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CRIMINAL LAW

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SUPREME COURT REVIEW (1970)

Foreword (or Backward?): The Year After Warren

JON R. WALTZ*

Mr. Justice Brandeis wrote that "The purpose [of the doctrine of separation of powers] was, not to avoid friction, but, by means of the inevitable friction . . . to save the people from autocracy."¹ He insisted that conflict between the three federal branches was a necessary evil.

Since May of 1969 the Supreme Court, the pinnacle of the federal judicial department, has found itself embroiled in controversy to an extent unprecedented since Franklin Delano Roosevelt's 1937 court-packing attempt. This most recent testing of Brandeis' thesis began with the pressures brought to bear, rightly or wrongly but with obvious success, to force Abe Fortas off the high bench. With a new vacancy to be filled, conflict boiled up twice again in rapid succession as President Richard M. Nixon practiced his own more orthodox approach to reconstituting a Court whose philosophy had become increasingly distasteful to the newly elected Chief Executive and his followers.

The resulting prolongation of the Fortas vacancy prevented the Supreme Court from attending to some of its important business. Of greater long-range significance, it placed the Court once again in the eye of a public storm which would give it a buffeting it could ill afford. Even so, this institution that has lived for controversy exhibited throughout an admirable if perhaps false calm. And, as the students who are the authors of this

inaugural review of Supreme Court decisions in the criminal field will demonstrate in the pages ahead, it somehow managed to go about much of its work.

The thirteen-month interregnum between Fortas and Harry A. Blackmun exposed the sort of machinations that frequently underlie the only meaningful form of direct political control over the Supreme Court, the nomination and confirmation powers.² President Nixon used his authority in an open and unabashed effort to influence future judicial policy and, at the same time and by the same effort, to repay campaign debts run up in the course of what has been denominated somewhat inflatedly as his Southern Strategy.³ The President made clear his intention to pick for the Supreme Court men who could be counted on to be stinting in their use of judicial power—men who, he said, would be "strict constructionists," whatever that term meant to him.⁴ His nominations of Clement F. Haynsworth, Jr., and G. Harrold Carswell,

² ". . . by and with the Advice and Consent of the Senate, [the President] shall appoint . . . Judges of the Supreme Court. . ." U.S. CONST. art. 2, § 2. See Swindler, *The Politics of "Advice and Consent,"* 56 A.B.A.J. 533 (1970).

³ See T. WHITE, *THE MAKING OF THE PRESIDENT 1968 171-72* (1969). See generally J. WITCOVER, *THE RESURRECTION OF RICHARD NIXON* (1970).

⁴ President Nixon would probably not care to partake of the argument—a tenable one—that William O. Douglas, despite his occasionally cavalier approach to opinion-writing, is a strict constructionist in the Jeffersonian sense in which that unsatisfactory phrase is most commonly employed. This, of course, is not the place for that argument but anyone who doubts that it can be made might take a look at Douglas's concurring opinion in *Williams v. Rhodes*, 393 U.S. 23, 39-40 (1968). And I like Professor William W. Van Alstyne's recent remark: "Mr. Justice Douglas has a very rugged Constitution." Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Appropriate Uses of an Old Analogy*, 16 U.C.L.A. L. REV. 751, 772 (1969).

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¹ *Meyers v. United States*, 272 U.S. 52, 293 (1926).

clearly, and of Blackmun arguably, were in execution of the presidential specifications for reconstructing the Court. The United States Senate, to its enduring credit, employed *its* power to extract from the executive branch a higher degree of responsibility than was exhibited in the first two of these nominations.

Richard Nixon was not doing something untried by his predecessors. History has revealed the tendency of presidents to add to the judiciary men who, at the time of their appointment, apparently stood for principles which the then chief executive would himself have espoused were he on the bench.⁵ In its turn, the Senate—regardless of whether or not its majority was drawn from the President's political party—has ordinarily confirmed such nominees, granting to the President a certain ideological leeway in filling judicial vacancies.⁶ Between 1898 and 1969, as enterprising columnists repeatedly reminded us at the peak of the Haynsworth-Carswell disasters, only one man placed in nomination for a Supreme Court seat—John Parker of North Carolina—was rejected by the Senate, and he failed by a single vote.⁷ The swift

⁵ T. WHITE, *supra* note 4, at 171. See also Swindler, *The Warren Court: Completion of a Constitutional Revolution*, 29 VAND. L. REV. 205 (1970). Presidents, of course, have often been foiled by their own appointees. To take some Twentieth Century examples, Woodrow Wilson's first appointee, Justice McReynolds, usually cancelled the vote of Wilson's only other appointee, Brandeis. Theodore Roosevelt on occasion felt badly let down by Oliver Wendell Holmes. Felix Frankfurter was not the judicial activist that F.D.R. had anticipated. Earl Warren's flexibility as Chief Justice must have come as something of a surprise to Dwight Eisenhower; Byron White's rigidity must have chagrined John F. Kennedy. See S. KRISLOV, *THE SUPREME COURT IN THE POLITICAL PROCESS* 5-6 (1965).

⁶ In the mid-Nineteenth Century, however, the Senate—eyeing ideological differences over slavery and Reconstruction issues—rejected fully one-quarter of the names submitted to it for the Supreme Court. See J. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 46-98 (1968). The number of unsuccessful nominations to the Court now stands, after 180 years of American judicial history, at twenty-six. Eleven were rejected by a recorded vote of the Senate; seven were withdrawn by the President when it became clear that Senate approval could not be obtained. As to the remaining eight the Senate either took no action or announced that action would be "postponed" indefinitely. Six other nominees were approved by the Senate but refused to accept appointment; a seventh, Edwin M. Stanton, was confirmed by the Senate but died before he could be commissioned and sworn in. For a detailed tabulation of nominations that were declined or rejected, see Swindler, *supra* note 2, at 536.

⁷ It was during this period that the nomination of Louis D. Brandeis generated active if obfuscating contention. After prolonged debate his nomination was approved by a 47-22 vote, with twenty-seven Senators abstaining. See A. MASON, *BRANDEIS* chs. 30-31 (1956).

and unanimous confirmation of Judge Blackmun, an apparent judicial conservative,⁸ fit the senatorial tradition of honoring the presidential prerogative. But what of the Senate's rejections of Haynsworth and Carswell? In practical effect, who was really structuring the Supreme Court, the executive branch or the legislative?

It has been argued by some, including the President himself, that ideological and geographical biases alone accounted for the successful massing of opposition to the two Southerners.⁹ Fortunately, much more than that was involved. A majority of the Senate, supported by large numbers of constituents, felt moved to reject the two nominees in consideration of what the Senators discerned to be the two most essential qualifications for appointment to the Supreme Court. For all their occasional fury and bitterness, the senatorial battles swirling around Haynsworth and Carswell reaffirmed the wisdom of lodging with the Senate a watchdog function. To put the same proposition more bluntly, these struggles—and their humiliating outcome—reaffirmed the presidential obligation to send to the Supreme Court only individuals of the highest ethical and intellectual quality.¹⁰

⁸ There is no need to speculate regarding the direction Mr. Justice Blackmun will take in the future. One of the most reliable sources for such predictions has now spoken. Jeane Dixon, the well-known psychic, reports that "Supreme Court Justice Harry Blackmun will turn out to be much more of a strict constructionist in criminal matters than his followers anticipated." Chicago Tribune, June 28, 1970, § 5, at 13, col. 2.

⁹ President Nixon described the Senate's rejection of nominee G. Harrold Carswell as an "act of regional discrimination" and added that "This Senate as it is presently constituted will not approve a man from the South who shares my view. . . ." NEWSWEEK, April 20, 1970, at 35. The President was silent a few months later when the citizens of Judge Carswell's own state, Florida, rejected his bid for a seat in the U.S. Senate.

¹⁰ The Constitution makes no provision for minimum qualifications for judges. It does not specify patterns of education and training. Not even the requisites of citizenship and minimum age imposed upon the President and members of the Congress are applied to the federal judiciary. This void could have been filled by either the executive or the legislative branch but both have declined to set formal qualifications for the federal bench. See J. GROSSMAN, *LAWYERS AND JUDGES* 23 (1965). Non-governmental guardians of the public's expectations are usually vague when discussing judicial qualifications. It is not much help when, for example, a New York Times editorialist delivers his newspaper of the pronouncement that "Judges are something special in our form of government; the most exacting standards can be none too high." Editorial, N.Y. Times, July 2, 1963, at 28, col. 1. For a long time, however, there has existed the notion that intellect and integrity are elemental aspects of the appropriate formula. Thus Francis Bacon said, "Judges ought to be more learned

The Senate's vote in the Haynsworth episode evidenced a gnawing doubt about the appointment of a man whose judicial conduct now and again bore at least an appearance of impropriety. Judge Haynsworth's honesty and integrity were not directly impugned by responsible spokesmen; his sensitivity to ethical norms and to the necessity for avoiding even the appearance of evil were assuredly called into question. If the Senate's judgment in the Haynsworth matter seemed harsh to some, it nonetheless reiterated one standard against which the executive, in the discharge of a key obligation to the nation, must measure every judicial nominee.

Judge G. Harrold Carswell's rebound nomination raised the second pivotal question that chief executives are supposed to ask themselves before submitting Supreme Court nominations to the Senate for its advice and consent. When a potential nominee's stock portfolio and his conscience appear to be in order, judgment as to the propriety of his appointment must rest on professional qualities—on the demonstrated power and range of his intellect. Carswell's nomination at first seemed the ideal sequel to the abortive effort to elevate Haynsworth: the Florida judge apparently had almost no capital assets and none of those he had appeared to pose any conflict of interests. As cautious Senators and various outside organizations scrutinized Carswell's record, however, one unsettling fact began to emerge. Aside from a few indications that he was or at least in times past had been something of a racist, Carswell's record as lawyer and jurist seemed indistinguishable from that of countless other lawyers and judges in the nation. Appointment to the Supreme Court is the highest honor that can come to a member of the legal profession and many a lawyer and many a layman began to question what Harrold Carswell had ever done to deserve the ultimate prize.

Despite one Senator's straightfaced suggestion that the mediocre segment of America's population was entitled to a representative on the country's highest court,¹¹ the charge that Carswell lacked a crucial qualification was not casually to be tossed aside. Strength of intellect can properly be demanded of Supreme Court justices. Intellect,

than witty . . . and more advised than confident. Above all things, integrity is their portion and proper virtue. . . ." F. BACON, *ESSAYS: OF JUDICATURE*, in *1 THE WORKS OF FRANCIS BACON* 58-59 (B. Montague ed. 1852).

¹¹ Remarks of Sen. Roman Hruska (R-Neb.), quoted in *N.Y. Times*, Mar. 17, 1970, at 21, col. 1.

coupled with experience and common sense, is the basic working equipment of the effective case-decider. Furthermore, resolving controversies is not the judge's only function. As Eugene V. Rostow once put it, "The Supreme Court is, among other things, an educational body and the Justices are inevitably teachers in a vast national seminar."¹² The *corpus* of Supreme Court opinions serves as the nation's textbook on such vital and complex subjects as the living Constitution, the functioning of federalism and the answers to an endless stream of "federal questions." Elevation to the Court requires of a man (or, one of these days, a woman) that degree of intellectual power and clarity which will equip the nominee to act as educator of the American people on the nature and meaning of law. The Senate looked at Judge Harrold Carswell with care and decided not to name him to the faculty.

At last Mr. Nixon faced up to the fact that the Senate of the United States would not permit presidential deviation from fundamental standards in the filling of the Fortas vacancy. He sent up the name of Harry Blackmun, whose attributes could survive measurement against those refined standards, and the Senate—with an almost audible sigh of relief—confirmed his nomination.

The prolonged presidential delay in submitting a name that the Senate could in good faith act upon favorably did delay Court treatment of a few crucial issues, such as the constitutionality of the death penalty.¹³ What is perhaps even more frustrating to students preparing an analysis of a year's criminal adjudication, the long delay forestalled meaningful appraisal of President Nixon's progress in reshaping the Court in his own image.

The performance in the past year of Mr. Nixon's first Supreme Court appointee, Chief Justice Warren E. Burger, provides only fragmentary indicia of the President's success at reining in the Court. In the criminal law field, however, Chief Justice Burger has supplied some evidence, mostly by the company he keeps on the Court, that at least in time he will be able to do what he was sent to the Court to do, that is, halt if not reverse the activist trend of what has come to be known compendiously as the Warren Court. If there is any discernible thread running through the major constitutional criminal law opinions written or joined in by the new Chief Justice during the

¹² Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193, 208 (1952).

¹³ See, e.g., *Maxwell v. Bishop*, 398 U.S. 262 (1970).

October Term, 1969-1970, it would have to be described as a reluctance to move much beyond the pales driven by the Warren Court. Alexander Bickel of the Yale Law School has called Burger's first term "the year of the pause."¹⁴ But "pause" implies the eventual resumption of a higher level of activity. It is by no means certain that Warren Burger's Supreme Court will resume the velocity of Earl Warren's. The Court remained an active one during the last term but its forward movement can be measured in jurisprudential inches instead of the old Warren miles. The Burger Court moved not as a vehicle picking up momentum but as one to which powerful brakes were being applied. Shifting the metaphor, perhaps the post-Warren year could properly be dubbed the year of the gathering lull.

Although Burger's first year was one of deceleration, it was not, by and large, a year for cancelling past gains. The Supreme Court, during its past term, showed continued sensitivity in several controversial sectors. It did so, most frequently, over its Chief Justice's dissent.

In *Toussie v. United States*,¹⁵ for example, the Court held that a young man who had failed to register for the draft could not be penalized for this failure on the basis of a prosecution brought eight years after his initial registration date. The five-year statute of limitation, it was held, began its run six days after the boy's eighteenth birthday. The Court declined to declare the offense a continuing one; had it done so, the limitation period would have commenced only after the defendant's twenty-sixth birthday, exposing him to prosecution until he was thirty-one years old. The Chief Justice joined in an ill-tempered dissenting opinion written by Justice White.¹⁶

In *Gutknecht v. United States*¹⁷ the Court struck down the Selective Service Administration's "delinquency regulations" as being without statutory authorization, thereby displaying an alert appreciation of the exigencies inherent in a bureaucracy that becomes, on occasion, savagely self-serving. Chief Justice Burger joined in a substantially narrower concurrence written by Justice Potter Stewart.

It was held in *In re Winship*¹⁸ that the standard

¹⁴ Quoted in TIME, July 13, 1970, at 11.

¹⁵ 397 U.S. 112 (1970).

¹⁶ 397 U.S. at 124.

¹⁷ 396 U.S. 295 (1970).

¹⁸ 397 U.S. 358 (1970). *In re Gault*, 387 U.S. 1 (1967), held that juveniles must be accorded the safeguards of a criminal trial when their asserted conduct, at issue in

of proof beyond a reasonable doubt is applicable, as a constitutional dictate, to juvenile proceedings. Chief Justice Burger and Potter Stewart joined in a dissent¹⁹ that demonstrates little more than that neither man has ever had much to do either with juvenile courts or with the detention facilities to which such tribunals regularly consign children. If constitutional cases are increasingly to be based on sociological facts—Professor Kenneth Culp Davis' "legislative facts"²⁰—then judges must somehow try to find out what those facts really are. (As an aside, Justice Black's separate dissent²¹ in *Winship* is fascinating in that—*mirabile dictu!*—it might have been written by the late Felix Frankfurter.)

In one sensitive area the Court rendered opinions that can be criticized on legalistic grounds as well as on more subjective bases. In *McMann v. Richardson*,²² *Brady v. United States*²³ and *Parker v. North Carolina*²⁴ a majority of the Court, including the Chief Justice, effectively foreclosed defendants from attacking the voluntariness of their guilty pleas. If the law's interest in the perfection of docket-clearing devices is legitimate on the criminal side as well as the civil, and surely it is, then plea bargaining has its place in the scheme of criminal procedure. However, as the dissenters in *Parker* point out,²⁵ it does not follow from the undeniable circumstance that an accused cannot always be insulated from every potential improper inducement to plead guilty that he should be shielded from none.

Chief Justice Burger does not invariably drag his feet. In *Waller v. Florida*²⁶ he cast a cold eye on Florida's effort to avoid a double jeopardy claim by the sophistry of likening a state and one of its municipalities to the federal government and one of the several states.²⁷ But the foolhardi-

juvenile court proceedings, was criminal in character. However, *Gault* left open the standard of proof question.

¹⁹ 397 U.S. at 375.

²⁰ K. DAVIS, ADMINISTRATIVE LAW § 15.03 (1959). Of course, there are those who have recognized the possible dangers inherent in appellate court reliance on "facts" outside the record. See, e.g., Cahn, *Jurisprudence*, 1954 SURVEY OF AMERICAN LAW 809, 826-27.

²¹ 397 U.S. at 377.

²² 397 U.S. 759 (1970).

²³ 397 U.S. 742 (1970).

²⁴ 397 U.S. 790 (1970).

²⁵ 397 U.S. at 799 (Brennan, J., joined by Justices Douglas and Marshall).

²⁶ 397 U.S. 387 (1970).

²⁷ The Chief Justice was surely on the side of the angels in another Florida case as well. In *Dickey v. Florida*, 398 U.S. 30 (1970), Chief Justice Burger wrote

ness of long-range and over-general predictions about how judges will behave is reaffirmed by *Ashe v. Swenson*,²⁸ another double jeopardy case involving that slippery concept, collateral estoppel. In *Ashe* one is confronted by a sharp split between the new Chief Justice and, of all people, Potter Stewart, with Stewart taking the "liberal" approach and Burger, in dissent, adopting a distinctly "conservative" stance.

In some respects the most intriguing case to come before the Supreme Court during the past term was *Illinois v. Allen*²⁹, in which an Illinois trial judge, after demonstrating what is generally contemplated by the phrase "the patience of Job," excluded an obstreperous³⁰ defendant from his own trial. In *Allen* the Supreme Court, in an opinion written by Justice Black and joined by Chief Justice Burger, rebuffed the Seventh Circuit's conclusion that a criminal accused, no matter how irrepressible, can never be barred from the courtroom "...and that the judge's ultimate remedy... is to bind and gag him."³¹ With both eyes on American justice's latest self-inflicted wound, the trial of the so-called "Chicago 8"³² for, among other things, violation of the anti-riot amendment to the 1968 Civil Rights Act,³³ Justice Black declared "...that a defendant [by his persistently disruptive behavior in the face of admonition] can lose his right to be present at trial."³⁴ Black attempted to catalog the avenues open to a beleaguered trial judge. Confronted

with an unruly defendant, the judge could "... (1) bind and gag him...; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."³⁵

It is reasonably clear that the first expedient on Black's list was intended as a measure to be resorted to only after all else had failed. Although hedging somewhat toward the end of his opinion, Justice Black explicitly stated that "...no person should be tried while shackled and gagged except as a last resort."³⁶ Justice Brennan, concurring, stressed the same point, remarking that "It offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law."³⁷

The *Allen* decision is badly misread by those who suggest that it places a general imprimatur on the gagging and shackling of the defendant Bobby G. Seale, co-chairman of the militant Black Panther Party, during the Democratic Convention riot conspiracy case. There the trial judge employed gag and thong as a first or, at best, second and hardly last resort. Seale, insistent upon either the presence of the defense attorney of his own choice or the right to represent himself, was accorded neither; the trial judge refused a relatively brief delay in the trial's commencement to permit participation by Seale's counsel and thereafter steadfastly refused to experiment even briefly with a *pro se* effort by Seale. At the outset of his troubles with Seale the trial judge—who, after all, was dealing with a layman—was archly cryptic in suggesting the possibility of a contempt citation.³⁸

for the Court in deciding that the accused was denied his right to a speedy trial where he had at all times been available to the state during an eight-year period following commission of the criminal acts alleged and in fact had made repeated efforts to secure a prompt trial. During the eight-year interval two witnesses had died, other potential defense witnesses were alleged to have become unavailable, police records had been lost or destroyed and the state could offer no valid reason for the delay. See also *Williams v. Illinois*, 399 U.S. 235 (1970).

²⁸ 397 U.S. 436 (1970).

²⁹ 397 U.S. 337 (1970). See Flaum & Thompson, *The Case of the Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L. C. & P. S. 327 (1970).

³⁰ The defendant was appearing *pro se*, although the trial court had appointed counsel to "sit in and protect the record." 397 U.S. at 339. Incapable of conducting his own defense, the defendant began berating the judge. The high point of the dialogue was reached when the defendant announced, "When I go out for lunchtime you're [i.e., the trial judge] going to be a corpse here." *Id.*

³¹ 397 U.S. at 342.

³² *United States v. Dellinger*, Crim. No. 69-180 (N.D. Ill. 1969).

³³ 18 U.S.C. §§ 2101-02.

³⁴ 397 U.S. at 343.

³⁵ 397 U.S. at 344.

³⁶ *Id.*

³⁷ 397 U.S. at 350-51.

³⁸ The following is representative of the trial judge's early admonitions: "... any outburst... will be appropriately dealt with at the right time during this trial..." Rec. 3145. When eventually defendant Seale inquired whether he was being threatened with a contempt citation, the trial judge responded, "I will not argue with you." Rec. 3146. Later the trial judge, without explanation of their legal significance, employed the terms "contemptuous" and "contumacious" in connection with Seale's conduct, Rec. 3600, but then reverted to his original phraseology, e.g., Rec. 3601, 3641, 3642. When the trial reached the 4,610th page of transcript the trial judge for the first time explicitly advised Seale that he was "... in contempt of court," adding retroactively that "... you have a lot of contemptuous conduct against you." Rec. 4610-11. On only one occasion did the trial court with any explicitness make a contemporaneous finding, on the record, of contempt, Rec. 4610, and on no occasion did the court intimate the possible penalty for Seale's continued interruptions. Then, suddenly, the trial court began to talk not of its contempt power but of its "... right to gag you." Rec. 4616. One day later,

And at no time did the trial court employ the expedient of excluding Seale from the courtroom until he promised to remain docile.³⁹ Finally, and most inexplicable of all, the trial court delayed for an unconscionable period of time before adopting the simplest and most clearly indicated expedient, which was to sever Seale from this multiple-defendant case and put him to a separate trial at which, presumably, his lawyer, fully recuperated from the illness that had prevented his appearance at the original trial, could be present.⁴⁰

In view of the mistrial eventually declared as to Seale, and the concomitant ordering of a new trial as to him, the propriety of the trial court's handling of Seale will arise in two contexts rather than three. It will arise when reviewing courts consider whether Seale's conviction of contempt of court is supportable;⁴¹ it will also arise when the

October 29, 1969, the trial judge directed the marshalls to "Take that defendant into the room in there and deal with him as he should be dealt with in this circumstance." Rec. 4763. Seale was bound to his chair and gagged. See also J. EPSTEIN, *THE GREAT CONSPIRACY TRIAL 227-76* (1970).

³⁹ It may well be, however, that at this juncture the trial judge considered himself bound by the 7th Circuit's decision in *United States ex rel. Allen v. Illinois*, 413 F.2d 232 (7th Cir. 1969). Decided by the 7th Circuit on July 7, 1969, *Allen* was not reversed by the Supreme Court until March 31, 1970. The "Chicago 8" trial commenced on September 26, 1969; Seale was severed from it on November 5, 1969.

⁴⁰ See Kalven, *Introduction: Confrontation and Contempt in CONTEMPT xxii* (D. Wagner & M. Weisman eds. 1970). Professor Kalven, who is not given to overwrought comment, believes that "It was politically reckless and intrinsically unfair to have permitted matters to get to such an impasse." *Id.* As one who was present in the courtroom during the pertinent period, I can attest the accuracy of Professor Kalven's observation.

⁴¹ It is not possible to agree completely with the thesis advanced by prosecutors Flaum and Thompson in their article, *supra* note 29 at 337, that it is "specious" to suggest "... that the *Allen* opinion does not purport to deal with the defendant whose unruly conduct is 'provoked' by rulings of the trial court to which he takes exception" (authors' emphasis). A litigant is surely not free to react in unorthodox fashion to mere "provocations" occurring in a courtroom but this truism has little to do with the complicated situation of the defendant Seale in the "Chicago 8" case and it is at least in part to Seale's conduct that Flaum and Thompson point. The defendant *Allen* had been deprived of no apparent constitutional rights. Having refused the helping hand of legal counsel, *Allen* was for no good reason being intimidating and obnoxious as a consequence either of calculation or of mental illness. In the "Chicago 8" trial Seale had been deprived of the services of the lawyer of his choice by the trial judge's actions and was attempting in the main to act *pro se*, arguing motions and cross-examining witnesses who had testified against him.

Justice Douglas, concurring in *Allen*, carefully

appellate courts consider the impact of the Seale fiasco on the fair-trial rights of his seven co-defendants.⁴²

Justice Douglas filed a separate opinion in *Allen*⁴³ that has attracted surprisingly little attention in view of the current efforts to impeach him because he is, according to Congressman Gerald Ford, a teacher of violent revolution. Douglas begins his opinion by agreeing wholeheartedly "... that a criminal trial... cannot take place where the courtroom is a bedlam. ..." ⁴⁴ Describing the trial courtroom as "a hallowed place," ⁴⁵ he insists that "... trials must proceed with dignity and not become occasions for entertainment by the participants, by extraneous persons, [or] by modern mass media. ..." ⁴⁶ But Douglas was disturbed by the selection of a 13-year-old robbery case involving a mentally ill defendant in which to set out guidelines for courtroom control. Without expressly charging

distinguished the Seale type of situation from *Allen*'s type. See footnote 49, *infra*. Nothing quoted or cited by Flaum and Thompson justifies their comment that Douglas' "... observation offers small comfort to the advocates of the 'provocation' theory in light of its explicit rejection by the seven-Justice majority in *Allen*."

Of course, if the defendant in a criminal case became obstreperous because the trial court deprived him of constitutional rights, the propriety of binding and gagging him will be mooted since a conviction would be reversed because of the deprivation of constitutional rights, not because of the subsequent repressive measures. Justice Douglas' analysis probably pertains only to contempt convictions based upon unrepresented accused's efforts to combat constitutional deprivations. Hopefully, this type of situation—Seale's situation, arguably—will remain excessively rare.

⁴² In a journal that possesses less prestige in academic circles than this one but which reaches larger numbers of laymen, I have outlined what seem to me to be the principal legal issues raised in the course of the Chicago riot conspiracy trial. Waltz, *13 Legal Questions Raised by the Trial of the Chicago 8 Minus 1 Plus 2*, *PLAYBOY*, June, 1970, at 178.

⁴³ 397 U.S. at 351.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* See J. KAPLAN & J. WALTZ, *THE TRIAL OF JACK RUBY 372* (1965), in which Stanford's John Kaplan and I said:

The Ruby trial [for the murder of accused presidential assassin Lee Harvey Oswald] was a 'state case' and our legal procedures are not designed for cases where all of the participants... know that the eyes of the nation are on them. The processes of American justice are designed for administration in relative quiet and tranquility... The difficult and fundamental problem... is that it may be impossible for the United States ever to afford in a 'state case' a fair trial if by this we mean a trial not basically different from the usual unpublicized one.

that his brothers should have waited for the appeal of Bobby Seale from his contempt conviction or for the inevitable appeals of his codefendants in *United States v. Dellinger*, instead of rushing to decide the apolitical *Allen* case, Douglas pointed out that the hard problems are not to be found in mine-run state criminal matters but in two very special sorts of litigations: "political trials"⁴⁷ and "trials used by minorities to destroy the existing constitutional system and bring on repressive measures."⁴⁸

Douglas' descriptions closely fit the trial of the antic "Chicago 8." At times he seems to be addressing himself specifically to the plight of Seale.⁴⁹ Moreover, Douglas' second categorization is likely to be germane to the trial of members of the violent Weatherman faction of the Students for Democratic Action that impends in the U.S. District Court for the Northern District of Illinois as these lines are written.⁵⁰

Douglas does not attempt a definition of the term "political trial";⁵¹ he merely suggests its contours by reference to examples: the trial of Eugene Debs,⁵² the *Mooney* case,⁵³ *Spies v. People*,⁵⁴

⁴⁷ 397 U.S. at 352.

⁴⁸ *Id.* at 356.

⁴⁹ For example, Douglas inquires, "Would we tolerate removal of a defendant from the courtroom during a trial because he was insisting on his constitutional rights, albeit vociferously, no matter how obnoxious his philosophy might have been to the bench that tried him? Would we uphold contempt in that situation?" 397 U.S. at 355. The author of a careful study of the "Chicago 8" trial transcript insists that "... the conduct for which Seale was held in contempt centered on legal argument and his insistence on what he perceived to be denial of his constitutional rights. Most of the [contempt] citations occurred in connection with Seale's arguing of a legal motion or attempting, after [defense attorneys] Kunstler and Weinglass finished their cross-examination, to conduct his own interrogation of a witness." J. DEMARCO, *THE SUPREME COURT AND THE CRIMINAL CONTEMPT POWER: UNITED STATES VERSUS BOBBY G. SEALE, ANNOTATED 40* (1970) (unpublished manuscript, on file in the Library, Northwestern University School of Law).

⁵⁰ *United States v. Evans*, Crim. No. 70-195 (N.D. Ill. 1970) (Hoffman, J.).

⁵¹ Professor Anthony Amsterdam has suggested that "... virtually every trial is a political trial when you look at it in a social context. We operate at a time of gravest doubt of the potential of the judicial system to deliver justice to anyone outside the mainstream. Thus, the trial of a poor black in Detroit for a misdemeanor is a political trial where neither the judge, jury, cop nor penal system is attuned to the life-style of the defendant in any way." Quoted by Victor Navasky in *Right On! With Lawyer William Kunstler*, N. Y. Times, April 19, 1970, § 6 (Magazine), at 93, col. 3. For an attempt by one of the "Chicago 8" to define the phrase, see T. HAYDEN, *TRIAL 97-101* (1970).

⁵² *In re Debs*, 158 U.S. 564 (1895).

involving Chicago's Haymarket riots, Sacco and Vanzetti⁵⁵ and the *Dennis* case.⁵⁶ But Justice Douglas speaks with an informed and informing perception, tinged with what can with perfect aptness be called patriotism, when he warns of the radical's perverse artifices:

Radicals on the left historically have used ... [disruptive] tactics to incite the extreme right with the calculated design of fostering a regime of repression from which the radicals on the left hope to emerge as the ultimate victor. The left in that role is the provocateur. The Constitution was not designed as an instrument for that form of rough-and-tumble contest. The social compact has room for tolerance, patience, and restraint, but not for sabotage and violence. Trials involving that spectacle strike at the very heart of constitutional government.⁵⁷

Douglas sees that the political case differs markedly from what can be called the subversive case. And Douglas sees what some of his brothers on the Court, including its Chief Justice, may not yet perceive. That is the fact that the Supreme Court, during the Burger years, will probably have one opportunity after another to answer the unique questions generated by political and subversive cases. The answer to the problems posed by subversive cases is to define workable procedures for conducting them. On the other hand, as Justice Douglas knows, the answer to the special difficulties inhering in political cases may "... involve the designing of constitutional methods for putting an end to them."⁵⁸ Constructing the details of such answers demands such men as Marshall, Holmes, Brandeis, Cardozo, Frankfurter. . . .

The Senate of the United States in the year just past advised the President of the United States that it will not consent to the knowing appointment of lesser men to the nation's highest court. Law students analysing future Supreme Court terms can tell us whether Richard M. Nixon and his successors have acted upon the Senate's advice. That may not be the least service supplied by the student editors of this journal.

⁵³ *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁵⁴ 122 Ill. 1, 12 N.E. 865 (1887).

⁵⁵ *Commonwealth v. Sacco*, 255 Mass. 369, 151 N.E. 839 (1926), 259 Mass. 123, 156 N.E. 57 (1927), 261 Mass. 12, 158 N.E. 167 (1927).

⁵⁶ *Dennis v. United States*, 341 U.S. 494 (1951).

⁵⁷ 397 U.S. at 356.

⁵⁸ *Id.*