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# The Supreme Court and National Security

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# THE SUPREME COURT AND NATIONAL SECURITY*

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Security has, of course, been a constant source of concern throughout history. War or threat of war has been the chief motivating force for that concern.

The framers of the Constitution well understood that fear for the safety of the state might result in tyranny and injustice. In the 17th Century, England had had a spate of treason trials, many of them spurred by the notorious informer Titus Oates. In the 18th, John Wilkes' fight against general warrants had had its echoes in Massachusetts. The speech of James Otis on similar abuses was described by John Adams as the birth of the "child Independence." And France had yielded many instances by its use of the infamous *lettres de cachet.* No doubt these examples contributed to the insertion into the original Constitution of the careful definition of treason and of the guaranty of the writ of habeas corpus, and into the bill of rights of the prohibition against unreasonable searches and of the guaranty of open trials with the right to jury, counsel and confrontation, as well as of the guaranty against self-incrimination.

## Early History

But however extensive the framers' experience may have been with concern for security, they might well be astounded were they to revisit the country they founded and observe the extent to which that concern has permeated our life in the past decade. And they might be equally astounded at seeing that the only effective organ of government which has occasionally put brakes on the abuses which have accompanied that concern was the United States Supreme Court. For, in their own lives, when the Adams administration ruthlessly enforced the Alien and Sedition laws, the Supreme Court was never called upon to act. Before that became possible, the genius of Jefferson had provided a leadership around which people could rally and the good sense of the community assert itself. The obnoxious laws were allowed to lapse, the convictions erased by presidential action.

But by the time the next great occasion arose—the Civil War—the

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courts had begun to exercise their function of constitutional interpretation with its inevitable consequence of judicial review of legislative and executive action. John Marshall had set the Supreme Court on the road to voiding such action when unconstitutional, and Roger Taney had completed the work. Nevertheless, during the war, despite arbitrary action taken by President Lincoln, the Court was silent. Taney grumbled when the military ignored his writs but was powerless to do more. However, after the war was safely won, the Supreme Court held unconstitutional the trial of a civilian by a military commission which sat in an area not the scene of military operations. The five-to-four decision in *Ex parte Milligan*[1] is the first landmark in the field of civil liberties. The pronouncement of Justice Davis remains its cornerstone:

> Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

## WORLD WAR I

No important issue in the field arose until during World War I. Then Congress passed the Espionage Act, which, among other things, punished interference with recruiting the armed forces. When this law was used for the prosecution of various leaders of the Socialist Party who had made speeches opposing our entry into the war, it was claimed that such prosecution violated the first amendment. The Supreme Court unanimously upheld the convictions of Schenck, the secretary of the party, and others, including its head, Eugene Debs. It was in the *Schenck* case[2] that Justice Holmes first formulated his famous "clear and present danger" test. He said:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and

[1] 4 Wall. 2 (1866).
[2] Schenck v. United States, 249 U.S. 47 (1919).

degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.

The application of those decisions to lesser fry evoked objection from both Holmes and Brandeis. In the *Abrams* case[3] twenty-year sentences had been imposed on a small group of fanatics who had issued pamphlets condemning American intervention against the new Soviet government of Russia. In his dissent Justice Holmes said:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Fear of the Russian Revolution had led various states to pass "criminal syndicalism" laws which prohibited the advocacy of the overthrow of the Government by force. These were applied to persons active in the newly organized Communist and Communist Labor parties. And New York prosecuted Ben Gitlow under a statute originally enacted after the assassination of President McKinley because of the publication of an inflammatory "Left Wing Manifesto." The Supreme Court upheld the conviction and ruled[4] that, where a state legislature specifically punished advocacy, the clear and present danger test had no application. Justices Holmes and Brandeis dissented. And in the *Whitney* case[5] Justice Brandeis reformulated the test in what, for a long time, remained its classic statement:

Those who won our independency by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the

[3] Abrams v. United States, 250 U.S. 616 (1919).
[4] Gitlow v. New York, 268 U.S. 652 (1925).
[5] Whitney v. California, 274 U.S. 357 (1927).

> power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

### BETWEEN THE WARS

But during the period between the two world wars, the Court struck down a number of state convictions, because it felt they transcended the requirements of due process. The extent to which the due process clause of the fourteenth amendment made any of the provisions of the federal bill of rights applicable to the states had for a long time remained in doubt. As recently as 1922 the Court had said[6] that nothing in the fourteenth amendment restricted the states in the area of freedom of expression. However, a few years later in the *Gitlow* case[7] the Court assumed the contrary. And in *Fiske* v. *Kansas*[8] the Court reversed the conviction of an I.W.W. organizer under a criminal syndicalism law because no evidence had been introduced to show that the I.W.W. actually advocated violence. In *Stromberg* v. *California*[9] a conviction was set aside because a law which prohibited any display of a red flag as "hostility" to government might punish its display, although the hostility was manifested in perfectly lawful ways.

And in 1937 the court reversed a conviction, in *DeJonge* v. *Oregon*,[10] under a criminal syndicalism law based on a speech made under Communist auspices where there was no proof that anything unlawful had been advocated. Chief Justice Hughes said:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

The next action by the court in this area was prompted by the South's fear of the Negro rather than a fear of ordinary social revolu-

[6] Prudential Ins. Co. of America v. Cheek, 259 U.S. 530 (1922).
[7] Gitlow v. New York, 268 U.S. 652 (1925).
[8] Fiske v. Kansas, 274 U.S. 380 (1927).
[9] Stromberg v. California, 283 U.S. 359 (1931).
[10] DeJonge v. Oregon, 299 U.S. 353 (1937).

tion. Angelo Herndon, a Communist organizer working in Georgia, had, during the depression, distributed literature which, it was charged, advocated the violent overthrow of the Government. He was convicted under an old state law aimed at "insurrection" of Negroes and unused until then. The Supreme Court, by a five-to-four vote,[11] held the conviction unconstitutional, both because the application of the law interfered with freedom of expression and because it laid down no sufficient standard of guilt. Justice Roberts concluded that the matter distributed was not unlawful and that there had been no showing that Herndon had approved any material that might be considered unlawful.

## World War II

That was the situation when the outbreak of World War II in Europe created new tensions. The fall of France prompted the enactment both of a draft law and of the first federal sedition law since the time of Adams. This last was modeled on the state criminal syndicalism laws and is known as the Smith Act. It also incorporated the provisions of the old Espionage Act which related to causing insubordination in the armed forces. Members of the Socialist Workers Party in Minneapolis were convicted under both aspects of the law. The Circuit Court of Appeals for the Eighth Circuit affirmed the conviction, ruling[12] that the clear and present danger test did not apply. And the Supreme Court refused to review, though twice asked to reconsider.[13]

Then came Pearl Harbor with its fear of Japanese invasion of the West Coast. The army at first imposed a curfew on all persons of Japanese ancestry, then ordered them evacuated from a large area along the whole coast and detained those evacuated in camps. The orders applied to citizens as well as aliens. In the *Hirabayashi* case[14] a challenge to the curfew was rejected. Chief Justice Stone said that the government had "the power to wage war successfully," that the military had the right to take what measures they believed were necessary "to meet the threat of sabotage and espionage," and that the "ethnic affiliations" of those singled out might be a sufficient source of danger in case of invasion. While the decision was unanimous, Justice Murphy expressed the view that it went "to the very brink of constitutional power." But he, together with Justices Roberts and Jackson, dis-

[11] Herndon v. Lowry, 301 U.S. 242 (1937).
[12] Dunne v. United States, 138 F.2d 137 (1943).
[13] Dunne v. United States, 320 U.S. 790 (1943); *id.* 814 (1943); *id.* 815 (1944).
[14] Hirabayashi v. United States, 320 U.S. 81 (1943).

sented when the principle of that case was applied[15] to sustain the evacuation orders. At the same time that this happened, the Court unanimously ruled[16] that a citizen of Japanese ancestry conceded to be loyal could not be detained in a camp. The question as to the procedure by which loyalty might be determined if not conceded was never passed upon. Fortunately, as the war progressed, the fear of invasion evaporated, and the camps were disbanded. It is worthy of note that, if Justices Black and Douglas had joined the dissenters in the evacuation case, the result would have been different.

During the course of the war there were various prosecutions but nothing like the number which had occurred during World War I. The Supreme Court reversed[17] the conviction of Jehovah's Witnesses in Mississippi under a law which punished the distribution of literature "calculated to encourage disloyalty," because there was no proof that the defendants had any "evil or sinister purpose." By a five-to-four vote,[18] the Court reversed an Espionage Act conviction based on the distribution of pro-Nazi, anti-English, and anti-Roosevelt material, because there was nothing in the pamphlets or their method of distribution which justified a finding that the defendant intended to interfere with the armed forces. And it reversed[19] the conviction of officers of the German-American Bund for advising members not to register under the draft law until it had been clarified.

The Court also reversed[20] convictions of civilians by military courts in Hawaii during the existence of martial law there on the narrow ground that Congress had not intended they be so tried. Justice Murphy alone dealt with broader issues and expressed the opinion that Congress had no power to permit military trials of civilians so long as there was no actual invasion and the ordinary criminal courts were able to function.

And the Court, for the first time in its history, reviewed two convictions for treason. In the first, it reversed,[21] because two witnesses had not been produced to show that the accused had given aid and comfort to the enemy. In the second, it affirmed[22] on the ground that the evidence necessitated the inference that this had been done. Justice

[15] Korematsu v. United States, 323 U.S. 214 (1944).
[16] *Ex parte* Endo, 323 U.S. 283 (1944).
[17] Taylor v. Mississippi, 319 U.S. 583 (1943).
[18] Hartzel v. United States, 322 U.S. 680 (1944).
[19] Keegan v. United States, 325 U.S. 478 (1945).
[20] Duncan v. Kahamanoku, 327 U.S. 304 (1946).
[21] Cramer v. United States, 325 U.S. 1 (1945).
[22] Haupt v. United States, 330 U.S. 631 (1947).

Douglas dissented from this last holding, as he could see no basis for reconciling the two decisions.

In the meantime the issue of membership in the Communist party arose in connection with deportation and denaturalization. The first case involved Schneiderman, an avowed Communist leader, who had become a citizen in 1923. The Government produced evidence that the party advocated forcible overthrow of the Government at that time, but no proof that Schneiderman had adopted these views as his own. A majority of the Court concluded[23] that citizenship could not be lost on such a state of facts, particularly since, at least in 1923, there was room for doubt about what the Communist party did advocate. But in the Bridges deportation case the Court merely held[24] that the departmental hearing had not been fair. Justice Murphy alone discussed the basic issues.

## The Cold War

Such was the posture of the law when the "cold war" started a whole new series of decisions. It will be more convenient to discuss these under certain categories rather than chronologically. Three main areas have been charted: 1) cases dealing with exposure, which have arisen primarily in connection with legislative investigations and registration requirements; 2) cases dealing with prevention, which have arisen most often in connection with loyalty programs and oaths; and 3) cases dealing with punishment, which includes criminal prosecutions and penalties such as deportation.

*Exposure.* Ever since the days of Martin Dies, the Un-American Activities Committee of the House of Representatives has been engaged in the business of bringing to public notice possible Communist affiliations of a great variety of people—in addition to sniping at many persons against whom some of its members had grievances, as with the attack on Governor (later Justice) Murphy of Michigan because of the enlightened position he took in dealing with sit-down strikes. Since this committee contented itself for a long time with questioning willing witnesses, no test of its powers developed until 1948. Then the courts of appeals for the Second Circuit and for the District of Columbia upheld them, though with eloquent dissents, and the Supreme Court refused to review.[25] And it likewise denied review[26] to the "Hollywood

[23] Schneiderman v. United States, 320 U.S. 118 (1943).
[24] Bridges v. Wixon, 326 U.S. 135 (1945).
[25] Josephson v. United States, 165 F.2d 82, Judge Clark dissenting, *cert. den.* 333 U.S. 838 (1948); Barsky v. United States, 167 F.2d 241, Judge Edgerton dissenting, *cert. den.* 334 U.S. 843 (1948).

Ten" who all had refused to answer questions about Communist affiliations on first amendment grounds.

After that, most unwilling witnesses pleaded the privilege against self-incrimination and escaped jail. It was in one of these cases[27] that Chief Justice Warren reminded the country of limitations on the power of Congressional committees:

> But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary. Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here.

Finally, in the *Watkins* and *Sweezy* cases, the court actually dealt with some of the basic constitutional issues. In *Watkins*[28] the Chief Justice stressed the breadth and vagueness of the resolution creating the Un-American Activities Committee. There are many who believe that the court intended to rule that constitutional restrictions were violated by this resolution; but the Court did not rest its decision on his part of its opinion. Rather, it decided that, in the setting of such a resolution, a witness was entitled clearly to be informed by the committee of the pertinency of the questions asked him.

The Court of Appeals for the District of Columbia Circuit has since ruled that the *Watkins* decision did not strike down the committee's power to compel witnesses to answer questions about Communist connections, and the Supreme Court has agreed to review that decision.[29]

In *Sweezy*[30] four of the Justices reversed a conviction for refusal to answer questions put by the attorney general of New Hampshire, acting under authority from the legislature to investigate subversion, on the ground that it had not been established that the legislature contemplated the kind of questions which were asked. These dealt with the contents of a lecture given at a university and the witness's connection with the Progressive party. Because of the nature of the questions, Justices Frankfurter and Harlan went further and contended

[26] Lawson v. United States, 176 F.2d 49, *cert. den.* 339 U.S. 934 (1950).
[27] Quinn v. United States, 349 U.S. 155 (1955).
[28] Watkins v. United States, 354 U.S. 178 (1957).
[29] Barenblatt v. United States, 356 U.S. 929 (1958).
[30] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

that first amendment freedoms were involved. Justice Frankfurter said:

> In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election. Until recently, no difference would have been entertained in regard to inquiries about a voter's affiliations with one of the various so-called third parties that have had their day, or longer, in our political history.

But the Supreme Court of New Hampshire, in a similar case, has refused to follow the United States Supreme Court, and that Court has agreed to hear argument.[31] Further light on this subject will thus be forthcoming at the current Term of the Court.

Registration requirements have, thus far, produced no authoritative decision. The Supreme Court avoided consideration of any of the constitutional issues involved in the Subversive Activities Control Act by remanding the case involving the Communist Party[32] to the Subversive Activities Control Board for reconsideration of claims that its findings had rested on the perjured testimony of various informers. After the Board confirmed its earlier finding, the Court of Appeals for the District of Columbia sent the case back for further consideration, because the Government had refused to produce statements made by its witnesses.[33]

*Prevention.* The first test in this area grew out of the Taft-Hartley Act requirement that officers of labor unions which sought the aid of the Labor Board file affidavits that they were not members of the Communist party and did not believe in violent revolution. Only Justice Black dissented from the holding that the "non-Communist" part of the oath was valid (Justice Douglas had not participated). But the Court divided evenly with respect to the "belief" part.[34] And that issue has not since arisen.

Various states and municipalities have imposed oath requirements. The first case to reach the Supreme Court involved Maryland's law, which exacted an oath from candidates for public office. The Supreme Court unanimously upheld this oath[35] on the assurance by the state

[31] Uphaus v. Wyman, 356 U.S. 926 (1958).
[32] Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956).
[33] S.A.C.B. v. Communist Party, 254 F.2d 314 (1958).
[34] American Communist Ass'n v. Douds, 339 U.S. 382; Osman v. Douds, 339 U.S. 846 (1950).
[35] Gerende v. Board of Supervisors, 341 U.S. 56 (1951).

attorney general that it required only a statement that the candidate was not engaged in an attempt to overthrow the Government by force and was not knowingly a member of an organization so engaged. Thus, no question of belief or even advocacy was involved.

On the basis of that decision, a majority of the Court upheld[36] an ordinance of Los Angeles which required every municipal employee to swear that he had not advocated the violent overthrow of the Government during the previous five years and had not belonged to any organization which did. Justice Frankfurter thought the oath bad, because it did not specifically require that the membership had been with knowledge of the character of the organization—knowledge the majority had implied into the law. Justice Burton dissented because of the five-year period, which left no escape when there had been a change of heart. Justices Black and Douglas also criticized the oath because of its retroactive application.

But the court unanimously struck down[37] an Oklahoma statute, because it required dismissal of employees regardless of their knowledge of the character of the organization.

The basic issues involved in the disqualification of public employees because of membership in proscribed organizations was given fuller consideration in the case involving New York's Feinberg Law. That statute set up machinery for listing such organizations and for periodic checks on all school employees. Employees dismissed for knowing membership were entitled to judicial review. The majority held[38] that any impact on freedom of association or expression resulted from the teacher's choice and was, therefore, not protected. Justices Black and Douglas dissented. Justice Douglas pointed out the threat to freedom implicit in the annual checkup required by the law and the trend to orthodoxy which would result.

The *Slochower* case[39] illustrates another aspect of this problem. New York City, by charter provision, declares forfeit the position of any employee who, when asked about the affairs of the city or the duties of his position, refuses to answer by claiming his privilege against self-incrimination. The Board of Higher Education of the City of New York dismissed a number of professors and other employees who had pleaded their privilege before the Senate Subcommittee on Internal Security when questioned about Communist connections. This, said

[36] Garner v. Los Angeles, 341 U.S. 716 (1951).
[37] Wieman v. Updegraff, 344 U.S. 183 (1952).
[38] Adler v. Board of Education, 342 U.S. 485 (1952).
[39] Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

the Supreme Court, was improper because the dismissal was automatic and took no account of circumstances. The court stressed the fact that the Senate subcommittee had disclaimed any intention to inquire into matters affecting New York City. Justices Reed, Burton, Minton, and Harlan dissented.

But on the last day of the 1957 Term the Court, in two 5-4 decisions, narrowed the scope of *Slochower*.[40] It upheld the dismissals of a teacher and a subway motorman on the ground that the dismissals rested on failure to answer questions put by the supervisory authority. The dissenters (the Chief Justice and Justices Black, Douglas, and Brennan) believed the dismissals bad because based on improper inferences of disloyalty. Justices Black and Douglas alone said the questioning had been improper.

The loyalty program instituted by President Truman in 1947 has not yet been passed upon by the Supreme Court, although the Court has decided a number of cases which arose under it. The first was a challenge to the power of the Attorney General to list organizations as subversive. It resulted in a decision that organizations listed without hearings (as originally was the practice) had the right to judicial review to determine whether the Attorney General had acted arbitrarily.[41] An attempt by the National Lawyers Guild to obtain a judicial ruling with respect to the power of the Attorney General failed, because the lower courts held it had first to go through the administrative hearing procedure established by the Attorney General after the earlier decision, and the Supreme Court refused to review.[42]

Several cases involving dismissed federal employees have reached the Supreme Court. In the first, by a four-to-vote, the Court avoided[43] expressing an opinion with regard to the power to dismiss a person in a non-sensitive position on the basis of unsworn statements from anonymous informants. In the second, the Court held[44] that the Loyalty Review Board had no power to pass on the case of an employee who had been cleared by his departmental board. This ruling was applied[45] to a case where the Secretary of State had overruled clearance given by a subordinate.

And in *Cole v. Young*[46] the Court held that a statute which permitted

[40] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958).
[41] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).
[42] National Lawyers Guild v. Brownell, 225 F.2d 552, *cert. den.* 351 U.S. 927 (1956).
[43] Bailey v. Richardson, 341 U.S. 918 (1951).
[44] Peters v. Hobby, 349 U.S. 331 (1955).
[45] Service v. Dulles, 354 U.S. 363 (1957).

summary dismissal in the interest of national security applied only to sensitive positions. The Court gave no indication on what basis, or by whom, it was to be determined which positions were sensitive. That decision has not affected the loyalty program as much as was expected, since loyalty is one of the factors which the Civil Service Commission considers in determining suitability for all positions. However, legislation has been introduced in Congress in an endeavor to undo the decision altogether.

The army has conducted a loyalty program of its own. Two aspects of it have reached the Supreme Court. Ordinarily, above-age doctors who were drafted were given commissions, but that was not done when there was doubt about loyalty. A commission was refused a doctor who had claimed his privilege against self-incrimination when asked to disclose organizational affiliations. The Court upheld[47] this action over dissents by Justices Black, Frankfurter, and Douglas.

In the case of privates it was the practice of the army to drop persons suspected of being disloyal from service with discharges less than honorable. Attempts to correct this practice were met with the contention, sustained by many lower courts, that such discharges were not subject to judicial scrutiny. When, finally, the Supreme Court heard argument on two of these cases, the Solicitor General persisted in that position, despite his frank admission that it was beyond the power of the army to determine the character of the discharge by reference to pre-induction activities alone. That was too much for the Court, which, over the sole dissent of Justice Clark, reversed.[48]

The State Department has inaugurated a loyalty program in connection with passports. For a long time it had insisted on its right to issue or revoke passports without judicial interference. But in a case sponsored by the American Civil Liberties Union[49] a three-judge court in the District of Columbia recognized that there was a constitutional right to a passport and held that a passport could not be revoked arbitrarily. Then the Department set up procedures in cases involving possible Communist affiliations which provided for hearings but left it open for the Secretary to act on undisclosed information. Later, it imposed on all applicants the obligation to disclose under oath the facts with reference to past or present membership in the Communist party.

[46] Cole v. Young, 351 U.S. 536 (1956).
[47] Orloff v. Willoughby, 345 U.S. 83 (1953).
[48] Harmon v. Bruckner, 355 U.S. 579 (1958).
[49] Bauer v. Acheson, 106 F. Supp. 445 (1952).

In 1958 the court[50] held that the Secretary of State had no power, under existing legislation, to deny passports to persons because of possible Communist affiliations. It therefore passed on no constitutional issues. Justices Burton, Clark, Harlan, and Whittaker dissented. An attempt to override this decision failed in Congress.

Two cases involving admission to the bar belong in this category as much as anywhere else. In each, admission had been denied for alleged lack of good moral character. In the *Schware* case[51] New Mexico had rejected the applicant, despite excellent recommendations, because he had at one time been a member of the Communist party. The Court unanimously held this improper. In the *Konigsberg* case [52] California had rejected the applicant, also highly recommended, because he had refused to answer questions about Communist affiliations. This time the Court divided. The majority held that such refusal did not evidence bad character; the minority, Justices Clark and Harlan, felt that refusal to answer pertinent questions justified denial of admission. Justice Frankfurter also dissented, but on the ground—also agreed with by the other dissenters—that the constitutional issue had not been properly raised in the state court.

The Supreme Court remanded a third case,[53] that of *Patterson* from Oregon, on the basis of these two decisions. But when the state court held that these cases did not control because here there had been a finding that the applicant had falsely denied that the Communist party advocated the violent overthrow of the government, the Supreme Court declined to review.[54]

*Punishment.* The 1940 Smith Act (now 18 U.S.C. 2385) is the chief basis for the Government's criminal prosecutions in the field of security. Its constitutionality was upheld by the Supreme Court when it reviewed the 1949 conviction of the leaders of the Communist party in *Dennis* v. *United States.*[55] Six of the justices (Chief Justice Vinson and Justices Reed, Minton, and Burton of the majority and Justices Black and Douglas, who dissented) concluded that the "clear and present danger" test applied, despite the fact that the statute punished advocacy, thus to that extent overruling the *Gitlow* case.[56] But they differed both in their interpretation of that test and the functions of

[50] Kent v. Dulles, 357 U.S. 116; Dayton v. Dulles, 357 U.S. 144 (1958).
[51] Schware v. Board of Examiners, 353 U.S. 232 (1957).
[52] Konigsberg v. State Bar, 353 U.S. 252 (1957).
[53] *In re* Patterson, 353 U.S. 952 (1957).
[54] *In re* Patterson, 356 U.S. 947 (1958).
[55] Dennis v. United States, 341 U.S. 494 (1951).
[56] Gitlow v. New York, 268 U.S. 652 (1925).

judge and jury in applying it. The four justices of the majority approved the reformulation of the test which had been made by Judge Learned Hand in the Court of Appeals. Chief Justice Vinson said:

> Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those facts which we deem relevant, and relates their significance. More we cannot expect from words.

The dissenters objected to the injection of the concept of probability and insisted that the prohibition of the first amendment was absolute "except in the extreme case of peril from the speech itself." The dissenters further objected to the majority's ruling that the issue of danger should be resolved by the judge, not the jury. They also dissented from the finding that there was a sufficient danger from the Communist party. Justices Frankfurter and Jackson, while agreeing that the convictions should be affirmed, believed, though for different reasons, that the "clear and present danger" test was not applicable.

For a number of years thereafter, the Supreme Court refused to review other Smith Act convictions, including those of the second-string leadership. But in 1957 it reversed[57] the convictions of the two California leaders of the party. That case raised a number of issues. All the justices except Justices Clark and Burton (but Justices Brennan and Whittaker did not participate at all) held that the part of the statute which punished the "organization" of a proscribed group related only to its original formation. Legislation has been introduced to change this. All the justices except Justice Clark agreed that the evidence with respect to five of the defendants was wholly insufficient, so that they were entitled to a dismissal of the indictment and that the trial court's charge had not made clear the difference between incitement to illegal action and mere discussion of it. But Justices Black and Douglas thought that the nine defendants given a new trial by this decision also should have been set free, partly because the law was unconstitutional, partly because the only overt acts charged were legal, partly because as to them the evidence was likewise insufficient. And they disagreed with a formulation of instructions to the jury which the majority approved.

[57] Yates v. United States, 354 U.S. 298 (1957).

The Government then announced that it would not proceed with the new trial of the remaining nine. And in many other Smith Act prosecutions around the country new trials were ordered or indictments dropped. The Court of Appeals for the Second Circuit reversed[58] the conviction of a Connecticut group and dismissed the indictment, and the Supreme Court denied the Government's application for certiorari.

Other prosecutions under the Smith Act involved the membership clause. No decision has yet been rendered by the Supreme Court on the extent to which mere membership may be punished. It avoided an opportunity for so doing by reversing[59] two convictions on the ground that pertinent statements by government witnesses had been withheld from the defense.

But the Supreme Court held[60] that the Smith Act exhausted the field, so that no state might prosecute the advocacy of the forcible overthrow of the Government. Justices Reed, Burton, and Minton dissented. Legislation introduced in Congress to permit concurrent state legislation has failed of passage so far.

The *Rosenberg* case requires brief mention. In that prosecution for violating the prohibition contained in the Espionage Act of 1917 against disclosure of secrets in wartime, the two chief defendants were convicted and sentenced to death. The Supreme Court refused to review their conviction and to grant a later motion to vacate the judgment.[61] Further review was then sought on the very eve of the scheduled execution of the Rosenbergs. Pending filing of the formal papers, an application was made to Justice Jackson on June 12, 1953, for a stay of execution. He referred the application to the full court, which declined to hear oral argument and denied the stay on June 15th, the last day of the 1952 term.[62] A further application for habeas corpus was denied in a "special term" held the same afternoon.[63]

Later on that day, an application for a stay was filed with Justice Douglas by new counsel, who, for the first time, attacked the validity of the death sentence on the ground that the Atomic Energy Act of 1946 had superseded the old law in reference to disclosure of atomic secrets, the chief charge in the *Rosenberg* case, and that the death penalty could be imposed under the 1946 law only on recommendation of the jury, which had not been given. Justice Douglas granted that

[58] United States v. Silverman, 248 F.2d 671 (1957); *cert. den.* 354 U.S. 942 (1958).
[59] Scales v. United States, 354 U.S. 1; Lightfoot v. United States, 354 U.S. 2 (1957).
[60] Pennsylvania v. Nelson, 350 U.S. 497 (1956).
[61] Rosenberg v. United States, 344 U.S. 838, 889 (1952), 345 U.S. 965 (1953).
[62] 345 U.S. 989.
[63] 346 U.S. 271.

application on June 17th, so that the new question, which he felt was a substantial one, could be decided by the lower courts.[64] Thereupon, the Attorney General requested Chief Justice Vinson to recall the Court to hear argument with respect to the stay. Over the protest of Justice Black, that was done. Extended argument took place on Thursday, June 18th. On the next day, Friday the 19th, the Court announced its decision vacating the stay on the ground that the question was not substantial.[65]

The chief point raised in the various majority opinions was that the Atomic Energy Act of 1946 was not in force at the time the acts charged took place in 1944 and 1945 and that by its express terms the later law did not purport to supersede existing laws. Justice Black objected to the "unprecedented" action of calling the Court in session during vacation to pass on a stay granted by one of the justices. And he, as well as Justices Frankfurter and Douglas, believed there was such substance to the argument presented that it should not have been disposed of until after ample time for consideration. The Rosenbergs were executed on the day the final decision was rendered.

In the field of deportation the Court has followed the old rule that this does not constitute punishment, but not without protest from Justices Black and Douglas. On that basis it has continued to hold[66] that the ex post facto prohibition was not applicable. And it sustained[67] legislation which made all former members of the proscribed organizations deportable and also upheld a later law which specifically made deportable all past or present members of the Communist party.[68] But in 1957 the Court held,[69] over dissent by Justices Burton, Clark, Harlan, and Whittaker, that deportation of a former party member was justified only where there had been "meaningful" membership. And the Court also held that the Attorney General had no power to require deportable aliens whom no country would take, to advise him about possible Communist activities,[70] nor to restrict their actions.[71] Here also legislation has been introduced to change the law.

California's law denying tax exemption to persons and organizations advocating the overthrow of the Government by force was perhaps

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[64] 346 U.S. 271, at 313.
[65] 346 U.S. 271, at 288.
[66] Lehmann v. Carson, 353 U.S. 685 (1957).
[67] Harisiades v. Shaugnessy, 342 U.S. 580 (1952).
[68] Galvan v. Press, 347 U.S. 522 (1954).
[69] Rowoldt v. Perfetto, 355 U.S. 115 (1957).
[70] United States v. Witkovich, 353 U.S. 194 (1957).
[71] Barton v. Sentner, 353 U.S. 963 (1957).

motivated by all three of the considerations already discussed. At least it does not clearly fit under any one of them. So it can best be treated here. It was declared unconstitutional by the United States Supreme Court[72] over the sole dissent of Justice Clark on the ground that it improperly cast the burden of proof on the taxpayer. Justices Black and Douglas reiterated their view that all such laws are unconstitutional on broad first amendment grounds.

*Some Odds and Ends.* Security considerations also occasionally creep into cases that do not by themselves involve security. Thus, in the ordinary criminal prosecution the Government may refuse to divulge information which it believes essential to national security. In 1953 the Supreme Court had held[73] that a federal conviction must be reversed when the defendant was not allowed to examine, and place before the jury, statements made by a crucial prosecution witness which were inconsistent with his trial testimony.

That rule was amplified in the much discussed *Jencks* case.[74] There the Court, over the sole dissent of Justice Clark, held that the defense was entitled to see such statements even if it could not establish that they were inconsistent with the trial testimony and that if the Government wanted to withhold the statements for security reasons it must drop the prosecution. Congress immediately passed a law[75] which somewhat restricts the effect of the decision. The new law provides that the trial judge need let the defense see only such parts of the statement as are relevant to the issues and also lets him expunge the testimony of the witness involved instead of requiring the case to be dropped. Even more restrictive legislation has been proposed.

The same principle was applied[76] to the prosecution's refusal to reveal the identity of an informer, because the Court believed that the refusal was prejudicial in the particular case. Again Justice Clark was the only dissenter.

*Some Conclusions.* The foregoing review shows a growing concern in the Supreme Court over the many restrictions on liberty resulting from the tensions of war and fear of war. Its record during and after World War II, despite the unfortunate decision upholding the evacuation from the West Coast, was vastly better than the one established during and after World War I. This is due, in part, to the new approach

[72] Speiser v. Randall, 357 U.S. 513; First Unitarian Church v. Los Angeles, 357 U.S. 545 (1958).
[73] Gordon v. United States, 344 U.S. 414 (1953).
[74] Jencks v. United States, 353 U.S. 657 (1957).
[75] 71 STAT. 595 (1957), 18 U.S.C. § 3500 (Supp. V, 1958).
[76] Roviaro v. United States, 353 U.S. 53 (1957).

to civil liberties problems reached after the depression under the leadership of Chief Justice Hughes.

Changes in the composition of the Court have, of course, greatly influenced the results in many situations. For a time (from 1943 to 1949) there was a group of four justices—Black, Douglas, Murphy and Rutledge—who could almost always be counted on to decide in favor of liberty. That balance shifted after the death of the last two of these under the influence of Chief Justice Vinson and the three other appointees of President Truman—Burton, Clark and Minton. While the pendulum has swung again under the leadership of Chief Justice Warren, with the help of Justice Brennan, yet the majority was pro-liberty in only seven of the eighteen civil liberties cases[77] decided at the current Term by a vote of five to four: Justice Whittaker joined the Chief Justice and Justices Black, Douglas, and Brennan three times, Justice Frankfurter did so twice, and Justices Clark and Burton each once. Justice Brennan joined the Chief Justice and Justices Black and Douglas nine times in dissents from unfavorable decisions; once Justice Whittaker did so. In one case the dissenters were Justices Frankfurter, Douglas, Harlan, and Brennan. There were also seven cases in which the Chief Justice and Justices Black and Douglas dissented alone and one case in which the dissenters were Justices Frankfurter, Douglas, and Brennan.

In all humility, perhaps a word of caution should be added to the characterization of a "favorable" decision. By that is meant one which upholds the asserted claim of violation of some civil liberty. But there has been such a wide extension of that area in the past decades that it is inevitable that extreme claims should be asserted which often find no support from any of the justices, or at the most from one or two. Therefore a denial of the claim does not necessarily mean a decision "unfavorable" to civil liberties. Some discrimination must be exercised in judging the Court in the light of statistics based only on the results of the cases.

In appraising the record of the Court, two opposite points of view have been expressed. There are those who are disturbed because the Court has continued its traditional practice of avoiding decision of constitutional issues whenever possible. That policy is, of course, frustrating to those of us who are more concerned with general principles

[77] There were two cases in which Justice Brennan did not participate and, judging by his other decisions, would have joined the Chief Justice and Justices Black and Douglas in dissent had he participated.

than particular instances. In consequence much damage is often done to our way of life by legislative or executive action before the Court gets around to passing on its constitutionality. Thus, the challenge to the charter of the Un-American Activities Committee has been awaiting adjudication for upwards of ten years. But this is one of the facts of judicial life to which we must adjust ourselves.

On the other hand, others are disturbed because the Court has been "soft" on Communists. Before they make such a judgment they should consider the impact of the decisions, less in the light of the individual affected, more in the light of the effect on the whole community of the restrictions on liberty which the Court has struck down. For there is no doubt that the harm of these restrictions has been incalculable. Countless young people have hesitated to join organizations, have rejected careers exposed to inquiry, have succumbed to the deadening level of conformity. Fortunately the Court has not been blind to these considerations.

It was inevitable, however, that the notable advances recently made by the Court should, as has here been already noted several times, have produced hostile reactions in many quarters. While no single security decision has aroused the storm which, throughout the South, greeted the school segregation decisions,[78] Congressman Walter and Senator Jenner have introduced legislation which, if enacted, would render many of the decisions discussed here nugatory in the future or prevent the Supreme Court from exercising jurisdiction in most of the pertinent areas. Fortunately, none of the legislation has thus far been enacted.

But in considering the merits of any of these proposals we must not react merely because it is a decision of the Supreme Court which Congress seeks to overcome. Insofar as the decision rested upon the Court's interpretation of a statute, it is appropriate for Congress to say that it wants the law to be different. After all, the responsibility for legislating is vested by the Constitution in the elected representatives, not in the appointed Court. The pending legislation should be scrutinized, therefore, entirely on the merits of each of its component parts, unhampered by any emotional reaction that it seeks to undo a Supreme Court decision. So judged, most, if not all, the proposals are bad. But that is another subject that cannot adequately be dealt with here.

However, insofar as the Court rested any of its decisions on con-

[78] Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

stitutional grounds, Congress has no power to interfere. Assuredly, it should not accomplish by the backdoor of denying jurisdiction to the Court what it could not accomplish directly by legislation. That was once done to avoid scrutiny of the post-Civil War reconstruction legislation, and the Supreme Court acquiesced.[79] Since then, no attempt has been made to withdraw all jurisdiction in a particular area, but in sustaining more limited restrictions on the Supreme Court's power to review very broad language was used with respect to congressional power.[80] Whether the present Court would adhere to these views is doubtful. However, it would be most unwise for Congress to enact any such legislation. It would give the forty-eight states and the eleven federal courts of appeals final jurisdiction with the probable result of divergent views on the meaning of the Constitution—veritable chaos.

One other aspect of congressional resentment at the Court is worthy of note. A nominee for a federal district court judgeship, on March 26, 1958, at the request of Senator Eastland, pledged that if confirmed he would not "participate knowingly in any decision to alter the meaning of the Constitution itself or of any law as passed by the Congress and adopted under the Constitution."[81] It is reported that the pledge was suggested by Senator O'Mahony to head off the Jenner bill. Let us hope that no nominee for the Supreme Court will ever agree to such a pledge. Either it will be interpreted as restricting his freedom in interpretation of statutes and the Constitution, or it is meaningless. All that can properly be asked of any person aspiring to high judicial office is that he subscribe to an oath to support and defend the Constitution. How he shall do this is for each justice to decide in the light of the best available information and according to his conscience. Fortunately, we have now on the Court men of vision, independence, and courage. Nowhere has this been more manifest than in the area of this discussion, national security.

This has been exemplified most fully, perhaps, by one of the great justices of our time, William O. Douglas, and well-expressed in the foreword to his most recent book, *The Right of the People:*

> This is the time for us to become the champions of the virtues that have given the West great civilizations. These virtues are reflected in our attitudes and ways of thought, not in our standard of living. They

[79] *Ex parte* McCardle, 6 Wall. 318 (1868), 7 Wall. 506 (1869).
[80] See The Frances Wright, 105 U.S. 381, 386 (1882); Stephan v. United States, 319 U.S. 423, 426 (1943).
[81] See New York *Times*, March 27, 1958, p. 17, col. 1.

are found in the ideas of justice, liberty, and equality that are written into the American Constitution. They concern the rights of the people against the state. These rights include the right to speak and write as one chooses, the right to follow the dictates of one's conscience, the right to worship as one desires. They include the right to be let alone in a myriad of ways, including the right to defy government at times and tell it not to intermeddle. These rights of the people also include the right to manage the affairs of the nation—civil and military—and to be free of military domination or direction.

These are the rights that distinguish us from all totalitarian regimes. The real enemies of freedom are not confined to any nation or any country. They are everywhere. They flourish where injustice, discrimination, ignorance, superstition, intolerance, and arbitrary power exist. We cannot afford to inveigh against them abroad, unless we are alert to guard against them at home. Yet in recent years as we have denounced the loss of liberty abroad we have witnessed its decline here. We have, indeed, been retreating from our democratic ideals at home. We have compromised them for security reasons.

It is time to put an end to the retreat. It is time we made these virtues truly positive influences in our policies. We have a moral authority in our ideals of justice, liberty, and equality that is indestructible. If we live by those virtues, we will rejuvenate America. If we make them our offensive at home and abroad, we will quicken the hearts of men the world around. The contest is on for the uncommitted people of the earth. These ideals express the one true advantage we have over communism in that contest.