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SHOULD THE SUPREME COURT BE "CURBED"? A PRESENTATION OF CIVIL LIBERTIES DECISIONS IN THE 1957-58 TERM

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The Supreme Court of the United States and its Justices have been criticized many times in our constitutional history. Current attacks, however, have reached a degree of bitterness and velocity unknown in recent years. The Honorable M. T. Phelps, senior justice of the Arizona Supreme Court is quoted as follows: "It is the design and purpose of the (United States Supreme) Court to usurp the policy-making powers of the Nation . . . By its own unconstitutional pronouncements, it would create an all-powerful, centralized Government in Washington. . . . I honestly view the Supreme Court, with its present membership and predilictions, a greater danger to our democratic form of government and the American way of life than all forces aligned against us outside our boundaries."[1] The Chairman of the Committee on the Judiciary of the United States Senate told his colleagues that the Supreme Court had engaged in delay, suppression, pre-emption, invention and misstatement to benefit the Communist cause and asked: "When do we begin to act in discharge of our responsibility to the people of the United States to curb this Court and restore the balance of powers; . . . preserve the power of the legislative branch to make the laws; preserve the power of the executive branch to choose and control its own employees; preserve the power of the States to keep order; protect the Constitution itself?"[2]

Discontent with the Supreme Court is manifest in high quarters. The Conference of Chief Justices of the state supreme courts voted 36 to 8 in favor of a resolution urging the Supreme Court to exercise 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."[3] A mail questionnaire was sent to the 351 active federal judges, and of the 128 judges replying, 54 percent agreed with the state chief justices that the Supreme

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[1] 104 Cong. Rec. 12120 (daily ed. July 10, 1958).
[2] *Id.* at 12121.
[3] N.Y. Times, August 24, 1958, § 1, p. 42, col. 2.

Court "too often has tended to adopt the role of policy maker without proper judicial restraint."[3a]

Discontent with the Supreme Court is manifest in the halls of Congress. At least six bills designed to "curb" the Supreme Court were introduced in the last session[4] and were defeated in the crucial Senate vote by a majority of 41 to 40.[5] The closeness of this vote made it plain to the New York Times "that while the battle was over the war was not, and that the effort to restrict the court is certain to be renewed in the Eighty-sixth Congress."[6]

Are attacks similar to those described above justified? Does the Court "coddle" communists,[6a] needlessly hamstring law-enforcement officials, usurp the power constitutionally lodged elsewhere, and ignore the distinction between that which is prescribed by the Constitution and that which a majority may deem desirable? The best answer is found by a study of the Court's decisions when it is asked to protect asserted fundamental rights of the individual against the power of government. This Article will present, under appropriate headings, fifty such decisions handed down in the 1957-8 Term of the Supreme Court. By avoiding editorial comment, by fairly presenting the factual situation giving rise to the controversy, and by giving the reasons set forth in the majority, concurring and dissenting opinions, it is felt the reader may view the current problem with more light if not with less heat.

Freedom of Speech and Assembly

On many occasions the Court was asked to set aside federal and state action on the grounds that it unduly infringed on rights of speech, assembly and religion. The Court reached the merits of these contentions in only three instances: two involving state interference with labor union activities, the third involving state impediment of the right to associate for the advancement of colored people. In two of these cases the Court held the individual interest was paramount, in the third the Court found sufficient justification for the state interference.

The first of these cases, *Youngdahl v. Rainfair*,[7] concerned the right of women strikers to congregate across the street from the plant and call the non-strikers such words as "cotton patch scabs," "pony tailed scabs," "cotton picking fools," etc. The strikers called one of the non-strikers

[3a] *How U.S. Judges Feel About the Supreme Court*, U.S. News & World Report, Oct. 24, 1958, p. 36.
[4] N.Y. Times, August 21, 1958, § 1, p. 1, col. 6.
[5] 104 Cong. Rec. 17437 (daily ed. August 21, 1958).
[6] N.Y. Times, August 24, 1958, § 4, p. 2E, col. 2.
[6a] Ober, *Communism and the Supreme Court*, 44 A.B.A.J. 35 (1958).
[7] 355 U.S. 131 (1957).

"fat scab" and asked her if the plant manager still liked her "low-cut dresses and earrings." The state courts enjoined this activity on the ground that it "was calculated to cause a breach of the peace." The Union contended that this language was appropriate in the rural area of eastern Arkansas where it occurred, and hence protected by the first amendment. The Court, in an opinion by Mr. Justice Burton, sustained the injunction. "Words can readily be so coupled with conduct as to provoke violence. . . . Recognizing that the trial court was in a better position than we can be to assess the local situation, we think the evidence supports its conclusion, affirmed by the State Supreme Court, that the conduct and massed name-calling by petitioners were calculated to provoke violence and were likely to do so unless promptly restrained."[8]

The Chief Justice, Mr. Justice Black and Mr. Justice Douglas dissented without reaching the merits on the ground that Congress had given the National Labor Relations Board exclusive jurisdiction of this controversy.

The second case, *Staub v. City of Baxley*,[9] also concerned the right of union persons to carry on union activity. The City of Baxley, in Georgia, enacted an ordinance making it illegal to "solicit" citizens of Baxley to become members of any "union or society" which requires fees or dues from its members without first applying for and receiving a permit from the Mayor and Council. The Mayor and Council had discretion to grant or deny the permit after considering, *inter alia*, "the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of the citizens of the City of Baxley."

Without applying for a permit, Staub, a union organizer, solicited several residents of the city to join the union. For this she was found guilty of violating the ordinance and fined $300. The Georgia court of appeals sustained the conviction without considering the constitutional issues on the theory that Staub's failure to apply for a permit precluded her from attacking the statute. The Supreme Court, in an opinion by Mr. Justice Whittaker, reversed. Holding that "the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance,"[10] the Court then said that "an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of

[8] 355 U.S. at 138-39.

[9] 355 U.S. 313 (1958).

[10] 335 U.S. at 319. "The Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands." Jones v. Opelika, 319 U.S. 103, 104 (1943).

an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."[11] Mr. Justice Frankfurter dissented for the reason that the Georgia decision refusing to hear the constitutional issues constituted an adequate non-federal ground for decision precluding the Supreme Court from hearing or deciding the merits.[12] Mr. Justice Clark concurred in this dissent.

The third decision in this area of law, *N.A.A.C.P. v. Alabama*,[13] concerned the right of Alabama to compel the N.A.A.C.P. to reveal the names and addresses of all its Alabama members. The Court held it could not. The question arose in the following manner. Alabama has a registration statute requiring all foreign corporations to designate a place of business and an agent to receive service of process before doing business within the state. The N.A.A.C.P., a New York corporation, had carried on its activities in Alabama since 1918 without complying with this statute. In 1956, the Alabama Attorney General filed suit to enjoin the Association from conducting further activities and to oust it from the state because of its failure to comply. The state circuit court in Montgomery County issued an *ex parte* restraining order that day. The N.A.A.C.P. moved to dissolve the restraining order contending that its activities did not subject it to the requirements of the statute, and alternatively, offering to comply. The Attorney General then moved for the production of a large number of the Association's records and papers, including membership lists, alleging that such documents were necessary for trial preparation in view of the denial by the N.A.A.C.P. that its activities within the state brought it within the terms of the qualification statute. Over the N.A.A.C.P.'s objection that disclosure of its membership would expose its members to economic reprisal, loss of employment, physical coercion, and other manifestations of public hostility, the court ordered the production of the requested records. The N.A.A.C.P. produced all the records requested except for the membership lists, and for this failure, was adjudged in contempt of court and fined $100,000.00. The N.A.A.C.P. appealed the contempt

[11] 335 U.S. at 322.

[12] "Where the decision of the state court is deemed to rest upon a non-federal ground which independently and adequately supports the state court judgment, the Supreme Court will not exercise jurisdiction to review notwithstanding the raising of federal questions upon the state court record or the decision of these questions by the state court. . . . In determining the 'adequacy' of non-federal grounds of decisions, the Supreme Court applies its own criteria, and determines the inquiry for itself, . . . otherwise power to review easily may be avoided." ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 89, 95 (2d ed., Wolfson & Kurland 1951).

[13] 357 U.S. 449 (1958).

conviction to the Alabama Supreme Court by way of certiorari, and that court held that membership lists are not privileged against disclosure when state demands are reasonable. A unanimous Supreme Court, in an opinion by Mr. Justice Harlan, reversed. It held that "the interplay of governmental and private action," resulting in loss of employment, physical coercion, etc., constitutes "a substantial restraint upon the exercise of petitioner's members of their right to freedom of association."[14] Alabama sought to justify its need and interest in the membership lists by showing that they were essential in proving that the N.A.A.C.P. conducted an intra-state business in violation of the foreign corporation registration statute. In view of the Association's admission that it conducted activities there since 1918, of its offer to comply with the registration statute, and of its compliance with the Attorney General's request to furnish all of its other books and records, the Court held that the state's interest was not sufficient "to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association."[15]

Loyalty-Security Cases

In five additional cases the individuals concerned contended they had been deprived of rights and privileges because of activities protected by the freedoms of speech, association and religion. One of these concerned an unfavorable Army discharge because of pre-induction activities, two of them concerned the dismissal of state employees for failure to answer questions relating to communism, and two of them concerned the denial of tax exemption for refusal to sign loyalty oaths. In three of these cases the Court sustained the right of the individual, in the other two the Court felt the state interests were controlling. In none of them did the Court base its decision on the principal rights asserted. The cases follow.

Harmon v. Brucker[16] involved the right of the Secretary of the Army to discharge a draftee with an honorable service record under conditions less than "honorable" because of pre-induction associations. The Solicitor General, conceding that the Secretary of the Army's action could not be defended on the merits, argued that Congress intended the Secretary to have the final say-so as to the type of discharges he granted, and that therefore the courts lacked review jurisdiction. The Supreme Court, in a per curiam opinion, held that the Secretary has no statutory authority to base discharges on anything other than military service,

[14] 357 U.S. at 462-63.
[15] 357 U.S. at 463.
[16] 355 U.S. 579 (1958).

and this being so, "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."[17] Mr. Justice Clark dissented. Reaching the merits, he reasoned that the Secretary of the Army can discharge security risks from the Army, that pre-induction activities are relevant in determining whether or not a soldier is a security risk, and that if a soldier is discharged as a security risk, "I would not require the Secretary to issue a discharge certificate which on its face falsifies the real grounds for its issuance."[18]

Beilan v. Board of Education[19] was the first of two cases concerning the discharge of a public employee for refusal to answer questions relating to communism. Beilan, a public school teacher in Philadelphia, was called into his Superintendent's office in June 1952 and asked if he had been a member of the Communist Political Association in 1944. He refused to answer. Continuing his teaching, he received "satisfactory" ratings for the next 13 months. Then, subpoenaed before the congressional Committee on Un-American Activities, he invoked the privilege against self-incrimination when asked questions relating to past membership in the Communist Party. A week later he was suspended and then discharged from his teaching job on the ground that his refusal to answer the question asked by the Superintendent rendered him "incompetent" as that term was used in the appropriate statute authorizing the discharge of "incompetent" teachers. The Supreme Court of Pennsylvania sustained the discharge, holding that the statutory term "incompetence" applied to this situation.

In the companion case of *Lerner v. Casey,*[20] a New York City subway conductor was discharged under the New York Security Risk Law when the New York courts found that his refusal to answer questions relating to communism made him of "doubtful trust and reliability" and hence a "security risk."

The Court sustained both discharges. When Beilan engaged in public school teaching, wrote Mr. Justice Burton for the Court's majority, he undertook "obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher. . . . [T]he Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's 'deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' This interpretation is not inconsistent with the Federal Constitution."[21] Mr. Justice Harlan, for the majority in *Lerner,* found no

[17] 355 U.S. at 581-82.
[18] 355 U.S. at 586.
[19] 357 U.S. 399 (1958).
[20] 357 U.S. 468 (1958).
[21] 357 U.S. at 405, 408.

"constitutional block" to the discharge in that case, as "a finding of doubtful trust and reliability could justifiably be based on appellant's lack of frankness . . . just as if he had refused to give any other information about himself which might be relevant to his employment."[22] Mr. Justice Frankfurter wrote a concurring opinion to emphasize that neither Beilan nor Lerner were fired because of communist activities. "The services of two public employees," he wrote "have been terminated because of their refusals to answer questions relevant, or not obviously irrelevant, to an inquiry by their supervisors into their dependability."[23]

There were four dissenters and three dissenting opinions. If the only rights involved in these two cases, wrote Mr. Justice Brennan, "were the rights of an unreliable subway conductor and an incompetent schoolteacher to hold their jobs," he failed to see "why it should take some nine pages in each case to justify the State's action." What is at stake, he added, is the "public labeling of the employees as disloyal." It is arbitrary and unconstitutional, he reasoned, to discharge a public employee as disloyal or subversive when the only evidence justifying such action is the employee's refusal to answer questions. Assuming membership in the Communist Party to be relevant to employment, Mr. Justice Brennan said: "But can we suppose that a subway conductor would be branded a security risk if he refused to answer a question about his health? Of course the answer is no, although the question is plainly relevant to his qualifications for employment."[24]

Mr. Chief Justice Warren concurred with Mr. Justice Brennan's dissent and added that "the facts of record compel the conclusion that Beilan's plea of the Fifth Amendment before a subcommittee of the House Committee on Un-American Activities" motivated the Board's discharge action. "The clearest indication of this is the fact that for 13 months following petitioner's refusal to answer the Superintendent's questions, he was retained as a school teacher . . . yet five days after his appearance before the House subcommittee petitioner was suspended. Since a plea of the Fifth Amendment before a congressional committee is an invalid basis for discharge from public employment, *Slochower v. Board of Higher Education,* 350 U.S. 551, I would reverse the judgment approving petitioner's dismissal."[25]

Mr. Justice Douglas concurred in the Chief Justice's dissent, and added that "we deal here only with a matter of belief. We have no evidence in either case that the employee in question ever committed a crime, [or] ever moved in treasonable opposition against this country. . . . [G]overnment has no business penalizing a citizen merely for his beliefs

[22] 357 U.S. at 476.
[23] 357 U.S. at 410.
[24] 357 U.S. at 422.
[25] 357 U.S. at 411.

or associations."[26] Mr. Justice Black concurred with the dissents of the Chief Justice and Mr. Justice Douglas.

The two remaining "loyalty-security" cases involved the constitutionality of California laws requiring a "loyalty oath" as a condition precedent to tax exemption. In 1952 the California constitution was amended[26a] to bar any person or organization which "advocates" the overthrow of the Government by force, violence, or other unlawful means from tax exemption. The legislature implemented this constitutional amendment with a statute[26b] requiring the claimant for tax exemption to file an oath declaring that he does not engage in the activities described in the amendment. According to existing procedure,[26c] if tax exemptions were disallowed the burden of proof was on the claimant to test the validity of the administrative determination at law.

Speiser, a veteran otherwise exempt from real property taxation, refused to sign the oath and paid his taxes under protest. He then filed suit to recover the tax, alleging that the Federal Constitution forbade the exaction of an oath as a condition of obtaining tax exemption. Specifically, he contended that the restraint on "advocacy" deprived him of rights of speech and assembly. The California Supreme Court construed the constitutional amendment as denying the tax exemptions only to claimants who engage in speech which may be criminally punished consistently with the free-speech guaranties of the Federal Constitution, *i.e.*, the amendment does not reach the advocacy of mere "abstract doctrine." As so construed, the laws were sustained.

The Supreme Court, in an opinion by Mr. Justice Brennan, reversed.[27] Assuming for purposes of the decision, that the Constitution does not prevent California from taxing illegal "advocacy," "the question remains whether California has chosen a fair method for determining when a claimant is a member of that class to which the California court has said the constitutional and statutory provisions extend."[28] California had placed upon the claimant the burden of proving that his speech was not illegal. The line between protected and illegal speech "is finely drawn." To make the one seeking tax exemption prove to the satisfaction of the tax collector that his speech has not crossed that line is to compel him to "steer far wider of the unlawful zone than if the State must bear these burdens. . . . In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech

[26] 357 U.S. at 413-14.

[26a] CAL. CONST. art. XX, § 19.

[26b] Cal. Rev. & Tax Code § 32.

[26c] First Unitarian Church v. Los Angeles, 48 Cal. 2d 419, 430, 311 P.2d 508, 515 (1957).

[27] Speiser v. Randall, 357 U.S. 513 (1958).

[28] 357 U.S. at 520.

which the Constitution makes free."[28a] Mr. Justice Douglas wrote a concurring opinion in which he said: "The state by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established."[29] Mr. Justice Black concurred with the Court and with Mr. Justice Douglas and wrote an opinion (in which Mr. Justice Douglas concurred) which said that "this whole business of penalizing people because of their views and expressions concerning government is hopelessly repugnant to the principles of freedom upon which this Nation was founded and which have helped to make it the greatest in the world."[30] Mr. Justice Clark dissented. "An exemption from taxation . . . is a bounty or gratuity on the part of the sovereign. The power of the sovereign to attach conditions to its bounty is firmly established under the Due Process Clause. . . . If the State's requirement of an oath in implementing denial of this exemption be thought to make an inroad upon speech over and above that caused by denial of the exemption . . . I find California's interest still sufficient to justify the State's action . . . an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it."[31]

In the companion case of *First Unitarian Church v. Los Angeles*,[32] the Church had refused to sign the oath as a "matter of deepest conscience," denying power in the state to require "coerced affirmation as to church doctrine, advocacy, or beliefs." In addition to the contentions made by Speiser, the Church argued that the California provisions are invalid "as abridgments of religious freedom." The Court, in an opinion by Mr. Justice Brennan, reversed the denial of the tax exemption for the reasons set forth in the *Speiser* case without discussing this additional argument. Mr. Justice Douglas wrote a concurring opinion in which he said there is a "supremacy of conscience in our constitutional scheme," and "no power in our Government to make one bend his religious scruples to the requirements of this tax law."[33] Mr. Justice Clark dissented. "The California court found that no tenet of petitioners' respective religions embraces the activity which is the subject of the state provisions. Nor does it appear that such activity can be characterized as religious in nature. . . . I would affirm."[34]

[28a] 357 U.S. at 526. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." Bailey v. Alabama, 219 U.S. 219, 239 (1911).

[29] 357 U.S. at 532-33.
[30] 357 U.S. at 531.
[31] 357 U.S. at 541, 543.
[32] 357 U.S. 545 (1958).
[33] 357 U.S. at 548.
[34] 357 U.S. at 548.

PROCEDURAL DUE PROCESS

Seven of the cases decided last term concerned procedural due process: the right to a day in court, the right to obtain and present evidence, the right to a trial untainted by perjured testimony, the right to indictment by grand jury, and the right to be free from punishment for violation of unknown and unknowable laws. They follow below.

Societe Internationale v. Rogers[35] concerned the power of a federal district court to dismiss an action because of plaintiff's failure to comply with a pre-trial inspection order when the plantiff's failure was due to causes beyond his control. Societe Internationale, a Swiss corporation, filed suit in the United States District Court for the District of Columbia to recover assets which had been seized by the Government during World War II as assets belonging to I. G. Farben, a German enemy national. The Government alleged in its answer that plaintiff was a "creature" of I. G. Farben, "enemy tainted" and hence not entitled to recover the seized properties. The Government moved for and the court issued an order requiring plaintiff to make available for inspection certain records which allegedly would show I. G. Farben control and domination of the plaintiff. These records were in the possession of Swiss banks, and Swiss law made it unlawful for the Swiss banks to disclose records within their custody. Plaintiff made repeated efforts to get these records, but without avail. The district court dismissed the suit for plaintiff's failure to comply with its discovery order. This order was purportedly issued pursuant to Rule 37 of the Federal Rules of Civil Procedure which on its face authorized such action. A unanimous Court,[36] in an opinion by Mr. Justice Harlan, reversed. "There are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . . Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner."[37]

Caritativo v. California[38] involved the right of a condemned prisoner awaiting execution to present evidence and be heard on issues relating to his sanity. If a California warden has "good reason to believe that a defendant, under judgment of death, has become insane,"[39] he is required by statute to call such fact to the attention of the district attorney whose duty it is to ask the court to impanel a jury so that the question

[35] 357 U.S. 197 (1958).
[36] Mr. Justice Clark did not participate.
[37] 357 U.S. at 212.
[38] 357 U.S. 549 (1958).
[39] CAL. PEN. CODE ANN. § 3701.

of sanity may be inquired into. The statutes give the prisoner no right to commence such proceedings, or to be heard in connection with the warden's determination of "good reason to believe . . . ." Caritativo, a prisoner awaiting execution, was examined by prison psychiatrists and found to be sane. He was personally observed by the warden who concluded on the basis of his observations and the psychiatric reports that he had no reason to believe the prisoner insane. Caritativo then brought this petition for habeas corpus alleging that he had been deprived of due process in that the prison psychiatrists had refused to consider competent medical testimony relating to past history of mental disease, in that the warden had refused to allow examination by a private psychiatrist retained by the prisoner's family, and in that the warden had refused the prisoner's attorney permission to examine the records of the prison psychiatric staff. The Court, citing *Solesbee v. Balcom,*[39a] in a per curiam opinion denied the writ. In the *Solesbee* case, the Court had emphasized that certain trial procedure safeguards were not applicable to the post conviction processes of sentencing, pardoning, and by analogy, determining issues relating to the mental health of condemned prisoners.

Mr. Justice Harlan concurred in the denial of the writ with the statement that, "In the absence of any challenge to the warden's affirmations that he . . . determined petitioners' sanity on the basis of responsible medical advice and on his own personal observations, and in the absence of any allegation that he acted in bad faith, I cannot say that the petitioners were denied due process . . . ."[39b]

Mr. Justice Frankfurter wrote a lengthy dissent ending as follows: "*Audi alteram partem*—hear the other side!—a demand made insistently through the centuries, is now a command, spoken with the voice of the Due Process Clause of the Fourteenth Amendment. . . . It may well be that if the warden cannot act on his arbitrary judgment . . . that unworthy claims will be put to the warden and perchance add to delays in the execution of the law. But far better such minor inconveniences . . . than that the State of California should have on its conscience a single execution that would be barbaric because the victim was in fact, though he had no opportunity to show it, mentally unfit to meet his destiny."[40] Mr. Justice Douglas and Mr. Justice Brennan joined in this dissent.

United States v. Procter and Gamble Co.[41] concerned the right of a defendant in a civil anti-trust suit to inspect the minutes of grand jury proceedings then being utilized by the Government in preparation for trial. For eighteen months a grand jury investigated possible

[39a] 339 U.S. 9 (1950).
[40] 357 U.S. at 558-59.
[39b] 357 U.S. at 552.
[41] 356 U.S. 677 (1958).

Procter and Gamble criminal violations of the anti-trust law and was dismissed without returning an indictment. The Government then filed civil anti-trust proceedings against Procter and Gamble, and utilized the testimony taken by the grand jury in preparation for trial. Procter and Gamble moved for production for this same testimony so it too could prepare for trial. The trial judge issued the production order upon a finding of "good cause" in that it would expedite the trial. The Government appealed, arguing that this order violated the policy of secrecy surrounding grand jury proceedings. A majority of the Court, in an opinion by Mr. Justice Douglas reversed on the reason that the "indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity" or when "the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach." No such showing was made here.

Mr. Justice Whittaker concurred with the suggestion that the Government be barred from access to grand jury proceedings in the absence of a judicial order. This would "eliminate the temptation to conduct grand jury investigations as a means of *ex parte* procurement of direct or derivative evidence for use in a contemplated civil suit." Mr. Justice Harlan dissented on the ground that the trial judge had not abused his discretion in ordering the grand jury proceedings made available to the defendants. Mr. Justice Frankfurter and Mr. Justice Burton concurred in this dissent.

Alcorta v. Texas[42] involved the right to a criminal trial free from the prosecutor's knowing use of perjured testimony. Alcorta was indicted for murder of his wife. He did not deny the killing, but testified at his trial that he killed her when he found her kissing a man named Castilleja in a parked car late one night. Castilleja was put on the stand by the prosecuting attorney and testified that he had not been kissing the wife at the time of the killing, that he had but slight acquaintance with the wife, and that when the killing occurred he had been making arrangements with the wife about taking his sister to church the following morning. The jury had an option under Texas law of finding Alcorta guilty of murder under the influence of "sudden passion arising from an adequate cause" (punishable by a maximum imprisonment of five years) or of murder with malice (punishable by death). It found him guilty of the latter. While Alcorta was awaiting execution, Castilleja filed an affidavit that he had given false testimony at the trial; that he had had sexual intercourse with Alcorta's wife on five or six occasions within a relatively brief period before the killing; that he had made this known to the prosecutor before trial; and that the prosecutor had told him

[42] 355 U.S. 28 (1957).

not to volunteer this information. Alcorta petitioned for a writ of habeas corpus and a hearing was held in which the prosecutor testified that he had known Castilleja's trial testimony to be false. The trial court denied the writ of habeas corpus and this denial was affirmed by the Texas Court of Criminal Appeals. The Court, in a unanimous per curiam opinion reversed for the reason that Alcorta had not been accorded due process of law.

Green v. United States[43] raised an issue much debated during the passage of the Civil Rights Acts Amendment of 1957,[44] the right to jury trial when charged with criminal contempt of a court order. Green, one of the top eleven leaders of the Communist Party, was convicted of violating the Smith Act. Pending appeal he was released on bail, and when the Supreme Court affirmed his conviction, he failed to surrender himself for imprisonment until over four years later. When he did surrender, the district court sentenced him to three years imprisonment for criminal contempt of the surrender order issued at the time of the Supreme Court's affirmance of guilt on the substantive charge. Green argued that the fifth amendment's provision for a grand jury presentment is applicable to a proceeding for criminal contempt when the contempt makes the alleged culprit subject to a prison term of more than one year's duration. The Court, in an opinion by Mr. Justice Harlan, rejected this contention. "The statements of this Court in a long and unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders establish beyond peradventure that criminal contempts are not subject to jury trial as a matter of constitutional right . . . . It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are 'infamous crimes' under the Fifth Amendment [which requires grand jury presentment in such crimes] although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2[45] and the Sixth[45a] Amendment."[46] Mr. Justice Frankfurter wrote a concurring opinion in which he called the roll of Justices who had sustained the power of judges to summarily punish for contempt. With but two exceptions, this roll included every Justice who has been on the Court since 1874.[47] Mr. Justice Black dissented. He did not deny that precedent was against him, but said "the time has come for a fundamental and searching re-

[43] 356 U.S. 165 (1958).
[44] 71 STAT. 634, 42 U.S.C. § 1975(a) (Supp. 1957).
[45] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."
[45a] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."
[46] 356 U.S. at 183-85.
[47] 356 U.S. at 192.

consideration of the validity of this power." The contempt power in its beginning "was a petty, insignificant part of our law involving the use of trivial penalties to preserve order in the courtroom . . . it has undergone an incredible transformation and growth, slowly at first and then with increasing acceleration, until it has become a powerful and pervasive device for enforcement of the criminal law. It is no longer the same comparatively innocuous power that it was. Its summary procedures have been pressed into service for such far-flung purposes as to prevent 'unlawful' labor practices, to enforce the prohibition laws, to secure civil liberties and now, for the first time in our history, to punish a convict for fleeing from imprisonment. In brief it has become a common device for by-passing the constitutionally prescribed safeguards of the regular criminal law in punishing public wrongs."[48] The Chief Justice and Mr. Justice Douglas concurred in this dissent. Mr. Justice Brennan dissented without reaching the constitutional issues. He believed the Government had failed to prove that Green knew of the order he was charged with disobeying, an essential element of the offense. The Chief Justice and Mr. Justice Douglas concurred in this dissent as well.

Lambert v. California[49] presented an issue thought to be well settled: is ignorance of the law ever an excuse? A Los Angeles municipal ordinance required, under pain of punishment, all persons convicted of a felony to register with the chief of police within five days after arrival in the city. Lambert was convicted of violating this ordinance. She had no knowledge of its existence at the time of her arrest, and promptly offered to comply if given opportunity. This was denied her and she was convicted. The Court, in an opinion by Mr. Justice Douglas, reversed. "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community."[50] Mr. Justice Frankfurter dissented. "What the Court here does is to draw a constitutional line between a State's requirement of doing and not doing. What is this but a return to Year Book distinctions between feasance and nonfeasance."[51] Mr. Justice Harlan and Mr. Justice Whittaker joined in this dissent. Mr. Justice Burton also dissented.

Sacher v. United States[52] involved the application of the due process doctrine that a man cannot be punished for violation of a law which is not known or knowable to the accused. The Senate Internal Security Committee appointed a subcommittee to investigate the recantation of

[48] 356 U.S. at 208.
[49] 355 U.S. 225 (1957).
[50] 355 U.S. at 229-30.
[51] 355 U.S. at 231.
[52] 356 U.S. 576 (1958).

Harvey Matusow. While Sacher was testifying under subpoena, the subcommittee entered upon "a brief excursion" into proposed legislation barring Communists from practice at the federal bar, a subject not within its authorized scope of inquiry. Sacher was convicted for contempt because of his refusal to tell the subcommittee whether or not he was or ever had been "a member of the Lawyers' Section of the Communist Party." The Court, in a per curiam opinion, reversed the conviction. "Inasmuch as petitioner's refusal to answer related to questions not clearly pertinent to the subject on which the two-member subcommittee conducting the hearing had been authorized to take testimony, the conditions necessary to sustain a conviction for deliberately refusing to answer questions pertinent to the authorized subject matter of a congressional hearing are wanting." Mr. Justice Clark, the sole dissenter, said that the question Sacher refused to answer "clearly relates to the recantation rather than the proposed legislation. . . . When the question is viewed in context, it seems to me that pertinency is clearly established."[53]

Coerced Confessions

The Court was asked on two occasions to set aside convictions allegedly based on confessions illegally coerced from the defendants. In *Payne v. Arkansas*,[54] the Court, in an opinion by Mr. Justice Whittaker, granted the requested relief. Payne, a nineteen-year-old Negro with a fifth-grade education, was arrested without a warrant on suspicion of murdering a former employer. He went without food for more than 25 hours and was held incommunicado for two days while he was questioned repeatedly. He confessed when the chief of police told him that a mob outside wanted to get in and that if Payne would tell the truth, the chief "would probably keep them from coming in." The Court held that a confession obtained under these circumstances "did not constitute an expression of free choice." Mr. Justice Burton and Mr. Justice Clark dissented on the grounds that "the state courts properly held petitioner's confession voluntary," and "sufficient other evidence of guilt to sustain the conviction"[55] was present.

In *Thomas v. Arizona*,[56] the Court, in an opinion by Mr. Justice Clark, held the confession not coerced. The facts are these. Thomas was arrested on Tuesday morning on suspicion of murder. He was arrested by the Sheriff of Cochise County and a posse of from 12 to 15 men. When he was apprehended, one of the posse lassoed him around the neck, and later that morning, when he continued to deny guilt, he was again lassoed around the neck and dragged to his knees. That

[53] 356 U.S. at 580.
[54] 356 U.S. 560 (1958).
[55] 356 U.S. at 569.
[56] 356 U.S. 390 (1958).

afternoon he was taken to town and questioned until 10:00 o'clock that night by six armed men. He denied guilt. The next morning he was brought before the court for preliminary examination and confessed to the crime. "Deplorable as these ropings are to the spirit of a civilized administration of justice" wrote Mr. Justice Clark, "the undisputed facts before us do not show that petitioner's oral statement was a product of fear engendered by them."[57] The Chief Justice, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennan dissented without opinion.

Right to Counsel

On three occasions, *Crooker v. California,*[58] *Cicenia v. LaGay,*[59] and *Ashdown v. Utah*[60] the Court was asked to set aside convictions based on confessions obtained while the accused was denied counsel.[61] The Court held that due process is not denied unless petitioner can show that prejudice resulted from denial of counsel. It rejected the contention that every state denial of a request to contact counsel was an infringement of the Constitution, for this "would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney. Due Process . . . demands no such rule."[62] Denial of counsel is only "one pertinent element in determining from all the circumstances whether a conviction was attended by fundamental unfairness."[63] Mr. Justice Douglas dissented. He said in his *Crooker* dissent: "The Court finds no prejudice from the denial of the right to consult counsel; and it bases that finding on the age, intelligence, and education of petitioner. But it was said in *Glasser v. United States,* 315 U.S. 60, 76, 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' That was a federal prosecution. But what is true of the need for counsel in a federal case is equally true in a state case."[64]

Moore v. Michigan[65] raised the issue of whether a state prisoner had intelligently "waived" his right to counsel in a murder case. In 1938, Moore, then a Negro boy seventeen years of age with a seventh grade education, was arrested on suspicion of murder and taken to the

[57] 356 U.S. at 400.
[58] 357 U.S. 433 (1958).
[59] 357 U.S. 504 (1958).
[60] 357 U.S. 426 (1958).
[61] The three cases differ in that in *Cicenia,* the accused had previously retained counsel and the demand to consult was made both by the accused inside the interrogation room and his counsel in the corridor; in *Crooker,* the demand was made by the accused alone; and in *Ashdown* the demand was made by the father of the accused who, from his post in the corridor, heard his daughter sobbing inside the interrogation room. This factual difference caused the Chief Justice and Mr. Justice Brennan, who did not participate in *Cicenia,* to join the majority in *Ashdown.*
[62] 357 U.S. at 441.
[63] 357 U.S. at 509.
[64] 357 U.S. at 442.
[65] 355 U.S. 155 (1957).

Kalamazoo jail where he was questioned intermittently for two days until he confessed to the crime. Prior to taking him to the courthouse, the Sheriff warned Moore that a mob was waiting to waylay him, and that Moore would be wise to plead guilty so he could be sent to Jackson immediately. The Sheriff drove to the courthouse by a circuitous route to avoid the mob. When Moore arrived at court, the judge asked if he wanted an attorney, and Moore said no, that he wanted to get the matter over with. He pleaded guilty and was sentenced to life imprisonment at hard labor. In 1950, Moore filed a motion for a new trial, contending that his waiver of counsel had been induced by fear. This motion was denied by the Michigan courts, largely upon the finding that there was in fact "no threat of mob violence." The Court, in an opinion by Mr. Justice Brennan, reversed. "It is of no moment to the inquiry that the situation described to the petitioner by the Sheriff did not exist. . . . We believe that the expectation of mob violence, planted by the Sheriff in the mind of this then 17-year-old Negro youth, raises an inference of fact that his refusal of counsel was motivated to a significant extent by the desire to be removed from the Kalamazoo jail at the earliest possible moment. . . . A rejection of federal constitutional rights motivated by fear cannot . . . constitute an intelligent waiver."[66] Mr. Justice Burton dissented. "The issue is one of fact as to what occurred 19 years ago. Three times the state courts have concluded that petitioner acted freely, intelligently and understandingly. On this record I would affirm that judgment."[66a] The record included statements from two eyewitnesses to the trial that Moore at that time was "very relaxed. There was no sign of fear." Mr. Justice Frankfurter, Mr. Justice Clark and Mr. Justice Harlan concurred in this dissent.

ENTRAPMENT

Two "entrapment" cases reached the Supreme Court. They are of interest in that they reflect two opposing approaches to the question of how to treat the problem which arises when government officials induce private citizens to commit crimes. In *Sherman v. United States*,[67] a majority of the Court, in an opinion by the Chief Justice, held that the doctrine is not available to one who shows "ready complaisance" to the suggestion of crime, that this is ordinarily a question for the jury, but that here the evidence was so conclusively in the negative that the trial judge should have ruled for the defendant as a matter of law.[68] Mr.

[66] 355 U.S. at 164. [66a] 355 U.S. at 168.

[67] 356 U.S. 369 (1958).

[68] The undisputed facts were that Sherman, a dope addict, met a government informer at a doctor's office where both men were attempting to cure themselves of the habit. The informer struck up a friendship, and then utilizing this friendship, asked Sherman to get him some dope. Sherman refused time and again, but

Justice Frankfurter, concurring in the result, said that the doctrine should apply whenever "the police conduct falls below standards, to which common feelings respond, for the proper use of governmental power," and that this issue is a matter for the judge, not the jury. Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan concurred with Mr. Justice Frankfurter. In *Masciale v. United States*,[69] the Court, in an opinion by the Chief Justice, held that the evidence concerning the "ready complaisance" was conflicting and the decision appropriate for disposition by the jury. Mr. Justice Frankfurter dissented on the ground set forth in his *Sherman* concurrence, that the issue was not "ready complaisance" by the accused, which opens up for examination his past conduct, habits and associates, but the standard of conduct shown by the Government, and that this issue should be decided by the judge, not the jury. Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Harlan concurred in this dissent.

Search and Seizure

The Court decided three cases arising under the fourth amendment's prohibtion against an unreasonable search and seizure. The fourth amendment, as augmented by the Federal Rules of Criminal Procedure, requires that arrest warrants be issued by a "neutral and detached magistrate," and only upon a written and sworn complaint showing that "there is probable cause to believe that an offense had been committed and that the defendant has committed it." *Giordenello v. United States*,[70] concerned the sufficiency of a complaint couched in statutory language which failed to disclose the source of the affiant's knowledge. An arrest warrant for Giordenello was issued on this complaint, Giordenello was arrested, and narcotics in his possession were seized and introduced at his trial. He argued that the complaint was insufficient and this insufficiency nullified the legality of the subsequent actions. The Court, in an opinion by Mr. Justice Harlan, agreed. As the complaint in no way indicated the source of the affiant's knowledge, it was impossible for the Court to understand how the Commissioner who had issued the arrest warrant "could be expected to assess independently the probability that petitioner committed the crime charged."[71] Mr. Justice Clark dissented. "Agent Finley directly and explicitly stated under oath that petitioner 'did receive (and) conceal' heroin. It therefore follows as the night does the day that 'probable cause' existed, and

finally yielding to his new friend's feigned agony, bought some and sold it to the informer at cost. He was indicted and convicted for this sale.

[69] 356 U.S. 386 (1958).

[70] 357 U.S. 480 (1958).

[71] 357 U.S. at 486-87.

the Commissioner had no recourse other than to issue the warrant."[72] Mr. Justice Burton and Mr. Justice Whittaker concurred in this dissent.

In the remaining two cases, *Miller v. United States*[73] and *Jones v. United States*,[74] all the Justices agreed as to the law but differed as to its application on the facts presented. When an officer makes an arrest without a warrant on probable cause, he may not force his way into the arrested person's house without first announcing his identity and purpose unless the facts known to the officer justify a virtual certainty that the person sought to be arrested knows the officer's purpose. In *Miller*, the police knocked at petitioner's door, said they were the police, and without more forced their way in. Once inside the police searched for and seized marked money which was used as evidence at petitioner's trial for the unlawful sale of narcotics. The Court, in an opinion by Mr. Justice Brennan, set aside the conviction on the ground that there was no evidence known to the police to justify their belief that Miller knew the purpose of their visit. Mr. Justice Clark dissented, finding sufficient evidence in the record to support the conclusion that Miller knew why the police were there. Mr. Justice Burton concurred in this dissent.

In the *Jones* case, all the Justices agreed that officers may not enter a dwelling to make a search without a warrant, notwithstanding facts unquestionably showing probable cause to believe that the dwelling contains unlawful contraband. Federal agents, after observing Jones' dwelling for three days, entered without a warrant and seized contraband which was used at the subsequent trial to convict him of possessing an illegal still. The Court, in an opinion by Mr. Justice Harlan, reversed the conviction on grounds that the evidence showed that the officers had entered the dwelling for the purpose of searching out and seizing the contraband. Mr. Justice Clark dissented. He believed the evidence showed that the officers entered for the purpose of arresting Jones, and the entrance being legal, the consequent search and seizure were also legal. Mr. Burton concurred in this dissent.

WIRETAPPING

There were two cases involving wiretapping. In *Benanti v. United States*,[75] New York police obtained a New York court order, authorized by New York law, and tapped the telephone of a bar and grill frequented by petitioner. Overhearing conversations indicating violation of a state law, the police stopped a car owned by petitioner and found therein some cans of alcohol without the tax stamps required by federal law. The New York authorities turned the alcohol over to federal authorities,

[72] 357 U.S. at 490.
[73] 357 U.S. 301 (1958).
[74] 357 U.S. 493 (1958).
[75] 355 U.S. 96 (1957).

and Benanti was convicted in a federal court for violating a federal law. He argued that the evidence seized by the New York authorities was inadmissible in a federal court, even if obtained without the knowledge or consent of federal officials. A unanimous Supreme Court agreed. Section 605 of the Federal Communications Act states that "no person not being authorized by the sender shall intercept any communication and divulge or publish the . . . contents . . . of such intercepted communication to any person."[75a] The Court held that Congress did not mean to allow state legislation which would contradict that section and that the lower federal court erred in admitting evidence obtained as a result of violating a federal statute.

Rathbun v. United States[76] raised the question of whether section 605 of the Federal Communications Act banned the admission of testimony in a federal court obtained by a state policeman while listening to a telephone conversation on an extension line at the request of the telephone owner. The Court, in an opinion by the Chief Justice, held it did not. "We hold that Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended that the word be used. Every statute must be interpreted in the light of reason and common understanding to reach the results intended by the legislature. . . . The telephone extension is a widely used instrument of the home and office . . . . Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception,* has not occurred."[77] Mr. Justice Frankfurter dissented on the ground that an interception was an interception whether occasioned by a wire tap unbeknownst to the parties, or by listening on an extension with the consent and at the request of one of the parties. Mr. Justice Douglas concurred in this dissent.

Double Jeopardy

The Court decided four "double jeopardy" cases by closely divided vote. In *Green v. United States,*[78] petitioner had been indicted for first degree murder and convicted in a federal court of second degree murder. He appealed this conviction and it was reversed. The Government thereupon retried him for first degree murder and this time Green was convicted. Green contended on appeal that the second trial violated his right against second jeopardy. The Government argued that the appeal

[75a] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).
[76] 355 U.S. 107 (1957).
[77] 355 U.S. at 109, 111.
[78] 355 U.S. 184 (1957).

from the second degree murder conviction constituted a "waiver" of the right to be free from a second trial in the event the appeal proved successful. The Court, per Mr. Justice Black, reversed. The jury at the first trial acquitted Green of the first degree murder charge and a man is not required "to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment."[79] Mr. Justice Frankfurter dissented on the theory that the trial, appeal, and retrial constitute one procedure entailing one continuous jeopardy, and there can be no second jeopardy until a conviction or acquittal free from legal error has been obtained. Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Harlan concurred in this dissent.

Gore v. United States[80] raised the problem of multiple punishment for a single transaction. Gore sold narcotics and for this single sale was indicted for violating the provisions of three separate federal criminal statutes: selling drugs not in pursuance of a written order; selling drugs not in the original stamped package; and selling drugs with knowledge that they had been unlawfully imported. He was convicted on all three charges and given three separate prison sentences, to be run consecutively. He moved to vacate the sentences, contending that for all three convictions "a sentence as for only one count could be imposed." The Court, in an opinion by Mr. Justice Frankfurter, sustained the three convictions and sentences. Pointing out that Congress intended each penal law to be given full force and effect, Mr. Justice Frankfurter held that this did not offend the constitutional prohibition against double jeopardy as shown by a large number of past decisions "participated in by judges especially sensitive to the application of the historic safeguards of double jeopardy." The Chief Justice dissented without reaching the constitutional issues. "I am persuaded . . . that the present purpose of these statutes is to make sure that a prosecutor has three avenues by which to prosecute one who traffics in narcotics, and not to authorize three cumulative punishments for the defendant who consummates a single sale."[81] Mr. Justice Brennan dissenting, read the prior cases as holding that the same act or transaction may violate two distinct statutory provisions only when each provision requires proof of a fact which the other does not. They were therefore not applicable as "the single fact of possession of unstamped narcotics suffices to convict the defendant"[82] of all three offenses with which he was charged. Mr. Justice Douglas dissented. "Once a crucial issue is litigated in a criminal case

[79] 355 U.S. at 193.
[80] 357 U.S. 386 (1958).
[81] 357 U.S. at 394.
[82] 357 U.S. at 398.

that issue may not be the basis of another prosecution. Here the same sale is made to do service for three prosecutions. . . . I think it is time that the Double Jeopardy Clause was liberally construed in light of its great historic purpose to protect the citizen from more than one trial for the same act."[83] Mr. Justice Black concurred in this dissent.

Two additional cases, *Hoag v. New Jersey*[84] and *Ciucci v. Ilinois*,[85] involved substantially the same question: can the state, consistent with the due process clause of the fourteenth amendment, prosecute more than once on the identical evidence growing out of the identical transaction when the one act violates more than one criminal law? Hoag was arrested for robbing five persons in a tavern, and charged in three indictments with robbery of three of the five victims. All five victims testified at this trial, and a jury acquitted. Hoag was then indicted and tried for the robbery of a fourth victim. All five victims again testified as they had in the earlier trial. This time a second jury found Hoag guilty. The *Ciucci* case has a similar background. Ciucci's wife and three children were found dead from bullet wounds in a burning building. He was arrested and tried for the murder of his wife. At this trial, evidence as to the killing of the three children was introduced. The jury found him guilty and fixed the penalty at 20 years' imprisonment. Ciucci was then charged and tried for murder of one of his daughters. Evidence concerning the killing of his wife and the other children was introduced at the trial. A different jury found him guilty and sentenced him to 45 years' imprisonment. Ciucci was then charged with the murder of his son and tried before yet a third jury. Again the evidence concerning the other killings was introduced, and this time Ciucci was found guilty and sentenced to death. The Court sustained the convictions in both cases. Mr. Justice Harlan, for the Court in *Hoag*, said "We do not think that the Fourteenth Amendment always forbids States to prosecute different offenses at consecutive trials even though they arise out of the same occurrence. The question in any given case is whether such a course has led to fundamental unfairness." The second trial of Hoag "resulted from the unexpected failure of four of the State's witnesses at the earlier trial to identify petitioner, after two of these witnesses had previously identified him in the course of the police investigation. . . . We cannot say that . . . the State's decision to try petitioner [again was so] lacking in justification that it amounted to a denial of those concepts constituting 'the very essence of a scheme of ordered justice which is due process.' "[86] Mr. Justice Douglas dissenting in both cases said in *Ciucci*, the state "in effect tried the accused for

[83] 357 U.S. at 396.
[84] 356 U.S. 464 (1958).
[85] 356 U.S. 571 (1958).
[86] 356 U.S. at 467, 470.

four murders three consecutive times, massing in each trial the horrible details of each of the four deaths. This is an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment."[87] The Chief Justice, Mr. Justice Brennan, and Mr. Justice Black concurred in this dissent. Mr. Justice Black added that he would dissent "on the ground that the Fourteenth Amendment bars a State from placing a defendant twice in jeopardy for the same offense."[88]

SELF-INCRIMINATION

The Court was asked to decide four unrelated problems concerning the fifth amendment's provision that no person "shall be compelled in any criminal case to be a witness against himself": Does the privilege extend to questions harmless on their face?[89] Do movie producers unreasonably interfere with the pursuit of an occupation by "blacklisting" employees who invoke the privilege before congressional committees?[90] Does a witness in an adversary civil proceeding, by testifying on direct examination that she would fight for this country in event of hostilities with Soviet Russia, thereby "waive" the right to claim the privilege when asked on cross examination if she is presently a member of the Communist Party?[91] Does a New York grand jury witness have the right to invoke the self-incrimination clause because of legitimate fear that his testimony might be used against him in a federal criminal prosecution?[92] They will be discussed in order.

In *Simpson,* the petitioner contended that he was entitled to invoke the privilege when a congressional committee asked these questions: "Mr. Simpson, would you please state your residence?" "Now, Mr. Simpson, did you ever go to high school?" and "Were you ever in the armed forces of the United States?" The lower courts could not see how answers to these questions could tend to incriminate, and rejected the plea of self-incrimination as a defense to the "contempt of Congress" charge against petitioner. The Court unanimously reversed: "Upon consideration of the entire record and the confession of error by the Solicitor General, the judgments of the United States Court of Appeals for the Ninth Circuit are reversed. *Hoffman v. United States,* 341 U.S. 479."[92a]

In *Wilson,* the second "self-incrimination" case, the petitioners had alleged in the California courts that they had considerable experience in

[87] 356 U.S. at 575.
[88] 356 U.S. at 575. Mr. Justice Douglas expressed similar views in his *Hoag* dissent. 356 U.S. at 477.
[89] Simpson v. United States, 355 U.S. 7 (1957).
[90] Wilson v. Loew's Inc., 355 U.S. 597 (1958).
[91] Brown v. United States, 356 U.S. 148 (1958).
[92] Knapp v. Schweitzer, 357 U.S. 371 (1958).
[92a] 355 U.S. at 7.

the motion picture industry and had been "blacklisted" from employment opportunities because of pleading the fifth amendment before congressional committees. They did not allege that "but for defendant's alleged interference any one of the plaintiffs would have been employed." The California courts sustained a demurrer to the complaint for failing to make this allegation. The Court, in a per curiam opinion, dismissed its writ of certiorari "because the judgment rests on an adequate state ground."[93] Mr. Justice Douglas dissented. Referring to a number of situations where the California courts had entertained jurisdiction of suits against labor unions (mostly brought by Negroes) wherein no showing of a likelihood of employment was made, he concluded that the lower court "has fashioned a different rule for this case. I can see no difference where the 'right to work' is denied because of race and where, as here, because the citizen has exercised Fifth Amendment rights. To draw such a line is to discriminate against the assertion of a particular federal constitutional right."[94]

In *Brown,* a civil deportation proceeding, petitioner took the stand in her own behalf and testified she would bear arms for this country in the event of hostilities with Soviet Russia. On cross examination she was asked if she was then a member of the Communist Party. She refused to answer on grounds of crimination, and was held in criminal contempt when the trial court found that her testimony on direct examination "waived" her right to claim the privilege. On appeal from this holding, petitioner relied upon a line of authority holding that a subpoenaed witness in an investigatory proceeding does not "waive" the right to invoke the privilege by denials of guilt or partial disclosures. The Government argued that Brown had "waived" her right to claim the privilege, and relied upon a line of authority which holds that in a criminal case, the defendant by taking the stand thereby opens himself to all relevant inquiries on cross examination. The Court, in an opinion by Mr. Justice Frankfurter, found the criminal cases cited by the Government more analogous to this adversary civil proceeding. The witness has the option of not testifying at all, but if he chooses to testify, the court need not accept testimony "freed from the antiseptic test of the adversary process. . . . The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination."[95] Mr. Justice Black, dissenting, did not think the decisions in the criminal cases controlling or analogous. "[F]ailure of a criminal defendant to take the stand may not be made the subject of adverse comment by prosecutor or

[93] See note 12, *supra.*
[94] 355 U.S. at 599.
[95] 356 U.S. at 155-56.

judge, nor may it lawfully support an inference of guilt. On the other hand the failure of a party in a civil action to testify may be freely commented on by his adversary and the trier of fact may draw such inferences from the abstention as he sees fit on the issues in the case. Thus to apply the criminal rule of waiver to a civil proceeding may place a defendant in a substantial dilemma. If he testifies voluntarily he can be compelled to give incriminating evidence against himself; but, unlike a defendant in a criminal case, if he remains off the stand his silence can be used against him as 'evidence of the most persuasive character.' "[96] Mr. Justice Black also thought that the other party to the civil litigation could be protected without requiring the defendant to answer criminating questions on cross examination. "As an obvious alternative, such one-sided testimony might be struck in full or part, if the occasion warranted, with appropriate directions by the judge for the jury to disregard it as unreliable. And in some instances where the prejudice to the opposing party was extreme and irremediable the court might even enter judgment in his favor."[97] The Chief Justice and Mr. Justice Douglas concurred in this dissent. Mr. Justice Brennan also dissented. "I think that in contempts, as in other areas of the law, penal sanctions should be used sparingly and only where coercive devices less harsh in their effect would be unavailing. In other words, there is a duty on the part of the district judges not to exercise the criminal-contempt power without first having considered the feasibility of the alternatives at hand. . . . The trial judge gave no thought to the use of the other sanctions and, in my view, his exclusive reliance upon the criminal contempt power was arbitrary in the circumstances."[98]

Knapp v. Schweitzer was the fourth self-incrimination case. Knapp, an employer, was subpoenaed before a New York grand jury and asked questions concerning the bribery of officials in the labor union which represented his employees. He refused to answer on grounds of both the New York and federal provisions against self-incrimination, claiming that his answer might tend to incriminate him under both New York and federal laws. The New York grand jury, pursuant to New York law, granted him immunity from New York prosecution, and again asked the questions. The grand jury had no power to grant immunity from federal prosecution, and Knapp refused to answer on grounds of the fifth amendment, claiming that the danger of federal prosecution was real and immediate since the New York District Attorney and the United States Attorney in the area had publicly announced a policy of cooperation in the prosecution of these "bribery" cases. The grand

[96] 356 U.S. at 158-59.
[97] 356 U.S. at 160.
[98] 356 U.S. at 163-64.

jury rejected his plea of the fifth amendment as not applicable, and upon Knapp's continued refusal to answer, he was cited and convicted of contempt. The New York courts sustained the conviction, reasoning that the fear of federal prosecution was unfounded as evidence obtained in a state proceeding with "the participation of Federal authorities" could not be utilized in the federal courts. The Supreme Court, in an opinion by Mr. Justice Frankfurter, affirmed. It held that the evidence obtained by the New York grand jury could be used in a federal prosecution as "Petitioner's assertion that a federal prosecuting attorney announced his intention of cooperating with state officials . . . presents a situation devoid of legal significance as a joint state and federal endeavor."[99] Knapp must give the evidence to the New York grand jury, despite the danger created of federal prosecution, for the fifth amendment applies only when questions are asked by federal instrumentalities. Were it otherwise, the existence of federal criminal statutes might hamstring legitimate state investigations. Knapp's dilemma "is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere."[100]

Mr. Justice Black dissented. "A witness who is called before a state agency and ordered to testify [is] in a desperate position; he must either remain silent and risk state imprisonment for contempt or confess himself into a federal penitentiary. . . . [A] person can be whipsawed into incriminating himself under both state and federal law even though there is a privilege against self-incrimination in the Constitution of both. I cannot agree that we must accept this intolerable state of affairs as a necessary part of our federal system of government."[101] Mr. Justice Douglas concurred in this dissent. The Chief Justice also dissented. "In this case the New York courts sustained petitioner's conviction on the understanding that . . . the testimony petitioner was compelled to give before the New York State grand jury could not, as a matter of federal law, be employed in a subsequent federal prosecution. . . . [I]t is implicit in the majority opinion in this Court that the petitioner does run the risk of a federal prosecution . . . . [W]e should not affirm a New York conviction if in fact the state courts construed state law under a misconception of federal law. . . . [T]his case should be remanded so that the New York Court of Appeals can reconsider state law in light of the majority's conclusion that the role of the federal prosecutor was not such as to prevent use of the state-compelled testimony against petitioner in a federal prosecution."[102]

[99] 357 U.S. at 380.
[100] 357 U.S. at 381.
[101] 357 U.S. at 385.
[102] 357 U.S. at 381-82.

EQUAL PROTECTION

There were two cases involving the equal protection of the laws guaranteed by the fourteenth amendment. In *Eubanks v. Louisiana*,[103] a unanimous Court set aside the murder conviction of a Negro on the ground that members of his race had been systematically excluded from grand juries, including the grand jury that indicted him. Grand juries were selected by the state trial judges following interviews or on the basis of the personal knowledge of those persons whose names were on a list of 75 citizens selected by the jury commissioners. Every list of 75 persons selected by jury commissioners contained the names of qualified Negroes, but only once since 1946 had a Negro been selected by a trial judge to serve on the grand jury, and this "from the mistaken impression that the juror was white." The Court held that this exclusion must be attributed to race as it could not be explained by chance or accident.

In *Eskridge v. Washington Prison Bd.*,[104] petitioner's appeal from a 1935 conviction of murder had been dismissed for failure to file necessary papers. He had not filed the papers because he lacked the financial means to prepare them, and his application to have them prepared at state expense had been denied by the trial judge on the ground that Eskridge had received a fair trial free from prejudicial error. In 1956, Eskridge petitioned for habeas corpus, alleging that the right to appeal, guaranteed by the state constitution, had been denied him. His petition was denied and the Court agreed to hear the case. Applying the doctrine established in the 1956 *Griffin*[104a] case, the Court reversed. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[104b] Mr. Justice Harlan dissented on the belief that the 1956 *Griffin* decision should not be given retroactive effect. Mr. Justice Whittaker concurred in this dissent.

INVOLUNTARY EXPATRIATION

Three cases raised the constitutional power of Congress to deprive native born citizens of their citizenship because of acts thought inimicable to the general welfare.

Perez v. Brownell[105] concerned the constitutionality of that provision of the 1940 Nationality Act depriving citizens of their nationality for "voting in a political election in a foreign state."[106] Perez was deprived of his citizenship for voting in a Mexican election. He contended that citizenship was the birthright of every person born in the United States, that it could be voluntarily relinquished by the individual

[103] 356 U.S. 584 (1958).
[104] 357 U.S. 214 (1958).
[104a] Griffin v. Illinois, 351 U.S. 12 (1956).
[104b] *Id.* at 19.
[105] 356 U.S. 44 (1958).
[106] STAT. 163, 267-68, 8 U.S.C. § 1481 (1952).

but not taken away by congressional action. The Court, in an opinion by Mr. Justice Frankfurter, disagreed with this contention and sustained the statute. The power of Congress to regulate foreign affairs includes the right to expatriate citizens whose conduct abroad embarrasses our foreign relations. The inquiry, remarked Mr. Justice Frankfurter, "and in the case before us, the sole inquiry into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action."[107] He concluded that withdrawal of citizenship is reasonably calculated to avoid the embarrassment in the conduct of our foreign relations which is attributable when Americans vote in foreign elections as "the termination of citizenship terminates the problem."[108]

Mr. Justice Whittaker dissented. He agreed with the "major premise of the majority's opinion—that Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs"[109] but he denied that the act of voting, legal where performed, has such an effect.

Mr. Justice Douglas dissented. "No doubt George F. Kennan 'embarrassed' our foreign relations when he recently spoke over the British radio. Does the Constitution permit Congress to cancel his citizenship? . . . Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist. One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or for worse, except and unless he voluntarily relinquishes that status."[110] Mr. Justice Black concurred in this dissent.

The Chief Justice dissented. "Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government *of* the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so. . . . I fully recognize that only the most compelling considerations should lead to the invalidation of congressional action, and where legislative judgments are involved, this Court should not intervene. But the Court also has its duties, none of which demands more diligent performance than that of protecting the fundamental rights of individuals. That duty is imperative when the citizenship of an American is at stake—that status that

[107] 356 U.S. at 58.
[108] 356 U.S. at 60.
[109] 356 U.S. at 84.
[110] 356 U.S. at 82-84.

alone assures him the full enjoyment of the precious rights conferred by our Constitution. As I see my duty in this case, I must dissent."[111]

In *Trop v. Dulles*,[112] Mr. Justice Brennan joined the four dissenting justices in the *Perez* case, and the Court declared unconstitutional that section of the Nationality Act of 1940 which deprives a citizen of his citizenship for desertion from the military forces in time of war provided that he is convicted by court martial, is dishonorably discharged from the service, and is not restored to active duty with permission of competent military authority.[113] Mr. Justice Brennan said: "It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war."[114] He explained this paradox by finding a reasonable nexus between the conduct of foreign relations and the expatriation of the American who votes in a foreign election; and no such reasonable nexus between the power to wage war and the expatriation of the American who deserts. "As a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation."[115]

The Chief Justice would declare the act unconstitutional for the reasons set forth in his *Perez* dissent, and also because the provision in issue is a penal statute and hence violates the eighth amendment's provisions against cruel and unusual punishment. "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. . . . [T]he expatriate has lost the right to have rights."[116] Mr. Justice Black concurred in this opinion and added that "Even if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities. . . . The statute held invalid here not only makes the military's finding of desertion final but gives military authorities discretion to choose which soldiers convicted of desertion shall be allowed to keep their citizenship and which ones shall thereafter be stateless. Nothing in the Constitution or its history lends the slightest support for such military control over the right to be an American citizen."[117]

Mr. Justice Frankfurter dissented. "Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American

[111] 356 U.S. at 65, 78.
[112] 356 U.S. 86 (1958).
[113] 66 STAT. 163, 268, 8 U.S.C. § 1481(a)(8) (1952).
[114] 356 U.S. at 105.
[115] 356 U.S. at 112.
[116] 356 U.S. at 101-02.
[117] 356 U.S. at 104-05.

citizenship and legislative withdrawal of that citizenship? Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens."[118]

Nishikawa v. Dulles,[119] the third expatriation case, concerned issues regarding burden of proof. Nishikawa, an American born citizen, visited Japan in 1939. He was there drafted into the Japanese Army. Service in the Japanese Army constitutes an act requiring denaturalization if done voluntarily, as it is then considered an act of voluntary expatriation. The Court, in an opinion by the Chief Justice, held that because the consequences of denationalization are so drastic, "it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed."[120] Mr. Justice Harlan dissented. "[E]vidence that an individual involuntarily served in a foreign army is peculiarly within his grasp, and rarely acessible to the Government. . . . [I]t seems to me the better course to require Nishikawa to prove his allegation of duress rather than to impose on the Government the well-nigh impossible task of producing evidence to refute such a claim."[121] Mr. Justice Clark concurred in this dissent.

Passports

Two cases, *Kent v. Dulles*[122] and *Dayton v. Dulles*,[123] concerned the right to a passport, a document presently necessary for foreign travel. Rockwell Kent, the artist, was denied a passport for refusing to file a non-communist affidavit. The Secretary of State purported to act under a 1926 Act of Congress[124] which gave him general discretionary authority over passports. Noting that passport applications had long been denied for only two reasons, that the applicant was not a citizen or that the applicant was participating in illegal conduct, the Court, in an opinion by Mr. Justice Douglas, held that Congress had not authorized the Secretary to deny passport applications for any additional reasons. "We deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced

[118] 356 U.S. at 121-22.
[119] 356 U.S. 129 (1958).
[120] 356 U.S. at 135.
[121] 356 U.S. at 145-46.
[122] 357 U.S. 116 (1958).
[123] 357 U.S. 144 (1958).
[124] 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1952).

with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."[125] Mr. Justice Clark, dissenting, found ample evidence that Congress intended the Secretary to deny passports to those he believed to be communists, and therefore would affirm the denial of the passport here. Mr. Justice Burton, Mr. Justice Harlan and Mr. Justice Whittaker concurred in this dissent.

In the *Dayton* case, the Court was asked to decide whether a passport applicant is denied due process when the Secretary refuses to grant a passport after determining "on confidential information" that the applicant is a participant in Communist Party activities. The Court did not reach this issue, for the record shows "a denial of a passport for reasons which we have today held to be impermissible. *Kent v. Dulles.*"[125a]

Deportation and Denaturalization

Five cases raised questions concerning the rights of persons of foreign birth presently within the physical jurisdiction of the United States. The Court decided all of them without reaching the Constitutional issues raised.

Rowoldt v. Perfetto[126] concerned the deportability of an alien under the Internal Security Act of 1950,[127] which, as amended in 1951,[128] requires the deportation of all aliens who join the Communist Party unless the membership results by operation of law, or unless they joined when younger than sixteen, or for purposes of obtaining employment, food rations or other essentials of living. Petitioner had joined the Communist Party in 1935. He testified without contradiction that he was not motivated by dissatisfaction in living under a democracy, it was "just a matter of having no jobs at that time. Everybody around me had the idea that we had to fight for something to eat and clothes and shelter .... Even at the few communist meetings I attended, nothing was ever said about overthrowing anything. All they talked about was fighting for the daily needs. That is why we never thought much of joining those parties in those days."[129] The majority of the Court, in an opinion by Mr. Justice Frankfurter, held that petitioner's one year membership in the Communist Party was not the type of membership which required

[125] 357 U.S. at 130. [125a] 357 U.S. at 150.
[126] 355 U.S. 115 (1957).
[127] 64 Stat. 987, 1006, 8 U.S.C. § 1251(a)-(c) (1952).
[128] 65 Stat. 28. 8 U.S.C. § 137 (1952). [129] 355 U.S. at 117-18.

deportation under the Internal Security Act. "Bearing in mind the solidity of proof that is required for a judgment entailing the consequences of deportation, particularly in the case of an old man who has lived in this country for forty years, we cannot say that the unchallenged account given by petitioner of his relations to the Communist Party establishes the kind of meaningful association required by the alleviating Amendment of 1951."[130] Mr. Justice Harlan, dissenting, held that the Internal Security Act of 1950 required the deportation of any alien who joined the Communist Party and that the amendments of 1951 (relating to membership when under sixteen, by operation of law, etc.) related only to membership in a foreign country. Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Whittaker concurred in this dissent.

Bonetti v. Rogers[131] also concerned the deportability of an alien for past membership in the Communist Party. Bonetti came to this country in 1923 at the age of 15. In 1932, while residing in Los Angeles, he joined the Communist Party and remained a member until 1936. In 1937, he left this country, abandoning all rights of residence here, and went to Spain to fight with the Spanish Republican Army. In 1938, he applied for a readmission, disclosed his former membership in the Communist Party, and was admitted as a new or quota immigrant. He never again joined the Communist Party. In 1951, deportation proceedings were instituted under the Internal Security Act of 1950 which requires the deportation of all aliens who become members of the Communist Party "after entry into the United States."[132] The majority of the Court, in an opinion by Mr. Justice Whittaker, held Bonetti non-deportable, construing the word "entry" to mean the last lawful entry which the alien relies upon to support his claim to remain: in this case the "entry" in 1938. "It is obvious that Congress in enacting these statutes did not contemplate the novel factual situation that confronts us, and that these statutes are, to say the least, ambiguous upon the question we must now decide. . . . 'When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, then the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration . . . . It may fairly be said to be a presupposition of our law to resolve doubts against the imposition of a harsher punishment.' "[133] Mr. Justice Clark dissented. "In enacting § 22 of the Act of 1950, the Congress stated, 'The purpose . . . is to strengthen the provisions of existing law with respect to the exclusion and deportation of subversive aliens' . . . . The construction of the section as applying to membership after *any* entry—including the first as well as the last—

[130] 355 U.S. at 120.
[131] 356 U.S. 691 (1958).
[132] 64 STAT. 1008.
[133] 356 U.S. at 696, 699.

seems to be demanded by this legislative history."[134] Mr. Justice Frankfurter and Mr. Justice Harlan concurred in this dissent.

Leng May Ma v. Barber[135] concerned the authority of the Attorney General to grant political asylum to aliens here on "parole." The Immigration and Nationality Act of 1952 authorizes the Attorney General to withhold deportation of any alien "within the United States" to any country in which in his opinion the alien would be subject to physical persecution.[136] Leng May Ma arrived in this country in May 1951 claiming United States citizenship on the ground that her father was a United States citizen. Pending determination of her claim, she was released on parole. Having failed to establish her claim, she requested the Attorney General to withhold deportation and claimed that she was now "within the United States" within the meaning of § 243(h) of the Immigration and Nationality Act of 1952. The Attorney General denied the claim and refused to grant the request. The majority of the Court, in an opinion by Mr. Justice Clark, agreed with the Attorney General. "The detention of an alien in custody pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States. . . . The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status, and to hold that petitioner's parole placed her legally 'within the United States' is inconsistent with the congressional mandate, the administrative concept of parole, and the decisions of this Court."[137] Mr. Justice Douglas dissented. "I would not read the law narrowly to make it the duty of our officials to send this alien and the others in the companion case to what may be persecution or death. Technicalities need not enmesh us. The spirit of the law provides the true guide. It makes plain, I think, that this case is one of those where the Attorney General is authorized to save a human being from persecution in a Communist land."[137a] The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan concurred in this dissent.

In *Heikkinen v. United States*,[138] a deportation order had been issued against petitioner in 1952 because of his Communist Party membership from 1923 to 1930. At that time, after indicating his preference for his native Finland if he could not stay here, the Immigration and Naturalization authorities told him that they would make arrangements to effect his deportation and that Heikkinen would be notified when and where to present himself for deportation. Subse-

[134] 356 U.S. at 701.
[135] 357 U.S. 185 (1958).
[136] 66 STAT. 212, 214, 8 U.S.C. § 1253(h) (1952).
[137] 357 U.S. at 188, 190.
[137a] 357 U.S. at 192.
[138] 355 U.S. 273 (1958).

quently, Heikkinen was indicted on two counts: for willfully failing to depart from the United States, and for willfully failing to make timely application for travel documents necessary for his departure. A unanimous Court, in an opinion by Mr. Justice Whittaker, reversed the conviction. The letter from the Immigration and Naturalization Service "told petitioner, in the plainest language, that the Service was making the arrangements to effect his deportation and, when completed, he would be notified when and where to present himself for deportation. Surely petitioner was justified in relying upon the plain meaning of those simple words, and it cannot be said that he acted 'willfully'—i.e., with a 'bad purpose' or without 'justifiable excuse'—in doing so, until, at least, they were in some way countermanded . . . ."[139]

In *Nowak v. United States*,[140] the Court, in an opinion by Mr. Justice Harlan, set aside a denaturalization decree because the Government had not proved its case by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt."[141] In 1937, Nowak, then a member of the Communist Party, was naturalized after answering the following question in the negative: "28. Are you a believer in anarchy? . . . Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? . . ." The district court held that this negative answer was fraudulent, and for this reason set aside the naturalization decree. The Court, in reversing, said that Nowak reasonably might have interpreted this question as not calling for information about membership in the Communist Party. He might reasonably have read it "as a two-pronged inquiry relating simply to anarchy." He answered it in 1937 "when communism was much less in the public consciousness . . . and when, accordingly, there was less reason for individuals to believe that government questionnaires were seeking information relating to Communist Party membership."[142] The lower courts had declared that an additional ground for Nowak's denaturalization was that he had not been, as required by law, attached "to the principles of the Constitution of the United States" for a period of five years preceding the naturalization. The Court assumed that the Communist Party in 1937 engaged in illegal advocacy but held that this did not justify Nowak's denaturalization, as the Government failed to prove that this illegal advocacy was known to the petitioner. Mr. Justice Burton, Mr. Justice Clark, and Mr. Justice Whittaker dissented. Reading the same record as did the majority, they believed the Government had fully proved its case.

[139] 355 U.S. at 279.
[140] 356 U.S. 660 (1958).
[141] 356 U.S. at 663.
[142] 356 U.S. at 664-45.

CRUEL AND UNUSUAL PUNISHMENT

The Court was asked twice by the same petitioner to set aside sentences on the ground that they were cruel and unusual. *Yates v. United States,*[143] *Yates v. United States.*[144] The first *Yates* case arose as follows. A defendant in a Smith Act prosecution, Yates took the stand in her own behalf, and on June 26, the first day of her cross examination, she was asked to identify four persons as members of the Communist Party. She refused to answer these four questions with the announcement that she could not in good conscience answer questions concerning other persons. For this refusal the trial judge held her in civil contempt and ordered her confined until she answered. On June 30th she was asked eleven additional questions concerning the Communist Party membership of nine other persons, and upon her refusal to answer, the trial judge found her guilty of eleven criminal contempts and sentenced her to a prison term of one year for each of the eleven contempts, the sentences to run concurrently. The Court, in an opinion by Mr. Justice Clark, affirmed the first contempt but reversed the other ten. It found that there had been but one contempt, because when a witness refuses to answer questions "within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area."[145] Mr. Justice Douglas dissented. "Because of the prosecutor's efforts to multiply the offense by continuing the line of questions, Mrs. Yates' *second* refusal to answer, following consistently the position she had made clear to the court upon the first day of her cross-examination, was not a contempt. Her *second* refusal to answer was merely a failure to purge herself of the first contempt, not a new one."[146] The Chief Justice and Mr. Justice Black concurred in this dissent.

The second *Yates* case arose when the district judge, on remand, sentenced her to one year in jail for the one act of contempt. Yates argued that this was excessive and pointed out the following. When she was first indicted for violation of the Smith Act (she was ultimately acquitted) the trial judge set bail at $50,000. She was unable to meet this amount and was confined pending appeal from the bail order. The Supreme Court held that the district judge had not applied the correct standards in fixing bail, and remanded the case so Yates could move to reduce bail. Her motion for reduction of bail was then denied, and she was confined in jail pending appeal from the order denying her motion to reduce bail. The court of appeals fixed bail at $10,000 and she was shortly thereafter released. On the first day of her cross examina-

[143] 355 U.S. 66 (1957).
[144] 356 U.S. 363 (1958).
[145] 355 U.S. at 73.
[146] 355 U.S. at 78.

tion she refused to answer four questions relating to the Communist Party membership of other persons, was held in civil contempt, and confined to jail until she answered. (She never answered.) At the conclusion of the trial she was convicted of violating the Smith Act and was denied bail pending appeal. On appeal from the order denying bail, the court of appeals held that the district judge had applied incorrect standards, and remanded for further proceedings. The district judge again denied bail and on appeal from this denial, the court of appeals fixed bail at $20,000. Yates furnished that amount and was released from custody. Four days later, the district judge ordered her committed for the civil contempt arising out of her refusal to answer the four questions asked her on June 26th. The district judge denied bail pending appeal of this question, but the court of appeals granted it, and subsequently reversed the civil contempt convictions. The district judge then found her guilty of criminal contempt in refusing to answer these four June 26th questions, and denied bail pending appeal. The court of appeals granted bail and subsequently reversed the contempt conviction. In the meantime, the district judge held Yates guilty of eleven criminal contempts for her refusal to answer the June 30th questions, this was reversed by the Supreme Court, and on remand the judge sentenced her to one year in jail for the one contempt. The district judge again denied bail pending appeal, and on appeal from this denial, the court of appeals set bail at $5,000 which Yates met. In sum, although Yates had been acquitted of all crimes except the one criminal contempt of June 30th, she had spent seven months in jail because the district judge had erroneously denied bail on seven different occasions.

The Court, in a per curiam opinion, after reviewing the above facts, held that "the time that petitioner has already served in jail is an adequate punishment for her offense in refusing to answer questions."[147] Mr. Justice Clark dissented. "It is for us to say whether the one-year sentence was improper rather than to pass on the adequacy of time already served on other judgments. Petitioner has served but 15 days on this sentence, and I therefore dissent from the judgment releasing her."[148] Mr. Justice Burton and Mr. Justice Whittaker concurred in this dissent.

CONCLUSION

The Court decisions and the votes of the Justices are set forth in the following chart.

[147] 356 U.S. at 367.
[148] *Ibid.*

Votes of Court and Justices in fifty cases during 1957-58 Term of Court when asked to protect asserted fundamental rights of the individual against the power of government.[149] A check in the left hand column is a vote for the individual, a check in the right hand column is a vote for the government. A check in neither indicates the Justice did not participate.

Name of Case [150]	Court		Black		Burton		Brennan		Clark		Douglas		Frankfurter		Harlan		Warren		Whittaker		Total	
Youngdahl v. Rainfair (freedom of speech, use of word "scab")		✓	✓			✓		✓		✓	✓			✓		✓	✓			✓	3	6
Staub v. City of Baxley (freedom of speech, licensing statute)	✓		✓		✓		✓			✓	✓			✓	✓		✓		✓		7	2
N.A.A.C.P. v. Alabama (freedom of association, right to inspect membership lists)	✓		✓		✓		✓		✓		✓		✓		✓		✓		✓		9	0
Harmon v. Brucker (Army security-risk discharge)	✓		✓		✓		✓			✓	✓		✓		✓		✓		✓		8	1
Beilan v. Board of Education (discharge of teacher for refusal to answer questions relating to communism)		✓	✓			✓	✓			✓	✓			✓		✓	✓			✓	4	5
Lerner v. Casey (discharge of subway conductor for refusal to answer questions relating to communism)		✓	✓			✓	✓			✓	✓			✓		✓	✓			✓	4	5
Speiser v. Randall (denial of tax exemption for refusal to file loyalty oath)	✓		✓		✓		✓			✓	✓		✓		✓				✓		7	1
First Unitarian Church v. Los Angeles (same as Speiser above)	✓		✓		✓		✓			✓	✓		✓		✓				✓		7	1
Societe Internationale v. Rogers (right to trial despite failure to comply with pre-trial production order)	✓		✓		✓		✓				✓		✓		✓		✓		✓		8	0
Caritativo v. California (right of condemned prisoner to participate in "sanity" hearing)		✓		✓		✓	✓			✓	✓		✓			✓		✓		✓	3	6
United States v. Procter and Gamble (right to inspect grand jury records)		✓		✓	✓			✓		✓		✓	✓			✓		✓		✓	2	7
Alcorta v. Texas (right to trial free from knowing use of perjured testimony)	✓		✓		✓		✓		✓		✓		✓		✓		✓		✓		9	0
Green v. United States (right to jury in criminal contempt proceedings)		✓	✓			✓	✓			✓	✓			✓		✓	✓			✓	4	5
Lambert v. California (ignorance of the law)	✓		✓			✓	✓		✓		✓			✓		✓	✓			✓	5	4
Sacher v. United States (congressional committee contempt—need to inform witness of matter under investigation)	✓		✓				✓			✓	✓		✓		✓		✓		✓		7	1
Payne v. Arkansas (coerced confession)	✓		✓			✓	✓			✓	✓		✓		✓		✓		✓		7	2
Thomas v. Arizona (coerced confession)		✓	✓			✓	✓			✓	✓			✓		✓	✓			✓	4	5
Crooker v. California (right to counsel)		✓	✓			✓	✓			✓	✓			✓		✓	✓			✓	4	5
Cicenia v. LaGay (right to counsel)		✓	✓			✓				✓	✓			✓		✓	✓			✓	3	5
Ashdown v. Utah (right to counsel)		✓	✓			✓		✓		✓	✓			✓		✓		✓		✓	2	7
Moore v. Michigan ("waiver" of counsel)	✓		✓			✓	✓			✓	✓			✓		✓	✓			✓	5	4
Sherman v. United States (entrapment—proper standard)	✓		✓		✓		✓		✓		✓		✓		✓		✓		✓		9	0
Masciale v. United States (entrapment—proper standard)		✓		✓		✓	✓			✓	✓		✓		✓			✓		✓	4	5
Giordenello v. United States (search and seizure)	✓		✓			✓	✓			✓	✓		✓		✓		✓			✓	6	3
Miller v. United States (search and seizure)	✓		✓			✓	✓			✓	✓		✓		✓		✓		✓		7	2

Name of Case	Court		Black		Burton	Brennan		Clark	Douglas		Frankfurter	Harlan	Warren		Whittaker	Total	
Jones v. United States (search and seizure)	✓		✓			✓	✓		✓	✓		✓		✓		✓		7	2
Benanti v. United States (wire tap—pursuant to state order)	✓		✓		✓		✓	✓		✓		✓		✓		✓		9	0
Rathbun v. United States (wire tap—on extension line)		✓		✓		✓		✓	✓	✓		✓	✓		✓		✓	2	7
Green v. United States (double jeopardy)	✓		✓			✓	✓		✓	✓		✓	✓	✓		✓		5	4
Gore v. United States (double jeopardy)		✓	✓			✓	✓		✓	✓		✓		✓	✓		✓	4	5
Hoag v. New Jersey (double jeopardy)		✓	✓			✓			✓	✓		✓		✓	✓		✓	3	5
Ciucci v. Illinois (double jeopardy)		✓	✓			✓	✓		✓	✓		✓		✓	✓		✓	4	5
Simpson v. United States (self-incrimination—extent of protection)	✓		✓		✓		✓	✓		✓		✓		✓		✓		9	0
Wilson v. Loew's Inc. (self-incrimination—ground for black-list)		✓		✓		✓		✓	✓	✓		✓	✓		✓		✓	1	8
Brown v. United States (self-incrimination, waiver)		✓	✓			✓	✓		✓	✓		✓		✓	✓		✓	4	5
Knapp v. Schweitzer (self-incrimination, plea before state agency)		✓	✓			✓		✓	✓	✓		✓		✓	✓		✓	3	6
Eubanks v. Louisiana (equal protection, exclusion of Negroes from grand jury)	✓		✓		✓		✓	✓		✓	✓		✓		✓		✓	9	0
Eskridge v. Washington Prison Bd. (equal protection, right to appeal in forma pauperis)	✓		✓		✓		✓	✓		✓			✓	✓			✓	6	2
Perez v. Brownell (expatriation, for voting in foreign election)		✓	✓			✓		✓	✓	✓		✓		✓	✓	✓		4	5
Trop v. Dulles (expatriation, for desertion in time of war)	✓		✓			✓	✓		✓	✓		✓		✓	✓	✓		5	4
Nishikawa v. Dulles (expatriation, burden of proof)	✓		✓		✓		✓		✓	✓		✓		✓	✓	✓		7	2
Kent v. Dulles (denial of passport for failure to file non-communist affidavit)	✓		✓			✓	✓		✓	✓		✓		✓	✓		✓	5	4
Dayton v. Dulles (denial of passport on secret evidence)	✓		✓			✓	✓		✓	✓		✓		✓	✓		✓	5	4
Rowoldt v. Perfetto (deportation—for nominal Communist Party membership)	✓		✓			✓	✓		✓	✓		✓		✓	✓		✓	5	4
Bonetti v. Rogers (deportation—joining Communist Party after last "entry")	✓		✓		✓		✓		✓	✓			✓	✓	✓	✓		6	3
Leng May Ma v. Barber (deportation—political asylum)		✓	✓			✓	✓		✓	✓			✓	✓	✓		✓	4	5
Heikkinen v. United States (failure to obey deportation order)	✓		✓		✓		✓	✓		✓		✓		✓		✓		9	0
Nowak v. United States (denaturalization—sufficiency of evidence)	✓		✓			✓	✓		✓	✓		✓		✓	✓		✓	6	3
Yates v. United States (multiple contempt for refusal to answer related questions)		✓	✓			✓		✓	✓	✓			✓	✓	✓		✓	3	6
Yates v. United States (review power of Court over excessive punishment)	✓		✓			✓	✓		✓	✓		✓		✓			✓	6	3
TOTAL	29	21	45	5	16	33	40	8	9	40	49	1	26	23	20	30	42	6	22	28

[149] The Court, and the individual Justices, did not always decide the cases on the basis of those issues deemed paramount by the litigants. The chart does not then necessarily reflect the thinking of the Justices on the issues sought to be litigated.

[150] The capsule descriptions are intended solely to refresh the reader's recollection of the cases. They are not intended to and do not necessarily describe the issues on which the cases were decided.

As seen from the above chart there were eight occasions when the Court was unanimous; in each instance all the participating justices voted for the individual. On eighteen occasions the Court reached its conclusion by five to four vote; eleven times holding for the government, seven times for the individual. In sixteen of these cases the Chief Justice, Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice Douglas voted for the individual. The individual won when these four justices were joined on three occasions by Mr. Justice Frankfurter, on three other occasions by Mr. Justice Whittaker, and on one other occasion by Mr. Justice Clark.

Some highlights of the Court's decisions are its holdings that the Constitution permits Congress to expatriate an American citizen whenever there is a relevant connection between a constitutional authority lodged in Congress and the ultimate legislative action,[151] that Congress had not authorized the Secretary of Army to give undesirable discharges because of pre-induction political activities and associations,[152] and that Congress had not authorized the Secretary of State to deny a passport to those he thought to be communists.[153] The Court also concluded that Congress had not authorized the deportation of an alien because of "nominal" Communist Party membership,[154] nor of an alien who joined the Communist Party during his first, but not during his subsequent life in the United States. On the other hand, the Court also held that Congress had not authorized the Attorney General to entertain a plea of political asylum by an alien temporarily admitted to this country on "parole."[154a] The above decisions based on statutory construction can be overruled whenever Congress sees fit to amend its statutes.

In the area of federal criminal prosecution, the Court: held that the United States could not punish a man who did not show "ready complaisance" to a government agent's suggestion that a crime be committed;[155] set aside a verdict of guilt based on wire tap evidence obtained by a state policeman pursuant to state law;[156] held that double jeopardy precluded the retrial of a man once acquitted by jury;[157] and declared that the plea of self-incrimination was a defense to a contempt charge based on a witness' refusal to tell a congressional committee his address.[158] On the other hand, the Court held that one accused of criminal contempt was not entitled to jury trial,[159] that evidence obtained by a state policeman listening in on a telephone extension was admissible in a federal prosecution,[160] that double jeopardy did not prevent the multi-

[151] See text at note 105, *supra*.
[152] See text at note 16, *supra*.
[153] See text at note 122, *supra*.
[154] See text at note 126, *supra*.
[154a] See text at note 135, *supra*.
[155] See text at note 67, *supra*.
[156] See text at note 75, *supra*.
[157] See text at note 78, *supra*.
[158] See text at note 89, *supra*.
[159] See text at note 43, *supra*.
[160] See text at note 76, *supra*.

ple punishment of a single act which violated more than one statute,[161] and that a witness in a civil proceeding, by proclaiming loyalty to the United States on direct examination, thereby "waived" the right to invoke the self-incrimination clause when asked on cross examination if she was then a member of the Communist Party.[162]

In the area of state "non-criminal" matters, the Court sustained the power of an Arkansas court to enjoin use of the word "scab" in a labor dispute,[163] and sustained the power of Pennsylvania and New York to discharge employees who refused to answer employer questions concerning communism.[164] The Court held that a city, in Georgia, could not lodge discretionary authority in its Mayor to license labor organizers,[165] that Alabama, in the circumstances present, could not punish the N.A.A.C.P. for refusal to turn over its membership lists,[166] and that California could not deny tax exemption to those who engaged in illegal advocacy by a method and technique which required the claimant for such tax exemption to prove that his speech was not illegal.[167]

In the area of state criminal prosecution, the Court held that Texas could not put a man to death on evidence which the prosecutor knew was perjured,[168] that Arkansas could not put a man to death on a confession obtained by coercion,[169] that Louisiana could not put a man to death when he was indicted by a grand jury from which members of his race were systematically excluded,[170] that if Washington provided an automatic appeal for those who could afford transcripts, it must also provide an appeal for those who could not,[171] that Michigan could not send a man to life imprisonment when his waiver of counsel was secured by threats of mob violence,[172] and that California could not imprison a woman for violation of a statute which she did not know, and had no reason to know, existed.[173] On the other hand, the Court held that California, Utah, and New Jersey could constitutionally deny a prisoner his right to counsel during a lengthy period of interrogation,[174] that neither New Jersey nor Illinois was barred by the double jeopardy Clause from successively trying a man for the same criminal act,[175] and that New York could punish a witness before its grand juries for refusal to give testimony which could and would be utilized against him in a federal prosecution.[176]

[161] See text at note 80, *supra*.
[162] See text at note 91, *supra*.
[163] See text at note 7, *supra*.
[164] See text at note 19, *supra*.
[165] See text at note 9, *supra*.
[166] See text at note 13, *supra*.
[167] See text at note 27, *supra*.
[168] See text at note 42, *supra*.
[169] See text at note 54, *supra*.
[170] See text at note 103, *supra*.
[171] See text at note 104, *supra*.
[172] See text at note 65, *supra*.
[173] See text at note 49, *supra*.
[174] See text at note 58, *supra*.
[175] See text at note 84, *supra*.
[176] See text at note 92, *supra*.

Any further conclusions would necessarily reflect this writer's opinion that the Court has failed to give sufficient weight to the asserted fundamental rights of the individual discussed above, and are therefore inappropriate in an article designed to encourage the reader to judge the Court by what it does, not by what people, no matter their station, say about it.