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Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, edited by Philip B. Kurland and Gerhard Casper

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Book Review

LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW. Edited by Philip B. Kurland and Gerhard Casper. Arlington, Va.: University Publications of America, Inc., 1975. 80 volumes. $3,900.

One of the most striking facts about American history is that the Constitution was written nearly 190 years ago and yet Americans are still arguing vehemently about its meaning. The term "constitutional rights" is invoked in different ways by prisoner and policeman, lawyer and judge, President and Congress, layman and professional. The debate which flared in the Constitutional Convention of 1787 continues today in schools, legislatures, and courts throughout the country, leading inevitably to—and reaching its climax at—the Supreme Court of the United States.

The significance of the Supreme Court in American life and history can hardly be overstated. As early as Alexis de Tocqueville,[1] observers of government and society in the United States realized that the institution of the Supreme Court and the Court's relationship to the Constitution placed American democracy in a unique position. In 1833, Dr. Joseph Story wrote about the indispensability of the national judiciary:

> [E]very government must, in its essence, be unsafe and unfit for free people, where such a [judiciary] department does not exist, with powers co-extensive with those of the legislative department. Where there is no judicial department to interpret, pronounce, and execute the law, to decide controversies, and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers, for the purpose of commanding obedience, to the destruction of liberty.[2]

It is in the holdings of the Supreme Court that the resiliency of the fabric of the Constitution is most evident. The adaptability of the American legal system to contemporary events, and occasionally, the necessary shaping of events by the legal system, have consistently played a significant role in

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 164-66 (First Schocken Paperback Edition, H. Reeve transl. 1835).

2. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1568 (1st ed. 1833).

the evolution of the Constitution and the nation. For example, in February 1793, the Supreme Court held in *Crisholm v. Georgia*[3] that a law suit brought by a citizen of one state against another state was within the jurisdiction of the Court under the terms of article III of the Constitution. Within 24 hours of the decision, Congress initiated action on what was to become the eleventh amendment,[4] which declared that the Court did not have jurisdiction over such cases. In July 1974, the Supreme Court ruled in *United States v. Nixon*[5] that certain tape recordings in the possession of President Nixon should be surrendered to the Watergate Special Prosecutor for use in criminal cases under investigation. A few days later there was a new President of the United States.

Regardless of the ultimate direction, or correctness, of the rulings of the Supreme Court, the results are usually significant because of the unique influence which the Court exerts upon the law, government, and history of the United States. The Court is a forum not only for conflicting points of law, but also for conflicting political philosophies, economic principles, and social and moral ideals. The only documents which provide a contextual view of the Court's work are the briefs and oral arguments of both sides before the Court, which have supplied the raw material for judicial decision and have creatively shaped the work of the Court. Availability of these important papers, however, has been restricted.[6]

Professors Kurland and Casper's *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* offers in 80 volumes the records, briefs, and oral arguments of 266 of the most notable constitutional cases that have reached the Court during its history. Simply making these briefs and arguments available in book form is a benefit for lawyers, faculty, students, and others who are interested in the development of our laws and institutions. The topics covered by the work reveal the breadth of impact the Court has had on American life,[7] and the presentation of the material will fascinate the social historian as much as the legal scholar. While the landmark cases of the distant past are present, the emphasis is clearly on 20th century legal developments and the collection's role as a working resource. In the beginning of each major brief, a statement of the case pre-

3. 2 U.S. (2 Dall.) 419 (1793).

4. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 193 (4th ed. 1970).

5. 418 U.S. 683 (1974).

6. *See* note 15 *infra* and accompanying text.

7. Among the major topics of the collection are judicial review, the implied powers of Congress, freedom of speech and press, due process, equal protection, double jeopardy, self-incrimination, searches and seizures, right to counsel, commerce, banking, taxation, federal regulatory powers, Reconstruction Era conflicts, New Deal legislation, states' rights, union and labor, antitrust and monopolies, obscenities, civil rights and liberty, abortion, religion, Indians, public lands, capital punishment, war powers, wiretapping, legislative apportionment, school busing, sex discrimination, and Presidential authority.

sents the factual history and precise legal issues before the Court. The body of the brief, which sometimes exceeds 100 pages in length, brings into consideration every available reason the case should be decided in favor of the given party, and places the case in its legal and historical perspective. Briefs of opposing parties are provided, and each brief cites cases and secondary authority to support the legal foundation for the position the brief asserts.

The brief is an invaluable research tool. Its study leads to an increased understanding of the issues and allows a comparative analysis of the reasoning process of the opposing parties. The partisan nature of a brief vividly highlights issues and policy considerations often muted by the Court in the reported opinion. For instance, the brief for the plaintiff in *Youngstown Sheet and Tube Co. v. Sawyer*,[8] succinctly states the basis for the suit:

> This concept of unbridled and unchecked executive power is presented in its most extreme posture by the action here challenged. The seizure reflects a complete disregard of the statutory machinery established by Congress, in keeping with its responsibility under the Constitution, for the handling of the labor dispute in the steel industry. Again, in flat disregard of the Congressional mandate guaranteeing an employer the right to bargain collectively with his employees, Mr. Sawyer has announced his intention to increase the wages of plaintiff's employees and has declined to give any assurance that he would not do this while the case was *sub judice*. In essential analysis, this is an attempt, without any vestige of statutory authority and solely upon the assertion of inherent executive power, to appropriate plaintiff's funds for payment of wages in whatever amounts Mr. Sawyer may choose to establish.
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> . . . [T]his claim of an inherent overriding power in the Executive to act by fiat in disregard of the law is not a new one. It is precisely the claim which was at the root of centuries of bloody struggle to overcome the absolutism of the English Crown. It was precisely the threat against which the Founding Fathers established safeguards by specifically limiting executive power in framing the Constitution of the United States.[9]

In addition to the briefs of counsel, *Landmark Briefs* includes the major amicus curiae briefs and, for the first time, the complete transcripts of many of the extant oral arguments before the Court. These oral arguments are particularly noteworthy because they have been virtually inaccessible until now.

The oral argument can be a critical factor in the final decision of the Court. The ability of the attorney to rebut the attack of the Court ration-

8. 343 U.S. 579 (1952).

9. 48 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 447-48 (P. Kurland & G. Casper eds. 1975) [hereinafter cited as LANDMARK BRIEFS].

ally and consistently may explain his success or failure, even beyond the arguments in his brief. The oral argument for petitioner in *Branzburg v. Hayes* [10] is illustrative. Branzburg, an investigative reporter, was subpoenaed to testify before a grand jury as to the identities of persons mentioned in an article he had written on the problem of drug abuse. He refused to identify these persons, claiming they were a confidential source of information. During the final oral argument, the petitioner's attorney claimed that compelling disclosure under these circumstances was violative of the first and fourteenth amendments. Counsel urged the Court to adopt a balancing test which would, in essence, draw distinctions between crimes.[11] The Court refused to accept the rationale behind this argument and consequently ordered the petitioner to testify.

Professors Kurland and Casper have wisely presented their product free of annotation and comment. Any additions complete enough to do justice to the cases would have been prohibitively expensive [12] and subject to inevitable substantive criticism, although a cross-reference to major secondary sources would have been a valuable supplement. The series of 266 cases is naturally prey to differences of opinion as to the selection of cases,[13] but by any standard, the coverage is excellent. Most importantly, a valuable service, the collection of complete primary records of major Supreme Court cases, has been rendered. As one constitutional lawyer expressed it: "My mind boggles at the prospect of being able to research in these materials for a casebook in constitutional law, or for briefs on a Supreme Court case. I have never had this type of material available to me, except in the Supreme Court Library itself. There you can't even use your own pencil." [14]

Presently there are two microform editions [15] of the records and briefs of

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10. 408 U.S. 665 (1972).

11. 74 LANDMARK BRIEFS 672-707.

12. The price of the entire series is significant. The volumes are quite lengthy, however, averaging about 1,000 pages each. Thus, the per volume price is on a par with a 500-page volume costing about $23.50. Considering the production expense, which includes the transcription and typesetting of the oral arguments which are on tape recordings at the National Archives, the price is reasonable. For those lucky libraries which placed an order before publication, a 20% discount was available. The publisher also grants a 10% discount when payment is made with an order.

The briefs are facsimiles of the actual briefs filed. They are essentially unedited; only appendices and "certificates of service" have been deleted. Each volume claims the only corrections made are those which were penciled in by the attorneys. Reported opinions of the Court are not included in the series.

13. For instance, I do not consider Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), 57 LANDMARK BRIEFS 3, worth preserving in any form.

14. Personal correspondence of author.

15. One is available in microfiche format and the other in microfilm. Neither, however, contains any briefs prior to 1832 or any oral arguments. For a single decade, 1960-1969, the price for all of the Court's records and briefs on microfiche is $18,359.00; for 14 years at the

the Court on the market. With the publication [16] of Kurland and Casper's compilation, at long last, there is an alternative. Those who do not have access to the United States Supreme Court Records and Briefs, those who cannot afford the expensive complete microfiche collection, and those who do not like the use of microforms of any sort because they would rather get the feeling of the liaison with the book, will be excited to find *Landmark Briefs* coming to their aid. Since the records and briefs of the Supreme Court are a unique, immensely valuable, and untapped source for scholars in many fields of American studies, as well as a valuable research source for practicing attorneys, this set is recommended for all comprehensive legal libraries.

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turn of the century, 1897-1910, the price of records and briefs on microfilm is $12,450.00. If a library bought one complete set of records and briefs in microform, the total cost, at current prices, would be about $100,000.00.

16. Fifty-two volumes are presently available; the complete 80 volume series should be on the market by March 31, 1977.

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