

BOOK REVIEWS

THE FEAR OF CRIME. By Richard Harris. New York: Prager Inc. Pp. 100. \$4.95

Mr. Richard Harris' little¹ book, *The Fear of Crime*, portrays in colorful, compact style the workings of the United States Senate, both in committee and on the floor, in the hammering out of a major piece of legislation. The book concerns itself with many of the legislative and political machinations involved in the drafting and passage of the Omnibus Crime Control and Safe Streets Act of 1968.²

Mr. Harris writes forthrightly about the bias of some of the bill's sponsors, about their determination to discredit the Supreme Court, and about their efforts to "lard the lean earth"³ with letters and testimony deftly drawn in major numbers from "favorable" correspondents and witnesses. No holds are barred by the author; he writes it as he believes it is and as he sees it. Being a seasoned, experienced staff writer in the political scene for the *New Yorker* for more than a decade, Mr. Harris spells out with expertness and with undisguised candor the finesses, the phony appeals, and the power plays to which the bill's sponsors resorted in their legislative efforts.

If you are (and perhaps even if you are not) a member of Mr. Harris' "unenlightened" public, you may feel strongly that you are not, as he more than hints, misguided or ignorant, or both, because you want something done about crimes of violence. You may disagree, even fervently, with this unstated but fairly implied thesis that crime must be permitted to flourish while society and government tear out by the roots the causes of crime, whether these causes be economic, sociological, anthropological, environmental, educational, or any combinations of these and other factors. In fairness, I must say that I think Mr. Harris is saying that if you are advocating that something be done about crime and if by that advocacy you mean "do something even if that something includes the deprivation of suspects' and others'

1. It is only 100 pages long, plus a twelve-page introduction by Nicholas deB. Katzenbach.

2. 42 U.S.C. §§ 370 *et. seq.* (Supp. IV, 1969).

3. Shakespeare, *The First Part of King Henry IV*, Act II, Sc. 2, Line 116.

fundamental rights” you are, through fear of crime, inviting totalitarian methods.⁴

The main thrust of *The Fear of Crime* is that the principal senatorial sponsors of the Omnibus Crime Control and Safe Streets Act were attempting not to control crime but to show congressional contempt for the Supreme Court's decisions in criminal cases. With this objective, created by a dislike for Supreme Court decisions in desegregation areas, these sponsors preyed upon the fear of crime in the nation and engineered the passage by Congress of the “Crime Bill” in an effort to congressionally interfere with the Supreme Court's decisions in the criminal law field.⁵ And even if some of the provisions of this “Crime Bill” may be found by the Court to be unconstitutional, the effect on the Court, mused the sponsors, will be a loss of prestige in the nation on account of the aversion of millions of citizens to the “coddling of criminals.” The end result may be, so the reasoning goes, that either the Court will “see the light” and voluntarily reduce its activism, or constitutional amendments (to authorize “police state” methods) will be easier to effect, or Presidents will continuously attempt to nominate for future Court vacancies new members who are conservatives, non-activists, or, ideologically, “law and order” individuals; in any of these events, the prestige of the Supreme Court will be lessened.

As students of the history of our Supreme Court know, the attempted discrediting of the Court by other branches of our tripartite Federal government has occurred with fair frequency. At the onset of the 19th century the Jeffersonian Republicans, disenchanted with the political viewpoint of the “holdover” Supreme Court and particularly of the Chief Justice, John Marshall, brought an impeachment action against Justice Samuel Chase. Because of a split among the Jeffersonian Senators, the vote was insufficient for conviction. Had Justice Chase been impeached, undoubtedly John Marshall would have been the next discredited victim. Thus, there was averted “as a matter of practical political constitutional interpretation”⁶ the impeachment

4. “He that is robb'd, not wanting what is stolen,
Let him not know't and he's not robb'd at all.”

Shakespeare, *Othello*, Act III, Sc. 3, Line 337.

5. “There is no vice so simple but assumes
Some mark of virtue on his outward parts.”

Shakespeare, *The Merchant of Venice*, Act III, Sc. 2, Line 75.

6. J.W. HURST, *THE GROWTH OF AMERICAN LAW* (1950) p. 69.

of a federal judge because of his political opinions, his views about public policy, and his interpretations of laws.

In the late 1860's, the "radical" Congress had trouble with the Supreme Court, especially in connection with the constitutionality of reconstruction legislation pertaining to the rebellious states. To prevent the Supreme Court from possibly holding unconstitutional some sections of the Reconstruction Act, Congress in 1868⁷ withdrew the appellate jurisdiction of the Supreme Court in habeas corpus actions, one of which was then pending in the Court. This case, *Ex Parte McCordle*,⁸ involved the amenability of a civilian newspaper editor in Mississippi to trial by military commission for publication of alleged incendiary and libelous articles. While the case was in "midstream" in the Supreme Court, Congress, utilizing the plain words of the Constitution in Article III, Section 2,⁹ repealed the appellate jurisdiction of the Supreme Court in such habeas corpus cases. The Supreme Court, even though jurisdiction had already attached in the case, dismissed McCordle's appeal for want of jurisdiction. The Court said, *inter alia*, "We are not at liberty to inquire into the motives of the legislature. . . . [T]he power to make exceptions to the appellate jurisdiction of this court is given by express words. . . . [J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."¹⁰

Despite the Supreme Court's acceptance in *Ex Parte McCordle* of the plain wording of the Constitution concerning the power of the Congress to remove appellate jurisdiction of the Supreme Court, it can be argued that the purpose of the "exception" clause in Article III, Section 2, was to give Congress the authority to regulate the manner of bringing cases to the court for appellate review in order to assure an orderly flow and not to "destroy the essential role of the Supreme Court in the

7. Act of March 27, 1868, 15 Stat. 44.

8. 74 U.S. (7 Wall.) 506 (1869).

9. Article III of the Constitution of the United States, after vesting the judicial power of the nation in the Supreme Court (and in subsequent inferior Federal courts established by Congress), and after defining the scope of those cases and controversies to which the judicial power shall extend, lists the Supreme Court's original jurisdiction. Then in the second sentence of Article III, Section 2, the Constitution provides, "In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

10. 74 U.S. (7 Wall.) 506, 514-15 (1869).

constitutional plan.”¹¹ Justice Douglas, dissenting in *Glidden Co. v. Zdanok*, (a case in which the majority opinion referred to *Ex Parte McCordle*), said “There is a serious question whether the *McCordle* case could command a majority view today.”¹² The Supreme Court, indeed, has not been loath in the past twenty years to overrule prior constitutional interpretations! On the other hand, if the second clause of Article III, Section 2, is interpreted as one of the “checks and balances” which the framers placed, like the Presidential veto, to provide some restraint by one arm of the Federal government against one of the others, then the “exception” clause is one way that Congress may validly remove types of cases from the appellate jurisdiction of the Supreme Court.

A clearly appropriate way for Congress to try to overturn an unwelcome constitutional decision by the Supreme Court is through the amending process of article V of the Constitution. This method, of course, is time-consuming and needs ratifying action by the legislatures (or by conventions) of three-fourths of the states.¹³

Efforts of the President to counteract adverse constitutional decisions by the Supreme Court, appear most dramatically in President Franklin D. Roosevelt’s court-packing plan of 1937. Thwarted by some Supreme Court holdings concerning New Deal legislation, President Roosevelt in February 1937, proposed to Congress that it enact legislation to increase the number of Federal judges, including those on the Supreme Court. In effect, the President was striving to get his legislation sustained by augmenting the Supreme Court with New Deal justices, who hopefully would find his pet legislation consistent with the provisions of the Constitution. In any event, as President Roosevelt announced to the nation in a “fire-side chat” the “. . . plan will save our National Constitution from hardening of the judicial arteries”¹⁴ The Senate Judiciary Committee

11. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362, 1365 (1953).

12. 370 U.S. 530, 605, n. 11 (1962).

13. The Sixteenth Amendment giving Congress power “to lay and collect taxes on income from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration” came as a result of the Court’s finding unconstitutional a Federal income tax law in *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

14. Radio address by President Roosevelt, March 9, 1937.

adversely reported upon President Roosevelt's proposed bill, concluding, *inter alia*, that "It would subjugate the courts to the will of Congress and the President and thereby destroy the independence of the judiciary, the only certain shield of individual rights. . . . Under the form of the Constitution it seeks to do that which is unconstitutional. . . . Its ultimate operation would be to make this government one of men rather than one of law. . . ."16

In summary, I agree with Mr. Harris that the "Crime Bill" contains some very undesirable provisions, especially in Title II of the new law.¹⁶ Title II attempts, in Federal trials, to override constitutional decisions of the Supreme Court regarding confessions¹⁷ and regarding identification of witnesses.¹⁸ The legislative procedures, set out in Title II by Congress, in effect violate the minimum constitutional standards announced by the Supreme Court in the *Miranda* and the *Wade* cases. The Supreme Court has from the beginning of the nation been *the* authority, in the context of cases and controversies, to decide what the Constitution means. For the Congress to promulgate legislation which in substance says that the Constitution means something different is "court-packing" with a fervor.¹⁹ The resulting clash of the Congressional act's permissiveness with the Supreme Court's prior determination of constitutional restrictions will be detrimental to the administration of justice. In advance of such a clash, responsible citizens should look on Title II of the "Crime Bill" as a symbol of reckless action by Congress in derogation of constitutional ways to change the Supreme Court's interpretation of the Constitution.²⁰

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15. S. REP. NO. 711, 75th CONG., 1st Sess. (1937) (Reorganization of the Federal Judiciary-Adverse Report of the Committee on the Judiciary).

16. Any thoughtful citizen must also be aware of the awesome potentiality of the invasion of privacy which is possible, even with its safeguards, under the provisions of Title III of the "Crime Bill". Title III deals with wiretapping and electronic surveillance.

17. *Miranda v. Arizona*, 384 U.S. 436 (1966).

18. *United States v. Wade*, 388 U.S. 218 (1967).

19. "This is very midsummer madness." Shakespeare, *Twelfth-Night*, Act III, Sc. 4, Line 62.

20. "It is not nor it cannot come to good." Shakespeare, *Hamlet*, Act I, Sc. 2, Line 158.

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