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The Warren Court and the Discretionary Power of the Executive

Robert A. Horn

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An important problem currently confronting the United States government as a result of the Cold War is that of protecting the security of the nation—often necessarily accomplished through rather arbitrary, discretionary action of the Executive—and at the same time providing judicial justice in concrete instances to persons adversely affected by such executive action. Professor Horn examines the limitations imposed on the discretionary power of the Executive by the Warren Court, concluding that these restrictions may not necessarily have diminished that power. However, he is critical of the manner in which the decisions have been reached and suggests that a more frank and flexible approach would benefit both the Court and the Executive.

Robert A. Horn*

Any attempt to assess the effects of the decisions of the Warren Court upon the discretionary powers exercisable under the Constitution by the executive branch is met by certain difficulties inherent in the problem. Since the appointment of Mr. Chief Justice Warren, two appraisals of current presidential power have received unusually wide attention. Professor Clinton Rossiter concluded in *The American Presidency* that "the outstanding feature of American constitutional development has been the growth of the power and prestige of the Presidency" and predicted a continuation of that development.[1] On the other hand, Mr. Walter Lippman declared in *Essays in The Public Philosophy* that "the democratic disaster of the twentieth century" is attributable to the fact that "the power of the executive has become enfeebled, often to the verge of impotence."[2] Two such con-

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1. ROSSITER, THE AMERICAN PRESIDENCY 62 (1956).
2. LIPPMAN, ESSAYS IN THE PUBLIC PHILOSOPHY 55 (1955).

flicting estimates of the present status of executive power, by eminent publicists and scholars who presumably examined essentially the same phenomena, illustrate the uncertainty which underlies any analysis of executive power.

Another difficulty is presented by the fact that neither Mr. Lippman nor Professor Rossiter suggests that the judiciary has played a leading role in defining the scope of contemporary executive power. Moreover, major studies of the Presidency, including the relation of the executive and judicial branches, cast doubt on any notion that the courts have ever played such a part, now or in the past.[3]

Furthermore, great as the powers of the Executive may be, most of them are exercised pursuant to statute. On the other hand, executive officers possess broad discretion in statutory interpretation. Thus, many cases involve the relations between the Court and both the other branches, not simply one of them. Yet, this Article is not concerned with the effects of the Court's decisions upon the whole scope of the Executive's statutory and constitutional powers, but deals only with those cases which affect the independently exercisable powers of the Executive. Hence, the amplitude of discretion left with the President by Congress and the Constitution must be one criterion for the selection of pertinent cases. One important decision of the Warren Court will illustrate the general nature of the cases excluded from consideration by that criterion. In *United States* ex rel. *Toth v. Quarles*,[4] a civilian, after honorable discharge from the service, had been arrested by military authorities and taken from the United States to Korea to stand trial by court martial for a murder he was alleged to have committed prior to discharge. In form, the decision was directed to the executive branch, for it ordered the Secretary of the Air Force to release the defendant from custody. But in an article of the Uniform Code of Military Justice, Congress had provided for the action taken by the executive.[5] The only discretion left to the military authorities, if it can properly be called that at all, was either to proceed as they had or to abandon their claim of executive power and seek conviction in federal court. In such a case, the onus for transgressing constitutional bounds properly lies on Congress rather than the executive branch.[6]

3. See particularly SCHUBERT, THE PRESIDENCY IN THE COURTS (1957).

4. 350 U.S. 11 (1955).

5. Uniform Code of Military Justice art. 3(a), 10 U.S.C. § 803(a) (1956).

6. See 350 U.S. at 23. Congress had passed § 803(a) against the advice of the Judge Advocate General of the Army. *Hearings Before A Subcommittee of the Senate Committee On Armed Services On S. 857 and H.R. 4080*, 81st Cong., 1st Sess., ser. 169767 at 256–57 (1949). The constitutional implications of the statement by the Judge Advocate General of the Army were supported by the testimony of the Assistant General Counsel of the Department of Defense. *Hearings Before A Subcommittee Of The House Subcommittee Of The Committee On Armed Services On H.R. 2498* at 881 (1949).

Also excluded from consideration here are the many decisions of the Supreme Court which deal with the routine exercise of power by independent commissions and administrative officials to whom Congress has committed executive authority. Quantitatively, these decisions have an important bearing on the executive branch, but they present problems beyond the scope of this Article. The day is past when they are generally argued, let alone decided, as constitutional questions.[7]

Finally, it must be remembered that the record of the Warren Court to date rests on the somewhat haphazard course of litigation presented by only six annual terms. To be other than impressionistic here is to indulge in delusive exactness, for the statistical universe of the Court's major decisions regarding executive power is much too small to permit statistical exposition. But even if one thinks dramatically rather than statistically, those decisions have not been the most controversial and exciting aspect of the Warren Court's work. Fortune has not brought it a case in the area of executive power which compares with the steel seizure case[8] of the Vinson Court, nor with its own decision in the school segregation cases.[9] Yet, it has been adding to what Mr. Justice Frankfurter has called the "coral reef of constitutional law."

Delusive exactness though it may be, a few statistical observations are of interest. In the Warren Court's fifteen decisions concerning executive power,[10] it was unanimous in only four cases;[11] and in one of these it is quite likely that only Mr. Justice Clark's nonparticipation kept it so.[12] Despite their importance, two of the cases were disposed of by per curiam opinions.[13] Perhaps more revealing is the simple statistic that in only four cases did the Supreme Court affirm the lower court's decision.[14] One other statistic is startling, especially

7. See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.01 (1958).

8. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

9. Brown v. Board of Education, 347 U.S. 483 (1954).

10. Seventeen decisions of the Warren Court involve circumstances in which the Executive had been left with some independently-exercisable discretion. But the Court vacated its original decisions in Reid v. Covert, 351 U.S. 487 (1956) and Kinsella v. Krueger, 351 U.S. 470 (1956), and reached a different result in both cases in Reid v. Covert, 354 U.S. 1 (1957). This Article discusses only the latter decision.

11. Wiener v. United States, 357 U.S. 349 (1958); Wilson v. Girard, 354 U.S. 524 (1957); Service v. Dulles, 354 U.S. 363 (1957); United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955).

12. Service v. Dulles, 354 U.S. 363 (1957).

13. Harmon v. Brucker, 355 U.S. 579 (1958); Wilson v. Girard, 354 U.S. 524 (1957).

14. McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955). In both *Guagliardo* and *Reid* the Court affirmed the decision of one lower court and reversed that of another.

when considered in conjunction with the foregoing: the government won only one of these fifteen cases,[15] while another is more properly described as a draw on the important constitutional issue of executive power.[16] Clearly the Warren Court is no rubber stamp for the Executive. And it has been less sympathetic to claims of executive authority than the lower federal courts.

The cases fall into two broad categories. The removal power of the executive was the constitutional problem in seven cases, all of which the government lost.[17] All but one of the seven dealt with dismissals resulting from loyalty-security programs of the national government.[18] Expressed in its broadest terms, the other consitutional problem concerns the President's power over the conduct of foreign relations. The President's authority to make executive agreements with foreign nations was at issue in six cases,[19] while the remaining two dealt with executive power to limit the foreign travel of American citizens.[20] In general, the Warren Court's concern with powers of the executive branch has reflected the country's struggles in the Cold War.[21]

I. The Removal Power

Of the seven cases which concerned the removal power, only one involved a removal by the President.[22] Four arose out of removal of federal employees by other executive officers.[23] The remaining two cases broke new ground: one dealt with the type of discharge papers which the military services may issue[24] and the other with loss of private employment as a consequence of security regulations.[25] It may be noted that a majority of the Supreme Court has not yet upheld the dismissal of any person by the national government on loyalty-security grounds.[26]

15. Wilson v. Girard, 354 U.S. 524 (1957).

16. United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955).

17. Green v. United States, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959); Wiener v. United States, 357 U.S. 349 (1958); Harmon v. Brucker, 355 U.S. 579 (1958); Service v. Dulles, 354 U.S. 363 (1957); Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955). An eighth case was declared moot: Taylor v. McElroy, 360 U.S. 709 (1959).

18. Wiener v. United States, 357 U.S. 349 (1958), dealt with removal for patronage purposes.

19. Wilson v. Girard, 354 U.S. 524 (1957); Reid v. Covert, 354 U.S. 1 (1957); United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955).

20. Dayton v. Dulles, 357 U.S. 144 (1958), and Kent v. Dulles, 357 U.S. 116 (1958).

21. Only two cases deal with problems not related to the Cold War: Wiener v. United States, 357 U.S. 349 (1958), and United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955).

22. Wiener v. United States, 357 U.S. 349 (1958).

23. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); Cole v. Young, 351 U.S. 536 (1956); Peters v. Hobby, 349 U.S. 331 (1955).

24. Harmon v. Brucker, 355 U.S. 579 (1958).

25. Greene v. McElroy, 360 U.S. 474 (1959).

26. *But see* Bailey v. Richardson, 341 U.S. 918 (1951), where the decision of a

So much has been written about the civil liberties issues in these loyalty-security cases that it is easy to forget that they are, after all, removal-power cases.[27] In considering questions about the removal power which these cases present, it is necessary to emphasize the problems of executive power, and to avoid the temptation to dwell upon civil liberties issues; yet thorough analysis does require adequate consideration of civil liberties. This conflict which inheres in any approach to the removal problem may be mollified by stipulating two facts preliminary to investigation and analysis. First, either the President or Congress, and sometimes both, have repeatedly authorized and prescribed removal of those found to be loyalty or security risks. Second, the Supreme Court has never intimated that the establishment of such grounds for removal is unconstitutional; rather, it has repeatedly assumed the contrary, and has been concerned only with the manner in which security measures have been adopted and implemented. There can be no dispute about what "is" in any of these respects, and this Article assumes that, except for the manner of adoption and implementation, there need be none about what "ought to be."

It will help keep the loyalty-security removal cases in perspective to consider first the one decision of the Warren Court which concerns removal on other grounds, for the conception of executive power under the Constitution and the scope of judicial review found in that case also pervade the loyalty-security cases. In *Wiener v. United States*[28] a former member of the War Claims Commission sued to recover his salary after his removal by the President. The President had regarded it as "in the national interest" to have "personnel of my own selection" on the Commission,[29] that is, the President regarded the office as a patronage position. And why not? In *Humphrey's Ex'r v. United States*[30] the Supreme Court had indicated that if Congress authorized the President to remove members of regulatory commissions *for specified causes*, removal for any other reason would be held contrary to congressional intent. But in establishing the War Claims Commission, Congress had been *completely silent* about removal, and the President fairly inferred that Congress had regarded the office just as he did.[31]

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court of appeals upholding a dismissal was affirmed per curiam by an equally divided Court.

27. Extensive citation of the voluminous literature dealing with civil liberties aspects of the loyalty-security programs seems unnecessary here. See, *e.g.*, an outstanding recent study: BROWN, LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958).

28. 357 U.S. 349 (1958).

29. *Id.* at 350.

30. 295 U.S. 602 (1935).

31. The Commission was established pursuant to the War Claims Act of 1948, 62 Stat. 1240, as extended by 65 Stat. 28 (1951). Not only was Congress silent

But a unanimous Supreme Court, in a brief opinion, held that the President had erred in inferring a power to remove without cause—without even mentioning why the inference might reasonably have been drawn. Mr. Justice Frankfurter, for the majority, subordinated the constitutional issues arising from the quasi-judicial nature of the functions of the commission, while conceding that, as a matter of statutory interpretation, ascertainment of congressional intent "is a problem in probabilities." But he returned to the constitutional issue of division of powers by indirection in concluding that "the most reliable factor for drawing an inference . . . is the nature of the function that Congress vested in the Commission."[32] Since that function was to "adjudicate according to law" the claims before it,[33] an assignment which Congress might have chosen to give the federal courts, it would be as bad for the President to attempt to influence the Commission as to attempt to influence the courts. The Court concluded:

> *[A] fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred . . . men of his own choosing. . . .
>
> [N]o such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.[34]

Some criticism of this opinion may be directed at the Court's refusal to recognize an inherent power of removal and at the criterion of an "adjudicatory function" on which the Court relied in finding that Congress did not intend to grant the power of removal without cause. Critics may point to the Court's admission that Congress might have dispensed the war claims itself, or vested administration of the claims in an executive officer who, it can be implied from the opinion, *may constitutionally* have been made subject to the President's removal power.[35] A sufficient answer to this is that weight ought to be given to the fact that Congress did not choose to place settlement of these claims in hands so open to political influence.

But if "the nature of the function" performed by the officer is the criterion for testing a claim of inherent presidential removal power, other critics may observe that the Cabinet Secretaries and many

about removal, but it had not required a bi-partisan composition for the Commission—seemingly an additional indication that it intended the commissioners' positions to be treated as patronage.

32. 357 U.S. at 353.

33. *Id.* at 355.

34. *Id.* at 356.

35. *Id.* at 355. In discussing the legislative history of the War Claims Act, the Court noted that the original House version of the bill had placed administration of claims in the hands of the Federal Security Administrator—"an arm of the President." *Id.* at 354.

other executive officers heretofore considered subject to removal at the pleasure of the President also perform quasi-judicial functions. It should be obvious that the Court would never interfere in the political process to the extent of holding that such duties immunize those officials from summary removal. But this is not to say that removal of such an officer solely because he refused to render a quasi-judicial decision according to the President's request would necessarily be legitimate.[36] The objections to this criterion of "function" thus seem to present more of a dialectical resource for those who are determined to find fault with the case than a practical danger to effective presidential control of anything he is entitled to control or ought even to want to control.

The criterion of an "adjudicatory function" which controlled the result in *Wiener* raises yet another question which was not presented for resolution in that case: whether the President has power, absent statutory authorization, to remove an officer performing such a function whom he believes guilty of crime or other improper conduct. The Court clearly distinguished such a case from the *Wiener* situation, involving removal for political purposes, when it observed that here was no "removal for cause involving the rectitude of a member of an adjudicatory body. . . ."[37] Nevertheless, some critics will insist that if, as the Court said, "no such power is given to the President directly by the Constitution, and none is impliedly conferred on him by statute simply because Congress said nothing about it," then the Court cannot, consistent with the proper scope of judicial review, distinguish between the two grounds for removal. The tempting short answer—that the two cases can be different because the Court can make them different—would merely confirm the objection. The better answer is that the whole idea of an inherent power of removal is only a convenient fiction which had to be invented because the Framers were as silent about a removal power in the Constitution as Congress was in the War Claims Act. Recognition of the Supreme Court's function of filling the "open spaces in the law"[38] requires recognition of the fact that in some instances the same distinctions which can be made in construing a statute on the assumption that Congress intended to adopt a wise public policy should also be made as a matter of constitutional wisdom.

Of the four cases which dealt with removal of federal employees on loyalty-security grounds, *Peters v. Hobby*[39] and *Service v. Dulles*[40] are relatively minor in importance, although they were the

36. *Cf.* Kendall v. Stokes, 37 U.S. (12 Pet.) 524 (1838).
37. 357 U.S. at 356.
38. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921).
39. 349 U.S. 331 (1955).
40. 354 U.S. 363 (1957).

ones treated as *causes celebres* by the press, probably because they involved persons of prominence or notoriety in contrast to the obscure civil servants involved in the two more important cases.

Peters v. Hobby was the first loyalty-security case decided by the Warren Court and provoked the greatest division among its members.[41] Dr. Peters had been cleared by the loyalty board of the Federal Security Agency, first without a hearing, and again after a hearing recommended by the President's Loyalty Review Board. When the Federal Security Agency's hearing resulted in a renewed clearance, the Loyalty Review Board, on its own motion, also held a hearing that resulted in a finding adverse to Dr. Peters and a direction for his dismissal. The Loyalty Review Board derived its power from Executive Order No. 9835, which provided: "The Board shall have authority to review cases involving persons recommended for dismissal . . . and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing . . . agency, or by the officer or employee involved."[42] Indisputably, Dr. Peters had not been recommended for dismissal by the agency board, nor had he or his agency referred his case to the Loyalty Review Board. The Court held that in the absence of a prior dismissal and proper referral, the Loyalty Review Board had exceeded its delegated authority to "advise" by providing for a hearing on its own motion.

Dr. Peters' principal constitutional contention had been that the use of secret evidence from unidentified informants who cannot be confronted and cross-examined invalidates dismissal proceedings. It is not strange that the Supreme Court did not pass on the question —it had once before[43] and has twice since failed to do so.[44] Some of the severest critics of the federal loyalty-security programs have agreed that in some circumstances the use of secret evidence is justified.[45] But despite the Court's reliance upon interpretation of the executive order, one may surmise that a majority of the Court might not have been prepared to deny Dr. Peters' constitutional contention.

The main question raised by the holding that the Loyalty Review

41. Mr. Chief Justice Warren wrote the opinion of the Court, Justices Black and Douglas concurred separately, and Justices Reed and Burton dissented. Both Justices Black and Douglas preferred to decide the case on the constitutional issue of the petitioner's right to confront his accusers. It is not clear whether the petitioner had in fact challenged the procedures of the Loyalty Review Board, the invalidity of which was made the basis for decision. *Compare* 357 U.S. at 337 *with id.* at 350.

42. Exec. Order No. 9835, 12 Fed. Reg. 1935, 1937 (1947).

43. Bailey v. Richardson, 341 U.S. 918 (1951).

44. Greene v. McElroy, 360 U.S. 474 (1959); Vitarelli v. Seaton, 359 U.S. 535 (1959).

45. See particularly ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE SPECIAL COMMITTEE ON THE FEDERAL LOYALTY-SECURITY PROGRAM 174–80 (1956), and BONTECUE, THE FEDERAL LOYALTY-SECURITY PROGRAM 246–48 (1953).

Board had exceeded the authority delegated by the President stems from a further power delegated to the Board: "The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive Orders relating to employee loyalty."[46] Pursuant to that authority, the Board had promulgated a regulation which provided for "post-audits" of agency security boards' actions and included a power to reverse a determination favorable to the employee.[47] The proceedings overturned in *Peters* were taken in accordance with that regulation.

Although it may be argued that the power to "make rules and regulations" did not confer any further substantive power, it is indisputable that there was nothing in the executive order which explicitly forbade the invalidated proceedings. And the post-audit regulation, as the dissent pointed out, had been adopted at the beginning of the program, and action under it had been formally reported to the President, who in amending Executive Order No. 9835 by Executive Order No. 10241, left post-audits undisturbed.[48] Was post-audit of prior findings favorable to the employee nevertheless inconsistent with the intent of the President? Reasonable men not only might disagree—they did.

Before the case was decided, Executive Orders No. 9835 and 10241 had been supplanted by Executive Order No. 10450. Under that order, the *Peters* case could not have arisen, nor can such cases arise in the future.[49] Thus, for executive power, the most lasting significance of the case may well be an observation made by Mr. Justice Reed in his dissent:

> The Court in this case is reviewing a Presidential Order and rules made thereunder. I do not find it as easy as does the majority to analogize such review to judicial review of congressional Acts and administrative interpretation of such Acts. Certain differences are immediately apparent. The

46. Exec. Order No. 9835, 12 Fed. Reg. 1935, 1937 (1947).

47. See Loyalty Review Board Regulation 14, 13 Fed. Reg. 255 (1947) as amended, 17 Fed. Reg. 631 (1952).

48. The dissent noted that "the results of the Review Board's post-audit actions . . . were unmistakenly recorded" in the Annual Reports of the Civil Service Commission from 1948 through 1952, and that the reports showed that the Board had been reviewing determinations favorable to the employee. 349 U.S. at 353–54.

Exec. Order No. 10241, 16 Fed. Reg. 3690 (1951). However, the significance of the President's failure to modify post-audit procedures may be limited by the fact that the purpose of the new order was to modify merely the prescribed *standard* for removal.

49. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953). Section 11 of the order required the Board, in winding up pending appeals, to remand to the department and agency boards any case in which it disagreed with the previous determination. Section 12 provided for abolition of the Loyalty Review Board upon completion of its pending business.

> Executive Branch is traditionally free to handle its internal problems of administration in its own way. The legality of judicial review of such intra-executive operations as this is, for me, not completely free from doubt.[50]

Of course one can reply that these "intra-executive operations" affected important private rights. But so do countless others which have nothing to do with loyalty-security programs. If the type and scope of review employed in the *Peters* case were extended to "intra-executive operations" outside the sphere of security programs which may encroach on the constitutionally-sensitive rights of belief and association, would such extension advance the rule of law, or would it be an insupportable obstacle to effective administration?

The administrative procedures reviewed in *Service v. Dulles*,[51] even more complex and dilatory than those involved in the *Peters* case,[52] also included "post-audit" review by the President's Loyalty Review Board of a prior decision favorable to Service rendered by the State Department's loyalty board. The Loyalty Review Board made findings adverse to Service and recommended his dismissal; this recommendation was acceded to by the Secretary of State without further independent consideration. Utilization of the "post-audit" review procedure would have invalidated the Secretary's action if it had been authorized only by the executive order as construed in the *Peters* case. But in *Service*, the Secretary claimed that the power to support his action was conferred not only by executive order but also by the oft-reenacted "McCarran Rider," which provided:

> Notwithstanding the provisions of . . . any other law, the Secretary of State may, in his absolute discretion . . . terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interests of the United States.[53]

The Department of State had promulgated regulations detailing the procedures to be followed in loyalty-security cases, applicable to action under both the McCarran Rider and the Executive order. Under a regulation adopted in 1949, as the Court paraphrased it, "the action of the Deputy Under Secretary, if *favorable* to the employee, was to be final, the Secretary reserving to himself power to act

50. 349 U.S. at 354.

51. 354 U.S. 363 (1957).

52. Before he was finally fired by Secretary Acheson, Service had thrice been cleared by the State Department's loyalty board. Three times the President's Loyalty Review Board had conducted "post-audits," and had twice ordered new hearings by the departmental board.

53. 65 Stat. 581 (1951). The McCarran Rider was attached to various appropriation bills from 1946 to 1952. See 66 Stat. 555 (1952); 64 Stat. 768 (1951); 63 Stat. 456 (1949); 62 Stat. 315–16 (1948); 61 Stat. 288 (1947); 60 Stat. 458 (1946).

further only if his Deputy's action was unfavorable to the employee."[54] Furthermore, a regulation adopted in 1951 provided that a decision for removal should "be reached after *consideration* of the complete file, arguments, briefs, and testimony presented."[55] But the Secretary, in dismissing Service, had overruled a prior *favorable* decision by the Deputy Under Secretary and had, as he stated in an affidavit, "made no independent judgment on the record in this case."[56] Thus, neither of the departmental regulations had been followed.

The decisive question, then, was whether or not the Secretary was bound to follow the departmental regulations in exercising "his absolute discretion" under the McCarran Rider. The Court, citing a similar holding in *United States* ex rel. *Accardi v. Shaughnessy*,[57] held that he was.

Although procedural formality is undoubtedly an essential means of protecting constitutional rights, the degree of formality insisted upon by the Court in *Service* evidences the influence of the more difficult constitutional problem raised by Service's contention that the findings and opinion of the Loyalty Review Board "were based upon procedures assertedly contrary to due process of law."[58] That implication is strengthened by the fact that the Court cited very weak precedent in support of its holding and strained more than a little in its construction of the "McCarran Rider." Thus, in relying on the first *Accardi* case, the Court ignored the practical reduction to shambles of the sweeping rhetoric of that opinion in the second *Accardi* case.[59] If, on the other hand, *Accardi I* is to be regarded as good authority, that case must also stand for its proposition that departmental regulations have "the force and effect of law."[60] Then surely the departmental regulations in *Service were* "law" as that word was used in the McCarran Rider, which gave the Secretary discretion "not withstanding any other provision of law." Therefore, if a constitutional implication is not to be drawn from the *Service* opinion, one must try to understand that what Congress really meant was that the Secretary had absolute discretion "notwithstand-

54. 354 U.S. at 384–85 interpreting U.S. DEPT. OF STATE, MANUAL OF REGULATIONS AND PROCEDURES beginning at § 390 (1949).

55. U.S. DEPT. OF STATE, MANUAL OF REGULATIONS AND PROCEDURES § 393.1 (1951).

56. 354 U.S. at 369. The Secretary explained his failure to make an "independent judgment" on the grounds that he "deemed it appropriate and advisable to act on the basis of the finding and opinion of the Loyalty Review Board." *Id.*

57. 347 U.S. 260 (1954).

58. 354 U.S. at 372.

59. Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955).

60. 347 U.S. at 265.

ing any other provision of law *except such provisions of law as he has promulgated.*"

The decision in *Cole v. Young*[61] has more general application, for it limits the power of discretionary removal of persons generally protected by a statutory right to a hearing to those cases which involve employees in "sensitive" positions with respect to national security. Nevertheless, the decision is of only a limited practical effect, for the procedures required by statute are not generally significant barriers to removal.[62]

In 1950 Congress passed an act which "notwithstanding . . . any other law" authorized the heads of eleven sensitive agencies, in their "absolute discretion," to suspend without pay "any civilian officer or employee." After such notice as is consistent with national security, opportunity to reply, and "such investigation and review" as the agency head deems necessary, he is authorized to "terminate the employment . . . in the interest of . . . national security. . . ."[63] The act also provides for extension of these provisions to other departments and agencies by the President when he deems it "necessary in the best interests of national security."[64] By Executive Order No. 10450, President Eisenhower brought the entire executive branch under the act.[65]

Subsequently Cole, a pure food and drug inspector for the Department of Health, Education and Welfare, was dismissed under this authority. In an opinion less tortuous than those in *Peters* and *Service*, the Court held the dismissal void. Mr. Justice Harlan, writing for the majority, demonstrated convincingly that despite its unqualified language, Congress had intended the act—at least when applied to agencies other than those specified—to cover only employees in positions which are "sensitive" in terms of their possible effects on national security. The Department Secretary had made no preliminary finding that Cole's position was "sensitive," for the terms of the Presidential Order which had extended and implemented the act did not require that exercise of the "absolute discretion" accorded department heads be predicated upon any such preliminary finding.[66] Hence the Court held that the summary dismissal had deprived Cole of his statutory right of appeal to the Civil Service Commission.[67] The Court attempted to avoid an out-

61. 351 U.S. 536 (1956).

62. PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 51 (1957).

63. 64 Stat. 476 § 1 (1950), 5 U.S.C. § 22–1 (1958).

64. 64 Stat. 476 § 3 (1950), 5 U.S.C. § 22–3 (1958).

65. Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953).

66. The Court read the order as enjoining upon agency heads "the duty of discharging any employee of doubtful loyalty, *irrespective* of the character of his job and its relationship to the 'national security.'" 351 U.S. at 522.

67. Cole was protected by The Veteran's Preference Act, 58 Stat. 387 (1944),

right declaration that the President as well as the Secretary had acted illegally, by assuming "for purposes of this decision" that the executive order had accomplished a valid extension of the act.[68] However, it was forced to qualify that assumption by recognizing that "the basis for our decision is simply that the standard prescribed by the executive order and applied by the Secretary is not in conformity with the Act."[69] This patent inconsistency prompted the dissent to note that "the reasoning of the opinion makes that extension *a fortiori* unauthorized."[70]

In his dissenting opinion, Mr. Justice Clark exposed a major constitutional issue which the Court succeeded in ignoring only by its rather ficticious assumption. By effectively striking down the President's extension of the act, the Court raised

> a question as to the constitutional power of the President to authorize dismissal of executive employees whose further employment he believes to be inconsistent with national security. This power might arise from the grant of executive power in Article II of the Constitution, and not from Congress.[71]

Should the constitutional powers of the President be interpreted to include inherent power to authorize dismissals for security reasons at the discretion of a department head? The *Wiener* case perhaps hints that the Warren Court doubts that it should be. But assuming the existence of such an inherent power and that Congress intended to limit that power to removal of persons in "sensitive" positions, can it do so constitutionally? Any answer the Court could give must affect the distribution of powers. Probably the majority would quote Mr. Justice Jackson's statement in the steel seizure case:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus* any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[72]

But was the Court justified in *Cole* in being so cautious as to refrain from openly scrutinizing the conflicting claims of congressional and presidential power?

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5 U.S.C. § 851 (1958), which then required that preference eligibles "shall have the right to appeal to the Civil Service Commission" and other procedural rights.

68. 351 U.S. at 542.

69. *Id.* at 557.

70. *Id.* at 566.

71. *Id.* at 568.

72. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952). (Emphasis added.)

In *Vitarelli v. Seaton*,[73] the Court recently reaffirmed its commitment to the requirement that departmental procedures, once established, must be rigidly adhered to. The decision, in which the Court was unanimous on all important issues, was pronounced by Mr. Justice Harlan in a refreshingly straightforward opinion. By the terms of his contract, Dr. Vitarelli could have been dismissed at the discretion of the Secretary of the Interior, at any time and without cause. Instead, he was dismissed "in the interest of national security" after service of charges and a hearing before the departmental security board. Although the proceedings had been taken under the same authority as in Cole's case, and there had been no finding that the position occupied by Vitarelli was "sensitive," the Court did not rely upon the *Cole* requirement that a finding of "sensitivity" precede dismissal. Nor did it choose to base its decision on constitutional grounds. Rather, the Court took the occasion to reaffirm its adherence to the Service rule that, at least in constitutionally questionable circumstances, strict compliance with departmental dismissal procedures will be required.

The department had promulgated procedural regulations for the handling of its security cases, but had violated them in three important respects. The regulations required that the statement of charges be as specific and detailed as security considerations permit, that departmental security board hearings be "orderly" and limited to consideration of "relevant," "competent," and "material" matters, and that employees have the right to cross-examine opposing, nonconfidential witnesses.[74] But at the hearing, the scope of the questions went far beyond the specific statement of charges,[75] and expanded beyond the relevant and material into a wide-ranging inquisition into Vitarelli's educational, social, and political beliefs.[76] Further, he was denied an opportunity to cross-examine a witness who, since his name was in the record, was obviously not a confidential informant.[77] The Court held that having given "national security" as the reason for dismissal, the department was bound to follow its own regulations.[78] Thus, whatever may be the importance of the constitutional issues implicit in failure to conform to those prescribed procedures, this case effectively illustrates that a requirement of adherence to such procedural formalities may protect important constitutional rights.

73. 359 U.S. 535 (1959).

74. These procedural protections were required by Dept. of Interior Order No. 2738, Nov. 9, 1953, §§ 15(a), 21(a), (e), & 21(c)(4) respectively, cited by the Court, 359 U.S. at 540, 542, 544.

75. *Id.* at 541 & n.4.

76. *Id.* at 542–43 & n.5.

77. *Id.* at 544–45.

78. *Id.* at 549. Mr. Justice Frankfurter, joined by Justices Clark, Whittaker, and Stewart, concurred in part and dissented in part.

Harmon v. Brucker[79] involved the discharge of two soldiers on grounds of security risk. The soldiers commenced litigation, claiming that the Army Review Board and the Secretary of the Army had improperly considered their pre-induction activities in denying them an "honorable discharge" certificate.[80] The Board and the Secretary had acted pursuant to a statute which provided that the findings of the Board "shall be based upon all available records . . ." and that those findings are "final subject only to review by the Secretary of the Army."[81]

The Solicitor General of the United States denied the jurisdiction of the courts to review the Secretary's approval of the Board's finding but conceded that if they had power, the Secretary was wrong.[82] This startling desertion left, so to speak, the Army's left flank exposed. In a per curiam opinion the Court swiftly put the Army to rout, saying that if the Secretary had "acted in excess of powers granted him by Congress . . . his actions would not constitute exercises of his administrative discretion," and that the federal courts had power "to construe the statutes involved to determine whether the respondent did exceed his powers."[83] Thus, the Justices demonstrated, as they have in the past, that whenever they believe an administrative abuse demands judicial correction they have little difficulty in concluding that "final" does not mean final.[84]

Having disposed of the jurisdictional question, the Court quite reasonably concluded that Congress intended that "the type of discharge to be issued is to be determined solely by the soldier's military record . . ." and that therefore "'records,' as used in the statute, means *records of military service* . . . ."[85] In this way the Court avoided passing on the question whether the statute as construed and applied by the Secretary violated due process. But the *result* stands in the great tradition of what has been called "natural justice."

The importance of the Court's recent decision in *Greene v. McElroy*[86] transcends the limitations which that decision places upon the removal power, for it imposes substantial qualifications upon other discretionary powers of the executive. The Defense Department's Industrial Personnel Security Program[87] may well depend

79. 355 U.S. 579 (1958).

80. The activities alleged against them were their associations with persons and groups considered subversive or of questionable loyalty. *Id.* at 584 (dissenting opinion).

81. 10 U.S.C. § 1553 (1958).

82. 355 U.S. at 582.

83. *Id.* at 581–82.

84. See, *e.g.*, Estep v. United States, 327 U.S. 114 (1946).

85. 355 U.S. at 583.

86. 360 U.S. 474 (1959).

87. REPORT OF THE COMMISSION ON GOVERNMENT SECURITY 235–319 (1957), gives a full and authoritative history of the program.

for its effectiveness upon the revelations of secret informants who cannot, consistently with the degree of secrecy required by national security, be required to confront the accused. If that is true, the Court's opinion in *Greene* left the future of that program in doubt. The Court claimed to decide "only that in the absence of explicit authorization from either the President or Congress . . ." the Defense Department could not deny clearance to an aeronautical engineer with the practical effect of barring him from his work by "a proceeding in which he was not afforded the safeguards of confrontation and cross-examination."[88] But the constitutional overtones in the Court's discussion of the "questionable constitutionality"[89] of any procedures which deny confrontation, led Justices Frankfurter, Harlan, and Whittaker to concur only in the judgment, "intimating no views as to the validity of those procedures."[90] And Mr. Justice Clark, who dissented alone, predicted that the opinion "speaks in prophecy" on the constitutional question.[91]

As the Chief Justice posed the issue,

> the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; rather, it is whether either the President or Congress *exercised such a power* and delegated to the Department of Defense the authority to fashion such a program.[92]

The question posed by the Chief Justice presents, more precisely, two issues. First, what acts or omissions of action, or both in combination, should be taken as a legally sufficient indication that either the President or Congress has *exercised* the power of delegation? It may be that a statute, an executive order, a memorandum, or even the spoken word is each sufficient in the proper circumstances—but if other means of delegation are insufficient, in particular the silent acquiescence of an executive official, the efficiency of government operations must suffer. The second issue is, *how specifically* must the chosen means of delegation *identify* the particular authority delegated? This question of the requisite specificity of standards is a familiar one in the case of congressional, but not presidential, delegation.[93]

Delegation by silent acquiescence, that is, omission of any showing of approval or repudiation, presents, in its most difficult form, the problem of determining the *existence and scope* of a delegation.

88. 360 U.S. at 508.
89. *Id.* at 506. *But see* Chase, *The Warren Court and Congress*, 44 MINN. L. REV. 595, 616–19 (1960).
90. 360 U.S. at 508.
91. *Id.* at 524.
92. *Id.* at 496.
93. See generally 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 2.03 (1958).

Although silence may often import consent, the legal sufficiency of the delegation which consent may imply is necessarily limited by its uncertainty. Moreover, silent acquiesence is also the least specific manner in which delegation can be made. Perhaps it is a legal fiction that the consent to be implied from silence delegates *any* authority. And, though *some* delegation be established, the question remains, *what* has been delegated? It may be piling fiction upon fiction to add that the *scope* of authority can be drawn from silence. But if these are fictions, they are necessarily generated by constitutional government, which requires that all authority establish its legitimacy upon proper challenge. Appraisal of the authority claimed to arise out of silent acquiescence thus becomes a duty of the judiciary, which should perform its task by discounting the *scope* of the authority claimed by the *uncertainty* that the power of delegation was *exercised*, or that it was exercised with determinable *specificity*.

In *Greene*, the Chief Justice acknowledged that certain ambiguous documents and the knowing silence of the President and Congress indicated with sufficient certainty that some degree of power had been delegated, for he declared: "[E]ven in the absence of specific delegation we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination."[94] But the Court went on to hold that a program which denied those safeguards fell outside the scope of the authorization which it had recognized.

What various acts or omissions could have been a legally sufficient indication of specific delegation to the Defense Department to carry out this program *in all its details*? No statute or executive order had expressly authorized an industrial security program. The evidence "in writing" which might have established an "implicit delegation" was inconclusive at best.[95] Hence, the best evidence of an effective delegation was a long period of knowing silence, for both Congress and the President had actual knowledge of the program, and they knew that it included denial of confrontation.[96]

Meeting this evidence, the Court articulated an emerging, if not new, principle: "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree . . . that delegation has been shown here."[97] But the Court did not agree. Instead, it

94. 360 U.S. at 506.

95. The Industrial Security Program originated in a War Department Circular of Feb. 5, 1942. REPORT OF THE COMMISSION ON GOVERNMENT SECURITY 237 n.7 (1957).

96. That fact had been reported to both the President and Congress. *Id.* at 262.

97. 360 U.S. at 506.

held that in this area of questionable constitutionality, "it must be made clear that the President or Congress, within their 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."[98]

There are many fields within "the area of doubtful constitutionality." Will the new principle be applied in all? And if it were, what would be the impact on the bureaucracy which frequently acts in reliance upon executive delegation through silent consent?

II. The Conduct of Foreign Relations

A. *Executive Agreements*

Guy W. Capps, Inc. v. United States[99] presented the Warren Court with an opportunity to make a major constitutional pronouncement respecting the President's power to enter into executive agreements.[100] However, the Court's contribution was of lesser significance, for it avoided the constitutional question.

To prevent Canadian potatoes from flooding the price-supported United States market, Congress in the Agricultural Act of 1948 had given the President power, upon investigation and hearing by the Tariff Commission, to proclaim a quantitative limitation on potato imports.[101] But rather than use this method of controlling imports of Canadian potatoes, the President concluded an executive agreement with Canada.[102] Canada agreed to prevent export to the United States of potatoes for *consumption* purposes in return for the United States' agreement to permit import of Canadian potatoes for *seed* purposes under certain conditions. Those conditions included a requirement that the Canadian exporter demand a guarantee by any United States seed-potato importer that the potatoes received from the Canadian shipper would not be sold as "table stock." Guy W. Capps, Incorporated imported about $150,000 worth of seed pota-

98. *Id.* at 507. The Court's authority for this point indicates its novelty. The oldest case was *Ex parte* Endo, 323 U.S. 283 (1944). Others were Scull v. Virginia, 359 U.S. 344 (1959); Kent v. Dulles, 357 U.S. 116 (1958); Watkins v. United States, 354 U.S. 178 (1957); and Peters v. Hobby, 349 U.S. 331 (1955).

99. 348 U.S. 296 (1955).

100. The question of executive power before the Court in *Capps* was at least as important as the question presented by the earlier, more controversial cases which dealt with the President's power to accept and enforce the Russian government's assignment to the United States government of claims arising from nationalization of the overseas assets of Russian companies. See United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

101. 62 Stat. 1247, 1249 (1948), 7 U.S.C. § 624 b (1958).

102. The agreement was concluded by exchange of notes between the Canadian Ambassador to the United States and the Acting Secretary of State of the United States, Nov. 23, 1948. 62 Stat. 3717–19, T.I.A.S. No. 1896. The notes are set forth in an appendix to the opinion of the Court, 348 U.S. at 305.

toes, most of which ultimately found their way to consumers' stomachs instead of farmers' potato patches. The government sued Capps Incorporated for an amount of damages, equal to the cost of buying up at support prices an equivalent amount of American-grown potatoes, on the theory that the assurance executed by the Capps firm constituted a contract for the benefit of the United States which it had breached.

Although the district court agreed that the assurance by the Capps firm constituted an enforceable contract, it held that there had been "no lack of diligence or care on the part of this defendant to see to it that its assurance was carried out."[103] In the court of appeals the government fared no better, but for a very different reason. Chief Judge Parker, citing the steel seizure case, held that "the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related. . . ."[104] The opinion added:

> It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. . . .
>
> [W]hatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.[105]

The case came to the Warren Court at a most embarrassing time, when acrid controversy was raging over the Bricker Amendment. However, the Court avoided the constitutional issue and held that "the District Court was not clearly in error in making the findings it did or in directing the verdict for respondent on the ground that no breach of contract was shown."[106] They concluded that "there is no occasion for us to consider the other questions discussed by the Court of Appeals. The decision . . . does not rest on them."[107]

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103. This portion of the district court's unreported opinion is quoted at 348 U.S. 300.

104. United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (1953).

105. *Id.* at 659–60.

106. 348 U.S. at 304–05.

107. *Id.* at 305.

Professor Arthur Sutherland observed that Judge Parker's opinion had strangely neglected another provision of the Agricultural Act,

> for Section 22 of the Agricultural Act of 1948 includes this clause: "(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement. . . ." Quite clearly Congress seems to have expressed its expectation and approval of subsequent efforts to adjust Canadian-American differences by agreement, rather than by unilateral proclamation of

In contrast to the *Capps* case, the opinions on rehearing in *Reid v. Covert*[108] contain probably the most important interpretations of the powers of the executive branch that the Warren Court has yet made. The constitutional issues in the case were various and complex. Unfortunately, none of the four equally wide-ranging opinions in the case represented a majority of the Court. The opinion of the Court, written by Mr. Justice Black and reflecting the views of four Justices, did not limit its pronouncements to the circumstances of the case—civilian *dependents* of military personnel tried by court-martial for a capital crime in time of *peace*.[109] But the insistence of the two concurring justices that *Covert* be limited to its facts was an important, if short-lived, limitation upon the authority of the case.[110]

Although members of the Court disagreed on many important constitutional questions, most of these were questions of executive power only tangentially if at all.[111] But the President's power to make executive agreements was placed squarely in issue in part II of Mr. Justice Black's opinion. An Air Force wife had killed her husband in England and an Army wife had killed her husband in Japan, and in each case the jurisdiction of the United States flowed from executive agreements with the respective countries, which provided for trial of such cases by United States military courts in return for cession of primary jurisdiction by the foreign nation.[112] Congress had vested United States' jurisdiction under those executive agreements in military courts by article 2(11) of the Uniform Code of Military Justice, which provides that "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . ." are subject to that

import fees or embargoes.
Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 291 (1953).

108. 354 U.S. 1 (1957).

109. The opinion is somewhat equivocal in its explanation of the extent to which it would recognize military jurisdiction over civilians in time of war. But the language leans toward recognition of jurisdiction in limited circumstances. *Compare* 354 U.S. at 14, 21, 22, *with id.* at 33–35.

110. The exemption of civilians from the jurisdiction of military courts was subsequently extended to *all* civilians in *noncapital* as well as capital cases. See text accompanying notes 132–43 *infra*.

111. Members of the Court disagreed on these important constitutional questions: whether the case fell within the fifth amendment exemption of "cases arising in the land or naval forces"; whether, if it did not, Congress might nevertheless provide for trial by court-martial under the necessary and proper clause in conjunction with its art. 1, § 8 power to make rules "for the government and regulation of the land and naval forces."

112. *Great Britain*: Executive Agreement of July 27, 1942, 57 Stat. 1193, E.A.S. No. 355. *Japan*: Administrative Agreement, 3 U.S.T. & O.I.A. 3341 (1952), T.I.A.S. No. 2492.

code.[113] The government contended that denial of jury trial and other intrusions upon the protections of the Bill of Rights resulting from prosecution under the Uniform Code of Military Justice "can be sustained as . . . necessary and proper to carry out the United States' obligations under the international agreements made with those countries."[114] To this contention Mr. Justice Black replied:

> The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of the Government, which is free from the restraints of the Constitution.
>
> . . .
>
> The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[115]

Since Justices Frankfurter and Harlan agreed that the statute, as applied, was unconstitutional, it is clear that they also rejected the government's contention that this application of the statute could be sustained as legislation necessary and proper to carry out the executive agreement. And not even the dissenters, Justices Clark and Burton, gave the slightest intimation of support for that portion of the government's argument in their dissent. On this question, therefore, the Court appeared to be unanimous.

Thus was laid to rest, insofar as any Supreme Court decision can ever finally dispose of any great constitutional problem, a question that had been troublesome at least since *Missouri v. Holland*.[116] Indeed, Mr. Justice Black took pains to make this final determination clear even to the most ardent supporters of the Bricker Amendment by stating: "There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. . . . There is nothing in Missouri v. Holland . . . which is contrary to the position taken here."[117]

After denying that any constitutional support for court-martial of civilian dependents under article 2(11) could be derived from the executive powers, the Court considered other possible bases for constitutionality. Finding none, the Court held that these defendants had been deprived of rights guaranteed by the Constitution "in its entirety."[118] Mr. Justice Black, for four members of the Court, rejected the contention that "only those constitutional rights which are 'fundamental' protect Americans abroad," and insisted that

113. 10 U.S.C. § 802(11) (1958).
114. 354 U.S. at 16.
115. *Id.* at 16–17.
116. 252 U.S. 416 (1920).
117. 354 U.S. at 17–18.
118. *Id.* at 18. The Court emphasized the fact that court-martial did not meet the constitutional requirements of art. III, § 2 or the fifth and sixth amendments.

"when the United States acts against citizens abroad . . . it can only act in accordance with all the limitations imposed by the Constitution."[119] Although there had admittedly been denial of trial by jury, even trial by court-martial includes a number of the procedural rights guaranteed by the Bill of Rights.[120] Thus, the question posed by Mr. Justice Black's dictum is *which* of the various limitations *expressed* in the Constitution are *"imposed* by the Constitution."

The meaning and importance of the dictum became clear in the context of the entire opinion. The position of Mr. Justice Black was that the United States government in exerting jurisdiction over a civilian American citizen abroad is constitutionally bound to accord him, not merely a "fair trial" by "due process of law" but *all* the procedural rights expressed in the Constitution in their most "specific," "literal," and "absolute" sense.[121] The effect of this theory upon executive power seems analogous to the effect that Mr. Justice Black's familiar theory of "total incorporation" of all Bill of Rights guarantees in the due process clause of the fourteenth amendment[122] would have upon the procedures required of state criminal prosecutions. Both theories predicate a choice that the procedural guarantees of the Constitution should be effectuated to the diminution of an equally supportable conflicting claim of constitutional power. In this case the Court chose to subordinate the power of the executive to the guarantees of the Bill of Rights by effectively invalidating those portions of the executive agreements which conditioned cession of primary jurisdiction upon agreement to try American civilians by court-martial.

Almost immediately, *Wilson v. Girard*[123] revealed difficulties in

119. 354 U.S. at 5–6, 8–9, 18.

120. See the following sections of the Uniform Code of Military Justice, 10 U.S.C. ch. 47: § 827 (counsel); § 831 (self-incrimination); § 837 (court's independence); § 838 (counsel); § 844 (double jeopardy); § 846 (subpoena power); § 855 (cruel or unusual punishment). It is not contended that the scope of each of these protections is the same in court-martial proceedings as it is in federal court.

121. For a discussion of art. III, § 2 and of the sixth amendment, see 354 U.S. at 7–9. Obviously, trial overseas cannot literally conform to the sixth-amendment requirement that trial be had "by an impartial jury of the State and district wherein the crime shall have been committed. . . ." If defendants are returned to the United States for trial in cases like these, attendance of crucial witnesses often may not be compelled. On the other hand, if Congress can and should create special United States courts abroad, an American jury would necessarily have to be drawn largely or entirely from government employees, military or civilian, and their dependents, all of whom may be subject to the influence of the military command. It is not likely that Mr. Justice Black, given his views expressed in *Reid* on despotic military authority, would consider that such a jury meets constitutional standards of impartiality. See Mr. Justice Black's dissent in Dennis v. United States, 339 U.S. 162, 175–76 (1950).

122. See Mr. Justice Black's dissent in Adamson v. California, 332 U.S. 46, 68 (1947).

123. 354 U.S. 524 (1957).

attempting to make the "total incorporation" theory of *Reid* a basis for decision. The facts, in brief, were these: While guarding a machine-gun during maneuvers in Japan, Girard, using a grenade launcher attached to his rifle, fired a cartridge case which killed a Japanese woman gathering brass nearby. Under the United States' treaty and executive agreement with Japan, primary jurisdiction to try Girard was in the United States if Girard's act was done in the line of duty, but in Japan if it was not.[124] It is important to bear in mind that the United States maintained that Girard had acted in the line of duty and that, until waived, it had primary jurisdiction. But like the United States' other international agreements on the subject, that with Japan provides that the state with primary jurisdiction shall give sympathetic consideration to a request that it waive jurisdiction in any case which is of particular importance to the other state. Typically, of course, the United States makes rather than receives such requests, and typically they are granted. When Japan claimed primary jurisdiction over Girard, the United States government resisted until international tension became severe. Eventually, for what the Secretaries of State and Defense obliquely admitted in a joint statement to be "reasons of state,"[125] the United States waived jurisdiction. A district court then enjoined the Secretary of Defense from surrendering Girard to Japanese authorities,[126] and amid even greater tension the Supreme Court agreed to extend its regular term to review this decision immediately.

The Supreme Court unanimously reversed the district court. The Court simply declared that since "a sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction" and since "Japan's cession to the United States of jurisdiction to try American military personnel for conduct constituting an offense against the laws of both countries was conditioned" by the provision for waiver of primary jurisdiction, the "issue for our decision is therefore narrowed to the question whether . . . the Constitution . . . prohibited . . . waiver of the qualified jurisdiction granted by Japan."[127] The Court found "no constitutional or

124. The Security Treaty with Japan of Sept. 8, 1951, 3 U.S.T. & O.I.A. 3329, T.I.A.S. No. 2491, authorizing administrative agreements governing "the disposition of armed forces . . ." was ratified by the Senate on March 20, 1952. The terms of the Administrative Agreement Under Art. III of the Security Treaty, Feb. 28, 1952, 3 U.S.T. & O.I.A. 3341, T.I.A.S. No. 2492, were known to the Senate at the time of ratification of the Security Treaty. 98 CONG. REC. 2376, 2557 (1952). The distribution of jurisdiction referred to in the text was accomplished by a Protocol To Amend Article XVII of the Administrative Agreement, Sept. 29, 1953, 4 U.S.T. & O.I.A. 1846, T.I.A.S. No. 2848.

125. The joint statement of the Secretaries of State and Defense is set forth in appendix B to the Court's opinion. 354 U.S. at 544.

126. Girard v. Wilson, 152 F. Supp. 21 (D.D.C. 1957).

127. 354 U.S. at 529–30.

statutory barrier" to the waiver of jurisdiction.[128] We may agree that it should not have found anything even if it had looked, but it did not bother to look. It ignored the rationale of *Reid v. Covert* and obviously assumed that Girard was deprived of nothing when the United States waived jurisdiction in accordance with the terms of the executive agreement merely because without that agreement Japan would have had primary jurisdiction.

The hypothesis of Mr. Justice Black's opinion in *Reid v. Covert*, that the exercise of executive powers must be subordinated to all the guarantees of the Bill of Rights, put the Court in an unnecessarily difficult constitutional posture in *Girard*. If this rationale had been applied in *Girard*, that *literal* application of the Bill of Rights seemingly would have entitled Girard to a constitutional right to the protection of a jury trial, or at least to the procedural protections of an American court-martial. Assuming, then, the validity of the theory of "total applicability," how can anyone deny that the Executive and the Senate, through an agreement and treaty, had negotiated away Girard's constitutional rights. Yet, we have it on the good and current authority of *Covert* that the "prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined."[129]

The dilemma which confronted the Warren Court in *Girard* originated with its decision in *Covert* and took this form: either *all* of the Constitution follows an American serviceman abroad or *none* of it does.

There is a logical and just way out of this dilemma, which can be best understood by hypothetically situating Girard's case at a military post within the United States. Undoubtedly, Congress could constitutionally provide for his surrender to state authorities and trial in a state court. But it could not subject him to state trial of a kind which makes a mockery of due process of law and violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[130] The Court should have recognized that despite *Reid v. Covert*, this is also the true and full measure of the American citizen's constitutional rights as a soldier *overseas*, and that these fundamental rights have been scrupulously preserved in treaties and agreements by the President, the Senate, and American executive authorities abroad.[131]

128. *Id.* at 530.

129. 354 U.S. at 17. See text accompanying note 115 *supra*.

130. Palko v. Connecticut, 302 U.S. 319, 328 (1937), quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

131. For a thorough consideration of the manner in which United States treaties and agreements have been implemented to assure military personnel of fair trials

In three recent cases, the Warren Court was again confronted with the basic problem of *Girard* and *Covert*: that of deciding the scope of the constitutional limitations upon executive action affecting United States citizens abroad. In none of these cases did the Court formulate a constitutional rationale adequate to clarify the meaning of *Girard* and *Covert*; but the results of the decisions are all too clear: The *Court* has effectively deprived Congress and the Executive of power to discipline by court-martial any member of the civilian entourage which accompanies the United States armed forces overseas in time of peace.[132] A further result is that the extent of the President's power to enter into the administrative agreements important to the maintenance of United States military establishments on foreign soil has been substantially limited.

Each case presented an altered version of the facts in *Covert*—the basic problem in each concerned the authority of the military to try United States civilians by court-martial pursuant to the terms of executive agreements with foreign nations. *Kinsella v. United States* ex rel. *Singleton*[133] held that a civilian *dependent* of a member of the armed forces overseas could not be tried by court-martial for a *noncapital* offense. *McElroy v. United States* ex rel. *Guagliardo*[134] and *Grisham v. Hagan*[135] held that civilian *employees* of the armed forces overseas could not be tried by court-martial for *noncapital* or *capital* offenses, respectively. However, the basis for decision in these cases is not so easily discerned.

Only in *Singleton* did the Court give any substantial consideration to the development of a rationale for decision. And there it relied upon a formalistic interpretation of Congress' power to "govern" and "regulate" the armed forces.[136] The Court reasoned that the test for military jurisdiction was one of "military status," and that the nonmilitary status of the petitioning civilian *dependent* placed her outside the "unambiguous language" of the Constitution and exempted her from court-martial jurisdiction.[137] This rationale seemed to be the primary basis for decision in *Guagliardo* as well.[138]

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in foreign courts, see Note, *Criminal Jurisdiction Over American Forces Abroad*, 70 HARV. L. REV. 1043 (1957).

132. The authority of these cases is undoubtedly limited to times of peace. See McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 285–86 (1960); Reid v. Covert, 354 U.S. 1, 33 (1957). Today's unstable conditions, often neither peace nor war, may raise difficult questions for the Court.

133. 361 U.S. 234 (1960).

134. 361 U.S. 281 (1960).

135. 361 U.S. 278 (1960).

136. "The Congress shall have power . . . to make rules for the government and regulation of the land and naval forces. . . ." U.S. CONST. art. I, § 8, cl. 14.

137. 361 U.S. at 240–41, 243.

138. 361 U.S. at 284, 286. However, the Court stated that *Grisham*, as well as *Singleton*, controlled the result in *Guagliardo*. *Id.* at 283–84. Whatever may have

The *Singleton* rationale, which was based upon the *civilian status* of the petitioner, could logically have controlled the result in *Grisham* as well. There, the Court could have ignored the capital nature of the offense and simply stated that a civilian employee of the armed forces is not in a "military status" and is therefore not subject to military jurisdiction. Instead, it held that *Covert* controlled the result, because "the death penalty is so irreversible . . ." that civilian employees as well as dependents charged with a capital crime "must have the benefit of a jury."[139]

Since the Court most fully developed the *Singleton* rationale, it would seem to be the most significant. But it is delusive for one to rely upon the Court's future continued adherence to such a formalistic approach where the problem is the difficult one of balancing constitutional protections and powers. Similar considerations counsel caution in attributing the results of the cases to an unannounced triumph of Mr. Justice Black's theory of the applicability of the total protections of the Bill of Rights, though that may be a *permissible* explanation. It is significant that the reasons the majority gave for the result in *Grisham* did not go so far: the defendant was entitled to a jury trial—a *literal* requirement of the Bill of Rights—for reasons that imply peculiarly *due process* considerations. Various examples of such equivocation could be drawn from the opinions,[140] but for purposes of predicting the future course of the constitutional limitations which the Court has imposed upon Congress and the Executive, it is sufficient to observe that while Mr. Justice Clark's new position[141] has for the present led to results in favor of "total applicability," his formalistic and equivocal statements of the bases for decision indicate that he has not committed himself.[142] If that is so, the Court may yet relieve the military departments of the executive branch of the difficult disciplinary problem which these decisions have imposed upon those responsible for maintaining order

been the precise basis for the Court's decision in *Grisham*, discussed in the text accompanying note 139 *infra*, some hints of both the "total applicability" and "due process" approaches may be discerned in *Guagliardo*. A brief discussion centered specifically on trial by jury. *Id.* at 284. Yet the description of *Grisham* was couched in due process terms, which emphasized the "capital crime" basis of that decision. *Ibid.*

139. 361 U.S. at 280.

140. *Compare, e.g.*, 361 U.S. 243 *with* 361 U.S. 246, 249.

141. Mr. Justice Clark dissented in *Covert*, rejecting both the "total applicability" theory and the "due process" theory of limitations upon the power to "govern" and "regulate."

142. Neither Mr. Justice Whittaker nor Mr. Justice Stewart participated in *Covert*, and both may also be regarded as "uncommitted" with respect to the broad question of the nature of the constitutional limitations upon the power of United States officials in dealing with United States citizens abroad. However, with respect to the power of Congress to "govern" and "regulate" the armed forces, their position, as stated in dissent by Mr. Justice Whittaker, is that such power "is independent

at overseas military establishments.[143] The Court may yet take the advice of Professor Sutherland:

> The basic decencies of the Bill of Rights should be guides for our officials everywhere. This does not mean that all details of the first eight amendments are mandatory procedure for every American official abroad. . . . We are necessarily remitted to some such standard as that imposed on state officials by the fourteenth amendment.[144]

B. Passports and Travel Control

In *Kent v. Dulles*[145] and its companion case, *Dayton v. Dulles*,[146] the Warren Court adopted as narrow a view of executive power as it has yet expressed. The position adopted in the opinion by Mr. Justice Douglas had the support of a bare majority of the Court. The cases were brought by United States citizens whose applications for passports had been refused. Kent was denied a passport primarily because he refused to submit a non-Communist affidavit required by State Department regulations.[147] Dayton had submitted an affidavit, had had a hearing, and had ultimately been refused a passport on review and findings by the Secretary of State himself—findings which clearly had been made after consideration of confidential information.[148] In *Kent* the Court held that the narrow construction ordinarily applied to powers that restrict personal liberty required a finding that in the absence of explicit congressional delegation, the Secretary of State had no power to curtail the liberty to travel by withholding passports on grounds of belief or association. *Kent* was made the vehicle of decision and *Dayton* was settled on its authority.

With some important exceptions, a passport has generally not been required in order to enter or leave the country.[149] However, in

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of and not restricted by Article III or the fifth and sixth amendments. . . ." 361 U.S. at 273.

143. Some relief may come from adoption of the Court's suggestions of alternatives to the present statutory declaration of jurisdiction by means of temporarily inducting employees into the services, or by obtaining a waiver of rights prior to departure for overseas stations. 361 U.S. at 286–87. However, should a case arise involving such procedures, the Court may find it necessary to avoid the claim that an otherwise unavailable power may not be created through the imposition of an unconstitutional condition upon government employment. See generally Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935).

144. Sutherland, *The Flag, The Constitution, and International Agreements*, 68 HARV. L. REV. 1374, 1380–81 (1955).

145. 357 U.S. 116 (1958).

146. 357 U.S. 144 (1958).

147. The Secretary of State, in 1952, issued a regulation, still in effect, under which a passport applicant may be required to make a statement under oath "with respect to present or past membership in the Communist Party." 22 C.F.R. § 51.142 (1958).

148. 357 U.S. at 148–49.

149. In tracing the history of congressional and executive use of passports to

1952 Congress passed an act which provides that in time of war or national emergency, on presidential proclamation, it is "unlawful for any citizen of the United States to depart from or enter . . . the United States unless he bears a valid passport."[150] That provision had originally been incorporated in a wartime emergency measure, the operation of which had been extended by Congress until 1953.[151] As re-enacted in the 1952 act, the provision effectively accorded control over travel abroad to the Secretary of State and formed the basis for constitutional objection to the regulations through which the Secretary exercised his discretionary power to control the issuance of passports.

Although they are distinct powers, the power to forbid exit without a passport makes the nature of the power to refuse a passport all-important because, as the Court in *Kent* for the first time proclaimed (and as the government there acknowledged), a citizen's liberty to travel abroad is protected by "due process."[152] Before 1856 the Secretary of State issued passports in his discretion wholly as an exercise of inherent executive power.[153] And in that year Congress adopted an act, still in effect, which by its language appears to recognize an inherent executive power: "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe . . . ."[154] Moreover, Mr. Justice Douglas could hardly deny that there is "a large body of precedents" and massive official and scholarly opinion which hold that issuance of a passport is a "discretionary act."[155] In *Kent*, the government contended that Congress had acquiesced in the Secretary of State's discretionary control over issuance of passports. Douglas' response to that con-

regulate travel, the Court observed that as early as 1815, during the War of 1812, and again during the Civil War, Congress and the Executive had asserted power to prevent citizens from crossing into enemy territory without first obtaining a passport. A broader power was claimed during World War I when Congress, as an emergency measure, asserted the power to prevent entry or departure from the country without a valid passport while a Presidential Proclamation was in force. 40 Stat. 559 (1918). The same statute, amended for use in the World War II emergency, 55 Stat. 252 (1941), had been invoked by Presidential Proclamation No. 2523 on Nov. 14, 1941. 55 Stat. 1696 (1941). See the Court's discussion, 357 U.S. at 122–124.

150. 66 Stat. 190, 8 U.S.C. § 1185(b) (1958).

151. The original 1918 emergency measure as adapted for use in 1941, see note 149 *supra*, was extended by Congress until April 1, 1953 by 66 Stat. 330, 333 (1952). See 357 U.S. at 124.

152. *Id.* at 125.

153. The Court pointed out that the passport had originally been regarded primarily as a form of credentials which simplified foreign travel, and that prior to 1856, issuance of various documents serving the functions of passports had been undertaken by various federal, state, and local officials and notaries public. *Id.* at 121–23. Apparently there had been little question raised as to that power.

154. 11 Stat. 52, 60–61 (1856). The original statute was codified with insignificant modification in 1926. 44 Stat. 887, 22 U.S.C. § 211a (1958).

155. 357 U.S. at 124–25.

tention denied *sub silentio* any *inherent* power in the executive. He said, with some scholarly support, that "the key to that problem . . . is in the manner in which the Secretary's discretion was exercised, not in the bare fact that he had discretion."[156] Thus, he treated the statute as having *delegated* power to be exercised only in accordance with particular procedures; and then refused to recognize, in spite of substantial evidence, that Congress had intended to delegate the power to institute procedures for denial of passports on grounds of belief or association.

There was strong evidence that Congress had intended either to recognize such power as inherent, or to delegate it. Mr. Justice Douglas found that denial of passports previously had been based on only two grounds in the State Department's peacetime practice: noncitizenship and criminal activity.[157] However, Mr. Justice Clark rightly stated in the dissenting opinion that this proposition, "vital to the Court's final conclusion," is "contrary to fact."[158] The Court's opinion admitted that ever since the Russian Revolution the Department occasionally had denied passports to Communists, but argued that the practice had not "jelled" into a third ground for denial by 1926 when the Secretary's statutory power was incorporated in the United States Code.[159] True, after 1926 passports were frequently denied on grounds of Communist Party membership.[160] True also, although unmentioned in the majority opinion, the legislative history of the war measures forbidding travel without a passport clearly shows Congress recognized the Secretary's discretion to deny passports on security grounds. Indeed, any such law is essentially meaningless otherwise. Furthermore, the provision in the act of 1952 was designed to supplant and make permanently available the substance of that emergency legislation, and Congress knew that the Secretary exercised his discretion to deny passports to Communists and expected that he would continue to do so.[161] Still, the Court in *Kent* hesitated "to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose."[162]

Some critics may question whether the power to deny passports

156. *Id.* at 125.
157. *Id.* at 127.
158. *Id.* at 139.
159. *Id.* at 128.
160. *Ibid.*
161. The legislative history is cited and discussed in the dissenting opinion. *Id.* at 136–37. It is hardly to be supposed that Congress was interested only in interdicting foreign travel of aliens and ordinary criminals in this period.
162. *Id.* at 128.

necessarily arises from a congressional delegation of power—the case thus raises an important, but unresolved, problem as to the extent of executive power subsisting independent of any delegation. Further, it may appear to some that the Court concluded that for the Secretary to prescribe Communist Party membership and activity as the ground for denial is equivalent to his restricting the travel of people with red hair or blue eyes if the fancy strikes him. But the problem here is really the same as that posed in connection with *Greene v. McElroy*—that is, the requisite specificity with which power must be delegated and the degree of specificity which may be attributed to delegation by silence. Again the Court avoided the question of the constitutionality of the executive regulations by insisting upon explicit evidence of a delegation.

Conclusions

No less an authority than Max Weber pointed to the conflict always potentially present between a modern bureaucracy and the judiciary, particularly in Anglo-American jurisdictions:

> For the field of administrative activity proper, that is, for all state activities that fall outside the field of law creation and court procedure, one is accustomed to claiming the freedom and paramountcy of individual circumstances. General norms are held to play primarily a negative role as barriers to the official's positive and "creative" activity, which should never be regulated. . . . Yet the point that is "freely" creative administration . . . does not constitute a realm of *free*, arbitrary action, of mercy, and of *personally* motivated favor and valuation . . . is a very decisive point. The rule and the rational estimation of "objective" purposes, as well as devotion to them, always exist as a norm of conduct. In the field of executive administration, especially where the "creative" arbitrariness of the official is most strongly built up, the specifically modern and strictly "objective" idea of "reasons of state" is upheld as the supreme and ultimate guiding star of the official's behavior.[163]

But he observed of the judicial process:

> American adjudication of the highest courts is still to a great extent empirical; and especially is it adjudication by precedents. . . . [F]ormal judgments are rendered, though not by subsumption under rational concepts, but by drawing on "analogies" and by depending upon and interpreting concrete "precedents." This is "empirical justice." . . . [I]t postulates *substantive* justice oriented toward some concrete instance and person; and such an "ethos" will unavoidably collide with the formalism and the rule-bound and cool "matter-of-factness" of bureaucratic administration.[164]

No words could be found more prophetic of the problems faced by the Warren Court as it attempts to provide substantive justice in

163. Gerth & Mills, From Max Weber: Essays in Sociology 220 (1958).
164. *Id.* at 216–17, 220.

concrete instances for persons affected by the Executive's cool, rational, objective determination of the measures required by "reasons of state" for protection of the security of the country in the Cold War.[165] It is a measure of Weber's wisdom that he did not denigate the vital purposes of either the bureaucracy or the judiciary when such conflict of purpose occurred. His wisdom certainly deserves attention, both by those members of the legal profession who recently accused the Warren Court of paralyzing internal security by invoking "technicalities emanating from our judicial process,"[166] and by the many political scientists who have regularly, and somewhat monotonously, denounced efforts of the executive branch to protect the nation's security as merely irrational and viciously unjust.

The impact of the Warren Court's decisions upon the executive branch can be summed up only tentatively. What the record makes clearest is the willingness of the Court to place limitations on executive power. There is a concept of executive power which tempts its holders to regard any new legal restriction upon executive discretion as somehow a subtraction from and diminution of the President's power. Some critics, out of their rightful concern for the maintenance of a strong Presidency in today's world seem to have adopted that concept. However, the Warren Court has properly rejected it, for this concept of power is a logical fallacy, though perhaps alluring because it seems scientific. The President's power is not a quantum which will eventually be amenable to expression in mathematical terms when the calculus by which to compute it has been perfected. The analogy of executive power to horsepower is fatally misleading. The power of a President rests ultimately upon public confidence, based upon the belief that there are certain things he cannot lawfully do, and would not even attempt to do. Thus, a rule that the President may not arbitrarily remove an officer performing quasi-judicial functions, invoked in *Wiener*, or a rule that he cannot by an executive agreement deprive American citizens abroad of their fundamental right to due process, which is the likely meaning of *Covert* and its progeny and *Girard* in combination, or the rule enforced in *Vitarelli* that in removing an official on security grounds the executive must observe the constitutionally required procedural regulations which he has proclaimed, may each ultimately *enhance* rather than *diminish* the power of a democratic executive.

In some cases, particularly *Peters v. Hobby* and *Greene v. Mc-*

165. It is not suggested that all discussion of the problem of internal security, or all action taken by legislative and executive authorities, state and national, has been "cool" and "rational." But it can fairly be argued that measures taken under presidential authority can be so described.

166. AMERICAN BAR ASSOCIATION, REPORT OF THE COMMITTEE ON COMMUNIST TACTICS, STRATEGY, AND OBJECTIVES 6 (1959).

Elroy, there appears a tendency to insist on an unrealistic and undesirable formalism in the relations between the President and his assistants in the executive branch. If that requirement were to be dogmatically extended beyond the realm of executive procedures which present difficult constitutional questions, it would be a serious and unjustifiable judicial encroachment upon executive authority. Mr. Justice Reed's admonition against analogizing these relations between superior and subordinates to those which obtain between coordinate legislative and executive branches is a wise one. Indeed, it would be remarkable were these analogies extended by a Chief Justice who has had important and substantial experience as an executive head of a great government.

A brief comment concerning the Warren Court's attitude towards Congress is relevant to any evaluation of the Court's treatment of executive power. Lawyers and scholars have frequently noted the general tendency of the Warren Court to continue the great deference toward legislative policy that has been characteristic of the Supreme Court since 1937. As we have seen, these cases concerning executive power have frequently involved construction of statutes claimed in a number of cases to be unconstitutional. It is true that only in *Reid v. Covert* and its progeny did the Court hold a statute invalid, and even there only as applied. In other cases the Court interpreted the statutes and thereby avoided questioning their validity—notably in *Cole v. Young*, *Service v. Dulles*, *Harmon v. Brucker*, and the passport cases. This, one may arguably entitle, deference to Congress, for in a sense it is. But one should not overlook the fact that Congress, rather than the Executive, might have been charged more often with being the constitutional culprit had the Court adopted other quite justifiable interpretations of the statutes and of legislative intent. Indeed, the deference shown to Congress in *Service v. Dulles* and the passport cases seems to take the form of insisting that despite the "legislative history," Congress *could not have* intended what it wrote. Such deference seems more than slightly Pickwickian.

If these are the main *results* of the Warren Court's treatment of executive power, what is to be said of the *technique* by which they have characteristically been achieved? Professor Pritchett, in *The Political Offender and the Warren Court*, has described that technique as follows:

> Where the Court has contrived to invalidate official action, which it has done rather often, it has typically been for rather narrow reasons. . . . [C]ertainly the starting point . . . is recognition of the caution the Warren Court has shown in taking new constitutional positions as to the rights of political offenders. The libertarian effects which the Court has recently

> achieved have been secured for the most part through the interpretation of statutes, not through the interposition of constitutional barriers.[167]

When the issues facing the Court are so novel and so grave, there is certainly much to commend in the gingerly tentativeness with which the Court has approached their resolution. But in speaking of the Court's "obligation to judge," Professor Pritchett added:

> If the Supreme Court's primary obligation is to avoid taking a position on matters of acute public controversy or where the interests which the Court is protecting are not substantial enough to give the Court a reasonable measure of support if a hue and cry is raised by the decision, then this recent experience suggests that the self-restraint doctrine needs to be reformulated.[168]

The Warren Court has frequently avoided premature decision of constitutional questions only at the price of appearing disingenuous. At times, especially in *Greene v. McElroy* and *Kent v. Dulles*, the Warren Court has almost seemed to create an irrebuttable presumption of presidential and congressional ignorance. And its versions of the process of government have occasionally taxed credulity. But the worst damage wrought by such opinions is likely to be upon the Court itself, for men who begin to suspect, however wrongly, that their judges are less than candid in appraising the facts, are soon likely to distrust their statements of the law. Both the Court and its critics need to take thought promptly about means by which such consequences may be avoided.

There are, of course, canons of propriety that control what may be said in a Supreme Court opinion. But would they have been seriously breached had the Court spoken to the President and Congress in words like the following?: "When we say that you did not know and did not intend that members of the executive branch would do what they have done, we do not mean that you were unaware of their probable or subsequent action, or that you did not in some more or less casual way approve their acts. What we do mean is that we are not sure that you were aware of the full consequences of the acts that you tacitly approved. What we ask of you, before we must pass upon these consequences, is your reconsideration of them and your renewed assurance that in full knowledge of them you have concluded that the public interest requires that they be borne."

Traditionalists may assert that such candor would have been improper. Certainly, it would seem to be a frank expression of a far-reaching claim of judicial power. But such a suspensory veto would be little different from the power that the Warren Court has in fact

167. PRITCHETT, THE POLITICAL OFFENDER AND THE WARREN COURT 60, 62 (1958).

168. *Id.* at 71.

exercised and would merely amount to judicial recognition and implementation of what has long been a truism among constitutional scholars: that the only kind of veto which the Court has ever held over publicly supported governmental action is a kind of suspensory or delaying power. The benefits of such a frank approach would be found in the Court's willingness to accept less formalistic evidence of exercise of executive or congressional powers. Further, an admission that a greater freedom of action is justified in the Court's use of its suspensory veto power would be an interesting parallel to the Warren Court's invention in the public school integration decisions of the novel and socially useful principle that governmental actions admittedly less than constitutional may under appropriate circumstances be given temporary judicial sanction. Both principles represent constitutional relativism at its best.