislate to meet changing conditions, but since the Court now says it can do the job, and is getting away with it, Congress is in dire danger of loss of all power.

In the opinion, read by Earl Warren, groundwork is apparently laid to try to remove state officials from office. This sounds unusual, but the Court must have had something like this in mind when it said that no state official "can war against the Constitution (as interpreted by the Court) without violating his undertaking to support it."

This can be construed as nothing less than a warning of further court action—or an invitation to someone to start proceeding to oust all Southern officials opposing the Court's stand on integration.

Furthermore, a key part of the opinion fails to make any distinction between schools, i.e., private and public. One cannot believe the Court was merely careless in this respect, for such carelessness would be inexcusable, especially since the Court had very much in mind the private school issue raised in Little Rock.

In other words, the Court has now gone much futher than even its fondest supporters probably wished. By choice of words here the Supreme Court has assumed jurisdiction over enrolment policies of private as well as public schools.

As a realist, one can only say that as of now the Court has set itself up as the Constitution.

S. L. Latimer, Jr.
Editor
THE STATE
Columbia, S. C.
Dated 10-1-58 P

162-27586-A
NOT RECORDED
199 NOV 3 1958

53 NOV 4 1958

Bar Hears High Court Assailed and Defended

By GEORGE L. WALKER
Staff Correspondent, The Detroit News

GRAND RAPIDS, Oct. 1. — Strong criticism of the U.S. Supreme Court echoed here today as 1,500 lawyers gathered for the 23rd annual convention of the State Bar of Michigan.

At the same time, a member of the Michigan Supreme Court urged revision of the state's judicial system to grease the wheels of justice and ease the burden of the state's highest court.

Supreme Court Justice Talbot Smith, Ann Arbor Democrat, said the state needs appellate courts ranking between the Circuit Court and the Michigan Supreme Court.

Michigan is the only state of its size which does not have appellate courts—which, Smith said, makes it "woefully lacking" in the administration of justice.

MUST ASK LEAVE

Under the present system of direct appeal to the Supreme Court, Smith declared, a man convicted of a crime must first ask the high court for leave to appeal.

Appellate courts would be required to take his appeal directly and thus ease the burden of preliminary decisions on the state's highest court, he said.

Smith made his remarks before a meeting of the Michigan Conference of Bar Officers, which earlier heard a University of Chicago law school professor describe the U.S. Supreme Court as "subversive."

3 DEFEND HIGH COURT

The words were hardly out of the professor's mouth when three Democratic members of the Michigan Supreme Court itself the object of recent criticism, rose in defense of the nation's highest court.

What brought the state justices to their feet was the assertion by Prof. Philip B. Kurland that a philosophy of "judicial activism" now has the upper hand in the U.S. Supreme Court.

Proponents of "judicial activism," he said, argue that the court cannot escape politics—therefore its political power should be used for wholesome social purposes.

HITS MEANS, NOT RESULT

Prof. Kurland said he does not regret the rise of this philosophy because of its results, "for by and large I would like to see achieved by proper means the results which the judicial activists have achieved by improper ones."

"I disapprove," he explained, "because I believe that such judicial activism is subversive of our constitutional system and can lead to destruction.

"Judicial activism is subversive, first, because it replaces a representative legislature with a group who are neither representative nor responsible to anyone but themselves.

UNDERMINES FAITH

"It is subversive because it undermines the public faith in the objectivity and detachment of the court, without which the court will be reduced to an impotent body . . .

"And finally, I find it subversive because the exercise of such naked power invites a reply in kind from those on whose domain the court is infringing."

When the meeting of some 50 bar officials was thrown open to discussion, Justice George Edwards of the Michigan Supreme Court was one of the first on his feet.

"I find Mr. Kurland's use of the word 'subversive' as applied to the U.S. Supreme Court is an unhappy one," he said. "It seems to me that the general charge without applying it to specific cases is unfortunate."

Prof. Kurland replied that he was not suggesting there was any affiliation between the court and totalitarian groups, but he used the word "subversive" in the sense of "undermining."

The two other members of the State Supreme Court who spoke up in defense of the U.S. Supreme Court were Justices Eugene F. Black and Thomas M. Kavanagh.

( ) Glos Ludowy
The Worker
( ) The Daily Worker
( ) Narodna Volya
( ) Romanul American
( ) Pittsburgh Courier
( ) Michigan Chronicle
( ) Detroit Free Press
(X) Detroit News
( ) Detroit Times
( ) Michigan Daily
( ) Wayne Collegian
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High Court Files Defensive Brief

THE SUPREME COURT is sticking firmly by its ruling against racially segregated schools, but the justices are not blithely ignoring charges that they are perverting the Constitution and abusing judicial power.

The long statement issued last Monday by the court was much more than an explanation of the Little Rock school decision. It was an elaborate defense of the judicial department's prerogatives.

The court is aware that it has critics other than the opponents of school integration, and it has seen fit to offer the general public a brief in its own behalf. It is publicly appealing for support.

Defending the theory that it is the proper interpreter of the Constitution, the court cited John Marshall's dictum that it is "emphatically the province and duty of the judicial department to say what the law is." And it pointed out that this theory has prevailed since 1803.

In response to the charge that it has violated state sovereignty, the court cited Article VI of the Constitution which says that laws and treaties made under the Constitution "shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

While defending the prerogatives of the judiciary as one of the three branches of the government, the court offers in justification of its school mixing decision the fact that the three justices who have been appointed since that momentous decision approve the ruling. In effect, it says to its critics, "You are questioning the wisdom of not only the nine present members of the court but of three retired justices."

The Supreme Court apparently believes that those who are criticizing and defying it are menacing the fundamental structure of the government. Speaking for the judiciary, it has asked the public at large to study its defensive brief and give a decision in its favor.

11-6-58

- Editorial -

"Dallas Times Herald"
Dallas, Texas, 10-2-58

Felix R. McKnight,
Executive Editor

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52 OCT 31 1958

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133 OCT 30 1958

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Deputy Attorney General Calls On Bar To Guard Court From Reckless Criticism

The Deputy Attorney General of the United States Thursday called on lawyers to protect the Supreme Court from "irresponsible criticism" which, se said, has increased greatly the past year.

Lawrence E. Walsh, speaking before the New England regional meeting of the American Bar Association, said such "overgeneralized, reckless criticism" had increased after the Court, made decisions "reached with great courage and after long consideration" in favor of varied minorities.

Walsh singled out the segregation decisions as an example. He said once a court order has been issued for integration, the federal government must step in if state forces are used to either frustrate that order or stand aside while the order is frustrated.

The deputy attorney general deplored formation of a national police force or centralization of police powers — a thing he said might happen if the federal government always had to take over in cases like that in Little Rock.

HE REPORTED the Little Rock's recent referendum on school segregaton was "so couched that it was impossible for those to win who wanted the schools opened on a partially non-segregated basis."

He asked the lawyers to "educate people to respect the Court" and especially singled out 61 Little Rock lawyers who advertised in that city's papers to clarify the referendum issue.

"They took their professional standings in their hands when they did so," the deputy attorney general pointed out.

"It's basically a problem of education but there's no specific solution," Walsh declared. "It can perhaps best be done by people with similar feelings on certain matters (as in the South) showing their neighbors that they still respect the decisions of the Supreme Court."

He said the ABA might well establish a committee to carry on such an educational process.

On the subject of preemption of states' rights by the federal government, Walsh cited the Steve Nelson case in Pennsylvania. Nelson was convicted of sedition in a lower court but that decision was reversed by the State Supreme Court on the basis that federal sedition laws had replaced the state ones and were supreme.

AS A RESULT, sweeping legislation was proposed which Walsh declared "would have rewritten 150 years of law in that state."

It said that no federal law would become supreme unless Congress passed it and that no state law would become unconstitutional because of conflict with federal law unless that conflict were irreconcilable.

And the law would have been retroactive for 150 years.

"This was all because of Steve Nelson. It would have affected the railroads and interstate commerce," Walsh said.

He said the ABA has more opportunity for formal action in such cases than in the segregation issue.

"We need some central place like the ABA to keep these attacks on the Court within compass."

"In some decisions — especially those resulting in release of Communists — some people who earnestly love this country have transferred their hatred of communism to the Court," the deputy attorney general pointed out. "In their bludgeon-like attack on the Court, they have asked overgeneralized legislation and tended to overlook due process of law."

"The attack on the Supreme Court has not spent itself," Walsh concluded. "Lawyers must help protect it from attacks which are not constructive."

Boston Traveler
Boston Herald
Boston Globe
Boston American
Boston Record
Christian Science Monitor
Portland Press Herald
Date: 10-3-58
Edition: Morning
Author or
Editor:
Title:

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Page: 1

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133 OCT 13 1958

REVIEW and OUTLOOK

Judicial Robes

We have a great deal of sympathy for the Federal judges who declined to answer a poll of their opinions about the Supreme Court's opinions. There are right and proper places for judges to differ with one another, but it serves no useful purpose to turn the judiciary into an arena of personal squabbling.

Nevertheless, it seems to us that a number of these Federal judges may have let their indignation cloud their judgment. Not content with a dignified refusal to answer a magazine's questionnaire, several of them went on to imply an impropriety in any public criticism of the Supreme Court or of its opinions.

Their immediate criticism was directed at the poll attempted by U. S. News & World Report but some of it was aimed not just at the poll alone but at the general fact that this magazine and others have been openly critical of the Supreme Court. The critical judges, incidentally, were not so open; many declined to be named but allowed the opinions to be published anonymously.

One of these, for example, observed: "It is a sad day in this country when the propriety or wisdom of Supreme Court decisions are to be determined by referenda, whether among the general public, members of the bar or members of the judiciary . . . When it (the Supreme Court) speaks, that is the law."

Now, no responsible person has suggested that Supreme Court opinions be "determined" by public opinion polls, or even by majority vote of the bar or other judges. But in the broader sense, they do rest on "referenda" and are subject to change.

The body of law we have is the creation of the public, the bar and the judiciary, present and past. The influence of lower judges, and of the general opinion of the bar, has always been large in both creating and shaping that law. We even have a provision in our Constitution permitting the people to overrule the Supreme Court, and on several occasions the people have used it to that purpose. If this were not the case, or ever ceases to be the case, we would have a nation not of laws but of rules by men who happen for the moment to be the highest judges.

Right now, as we all know, the Supreme Court is coming in for a good deal of criticism. This is not, as the public may suppose, limited to the controversy over the school integration decision, although that of course dramatizes it. The recent Conference of Chief Justices, comprising the heads of the state judiciary, approved a restrained, thoughtful and dignified "dissenting opinion" on Supreme Court rulings in many fields.

And it is a matter of record that the dissenters on the Supreme Court itself are among the less restrained critics when it comes to differing with the views of their brethren.

Federal judges, including those on the Supreme Court, would not be human if this did not make them a little sensitive: it may well make them touchy about their prerogatives. But no Supreme Court decision is as likely to be destructive to our values as the adoption of the idea, in the phrases of some Federal judges, that it is "improper," "impertinent" or "brazen" for anyone to discuss, debate or criticize Supreme Court decisions.

The Supreme Court, let us not forget, is a man-made institution, as well as being inhabited by men. So are the laws it administers. It is, therefore, in the deep meaning of that phrase, a political institution.

Judges ought not to be swayed by the passing emotions of the mob. But that is not the same thing as refusing to listen to other members of the judiciary, to the members of the bar or to the voice of the people.

0-20 (Rev. 7-18-58)

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UNI -113

(COURT)

THE SUPREME COURT OPENS ITS 1958-59 TERM MONDAY WITH RACIAL CONFLICTS STILL UPPERMOST AMONG ITS PROBLEMS.

SCHOOL INTEGRATION AND OTHER TYPES OF RACE CASES ARE DOCKETED FOR ATTENTION ALONG WITH ABOUT 350 OTHER APPEALS THAT HAVE COME IN DURING THE SUMMER.

THE NINE JUSTICES WILL BE CONFERRING NEXT WEEK ON WHICH ONES THEY WILL HEAR AND WHICH WILL BE REJECTED. THEY WILL ANNOUNCE THE RESULTS THE FOLLOWING MONDAY.

OTHER VITAL ISSUES ARE BEFORE THE COURT IN CASES WHICH WERE ACCEPTED LAST TERM TOO LATE TO BE HEARD AND ARE NOW SCHEDULED FOR ARGUMENT.

AMONG THESE ARE THE GULF COAST TIDELANDS OIL CONTROVERSY AND THE GOVERNMENT'S ANTI-TRUST SUIT AGAINST THE INTERNATIONAL BOXING CLUBS.

WITNESSES WHO HAVE REFUSED TO ANSWER INVESTIGATORS' QUESTIONS ARE ALSO POSING INTRICATE CONSTITUTIONAL ISSUES. THESE INCLUDE CHALLENGES TO THE OPERATING AUTHORITY OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES AND TO THE ANTI-SUBVERSIVE LAW OF NEW HAMPSHIRE.

MONDAY'S OPENING CEREMONY WILL BE CONFINED MOSTLY TO ADMITTING ATTORNEYS TO THE BAR.

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149 OCT 10 1958

50 OCT 10 1958

0-19 (Rev. 7-1-58)

HIGH COURT TERM FACING 350 CASES

New and Old Racial Issues Among Key Items on Hand for Opening Tomorrow

By ANTHONY LEWIS
Special to The New York Times.

WASHINGTON, Oct. 4—The Supreme Court meets at noon Monday to begin its regular 1958-59 term.

If custom prevails, that first session will be chiefly ceremonial. The justices will recess soon after convening to begin considering more than 300 cases, which have piled up during the summer.

Cases of the docket include many of the highest public interest. There are half a dozen that raise old and new questions on the racial issue. There is an important test of Federal loyalty-security programs, there are challenges to Congressional and state contempt citations, and there is the familiar problem of "off-shore oil lands."

Beyond those issues the court has before it a score of more than usually important cases in the staple areas of its business—taxation, Federal regulation of business and labor and criminal law.

The court has already granted review of seventy cases and will begin hearing oral argument on them a week from Monday. The term continues until June.

The last summer past did not allow as much time as usual for the justices to go over incoming legal papers. A special term on the Little Rock case brought them all back to Washington in late August. That term ended only last Monday.

Petitions Up For Study

During the next week the justices probably will hold frequent conferences to consider the accumulated petitions for review. A week from Monday, if the usual timetable is followed, they will issue a long list of orders indicating the additional cases they will consider and those they will not.

The following is a brief account of some of the more significant cases, including some the court has agreed to review and some at the stage of a petition for review.

For those with a professional interest the number of each case on the Supreme Court docket is given in parentheses.

RACIAL SEGREGATION

A year after he was enjoined from using state troops to enforce segregation at Little Rock's Central High School, Gov. Orval E. Faubus of Arkansas is asking the Supreme Court to review the validity of that injunction. He contends among other things that Judge Ronald N. Davies of the District Court was prejudiced against him (No. 212).

Louisiana has a law requiring applicants for state colleges to get certificates from their high schools. Another law in effect prohibits school officials from certifying Negroes for white colleges. Louisiana officials want the court to review decisions holding the statutes unconstitutional (Nos. 114, 120).

In another Louisiana case, the lower Federal courts ruled out the segregation of Negroes in the state parks. New Orleans park officials seek review (No. 295).

A special three-judge Federal court in Virginia struck down last winter several state statutes intended to put out of business the National Association for the Advancement of Colored People. The state has appealed (No. 127).

The N. A. A. C. P. is seeking review in another Virginia case. The state's Supreme Court of Appeals held constitutional a subpoena by a state legislative committee demanding production of the organization's membership lists (No. 84).

An N. A. A. C. P. appeal is pending also from a three-judge court decision that found Alabama's Pupil Placement Law not unconstitutional on its face (No. 341).

A specialized school segregation problem arises from Delaware. Review is sought of a lower Federal court decision that the state Board of Education has authority to adopt a desegregation plan binding on all local school boards (No. 260).

LOYALTY

The program has been taken to arbitration for the first time the use of confidential informants in the industrial security program, covering defense plant workers. William L. Green, vice president of a business concern lost his job when his security clearance was canceled. He was told by the lower Federal courts that his injury was not judicially reviewable (No. 180).

CONTEMPT

The power of the House Committee on Un-American Activities to compel testimony on Communist affiliations is questioned again in the case of Lloyd Barenblatt, a former Vassar College instructor. The court has agreed to review the case (No. 35).

Abram Flaxer, head of a union alleged to be Communist-dominated, challenges the right of the Senate Internal Security subcommittee to subpoena his union's membership records in another case on which review has been granted (No. 60).

The Government is seeking review of a Court of Appeals decision that the Senate Permanent Investigations subcommittee had no authority to question Frank W. Brewster, teamster union official, about labor racketeering (No. 219).

The court has agreed to hear two state contempt cases. In Virginia a Quaker was held in contempt for refusing to answer questions put by a legislative committee investigating racial maters (No. 51), and in New Hampshire the leader of a

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N. Y. Daily News
N. Y. Times 54
Daily Worker
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World Fellowship tourists home was convicted for rejecting inquiries about Communist affiliations (No. 34).

The authority of an Ohio Un-American Activities Commission is challenged in another case in which a man convicted of contempt seeks review (No. 175).

ORIGINAL CASES

Two fairly rare cases, suits the Supreme Court hears as an original matter instead of in review of lower courts, are on the docket for early argument.

The first raises again the politically involved question of who has the rights to oil under the marginal sea. The United States claims everything beyond the three-mile mark, while Texas and other Gulf of Mexico states want the rights out to ten and one-half miles (No. 10, original).

California, with New York supporting on the sidelines, is seeking to sue the State of Washington to strike down state laws that are alleged to discriminate against California wine. The court will hear argument on whether it should entertain the suit (No. 13, original).

CRIMINAL LAW

Alphonse Bartkus, who was acquitted of bank robbery in a Federal trial and then convicted of the same robbery in an Illinois trial, will contest the constitutionality of the successive trials. The court divided 4-4 on this case last term and put it over for reargument (No. 1).

In another case the argument concerns conviction in a state court, then conviction in a Federal court for the same crime (No. 7).

If a wife is willing to testify against her husband, is she legally competent to do so? The court has granted review to consider that question (No. 20).

John Lee, a soldier who was dishonorably discharged and sentenced to a term in an Army prison, killed a fellow prisoner in the camp. The court will decide whether he could constitutionally be tried by court martial for the murder (No. 42).

Rudolf Ivanovich Abel, convicted of espionage for the Soviet Union in a notable Brooklyn trial, wants the Supreme Court to review his case. He questions, among other things, whether a warrant for a deportation arrest entitled Immigration officials to search his room for evidence of espionage (No. 263).

An Oregon man has asked review of his state conviction on the ground that admission of photographers to the courtroom over his protest prevented his getting a fair trial (No. 193).

Another petition for review charges that a Florida statute giving juries discretion to recommend the death penalty in rape cases is unconstitutional, because only Negroes have been executed for rape in the last twenty years (No. 149).

TAXES

Macy's lost a suit for $1,000,000 in Federal tax refunds when the Court of Appeals refused to let it belatedly use the so-called last-in-first-out (LIFO) accounting method. It wants a review (No. 369).

Is it an "ordinary and necessary"—and hence deductible—business expense for a liquor dealer to spend money campaigning against a legislative proposal for state-owned liquor stores? The court will review two cases on that question (Nos. 29, 50).

The court has agreed to consider several cases in the complicated area of constitutional limits on state taxation. One involves Ohio's power to levy a property tax on iron ore imported from Canada by a steel company and stored for use at its mill (No. 9).

Two others concern a state's authority to collect income taxes from out-of-state companies doing interstate business (Nos. 12, 33), and another questions a franchise tax imposed on an express company doing only interstate business in the state (No. 38).

BUSINESS

A decree ordering the breakup of the International Boxing Club under the antitrust laws will be reviewed early in the term (No. 18).

When the Federal Communications Commission approved the sale of a Philadelphia television station, did that approval foreclose future antitrust action against the sale by the Justice Department? The department and the F. C. C. argue no, but a Federal District Court held yes. The Supreme Court will decide (No. 54).

Review is sought of a decision by the Ninth Circuit Court of Appeals that a private antitrust plaintiff must show injury to the public as well as private damages to collect from the defendant (No. 76).

The Pacific Far East Line, turned down by the Maritime Board in its effort to start an unsubsidized service to Hawaii, seeks review of a Court of Appeals ruling that the Maritime Board decision cannot be reviewed in the courts at all (No. 219).

A disappointed inventor, Jerome S. Spevack, contends that his patent rights will be ruined if the Atomic Energy Commission goes ahead with its threat to declassify a hitherto secret process of his. He asks review of lower court decisions refusing an injunction against A. E. C. officials (No. 339).

The Securities and Exchange Commission is eager for review of decisions that it has no authority to regulate insurance companies' sales of variable annuity policies (Nos. 237, 290).

The natural gas industry is uneasy about a set of cases the court has agreed to review. The lower court held that a gas distributor could not raise his prices prior to a complete rate proceeding in the Federal Power Commission, unless his customers agreed. This would change existing practice. The companies argue that such delay in rate adjustment would bankrupt them (Nos. 23, 25, 26).

LABOR

The court will review a question that has long troubled the National Labor Relations Board: Do the District courts have jurisdiction to overrule the board's definitions of bargaining units when those definitions are said to be in violation of the Taft-Hartley Act (No. 14)?

The N.L.R.B.'s fixed policy of refusing jurisdiction over labor disputes in the hotel industry will also be reviewed (No. 21).

The court also has agreed to consider how far the concept of interstate commerce goes in permitting Federal wage and hour standards. Specifically, can those standards cover architectural draftsmen who work within one state on plans for structures in other states (No. 37)?

MISCELLANY

Under Federal law broadcasters cannot censor political speeches on their stations. Are they then liable for slanderous statements? The court is asked to review a decision that the stations are immune from liability (No. 248).

A lawyer admitted to practice in the District of Columbia and in a Pennsylvania Federal court seeks review of a Pennsylvania ruling that he cannot open an office for the practice of law in Philadelphia because he is not a member of the state bar (No. 256).

The Florida courts have held unconstitutional a widely used reciprocal witnesses law in which the states agree to produce witnesses for each other's court proceedings. The Supreme Court has agreed to decide (No. 53).

Finally, Pennsylvania has a local option law permitting towns, by popular vote, to ban movies on Sunday. The court is being asked to consider whether such a ban violates the Constitution's guarantees of freedom of speech and press (No. 166).

REVIEWS COURT WORK. Prof. Robert A. Dahl of Yale University. He has published his findings on the U. S. Supreme Court.

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Hundreds of Cases

Supreme Court Opens Today

By MARSHALL McNEIL Scripps-Howard Staff Writer

The 168-year-old Supreme Court opens its regular session today knowing there is little new in the present wave of criticism breaking over its great white building.

Today's formal opening of the new term was scheduled to be marked only by a brief ceremony including official convening of the court and admission of new attorneys to practice before it. No opinions or rulings of any kind were expected.

Before it recesses next summer, it will have decided several hundred cases involving, among other things, civil rights, states' rights, taxation, criminal law, labor, and the powers of the Congress and the executive branch of the Government.

It probably will determine the constitutionality of pupil-placement laws passed by Southern states opposing racial integration in public schools, including an appeal by Arkansas Gov. Orval Faubus against court-ordered restraint.

TIDELANDS CASE

It may decide whether the Federal Government shall have dominion over the oil-rich tidelands beginning three miles, instead of 10.5 miles, off the coast of Texas and Louisiana.

The nine justices will file to the bench today led by white-haired, benign-looking Chief Justice Earl Warren, California politician and lawyer turned jurist by President Eisenhower's appointment.

UNANIMITY

Southern critics of the court, such as Sen. Harry Byrd (D., Va.), speak of it as the "Warren Court."

If this only means that it is unanimously behind the Chief Justice in the public school integration decisions, it is the "Warren Court," and twice in the latest Little Rock decision he stressed the unanimity among the jus-

tices, old and new, on this issue.

But in other cases in the last regular session the court divided from within its own membership have come dissents severly condemning the opinion of varying majorities.

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President Names Potter Stewart To High Court to Succeed Burton

Circuit Judge, 43, Is Ohio Republican, Described as "Right of Center"

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON — President Eisenhower named Circuit Judge Potter Stewart, a "right of center" jurist from Ohio, to the Supreme Court.

The White House announced that Mr. Stewart, under a recess appointment, will succeed to the High Court when Justice Harold H. Burton retires next Monday. Mr. Stewart's nomination will have to be confirmed by the Senate next session.

Government officials described Mr. Stewart, a Republican, as a "right of center" conservative in his judicial philosophy but probably not as conservative as the retiring Mr. Burton. However, Mr. Stewart's appointment was recommended by Sen. Bricker (R., Ohio), an outspoken critic of the High Court's increasingly liberal complexion, and was endorsed by the American Bar Association, which has sharply criticized some recent Court decisions.

With the Supreme Court under its severest attack in two decades, President Eisenhower was under heavy pressure to find a replacement to match Mr. Burton's conservative leanings. Whether the 43-year-old Mr. Stewart will fill the bill is hard to predict. As one Government official put it, "Once a man puts on the black robe, it's almost impossible to tell what he'll do."

Stewart's Views Described

An aide to Sen. Bricker described Mr. Stewart's views thusly:

"He is a conservative in the sense that he values individual liberties and rights above everything else. In the same tradition, a property right is an individual liberty."

The nominee's votes on issues of individual liberties undoubtedly will come in for close scrutiny by conservative critics of the Court. For it is on these questions, more than anything else, that the controversy over the tribunal has centered. Critics in Congress, the bar, the press and the public charge the Court has paid too much attention to individual rights at the expense of law and order.

The impetus for this liberal philosophy comes from a four-member Court bloc. Chief Justice Warren heads the group and on most important decisions can count on support from Justices Douglas, Black and Brennan.

How often Mr. Stewart lines up with this bloc in his future voting will provide the key to his judicial philosophy. Mr. Stewart, who attended White House Press Secretary Hagerty's news conference to announce his appointment, refused to shed much light on his philosophy.

As a judge of the Sixth Circuit Court of Appeals, Mr. Stewart said he participated in only one school integration case—a particularly explosive issue at this time. He said that case involved a situation in Ohio and integration was upheld.

However, a recent opinion by Mr. Stewart would seem to indicate that he believes in

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limiting individual rights to some extent. Sitting on the Second Circuit Bench, Mr. Stewart wrote the opinion upholding the criminal contempt conviction of Marie Torre, television columnist for the New York Herald Tribune. Miss Torre was sentenced to 10 days in jail for refusing to divulge the name of a news source. Judge Stewart wrote:

"Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic, too, are courts of justice armed with the power to discover truth."

Mr. Stewart told reporters he was a great admirer of the late Sen. Robert A. Taft, former leader of the conservative wing of the Republican Party. He said he knew Mr. Taft for many years.

Admirer of President

The new appointee added that he has been an admirer of President Eisenhower since he first met the President at the time he was appointed to Sixth Circuit Court bench in 1954. Mr. Stewart also spoke highly of the conservative Justice Burton. "Needless to say," he declared, "I admire him greatly for his diligence, fair-mindedness and high mindedness."

Mr. Stewart is the fifth member named to the High Court by the President. His appointment marks the first time Eisenhower appointees have made up a majority of the nine-man court. The President appointed Chief Justice Warren in 1953, Justice Harlan in 1955, Justice Brennan in 1956, and Justice Whittaker last year.

The American Bar Association heartily endorsed Mr. Stewart's selection. Bernard G. Segal of Philadelphia, chairman of the A.B.A.'s standing committee on the Federal judiciary, called the appointment an "excellent one." He said his committee reported to Attorney General Rogers that "Judge Stewart is fully qualified for elevation to the Supreme Court of the United States."

Mr. Eisenhower named Mr. Stewart to the Sixth Circuit Court of Appeals in April, 1954. The Sixth Circuit includes Michigan, Ohio, Kentucky and Tennessee.

It was believed Mr. Stewart's Midwest background was a relevant factor in his selection. Retiring Justice Burton was a former Senator from Ohio. Justice Whittaker, from Missouri, is the only other Justice from the Midwestern area.

Practiced Law in Cincinnati

Before his appointment to the circuit court, Mr. Stewart had no previous experience as a Federal district judge, but was a member of the Cincinnati law firm of Dinsmore, Shohl, Sawyer and Dinsmore.

Born in Jackson, Mich., Mr. Stewart has spent most of his life in Cincinnati. He was graduated from the Yale University Law School in 1941. He was a member of the Cincinnati City Council in 1950-53 and served as vice mayor of the city during the latter two years. Mr. Stewart served as a member of the White House conference on education in 1954-55.

Mr. Stewart said Attorney General Rogers called him to Washington late Monday afternoon. He said he was offered the Supreme Court appointment by Mr. Eisenhower early yesterday morning.

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HEADLINE PERSONALITY

New Justice Delights In Intricate Cases

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The two men talking in the office of Supreme Court Justic Burton yesterday were a study in contrast.

One was the retiring Justice Burton, 70-year-old, gray-haired, a little tired, his dignified demeanor mellowed by inherent good-humor.

The other was Judge Potter Sewart, a youthful 43, black-haired, with justa touch of gray at the temples, athletically bfult, sincere and betraying a nervous natural in one who has just been named to the highest court in the land.

'It had been a hectic two days for Judge Stewart.

Only the day before he'd received an urgent phone call at his Cincinnati office where he is a judge of the 6th Circut Court of Appeals. At the other end of the wire was Attorney General Rogers. All Mr. Rogers told him was that he was wanted in Washington on an important matter.

FULL NAME—Potter Stewart.
BIRTHDAY—January 23, 1915.
EDUCATION—Hotchkiss Preparatory School; Yale University; Yale University Law School; Cambridge University, England.
JOBS—Reporter; lawyer; city councilman; judge, Sixth Circuit Court of Appeals.
FAMILY—Married to former Mary Ann Bertles of Grand Rapids, Mich. Three children: Harriet, 13; Potter, jr., 10, and David, 7.
HOBBIES—Fishing, golfing.

Meets Colleagues

A few hours later, after a plane flight, the jurist was given an inkling of his appointment, during a conference with the Attorney General. Yesterday he was officially notified of his appointment by President Eisenhower at the White House.

Then, the appointee sped to the Supreme Court to meet his new colleagues. Justice Burton discreetly withdrew while Judge Stewart, unassuming and modest, sat for a brief, informal interview.

What pointed his steps in the direction of a law career? "I grew up in a lawyer's household. (His father is an Ohio Supreme Court judge) I can't remember of thinking of ever being anything other than a lawyer."

He remembers well the first case he ever tried as a young lawyer. He was appointed by the court to defend a man accused of forgery.

"The defendant was convicted," Judge Stewart admitted with a rueful smile. "I was disappointed," he said, "but after it was all over, I realized and I think my client did, that justice was done."

The appointee apparently finds the delight in law cases that to the layman would seem unutterably dull. He spoke with enthusiasm about what he considered one of his most interesting cases, which involved

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Supreme Court Change

President Eisenhower now has made his fifth Supreme Court appointment, choosing Federal Circuit Judge Potter Stewart to replace Justice Harold H. Burton, who will retire Monday. Thus, assuming Judge Stewart's confirmation, those who have been speaking critically of the "Warren court" should refer henceforth to the "Eisenhower court."

Justice Burton, for 13 years, has been a diligent, competent and conscientious member of our highest tribunal. His role has not been a spectacular one, and it is not an easy thing to pin a label on him. For whatever meaningfulness such characterizations may have, however, and it is not great, Justice Burton would have to be considered a member of the court's "conservative" wing. On the whole, he has thrown his weight on the side of holding the court to its traditional function—as a judicial and not a policy-making body. Thus, his retirement, forced by considerations of health, raises important questions concerning his successor.

Judge Stewart has had four years of experience on the bench of the Sixth Circuit. He is a Republican and an Ohioan, which means that his selection maintains the political and geographical balance on the court. Since he was recommended for the vacancy by Ohio's Senator Bricker, it may also be assumed that Judge Stewart, in the general sense at least, is a conservative. However, the Senate, in considering confirmation, should be more concerned with Judge Stewart's concept of the proper role of the Supreme Court. The serious criticism of the current court is directed toward its alleged tendency to exceed proper judicial bounds, to exercise through its decision-making power in a broad range of cases a legislative, as distinguished from a judicial, influence. It was this trend which resulted in the last congressional session in numerous legislative efforts, some successful and some unsuccessful, to "curb the court." At best, however, this is a difficult and unsatisfactory remedy. What really is needed is a careful and dispassionate examination of a nominee's judicial philosophy before and not after he has been confirmed. Presumably, this will be forthcoming in the Senate in Judge Stewart's case.

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"the mutualization" of a life insurance company.

The litigation spread over years and there were "many intricate problems" he related almost gleefully.

Likes Fishing, Golf

For recreation he likes fishing and golf. But, he admitted, sometimes he talks as though he were a much more expert fisherman than he is actually. As for golf, "my own best friend wouldn't accuse me of being a golfer. I play socially and for the fun of walking around."

Reporters had asked him whether he was a liberal or conservative. To his he replied he just likes to think of himself as a lawyer.

He has taken part in only one case invplving the currently prominent school integration question.

In 1956 he ruled with the majority in overturning a lower court and ordering integration of Negroes into elementary schools of Hillsboro, Ohio, a small community about 50 miles northeast of Cincinnati.

On Torre Case

Earlier this month, he ruled in a New York case that is likely to reach the Supreme Court in time.

He sat with the Second Circuit Court of Appeals which upheld a jail sentence to Marie Torre, New York columnist, for refusing to divulge a news source.

Judge Stewart wrote that although freedom of the press is precious and vital, it "is not an absolution."

The jurist attended Cincinnati public schools, Hotchkiss Preparatory School and received his bachelor's degree from Yale. Later, he studied at Cambridge in England for a year. Afterward, he was graduated from Yale Law School cum laude in 1941.

He worked for a while as a reporter for the Cincinnati Times-Star at one point in his career. As a lieutenant in the Navy from 1942-5 he won three battle stars. He was elected to the Cincinnati City Council in 1949 and 1951.

Judge Stewart was married in 1943 to the former Miss Mary Ann Bertles of Grand Rapids, Mich. They have three children—Harriet, 13; Potter, jr., 10, and David, 7.

A Republican, he had been appointed to the 6th Circuit Court by President Eisenhower on April 6, 1954.

That appointment brought a prise remark from his son Potter, jr., then 6 years old. It was, "Now Daddy can throw everybody in jail."

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On Promoting Judges

For the fourth time President Eisenhower has gone to a lower court for an Associate Justice of the United States Supreme Court. His appointment of Judge Potter Stewart of the United States Court of Appeals, Sixth Circuit, to succeed Justice Burton thus gives practical emphasis to the Administration's policy of preferring men already under judicial discipline for advancement to the highest bench. Judge Stewart will be the third member of the Supreme Court promoted from the Courts of Appeals, the other two being Justices Harlan and Whittaker. Justice Brennan was selected from the Supreme Court of New Jersey.

Only Chief Justice Warren among the Eisenhower appointees went to the Supreme Court without judicial experience. Apparently the President feels that somewhat different qualifications are needed in the case of the Chief Justiceship—that the head of the Court should be a figure of national reputation as well as an eminent lawyer. As we understand the President's policy, it does not preclude the appointment of practicing lawyers, law school professors and Government officials to associate justiceship, but only gives a preference to men already on the bench.

The wisdom of this policy depends in large part upon the kind of men who are available in the lower courts. If there is a systematic policy of recruiting the ablest legal minds in the country for the lower courts, promotion of the best of these would be at once essential to morale and a logical extension of the practice.

Justice Frankfurter insists that "the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero." The search for Justices, he has written, should be made among those men "who give the best promise of satisfying the intrinsic needs of the Court, no matter where they may be found, no matter in what professional way they have manifested the needed qualities." The history of the Court emphatically sustains the wisdom of this conclusion. Intellectual capacity, learning in the law, understanding of our constitutional system and judicial temperment are far more important than experience in a lower court.

At the same time it is well to remember that most of the qualities which fit a man for the Supreme Court are also highly desirable in the Courts of Appeals. So long as talented lawyers with a genius for untangling legal dilemmas and reconciling the demands of liberty and order are appointed to the Courts of Appeals, it is certainly no mistake to advance the best of them to the highest bench. In the years ahead the Justices who have gone to the Court by this route must expect to have their work carefully compared with that of the many other Justices who have come out of the executive and legislative branches. Judge Stewart's high standing at the bar and his good work on the bench suggest that he will give a good account of himself in this competition.

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Supreme Court Overworked; Quality of Opinions Suffers

Erwin N. Griswold

Last Thursday evening Dean Erwin N. Griswold delivered the Morrison Lecture before the State Bar of California at Coronado, California. The following are excerpts from that address:

Over the past three of four years, there has been great controversy about the Supreme Court. This has not been unprecedented, for the Court is inevitably and inherently subject to controversy. . . . This is especially true when the issues which the Court must decide have deep emotional overtones.

Much of the criticism of the Supreme Court in recent years can be traced directly or indirectly to the segregation decisions of 1954 and 1955. . . . There is in all probability nothing that has happened within the past ten years which has so played into the hands of the communists as the reaction to the Supreme Court's decision in the School cases.

Governor Faubus will no doubt have a place in our national chronicles. As my colleague, Professor Paul A. Freund, has pointed out, though, he "is not likely to be identified in history with Abraham Lincoln." Freund, "Storm over the Supreme Court," 21 *Modern L. Rev.* 345, 357 (1958).

Not all of the criticism of the Supreme Court has arisen out of the School cases. There have been some other decisions, chiefly in the field of Civil Liberties, which have evoked considerable opposition.

Quite a bit of the criticism in this area, it seems to me, has been based on plain misunderstanding. For example, a year ago there was great excitement about the *Jencks* case, in which the Court held that when a witness testifies who has previously given a statement to the F.B.I., that statement must be made available to counsel for the defendant. Really this seems rather elementary. How could we have a decent system o

(See OVERWORK on page three)

(Continued from page one)

criminal trials on any other basis Yet this decision was attacked on th ground that it opened "the F.B.I. file to the communists, to say nothing o assorted crooks, grafters, narcoti peddlers, etc." *Nine Men again America* (1957) 18. Actually, it d not do that at all, as can be seen b anyone who will take the trouble t read it. There was an extravagan dissenting opinion in the case, whic gave rise to some misunderstandin And the then Attorney General wen before both Houses of Congress an said that the government was con fronted with a "grave emergency, and sought a statute which Congres passed. Whether there was such a emergency in fact seems rather doub ful, even though some lower court may have misapplied the decision. Th witness in the *Jencks* case wa Harvey Matusow. Suppose your cl ent was being convicted on Harve Matusow's testimony, and you knew that he had made a previous state ment to the F.B.I. Wouldn't you wan to see that statement? Wouldn't yo regard it as highly unfair and im proper if you were not allowed to s the statement? Is there any lawy who can seriously say that the S preme Court did anything in t *Jencks* case except its plain duty Lawyers, especially trial lawyer should be commending the Court f this decision.

HARVARD LAW RECORD
CAMBRIDGE, MASS.,
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Another case which has caused concern, especially here in California, is the *Konigsberg* case, in which your own Supreme Court was reversed on

Earl Warren
Chief Justice
U. S. Supreme Court

a matter of admission to the bar. That decision troubles me, too. Nevertheless, as my colleague Professor Archibald Cox pointed out in a speech he gave in Los Angeles at the time of the American Bar Association Convention there last August, this decision should not be read too broadly. One of the first things that a law student learns in Law School is that an opinion must be taken in the light of the facts before the Court, and that its significance depends on the actual decision on those facts, and on nothing more. As Professor Cox observed in his speech, the *Konigsberg* case shows that the Supreme Court "is concerned that a man should not be denied admission to the bar because of radical political or economic views," and that he should not be put to a special burden of proof because of such views. There is a clear distinction, which I am sure the Court would recognize, between radical political and economic views, on the one hand, and true subversion, on the other. The ranks of honored lawyers, throughout the centuries, in this country and elsewhere, have included people who challenged the status quo, as a matter of principle or on behalf of a client. Moreover, as Professor Cox likewise pointed out, the Court is concerned here, as in other fields of the law, "lest what appear to be findings of fact should mask the application of a rule of law" which is inconsistent with proper freedom in seeking admission to the bar.

As I have indicated, I do not think that the *Konigsberg* opinions are very satisfactory. Yet I have considerable confidence that experience will show that the conclusion reached is not only one that we can live with but is one that we will come to accept. The subsequent action of the Court in a case from Oregon — *In re Patterson*, 356 U. S. 947 (1958) — seems to confirm this view.

Nelson Case

Finally, I would like to make reference to another decision as to which it seems to me that there has been great misunderstanding, based very largely on purely emotional grounds. This is the decision in *Pennsylvania v. Nelson*, 350 U. S. 497 (1956), where the Court held that the adoption by Congress of the Smith Act had superseded state statutes in the field of subversion. Actually, there is really nothing novel or startling in this decision. The same general conclusion has been reached before in literally hundreds of cases. Reference is rarely made to the point actually decided in the *Nelson case*, which was that the Commonwealth of Pennsylvania could not maintain a prosecution for subverson against the *Federal* government, after Congress had provided for such prosecutions in the Smith Act. Why should a State prosecute for a conspiracy against the United States, especially when Congress has made provision for prosecution in such cases by Federal authorities and in the Federal Courts? Such conspiracies have interstate ramifications, and are almost surely in more experienced and better informed hands when they are handled by Federal authorities. Moreover, in the *Nelson* case, the Supreme Court affirmed a decision of the Pennsylvania Supreme Court. This was no novel doctrine.

There have been moves in Congress to abolish the whole doctrine that state laws are superseded when Congress has passed a valid statute in the area. This is really throwing out the baby with the bath. The passage of such a statute would upset the federal-state balance in many areas, and would go far to Balkanize the United States. More than two years have passed since the *Nelson* case was decided, and there is no evidence that I know of that it has done any harm of any sort. If State officers have information of subversion against the United States, there is no reason to think that it will not get full attention from the F.B.I. and other agencies of the Federal Government. Why should it be the responsibility of the States to prosecute for offences against the United States anyway?

Literate Critics

However, it should surely be recognized that not all criticisms of the Supreme Court in recent years can be dismissed on the ground that they are based primarily on emotional grounds or on misunderstanding. There are a number of persons of eminence and understanding who may be called, in the words of Professor Philip B. Kurland of the University of Chicago Law School, the "Literate Critics" of the Supreme Court.

First and foremost among these, of course, is Judge Learned Hand. . . . [Judge Learned Hands says] that the Supreme Court should not undertake to act as a third house of the legislature, and there can be no disagreement with that. And insofar as he says that our legislative bodies themselves have a great responsibility in the field of civil liberties which they should exercise more regularly and carefully, one may likewise agree. But a legislative body is not a good place for the protection of individual rights — strange as that observation may seem. There is ordinarily no concrete specific case before the legislative body. It legislates in general terms on a broad issue, and rightly enough with the general public interest primarily in view. However, in the courts, there is an individual claiming protection, and presenting the concrete facts of an actual case. Moreover, the action against which the individual is seeking protection may be that of an executive or administrative officer who is seeking to apply the law in a way that the legislature could hardly have foreseen. Even with the greatest of responsibility on the part of the legislature, there is ample scope for the proper functioning of the courts in this field. But the courts should here, as everywhere else, be restrained and careful. For his emphasis on this important point we can be grateful to Judge Hand.

[A] document to which careful and respectful attention must be given is the Declaration signed by the Chief Justices of the Supreme Courts of thirty-six of the States at their annual Conference held in Los Angeles last August. . . . My best judgment is that this statement will live in history as a symptom of the times and not because of its own power as persuasive discussion of constitutional law.

Caution Abandoned

Having paid my respects to a number of those who have recently engaged in criticisms of the Supreme Court, it is only appropriate that I, too, should now throw caution to the winds, and join their ranks.

The Supreme Court in our system has unique responsibilities. Its duties are truly awesome. . . . The Court, and each of its members, have far too much to do, and have to work far too hard and too fast, especially in view of the great complexity and importance of the issues that come before it. . . . To an extent to which I think the bar is largely unaware, the Supreme Court is now oppressed by mere volume and complexity of its business.

So I would first propose that the organized bar establish committees to review the volume of the Court's work, and, in cooperation with the Court, to devise ways and means to reduce this, so that the Court may have ample time to consider and weigh the tremendous questions which come before it.

One area where something could be done, for example, is with respect to ordinary tax cases. It is now some twenty years ago since . . . Roger Traynor proposed that there should be a special court of appeal in tax cases. And I came along with a similar proposal a few years later. These suggestions were strongly disapproved by practicing lawyers. Yet the fact remains that the Supreme Court in a federal nation of 185,000,000 persons ought not to have to spend its time deciding ordinary tax cases. Indeed, I will even go so far as to say that the Supreme Court, hard pressed for time as it is, does not do a very good job in the intricate and specialized field of federal taxation. For instance, I may mention one of its most recent decisions in the field — *Flora* v. *United States*, 357 U. S. 63 (1958) — where the Court held that a taxpayer who had paid only part of a tax claimed to be due from him could not maintain a suit to get it back. This leads to the bizarre result that a taxpayer who pays everything he has is wholly without remedy if he cannot pay the whole tax assessed. This result was reached in the teeth of the language of the statute, and on the basis of a statement of practice which is demonstrably wrong. I venture the thought that this was a result which would not have been reached if the court had had more time for the consideration of the case. But, as things are, tax cases inevitably have a low priority among all the cases the Supreme Court has to decide. It would be in the interest of all concerned to find a way to relieve the Court from having to decide these cases, and many other — non-constitutional — cases in the general area of administrative law.

Too Broad Grounds

As I have reviewed the decisions of the Court in recent years, there are not many of the results reached, it seems to me, which are really objectionable on what might be called sound professional grounds. But in an unfortunate number of the cases, in my view, the opinions proceed on too broad grounds, and it is these grounds, rather than the actual points decided, which have caused some of the trouble. This is an area where perhaps the Chief Justice can have an especial influence.

Take, for example, the *Watkins* case — *Watkins* v. *United States*, 354 U. S. 178 (1957) — where the Court

(See OVERWORK on page four)

(Continued from page three)

reversed a conviction for contempt of Congress and talked in rather broad terms about the powers of Congress in this field. Or the *Sweezy* case — *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957) — which was decided at the same time. The latter case has been the subject of an intemperate attack by the Attorney General of New Hampshire, though he was losing counsel in the case and might better have been more restrained. The former case has occasioned a good deal of complaint in Congress. Looking as a lawyer at the facts of these cases, and what was decided, I cannot believe that they are truly objectionable. But both opinions contain broad statements, which might better, I think, have been carefully guarded and trimmed away. Most of the reaction comes from the breadth of some of the statements in the opinions, which were not really necessary to the decisions themselves.

Another case to which I would refer is *Hoag* v. *New Jersey*, 356 U. S. 464, decided last May. Here the majority of the Court held that a person could be tried and convicted in New Jersey of robbery after he had been acquitted of robbing three other persons on the same occasion. Note that this was an appeal from a State court, and that New Jersey had held that such a second trial was consistent with its law. The only question was whether this violated the Fourteenth Amendment's prohibition against an action contrary to "due process of law." In this case, the Chief Justice filed a dissenting opinion. He felt that "the conviction of this petitioner has been obtained by use of a procedure inconsistent with the due process requirements of the Fourteenth Amendment." But he never tells us why. To me there is more of yearning than of law in this opinion. Perhaps it is his long experience as Governor which leads the Chief Justice to approach problems in some cases in terms of generalities and without sharp focus

Interstate Commerce

Finally, there is one important area where I have long found myself in sharp disagreement with a majority of the Court. In the field of interstate commerce, Congress has refused to pass a workmen's compensation act but has instead left in force the Employers' Liability Act, which bases liability on negligence and fault. Yet over a series of years, the Court has by one extreme decision after another largely transformed this statute into a workmen's compensation act, with unlimited liability. Justices Black and Douglas have been the leaders in this movement. Closely related to this has been the substantial elimination of any effective judicial restraint in civil jury trials, so that state courts are repeatedly required to allow juries to find verdicts on an amount of evidence which can hardly be called a scintilla. I am sorry that the Chief Justice has followed along in these cases. Indeed, these cases ought not to be before the Supreme Court at all. That the Court has brought them there through certiorari only enhances my criticism in this field. Speaking in purely professional terms, without any reflection on motive, this is one area where the Court has, to me, yielded unduly to the "activists," and thus caused itself unfortunate harm.

My hope would be, then, that the Court would endeavor, as a matter of its wisdom and judgment, to exercise great care to decide constitutional questions only when absolutely necessary, and then only in carefully guarded and narrowly written opinions designed to decide only the precise questions then before the Court, and inescapably required to be decided. If it be said that this is the Frankfurter line, I would say that it is none the worse for that. Moreover, I am sure that he would be the first to agree that he did not originate this approach, but that he got it from, among others, James Bradley Thayer, a great professor in the Harvard Law School two generations ago, who should be remembered more widely than he is.

BOX SCORE ON THE SUPREME COURT

On July 10, 1958, Senator James O. Eastland of Mississippi, told the U. S. Senate how the individual members of the Supreme Court have voted on Communist cases. He said, in part:

Earl Warren took the oath of office as Chief Justice in October 1953. In the four and a half years since he has been Chief Justice, the Court has consented to hear a fantastic total of 39 cases involving Communist or subversive activities in one form or another. Thirty of these decisions have sustained the position advocated by the Communists, and only nine have been to the contrary.

Even more significant than the over-all result of these decisions is an analysis of the votes and positions taken by the individual judges. This is from the tabulation previously introduced in the RECORD, which starts with the year 1943.

Hugo Black participated in a total of 71 cases, and his batting average is an even 1,000. Seventy-one times he voted to sustain the position advocated by the Communists, and not one vote or one case did he decide to the contrary.

Justice William Douglas participated in 69 cases. His batting average is slightly lower than Black's. Pro-Communist voted 66; anti-Communist, three.

It is hard to believe, Mr. President, that the Government, or the States, the Department of Justice, the Federal Bureau of Investigation, the congressional committees, the United States District Courts, and United States Circuit Courts of Appeal were always wrong when it comes to Communists.

Felix Frankfurter is the third member of the Court who has served continuously throughout this period. He participated in 72 cases and his record shows pro-Communist votes, 56; anti-Communist, 16.

Tom Clark was appointed to the Court in 1949. He is the last member now on the Court of a group composed of Clark, Reed, and Minton, who were usually anti-Communist. These are their records:

Pro-Communist votes: Clark, 18; Reed, 14; Burton, 32; and Minton, 10.

Anti-Communist votes: Clark, 33, Reed, 40; Burton, 37; and Minton, 35.

Burton is included above with his record of 32-37; he was more often with than against the strong anti-Communist judges.

Here are the records of the remaining members of the presently constituted Court:

Pro-Communist votes: Warren, 36; Harlan, 20; Brennan, 18; and Whittaker, four.

Anti-Communist votes: Warren, three; Harlan, 14; Brennan, two; and Whittaker, seven.

Mr. President, I have here presented an overall picture based entirely on a statistical analysis. I do not argue that a judge was always wrong in each and every individual decision that might have a result favorable to the Communist position. What concerns me and is of vast concern to the American people is the pattern that has been developed and made clear by these facts and figures. Also, since the great number of cases considered in the categories that I have here discussed arise by virtue of writs of certiorari where the Court affirmatively decides what it shall and shall not consider, the startling increase in the number of decisions that favor the position of the Communists under Warren can be justifiably held to be most significant.

EVEN more important than the high proportion of cases which have been decided favorably to the Communists contention is the fact that increasingly, under Chief Justice Warren's regime, the Court has been expanding its usurpation of the legislative field and purporting to make new law of general application which will be favorable to the Communist position, not only in the individual cases decided, but in innumerable other cases.

Audition

Wishing to do the right thing, the motorist stopped the car and started back in search of the farmer whose rooster he had hit.

"Pardon me," said the motorist, "I killed your rooster with my car and I came to let you know I'm willing to replace him."

"Hmmmmm," mused the farmer, "let's hear you crow."

VOLUME XLV—No. 16 U.S. News & World Report WASHINGTON, D. C.

IT'S "IKE'S COURT" NOW— WHERE IT STANDS

With a new Justice moving into the U. S. Supreme Court—

Line-up now is five Eisenhower appointees, four pre-Eisenhower appointees.

But don't look for a basic shift in direction of Court's findings. Don't look for an end of controversy over the Court, either.

New Justice, Potter Stewart, takes office at a time when the highest court is under fire from many directions.

Segregation rulings are only one sore spot. State's rights is another. Supreme Court's power is still another.

The docket is loaded with touchy issues.

President Eisenhower last week made his fifth appointment to the Supreme Court of the United States. Mr. Eisenhower's appointees now form a majority of the Court.

The choice of Potter Stewart to be the fifth Eisenhower-appointed Justice will not alter the Court's complexion. His views on national and judicial issues are reported to be rather close to those of Justice Harold H. Burton, whom he replaces.

A majority of the existing Supreme Court still is Democratic. And the court of today is more deeply in controversy than at any time since the 1930s, when a Court with a Republican majority was under attack. The Court of 1935 and 1936 was attacked for taking a narrow view of the powers of the Government in Washington. Today's Court is under attack for asserting an authority that critics contend makes both the Court and the central Government all-powerful.

This clash between the power of the Supreme Court and that of individual States, as well as between the Supreme Court and the Congress, is expected to grow in intensity.

"Radicals" vs. "conservatives." The record indicates that the Court itself does not divide along party lines. The division is between those Justices who are regarded as "conservative" in viewpoint and those often described as "radical."

On the issue of racial segregation, in schools or elsewhere, there is no division. The Court has been unanimous in insisting upon desegregation. Justice Stewart will bring no break in that solid front. The new Justice, when on the Sixth Circuit Court of Appeals, concurred in a decision that ordered the school board of Hillsboro, Ohio, to put an end to a districting system that excluded Negro pupils from white schools. He said in a separate opinion: "The board's action was, therefore, not only unsupported by any color of State law, but in knowing violation of the Constitution of the U. S."

It is in other fields relating to federal

POTTER STEWART, pictured at Supreme Court building last week

THE NEWEST MEMBER of the Supreme Court, Potter Stewart, is also the youngest. He is 43. For four years prior to his appointment by President Eisenhower last week, Associate Justice Stewart was a judge in the U. S. Court of Appeals.

The young Justice-designate, who takes the post left vacant by the resignation of Justice Harold H. Burton, of Ohio, is also an Ohio resident. His father, James Garfield Stewart, now a member of the Ohio supreme court, was once mayor of Cincinnati. He himself was a member of the Cincinnati city council, and vice mayor of the city. He is a Republican and was a strong supporter of the late Senator Robert A. Taft for the Republican nomination for President in 1948 and 1952.

Other lawyers have a high regard for Justice Stewart as a lawyer and a judge. A spokesman for the American Bar Association termed his appointment to the Supreme Court "excellent."

The new Associate Justice graduated with honors from Yale University and Yale Law School. During World War II, he served at sea with the Navy.

Senate confirmation is needed to make the appointment permanent.

Where laws are made, then interpreted—the Capitol, home of Congress, in foreground, Supreme Court in background.

PRESIDENT EISENHOWER APPOINTED THESE

EARL WARREN

Chief Justice. Age 67. Elected Republican Governor of California three times, serving 1943 to 1953. Appointed Chief Justice Sept. 30, 1953.

JOHN M. HARLAN

New York Republican, 59. Lawyer, counsel for prosecution in New York graft cases in 1920s. Advanced from U. S. Court of Appeals in 1955.

power, to rights of labor unions, to civil liberties, to other national issues that the division is sharp.

On the so-called "radical" side of the issues, Justices Hugo L. Black and William O. Douglas almost always vote together. Both were appointed by President Franklin D. Roosevelt. Chief Justice Earl Warren, in most instances, joins the Black-Douglas combination. The Chief Justice was appointed by President Eisenhower. Justice William J. Brennan, Jr., joins this group more often than not, giving it a fourth vote. Justice Brennan, although a Democrat, was named by President Eisenhower.

On the so-called "conservative" side of the issues, Justices Tom C. Clark, a Democrat, and Harold H. Burton, a Republican, both appointed by President Harry S. Truman, usually stood together. Justice Burton now is replaced by Justice Stewart, also a Republican. It remains to be disclosed where the new Justice will stand. Justice Charles E. Whittaker, appointed by President Eisenhower in 1957, has been on the Court too short a time to establish a clear record, but appears to incline toward a "conservative" viewpoint.

The power balance. Justice Felix Frankfurter, a Roosevelt appointee, and Justice John M. Harlan, appointed by President Eisenhower, tend to hold the balance of power in the Court. Both of these Justices at times lean toward the idea of "judicial self-restraint," recommended last summer in a resolution by the Conference of Chief Justices, consisting of chief justices of State supreme courts.

The basic core of the Court, according to those who study its actions, inclines to the "radical" viewpoint. The Chief Justice and Justices Black, Douglas and Brennan, when together on crucial issues, need to persuade only one other Justice to win their point.

The Court itself in the period ahead is expected to be under continuous attack, not only from the South, where integration decisions are vigorously opposed, but from Congress and State judges and lawyers.

The Senate last summer came within one vote of passing a bill to restrict the Court's powers. Representatives Howard W. Smith (Dem.), of Virginia, has said he will introduce again a bill to limit the Court's power to strike down State laws. Other bills are expected to aim at overturning decisions on prosecution of Communists, federal loyalty laws, passport rules.

Ahead: more controversy. The Court will decide questions that appear certain

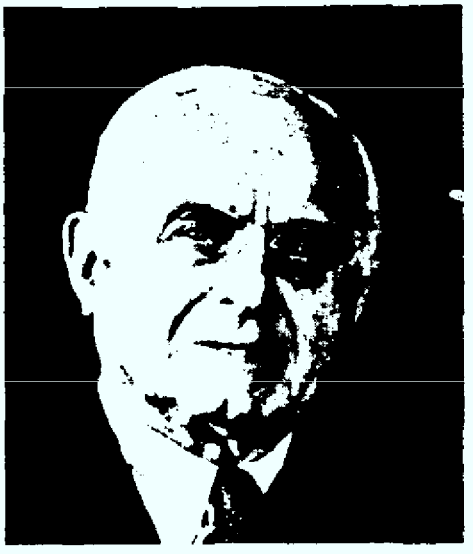
PRESIDENTS ROOSEVELT AND TRUMAN

HUGO L. BLACK

Age 72. Democratic Senator from Alabama, 1927 to 1937, when named to Court as President Roosevelt's first appointee. Senior Justice, in service.

FELIX FRANKFURTER

At 75, the oldest member of the Court. Born in Vienna, Austria. Appointed by President Roosevelt in 1939. Was professor of law at Harvard.



FIVE JUSTICES TO SUPREME COURT IN THE LAST FIVE YEARS

WILLIAM J. BRENNAN, JR.
Democrat, 52. Lawyer, then a judge in New Jersey courts. Moved up to State Supreme Court in 1952. Appointed to U. S. Supreme Court in 1956.

CHARLES E. WHITTAKER
Republican, 57. Trial lawyer until 1954. Entered the federal judiciary as a district judge in Missouri. Named to Supreme Court in 1957.

Photos: USN&WR, Wide World

POTTER STEWART
Age 43. Appointed Oct. 7, 1958. Lawyer, was Republican member Cincinnati city council. Became federal judge in 1954. Court's youngest member.

to excite controversy. The questions deal with integration, the powers of Congress, and business regulation.

On the race question there are cases involving restrictions by State law on the activities of the National Association for the Advancement of Colored People, and the validity of a pupil-assignment law in Alabama. Louisiana is appealing a lower-court decision that held unconstitutional a law said to discriminate against Negroes by requiring applicants for State colleges to get certificates from their high schools. A federal-court injunction against Governor Orval E. Faubus, of Arkansas, also is on appeal.

The power of congressional committees to compel testimony from witnesses comes up again in a number of cases. The Court has agreed to review a case questioning the power of the House Committee on Un-American Activities to require witnesses to testify about Communist affiliations. Another case questions the power of the Senate Internal Security Committee to subpoena records of a union said to be Communist-dominated. Other cases pending involve questioning of witnesses by committees of State legislatures.

The Court has been sharply criticized for past decisions limiting the power of congressional committees and weakening federal and State action against Communists.

Issue of criminal laws. Decisions also are sought on whether persons can be tried in both federal and State courts for the same crime, and whether a wife can testify against her husband if she is willing to do so.

The resolution of the State chief justices particularly deplored the recent trend of Supreme Court decisions that interfered with State administration of criminal laws.

The Court is being asked to review, for the first time, the use of confidential information in security cases covering privately operated defense plants. The case involves an executive of a business firm who lost his job when his security clearance was canceled. Past decisions on the security program have led to protests in Congress that the Supreme Court is weakening the laws.

Another case challenges the constitutionality of a Pennsylvania law that permits local option in banning Sunday motion pictures. The challenge is that this law violates freedom of speech and press.

The docket appears certain to keep alive the controversy over the Supreme Court that has been growing ever since Earl Warren became Chief Justice [END]

APPOINTED THESE FOUR JUSTICES

WILLIAM O. DOUGLAS
Democrat, 60, appointed by President Roosevelt in 1939 from State of Washington. Was professor of law, later an official under New Deal.

TOM C. CLARK
Texas Democrat, 59. Only Truman appointee left on Court. Served as U. S. Attorney General for four years, appointed to Court in 1949.

Photos: USN&WR

that the paramount issues—the ones the people were most concerned about and on which the elections probably would turn—were these two: Peace and jobs.

Economy, Good or Bad? On economic policy, the lines were sharply drawn. Nixon in his speeches sounded the Republican note that the voters have never had it so good; the GOP has given them higher wages, more security, and, besides, stopped the recession. The Republican Party, said the Republicans, is the party of private enterprise, while the Democratic Party is the party of "nationalization [and] socialization."

In a policy statement last week, Republican leaders in Washington said that any future Congress controlled by the Democrats would be "far to the left of the New and Fair Deals." Private enterprise, the GOP said, "could not survive in such a climate."

To this the Democrats responded: The Republicans were responsible for the recession in the first place, responsible for inflation, responsible for unemployment. Even though the number of jobless dropped by half a million in August, they said, there still were more than 4 million people out of work. Harry Truman quipped: "The Republicans have created a new kind of 4-H club—high prices, high taxes, high unemployment, and high interest rates."

On foreign policy, on the issue of peace, however, neither party was quite so dogmatic. The big reason: Neither could afford to risk an all-out stand while the situation at Quemoy and Matsu remained unresolved.

Nonetheless, at the weekend, the Democrats issued a policy statement in which they accused the Administration of giving "six years of leaderless vacillation" in foreign affairs and of bringing the U.S. to the "brink of having to fight a nuclear war inadequately prepared" and without allies.

The Dilemma: For the Democrats, there was the real fear that the Formosa affair could become a major Republican asset. Even the severest critics of Secretary of State John Foster Dulles admitted that by guessing correctly that the Reds were not ready for all-out war, he had forced them to back down. If Dulles now brought off a satisfactory settlement before election day, the voters might hand all the credit to the Administration for clearing up the mess.

The danger to the Republicans worked in reverse: If the Far Eastern crisis should suddenly worsen, if the shooting should break out again, the voters might well turn their backs on the Administration in droves.

On the latest in NEWSWEEK's series of election size-ups—on Pennsylvania and Alaska—see pages 41 and 42.

THE '[illegible]ERALS'

UPI

JUSTICE BLACK
(F.D.R. appointee—1937)

Harris & Ewing

CHIEF JUSTICE WARREN
(Ike appointee—1953)

UPI

JUSTICE DOUGLAS
(F.D.R. appointee—1939)

The 'New' Supreme Court . . .

When the United States Supreme Court reconvened this week for the second session of its regular term, there was a new face on the bench. It belonged to 43-year-old Potter Stewart, a Federal judge whom President Eisenhower appointed to succeed Justice Harold Burton, retiring at 70 for his health. (See THIS WEEK's NEWSMAKER, page 38.)

The presence of the new Justice pointed up two facts:

▶That with five of its members now Eisenhower appointees, the nine-man tribunal has become an "Eisenhower court." (President Roosevelt did not have a majority of his own appointees until 1940; President Truman made only four appointments.)

▶That the Court's membership, which has been moving in a steadily liberal direction throughout the Eisenhower Administration, has taken still another move, however slight, toward the liberal point of view. Justice Stewart is generally regarded as conservative; but certainly he will not be quite as conservative as the man whom he replaced. (Justice Burton ranked with Justice Tom Clark as the two members farthest to the right; both were Truman appointees.)

From these two facts, the paradox emerges: That a Republican Administration, for the first time in more than two decades, has a majority of its own appointees on the Supreme Court; and yet the Court has a far more liberal slant, and is under fire from conservatives, as hot or hotter, than at any time during either the Roosevelt or Truman Administrations.

Mr. Eisenhower did not deliberately seek such a situation. He has made only one political appointment, that of Earl Warren as Chief Justice. Otherwise, the President has made it a policy to nominate only front-rank lawyers, preferably with judicial experience, and has insisted on their endorsement by the American Bar Association. But it has so happened that in nearly every case, the men he has chosen have been less conservative than the Justices they were replacing. Warren turned out to be more liberal than the late Chief Justice Fred Vinson, a lifelong Democrat. Justices John Marshall Harlan and William J. Brennan, both moderates, succeeded two conservatives, Robert H. Jackson and Sherman Minton.

Classic Pattern: It is true that the Court tends to divide itself into the apparently inevitable classic pattern of three blocs, liberal, conservative, and middle-of-the-road. Warren leads the liberal bloc, with Justices Hugo Black and William O. Douglas (both Roosevelt appointees). On the conservative side, with Tom Clark, are Justices Charles E. Whittaker (Mr. Eisenhower's fourth appointment) and Felix Frankfurter, who was criticized as a radical when President Roosevelt appointed him in 1939. Brennan and Harlan are middle-of-the-road, and Potter Stewart is expected to fall into that category.

But if the pattern is familiar, there is this big difference: Today's conservatives and middle-of-the-roaders are more liberal than their predecessors.

There can be little doubt that Mr. Eisenhower has been startled by the turn the Supreme Court has taken. Although he has emphasized his deep respect for the Court's position in American life, he also has expressed misgivings. He recently said that he thought the Court might have gone "slower" on integration. Earlier, he had said there were some decisions that "each of us has very great trouble understanding." Within

JUSTICE CLARK (Truman appointee—1949) | JUSTICE WHITTAKER (Ike appointee—1957) | JUSTICE FRANKFURTER (F.D.R. appointee—1939)

nen, Flabbergasts Even Ike

ribunal's proper function. e lawyer in Washington put : "Historically, there has a pulling and hauling among anches of government. Dur- there was a tendency for the more than its allotted third en it stood in the way of so- ion. Some feel that the dministration grabbed more re for the executive branch. Administration, Congress has ify the balance and in some erdone it . . .

nes a Court which is once to restore the balance. It el that Congress has taken s share of power and the ex- ch not enough. It is in this truggle that the present s from its predecessors."

t, and far more critical, ap- e Court's role was made by ation's most respected jurists, ral Judge Learned Hand, in lectures that he delivered at rlier this year. When the s down a law, Judge Hand e it does not "commend itself t's notion of justice," then the surping the function of the branch and becomes, in ef- d legislative chamber."

Words: But the sharpest at the Court has received can jurists came at the Con- state Chief Justices in Califor- gust. There an overwhelming to 8—voted for a resolution at the Court "too often has adopt the role of policy- out proper judicial restraint" s. Sept. 1). Such criticism of tribunal by the nation's top state judges was without precedent, and it was a hard blow at the Court's battered prestige.

The attacks on the Court in Congress were more to be expected. Naturally, most Southern congressmen were looking for every opportunity to strike back at the integration rulings; naturally, most conservatives were angered by such decisions as the reversal of the conviction of the thirteen second-string Communists under the Smith Act. In the closing hours of the last session, critics of the Court came surprisingly close to ramming through bills that would have severely restricted the Court's jurisdiction over civil-rights and subversion cases.

Stronger Attacks: When Congress reconvenes in January, conservative lawmakers in both houses are prepared to introduce new legislation to curb the Court's powers. The bills they have prepared constitute the most far-reaching attack on the Court's authority since Chief Justice John Marshall first asserted, in 1803, that the Court had the power to declare acts of Congress and the State Legislatures unconstitutional—a power the authors of the Constitution had not expressly provided.

The Constitution does specify, however, the power of Congress to limit the Supreme Court's appellate jurisdiction. Among the proposals due to be submitted at the next session are one to curtail the jurisdiction of the Court in cases of contempt of Congress, and one permitting the states to enforce their own laws on sedition against the Federal government without being subject to review by the Supreme Court.

As the Court's fall term gets under way, its members cannot fail to consider the possibility that any acceleration of

the present liberal trend might well lend strength to its opponents in Congress. There was a grain of truth in the famous saying of Finley Peter Dunne's Mr. Dooley: The Supreme Court follows the election returns. The present Court cannot afford to ignore public opinion, and its reflection in Congress, at the risk of having its powers cut and the balance of power in government upset.

Newsmaker

Mr. Justice Stewart

Back in the harried, frantic days after Pearl Harbor, a midshipman named Potter Stewart in the Navy's V-7 course at Northwestern University used to keep his fellow students awake by stomping up and down his quarters, singing out:

"Hup, tup, trip, four, hup, tup . . ."

Midshipman Stewart was teaching himself to march. His instructors agreed that in class, Stewart was a brilliant student—but when it came to military drill, he was all left feet. And Stewart had decided to do something about it.

"That's the kind of guy he is," a friend of Stewart's said last week. "He's the most single-minded man you ever saw. If he has to do something, no matter how trivial it may be, he buckles down to it and does it."

The ex-midshipman he was describing is now Judge Potter Stewart of the U.S. Sixth District Court of Appeals, and President Eisenhower's latest appointment to the Supreme Court.

Stewart's singleness of purpose has been evident all through his life. From Hotchkiss School in Lakeville, Conn., he went on to Yale (from which he was graduated Hotchkiss also was laude degr a year's in Englan he made he was in

"And politics," became ing else other int night—no far away, to show politician welcome

Stewa Cincinna in 1949, His fath a justice once ma three ye mayor), Federal

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Stewa —with Douglas 105 yea (160 p ing sligh and flas not ave man o raconte imitati Thurm marrie

The Judge's family: Potter Jr., 10; Mrs. St

the present liberal trend might well lend strength to its opponents in Congress. There was a grain of truth in the famous saying of Finley Peter Dunne's Mr. Dooley: The Supreme Court follows the election returns. The present Court cannot afford to ignore public opinion, and its reflection in Congress, at the risk of having its powers cut and the balance of power in government upset.

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Stewart's singleness of purpose has been evident all through his life. From Hotchkiss School in Lakeville, Conn., he went on to Yale (from which he was graduated in 1937), where he had a Hotchkiss scholarship for four years. He also was Phi Beta Kappa, took a cum laude degree, and won a fellowship for a year's study at Cambridge University in England. Back at the Yale Law School, he made the Law Review, which means he was in the top 10 per cent of his class.

"And when he first decided to go into politics," Stewart's friend went on, "he became completely absorbed in it. Nothing else mattered. He dropped all his other interests, he campaigned day and night—no meeting was too small, or too far away, or too late at night for Stewart to show up. He became the complete politician, and the old-time professionals welcomed him to their ranks."

Stewart entered Republican politics in Cincinnati running for the city council in 1949, following in the family tradition. His father, James Garfield Stewart, now a justice of the Ohio Supreme Court, was once mayor of Cincinnati. Stewart served three years (serving one year as vice mayor), and he was appointed to the Federal bench in 1954.

First a Lawyer: Stewart has trouble defining his own political philosophy. When he was asked last week if he could define himself as a "liberal" or "conservative," he replied: "I really can't. I don't know what I am, except that I like to be thought of as a lawyer."

Stewart, now 43, is the youngest man—with the exception of William O. Douglas—to be appointed to the Court in 105 years. He is a tall (5 feet 11), slim (160 pounds) man with dark hair graying slightly at the temples, with a warm and flashing smile, and full of life. He's not averse to a drink or two, he's a good man on a fishing trip, he's an excellent raconteur and mimic. (In law school, his imitation of the distinguished lawyer Thurman Arnold was renowned.) He is married to the former Mary Ann (Andy) Bertles of New York and Bermuda, and the father of two boys and a girl.

"At golf," said an associate, "he fancies himself the world's greatest putter, but he's terrible. At bridge—which he says he knows nothing about—he's a whiz."

But more important than all these things is Stewart's single-minded devotion to the law—the lodestone of his life.

Associated Press

The Judge's family: Potter Jr., 10; Mrs. Stewart; David, 7, and Harriet, 13

PEOPLE:

Jimmy Byrnes Tells It

Next to Thomas Jefferson, no American has exercised so much continuous influence in government as James Francis Byrnes of South Carolina. And no American, including Jefferson has ever held such a variety of official positions. In a half century of public life, Byrnes served in both the House of Representatives and Senate, on the Supreme Court, as the nation's first real "assistant President," as U.S. Secretary of State, and as governor of his state. Only a phrase ("Clear it with Sidney") kept him from becoming President.

His unique record reaches from the days of the horse and buggy to the atomic age, spans a domestic economic revolution, the emergence of the U.S. as a world power, two world wars, and two great attempts to keep peace in the world. In the sweeping events of his times, Jimmy Byrnes, now 79 and in retirement, has played an important and sometimes dominant role.

Byrnes has told part of his story, notably in his book, "Speaking Frankly." This week he tells far more, in an autobiography* that covers his public career from his first torchlit victory parade to the day, almost 50 years later, when he left the old Governor's Mansion.

And of all the historical revelations he makes, none is more significant than his own detailed story of why Harry S. Truman, and not James F. Byrnes, became 33rd President of the U.S. upon the death of Franklin D. Roosevelt.

Devious Doings: Byrnes says he ran for the Democratic Vice Presidential nomination in 1944 at President Roosevelt's urging. Yet, as the convention approached, he kept getting disturbing reports that Mr. Roosevelt really preferred, first, Sen. Harry S. Truman, and second, Associate Supreme Court Justice William O. Douglas. Byrnes confronted the President with these reports, and the President scoffed at them. He kept encouraging Byrnes to run.

Two days before the convention, Mr. Roosevelt passed through Chicago on his way to San Diego, and Democratic National Chairman Robert Hannegan and Chicago boss Ed Kelly boarded his special train to find out who he wanted

*"All in One Lifetime." 421 pages. Harper. $5.

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Court to Sift States' Rights On Subversion

By TED LEWIS

Washington, Oct. 20 (NEWS Bureau).—The Supreme Court today decided to consider a states rights case involving the controversial issue of antisubversive investigations ordered by the Ohio State Legislature.

The court's action meant that a decision will be handed down before next July and is almost certain to have an impact on the new Congress. Last session, Congress considered in heated debate legislation aimed at wiping out previous court rulings nullifying state antisubversive laws and restricting powers of House and Senate investigating committees.

The Ohio case concerns three witnesses—Talmade Raley, Joseph Stern and Emmett Calvin—convicted six years ago of contempt for refusing to answer questions when summoned before the Ohio State Un-American Activities Commission. The three received short jail sentences and were fined $500 each.

The Supreme Court today struck down another attempt to get around desegregation decisions of the tribunal. It affirmed a lower court decision that Negroes are entitled to use the facilities of a New Orleans city park. The ruling had been appealed by the New Orleans City Park Improvement Association.

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Double Jeopardy

U. S., State Laws Involved

By Richard L. Lyons

TWO CASES raising questions about the scope of the constitutional protection against double jeopardy and the power of state and Federal governments to enforce laws in the same field were argued before the Supreme Court yesterday.

Lyons

One case involved Alfonse Bartkus, who was charged with having helped rob a federally insured savings and loan association in Chicago. He was tried and acquitted in Federal court under a law making it a Federal offense to rob a Federally-insured bank. Federal agents turned their evidence over to Illinois prosecutors and he was then tried, convicted and sentenced to life in prison by a state court for the same act.

The other case involved two men—Louis J. Abbate and Michael J. Falcone—who admittedly conspired to blow up telephone installations which included some circuits leased and controlled by the Federal Government. They pleaded guilty in a state court for conspiring to destroy private property and received 90-day sentences.

The Federal Government apparently felt this wasn't tough enough. It retried them in Federal court for the same act and won conviction. The men then received stiffer sentences under a law making it a Federal crime to conspire to destroy communication facilities controlled by the Government.

Prosecutions by both governments for the same act are rare. But Charles A. Bellows, attorney for Abbate and Falcone, predicted many would follow if the procedure is allowed.

The Court is sharply divided on the questions raised. It heard the Bartkus case last year, split 4 to 4 with Justice William J. Brennan Jr. not taking part, and agreed to rehear it.

The Government is contended that a reversal in the Abbate case could prevent state and Federal government Federal law enforcement in several fields, including civil rights. If a Southerner were charged with civil rights violation, it might permit the state to try him for a minor offense, either acquit him or impose a nominal sentence and thus prevent Federal action.

THE FIFTH Amendment to the Constitution says that no person shall "for the same offense be twice placed in jeopardy of life or limb." As construed by the Supreme Court to date, this doesn't mean quite what most lay persons think it does.

The Court has limited the protection against double jeopardy to Federal courts. Most states have their own double jeopardy provisions. But the five that do not can retry a person for the same crime unless the court decides the circumstances violate its concept of "ordered liberty." In the Federal courts the double jeopardy clause forbids retrial of persons convicted as well as those acquitted—to prevent the Government from trying to boost the sentence.

The Court has held that a single act can constitute two or more crimes for which a person can receive separate sentences—such as a dope peddler being tried for illegal possession and sale. It has ruled in a state case that when a person held up several persons in a bar at once he could after being acquitted of robbing one then be tried and convicted of robbing another.

The Court has also ruled that both Federal and state governments can try a person for the same act which violated laws of each if they were enacted for different purposes. For instance, a counterfeiter could be tried by the Federal Government for illegally taking over its function of making money and again by the state for defrauding its citizens. The reasoning is that in such a case each government has a special and different interest to protect.

NEVER BEFORE, however, has the Court had this issue presented quite as it was in the Bartkus case—where a person was acquitted by a Federal court and then convicted in a state court for the same act.

Walter T. Fisher, court-appointed lawyer for Bartkus, argued that the Federal and state laws had the same purpose—to prevent bank robberies. He asked the Court to apply the former acquittal half of the double jeopardy clause to the states, at least to prevent trial by both the ments where their laws had the same purpose.

William C. Wines, assistant attorney general of Illinois, argued that both governments could try Bartkus even if their laws had identical purposes. "One of the prices paid for dual sovereignty is dual powers," he said.

The Abbate case was the opposite side of the coin with the state trial coming first, except that Abbate and Falcone were convicted both times. Their attorney, Bellows, said this made no difference. No person should be tried twice for the same offense, he said.

"The idea that a person cannot be tried twice for the same thing is so deeply ingrained and fundamental" that the Court should extend it to every court," he said.

Leonard B. Sand, Justice Department attorney, argued that the principle of letting the Federal Government enforce its laws regardless of state action is inherent in the Federal system and vital to carrying out Federal policies. The Federal and state laws involved in the Abbate case were enacted for different purposes, said Sand. The Federal act was designed to protect military circuits from sabotage. The state law protects any private property. But the Federal Government should be permitted to retry Abbate even if the statutes were identical, he said.

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NINE JUDGES ON TRIAL

At Pasadena, Calif., last Aug. 23, the Conference of State Chief Justices, by a vote of 36-8, approved a long, detailed report attacking the Earl Warren Supreme Court in language about as strong as lawyers ever permit themselves to put on paper.

Chief Justice Earl Warren

The Warren Court, said the chief justices of the supreme courts of ¾ of the states, has taken to invading the territory of Congress and making laws on its own, instead of leaving that job to the Senate and the House, whose business under the Constitution is to make all federal laws.

As the state chief justices put it, the Warren Court "too often has tended to adopt the role of policy maker without proper judicial restraint."

This was a very tough indictment of the high court, because it came from judges of other courts. Therefore, it was expert testimony, not just some squawking by amateur critics not trained in the legal profession.

But there was—

WORSE TO COME

—for the Warren Court; and it has now arrived via the U. S. News & World Report, the esteemed weekly news magazine published in Washington.

When the state chief justices' complaint became public, the USNWR set out to poll all 351 of the judges, active and retired, on the U. S. district courts and U. S. circuit courts of appeals, as to whether they agreed or disagreed with the state supreme court chiefs.

The Tale the Poll Tells

Results of this poll have now been published in the magazine's Oct. 24 issue.

Answers to the short questionnaire were received from 128 of the federal judges, or 36.5% of the total number. Professional pollsters such as Dr. George Gallup regard a response of 30-40% in such canvasses as "very good"—far above average.

Of the 128 judges answering the questionnaire, 46% agreed with the state chief justices in their denunciations of the Warren Court, 39% disagreed, and 15% wouldn't say yes and wouldn't say no.

Of those who did say yes or no, 54% agreed with the state justices, and 46% disagreed.

Thus, it is evident that there is—

STRONG DISAPPROVAL

—of the Warren Court among a large percentage of those who know the Supreme Court best; namely, the judges on the lower levels of the judiciary pyramid capped by the Supreme Court.

What it adds up to is that the Supreme Court has been tried by a qualified jury of its peers (if not its superiors) in legal learning and judicial experience, and has been found wanting.

A Threat to Our Survival

Its persistent invasions of Congress' lawmaking territory are a threat to the very survival of this country as a republic.

That is how serious the situation is, and how menacing to the traditional rights and privileges of all of us.

We most earnestly hope that the next Congress will pass some or all of the curb-the-Warren-Court measures which came within a whisker of passing the last Congress but were finagled to death by Senate Majority Leader Lyndon Johnson (D-Tex.) and House Speaker Sam Rayburn (D-Tex.).

Meanwhile, if you want to find out some of the things the Warren Court—

HAS BEEN UP TO

—you can hardly do better than to come by a copy of the 1958 report of the American Bar Association's Special Committee on Communist Tactics, Strategy and Objectives.

This document summarizes the Warren Court's 20 worst pro-Communist decisions, in addition to giving the reader a working knowledge of how the criminal Communist conspiracy operates throughout the free world.

Better Get This Report

The report was mysteriously throttled in the ABA; but Sen. Styles Bridges (R-N. H.) got hold of a copy and inserted it in the Congressional Record.

It is now being distributed at 10c a copy (to cover mailing and production costs) by America's Future, Inc., 542 Main St., New Rochelle, N. Y.; and we recommend it to all patriotic Americans.

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Court Acts as Watchdog Of U.S. Agency Integrity

With increasing interest in the Supreme Court, The Herald Tribune has assembled a group of distinguished lawyers to comment on current, important court decisions. The group includes lawyers in general practice and on law faculties. Today's article is by Bennet Boskey of Washington.

Two television channel cases last week provided the first occasion for the Supreme Court to consider suggestions of impropriety recently uncovered in Congressional investigations into the Federal Communications Commission.

Both cases were sent back for the Court of Appeals to scrutinize charges of impropriety which had come to light subsequent to decisions upholding F .C. C.'s channel transfers.

Terse one-sentence orders sufficed to make the court's meaning plain.

The Supreme Court issued no formal opinions last week, which is not unusual as the year's work gets under way during October. The justices are completing the process of sifting the hundreds of cases accumulated during summer recess. They must decide:

Which of the cases pending on petitions for certiorari should be accepted for review on the merits.

Which of them the court should decline to review; and which, like these two television cases, deserve some review but can be disposed of summarily without hearing oral argument.

Both television channel contests arose out of a major proceeding initiated by the F. C. C. to bring about changes in the nation-wide allocation of channels.

Sangamon Valley Television Corporation v. United States: the F. C. C. ordered Channel 2 transferred from Springfield, Ill., to St. Louis. Sangamon, an applicant for Channel 2 at Springfield claimed the transfer would violate the communications act. The District of Colum-

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bia Court of Appeals affirmed F. C. C. Sangamon then sought Supreme Court review, which the government opposed.

The Government's brief called attention to testimony before the legislative oversight subcommittee of the House Committee on Interstate and Foreign Commerce, given in May and June, 1958, subsequent to the Court of Appeals decision.

The Government said this testimony indicates that while the matter was under consideration by F. C. C., representatives of someone interested in having a new channel assigned to St. Louis, and representatives of Sangamon and another applicant, who were interested in keeping Channel 2 in Springfield, made ex parte (outside) presentations to various F .C. C. members concerning the merits.

Sangamon's reply brief denied that the testimony indicates Sangamon, or any representative authorized by Sangamon, ever made any ex parte representations to any F. C. C. member.

Judgment Vacated

The Supreme Court's order directs that in view of the government's representations concerning the Congressional hearings, the judgment be vacated and the case remanded for such action as the Court of Appeals may deem appropriate. Identical disposition was made of WIRL Television Corp. v. United States, involving an attack on F. C. C.'s transfer of Channel 8 from Peoria, Ill., to the Davenport-Rock Island-Moline area.

Justices Clark and Harlan dissented on a purely procedural ground.

They agreed that impropriety in the F. C. C. proceeding, if it existed, is a proper subject for court inquiry. But they saw no need to vacate the judgments, feeling that denials of certiorari would not foreclose the Court of Appeals from considering the impropriety question.

The majority of seven, however, apparently took the view that such reconsideration ought not depend on the initiative of the parties, but was a duty the Court of Appeals should undertake regardless of what the parties' wishes might be. It is now for the Court of Appeals to find out whether in fact there occurred improper pressures or behind-the-scenes representations of a type which would invalidate the proceedings.

The court here was dealing with an important aspect of the recurring problem of protecting the integrity of administrative and judicial proceedings against serious abuse.

One of "Proudest Boasts"

As the court has said elsewhere, in requiring that proceedings tainted by the use of perjured or false testimony be reopened, "the untainted administration of justice" is "one of the most cherished aspects of our institutions" and "one of our proudest boasts."

Federal regulatory agencies exercise vast powers delegated by Congress. Some of the powers are conferred in such broad terms that, ordinarily, the agency's determination will be conclusive; the scope of judicial review is narrow indeed. Often the stakes are large. Safeguards are essential to assure that the great discretion entrusted to the agencies will be exercised only in an aboveboard manner which fully protects the public interest and the rights of all parties as well.

Much is being said about formulating new codes of ethics for administrative agencies. Certainly the administrative agencies themselves ought to make it clear that any effort to tamper with their processes will be vigorously rebuffed. If there were no reason to expect than an improper approach might succeed, perhaps fewer people would be tempted to try it.

Security Case To Be Reviewed

High Court to Rule On Firing by Plant

By HOWARD L. DUTKIN
Star Staff Writer

The Supreme Court today agreed to review a lower court ruling that the Defense Department has exclusive authority to decide security qualifications of employes in plants with defense contracts.

Attorneys for William L. Greene, a former vice president and general manager of the Engineering and Research Corp., asked the review, partly on the grounds that confidential information was used against Mr. Greene.

Mr. Greene was dismissed from his job in 1953 after the acting Secretary of the Navy wrote to his employer that Mr. Greene should be barred from classified files and projects.

A three-judge panel of the United States Court of Appeals here recognized that Mr. Greene was injured in being forced from his $18,000-a-year job. He later went to work as an architectural draftsman for $4,400 a year.

No Right of Confrontation

But, the opinion said, Mr. Greene did not have the right to be confronted by his accusers as he had claimed. The appellate court said the Navy Secretary's powers to exclude such employes from security information was clear under the "general program for industrial security."

A Navy review board had

See COURT, Page A-6

COURT

Continued From First Page

charged, among other things, that Mr. Greene in 1950 and 1951 had been in close association with Gregory Silvermaster and William Ludwig Ullman, who, the board said, had been identified as Soviet spies. Other charges involved Mr. Greene's alleged association with persons identified as Communist supporters.

The industrial security program covers hundreds of thousands of workers in plants throughout the country.

Appellate Court Ruled

The appellate court opinion, which had upheld the Government, declared that a government which is too cautious in applying the security program may ultimately have few re-

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serve it."

The opinion was written by Judge George T. Washington, with the concurrence of Judges Prettyman and Miller.

In another case, the high court agreed to rule on whether the Atomic Energy Commission might be barred from publishing a patent for processing "heavy water," an essential ingredient in the production of atomic power.

A scientist formerly employed by the AEC, Jerome S. Spevack, had lost a lower court move to have the commission enjoined from publishing details of the process which he had devised.

Mr. Spevack had developed the process before becoming a paid consultant with the AEC in 1949. While with the commission, he issued a report on the heavy water process. But he reserved the rights to his invention.

Subsequently, he was forbidden by the AEC from disclosing his process. This, Mr. Spevack contends, prevented him from seeking foreign patents.

Meantime, he contended, the AEC proposes to disclose the process itself.

In ruling against Mr. Spevack, the United States Court of Appeals for the District held that the Constitution does not forbid the publication of patents. Furthermore, the court stated, if publication of the patent deprived Mr. Spevack of property rights without compensation, the courts have power to grant him a judgment against the Government.

Attorneys for Mr. Spevack argued that the Atomic Energy Act did not authorize the commission to publish Mr. Spevack's process without his consent.

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Protesting Lawyer Quits Supreme Court Bar

A Shreveport (La.) lawyer has resigned as a member of the Supreme Court bar because of his "profound disrespect for the court as now constituted."

The attorney, Allen Harvey Broyles, had been admitted to practice before the court on May 2, 1947.

In a letter to the Supreme Court clerk, Mr. Broyles stated:

"Please strike my name from rolls of attorneys authorized to practice before the Supreme Court. Also, please note in your records that the action is taken pursuant to my request.

"In my opinion, the Supreme Court has flagrantly violated the doctrine of stare decisis (the doctrine of letting remain that which has been decided previously), has unduly stressed certain constitutional provisions and completely ignored others, has ignored obvious legislative intent and has patently violated all other established rules of interpretation of laws and the constitutional provisions."

Mr. Broyles said he shared "the opinion of many millions of Americans that the Supreme Court has substituted its own ideas . . . for established legislative processes."

The attorney continued:

"In view of my profound disrespect for the court as now constituted, I am no longer proud to be an officer of the court."

Court officials said that while resignations are unusual, they are not unprecedented. In most cases, no reason is given for a resignation.

The court yesterday granted Mr. Broyles' request.

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The Inquiring Fotographer

by JIMMY JEMAIL

THE NEWS will pay $10 for each question accepted for this column.

THE QUESTION

How do you feel about the Supreme Court freeing convicted Communists and reviewing Russian spy Abel's conviction on constitutional grounds while refusing to review Frank Costello's tax conviction on the same grounds?

WHERE ASKED

Brooklyn and Manhattan

THE ANSWERS

Bert L. Kummer, Brooklyn, sales manager: "Costello was never convicted of any crime except tax evasion and the Government admitted it took illegal steps to convict him. Abel, the master spy, was convicted of a heinous crime. Yet the Supreme Court will review his case on a technicality and refuses Costello a review. It's wrong."

Joseph B. Keating, Brooklyn, public relations: "Only recently the Supreme Court ruled against wire tapping. Yet, in spite of admissions that Costello's phones were tapped, the court refused a review, but it agreed to review Red spy Abel's conviction on the merest technicality. The court has freed many Communists on review."

Gertrude Kane, Brooklyn, department manager: "It's impossible for me to understand why the Supreme Court has been so kind to convicted Communists. Sure, Costello is a gambler, but everyone has a right to be heard in court. That's the American way."

James Marrianna, Brooklyn, [illegible]: "Tax evasion is the only crime Costello has been jailed for. It's trivial compared to Abel's offense. He is the most dangerous spy ever to come here. To review his conviction and deny Costello a review is hypocritical."

Bernard Wolff, Brooklyn, custom shirt maker: "I hold no brief for Frank Costello. He's a gambler and everyone knows it. But it's a crime to tamper with one's mail. The Government admits doing it with Costello. It's terrible when the Government breaks a law to convict someone. It could happen to anyone."

Stephen Malatak, Jackson Heights, bar manager: "The Supreme Court is only half right. Both cases should be reviewed. It should be a matter of pride in this country for us to be able to say: 'Yes, Costello is guilty, but his guilt has not been constitutionally proved in courts.'"

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Court-Curbing Bill

When Senator JOHN L. MCCLELLAN (D., Ark.) introduces a bill at the next session of Congress to curb the Supreme Court's powers to make sociological decisions he will be able to present convincing opinions in support which were lacking during the past session.

Especially in mind is the report of the Committee on Federal-State Relationships adopted by the Conference of Chief Justices at their August meeting. This report is highly critical of the Supreme Court's policy-making tendencies and of the court's inconstancy. On this point the report says:

". . . it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's ruling on constitutional questions as binding adjudications of the meaning and application of the Constitution, the court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years."

In the main, the report deals with the extent to which the Supreme Court has patently invaded the field of state's rights and is a document of such scope as to earn the classification of historic. Not only should it be introduced in support of any measure calculated to curb the court's powers but some of those who had a hand in its preparation should be heard in person at the customary hearings. Six of the 10 justices who prepared the document are on Supreme Court benches outside the South.

If partisan and sectional politics could be kept out of congressional consideration of the bill Senator MCCLELLAN says he will introduce and the Conference Report were presented properly, it is probable that the bill would be passed on strength of the report alone.

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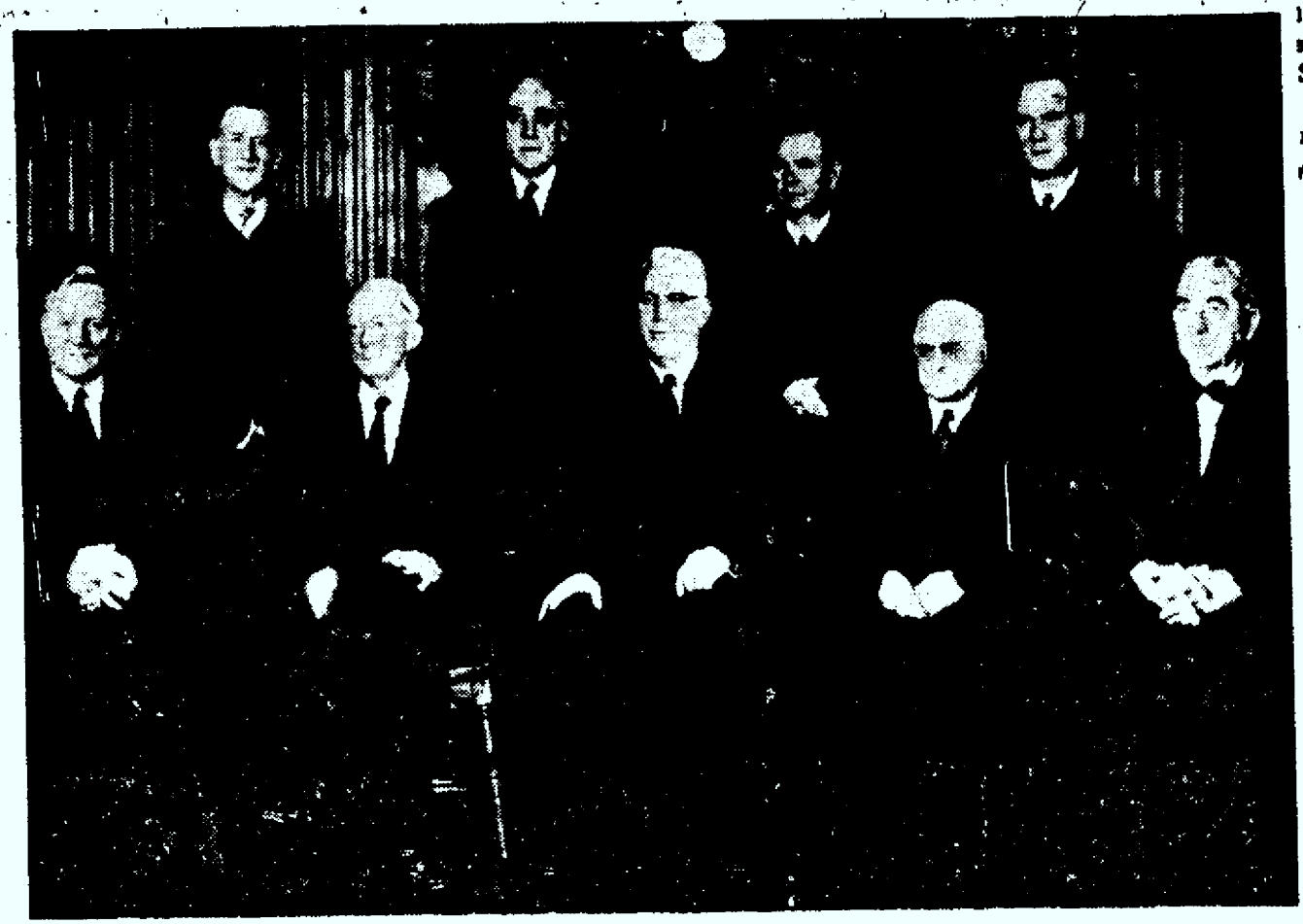

JUSTICES SIT FOR FORMAL PORTRAIT

This formal portrait of the Supreme Court, as now constituted, was taken today at the court building. Seated, left to right: Justices William O. Douglas, Hugo L. Black, Chief Justice Earl Warren, Felix Frankfurter and Tom C. Clark. Standing: Charles Evans Whittaker, John Marshal Harlan, Wiliam J. Brennan, jr. and Potter Stewart. AP Photo.

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All-American Nine

By Max Lerner

You must have seen their new group portrait in the papers yesterday. Each time a Supreme Court Justice dies or resigns, and a new one is tagged, they call in the photographer and pose stiffly for posterity in their new order of seniority. In the reshuffling, as with a game of musical chairs, everyone junior to the departed member moves up a chair, leaving the bleakest spot (farthest right, rear) to the cub.

I am glad the Supreme Court sticks to this ritual, for—aside from the foolish black robes of the Justices, and the quill pin on counsel's desk as he argues—not much else remains unchanged. The court's burdens have been multiplied, as have its enemies (Justice Harlan tried ruefully to answer the latter yesterday, as did Justice Douglas a few weeks ago). The calendar is more crowded, the cases more complex than they were, yet they have to move faster.

Almost every condition under which the judges of the past lived, worked, thought, conferred, wrote their decisions, has been changed. The court, moreover, has always been mixed up in the political embroilments of its time, but it is living as dangerously in our day as it ever lived.

* * *

If you like the human and dramatic, there is a book to your taste about the court—John P. Frank's "Marble Palace" (Knopf, $5). The author clerked for Justice Black, taught at a couple of law schools, and is now a working lawyer—which ought to explain the interesting mixture in the book of the academic and the human.

He tries to do too much—to give too compressed a survey of the court's development, describe its inner workings, pass on the literary frailties as well as on the philosophical and technical skills of the judges. In the end it is a bit of hodge-podge, but what of it? It isn't great scholarship or deep theory or even bitter polemics. But it is part of the humanizing of knowledge which makes the Tuesday accounts of the Monday decisions add up to more sense.

Incidentally the great event in Supreme Court scholarship will come soon when the volumes of the big Holmes project start appearing. With a characteristic gesture Justice Holmes left his estate to the U. S., and the money is being used to finance a six-volume history of the Supreme Court. The authors have now been chosen, the general editor is Paul Freund of Harvard, and the results ought to be good.

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RE: ALL-AMERICAN NINE
by MAX LERNER

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I like the article that Fred Rodell has written on some of the court greats, in "A Gallery of Justices," for the Saturday Review. He has put together an All-American Nine, or what he calls "One Man's Dream Court." It's a fascinating game. If you like to choose the Ten Best Plays, or Ten Best Movies, or Ten Greatest Scientists, why not a benchful of the great justices?

Of the 93 men who have served on the court since its beginnings (the ninety-third is Justice Potter Stewart, of Ohio) here are Rodell's Nine. He takes John Marshall and William Johnson from the Marshall Court. Then he jumps and takes Samuel Miller and John Harlan from the courts that sat between the Civil War and the turn of the century, the latter being the Plessy v. Ferguson dissenter. Then another jump, and he takes the great trio of giants —Holmes, Hughes and Brandeis—from the court of the early 20th century. He ends with his two favorite judges from the present bench—Black and Douglas.

Note that, except for Marshall, Rodell has packed his bench with liberals; and, except for Marshall and Hughes, it is also a bench of rebels and dissenters, both on economic and civil liberties issues. Even on a tribunal so massively based on precedent, it is the non-conformists who have done the most creative work.

* * *

I don't quarrel overmuch with this bias. But there are really only two judges whom everyone would choose—Marshall and Holmes. After that it is pretty much a grab-bag, if you are willing to defend what you grab.

I have two dissents from Rodell's list. I cannot accept a list of Supreme Court greats which omits Roger Taney: Marshall and Taney, between them, not only dominated the court for an interminable stretch but also laid the foundations of our constitutional law. To include Taney, I omit William Johnson—an interesting man, but a relatively slight figure. Similarly I find it hard to omit the craggy figure of Chief Justice Stone, especially after Mason's biography. To make room for him, I should have to drop Douglas.

Thus my own list reads Marshall, Taney, Miller, Harlan, Holmes, Hughes, Brandeis, Stone and Black. Not a very novel list, but in such matters novelty is not the deepest consideration.

* * *

One of the harshest compulsives in making such a list, is to limit yourself to only one member of the present court. Despite the attacks on it, mostly by know-nothings, it is a court that contains some extraordinary men. In an age of rubber-stamped political personalities, our justices have managed to be themselves.

Actually there are four men on the court—Black, Frankfurter, Douglas, and Warren—who could sit on an all-time bench without diminishing its stature. Black is hewn out of the Alabama soil, with a powerful mind that has remained steadfastly militant. Frankfurter is scholar and tactician, unfailingly and infernally articulate, the "concurringest" judge who has ever sat on the bench, ever searching an agonized conscience. Douglas has a good deal of the same outspokenness as Black, and—like him—courage and a fierce passion for freedom. And Warren, while he has been on the court too briefly to show the whole profile of his future development, has already displayed the qualities of a great Chief Justice.

These four men, in intellect, convictions, and the quality of their leadership, overshadow the President and the whole crowd of aspirants in both parties for the 1960 nomination.

In fact, if there is one event that could get me to vote the Republican ticket in 1960, it would be the very unlikely choice of Earl Warren as candidate.

0-20 (Rev. 7-18-58)

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REC-10

UPI-142

(COURTS)

NEW YORK--LOSS OF PUBLIC CONFIDENCE IN THE COURTS, REFLECTED IN THE RECENT ATTACKS ON THE SUPREME COURT, THREATENS THE EXISTENCE OF OUR CONSTITUTIONAL GOVERNMENT, MICHIGAN STATE SUPREME COURT JUSTICE JOHN R. DETHMERS WARNED TODAY.

"ONE MUST EXPERIENCE SOME CONCERN FOR OUR LIBERTIES IN THE RECENT UNBRIDLED ATTACKS ON THE INTELLIGENCE, INTEGRITY AND MOTIVES OF THE JUSTICES AND ON THE COURT AS AN INSTITUTION OF GOVERNMENT," JUSTICE DETHMERS SAID.

"SUBVERSIVES AND THOSE BENT ON THE DESTRUCTION OF OUR SYSTEM HAVE AS A PRIME OBJECTIVE THE UNDERMINING OF PUBLIC CONFIDENCE IN THE COURTS, KNOWING FULL WELL THAT WITHOUT THE SUPPORT OF PUBLIC OPINION COURTS CAN AVAIL NOTHING IN DEFENSE OF THE CONSTITUTIONAL RIGHTS OF PERSONS," HE SAID.

DETHMERS ADDRESSED 1,500 INDUSTRIALISTS AT A LUNCH OF THE 63RD ANNUAL CONGRESS OF AMERICAN INDUSTRY OF THE NATIONAL ASSOCIATION OF MANUFACTURERS.

WITH THESE CRITICISMS HE SAID, HAVE COME PROPOSALS TO CURB THE POWERS OF THE HIGH COURT. SUCH CURBS, HE ADDED WOULD STRIKE AT THE ROOTS OF OUR FREE SOCIETY BY MAKING THE CONSTITUTIONAL RIGHTS OF INDIVIDUALS AND MINORITIES DEPENDENT ON THE WILL OF THE MAJORITY AS REFLECTED IN CONGRESS.

AT THE SAME TIME, HOWEVER, THE MICHIGAN SUPREME COURT JUSTICE CRITICIZED WHAT HE SAID WAS THE DOMINATE "ACTIVIST" WING OF THE PRESENT SUPREME COURT.

HE SAID THE POSITION OF THESE JUDICIAL ACTIVISTS IS THAT THE COURT "IS FREE TO INTERPRET THE CONSTITUTION IN THE LIGHT OF CURRENT PHILOSOPHIES, PSYCHOLOGY AND POLITICAL AND SOCIAL DOCTRINES, REGARDLESS OF THE ORIGINAL INTENT OF ITS FRAMERS.

"IF, THE COURT IS TO EXERT A POLITICAL POWER TO ACHIEVE THE SOCIAL ENDS IT DEEMS EXPEDIENT, WHAT WILL REMAIN OF CONSTITUTIONAL RESTRAINTS ON GOVERNMENT AND CONSTITUTIONAL GUARANTEES OF PERSONAL RIGHTS AND LIBERTIES?" HE ASKED.

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WASHINGTON CAPITAL NEWS SERVICE

'Warren Court Greatest' — Edward Bennett Williams

"The Warren court is the greatest Supreme Court of our generation. . . . Never before has this nation needed in its legislative and executive branches the enlightened leadership it has received from the judiciary. . . . I doubt if the Bill of Rights would have gotten out of the Senate Judiciary Committee." These opinions were expressed by Edward Bennett Williams, nationally famous Washington, D. C., criminal lawyer whose clients have included Frank Costello, Jimmy Hoffa, Joseph McCarthy, and Aldo Icardi, in an address before the Ford Hall Forum in Boston last Sunday evening, November 30.

"Traditionally the Court has been the bastion of the status quo," Mr. Williams declared. But for the last five years, under Chief Justice Warren, the Court has been "dynamic, visionary, humanitarian, broad-gauged in its approach to the issues presented to it."

Mr. Williams expressed deep regret that the ruling outlawing segregated schools in *Brown* v. *Board of Education*, which he termed "a great humanitarian decision," was being "met with defiance by one-sixth of this nation." He expressed even deeper disappointment because the "Chief Executive of this Land took a position of moral neutralism" on the school integration problem. "There is no room for neutralism on the greatest domestic moral issue of our times," he asserted.

Mr. Williams heralded the *Watkins* decision of the Supreme Court as long needed and long overdue. "Legislative committees need to be curbed," he declared, and the only way they can be effectively curbed is by the courts. "The Kefauver committee ran wild," Mr. Williams asserted, as later did the red-hunting committees and the McClellan committee.

Congress, Mr. Williams asserted, has "no right to expose for the sake of exposure alone." A Congressional committee has a right to conduct an inquiry or investigation only if it has an "honest-to-goodness, bona fide intention to legislate," and to use the

(Continued from page one)

products of its investigation as an aid to legislation.

The *Watkins* case affirmed this principle, Mr. Williams stated, but that decision has been "met for over a year with open and cynical defiance" by Congressional committees "who have refused to recognize it."

These committees, he continued, have a habit of meeting in a closed session. If the testimony given by witnesses at this closed session is of a nature "to excite headlines," he charged, the witnesses are recalled in open session, where they are again asked the same questions that they have already answered, or refused to answer, for the sole purpose of publicly humiliating them.

The committees, he continued, also have a habit of calling witnesses in open session after they have been advised that the witnesses will not answer, but will instead seek refuge in the 5th Amendment. The apex of a modern Congressional investigation, he declared, seems to be "to call a witness who will testify nothing about a subject concerning which the Committee already has full information."

Mr. Williams decried what he termed the "legislative lynch," the process of calling witnesses before an open hearing for the illegitimate purpose of publicly humiliating and castigating them. "It is just as wrong to lynch a guilty man as it is to lynch an innocent man," he declared. Even a "good end does not justify an evil means."

Mr. Williams singled out the *Benanti* decision for praise. But he deplored the fact that while wiretapping in the United States is a crime under a federal statute, the F.B.I. habitually taps wires. Indeed, he charged, it is "standard investigative procedure" in certain types of cases. This "has sullied the reputation of an otherwise fine organization."

To the argument that it is necessary to tap wires to compete with the modern criminal, Mr. Williams replied, "necessity has been the excuse for infringement of human rights and liberties since time immemorial." It is the "argument of tyrants," he continued. The significant difference between a democracy and a totalitarian state is that in a democracy the police

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The Worker
New Leader

Harvard Law Record
Date 12-4-58

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"are under the law;" in a totalitarian state "the police are the law."

Mr. Williams emphasized that as long as it is a crime under a federal statute to tap wires, he would oppose the tapping of wires by the F.B.I. "Lawless law enforcement breeds anarchy. Crime is contagious."

Softening a little, he indicated that he might favor a modification of the law to permit the F.B.I. to tap wires in certain specific types of cases after the procurement of a court order upon good cause shown. But the F.B.I. has never gone before Congress and asked for a change in the law. This may be, he explained, because it would be embarrassed, for its hands are not clean. But it is more likely, he said, that the F.B.I. is more satisfied with things the way they are and doesn't want to be bothered with going to court and showing good cause when it wishes to tap wires.

Mr. Williams expressed confidence that the Supreme Court would overturn a 20-year-old decision and rule, in a case of his now before the Court, that the use of detectaphones and other types of modern mechanical eavesdropping equipment is unconstitutional. It is irrational to believe, he stated, that the framers of the Constitution intended that a man's written papers and documents should be secure against illegal search and seizure, but that his most private conversations in his private home should be entitled to no such protection.

Vigorously defending the *Jencks* decision, Mr. Williams stated that he learned years ago, representing insurance companies, that when defending a corporate bankroll in a civil case, a lawyer has the opportunity to take the plaintiff's deposition, question him about his case, force him to produce germane papers and documents, etc., so that when the lawyer enters court he is "like a quarterback with a full set of the opponent's plays." But when you go into a courtroom to defend a man whose life or freedom rather than his bankroll is in jeopardy, he pointed out, none of the above weapons are available to you. You go in "flying blind."

Mr. Williams expressed wholehearted agreement with the *Nelson* decision, asserting that it would be a grievous error to have "48 standards of sedition" in this country. "There should be one standard of Americanism," he stressed, "not 48."

The noted attorney lamented that every time there is a movement in the direction of the extension of human freedom, especially a movement in the courts, there is an immediate reaction. Legislation was introduced into Congress for the purpose of overturning the *Benanti, Jencks, Nelson, Mallory,* and other decisions, almost immediately after they were announced, he observed with dismay. The Senate Judiciary Committee has a habit of "rushing forward" with this type of reactionary legislation.

Mr. Williams produced and quoted from a document which he said was disseminated in June and July of this year by the Senate Judiciary Committee and which, in effect, labeled the Supreme Court a "tool of the Communist party." This was the "most scandalous report ever put out by an arm of the United States government," he declared, and it was paid for with the taxpayer's money. The embarrassment of some of the members of the Committee soon forced its recall, he continued, and it is no longer available.

The most shocking thing about the whole business, Mr. Williams declared, was the fact that the document met with "apathy and indifference" from not only the public but from the Bar. For the latter there was no excuse, he asserted.

—Binder

Edward Bennett Williams

0-19 (Rev. 7-18-58)

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Criticism Of Court Clarified

Associated Press

Attorney General William P. Rogers has been advised that a report criticizing the Supreme Court which was adopted last August by the Conference of Chief Justices of State Courts "did not undertake to deal" with High Court decisions in the school desegregation cases.

The Justice Department yesterday made public an exchange of letters on the subject between Rogers and Chief Judge Frederick W. Brune of the Maryland Court of Appeals. Brune headed the Conference committee which prepared the critical report dealing with "Federal-state relationships as affected by judicial decisions."

Brune told Rogers, in response to an inquiry:

"The report did not mention the school desegregation cases; and it did not undertake to deal with them."

The state judges, meeting at Pasadena, Calif., adopted the report by a vote of 36-8 on Aug. 23. At the time, litigation over attempts to get Little Rock's Central High School reopened on a desegregated basis was in the headlines all over the Nation.

The Pasadena conference report accused the Supreme Court of lacking "judicial restraint" and of making "impatient decisions" which usurped states rights.

Wash. Post and Times Herald
Wash. News
Wash. Star
N. Y. Herald Tribune
N. Y. Journal-American
N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

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0-20 (Rev. 7-18-58)

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BE-13A
(COURT)
THE SUPREME COURT AGREED TODAY TO EXAMINE A TEST CASE IN WHICH SIX NEGROES WERE CONVICTED UNDER A STATE TRESPASS LAW WHEN THEY TRIED TO PLAY GOLF ON A PUBLIC COURSE AT GREENSBORO, N.C.
THE SIX WERE SENTENCED TO 30 DAYS IN JAIL AS THE RESULT OF A DEC. 7, 1955, INCIDENT AT THE GILLESPIE PARK GOLF CLUB. THE COURT WILL HEAR ARGUMENTS ON THEIR APPEAL AND HAND DOWN A WRITTEN OPINION LATER THIS TERM.
THE COURT ALSO:
--AGREED TO EXAMINE THE VALIDITY OF A LOS ANGELES CITY ORDINANCE WHICH MAKE IT A CRIME FOR A BOOKSELLER TO HAVE AN OBSCENE BOOK IN HIS POSSESSION. ELEAZAR SMITH, WHO APPEALED HIS 30-DAY SENTENCE UNDER THE LAW, CONTENED IT IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE THAT THE BOOKSELLER MUST HAVE KNOWLEDGE OF THE BOOK'S CONTENTS.
--ACCEPTED FOR REVIEW A CASE CHALLENGING FEDERAL POWER COMMISSION REGULATION OF NEW GAS RATES FIXED IN FIRST CONTRACTS BETWEEN PRODUCERS AND PIPELINES. IT INVOLVES A CONSUMER CLASH WITH PRODUCERS.
--REJECTED A CHALLENGE TO PHILADELPHIA'S 1939 INCOME TAX LAW WHEN IT IS APPLIED TO THE SALARIES OF NON-RESIDENT FEDERAL EMPLOYES.
--RULED THAT NON-PROFESSIONAL EMPLOYES OF AN ARCHITECTURAL-ENGINEERING FIRM ARE SUBJECT TO FEDERAL WAGE-HOUR PROVISIONS. THE 7 TO 2 DECISION MEANS SUCH WORKERS MUST BE PAID AT TIME-AND-A-HALF FOR OVERTIME AFTER 40 HOURS A WEEK.
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WASHINGTON CAPITAL NEWS SERVICE

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DeLoach
McGuire
W.C. Sullivan

Let's Give The Devil His Due

A lot of Arizonans are tossing squishy verbal tomatoes at the U.S. Supreme Court for saying a white reservation trader couldn't use state courts to collect a bill from an Indian. We think they're throwing at the wrong target.

Heaven knows the supreme court has been in hot water for a long time, and fully deserves to be there. The justices deserve most of the lambasting they have received for habitually tossing legal precedent out the window, ignoring the plain intent of the Constitution and congress in many cases, and going blithely ahead creating "the law" as they individually think it should be. It is precisely because they did not do any of these things in the Arizona case that we hate to see them smeared for it.

The question in the Arizona case was whether Hugh Lee of the Ganado Trading Post on the Navajo Indian Reservation could sue and collect in state courts for goods he sold to Paul and Lorena Williams, Indians, on credit. The Arizona Supreme Court thought he could, because no act of congress expressly prohibits state jurisdiction over civil suits by non-Indians against Indians involving dealings on a reservation. The U.S. Supreme Court disagreed.

WE ARE NOT going to attempt to referee between the courts, but one thing seems certain. The U.S. Supreme Court did not overstep judicial bounds this time. It stayed with precedent and law, instead of trying to change them. It noted that the United States is still bound by a treaty with the Navajos signed by Gen. William T. Sherman in 1868 giving the tribal government exclusive jurisdiction over internal affairs and prohibiting all but U.S. government personnel from entering the reservation. (Lee, the trader, operated under a federal license.)

The high court noted that the Navajo-Hopi rehabilitation bill passed by congress in 1949 was adopted only after a provision was dropped which would have given jurisdiction to state courts. Obviously congress did not intend the state courts to have automatic jurisdiction, else it would not have deleted the provision. The lawmakers did, however, pass a law in 1953 saying the states could take jurisdiction by state legislation or state constitutional amendment, whichever might be called for. Arizona has never taken such action; therefore, in the opinion of the federal supreme court, has not acquired jurisdiction.

WE WOULD say that the nine cagy men in Washington have established an airtight case for the proposition that congress has said "no" to automatic jurisdiction of state courts over what happens on Indian reservations. That leaves the question: Did congress have the constitutional right to say no? Is this not a power which is "not delegated to the United States by the Constitution, nor prohibited by it to the states," and which therefore is "reserved to the states respectively"?

It would be, except for one thing. Congress acted under the treaty signed by General Sherman — and treaties rank equally with the Constitution as the supreme law of the land.

If we are right, and the federal supreme court has stayed foursquare with precedent and the law in this case, then let's not pick on the court for not doing that which we previously have criticized it for doing—making its own law. If the law itself needs changing, let's get it changed by going to congress or the legislature. As we have maintained all along, that is where law ought to be made.

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ROBERT BARRY, Managing Editor; PHOENIX GAZETTE
1/17/59 - page 6

RE: U.S. SUPREME COURT DECISION CONCERNING SERVICE OF LEGAL PAPERS ON INDIAN RE (Information)
PX 70-0

59 FEB 5 1959

0-19 (Rev. 7-18-58)

Warren Court vs Vinson Court

By Alan Barth

The following is condensed from a lecture delivered at the University of California, where Barth is a visiting lecturer on leave from the editorial department of The Washington Post.

THE COUNTRY'S courts, Alexander Hamilton wrote in the Federalist, were intended to be "an intermediary body between the people and the legislative in order, among other things, to keep the latter within the limits assigned to their authority."

And he declared that the restraints which the Constitution sought to impose on Congress "can be preserved in practice no other way than through the medium of courts of justice whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights and privileges would amount to nothing."

The Federal courts — and especially the United States Supreme Court—are expected under this concept of the judicial function to serve as sentinels and champions of individual liberty as against the potentially oppressive power of the State—and especially against legislative intemperance and extravagance.

It can fairly be said, I think, that the Warren Court has fulfilled this concept a great deal more vigorously and effectively than the Vinson Court which preceded it. If you divide the past decade in half, taking as the dividing point 1953, the year in which Earl Warren succeeded Fred Vinson as Chief Justice, you will find an unmistakable and, indeed, dramatic change in the tenor of the Court's decisions during the last five years as compared with the five years preceding.

What I want to attempt here is to relate the general trend and temper of the Supreme Court's decisions during the past decade to the emotional orientation and temperature of the national community in which the Court functions.

My hope is to put a hand, as it were, on the national forehead—in much the manner that a mother sometimes puts her hand on the forehead of a child to determine if he is well enough to go off to school—and thus arrive at some kind of rough, unscientific and admittedly unscholarly judgment as to the national temperature regarding civil liberties.

ONE ILLUSTRATION of the contrast between the Vinson and Warren Courts may be found in the striking difference of emphasis between them in interpreting the Smith Act—the Act which makes it a crime to teach or advocate the duty or necessity of overthrowing the Government by force and violence.

In an opinion written by Chief Justice Vinson himself in 1951, the Court upheld the constitutionality of the Smith Act, Justices Black and Douglas dissenting.

In 1957—without actually repudiating the Dennis decision of 1951 —, the Warren Court reversed the conviction of several California Communists, adopting the view that men may be punished for advocating overthrow of the Government by force and violence only when those to whom the advocacy is addressed are urged "to do something now or in the future, rather than merely to believe something."

This still leaves the possibility, as Mr. Justice Black pointed out, that men may be convicted for "agreeing to talk as distinguished from agreeing to act." Nevertheless, it goes a long way toward restoring to the clear-and-present-danger doctrine some of the original meaning given to it by Justices Holmes and Brandeis and almost drained from it by Judge Learned Hand and by the Vinson Court. The Warren Court put its emphasis on the protection of free speech rather than on the protection of national security.

COURTS may be judged, to some extent, by what they don't do—granted, of course, the wisdom of waiting until an apt case comes before them. Time and again—in the Josephson Case, in the Barsky Case, in the Lawson Case and in others as well—the Vinson Court was asked to pass upon the validity of inquiry by congressional investigating committees into private political belief. In eloquent dissenting opinions, such distinguished Appellate Court judges as Edgerton and Clark contended that questions put to witnesses by the House Committee on Un-American Activities violated First Amendment rights.

But the Vinson Court declined to review any of these cases. And so it allowed the Un-American Activities Committee and the Senate Internal Security Subcommittee, and even Sen. McCarthy's permanent Subcommittee on Investigations, to proceed unchecked in their deliberate efforts to punish by publicity conduct or belief which the Constitution of the United States forbade Congress to make punishable by law.

In the Watkins decision a year ago, however, Chief Justice Warren reasserted a doctrine long settled by the courts that the congressional power to investigate is a limited power, subject to the same limitations which the Constitution imposes on the power to legislate, of which it is an adjunct.

Then he went on to assert in language very reminis

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Supreme Court

Wash. Post and Times Herald
Wash. News
Wash. Star
N. Y. Herald Tribune
N. Y. Journal-American
N. Y. Mirror
N. Y. Daily News
N. Y. Times
Daily Worker
The Worker
New Leader

Date JAN 18 1959

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