1960

# The Warren Court and Congress

Harold W. Chase

# The Warren Court and Congress†

*Since the appointment of Mr. Chief Justice Warren, the Supreme Court frequently has been rebuked for what has been called overzealous judicial activism and lack of deference toward Congress. Professor Chase shows, however, that such criticisms have been responses to a very limited portion of the Court's decisions—those involving segregation or issues of national security. Moreover, from canvassing all the decisions of the Warren Court relating to congressional power, he feels that such attacks are unwarranted. While defending the Court from these attacks, he contends that the Court has in fact exercised an excess of self-restraint and that its real shortcoming has been in its failure to prevent Congress from invading individual rights —a duty imposed on the Court by the Constitution.*

Harold W. Chase*

Since its decisions in the segregation cases in 1954, the Warren Court has frequently been accused of usurping congressional power. Until 1958, it was easy for a close observer of the Court to dismiss the charges as baseless, for it seemed apparent that a majority of the Court was committed to a philosophy of judicial self-restraint and, as a consequence of that philosophy, was on the whole deferential to Congress. Moreover, the charge of excessive judicial activism initially came from individuals and groups which had a highly partisan interest in specific problems decided by the Court. The critical responses of such people to the performance of the Court were political and emotional, rather than analytical and objective. For example, nineteen southern Senators and eighty-two southern Repre-

† This Article is a revised version of a paper delivered by the author at the annual meeting of the American Political Science Association in Washington, D.C., September 11, 1959. See the Washington Post, Oct. 5, 1959, § A, p. 12, col. 1, for an editorial comment on the paper.

* Associate Professor of Political Science, University of Minnesota. The author wishes to acknowledge the valuable criticism of Professors John J. Cound and Yale Kamisar of the University of Minnesota Law School and Professors William Anderson and Lloyd Short of the Political Science Department of the University of Minnesota. The author would like to make clear that this acknowledgment should not be taken to mean that the aforementioned professors necessarily share his views, either as to analysis of the cases or as to conclusions.

sentatives joined in issuing a "manifesto" in March of 1956, which read in part:

> We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people. . . .
> . . .
> [T]he Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal political and social ideas for the established law of the land.[1]

Of course it was clearly foreseeable that southern politicians, for emotional or political reasons, would feel compelled to protest against the decisions in the segregation cases and that "any stick would do to beat the dog." It was quite disturbing, however, when in 1958 the state chief justices and such eminent constitutional law experts as Learned Hand and Professor Corwin also accused the Warren Court of usurping congressional power, even though they did not refer to the segregation cases.

In his widely-publicized Oliver Wendell Holmes Lectures, the venerable Judge Hand, a long-time advocate of judicial self-restraint, restated his views concerning the proper role of the Supreme Court in the American scheme of government.[2] The lectures were not, as sometimes advertised, an attack on the Warren Court per se.[3] Rather, as Judge Hand indicated, he was addressing himself "to the function of United States courts, particularly the Supreme Court, of declaring invalid statutes of Congress, or of the States, or acts of the President, because they are in conflict with what we have come to call our 'Bill of Rights' . . . ."[4] As his basic assumption, Judge Hand stated:

> The authority of courts to annul statutes (and *a fortiori*, acts of the Executive) may, and indeed must, be inferred, although it is nowhere ex-

1. *Southern Congressmen Present Segregation Manifesto*, 12 CONG. Q. ALM. 416–17 (1956).

2. HAND, THE BILL OF RIGHTS (1958). For his earlier views see Hand, *The Contribution of an Independent Judiciary to Civilization*, reprinted in THE SPIRIT OF LIBERTY 155 (Dillard ed. 1952); Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696 (1946). For an assessment of Hand's earlier views, see Wyzanski, *Judge Learned Hand's Contributions to Public Law*, 60 HARV. L. REV. 348, 353 (1947). For a view that Hand now favors more judicial review than he did previously, see Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 584 (1958).

3. For example, the New York Times captioned its report of Hand's second lecture in this manner:

> TOP COURT CHIDED
> BY LEARNED HAND
> He Says It Still Functions
> Occasionally as a "Third
> Legislative Chamber"

N.Y. Times, Feb. 6, 1958, p. 19, col. 1.

4. HAND, THE BILL OF RIGHTS 1 (1958).

> pressed. . . . However, this power should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised.[5]

He endeavored to demonstrate that the Supreme Court *as an institution* has, from time to time, gone beyond what he considers to be the Court's proper function. But the fact is inescapable that he felt that the Warren Court was as guilty of exceeding its powers at the expense of Congress as some of its predecessors. For example, in reference to the segregation decisions, he said:

> I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has not abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main*.[6]

It was also clear that Judge Hand was referring to the Warren Court when he said:

> I trust it is not disrespectful to say that I find it impossible to prediet what attitude the Court would take towards a statute of which it much disapproved even where it concerned economic issues only; and as will appear, the answer becomes decidedly more obscure when the statute touches those other interests, now called "Personal Rights."[7]

Professor Corwin's main criticism of the Warren Court came in his response to a *New York Times* editorial which had urged the defeat of legislative proposals aimed at curbing the Court. Pointing to the decisions in *Yates v. United States*[8] and *Watkins v. United States*,[9] Corwin charged that "keeping the court out of legislative territory" had become a "real problem."[10] In his characteristically colorful style, Professor Corwin said: "There can be no doubt that on June 17 last [the day *Watkins* and *Yates* were decided] the court went on a virtual binge and thrust its nose into matters beyond its competence, with the result that (in my judgment at least) it should have aforesaid nose well tweaked."[11]

Late in 1958, the Conference of Chief Justices approved a report of its Committee on Federal-State Relationships as Affected by Judicial Decisions, which was highly critical of the Warren Court.[12] Although much of the report criticized supervision of state action

5. *Id.* at 66.
6. *Id.* at 55.
7. *Id.* at 46.
8. 354 U.S. 298 (1957).
9. 354 U.S. 178 (1957).
10. N.Y. Times, March 16, 1958, § 4, p. 10, col. 6.
11. *Ibid.*
12. CONFERENCE OF CHIEF JUSTICES, COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, REPORT (1958).

by the Supreme Court, it was clear that the state chief justices felt that the Court had encroached on the power of Congress also.[13] It is noteworthy that of the nine chief justices and one associate justice who composed the committee which drafted the report, only two came from states which have been intransigent on the problem of integration.[14] But the significance which might normally attach to this fact palls when one considers the remarks of Chief Justice Charles A. Jones of Pennsylvania, spoken in opposition to the report at the Conference. In his opinion the segregation decisions really underlay even the chief justices' chastisement of the Court.[15] Nonetheless, with such prestigious critics expressing concern that the present Supreme Court has been encroaching upon the power of Congress, a critical re-examination of the decisions of the Warren Court which concern congressional power is certainly warranted.

Fortunately, there is consensus on the two most important criteria for judging the Court's performance as it pertains to Congress. It is generally agreed that (1) the Court should keep Congress within constitutional bounds, but that (2) the Court should not arrogate

---

13.

> Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.
>
> But if and when a court in construing and applying a constitutional provision or a statute becomes a policy-maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

CONFERENCE OF CHIEF JUSTICES, COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, REPORT 7 (1958).

14. *Id.* at 31.

15.

> It is true that nowhere in the report is the public school segregation decision mentioned. According to reliable newspaper account of the introduction of the resolution and the report whereon it is based, "it was explained that Committee members felt that to inject this into the study would stir sectional feelings and defeat the over-all purpose of the study." I readily and whole-heartedly concede the good faith of the Committee's desire and intent in such regard, but the fact remains that no matter how meticulously reference to the school segregation case is avoided, it must be recognized that the *principal* cause of the present-day criticism of the Supreme Court is that decision. And, thus, the Committee report, quite unintentionally but nonetheless actually exploits a hostility to the Supreme Court bred of a decision (involved in current litigation) which the report does not and could not properly discuss.

Harv. L. Rec., Oct. 23, 1958, p. 1, col. 1.

unto itself the legislative function of Congress. With respect to the first criterion, the old, familiar explanations of the reasons why the Court must exercise this function still make good sense.[16] Even such staunch advocates of judicial self-restraint as Learned Hand believe that the Court should check congressional action when Congress patently and wantonly exceeds its constitutional power.[17] As to the second criterion, no one has ever argued with sophistication that the Court should become a third legislative body and make law in the manner of Congress and state legislatures. In attempting to ascertain whether or not the Warren Court has complied with the two criteria, we would do well to heed the advice of Governor Alfred E. Smith: "Let's look at the record."

## I. The Court and Congressional Investigations

The decision in *Watkins v. United States*[18] in which the Supreme Court affirmed a witness' right to refuse to answer questions before a congressional investigating committee, has been regarded by many as proof of the cavalier attitude of the Warren Court toward Congress. As pointed out earlier, Corwin felt that the decision was an example of the Court's "putting its nose" into legislative business.[19] Many who felt that congressional investigations into Communism and subversive activities had been fruitful were antagonized by the decision. The American Bar Association's Special Committee on Communist Tactics, Strategy, and Objectives, in its report of 1958, quoted with approval a statement made by Judge Robert Morris, former Chief Counsel of the Senate Internal Security Subcommittee, to the effect that "the power of the Congress to learn the underlying facts of the [Communist] conspiracy has been hamstrung" since the *Watkins* decision.[20] Some members of Congress even sought legis-

16. See, *e.g.*, The Federalist No. 78 (Hamilton); No. 48 (Madison). See also the discussion by Marshall, C.J., in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 153–80 (1803). For modern views, see Rostow, *The Supreme Court and the People's Will*, 33 Notre Dame Law. 573 (1958); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

17. Learned Hand's view on the matter is rather unique and interesting. He made it clear that he felt that the Court must have authority to annul statutes whether or not the framers of the Constitution intended it that way. Without this power, Hand contended, "we should have to refer all disputes between the 'Departments' [branches] and states to popular decision, patently an impractical means of relief, whatever Thomas Jefferson may have thought." Hand, *op. cit. supra* note 4, at 66. And the House of Delegates of the American Bar Association prefaced its resolution criticizing the Warren Court with these words: "Whereas, the Supreme Court of the United States and an independent judiciary created by the Constitution have been and are the ultimate guardians of the Bill of Rights and the protectors of our freedom . . . ." N.Y. Times, Feb. 25, 1959, p. 25, col. 1.

18. 354 U.S. 178 (1957).

19. See text accompanying notes 8 & 9 *supra*.

20. 104 Cong. Rec. 19134 (1958). See also Cohn & Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 Fordham L. Rev. 233, 268–73 (1959).

lation to remove cases like *Watkins* from the appellate jurisdiction of the Court.[21] Obviously, therefore, these strong views concerning the impropriety of the Court's action in *Watkins* establish good reason for examining here precisely what the Court actually did in that case.

In his opinion for the majority, Mr. Chief Justice Warren said that although the power of Congress to investigate is inherent and broad, it is not constitutionally unlimited.[22] He asserted:

> There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.[23]

He also said:

> Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.[24]

Further, Warren indicated that the right to remain silent about "beliefs, expressions, or associations" was a necessary derivative from first amendment rights, if those rights were to be meaningful.[25] Then Warren pointed out that the Constitution places upon the judiciary the responsibility "to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."[26]

In view of Mr. Chief Justice Warren's sweeping language, it is not suprising that the decision was construed by some as an indication that the Court would confine congressional investigating power within strict bounds.[27] But the Court's recent decision in *Barenblatt v. United States*[28] makes meaningless any speculation regarding the extent to which the Court will curb congressional investigations. Mr. Justice Harlan, speaking for the five-member majority in *Barenblatt*, made it clear that five out of the eight Justices who had comprised

21. S. 2646, 85th Cong., 2d Sess. (1958).
22. 354 U.S. at 187.
23. *Ibid.*
24. *Id.* at 197.
25. *Ibid.*
26. *Id.* at 198–99.
27. See *The Supreme Court, 1956 Term*, 71 HARV. L. REV. 83, 144–45 (1957); Comment, 56 MICH. L. REV. 272, 283–84 (1957).
28. 360 U.S. 109 (1959), *rehearing denied*, 361 U.S. 854 (1959).

the majority in *Watkins* had not concurred in Warren's broad dicta:

> A principle contention in *Watkins* was that the refusals to answer were justified because the requirement . . . that the questions asked be "pertinent to the question under inquiry" had not been satisfied. *This Court reversed the conviction solely on that ground*, holding that Watkins had not been adequately apprised of the subject matter of the Subcommittee's investigation or the pertinency thereto of the questions he refused to answer.[29]

In short, the majority of the Warren Court, like most of their predecessors, have not, and apparently will not, seriously limit the investigatory power of Congress.[30]

On the basis of *Barenblatt* a more valid indictment of the Court might be that it has failed to hold congressional investigating power within constitutional bounds. The Constitution clearly limits congressional inquiries sharply by the first amendment and by the prohibition against bills of attainder.[31]

Patently, the "right to silence" per se is not a first amendment freedom. But the first amendment does protect a witness who wishes to remain silent when he is queried in such a way as to inhibit his exercise of first amendment freedoms. For what may very well be involved in questions relating to one's beliefs is "the right to affiliate freely with legal organizations and to advocate unpopular causes which later prove inimical to national interests without the fear of being penalized subsequently, rather than any general right to remain silent."[32] On the other hand, a witness being queried only about his business transactions, for example, would be hard put to demonstrate how his first amendment freedoms are being abridged. Of course, any witness who is being questioned by a legislative committee clearly with the objective of punishing him is constitutionally protected by the prohibition against bills of attainder, even where he does not have the protection of the first amendment.

The majority in *Barenblatt*, however, agreed that the first amendment applied in that case:

> Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation,

29. *Id.* at 116–17. (Emphasis added.)

30. It could be argued that the Court in NAACP v. Alabama, 357 U.S. 449 (1958), did effectively place limits on judicial inquiries at the state level which might be applicable to congressional investigations. But, if the Court climbed the hill in that case, it climbed down again in Uphaus v. Wyman, 360 U.S. 72, *rehearing denied*, 361 U.S. 856 (1959), a case dealing with state legislative investigative power

31. U.S. CONST. art. I, § 9.

32. *The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 160 (1959).

> resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.[33]

If the first amendment applied in *Barenblatt*, as the majority acceded, from what part of the unequivocal language of that amendment did the Court find a basis for exercising discretion to balance competing private and public interests? True, previous Courts have done so. But, as Mr. Justice Black argued persuasively in dissent:

> To apply the Court's balancing test under such circumstances is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised." This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. Not only does this violate the genius of our *written* Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights. "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against *every* assumption of power in the Legislative or Executive; they will be naturally led to resist *every* encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." Unless we return to this view of our judicial function, unless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.[34]

Granted that first amendment freedoms are not absolute (however meritorious the literal argument for that proposition may be,[35] it is too late in the game to assert it), nevertheless it is urged that the *presumptions* should all be in favor of the exercise of freedom. Mr. Justice Rutledge expressed the principle well in *Thomas v. Collins*:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. . . .
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by

33. 360 U.S. at 126.
34. *Id.* at 143–44.
35. See MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

> clear and present danger. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.[36]

But, even assuming that the balancing idea is valid in right to silence cases,[37] it does not appear that the majority applied it very well in *Barenblatt*. As Black complained:

> It is these interests of society, rather than Barenblatt's own right to silence, which . . . the Court should put on the balance against the demands of the Government . . . . Instead they are not mentioned, while on the other side the demands of the Government are vastly overstated and called "self preservation." [38]

As to the dissenters' second assertion—that the congressional subcommittee was attempting to *punish* Barenblatt contrary to the constitutional prohibition against bills of attainder—the majority wrote:

> Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. . . .[39]

It is clear, then, that a majority of the Court will not prevent congressional committees from using the investigatory power to punish —an objective which is expressly banned by the Constitution. And it has been obvious for some time, as the dissenters indicated in an

---

36. 323 U.S. 516, 529–30 (1945). See also Freeman, *Civil Liberties—Acid Test of Democracy*, 43 MINN. L. REV. 511 (1959).

37. See Note, *Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation*, 65 YALE L.J. 1159, 1172–79 (1956).

38. 360 U.S. at 144. The following represents a telling analysis of the balancing done by the majority in *Barenblatt*:

> Exposure alone hardly seems an adequate legislative end to justify subordination of first-amendment guarantees, but the majority indicated that the Court will not examine the motives of either Congress or the committee. While the Court will not ordinarily invalidate legislation solely on the basis of the alleged motives for its enactment, it seems that motivation should be considered in determining the weight of the governmental interest if the balancing process required in the present case is to be a meaningful one. The Court further indicated that it will make no inquiry into the validity of the legislature's basic premise, here the danger of the Communist conspiracy, but some examination along this line would also seem necessary. Finally, the judicial inquiry into the relation between the specific questions asked and the general legislative purpose seems at best perfunctory in *Barenblatt*. In view of the seemingly inevitable result to which such "balancing" will lead, the Court has apparently determined that the legislative power to investigate subversives will outweigh the first-amendment interests upon which these inquiries may impinge unless the committee's conduct in its totality indicates the use of "indiscriminate dragnet procedures" or a flagrant disregard for the rights of its witnesses.

*The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 161 (1959).

39. 360 U.S. at 132. See also CARR, THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1945–1950 (1952).

appendix,[40] that the particular committee whose actions were challenged in *Barenblatt* has been bent upon punishing rather than investigating in the true sense of that word.

To sum up, despite the vigorous dissent by four Justices in *Barenblatt*, a majority of the present Court has never imposed a meaningful limitation on Congress' power to investigate. To the contrary, in the area of legislative investigations, the Court has failed to fulfil its responsibility of defending constitutional liberties against encroachment by Congress.

## II. Cases in Which the Court Has Declared Statutory Provisions Unconstitutional

In six years the Warren Court has unequivocally declared only three congressional enactments unconstitutional.[41] Granted, it required six strokes of the judicial sword to render one provision lifeless.[42] And, the Court decided one case in such a way as to effectively strike down several other statutory provisions, even though it avoided expressly saying so.[43] Whatever the precise number of Warren Court declarations of unconstitutionality, that number is minimal and hardly substantiates the oft-quoted criticism that the Warren Court is running roughshod over Congress. True, while Vinson served as Chief Justice over a comparable span, the Court never declared an act of Congress unconstitutional. But the Vinson Court was unduly permissive about allowing inroads to be made on the Bill of Rights.[44] It would be fairer, perhaps, to compare the record of the Warren Court with that of another which was frequently charged with treating Congress cavalierly—the Hughes Court, which in the much shorter period of 1934–1936 overruled twelve acts of Congress.[45] However, quantitative analysis is of only limited usefulness in evaluating accusations made against the Warren Court, for even if the Court checked congressional power only a few times *arbitrarily*, it would have been exceeding its power. An analysis of the pertinent Warren Court decisions will answer the query concerning the arbitrariness of its action.

40. 360 U.S. at 163.

41. See Trop v. Dulles, 356 U.S. 86 (1958); Reid v. Covert, 354 U.S. 1 (1957); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

42. See Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

43. Bolling v. Sharpe, 347 U.S. 497 (1954).

44. Pritchett, Civil Liberties and the Vinson Court 238 *passim* (1954).

45. Legislative Reference Service, Library of Congress, The Constitution of the United States 1252–54 (Corwin ed. 1953).

### A. *United States* ex rel. *Toth v. Quarles*[46]

In 1950, Congress enacted the widely-heralded Uniform Code of Military Justice.[47] Attempting to plug what it deemed a lacuna in the law—the lack of provision for trying ex-servicemen for crimes punishable under military law and committed while in the service—Congress considered a proposal presented by the Judge Advocate General of the Army. He had urged Congress to

> confer jurisdiction upon Federal courts to try any person for an offense denounced by the code if he is no longer subject thereto. This would be consistent with the fifth amendment of the Constitution. . . . If you expressly confer jurisdiction on the Federal courts to try such cases, you preserve the constitutional separation of military and civil courts, you save the military from a lot of unmerited grief, and you provide for a clean, constitutional method for disposing of such cases.[48]

However, Congress rejected this suggestion and enacted the following provision instead:

> [A]ny person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status.[49]

In *United States* ex rel. *Toth v. Quarles*, the first Supreme Court decision involving this provision of the code, the Warren Court declared it unconstitutional.[50]

In the *Toth* case, all nine Justices agreed that, *if* Congress had the power to turn ex-servicemen over to the military for trial by court-martial for crimes committed while in the service, Congress derived that power from the constitutional provision directing Congress "to make Rules for the Government and Regulation of the land and naval Forces," as supplemented by the necessary and proper clause.[51] All nine Justices further agreed that under these provisions persons *currently* in the armed services could constitutionally be subjected to trial by court-martial for military offenses.[52] And all but two of the Justices agreed that ex-servicemen were full-fledged civilians and, as such, were entitled to the protections afforded by article

46. 350 U.S. 11 (1955).
47. See generally Snedeker, *The Uniform Code of Military Justice*, 38 GEO. L.J. 521 (1950).
48. *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 256–57 (1949).
49. Uniform Code of Military Justice, art. 3(a), 64 Stat. 109–10 (1950).
50. 350 U.S. 11 (1955).
51. *Id.* at 14, 31.
52. *Id.* at 14, 28.

III and the Bill of Rights.[53] At this point, however, the unanimity of the other seven Justices also dissolved. The five-Justice majority implied that, since article III and the Bill of Rights were applicable, the scope of the constitutional grant of power to Congress had to be construed more strictly than where no other constitutional provisions run counter to a power of Congress.[54] For the majority, then, determination of constitutionality hinged upon the question whether or not it was essential to the making of "Rules for the Government and Regulation of the land and naval Forces" to try ex-servicemen by court-martial for crimes committed while in service.[55] The majority answered this in the negative:

> Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.[56]

In view of the testimony of the Judge Advocate General of the Army, it would be difficult to conclude that the Court was arbitrarily curbing Congress rather than merely upholding the Constitution.[57]

### *B. Reid v. Covert*[58] *and Progeny*[59]

Within two years after the decision in *Toth*, another provision of the Uniform Code of Military Justice was challenged in the Supreme Court. This provision made the Code applicable to "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States."[60] Two servicemen's wives who were accused of murdering their husbands were tried and convicted in court-martial proceedings. When the constitutionality of Congress' conferral of military jurisdiction in cases of crimes committed by dependents overseas was initially questioned, a majority of the Court found Congress' action constitutional.[61] On its face such

53. Mr. Justice Minton, whom Mr. Justice Burton joined in a separate dissent, wrote: "My trouble is that I don't think Toth was a full-fledged civilian." *Id.* at 44.
54. *Id.* at 21–22.
55. *Id.* at 13–14.
56. *Id.* at 22–23.
57. *But see* Willis, *Toth v. Quarles—For Better or For Worse?*, 9 VAND. L. REV. 534 (1956); 40 MINN. L. REV. 705 (1956).
58. 354 U.S. 1 (1957).
59. See note 42 *supra.*
60. Uniform Code of Military Justice, art. 2(11), 64 Stat. 109 (1950).
61. Reid v. Covert, 351 U.S. 487 (1956); Kinsella v. Krueger, 351 U.S. 470 (1956).

a decision seemed difficult to square with the decision in *Toth*.[62] But Mr. Justice Clark speaking for the majority in *Kinsella v. Krueger* said that the distinction was that the wives, at the time of their court-martial, were citizens *in a foreign country*. His words were:

> Entirely aside from the power of Congress under Article III of the Constitution, it has been well-established since Chief Justice Marshall's opinion in *American Insurance Co. v. Canter* . . . that Congress may establish legislative courts outside the territorial limits of the United States proper. The procedure in such tribunals need not comply with the standards prescribed by the Constitution for Article III courts.[63]

Since Congress could set up legislative courts, he concluded that they could constitutionally "employ the existing system of courts-martial for this purpose" as well.[64] Mr. Chief Justice Warren and Justices Black and Douglas dissented but indicated that the many cases to be decided in the closing days of the term precluded their writing dissenting opinions.[65] In reserving judgment, Mr. Justice Frankfurter also relied on shortness of time as an excuse; he said that he did not have sufficient time to reflect on the issues involved, for "Reflection is a slow process. Wisdom, like good wine, requires maturing."[66]

Subsequently, the Court reheard the cases and decided 6–2, one Justice taking no part, that the previous decisions could not be permitted to stand—that the wives could not constitutionally be tried by courts-martial.[67] This was not a capricious changing of minds. But, since the Warren Court is sometimes charged with reversing itself irrationally,[68] it is worth examining what actually did happen. Five Justices maintained their previous positions on constitutionality of the disputed provision, Justices Clark and Burton now in dissent, and Justices Black, Douglas and the Chief Justice now in the majority. Mr. Justice Frankfurter had by this time completed his reflection on the issues and now concurred in the result of unconstitution-

62. The *Krueger* and *Covert* majority might have distinguished the *Toth* decision by asserting that there are degrees of connection with the military and by finding that these civilians had a sufficient nexus at the time of arrest to warrant court-martial under the war powers. The majority chose, instead, to base military jurisdiction on congressional power to provide overseas legislative courts, and its result is therefore dependent upon the making of the arrest outside of the territorial limits of the United States. For both *Krueger* and *Toth* to remain persuasive authority, the significance of *Toth* must be restricted to cases in which the discharged serviceman is apprehended in the United States. *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 83, 111 (1956).

63. 351 U.S. 470, 474–75 (1956).

64. *Id.* at 476, 480.

65. *Id.* at 486.

66. *Id.* at 485.

67. Reid v. Covert, 354 U.S. 1 (1957).

68. See, *e.g.*, Cohn & Bolan, *supra* note 20, at 244.

ality. Mr. Justice Brennan, who had replaced Mr. Justice Minton on the Court, also joined in the new majority; Minton had been on the other side. Mr. Justice Whittaker, the most recent addition to the Court as of this time, took no part in the decision;[69] his predecessor, Mr. Justice Reed, had ruled in favor of constitutionality. In short, Mr. Justice Harlan was the only member who had actually changed the position he asserted originally. And with refreshing candor, he stated that additional reflection on the issues had convinced him he had been wrong.[70] He made clear, however, that he had changed his mind only on the narrow ground "that where the offense is capital, Article 2(11) [the provision of the Code in dispute] cannot constitutionally be applied to the trial of civilian dependents of members of the armed forces overseas in times of peace."[71]

In the view of the Chief Justice and Justices Black, Douglas, and Brennan, the important consideration was that the wives were *civilians*, even though they were at overseas posts, and as civilians they were entitled to the same constitutional protection they would have were they stationed at posts in the United States. Consequently, for these Justices the reasoning of the *Toth* decision was both applicable and persuasive. They left open the question of whether or not servicemen's dependents could be subjected to the Code in "an area where active hostilities were under way."[72]

Mr. Justice Frankfurter concurred in the result but indicated that like Mr. Justice Harlan, he, too, might have decided in favor of unconstitutionality only because a capital offense was involved.[73] Thus, after *Reid v. Covert* two questions remained unanswered concerning article 2(11) of the Uniform Code of Military Justice: (1) Could dependents be tried by courts-martial for *noncapital* of-

69. In recent decisions, Mr. Justice Whittaker has sided with the majority in extending the *Reid v. Covert* holding of unconstitutionality to noncapital offenses committed by civilian dependents overseas. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 259 (1960) (Whittaker, J., concurring). However, he has taken the position that civilian *employees* of overseas military forces are not entitled to the same protection afforded civilian *dependents* overseas under the language of *Reid v. Covert*. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 287 (1960) (Whittaker, J., dissenting); Grisham v. Hagan, 361 U.S. 278, 280 (1960) (Whittaker, J., dissenting). He was joined both in dissent and concurrence by Mr. Justice Stewart.

70. 354 U.S. at 65.

71. *Ibid.* He reaffirmed this position in recent cases. Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 249 (1960) (Harlan, J., dissenting); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 287 (Harlan, J., dissenting); Grisham v. Hagan, 361 U.S. 278, 280 (Harlan, J., concurring).

72. *Id.* at 33–34.

73. *Id.* at 64. Mr. Justice Frankfurter's words were:

> What has been urged on us falls far too short of proving a well-established practice — to be deemed to be infused into the Constitution — of court-martial jurisdiction, certainly not in capital cases, over such civilians in time of peace.

He reaffirmed this position by joining with Mr. Justice Harlan in the recent relevant decisions. See note 71 *supra*.

fenses? (2) Would civilian *employees* of the armed services be accorded the same treatment by the Court as dependents? Recently, the Court answered these questions in decisions which, taken together with *Reid v. Covert,* have administered the *coup de grace* to article 2(11) of the Code. The Court has decided that neither dependents nor civilian employees overseas with the armed forces may be tried by courts-martial in either capital or noncapital cases.[74] True, these decisions have created a situation where, as of this writing, there are no provisions at all for trying in United States courts civilian employees and dependents who commit crimes overseas. Yet, in determining whether the Court has been *arbitrary* in these decisions, the words of Mr. Justice Black concerning the lower court decisions in the *Covert* case are worth pondering:

> These cases raise basic constitutional issues of the utmost concern. They call into question the role of the military under our system of government. They involve the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights. These cases are particularly significant because for the first time since the adoption of the Constitution wives of soldiers have been denied trial by jury in a court of law and forced to trial before courts-martial.[75]

Once it is established that the Constitution forbids the use of courts-martial for overseas dependents in capital cases, it would seem to follow, as Mr. Justice Clark asserted for the majority in the recent *Singleton* decision, that the Constitution similarly bans the use of courts-martial for overseas dependents in noncapital cases.[76] Nor

74. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (noncapital, civilian dependent case); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (noncapital, civilian employee case); Grisham v. Hagan, 361 U.S. 278 (1960) (capital, civilian employee case).

75. 354 U.S. at 3 (announcing the judgment of the Court and delivering an opinion concurred in by three other Justices). *But see* McLaren, *Constitutional Law: Military Trials of Civilians,* 45 A.B.A.J. 255 (1959).

76. Mr. Justice Clark's reasoning was as follows:

> We now reach the Government's suggestion that, in the light of the noncapital nature of the offense here, as opposed to the capital one in the Covert case, we should make a "fresh evaluation and a new balancing." But the power to "make Rules for the government and Regulation of the land and naval Forces" bears no limitation as to offenses. The power there granted includes not only the creation of offenses but the fixing of the punishment therefor. If civilian dependents are included in the term "land and naval Forces" at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power.

Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 246 (1960). Justices Harlan and Frankfurter argued that the Court has in other contexts permitted a constitutional

does it seem unreasonable to assert, as Clark also has, that one class of civilians must be treated like another when overseas with the armed forces.[77]

### C. *Trop v. Dulles*[78]

In a 5-4 decision in 1958, the Court declared unconstitutional a statutory provision which stripped citizenship from any person convicted of desertion in wartime by a court-martial proceeding.[79] To understand fully the opinions in the *Trop* case requires conjunctive consideration of the opinions in *Perez v. Brownell*,[80] a case decided the same day, in which a five-member majority decided that a statutory provision calling for loss of citizenship for a person voting in a foreign election was constitutional. Three of the four Justices who concurred in the opinion of the Court in *Trop* — Mr. Chief Justice Warren and Justices Black and Douglas — had maintained in dissent in *Perez* that *under no circumstances* could Congress constitutionally deprive a citizen of his citizenship.[81] They had pointed out that the Constitution provides that "'all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States.'"[82] They thought it noteworthy that, although the Constitution provides that citizenship may be granted under a "'uniform Rule of Naturalization' . . . there is no corresponding provision authorizing divestment."[83] But since the majority had rejected their basic contention in *Perez*, these three Justices proceeded in *Trop* on the assumption that there were times when Congress might be able to constitutionally expatriate citizens.[84] Even assuming that Congress did have such power, the three felt that expatriation *as punishment* was precluded by the eighth amendment prohibition against cruel and unusual punishments.[85] Presumably Mr. Justice Whittaker, who joined with the majority in *Trop*, did so on the grounds of the eighth amendment, for he specifically stated

distinction between capital and noncapital cases: "Thus, this Court has held that the Fourteenth Amendment requires a State to appoint counsel for an indigent defendant in a capital case . . . , whereas in noncapital cases a defendant has no such absolute right to counsel. . . ." McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 255 (1960) (Harlan, J., dissenting). But the due process clause allows more leeway for making such distinctions than do the fifth and sixth amendments.

77. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 283–84 (1960). *But see* the view of Justices Whittaker and Stewart, *supra* note 69.

78. 356 U.S. 86 (1958).

79. *Ibid.*

80. 356 U.S. 44 (1958).

81. 356 U.S. at 92 (opinion of Warren, C.J.).

82. 356 U.S. at 65 (Warren, C.J., dissenting).

83. *Id.* at 66. This, they said, did not, however, preclude naturalization from being set aside if unlawfully procured. *Ibid.*

84. 356 U.S. at 93 (opinion of Warren, C.J.).

85. *Id.* at 101.

in a separate opinion in *Perez* that Congress could *under some circumstances* constitutionally expatriate a citizen.[86] Mr. Justice Brennan, who had joined in the decision denying Perez citizenship, took great pains in a separate opinion to explain that he was not being inconsistent by voting for unconstitutionality in the *Trop* case.[87] He maintained that the distinguishing factor was that the provision challenged in *Perez* was a lawful exercise of Congress' power to regulate the conduct of foreign affairs,[88] whereas the expatriation-for-desertion statute was not reasonably related to Congress' war power.[89] In short, the reasoning on which the majority seemed to jell in *Trop* was that expatriation is not a constitutionally allowable punishment for desertion.[90] However, the dissenters, Justices Frankfurter, Burton, Clark, and Harlan, thought Congress could, in the exercise of its war power, expatriate wartime deserters. Unlike Mr. Justice Brennan, they felt there was a "rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship."[91] Coming to grips with the majority position that expatriation was an unduly harsh punishment, Mr. Justice Frankfurter pointed out that desertion was punishable by *death*, and he posed the rhetorical question: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"[92] But this begs the question. Undoubtedly, there are punishments short of death that civilized people regard as being cruel and unusual. One can be sure that Mr. Justice Frankfurter would regard mutilation or castration as a cruel and unusual punishment for even the most heinous crimes, though the victim survived. Perhaps the majority did overdramatize the consequences of expatriation, but certainly it seems that they were not acting arbitrarily in finding that expatriation was "a form of punishment more primitive than torture" and that "the expatriate has lost the right to have rights."[93]

### *D. Bolling v. Sharpe*[94]

In *Bolling v. Sharpe*, a companion case to *Brown v. Board of Education*,[95] the Court scrupulously avoided any indication that it was

86. 356 U.S. at 84 (memorandum of Whittaker, J.).
87. 356 U.S. 86, 105 (1958).
88. *Ibid.*
89. *Id.* at 107.
90. It is interesting to speculate on how the Supreme Court would rule on a case involving loss of citizenship as a punishment for some criminal charge other than desertion. See, *e.g.*, the relatively new provision for loss of citizenship for conviction under the Smith Act. 68 Stat. 1146 (1954), 8 U.S.C.A. § 1481(9) (Supp. 1959).
91. 356 U.S. at 122.
92. *Id.* at 125.
93. *Id.* at 101–02.
94. 347 U.S. 497 (1954).
95. 347 U.S. 483 (1954).

declaring an act of Congress unconstitutional. Perhaps it was not. But the fact remains that Congress, in its role as lawmaker for the District of Columbia, had in the past enacted laws which surely seemed to require racial segregation in the District of Columbia schools.[96] Because the equal protection clause applies only to the states, the Court obviously had difficulty basing the *Bolling* decision on specific constitutional grounds. Mr. Chief Justice Warren asserted for a unanimous Court that the due process clause prohibited segregation:

> The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[97]

But even to invoke the due process clause, the Court had to read new meaning into "liberty" in the fifth amendment. This the Court did:

> Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[98]

Surely, the real basis for the decision must have been the Court's conviction that, regardless of the absence of an "equal protection" clause in the fifth amendment, "in view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[99] If the Constitution did prevent segregation in the schools of the states, it would indeed be a ludicrous result for the schools in the District of Columbia to remain segregated.

### *E. Summary*

In summary, it seems clear that the Court has not arbitrarily curbed congressional power in the cases in which it has declared an act of Congress unconstitutional. In all of these cases, important rights were at stake, rights which seem to have firm constitutional bases. Surely, a majority of the Supreme Court was not acting arbitrarily when it found constitutional basis for withholding civilians from trial by the military, insisting on desegregation of the District

96. For a review of relevant congressional enactments, see Carr v. Corning, 182 F.2d 14 (D.C. Cir. 1950).
97. 347 U.S. at 499.
98. *Id.* at 500.
99. *Ibid.*

of Columbia schools, and refusing to allow a citizen to be deprived of citizenship as punishment.[100] The position that these decisions do not represent a wanton lack of deference toward Congress is strengthened by the fact that they are not the exclusive property of the so-called "activists," Justices Black, Douglas, Brennan, and the Chief Justice, as indicated by the following tabulation:

| | *Bolling* | *Toth* | *Covert* | *Trop* | *Singleton* | *Guagliardo* | *Grisham* |
|---|---|---|---|---|---|---|---|
| Warren | M | M | M | M | M | M | M |
| Black | M | M | M | M | M | M | M |
| Douglas | M | M | M | M | M | M | M |
| Brennan | .. | .. | M | M | M | M | M |
| Frankfurter | M | M | M | D | D | D | M |
| Clark | M | M | D | D | M | M | M |
| Harlan | .. | M | M | D | D | D | M |
| Burton | M | D | D | D | .. | .. | .. |
| Whittaker | .. | .. | * | M | M | D | D |
| Stewart | .. | .. | .. | .. | M | D | D |
| Minton | M | D | .. | .. | .. | .. | .. |
| Reed | M | D | .. | .. | .. | .. | .. |
| Jackson | M | .. | .. | .. | .. | .. | .. |
| | 9–0 | 6–3 | 6–2 | 5–4 | 7–2 | 5–4 | 7–2 |

Key: M = Majority; D = Dissent; * = Not participating.

## III. Cases in Which the Court Allegedly Avoided Constitutional Questions But Still Thwarted Congress' Exercise of its Constitutional Powers

Critics have charged that the Warren Court has frequently thwarted Congress' exercise of constitutional powers even when simultaneously professing to avoid the constitutional issues in the case. The argument is that the Court, unwilling to challenge Congress' power openly prefers to do it surreptitiously when Congress exercises power in ways which the members of the Court personally disapprove.[101] Some credence is lent to this theory even by some of

100. There may be significance in the fact that, exclusive of the segregation case, all these cases involve the military, and that the real meaning to be drawn from the cases may be that the Court is especially watchful where Congress bestows power on the military because the ordinary political checks that operate on Congress and the administration do not operate as effectively on the military. For example, it is more difficult for the press and the public to learn what the military is doing.

101. Mr. Justice Clark apparently takes this view, as indicated by the following excerpt from one of his dissents:

> [The Court] refuses to pass on the important questions relating to the constitutionality of the Internal Security Act of 1950, a bulwark of the congressional program to combat the menace of world Communism. Believing that the Court here disregards its plain responsibility and duty to decide these important constitutional questions, I cannot join in its action.
>
> I have not found any case in the history of the Court where important consti-

the Court's staunchest defenders. For example, Professor C. Herman Pritchett apparently believes that in critical cases the Court has often avoided consideration of the question of Congress' constitutional powers for reasons of expediency rather than principle. He has argued that for political reasons the Court must use extreme care in exercising the power to declare acts of Congress unconstitutional.[102] Yet, Pritchett urges, neither can the Court stand by and watch Congress decimate the Bill of Rights. It has the obligation of bringing to bear its judgment on the pressing policy issues of the day.[103] But, as he recently pointed out, the Court *need not* reach the basic question of Congress' constitutional power in order to bring to bear its judgment on important policy issues.[104] He feels that the Court has consciously developed a technique for limiting the constitutional power of Congress by deciding cases on subsidiary issues which *in effect* challenge that power. And he finds that technique commendable, for, although Congress may by simple legislation parry the thrust of the Court's decision, Congress must at least consider the issues again.

It is difficult, however, to agree with Pritchett on several scores. First, there is no evidence that a *majority* of the Court have *deliberately* decided that they will avoid constitutional issues and yet restrain Congress in the cases Pritchett relied on to make the point,

---

tutional issues have been avoided on such a pretext.
Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 127–28 (1956) (dissenting opinion).

102. He said:
The Court can be imprudent only at its peril. The power of judicial review is too important, and the Court's position intrinsically too weak, to permit the making of too many mistakes. Self-restraint counsels the Court to reach constitutional issues reluctantly and to be chary of disagreeing with legislatures or executives, whether national or state.
PRITCHETT, THE AMERICAN CONSTITUTION 154 (1959).
Previously, he had indicated the basis for this opinion:
The grave risks run by a Court which rejects the counsel of self-restraint were demonstrated in 1935 and 1936. That Court was willing to risk a test of its authority in defense of its interpretation of the Constitution, and in opposition to an enormously popular legislative and executive program. That effort to block the President and Congress was a miscalculation which for a time jeopardized the entire institution of judicial review.
Pritchett, *The Supreme Court Today: Constitutional Interpretation and Judicial Self-Restraint*, 3 S.D.L. REV. 51, 63 (1958).

103. He said:
But self-restraint is not the ultimate in judicial wisdom. The Court's primary obligation is not to avoid controversy. Its primary obligation is to bring all the judgment its members possess and the best wisdom that the times afford, to the interpretation of the basic rules propounded by the Constitution for the direction of a free society. The Supreme Court has a duty of self-restraint, but not to the point of denying to the nation the guidance on basic democratic problems which its unique situation equips it to provide.
PRITCHETT, *op. cit. supra* note 102, at 154.

104. Ford Lectures, University of Minnesota, April 20–22, 1959.

that is, *Yates*,[105] the security program cases,[106] and the passport cases.[107] A more plausible inference to be drawn from these cases is that a majority of the Court will not quarrel about the constitutional limits of congressional power. Nor will the majority quarrel about how the power is exercised in these cases, even where fundamental liberties are involved, as long as there is clear indication that it is being exercised in accord with Congress' expressed and specific intent.

Second, it is obvious that the Court did not really avoid criticism by not deciding these cases on the issue of Congress' constitutional power. Would any more heated criticism have been generated from certain quarters if, for example, in *Yates* the Court had declared the Smith Act unconstitutional?[108]

Third, assuming that it is the duty of the Court to uphold the Constitution, these decisions were hardly great victories for individual freedom. Although the narrow holdings of the cases may seem to be such victories, the Court has in fact strengthened the bases for the making of substantial inroads into the safeguards for individual liberty contained in the Constitution.

### *A. Yates v. United States*[109]

Foremost among these cases is *Yates v. United States*, in which only two Justices, Black and Douglas, were willing to hold the Smith Act unconstitutional.[110] The majority, in an opinion written by Mr. Justice Harlan, pointedly declined to discuss the question of the constitutionality of the Smith Act: "We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute."[111] They clearly indicated by their decision, however, that the Smith Act was constitutional and, that if it was carefully applied by the government along the lines they suggested, they would uphold future convictions under

105. 354 U.S. 298 (1957).

106. Greene v. McElroy, 360 U.S. 474 (1959); Service v. Dulles, 354 U.S. 363 (1957); Cole v. Young, 351 U.S. 536 (1956).

107. Dayton v. Dulles, 357 U.S. 144 (1958); Kent v. Dulles, 357 U.S. 116 (1958). Pritchett also used Watkins v. United States, 354 U.S. 178 (1957), to make his point, but that was before the *Barenblatt* decision.

United States v. Five Gambling Devices, 346 U.S. 441 (1953), is also an excellent example of the Court's avoiding the constitutional issue in a case where it nevertheless rendered void a congressional enactment. However, Professor Pritchett has not used this case to support his theory.

108. See ABA, SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY, AND OBJECTIVES, RESOLUTION AND REPORT (1959), published in 104 CONG. REC. 19132 (1958); Cohn & Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 FORDHAM L. REV. 233, 279–83 (1959).

109. Yates v. United States, 354 U.S. 298 (1957).

110. *Id.* at 339 (dissenting in part).

111. *Id.* at 319.

the law.[112] They left the way open, too, for Congress to redefine parts of the statute, implying that certain redefinitions would be constitutionally acceptable.[113] In view of the nature of the statute and the danger it was contrived and has been applied to meet, the Court was certainly exhibiting deference to Congress. Without taking an absolutist position that the first amendment means what it says—"Congress shall pass no law . . ."—it is clear that, if it is to have *any* meaning, restrictions on free speech must be justified by the gravest kind of danger. As we must appreciate by now, the danger presented by American Communists was not and is not from their advocacy of overthrow of the government.[114] Moreover, other laws were and are available to meet the very real dangers of espionage, sabotage, and seditious conspiracy, when the talk of the Communists becomes overt action.[115] Mr. Justice Black's opinion in *Yates*, in which Mr. Justice Douglas joined, is a more persuasive interpretation of the real issues in *Yates* than the majority opinion:

> In essence, petitioners were tried upon the charge that they believe in and want to foist upon this country a different and to us a despicable form of authoritarian government in which voices criticizing the existing order are summarily silenced. I fear that the present type of prosecutions are more in line with the philosophy of authoritarian government than with that expressed by our First Amendment.[116]

The law on the subject, as stated in the opinion of Mr. Justice Harlan in the *Yates* case, hardly represents a victory for libertarian values. Instead, that decision *fortifies* the concept that Congress may constitutionally abridge free speech for less than the most pressing reasons.

### *B. The Loyalty-Security Program Cases*

It has been alleged that the Court thwarted Congress' exercise of constitutional power and jeopardized national security by its decisions in cases involving dismissal of government and private employees under government security programs, notably in *Cole v. Young*,[117] *Service v. Dulles*,[118] *and Greene v. McElroy*.[119] The statute involved in the *Cole* case empowered the heads of certain agencies to summarily dismiss their civilian employees, when they deemed

112. *Id.* at 334.
113. *Id.* at 309–10.
114. See CHASE, SECURITY AND LIBERTY 1–10 (1955).
115. *Id.* at 24.
116. 354 U.S. at 343 (dissenting in part). The majority merely required a new trial. Justices Black and Douglas would have acquitted the defendants.
117. 351 U.S. 536 (1956).
118. 354 U.S. 363 (1957).
119. 360 U.S. 474 (1959). See also Peters v. Hobby, 349 U.S. 331 (1955), which did not directly involve an act of Congress.

dismissal necessary in the interest of national security.[120] Without reaching any constitutional questions, a majority of six Justices, decided that the proper interpretation of the statute precluded summary dismissals from nonsensitive positions.[121] The *Service* case involved a government employee who had been dismissed by the State Department under the so-called McCarran Rider, passed by Congress, which gave the Secretary of State power "in his absolute discretion [to] terminate the employment of any officer or employee of the Department."[122] Yet, all participating members of the Court[123] found no constitutional question involved.[124] Instead, their decision to remand the case purportedly was based on the fact that the Secretary in this case had not followed the exact procedure prescribed by departmental regulations:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.[125]

These decisions, considered with *Greene v. McElroy*, in which the Court held that the Defense Department has no authority to refuse a private employee a security clearance without affording him rights of confrontation, demonstrate that the Court was not limiting Congress' power. Rather they reveal that the Court was disturbed, as well it might be, about the way the various security programs were being administered.[126] As the nearly unanimous Court said in *Greene*:

> Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized, but also because explicit action, especially in areas of doubtful constitutionality, requires careful and pur-

120. 351 U.S. at 538.
121. *Id.* at 557.
122. 65 Stat. 581 (1951).
123. Mr. Justice Clark did not participate.
124. 354 U.S. at 373.
125. *Id.* at 388.
126. For other criticism of the security programs see BROWN, LOYALTY AND SECURITY (1958); STAFF OF SENATE COMMITTEE ON POST OFFICE AND CIVIL SERVICE, 84TH CONG., 2D SESS., ADMINISTRATION OF THE FEDERAL EMPLOYEES' SECURITY PROGRAM (1956); COMMISSION ON GOVERNMENT SECURITY, REPORT (1957); NEW YORK CITY BAR ASSOCIATION SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM, REPORT (1956).

poseful consideration by those responsible for enacting and implementing our laws.[127]

Justices Frankfurter, Harlan, and Whittaker, concurred in the judgment that neither Congress nor the President had authorized the procedures but took pains to add that they were "intimating no views as to the validity of those procedures."[128] Despite the majority's insistence that it was not reaching the constitutional issue, it seems apparent that if the Court felt that nonconfrontation was unconstitutional per se it is doubtful that it would have considered whether Congress or the President had in fact authorized such procedures.[129] Obviously, neither the President nor Congress could make nonconfrontation satisfy due process requirements in criminal cases. Nor would the Court concern itself with the question of what the President or Congress expressly meant to do in deciding that nonconfrontation in that context was unconstitutional. All the Court seemed to be requiring of the Administration in the *Greene* case was a clear indication that the programs were to be administered precisely as Congress or the President specified. Evidently, the Administration so construes the holding in *Greene*. For, recently, the President issued an executive order the main thrust of which is to delimit the use of non-confrontation in the industrial security program, but which, on the other hand, specifically provides for non-confrontation in some circumstances.[130]

From the standpoint of libertarian values, the decisions in these cases leave something to be desired. Most libertarians would not quarrel with the assertion that Congress has the constitutional power to set up security programs, nor would they dispute the need for them.[131] What libertarians should and do insist upon is that procedures set up in such programs meet the constitutional requirement of due process.[132] It is too late in the game to accept the proposition that working for the government is a "privilege" rather than a "right" and that consequently the fifth amendment does not apply. As Mr. Justice Clark conceded in *Wieman v. Updegraff*,[133] "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend

127. 360 U.S. at 507.

128. *Id.* at 508 (concurring opinion).

129. See Rauh, *Nonconfrontation In Security Cases: The Greene Decision*, 45 VA. L. REV. 1175 (1959). *But see* Horn, *The Warren Court and the Discretionary Powers of the Executive*, 44 MINN. L. REV. 639, 653–54 (1960).

130. Exec. Order No. 10865, 25 Fed. Reg. 1583 (1960). Congress is considering legislation to buttress the Presidential Order. 106 CONG. REC. 2908 (daily ed. Feb. 23, 1960) (remarks of Senator Keating).

131. See BROWN, *op. cit. supra* note 126, at 463; CHASE, *op. cit. supra* note 114, at 55.

132. *Ibid.*

133. 344 U.S. 183 (1952).

to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[134] Yet these decisions virtually invite the Administration to establish procedures for implementing the security programs which inherently are so unfair as to violate due process.[135]

*C. The Passport Cases*[136]

The Court's decisions in the passport cases in 1958 brought further charges that it had placed the security of the republic in jeopardy.[137] The state department was distressed enough by these decisions to entreat the President to call for quick legislative action, presumably to overcome the danger created by large numbers of suspected subversives traveling abroad.[138] Although an old statute had provided that the Secretary of State could "grant and issue passports . . . under such rules as the President shall designate,"[139] the decisions in these cases placed no curb on congressional power. The Court in two five–four decisions found only that the Secretary of State had no "authority to withhold passports to citizens because of their beliefs or associations" *unless* there was a more specific grant from Congress empowering him to do so.[140] Mr. Justice Douglas, speaking for a majority, said: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[141] However, despite the important liberty at stake the President is probably correct in assuming that all that is necessary to win the Court's acquiescence in passport restrictions is for Congress to make them more specific in a new statute.[142] This is not to imply that Congress should not in any manner or under any circumstances impose restrictions on the freedom of travel, but rather that it should do so only to protect national security and that procedures for enforcing the restrictions set forth in the legislation should provide individuals with the widest possible degree of protection against governmental arbitrariness.[143]

134. *Id.* at 192. See also BROWN, *op. cit. supra* note 126, at 333–35.

135. See Chase, *Federal Loyalty Security Program, A Comment*, 10 VAND. L. REV. 553 (1957).

136. Kent v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958).

137. See ABA, SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY, AND OBJECTIVES, *op. cit. supra* note 108.

138. N.Y. Times, July 9, 1958, p. 10, col. 2.

139. 11 Stat. 60 (1956), 22 U.S.C. § 211a (1958).

140. 357 U.S. at 130.

141. *Id.* at 129.

142. N.Y. Times, July 8, 1958, p. 1, col. 4. See also *id.* at 54 for text of the President's message.

143. For an exceptionally fine collection of views on the passport problem, see STAFF OF SENATE COMMITTEE ON THE JUDICIARY, 85TH CONG., 2D SESS., THE RIGHT TO TRAVEL (1958).

*D. Communist Party v. Subversive Activities Control Board*[144]

In *Communist Party v. Subversive Activities Control Board,* the majority of the Court refused to pass on the constitutionality of the provisions of the Subversive Activities Control Act of 1950[145] requiring "Communist-action" organizations to register as such. As Judge Bazelon had pointed out in his dissent in the Court of Appeals for the District of Columbia, there was a constitutional question involved in that the requirement of registration appears on its face to violate the fifth amendment privilege against self-incrimination.[146] However, the majority did not reach the constitutional question but remanded the case to the Board "to make certain that the Board bases its findings upon untainted evidence."[147] The Board had refused to reopen the hearing to receive evidence that three witnesses who had appeared against the Party in the original hearing had committed perjury. The Board felt that it had ample evidence to support its findings apart from the testimony of the three whose honesty was questioned. It was refreshing to have the Court lecture on the need for an "untainted administration of justice," for it is hard to believe that lawyers in the Department of Justice who had to work at length with Harvey Matusow, one of the questionable witnesses, did not recognize him for the liar he evidently was. But the Court's decision hardly reflects a disregard for the power of Congress. To the contrary, there is strong reason for believing that, if the Court does pass on the constitutionality of the act itself, it will find it constitutional. Surely Mr. Justice Clark had made the same point in conference with the eight other Justices that he made in his dissent:

> Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the Act is unconstitutional, it should be declared so on the record before us.[148]

Granted, there is precedent for the Court to require exhaustion of administrative remedies even in the face of a challenge of the constitutionality of legislation setting up the administrative agency involved, just as there is precedent to the contrary.[149] But this Court has recently expressed the view that:

> If . . . an administrative proceeding might leave no remnant of the con-

144. 351 U.S. 115 (1956).
145. 64 Stat. 987, 50 U.S.C.A. § 786 (1952).
146. Communist Party v. Subversive Activities Control Bd., 223 F.2d 531, 576 (D.C. Cir. 1955).
147. 351 U.S. at 125.
148. *Id.* at 130.
149. See DAVIS, ADMINISTRATIVE LAW TEXT 362–65 (1959).

> stitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.[150]

If the court in the *Communist Party* case felt that it was possible for the Board to act and to "leave no remnant of the constitutional question," there is a strong inference that the constitutionality of the Board itself was not questioned by the Court. Further, at least two members of the majority subscribe to the general idea implicit in Mr. Justice Clark's dissent that the Court should not wittingly do today what it must necessarily undo tomorrow.[151]

## IV. Cases in Which the Court Allegedly Has Thwarted Congressional Intent by Misconstruing Statutes

Obviously, a Supreme Court bent on doing so could for a time defeat the will of Congress by deliberately misinterpreting manifested congressional intent underlying legislation. Some commentators feel that the Warren Court has often done exactly this.[152] Is such a charge warranted? Unfortunately, it is not always easy to divine the intent of Congress even in relation to relatively uncomplicated legislation. For example, what could seem more clear than the word "statement" in the statute enacted by Congress as a response to the Court's decision in *United States v. Jencks*?[153] The statute provides that:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.[154]

Yet, when the Court was confronted in *Palermo v. United States*[155] with the question whether or not a government agent's 600-word, typed summary of a conference with a witness which included "brief

150. Public Utilities Comm'n v. United States, 355 U.S. 534, 539–40 (1958).

151. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that *habeas corpus* after conviction is available in these cases gives added support to our reading of [the statutory provision]. *It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.*

Estep v. United States, 327 U.S. 114, 125 (1946). (Emphasis added.)

152. See, *e.g.*, Cohn & Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 Fordham L. Rev. 233, 264, 266 (1959).

153. 353 U.S. 557 (1957).

154. 18 U.S.C. § 3500 (1958).

155. 360 U.S. 343 (1959).

statements of information" was a "statement" within the meaning of the statute, the Court found the meaning of "statement" quite bewildering.

In recent years Mr. Justice Frankfurter has been so intrigued with the difficulty of statutory interpretation that he has vied with himself to find prose adequate to describe it.[156] Despite this elucidation by Frankfurter as to the inherent difficulty in statutory interpretation, the notion persists that the Court is deliberately taking liberties in statutory construction.[157]

Examination of the relevant cases decided by the Warren Court reveals that on the whole the Court has hewed pretty closely to the canons of construction developed by earlier Supreme Courts with the acquiescence of Congress. For example, the Warren Court often has construed criminal statutes strictly but not so strictly as to defeat the obvious intent behind the legislation.[158] It has attempted "to save and not to destroy"[159] a statute which it construed and to give "coherence to what Congress has done."[160] And it has given a liberal construction to welfare legislation.[161]

Which cases, then, are relied on to show that the Court has disregarded the manifested intent of Congress? *Yates v. United States*[162] is one that is frequently cited. In that case the Court con-

156. Some problems, he said, "will lie in the penumbra of express statutory mandates." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). In respect to the Taft-Hartley Act, he wrote: "The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). Again, as if to warn the political scientists and sociologists against attempting analyses of the Court's performance, he said: "The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation, is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern 'brain' machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials." Local 1976, AFL v. NLRB, 357 U.S. 93, 100 (1958). He even resorted to humor, at least once: "On more than one occasion, but evidently not frequently enough, Judge Learned Hand has warned against restricting the meaning of a statute to the meaning of its 'plain' words, 'there is no surer way to misread any document than to read it literally. . . .'" Mr. Justice Frankfurter added: "The notion that the plain meaning of the words of a statute defines the meaning of the statute reminds one of T. H. Huxley's gay observation that at times 'a theory survives long after its brains are knocked out.'" *Ibid.*

157. See note 152 *supra.*

158. See Arroyo v. United States, 359 U.S. 419 (1959); Rainwater v. United States, 356 U.S. 590 (1958); United States v. Turley, 352 U.S. 407 (1957); United States v. Bramblett, 348 U.S. 503 (1955).

159. United States v. Menasche, 348 U.S. 528, 538 (1955), quoting from NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

160. Achilli v. United States, 353 U.S. 373, 379 (1957).

161. United States v. Scovil, 348 U.S. 218 (1955).

162. 354 U.S. 298 (1957).

strued the word "organize" to mean "acts entering into the creation of a new organization."[163] Since the latest "organizing" of the Communist Party of the United States within the meaning given by the Court occurred in 1945, the pertinent statute of limitations precluded convicting anyone for "organizing" in recent years.[164] However, Congress failed to legislatively overrule the Court's interpretation of "organize" in *Yates* despite the contentions of Representative Smith, author of the Smith Act, that Congress had intended "organize" to connote a continuing activity.[165]

Another area in which the Court has been criticized for misconstruing statutes is labor relations law. The chief justices of the states reported that they found the Court's decision in *Textile Workers Union v. Lincoln Mills*[166] "somewhat disturbing." They remarked:

> That case concerns the interpretation of Section 301 of the Labor Management Relations Act of 1947. Paragraph (a) of that Section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties. . . ." Section 301(a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.[167]

Professor Meltzer, who was one of the team of University of Chicago Law School professors who prepared studies for the Committee of Supreme Court Judges, studies which, ironically, do not bear out the contentions of the committee, did a comprehensive analysis of the labor relations cases and made the point that "Although . . . [Section 301 (a) appears] to be only a grant of jurisdiction, it should be noted that the standards for vicarious responsibility embodied in Section 301 (b) constituted substantive regulation. . . ."[168] In short, one cannot categorically claim that the Court was wrong in its interpretation. Meltzer's discerning conclusions respecting the Court, Congress and state jurisdiction over labor relations are relevant here:

> In a period bristling with primitive denunciation of the Supreme Court

163. *Id.* at 310.
164. *Id.* at 312.
165. See Celler, *The Supreme Court Survives a Barrage*, Reporter, Nov. 27, 1958, p. 31.
166. 353 U.S. 448 (1957).
167. CONFERENCE OF CHIEF JUSTICES COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, REPORT 10 (1958).
168. Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations*, 8 U. CHI. L. REC. 95, 115 (1958).

> it is appropriate to say again that these problems have not been created by the Court. They result in part from the complexities of a federal system, which are magnified in a "field" such as labor relations, which intersects with so many activities and implicates such diverse forms of regulation. They result also from the default of Congress with respect to fundamental issues whose solution determines how and by whom a modern economy should be governed and, indeed, in some situations whether it is to be governed by all.[169]

It is to be regretted that the state supreme court justices had so little time to consider the studies executed in their behalf by members of the University of Chicago Law Faculty before they issued their own report.[170]

The Court has also been criticized for its interpretation of various statutory provisions pertaining to Communist aliens. *Bonetti v. Attorney Gen.*[171] and *United States v. Witkovich*[172] are cited as prime examples, although *Rowoldt v. Perfetto*[173] could have been included too.[174] In *Bonetti* the provision interpreted was the one requiring the Attorney General to deport all aliens who were Communists Party members "at the time of entering the United States, or . . . at any time thereafter. . . ."[175] Bonetti had complicated the issue by coming to the United States first in 1923, becoming a Communist Party member between 1932–1936, leaving the country and then returning in 1938. The majority decided that his "entry" date was 1938 and not 1923.[176] Consequently, he was not a Communist Party member during or after "entering the United States." Was this unreasonable statutory interpretation?

The *Witkovich* case involved a provision of the Immigration and Nationality Act of 1952 which required that any "alien against whom a final order of deportation . . . has been outstanding for more than six months, shall . . . give information under oath as to his nationality, circumstances, habits, associations, and activities,

169. *Id.* at 124–25.

170. Evidently, the Chicago professors were afflicted with the malady so common in the profession — failure to meet deadlines. Unfortunately, this prevented the chief justices from making full use of the excellent studies. For a blow-by-blow account of the efforts of the justices to get the study materials, see CONFERENCE OF CHIEF JUSTICES, COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, REPORT Forward (1958).

171. 356 U.S. 691 (1958).

172. 353 U.S. 194 (1957).

173. 355 U.S. 115 (1957).

174. ABA, SPECIAL COMMITTEE ON COMMUNIST TACTICS, STRATEGY, AND OBJECTIVES, SUPPLEMENTAL REPORT, published in 104 CONG. REC. 19132–33 (1958); Cohn & Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 FORDHAM L. REV. 233, 266, 267 (1959).

175. 356 U.S. 691, 694 (1958), quoting from the Anarchist Act § 4(a), 40 Stat. 1012 (1918), as amended by the Internal Security Act § 22, 64 Stat. 1006 (1950), 8 U.S.C. § 137(2) (1952).

176. See 356 U.S. 691 (1958).

and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper. . . ."[177] Despite this broad grant of power to the Attorney General, the Court upheld Witkovich's contention that the Attorney General could only ask him those questions which would enable the government to ascertain that he, Witkovich, was holding himself ready for deportation, and could not ask him questions about his associations and activities.[178]

The Internal Security Act of 1950 contained a provision making aliens who were Communist Party members deportable.[179] Later, Congress realized that this provision as it stood was too broad, for some people in other countries had joined the party *innocently*.[180] Consequently, in 1951, Congress amended the provision by defining "membership" to mean "only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes."[181] In the *Rowoldt* case, a majority of the Court found that Rowoldt had been only a lukewarm Communist for approximately one year and felt that he was precluded from deportation under the revised definition of "membership," if not specifically, at least by the spirit of it.[182]

Just recently, the Court quoted with approval the words of an earlier Court to the effect that "'[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.'"[183] The fact that Congress has refrained from "rectifying" any of these alleged "mistakes" is of some significance. Since there are those who refuse to see much significance in Congress' refusal to act in such instances,[184] the question will be developed more fully later.[185]

177. United States v. Witkovich, 353 U.S. 194, 195 (1957), quoting from the Criminal Appeals Act § 17, 68 Stat. 1232 (1954), 8 U.S.C. § 1252d (1952).

178. 353 U.S. at 184.

179. 64 Stat. 987, 1006 (1950).

180. Galvan v. Press, 347 U.S. 522, 527 (1954).

181. 65 Stat. 28 (1951).

182. See Rowoldt v. Perfetto, 355 U.S. 115, 120–21 (1957).

183. Patterson v. United States, 359 U.S. 495, 496 (1959), quoting from United States v. South Buffalo R.R., 333 U.S. 771, 774–75 (1948).

184. For example, Anthony Lewis, the New York Times' fine reporter, took this view in critiquing this paper at the American Political Science Convention in 1959. See also Note, *Congressional Reversal of the Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324 (1958).

185. See notes 226–37 *infra* and accompanying text.

## V. Cases in Which the Court Has Clearly Affirmed Broad Constitutional Power for Congress

It is significant that the decisions for which the Warren Court has been criticized, even assuming the criticisms were valid, all deal with but a few important issues. In making a complete assessment of the Court's deference or lack of deference to Congress, it is obviously a mistake to limit the inquiry to cases dealing with civil liberties, Communists, or any other small segment of cases, however important they may be. It is only within the context of *all* the Warren Court cases relating to congressional power that we can make valid judgments.

The Court has been condemned by many, notably the chief justices of the states, for what they construe as acquiescence by the Court in the aggrandizement of national power at the expense of the states. Although analysis of Warren Court decisions dealing with state power is beyond the scope of this Article, it is important to this discussion of the Court and Congress to point out that in the much-criticized decisions in the labor-relations field, the Court has affirmed broad congressional power under the commerce clause. And here the Court has developed no novel theories, as even the Conference of Chief Justices' Committee on Federal-State Relationships conceded, though it took a few gratuitous swipes at the Court:

> in the days of Chief Justice Marshall the supremacy clause of the federal Constitution and a broad construction of the powers granted to the national government were fully developed, and as a part of this development the extent of national control over interstate commerce became very firmly established. The trends established in those days have never ceased to operate and in comparatively recent years have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.[186]

At no time did the Warren Court suggest that Congress could not cede power to the states in these fields—it even indicated to the contrary.[187] And Congress has finally acted to eliminate the "no-man's land" of labor law.[188]

Dean Lockhart has summed up the matter succinctly:

> The Chief Justices [of the states] deplore the rapid expansion of national powers, but they are criticizing the wrong agency or seeking the wrong remedy. Congress is the agency that has expanded the national

186. Conference of Chief Justices Committee on Federal-State Relationships as Affected by Judicial Decisions, Report 8 (1958).

187. See Guss v. Utah Labor Relations Bd., 353 U.S. 1, 11 (1957).

188. See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 261–62 (1959); McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 Minn. L. Rev. 205, 230–37 (1959).

> powers, and the Court has practiced judicial restraint in leaving these policy determinations to Congress. If the Chief Justices want the Court to check this legislative expansion of federal powers, the court must exercise less judicial restraint, not more.[189]

It is obvious that although the Court might be legitimately chastised in this area on other grounds, criticism of the Court for its lack of deference to Congress is completely unjustifiable.

The Warren Court has affirmed congressional power in several other cases. For example, the Court found in *Pennsylvania v. Nelson* that Congress could and did preempt the field of anti-sedition legislation.[190] And, assuming that Congress intended, in setting up the War Claims Commission, to create a body whose quasi-judicial decisions would be free from political influence, the Court upheld that intent against the President's assertion of power to remove a commissioner.[191] Despite sharp dissents by Justices Black and Douglas, the Court upheld Congress' power to dispose of tide-lands as it saw fit, quoting with approval an earlier Court decision holding that the power of Congress to dispose of any kind of property of the United States "is vested in Congress without limitation."[192] The Court reaffirmed Congress' power to regulate Indian affairs.[193] It also upheld what Corwin is wont to call Congress' "superpower," the power to do virtually whatever it wishes in order to improve or protect navigation on navigable or not-so-navigable waters.[194] And a unanimous Court agreed that the power of Congress to legislate for the District of Columbia "includes all the legislative powers which a state may exercise over its affairs."[195]

The Warren Court has also upheld congressional power in cases, at least some of which bear out the contention that the Warren Court has not been as protective of libertarian values as the "guardian" of the Constitution should be. This is not to imply that in these cases the Warren Court has acted differently from some of its predecessors, or that the Warren Court was necessarily wrong.

A majority of the Court found the first amendment per se no bar to a federal obscenity statute.[196] To raise this point here is not to suggest that Congress should not be able to pass such a law but rather that such a law should have to be evaluated in the context

189. Lockhart, *Comment: A Response to the Conference of State Chief Justices*, 107 U. PA. L. REV. 802, 803 (1959).
190. 350 U.S. 497 (1956).
191. Wiener v. United States, 357 U.S. 349 (1958).
192. Alabama v. Texas, 347 U.S. 272, 273 (1954), quoting from United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).
193. See Williams v. Lee, 358 U.S. 217 (1959).
194. See United States v. Twin City Power Co., 350 U.S. 222 (1956).
195. Berman v. Parker, 348 U.S. 26, 31 (1954).
196. See Roth v. United States, 354 U.S. 476 (1957).

of the first amendment. The point has been made well elsewhere:

> Apart from strong reasons for constitutional protection arising out of the importance of freedom of expression in this area, recognition of a constitutional issue in obscenity censorship would have substantial additional advantages in providing a more dependable and sane method of discriminating between that which may be banned as obscene and that which must be permitted to circulate.[197]

While denying that it was dealing with the constitutional questions, the Court indicated that Congress could probably constitutionally prohibit corporations and labor unions from buying television time to promote candidates.[198] But, as the dissenters, Justices Douglas and Black and the Chief Justice, pointed out, the first amendment would seem to preclude such legislation.[199] Nor did a majority seem to worry about the impact of the first amendment on a sweeping law requiring registration of lobbyists.[200]

Despite Mr. Justice Black's biting dissent,[201] in which he stated that punishment for criminal contempt by means of summary proceeding "has aptly been characterized by a State Supreme Court as, 'perhaps, nearest akin to despotic power of any power existing under our form of government,'"[202] the majority (just as the Supreme Court had always done)[203] upheld an old act of Congress which they contended provided for summary punishment for contempts under some circumstances.

Nor did a majority see that the Immunity Act of 1954 tread hard on the self-incrimination clause of the fifth amendment, although Mr. Justice Douglas, with Mr. Justice Black concurring, argued persuasively that it did.[204] Neither could a majority see how the Gamblers Occupational Tax Act violated the self-incrimination clause, even though it requires gamblers to indicate that they are violating the law.[205]

On the grounds that "the power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our

197. See Lockhart & McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 388 (1954). See the dissents in *Roth*, 354 U.S. at 503 (Harlan, J.), at 508 (Douglas, J.).

198. See United States v. UAW, 352 U.S. 567 (1957).

199. *Id.* at 597.

200. See United States v. Harriss, 347 U.S. 612 (1954).

201. 356 U.S. 165, 193 (1958). The Chief Justice and Mr. Justice Douglas joined in dissent.

202. Greene v. United States, 356 U.S. 165, 194 (1958), quoting from State *ex rel.* Ashbaugh v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194–95 (1897).

203. See *id.* at 189 (Frankfurter, J., concurring).

204. See Ullmann v. United States, 350 U.S. 422, 440 (1956).

205. See Lewis v. United States, 348 U.S. 419 (1955).

foreign relations and the national security,"[206] a majority, in *Galvan v. Press* expressing regrets as they did so, permitted some almost unbelievable deprivations of the liberties of aliens. It found Galvan, an alien who had been a Communist from 1944 to 1946, deportable on the basis of a statute passed in 1950 which required deportation of any alien who at the time of entry to the United States, or any time thereafter, was a member of the Communist Party.[207] Incredibly, the majority found that this was not *ex post facto* even though conceding that "the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation."[208] In another case where an alien was denied an application for suspension of a deportation order on the basis of confidential and undisclosed information, the majority opined that on the basis of *Galvan*, "we must adopt the plain meaning of a statute, however severe the consequences."[209] They added that "suspension of deportation is not given to deportable aliens as a right, but, by congressional direction, it is dispensed according to the unfettered discretion of the Attorney General."[210] It is interesting to note that the Court took a different view of such unfettered discretion in the *Greene* case discussed earlier. In fairness, it must be added that in some cases, by statutory interpretation, the Court has mitigated the hard lot of aliens, only to be criticized in some quarters for doing so.[211]

## VI. The Warren Court as a Policy-Maker

As a reaction to the earlier days when it was being asserted both by the Court and commentators that the Court merely decided cases, it has become popular to play up the fact that the Court does make policy. For example, a majority of the Warren Court speaking through Justice Frankfurter blandly conceded, as perhaps no other Supreme Court before it would have, that courts *make* law.[212] A former federal judge, Robert A. Leflar, now Professor of Law at the University of Arkansas, said recently, "One thing stands out above all else from this—our courts have made most of our law, the

206. Galvan v. Press, 347 U.S. 522, 530 (1954).
207. See *id.* at 526.
208. *Id.* at 531.
209. Jay v. Boyd, 351 U.S. 345, 357 (1956).
210. *Id.* at 357–58.
211. See notes 171–82 *supra* and accompanying text.
212. "The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in lawmaking by courts. Legislation and adjudication are interacting influences in the development of law." National City Bank v. Republic of China, 348 U.S. 356, 360 (1955).

mass of our common law. Courts do make law. It is their business to make law. At least that is true of appellate courts."[213] Indeed, it is true that the Supreme Court makes law and with it national public policy. But some of the claims and allegations about the extent and manner of law and policy-making by the Court are extravagant beyond reason. Take, for example, these words of Professor Bernard Schwartz:

> A high court which, in effect, reverts to the position of originating lawmaker is bound to encounter popular opposition. This is especially true when the tribunal is composed of men who give all too frequent evidence of being unversed in the intricacies of our public law and procedure. Such men will inevitably be deficient even in adequately explaining the bases of their actions. Their opinions will tend to be homilies in political science. Their language will be turgid and verbose; their reasoning prolix and obscure. All too often, they will ignore the distinction between *obiter* and *ratio* and the appropriate weight to be given to different types of legal and non-legal authority.[214]

The implication of such criticism is that the Court has set itself up as a super-legislature, deciding on its own initiative what the laws and policies of the nation should be. But the fact remains the Court exercises no such wide-ranging power. Whatever it does in respect to law and policy-making, it does in consequence of deciding specific cases. As Dean Rostow put it: "The Court's function is recognizably different from that of the legislature or of the executive, even when it must weigh the same considerations in the scales. The forum is different. The time is different, so that the pressure of contending interests appears in a different perspective."[215] Of course, the Supreme Court makes law and policy, but it does so not as a legislature but as a Court, by interpreting the Constitution and statutes and by filling in the interstices of the law. And this the Warren Court has done, no more, no less, than its predecessors. Decisions which are relied upon to demonstrate that the Warren Court has a special proclivity for law-making are for the most part decisions which involved the meaning of the Constitution. If the Court has the function, which we as a people seem to agree that it has, of upholding the Constitution, then it should hear and decide important cases involving constitutional questions. *Whichever way it decides an important case, it makes policy in the sense that it affects public policy.*

It has been alleged that the Court usurped legislative powers in

213. Leflar, *The Task of the Appellate Court*, 33 NOTRE DAME LAW. 548, 562 (1958).

214. Schwartz, *The Supreme Court—October 1957 Term*, 57 MICH. L. REV. 315, 348 (1959).

215. Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 585 (1958).

the school segregation cases.[216] But if the Constitution has meaning, how else could the Court have decided *Brown v. Board of Education*?[217] To argue that schools can be separate and equal in this day and age makes about as much sense as arguing that Apartheid is not designed to discriminate against the Negro.[218] It might be worth pausing to consider that it was an earlier Court overruling what seemed to be the express intent of Congress which originally established the legal basis for racial discrimination.[219] Subsequent decisions as to enforcement of the *Brown* decision are a natural consequence of that decision. There is no indication in the Court's opinions in these cases that it would be aggrieved by legislative and executive action on both national and state levels to establish policy in this area that met with constitutional requirements.

The state chief justices indicated that they felt that the Supreme Court "too often has tended to adopt the role of policy-maker without proper judicial restraint" in "supervision of state action . . . by virtue of the Fourteenth Amendment."[220] But, as can be seen, these justices themselves point out why the Court was *compelled* to do so—the fourteenth amendment.

There is still another category of cases where it has been alleged that the Court has gone too far in making policy—those cases involving the jurisdiction of state and national governments over labor relations.[221] It is true that the Court had attempted to fill in the interstices of the law, but they did so because they believed that Congress had "delegated" the task to them. As the Court explained, speaking through Mr. Justice Frankfurter:

> The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our

---

216. HAND, THE BILL OF RIGHTS 55 (1958).

217. 349 U.S. 294 (1955).

218. *But see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

> In the context of a charge that segregation *with equal facilities* is a denial of equality, is there not a point in *Plessy* in the statement that if "enforced separation stamps the colored race with a badge of inferiority" it is solely because its members choose to put that construction upon it?

*Ibid.* With due respect to Professor Wechsler, is there any doubt that segregation in the schools stems from the feeling among southern whites that the Negro is inferior and that segregation thus confirms and stamps the Negro with "a badge of inferiority"? See Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24–31 (1959).

219. See Civil Rights Cases, 109 U.S. 3 (1883).

220. CONFERENCE OF CHIEF JUSTICES COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, REPORT 27 (1958).

221. See *id.* at 9–11. But the committee concedes that the "uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear." *Id.* at 10.

> economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by Congress. Others were only dimly perceived and their precise scope only vaguely defined. *This Court was called upon to apply a new and complicated* legislative scheme, the aims and social policy of which were drawn with broad strokes while *the details had to be filled in, to no small extent by the judicial process.*[222]

For years, Congress did nothing to relieve the Court of the responsibility it has assumed for making policy in this area.

There can be no question that Congress has discovered the political efficacy of allowing the Court to spell out policy in controversial fields and that the Court has sometimes performed the task perhaps neither happily nor well. In any case, the Court *has not usurped* the function of policy-making from Congress.

The Supreme Court has traditionally exercised wide policy-making powers in respect to supervising administration of criminal justice in the federal courts.[223] The Warren Court, in a 5–4 decision, has asserted recently that the Court also has "supervisory powers over federal law enforcement agencies."[224] As the dissenters pointed out,[225] this is the first time that such power per se has been claimed by the Court. Nonetheless, the Warren Court has made it clear that even in these areas it will adhere to the expressed wishes of Congress, unless, of course, those wishes run counter to provisions of the Constitution.

## VII. The Meaning of What Congress Has Done and Has Not Done Regarding the Court

If, as alleged, the Court has been trespassing upon the domain of Congress, surely Congress should be very much aggrieved. Yet Congress has chosen to do virtually nothing about the alleged tres-

222. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239, 240 (1959). (Emphasis added.) See Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations*, 8 U. Chi. L. Rec. 95, 96 (1958).

> In any event, Congressional directions were, as the Court has frequently observed, fragmentary and elusive. As a result, there was committed to the Court the task of adjusting two intricate systems of regulation. The Court, in turn purported to determine what Congress "intended," or what it would have "intended" if it had appreciated the problems involved, or perhaps what kind of adjustments between federal and state power made sense within the framework of the national regulation.

*Ibid.*

223. See, *e.g.*, Palermo v. United States, 360 U.S. 343 (1959); Mallory v. United States, 354 U.S. 449 (1957).

224. Rea v. United States, 350 U.S. 214, 217 (1956).

225. *Id.* at 218 (Harlan, J., dissenting).

passes. How much significance can be attached to Congress' failure to act? There are those who argue "not much." For example, the authors of an analysis of congressional reversals of Supreme Court decisions from 1945–1957[226] concluded:

> Judicial reluctance to overrule past decisions or to correct an imperfection in the drafting of a statute is often based on the easy assumption that the legislature will act to change an unsatisfactory result. Some authorities in the field even go so far as to place the duty to correct errors in statutory interpretation exclusively with the legislature. But a recognition of the unusual unanimity of interest and opinion which is generally required to bring about a congressional reversal of a Supreme Court decision indicates that reliance on legislative correction is rarely warranted.[227]

It is certainly true that obtaining the consensus necessary in Congress to override a Court decision is a difficult matter. It is also true that "the Court's decisions often carry more weight than logic intends them to, and that it will be suggested (as in the *Tidelands* and *Phillips Petroleum* cases) that an adverse congressional action somehow would violate the principle of the separation of powers."[228] Nonetheless, when Congress is deeply disturbed about a Supreme Court decision, and it has the constitutional power to override that particular decision, it can do so. The authors of the foregoing study have themselves provided a catalogue of such cases.[229] And Mr. Justice Douglas' words spoken at the Columbia Law School are pertinent here: "If the Congressional will is defied, the error can be corrected by an amendment of the law." He pointed out that there were at least twenty-six instances between 1945 and 1957 in income tax cases "where Congress by later enactment modified or changed the rule of law announced by the Supreme Court."[230] Regardless of what significance can be attached to congressional failure to act, it seems clear that were the Court truly running roughshod over Congress, a consensus would have been reached in Congress to curb the Court.

Congress has sometimes taken quick action to overturn a Supreme Court decision. Immediately after the decision in *Jencks v. United States*[231] perhaps moved by Mr. Justice Clark's bitter dissent charging that "Unless Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in

226. See Note, *Congressional Reversal of Supreme Court Decisions: 1945–1957*, 71 HARV. L. REV. 1324 (1958).
227. *Id.* at 1337.
228. Memorandum from Professor John J. Cound to the author, Oct. 1, 1959.
229. See note 226 *supra.*
230. N.Y. Times, Nov. 9, 1958, § 1, p. 1, col. 3, at p. 44, col. 1.
231. 353 U.S. 657 (1957).

law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets,"[232] and by the ensuing publicity given the former Attorney General's words, the Congress did study the *Jencks* decision and enact a statute. However, the result was virtual reaffirmation of the Court decision.[233]

As pointed out earlier, in 1959 Congress did enact new labor legislation which in part reversed Supreme Court decisions, although it could be equally argued that Congress was really reversing its own position.[234] This, then, is what Congress has done about Court decisions, but weigh against this what Congress has refused to do.

Congress has over the past few years considered a whole host of proposals aimed at the Court. A year ago, Senator Jenner implored Congress "to protect itself and the country against the usurpations of this runaway, wild Court, which is tearing down the Constitution of the United States."[235] Yet Congress has chosen to do nothing about these proposals. True, some measures did pass the House but these were not measures which would have changed the composition of the Court or diminished its powers.[236] They were measures which would have reconstrued statutes which a majority of the House felt the Court had misconstrued. But all of these failed either to pass or be considered by the Senate.[237] More important, on the highly-charged issue of desegregation in the schools, Congress did nothing to demonstrate discontent with what the Court had done.

## Conclusions

Although a minority of the Justices—Black, Douglas, Brennan, and the Chief Justice—would probably prefer to have it otherwise, the Warren Court as an institution has been exceptionally deferential to Congress. So much so, that for one with libertarian values it has been too permissive, allowing Congress to make grave invasions of fundamental liberties. Therefore, it is strange, indeed, that the Court has been attacked for treading on the power of Congress. However, several explanations for this criticism come to mind.

232. *Id.* at 681.

233. See 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1958). *But see* Cohn & Bolan, *The Supreme Court and the A.B.A. Report and Resolutions*, 28 Fordham L. Rev. 233, 257 (1958).

234. See notes 221–22 *supra* and acompanying text.

235. 104 Cong. Rec. 18645 (1958); see Senator Jenner's remarks, *id.* at 8683, 13813, 14089.

236. See N.Y. Times, Aug. 22, 1958, p. 1, col. 5; Celler, *The Supreme Court Survives a Barrage*, Reporter, Nov. 27, 1958, p. 31.

237. *Ibid.*

First, a good part of the criticism stems from people who are unhappy about particular decisions, such as the segregation decisions. In their fury, they are willing to use any and all arguments available against the Court in the hope that somehow the decisions can be reversed. In addition, there is some element of the strategy used by umpire "baiters" in baseball. To paraphrase a one-time baseball manager who was a notorious umpire baiter, "you don't change the umpire's mind about the decision just made, but you can sure worry him about the next one." The strategy makes sense, for the Court is very sensitive to public opinion. As Mr. Justice Frankfurter put it: "The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in law-making by courts."[238] There is ample evidence that the Court will not long swim against the current of prevailing opinion.[239] If proponents of certain views can create the impression that they are in fact the dominant opinion, they may well force the Court to modify its views, however right the Court may have been.[240]

Second, any assessment of how the Warren Court has performed depends in large part on from what point of view one reads the Bill of Rights and other provisions of the Constitution safeguarding individual liberty. If these provisions have real meaning, then, a Court in our system must uphold them against encroachment even by Congress. Sadly enough, over the past few years there has been a general failure among Americans to appreciate the tremendous importance of our fundamental liberties. As incredible as it seems, men trained in the law, the Special Committee on Communism, Tactics, Strategy and Objectives of the American Bar Association, offered the following resolution for the approval of the Association's House of Delegates:

> Be it further resolved that whenever there are reasonable grounds to believe that as a result of court decisions internal security is weakened, or wherever *technicalities* are invoked against the protection of our nation, remedial legislation be enacted by the Congress. . . .[241]

---

238. National City Bank v. Republic of China, 348 U.S. 356, 360 (1955).

239. See Mendelson, *Mr. Justice Frankfurter—Law and Choice*, 10 VAND. L. REV. 333, 341 (1957).

240. This apparently is what motivated the Court's decision in *Barenblatt v. United States*, discussed in notes 28–40 *supra* and accompanying text. For another example of judicial response to dominant public opinion, note Mr. Justice Roberts' explanation for the Court's shift in attitude after the 1936 election:

> Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy. . . .

ROBERTS, THE COURT AND CONSTITUTION 61–62 (1951). See MASON, SECURITY THROUGH FREEDOM 109–11 (1957).

241. N.Y. Times, Feb. 25, 1959, p. 1, col. 2, at p. 25, col. 1. See *Excerpts from American Civil Liberties Union Analysis of Bar's Proposal on High Court Rulings*, N.Y. Times, April 19, 1959, § 1, p. 82.

Technicalities indeed! It is the Bill of Rights they refer to. The reference to "technicalities" was finally deleted, but only after spirited debate. In the course of the debate, an eminent past president of the Association, Loyd Wright, asserted that "American people pay too much attention to their liberties and not enough to their responsibilities."[242]

Third, some of the criticism of the Court comes from those who feel that as a matter of democratic principle, the Court should very reluctantly exercise the power to declare acts of Congress unconstitutional. They generally do not advocate that the Court be deprived of the power completely. They prefer that the Court exercise self-restraint. Oddly enough, the majority of the Court itself is presently committed to this view. But, evidently, they have not exercised enough restraint to satisfy some critics.

In view of the Court's failure to check the excesses of Congress, why has the Court escaped criticism from libertarian quarters? To some extent the answer must lie in the fact that we have just weathered a period in our history in which government has not been scrupulous about observing the rights of citizens. Consequently, any victory at all has loomed large in the thinking of libertarians. And the defeats have been accepted philosophically as manifestations of the times. Also, they have felt it so important to defend the Court for the few important victories achieved, notably the segregation decisions, that they have been chary about criticizing the Court lest such criticism help dissipate the few victories.

Second, many who hold libertarian values also have a deep commitment to the concept of majority rule. For them, there has been real appeal in the arguments for judicial self-restraint. They have failed to appreciate that judicial self-restraint does not have the same impact that prohibiting the Court to exercise the power to declare an act of Congress unconstitutional would have. For the public at large, the failure of the Court to exercise its power, even as a matter of principle, is regarded as approval of what Congress has done and gives to the action an added and impressive endorsement. Mr. Justice Jackson made the point well in his separate opinion in *Korematsu v. United States*:

> A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[243]

It is far better for the Court to be stripped of the power for all to

242. N.Y. Times, Feb. 25, 1959, § 1, p. 1, col. 2, at p. 25, col. 1.
243. 323 U.S. 214, 246 (1944).

know rather than to maintain an illusion, in a doctrine of self-restraint, that the Court can be counted upon in a real pinch to serve as a bulwark against congressional invasions of liberty. In this connection, Professor Harrop Freeman's observation of the record of the Supreme Court is meaningful: "The Court must protect [first amendment] liberties for once against the federal legislature. 175 years of nonuse of the power given the Court raises question whether power exists."[244] In short, if the citizenry are to be the "safest depository of their own rights," it should be made clear to them that they can only depend upon themselves.[245]

But the time has come for those with libertarian values to point up the failure of the Court to defend constitutional liberties from invasions by the Congress. Certainly, it would never do to allow the Court to believe that the "dominant opinion" of the nation approves emasculation of constitutional liberties.

244. Freeman, *Civil Liberties — Acid Test of Democracy*, 43 MINN. L. REV. 511, 528 (1959). See Edgerton, *Incidence of Judicial Control over Congress*, 22 CORNELL L.Q. 299 (1937); Sklar, *The Fiction of the First Freedom*, 6 WEST POL. Q. 302 (1953).

245. For an excellent treatment of the doctrine of judicial self-restraint, see Mendelson, *supra* note 239.