Washington Law Review

Volume 59
Number 4 *New Deal Symposium*

11-1-1984

Politics and Principles: An Assessment of the Roosevelt Record on Civil Rights and Liberties

Peter Irons

POLITICS AND PRINCIPLE: AN ASSESSMENT OF THE ROOSEVELT RECORD ON CIVIL RIGHTS AND LIBERTIES

Peter Irons*

Franklin D. Roosevelt did little to advance the cause of civil rights and liberties during his twelve years in the White House. Admittedly, there is a whiff of sacrilege in this retrospective judgment of a man whose place in the pantheon of national leadership is secure. When he took office in 1933, Roosevelt faced the awesome task of rebuilding a shattered economy. That his success in this monumental endeavor was imperfect, frustrated at first by a recalcitrant judiciary and later by electoral setbacks, is less a measure of Roosevelt's presidential greatness than is his success in mending the shattered hopes and dreams of those who suffered the ravages of the Great Depression. Once the nation turned from domestic reconstruction to meet the challenge of fascist aggression, Roosevelt led a virtually united people to the brink of military victory. His death in 1945 came at a time of unprecedented American power and prestige in the world community.

Notwithstanding this ineradicable legacy, the fact remains that Franklin Roosevelt displayed a consistent lack of leadership in the area of civil rights and liberties. This is not to say that he did not, on the appropriate occasion, mouth the rhetoric of concern and support for the constitutional rights of those racial, religious, and ethnic minorities that were subjected to prejudice or repression. Undoubtedly sincere, such expressions of concern were colored both by Roosevelt's greater concern with the economic problems that consumed his presidential energies and by his patrician outlook and privileged background. The combined impact of these factors is evident in his Constitution Day speech of 1937. "Tolerance and concern for fair play are virtues which do not flourish in the stony soil of economic want and social distress," he told his audience at the Antietam battlefield in Maryland. "Those of us whose circumstances have been cast in fortunate lots are too prone to bear with fortitude the hardships of a goodly portion of our fellow countrymen and women."[1]

* Associate Professor of Political Science, University of California, San Diego. B.A., 1966, Antioch College; M.A., 1970, Ph.D., 1973, Boston University; J.D., 1978, Harvard Law School.

1. *Quoted in* ROOSEVELT AND FRANKFURTER 415–16 (M. FREEDMAN ann. 1967). The only reference in this speech to the problem of "non-discrimination against minorities" came in Roosevelt's profession that he was "most happy at the effectiveness" of current judicial protection of "minority rights." *Id.* at 414.

Roosevelt's view of "fair play" as the core value of the constitutional system bore the marks of his Groton chapel lessons and of exhortations on its playing fields. But his commitment to the "rules of the game" as a guiding principle of public behavior gave little solace to the victims of official lawlessness. Not once in his speech at Antietam, an occasion and place that called for a forthright statement, did Roosevelt defend the rights of the black Americans over whose status as slaves the Civil War had been waged. Speaking in a state that bordered the symbolic Mason-Dixon line, and that held its black citizens in the grip of Jim Crow laws, the President voiced the code words of segregation. "The Bill of Rights is precious to all of us," he first stated in a ritual nod to the constitutional decalogue. "The reserved powers of the States to deal with matters of purely local concern are also precious," he immediately assured those who might fear any federal assault on their local "customs" and laws.[2]

Singling out this speech as being representative of Roosevelt's public statements on civil rights and liberties is not unfair. In such remarks he rarely ventured beyond the safe redoubt of platitude, in sharp contrast to his pointed and often personal barbs at those who disputed the wisdom of the New Deal recovery program.[3] Partisanship offers a partial explanation for this rhetorical disparity. Critics on economic issues were largely, although by no means exclusively, Republicans, and Roosevelt seemed to revel in excoriation of the GOP minority in Congress and its big-business backers.[4] His habitual avoidance of specific reference to racial and civil liberties issues reflected, at least in part, the political reality of Dixiecrat domination of the Congress.[5]

2. *Quoted in id.* at 416. Roosevelt also assuaged the states' rights sentiments of his listeners by denouncing the Reconstruction-era Congress as a "callous majority" that had been responsible for "the agony of our Southern States in the period after the War between the States . . . ." *Id.* at 414. This evocation of Confederate terminology and mythology could hardly have heartened those who looked to Roosevelt for leadership on civil rights.

3. In his Antietam speech, for example, Roosevelt barely masked his criticism of "the Supreme Court Odd Man" who had held that "state minimum wage laws for women were unconstitutional." *Id.* at 410. In this clear reference to Supreme Court Justice Owen Roberts, Roosevelt noted that Roberts had recently confessed that for "twenty years he had been wrong" on this issue. *Id.* at 410. This was an obvious reminder of Roberts' "switch-in-time-that-saved-nine" vote in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

4. During his first presidential term, Roosevelt had in fact courted business support and muted his attacks on congressional critics. When this strategy failed to muster GOP support for his recovery program, Roosevelt lashed out in the 1936 election campaign against the "economic royalists" who sought a "new industrial dictatorship." *Quoted in* W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 183–84 (1963); *see also* A. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 638–39 (1960).

5. *See* H. SITKOFF, A NEW DEAL FOR BLACKS 40–45, 284, 286–88, 292–94 (1978). This is the best existing treatment of relations between blacks and the Roosevelt administration. Chapter 11 deals with the campaign for an anti-lynching bill and chapter 9 deals with the National Association for the Advancement of Colored People (NAACP) and its legal strategy to end segregation.

Partisan factors alone, however, cannot fully explain Roosevelt's continuing failure to confront directly the civil rights and liberties issues that persisted throughout his presidential tenure. Compassion for the poor and powerless he had in full measure, and as Chief Executive he did not shrink from pursuing the maximum exertion of federal power on behalf of this "forgotten" constituency. Uppermost in the minds of those who framed the Bill of Rights, Roosevelt told his Antietam audience, was the conviction that fulfillment of these rights required "a central government, strong enough to avert economic chaos."[6] But at the same time, he believed firmly in states' rights, and in particular in the responsibility of state and local government for law enforcement. The concept of a federal mandate for the protection of racial and political minorities was simply outside his Jeffersonian notion of the proper allocation of federal and state powers.

This brief sketch of Roosevelt's basic conception of the constitutional structure of the American governmental system is intended as a prologue to the discussion in this article of several of the more significant civil rights and liberties issues and episodes during the period from 1933 to 1945. The definitional problem in such an undertaking is complex. For the sake of brevity, this article will deal primarily with issues arising from claims of abridgment of rights protected by the first amendment and the Civil War amendments, and will stress those rights arguably protected by federal statute or by direct constitutional proscription. However, the concepts of civil rights and liberties are fluid and subject to considerable debate over their scope and content. Thus, a more practical rule of thumb will be employed: this article will focus on episodes that prompted an organization such as the American Civil Liberties Union (ACLU) or the National Association for the Advancement of Colored People (NAACP) to complain that the Roosevelt administration was derelict in protecting what these groups viewed as civil rights and liberties.[7] These outcries, after all, focused the attention of the public, the press, and government officials on a case or problem and gave historical import to the issues involved.

The central focus of this article is on the role played in these episodes by the U.S. Department of Justice, the primary federal agency entrusted with law enforcement duties and powers. In particular, the role of the attorney general as the department's titular head and as the personification of federal enforcement of civil rights and liberties provides this article

6. *Quoted in* ROOSEVELT AND FRANKFURTER, *supra* note 1, at 415.

7. Facts about civil rights and liberties violations, and expressions of the views of these organizations, can be found in the annual reports of the ACLU and in THE CRISIS, the monthly publication of the NAACP.

with its analytic framework. A recent press commentary put this crucial cabinet post in perspective: "More than anyone but the President himself, it is the Attorney General who sets the moral tone of an Administration, symbolizing its commitment or lack of commitment to impartial justice."[8] The four men who served Franklin Roosevelt in this post—Homer Cummings, Frank Murphy, Robert Jackson, and Francis Biddle—spanned the spectrum in the "moral tone" that each imposed on the department's approach to civil rights and liberties, from the virtual unconcern shown by Cummings to the passionate moralism and activism with which Murphy invested his office.

President Roosevelt allowed his attorneys general to function with considerable autonomy. Although the President took an active interest in federal judicial appointments[9] and in candidates for the patronage post of United States Attorney in the federal districts, he rarely intervened in the litigation decisions of the Justice Department.[10] Roosevelt and his White House staff were kept informed of developments in significant or politically sensitive cases, but with the Justice Department Roosevelt displayed less of his penchant for meddling in the affairs of cabinet agencies than with most others.[11] Within the context of the President's ultimate reponsibility for the acts and policies of his subordinates, the Roosevelt record in civil rights and liberties is, then, more properly viewed as the separate records of his four attorneys general.

LYNCH MOBS AND LABOR VIOLENCE—THE ERA OF HOMER CUMMINGS

Homer S. Cummings became attorney general by accident. Roosevelt had named Senator Thomas Walsh, a progressive Montana Democrat, to this post, but Walsh died two days before the presidential inauguration.[12] Rather than leave the cabinet incomplete while he searched for a distinguished replacement, Roosevelt hastily reached into the ranks of his political allies and tapped Cummings, who had been slated for the post of governor-general of the Phillippines.[13]

8. Taylor, *Ties of Attorneys General to Chief*, N.Y. Times, Jan. 30, 1984, at A14, col. 3.

9. F. BIDDLE, IN BRIEF AUTHORITY 192–204 (1962) (Attorney General Biddle describes many instances of Roosevelt's involvement in decisions about judicial nominations).

10. *Id.* at 191. Roosevelt did, on occasion, take a personal interest in cases that affected his economic recovery program, meeting with government lawyers to discuss litigation decisions. *See* P IRONS, THE NEW DEAL LAWYERS 39 (1982).

11. *See* F. BIDDLE, *supra* note 9, at 191.

12. N.Y. Times, March 3, 1933, at 1, col. 3.

13. DICTIONARY OF AMERICAN BIOGRAPHY 137 (Supp. 6, 1980). There is no full-length biography of Cummings. In his book about the Justice Department, H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE (1937), he made no reference to civil rights and liberties problems during his tenure as

Roosevelt was not the first and certainly not the last President to appoint an attorney general as a reward for faithful party service. Sixty-one at the time he took office, Cummings was a Yale Law School graduate who had combined private practice in Stamford, Connecticut, with an active career in public service and party politics.[14] He played a key role as Roosevelt's floor manager at the 1932 Democratic convention and worked hard in the election campaign.[15] As a former county prosecutor, Cummings brought a law-and-order perspective to the Justice Department, tempered with a genuine concern for due process and the rights of defendants.[16] But he was, at heart, a genial, gregarious politician more at home in smoke-filled rooms and on the golf course than with the angry advocates of civil rights and liberties.

During his six years as attorney general, Cummings pursued one objective—crime control—with an obsessive zeal. At a time when the automobile and telephone made it easy for criminals to travel and operate across state lines, Cummings moved quickly and with great success in persuading Congress to expand vastly his department's law enforcement powers. In his official report for 1934, he boasted of his lobbying prowess and its results "in curbing the activities of notorious murderers, kidnappers, gangsters, bank robbers and extortionists engaged in desparate interstate enterprises."[17]

In his anti-crime crusade, Cummings was more than willing to press the department's existing powers to their limits and to seek even more authority over matters that were traditionally state and local concerns. But he retreated to the states' rights argument when confronted with demands that he take action against lynching. Roosevelt's election had given hope to those groups, led by the NAACP, which had vainly sought for years the enactment of a federal anti-lynching law.[18] The campaign for the law became a crusade in 1933, spurred by national revulsion at a wave of brutal lynchings (twenty-eight during the year). Its proponents united

---

attorney general. The most important of his writings and official documents are collected in SELECTED PAPERS OF HOMER CUMMINGS (C. Swisher ed. 1939).

14. Cummings had been a three-term mayor of Stamford, an unsuccessful candidate for the United States House and Senate, and a Democratic national committeeman from 1900 to 1925. DICTIONARY OF AMERICAN BIOGRAPHY, *supra* note 13, at 137.

15. *Id.*

16. In 1924, when Cummings was state's attorney for Fairfield County, Connecticut, a vagrant was indicted for the murder of a Catholic priest. Despite a confession in the case, Cummings became convinced of the defendant's innocence after a scrupulous investigation, and in a "gripping courtroom scene" gained dismissal of the indictment. *Id.*

17. *Quoted in* N.Y.Times, Jan. 2, 1935, at 10, col. 6.

18. H. SITKOFF, *supra* note 5, at 279–80.

behind a bill introduced by Senators Edward Costigan of Colorado and Robert Wagner of New York.[19]

While the anti-lynching coalition organized its lobbying effort, and sought Roosevelt's aid in breaking the expected Southern filibuster in the Senate, three black youths were lynched in Alabama in August, 1933. This crime prompted civil rights leaders to demand federal prosecution of the Tuscaloosa County sheriff for turning the victims over to the mob.[20] A delegation headed by Walter White, the NAACP's executive secretary, met with Attorney General Cummings on August 24. The delegation pointed out to Cummings a federal statute which made it a criminal offense for a person acting "under color of any law" to deprive another "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . ."[21] The visitors reminded the attorney general that the sheriff's action had deprived the lynched youths of their lives, in violation of the fourteenth amendment.

The demand for prosecution in this case was largely symbolic, in view of the maximum penalty provided under the statute, a one-year prison term or $1000 fine. What the delegation undoubtedly hoped, rather than to obtain the sheriff's indictment, was to sensitize Cummings to the issue and to enlist his support for the Costigan-Wagner bill. Cummings' response left Walter White with a feeling of outrage: "The attorney general was suave; he would make no commitment; he called for a brief."[22] As Cummings had asked, the civil rights groups prepared and sent to him a lengthy brief which argued the applicability of the federal statute, section 52 of the criminal code, to state and local officials dealing with lynch mobs. According to White, the attorney general simply informed the delegation several months later that "the department did not intend to take any action" in the Tuscaloosa case.[23]

19. *Id.* at 280–88; *see also Hearings on S. 1978 Before the Senate Judiciary Committee*, 73d Cong., 2d Sess. (1934).

20. White, *U.S. Department of (White) Justice*, THE CRISIS, Oct. 1935 at 309.

21. Civil Rights Act of 1870, ch. 114, § 17, 16 Stat. 144 (codified at 18 U.S.C. § 52 (1946)) (current version at 18 U.S.C. § 242 (1982)). For the history of this crucial statute, and an exhaustive discussion of its use during the Roosevelt administration, see R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS (1947). Carr notes that this statute had its origins in the Civil Rights Act of April 9, 1866, and that prior to the Roosevelt administration it "had been involved in only two reported cases, both in federal district courts." *Id.* at 70–71. Carr's invaluable book, which focuses on the activities of the Civil Rights Section of the Justice Department, *see infra* text accompanying notes 60–85, is based on access to Justice Department case files.

22. White, *supra* note 20, at 309.

23. *Id.* White noted with scorn that Cummings did not reply directly but passed the message through his executive assistant, William Stanley. White was also distressed that Cummings refused to place the topic of lynching on the agenda of the National Crime Conference in December 1934, despite Roosevelt's denunciation of lynching in his conference speech. *Id.* at 310.

President Roosevelt genuinely abhorred lynching, which he denounced in 1933 as "a vile form of collective murder."[24] But he put no political muscle behind his verbal support for the Costigan-Wagner bill, limiting his effort to the marshmallow statement that "the President will be glad to see the bill pass and wishes it passed."[25] The Dixiecrats who controlled the Senate quite predictably ignored this exhortation and killed both this bill and its successors.[26] Attorney General Cummings took his cues on this issue from the White House and matched Roosevelt in verbal evasion. In August 1938 he told the sponsor of a House bill that would direct the FBI to investigate lynching that he viewed the crime "with loathing," but that "the responsibility, so far as legislation is concerned, is primarily and unmistakably with Congress."[27] Like the President, Cummings stayed on the sidelines as the battles over lynching raged during his six years in office, an ineffective cheerleader in this one-sided contest with enormous human and moral stakes.

The second major civil rights and liberties issue that arose during the Cummings era in the Justice Department was that of violence and legal repression directed at labor organizers and strikers. Backed by local police, National Guard troops, and the courts, employers had virtually crushed the labor movement in the decade that preceded the New Deal.[28] Heartened by the promise of federal legislation to ensure their rights to organize and bargain collectively, millions of unorganized workers voted for Roosevelt and, after his election, plastered factory gates with appeals that "The President Wants You to Join the Union."[29] Congress

24. *Quoted in* H. SITKOFF, *supra* note 5, at 280. Roosevelt was responding to the November 1933 lynching of two white men in San Jose, California, which "set off a nation-wide protest that the NAACP used to launch its campaign" for the Costigan-Wagner bill. *Id.* It is an ironic historical parallel that thirty years later, President Lyndon Johnson did not pressure Congress for passage of the Voting Rights Act of 1965 until two white civil rights workers were murdered in Alabama. R. EVANS & R. NOVAK, LYNDON B. JOHNSON: THE EXERCISE OF POWER. 493–97 (1966).

25. *Quoted in id.* at 283.

26. *Id.* at 284–97. After Congress adjourned in 1934 without voting on the Costigan-Wagner bill, presidential assistant Louis Howe wrote a note on his copy of the bill: "Not favored at this time—may create hostility to other crime bills." *Quoted in id.* at 284.

27. *Quoted in* N.Y. Times, Aug. 3, 1938, at 38, col. 5. This bill would not have made lynching a federal crime but would merely have provided for investigations at the direction of the attorney general.

28. R. GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 183–91 (1978). Spanning the period from the 1870's to the 1970's, this book exhaustively documents private and public repression against labor, political dissidents, and the members of racial and religious minorities. Goldstein notes that the 1920's were the heyday of the anti-strike injunction; more than 900 were issued by state and federal courts during this decade. *Id.* at 183; *see also* I. BERNSTEIN, THE LEAN YEARS (1960). This book about the labor movement in the 1920's is another excellent source of data.

29. *Quoted in* P. IRONS, *supra* note 10, at 203. The anti-union campaign succeeded in reducing the strength of organized labor from four million members in 1920 to less than half that number in 1933. *Id.*

responded to labor pressure by inserting into the National Industrial Recovery Act (NIRA), passed in 1933, the requirement in section 7(a) that employers permit workers to "organize and bargain collectively through representatives of their own choosing" over issues of wages, hours, and working conditions.[30]

Hailed as "Labor's Bill of Rights," section 7(a) triggered an intense but short-lived labor organizing campaign that foundered on the rocks of employer resistance. Along with competition from company unions, the discharge of union members, infiltration by labor spies, and the widespread refusal of employers to recognize unions, those who tried to "organize the unorganized" encountered Justice Department reluctance to seek judicial enforcement of section 7(a).[31] Francis Biddle, whose initial New Deal post was chairman of the first National Labor Relations Board, often bickered with Attorney General Cummings over Justice Department foot-dragging in enforcement cases.[32] Cummings found fault with every case prepared by Biddle's board and took only a handful before the conservative federal judges who struck down New Deal statutes with undisguised hostility.[33]

Justice Department obstruction was only one of the factors that made section 7(a) a victim of the business counteroffensive against unions in the 1933–36 period.[34] State and local officials proved to be equally unwilling to protect organizers and striking workers, and were often eager to intervene on the side of the employers. The clashes of strikers and policemen at picket lines resulted in more than eighteen thousand arrests between 1933 and 1936, and over one hundred strikers were killed in labor disputes during this period.[35] Only a year after Roosevelt took office, the ACLU had shifted from praise of his labor program to bitter criticism and condemnation of federal officials for siding with employers.[36]

30. National Industrial Recovery Act (NIRA), ch. 90, § 7(a), 48 Stat. 195, 198 (1933) (current version at 29 U.S.C. § 157 (1982)). Roosevelt had opposed the inclusion of § 7(a) in the NIRA, and agreed to it only after labor leaders threatened to call a general strike if he resisted. *See* P. IRONS, *supra* note 10, at 204.

31. P. IRONS, *supra* note 10, at 208–10.

32. *Id.* at 221–25.

33. *Id.* at 218–20.

34. A well-financed legal campaign against both the NIRA and the National Labor Relations Act (NLRA), organized by the American Liberty League, crippled enforcement of both statutes until the Supreme Court upheld the NLRA in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). P. IRONS, *supra* note 10, at 81, 243–48.

35. GOLDSTEIN, *supra* note 28, at 218.

36. In its 1933–34 annual report the ACLU complained that "the New Deal administration has refused to interfere in this industrial strife to make good its implied support of trade unionism." AMERICAN CIVIL LIBERTIES UNION, LIBERTY UNDER THE NEW DEAL 3 (1934). Two years later, the ACLU saw little improvement in the record of the Roosevelt administration, citing "the resort to

The bloody 1934 San Francisco general strike put the Roosevelt administration to the first real test of its labor sympathies. Led by Harry Bridges, the longshoremen, whose waterfront strike spread across the city, fought battles with the police, leaving two strikers dead and hundreds injured.[37] Employer groups appealed to the federal government for National Guard intervention. General Hugh Johnson, the bombastic National Recovery Adminstration director, supported military force to break the strike and rushed to San Francisco. There he likened the situation to "civil war" and urged conservative union leaders, who backed the general strike but also feared Bridges as a radical, to "run these subversive influences out from their ranks like rats."[38]

Although the Justice Department played no direct role in the San Francisco strike, Attorney General Cummings advised Roosevelt that the President had federal statutory authority to employ Army troops against the strikers and to declare martial law in the area. Frances Perkins, the Labor Secretary whose moderate counsel ultimately prevailed, met with Cummings and "pleaded that this was in no way an alarming situation" that required a military response. "I thought it unwise," she reported telling Cummings, "to begin the Roosevelt administration by shooting it out with working people who were only exercising their rights . . . to organize and demand collective bargaining."[39] Federal troops remained in their barracks and the general strike fizzled out when craft union leaders withdrew their support from Bridges and his longshoremen.[40]

Though Cummings was willing to dispatch armed forces against striking workers in San Francisco, he was reluctant to dispatch Justice Department lawyers to investigate claims of civil rights and liberties violations around the nation. One case in which he did order an inquiry involved charges that sharecroppers and tenant farmers on the cotton plantations of eastern Arkansas were held in peonage and subjected to violent reprisals for striking against planters.[41] The sharecroppers and tenants were

force and violence by employers" as one of the greatest threats to labor and civil liberties. AMERICAN CIVIL LIBERTIES UNION, HOW GOES THE BILL OF RIGHTS? 5 (1936).

37. A lengthy account of the strike is found in C. LARROWE, HARRY BRIDGES 62–94 (1972); *see also infra* text accompanying notes 88–106 for a discussion of the later effort to deport Bridges.

38. C. LARROWE, *supra* note 37, at 85. Johnson was in San Francisco to give a speech and barged into the volatile situation without any official role.

39. F. PERKINS, THE ROOSEVELT I KNEW 314 (1946). Perkins reports that Roosevelt deliberately avoided taking sides in the strike or making any public statement about it. *Id.* at 312–15.

40. *See* C. LARROWE, *supra* note 37, at 62–94 (discussing generally the developments of the strike).

41. For an account of the early years of the Southern Tenant Farmers Union (STFU), see D. GRUBBS, CRY FROM THE COTTON (1971). The efforts of lawyers in the Agricultural Adjustment Administration, the federal agency with jurisdiction over labor relations between growers and farmworkers, to aid the STFU and southern sharecroppers are discussed in P. IRONS, *supra* note 10, at 164–73.

members of the biracial Southern Tenant Farmers Union (STFU). Repeated complaints by STFU leaders and their northern liberal allies prompted Cummings in June 1936 to order an investigation of allegations that striking cotton choppers were being fined for vagrancy and then "forced to work at the point of guns to pay off these fines."[42]

Cummings authorized the Arkansas investigation with an eye toward enforcement of the federal Antipeonage Act, the modern version of a Reconstruction statute designed to protect former slaves from a form of forced labor that resulted from perpetual indebtedness.[43] As early as 1914, the Supreme Court had held that certain state laws violated the Antipeonage Act.[44] Nonetheless, the Justice Department had rarely taken advantage of the Antipeonage Act to pursue widely alleged abuses, and the STFU and its supporters hailed Cummings' announcement. The special assistant he dispatched to Arkansas, Sam Whittaker, not only investigated the peonage charges but also the claims that members of the STFU staff had been beaten and flogged.[45] The outcome of the federal inquiry disheartened the STFU and its supporters. The Whittaker investigation, Cummings announced to the press in August 1936, "failed to reveal any violation of Federal statutes."[46] The facts uncovered by Whittaker, added the attorney general, would be turned over to Arkansas officials for possible state action. Not surprisingly, no state prosecutions were forthcoming.

The Arkansas turmoil had one result that later prompted Cummings to initiate the only major prosecution under federal civil rights laws during his tenure in office. Dismayed by the ineffective Arkansas probe, Gardner Jackson, an untiring activist who organized support for the STFU and other liberal causes, turned his efforts from the executive to the legislative branch of the federal government. Jackson persuaded Senator Robert La-Follette, Jr., the Wisconsin Progressive, to introduce a resolution to authorize a congressional investigative body with jurisdiction over civil

42. N.Y. Times, June 4, 1936, at 4, col. 6. The strikers demanded wages of $1.50 for a ten-hour day, rather than the 75 cents they were receiving. *Id.*

43. 18 U.S.C. § 444 (1935) (current version at 18 U.S.C. § 1581 (1982)). This revision of the Reconstruction-era Peonage Abolition Act imposed a fine of not more than $5000, or not more than five years in prison, or both, for holding any person in "a condition of peonage." *Id.* In 1905, the Supreme Court upheld the constitutionality of the act in Clyatt v. United States, 197 U.S. 207 (1905). The Court defined peonage as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master." *Id.* at 215. For a discussion of the statute's history and use by the Roosevelt administration, see R. CARR, *supra* note 21, at 77–80, 180–82.

44. United States v. Reynolds, 235 U.S. 133 (1914) (invalidating Alabama laws allowing a person fined upon conviction for a misdemeanor to confess judgment with a surety in the amount of the fine and agree with the surety, in consideration of the surety's payment of the fine, to reimburse him by working for him).

45. N.Y. Times, June 19, 1936, at 15, col. 1.

46. *Quoted in* N.Y. Times, Aug. 13, 1936, at 19, col. 6.

liberties issues.[47] The Senate passed the resolution in June 1936 and Senator Hugo Black, who chaired the Committee on Education and Labor, appointed LaFollette to head a three-member subcommittee that became popularly known as the LaFollette Civil Liberties Committee.[48]

The LaFollette Committee devoted its first year to exposure of the "labor spy" network that spread across the country and was funded by anti-union employers to the tune of several million dollars a year.[49] In 1937, LaFollette turned his attention to labor violence in Harlan County, Kentucky, where for the past six years coal miners had fought for recognition of their union, the United Mine Workers of America.[50] Coal operators in "Bloody Harlan" owned the county sheriff, Theodore Middleton, whose deputies patrolled the mining camps with machine guns. Between 1934 and 1937 thirty-seven of Middleton's deputies were convicted of felonies and sixty-four were indicted at least once.[51]

LaFollette began hearings on the Harlan County situation in April 1937, just two weeks after the Supreme Court upheld the National Labor Relations Act in the *Jones & Laughlin* case.[52] The combination of the well-publicized hearings and judicial approval of labor's rights to organize free of employer interference had an obvious impact on the Justice Department. On May 19, 1937, Attorney General Cummings issued a press release that announced his dispatch of FBI agents to Harlan County with orders to investigate complaints of "violence and terrorism" in the troubled area. "If the investigation discloses offenses under Federal jurisdiction," Cummings stated, "vigorous and prompt prosecution will follow."[53]

Based on evidence collected by the FBI and presented to the LaFollette Committee, Cummings authorized the prosecution of more than fifty defendants, including sixteen coal companies, eighteen company operators,

47. J. AUERBACH, LABOR AND LIBERTY 43–47, 62–73 (1966). Auerbach's book provides a thorough and sympathetic history of the LaFollette Committee. He notes as well the contributions of Heber Blankenhorn, an investigator for the NLRB, in pressing for the Senate investigating committee. *Id.* at 59–73.

48. *Id.* at 75. Senators Elbert Thomas and Louis Murphy were also named to the subcommittee; Murphy died shortly after his appointment and was not replaced until 1939. *Id.*

49. *Id.* at 97–115. For a list of reports issued by the LaFollette Committee, see *id.* at 221.

50. *Id.* at 115–20. Violence against the Harlan County miners reached such levels that a special commission, appointed by Governor A. B. Chandler in 1935, reported that it was "almost unbelievable that anywhere in a free and democratic Nation . . . conditions can be found as bad as they are in Harlan County. There exists a virtual reign of terror . . . ." *Id.* at 116.

51. *Id.* at 117–18.

52. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

53. *Quoted in* N.Y. Times, May 20, 1937, at 3, col. 5. Cummings attributed his move to the revelations of the LaFollette Committee and to complaints by John L. Lewis, president of the United Mine Workers and chairman of the Committee for Industrial Organization. *Id.*

and twenty-two deputy sheriffs.[54] They were indicted under the Reconstruction-era statute that made it a crime for two or more persons to conspire to deprive any citizen of rights secured by the Constitution or federal law.[55] Tried in 1938, the Harlan County cases ended in a mistrial after a hung jury. The defendants were not retried, but Justice Department and other federal officials persuaded coal operators to end their reign of terror against the miners and the union organizing campaign.[56]

It seems clear that Cummings bowed to public and political pressure in approving federal prosecution in the Harlan County case. Still, his reluctant use of the federal civil rights laws did set a precedent that his successors followed with more vigorous action. The Cummings era in the Justice Department spanned six years marked by widespread violence and official oppression visited on blacks and union members. The statutory enforcement tools available to federal prosecutors were weak and lacked firm judicial sanction. Nonetheless, Cummings made no move to strengthen these tools and failed almost totally to set a "moral tone" of support for civil rights and liberties. The "accidental" attorney general left his post in 1939 with a record of failed opportunity.

BRUTALITY AND BIGOTS—TURNING THE SCREWS OF ENFORCEMENT

Each of the three men who followed Homer Cummings as attorney general in the Roosevelt administration proclaimed a determination to enforce the civil rights laws to their fullest extent. A number of political factors—the rightward turn of Congress, looming war clouds and the ensuing global conflict, and the concomitant fear of "subversive" and "disloyal" groups in American society—placed obstacles in the path of impartial enforcement. The impact of these factors produced lapses in the records of Cummings' successors that cannot be ignored or excused.[57] But on the whole, the final six years of the Roosevelt era were marked by

54. *See* R. CARR, *supra* note 21, at 27.

55. The Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 141 (codified at 18 U.S.C. § 51 (1946)) (current version at 18 U.S.C. § 241 (1982)). This law was designed to enforce the thirteenth amendment. The statute provided a stiff maximum penalty of ten years in prison and a fine of not more than $5000, in contrast to the one-year term and $1000 fine provided for violation of 18 U.S.C. § 52, *see infra* note 21. See R. CARR, *supra* note 21, at 57–70 for a discussion of the history of § 51 and its use by the Roosevelt administration.

56. R. CARR, *supra* note 21, at 27–28. Justice Department pressure led the coal operators to sign a contract with the United Mine Workers in order to avoid a retrial. J. AUERBACH, *supra* note 47, at 120. The report of the LaFollette Committee on the Harlan County situation is in SENATE COMMITTEE ON EDUCATION AND LABOR, PRIVATE POLICE SYSTEMS, S. REP. No 6, Part 2, 76th Cong., 1st Sess. (1939).

57. See *supra* text accompanying notes 88–143 for discussion of these issues.

a vastly improved Justice Department record in the area of civil rights and liberties.

It is impossible to say whether President Roosevelt selected Frank Murphy to succeed Cummings with the intention to restore the "moral tone" that could be set by the attorney general. Murphy was a loyal New Deal politician who needed a job, having been defeated for reelection as governor of Michigan in the 1938 electoral debacle of Democrats in both Congress and the states.[58] Murphy was rewarded, as Cummings had been, for faithful party service. But this was the only characteristic the two men shared. More than any attorney general in American history, Murphy brought to the post a crusading spirit and a passionate moralism that reflected his former membership on the NAACP board of directors and his hatred of racial and religious prejudice.[59]

Murphy wasted no time in charting a new course for the Justice Department. On February 3, 1939, less than a month after he assumed office, he created a new departmental body, first called the Civil Liberties Unit and later retitled and more widely known as the Civil Rights Section (CRS). In announcing this move, Murphy stressed that "an important function of the law enforcement branch of government is the *aggressive protection* of fundamental rights inherent in a free people." He promised to "*pursue a program of vigilant action in the prosecution*" of those who infringed constitutional and federal statutory rights.[60] The small but dedicated group of lawyers assigned to the CRS immediately began to review the existing body of federal law with the aim of finding a solid basis for enforcement. They also began selecting cases for prosecution from the backlog of complaints that had piled up in the department, and from the wave of complaints that flowed in after the publicity given to Murphy's statement.[61]

58. Murphy, born in 1893, gained "a lasting hatred for 'industrial slavery' " during his boyhood work in a starch factory. CURRENT BIOGRAPHY 610 (M. Block ed. 1940). He served for three years as an assistant United States attorney and sat as a municipal judge before his election as mayor of Detroit in 1930. Roosevelt appointed him as governor general of the Philippines (the post for which Homer Cummings had been slated) in 1932. During his term as governor of Michigan, his refusal to employ troops to oust the General Motors "sitdown" strikers cost him conservative support, while his early threat to use force cost him labor votes in 1938. *Id.; see also* S. FINE, FRANK MURPHY: THE DETROIT YEARS (1975); J. HOWARD, MR. JUSTICE MURPHY (1968).

59. H. SITKOFF, *supra* note 5, at 66. Murphy's status as an Irish Catholic affected his views on civil rights and liberties. John Pickering, who served as law clerk to Murphy on the Supreme Court, recently stated that Murphy "had a terrible streak of religious fervor in him, and felt very strongly about religious freedom and race." *Quoted in* P. IRONS, JUSTICE AT WAR 243 (1983).

60. *Quoted in* R. CARR, *supra* note 21, at 1.

61. *Id.* at 33–34, 56–57; *see also* Schweinhaut, *The Civil Liberties Section of the Department of Justice*, 1 BILL OF RIGHTS REV. 206 (1941). Henry Schweinhaut headed the CRS from 1939 to 1941, followed by Victor Rotnem from 1941 to 1945.

The new attorney general had an acute perception, as a veteran of local and state service during the Depression decade, of the fact that civil rights and liberties were most often infringed by officials at these lower levels of government. Taking the stump at the May 1934 meeting of the United States Conference of Mayors, Murphy combined an impassioned plea for cooperation with a chiding lecture to his former colleagues. Noting that his department had received "a steady deluge of letters complaining that civil liberties have been abridged" by local police and officials, Murphy summed up these informal petitions as an indictment of his listeners:

> They indicate clearly that some public officials have used their power arbitrarily; that ordinances have been passed and invoked that are oppressive and unjust and violate common right; that citizens have been denied the right to express freely their opinions and to worship as they please; and that some have been prevented from petitioning their government for the redress of grievances.[62]

Murphy did not need to remind his audience that each count of this indictment was leveled particularly at one mayor who was conspicuously absent from the meeting, Frank Hague of Jersey City. Determined to keep labor organizers out of his fiefdom, Hague's compliant city council had enacted ordinances that gave city officials unbridled discretion to ban picketing on city streets. Jersey City police had arrested hundreds of those who defied the ordinances. This volatile situation gave a special emphasis to Murphy's statement that "the first battleground of civil liberties is the local communities."[63] The mayors could hardly have missed the point when the Supreme Court, in an opinion handed down just three weeks after Murphy spoke, struck down the Jersey City ordinances as an infringement of constitutional rights secured by the fourteenth amendment and protected by federal statute.[64]

---

62. *Quoted in* N.Y. Times, May 16, 1939, at 16, col. 2. The Times, which editorially commended Murphy for his speech, professed an inability to "put as much confidence as Mr. Murphy does" in the prospect of effective federal and state enforcement of civil liberties, noting the prevalence of state criminal syndicalism laws and similar repressive statutes. N.Y. Times, May 17, 1939, at 22, col. 2.

63. *Quoted in id.*, May 16, 1939, at 16, col. 2. The ACLU, in its 1938 annual report, singled out Jersey City as the only large city where "practically all meeting places [are] closed to organizations opposed by the authorities." AMERICAN CIVIL LIBERTIES UNION, ETERNAL VIGILANCE! 43 (1938).

64. Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). The Court based its ruling on the Civil Rights Act of April 20, 1871, which subjected "any person" who acted "under color of any law" to deprive another of rights protected under the Constitution to a suit for damages or equitable relief. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 8 U.S.C. § 43 (1941)) (current version at 42 U.S.C. § 1983 (Supp. V 1981)). This judicial approval of the civil counterpart to § 52 of the federal criminal law obviously strengthened the hand of Justice Department lawyers in bringing criminal prosecutions against state and local officials.

Although the Justice Department had not been a party to the Jersey City case, the Supreme Court decision gave heart to lawyers in the CRS and prompted them to press for federal prosecution of local officials who acted "under color of law" in denying protected civil rights. Given the lead-time required for the preparation of such cases, only a handful were brought during the year that Murphy served as attorney general. Conscious of the depth of black frustration at the failure of the anti-lynching campaign, CRS lawyers decided to focus on police brutality cases. As their first target, they selected an Atlanta policeman, William Sutherland, accused of extracting a confession from a black prisoner with an electric "tacking iron," a third-degree method that left the victim severely burned.[65]

Revulsion at the torture inflicted by Sutherland led the local United States Attorney to recommend federal prosecution, despite the policeman's earlier acquittal in state court. In March 1940 a federal grand jury issued an indictment based on section 52 of the criminal code, charging the defendant with acting "under color of law" in depriving the victim of his rights to due process and equal protection of the laws. Justice Department lawyers won a legal victory when the federal judge overruled a demurrer to the indictment based on the argument that a policeman who had clearly exceeded his statutory authority acted without official sanction and was thus beyond the reach of federal law. The federal prosecutors failed, however, to gain a conviction in two trials because of jury disagreement; they finally dropped the case.[66] Justice Department lawyers were not unsuccessful in all of the early police brutality cases. Another prosecution begun in 1940, against an Arkansas deputy sheriff charged with brutality against prisoners, ended with a conviction in 1942. CRS lawyers were especially heartened in this case by an appellate decision that sanctioned the use of section 52 in police brutality cases.[67]

Federal civil rights prosecutions began in earnest when Frank Murphy became attorney general. The "moral tone" he set in this area continued under the two men who next held this post, although they lacked his fervent commitment. Upon Murphy's nomination to the Supreme Court in January 1940, President Roosevelt replaced him with Robert H. Jackson, an upstate New York lawyer who had campaigned vigorously for Roosevelt in 1932. Rewarded with the office of general counsel in the Bureau of

65. R. CARR, *supra* note 21, at 151–52.

66. *Id.* at 152–54. Carr, whose account of this case is based on the Justice Department file, noted "a strong reluctance by the FBI" to conduct an investigation of a local police department. Unnamed "higher authorities" in the Department sided with the FBI until CRS lawyers complained loudly. *Id.* at 152–53; *see infra* note 87.

67. *Id.* at 154–55; Culp v. United States, 131 F.2d 93 (8th Cir. 1942).

Internal Revenue, Jackson later moved to the Justice Department and became solicitor general in 1938, serving under both Cummings and Murphy.[68] During his tenure as attorney general, Jackson supported the civil rights enforcement program with considerably less fervor than Murphy.[69]

Jackson did approve one notable prosecution in a voting rights case, providing Justice Department lawyers with a long-sought judicial sanction. This case did not involve disenfranchised blacks, but rather a scandal within the lily-white Louisiana Democratic party. Members of the party's reform faction, in their zeal to oust the entrenched Long machine, were caught stealing ballots during the bitter primary election and were indicted under sections 51 and 52 of the federal criminal code. When the federal district judge sustained demurrers to these charges, the government appealed directly to the Supreme Court.[70] The significance of the Court's ruling in the *Classic* case,[71] a narrow four-to-three decision handed down in March 1941, did not lie in its reversal of the trial judge on the section 51 charge. This part of the opinion merely extended to congressional primaries an earlier ruling that dealt with fraudulent practices in general elections.[72] The Court broke new ground, however, in holding that state officials who committed acts outside the scope of their authority could be prosecuted under section 52, which did not require proof of a conspiracy to infringe constitutional rights.[73]

With their most potent enforcement tool sharpened by the Supreme Court, lawyers in the CRS wielded section 52 in a new round of police brutality prosecutions. When Robert Jackson followed Frank Murphy to the Supreme Court in June 1941, responsibility for this campaign fell on Francis Biddle, the fourth and last attorney general to serve under Roosevelt. Like his immediate predecessor, Biddle was elevated from the post

68. Jackson, born in 1892, spent twenty years in trial practice in Jamestown, N.Y., and became "widely esteemed for his salty independence of mind and clear courtroom presentation." DICTIONARY OF AMERICAN BIOGRAPHY 357 (Supp. V 1977); *see also* E. GERHARDT, AMERICA'S ADVOCATE (1958). Roosevelt, while governor of New York, appointed Jackson in 1930 to a state commission to reform the judicial system. *Id.* Jackson also gained Roosevelt's favor with his vigorous 1937 Senate testimony in defense of the President's "court-packing" plan. *Id.*

69. Albert E. Arent, a CRS lawyer who served under both Murphy and Jackson, recently stated that Jackson "paid very little attention to our work and the old guard [in the Department] made it frustrating for us." Letter from Arent to author (January 31, 1984) (copy on file with the *Washington Law Review*).

70. *See* R. CARR, *supra* note 21, at 85–94.

71. United States v. Classic, 313 U.S. 299 (1941).

72. United States v. Mosley, 238 U.S. 383 (1915). See R. CARR, *supra* note 21, at 65–66, for a discussion of this case.

73. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Classic*, 313 U.S. at 326.

of solicitor general and was also a veteran of New Deal legal service.[74] Underneath the "casual" exterior noted by friends, Biddle had a core of toughness and closely matched Murphy in his commitment to civil rights and liberties.

Biddle later wrote proudly of his record in bringing prosecutions against state officials "who had misused the power of office under 'color of law' to deprive individuals of their rights."[75] He took a personal interest in the case brought in 1943 against Claude Screws, a rural Georgia sheriff who, joined by a deputy and a local policeman, beat to death a handcuffed black prisoner arrested on a forged warrant.[76] After conviction by a federal jury, Screws and his co-defendants received three-year prison sentences. Biddle expressed pleasure that jury members "were not deflected from doing their sworn duty by the usual charge of 'Yankee interference.' "[77]

The conviction of the homicidal officers proved to be a Pyrhhic victory. After the verdicts were upheld by the Fifth Circuit Court of Appeals,[78] the Supreme Court agreed to review the cases and proceeded to blunt the utility of section 52. Six justices supported the constitutionality of the statute, but a five-member majority held that the trial judge had erred in his jury instructions and ordered a new trial. Writing for the Court, Justice William O. Douglas stated that the law required the jury to find that the defendants had "willfully" deprived their victim of a right "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."[79] The import of Douglas's opinion seemed to be that the jury must find that the defendants had in mind the due process rights of their victim when they bludgeoned him to death. Not suprisingly, Screws and his fellow officers were acquitted on retrial, which led Biddle to complain that the results of the *Screws*

74. Biddle, born in 1886, graduated from Harvard Law School and served a clerkship with Justice Oliver Wendell Holmes. He spent twenty-three years in corporate practice in Philadelphia before Roosevelt appointed him in 1934 as chairman of the first NLRB. Biddle also spent an unhappy year as a federal circuit judge at Roosevelt's insistence. Unlike his predecessors as attorney general in the Roosevelt administration, Biddle had been a Republican before his New Deal service and had had no involvement in party politics. F. BIDDLE, IN BRIEF AUTHORITY (1962) (Biddle recounts his experiences in public service and as attorney general); *see also* P. IRONS, *supra* note 10, at 221.

75. F. BIDDLE, *supra* note 74, at 156.

76. *Id.* at 156–59. Robert Hall, the black victim, owned a pearl-handled pistol that one of Screws' deputies coveted and took from Hall. On Hall's complaint, the county grand jury ordered the pistol returned. In retaliation, Screws forged a warrant that charged Hall with theft of an automobile tire. The officers who beat Hall to death were drunk and "boasted they were going to 'get' a Negro who had 'lived too long' and got too smart." *Id.* at 157.

77. *Id.* at 157.

78. Screws v. United States, 140 F.2d 662 (5th Cir. 1944), *rev'd*, 325 U.S. 91 (1945); *see also* R. CARR, *supra* note 21, at 106–15.

79. Screws v. United States, 325 U.S. 91, 104 (1945).

decision "was greatly to lessen the value of Section 52 in punishing atrocities of this character where the state refused to take action."[80]

The Supreme Court also complicated the task of providing federal protection to members of the Jehovah's Witnesses sect, whose street-corner preaching and door-to-door proselytizing had provoked hundreds of arrests and the passage of many restrictive local ordinances. In June 1940 the Court upheld the action of a Pennsylvania school board in expelling two young Witnesses who refused to salute the American flag.[81] Victor Rotnem, a Civil Rights Section lawyer who headed the unit while Biddle was attorney general, described the violent consequences of the Court's opinion: "Between June 12 and June 20, 1940, hundreds of attacks upon the Witnesses were reported to the Department of Justice. Several were of such violence that it was deemed advisable to have the Federal Bureau of Investigation look into them."[82]

One of these violent reprisals against the Witnesses led to a successful prosecution under section 52. When seven members of the sect arrived in Richwood, West Virginia, in June 1940, they visited the Mayor's office to seek police protection. They were promptly seized by a deputy sheriff, forced to drink large doses of castor oil and taken out to face a mob of 1,500 hostile people. The deputy, who had removed his badge, then ordered the Witnesses to salute the flag, after which they were tied to a rope, marched through the streets, and finally told to leave the town and not to return.[83] Lawyers in the CRS brought charges against the deputy sheriff and chief of police and secured convictions that were upheld by the Fourth Circuit Court of Appeals.[84]

Overall, the Justice Department compiled a creditable record over the last six years of the Roosevelt administration in cases that dealt with racial and religious minorities. Needless to say, the CRS was unable to bring prosecutions in more than a handful of the cases referred to it.[85] Many of these complaints were factually weak, many were settled

80. F. BIDDLE, *supra* note 74, at 159.

81. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). This decision was overruled in West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

82. Rotnem & Folsom, *Recent Restrictions Upon Religious Liberty*, 36 AMER POL SCI REV 1053, 1061 (1942). This article recounts several of the instances of church burnings and mob violence to which Witnesses were subjected.

83. For an account of this case, see R. CARR, *supra* note 21, at 134–35, 143–44, 155–59.

84. Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). Finding that "the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who asaulted the victims constituted a violation of his common law duty," the court placed his "dereliction . . squarely within the provisions" of § 52. *Id.* at 907.

85. "More than eight thousand complaints that reached the CRS in 1942 resulted in only seventy-six prosecutions; in 1943, over thirteen thousand complaints produced prosecutive action in only sixty-one cases; and, in 1944, the twenty thousand complaints culminated in only sixty-four prosecutions." R. CARR, *supra* note 21, at 129.

without prosecution, some did not pass grand jury scrutiny, and others that resulted in indictments were lost when juries refused to convict. The Supreme Court's backing-and-filling in its statutory interpretation of section 52 complicated the enforcement program. Institutional factors also affected the work of CRS lawyers. "Certain career lawyers in the upper echelons of the Justice Department were hostile to the program," one of the CRS lawyers recently stated.[86] Resistance to civil rights enforcement at lower levels, particularly within the FBI, additionally hampered efforts to secure evidence against local officials and policemen.[87] Notwithstanding these hobbles, CRS lawyers did their best to protect and enforce constitutional rights.

COMMUNISM AND CONCENTRATION CAMPS—CIVIL RIGHTS IN CRISIS

Balanced against the Roosevelt administration's efforts to protect the civil rights and liberties of oppressed minorities are its egregious failures. Among the episodes in which the Justice Department capitulated to political pressure, three in particular stand out as examples of subordination of the Constitution to the politics of paranoia. Each of these episodes—the campaign to deport Harry Bridges, the prosecution of "seditious" critics of American wartime policies, and the internment of Japanese Americans—illustrate the dominance of politics over law when the two institutions battle.

Harry Bridges was the victim of a unique political and legal vendetta which lasted more than two decades. His troubles began in 1934, when Bridges directed the San Francisco waterfront strike that spread across the city and split the Roosevelt administration into hard-line and more moderate factions.[88] Members of the Communist party supported the strike and made up a vocal and influential minority in the longshoremen's union that Bridges headed. These connections, along with his openly radical views, made Bridges the target of West Coast shipping interests and their allies among local, state, and federal officials. Charges that the union leader was a communist became a staple of hostile press comments and denunciation by conservative politicians.[89]

86. Letter from Arent to author (January 31, 1984) (copy on file with the *Washington Law Review*).

87. *See* R. CARR, *supra* note 21, at 152–53. Carr noted, however, that the FBI and CRS "worked together reasonably well" in later cases. *Id.* at 153.

88. *See infra* text accompanying notes 37–40.

89. *See* C. LARROWE, *supra* note 37, at 32–35, 56–59. Bridges recently admitted his political affinity with Communist Party positions. "I agreed with the party 95 percent of the time. But I never

As an alien, Bridges was especially vulnerable to legal attack. (Although Bridges had twice taken out naturalization papers after his arrival in the United States from his native Australia in 1920, he had let them lapse each time before the deadlines set for formal application for American citizenship.) The first official move to seek his deportation began in 1937 on the initiative of the Seattle director of the Immigration and Naturalization Service (INS), an agency then part of the Labor Department.[90] The INS official bombarded his Washington headquarters with affidavits and police reports that alleged that Bridges was a communist. Labor Secretary Frances Perkins sought Roosevelt's advice on whether to bring deportation proceedings against Bridges under federal law. According to Perkins, Roosevelt dismissed the idea on civil liberties grounds.[91]

Despite this presidential directive, mounting political pressure finally forced Perkins to issue a deportation warrant against Bridges in March 1938. Her distaste for the crusade to deport Bridges was reflected in her selection of James Landis to serve as trial examiner in the fact-finding hearings mandated by INS regulation. Then the dean of Harvard Law School, Landis upheld his reputation as a New Deal liberal in finding, after an eleven-week hearing that produced a 152-page report submitted in December 1939, that the evidence presented had not shown that Bridges was currently either a member of or "affiliated" with the Communist Party.[92]

The conservative reaction to the Landis report took several forms. One was an impeachment resolution filed against Perkins in the House of Representatives, which scared the Secretary but went nowhere.[93] More important was the successful campaign to transfer the INS to the Justice Department, which bypassed Perkins. The next move in the congressional crusade involved a classic bill of attainder. This legislative billy-club directed Attorney General Robert Jackson to deport Bridges "forthwith to Australia" on the ground that his "presence in this country the

joined. They never asked me, and I never volunteered." Interview with Harry Bridges in San Francisco (January 8, 1984).

90. *See* C. LARROWE, *supra* note 37, at 138–42; F. PERKINS, *supra* note 39, at 316–17.

91. F. PERKINS, *supra* note 39, at 317–18. Secretary Perkins related her meeting with Roosevelt to discuss the pressure to deport Bridges. The President asked if Bridges had "done anything to overthrow the Government." Perkins said he had not. " 'Then why in the world,' asked the President, 'should a man be punished for what he thinks, for what he believes? That's against the Constitution.' " *Id.* at 318. This account strikes the author as somewhat disingenuous.

92. U.S. DEPARTMENT OF LABOR, IN THE MATTER OF HARRY R. BRIDGES (1939).

93. F. PERKINS, *supra* note 39, at 218–19; see 84 CONG REC 702–11 for the text of the impeachment resolution, offered by J. Parnell Thomas, a New Jersey Republican. The House Judiciary Committee, controlled by the Democrats, reported unfavorably (and unanimously) on the resolution and it was tabled by the House without debate on March 24, 1939. *Id.* at 3273.

Congress deems hurtful."[94] Jackson responded with a public letter denouncing this bill as unconstitutional and noting that Bridges "had been accused, investigated, and tried at great length, and judgment has been rendered that he had not been proved guilty of the charges made against him."[95]

Jackson's success in blocking passage of the bill of attainder proved to be illusory. In June 1940, Bridges' leading congressional opponent, Sam Hobbs, added to the Alien Registration Act—better known as the Smith Act—a provision directing the deportation of aliens who "at any time" after their arrival in the United States had been members of or "affiliated" with the Communist Party.[96] Hobbs thus circumvented Landis's interpretation of the earlier statute and opened the door for renewed proceedings against Bridges.[97] Jackson promptly ordered the FBI to reopen its investigation of the outspoken union leader, whose opposition to the growing "preparedness" campaign put him at odds with the attorney general's interventionist sentiments.[98] Announcing in February 1941 that a 2,500 page FBI report contained "new and additional evidence" in the case, Jackson issued a second deportation warrant and chose Charles B. Sears, a retired New York State judge, to conduct a second round of hearings.[99] Based largely on the testimony of two witnesses who had not appeared at the prior hearings, both of them bitter union foes of Bridges, Sears concluded after the ten-week session, in a 185-page report submitted in September 1941, that Bridges was a Communist Party member and should be deported to his native country.[100]

The timing of the Sears report placed the burden of decision on Francis Biddle, who had recently replaced Jackson as attorney general. Political

94. 86 CONG. REC. 8203.

95. N.Y. Times, June 20, 1940, at 12, col. 3. Although Jackson carefully stated that he did "not now consider" whether the proposed legislation constituted a bill of attainder, was an ex post facto law, or violated the due process clause of the fifth amendment, the tone of his letter left no doubt of his position on these issues. *Id.*

96. Immigration Act of 1917, ch. 439, § 23, 54 Stat. 673 (1940).

97. Hobbs did not conceal his intention. "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish." 86 CONG. REC. 9031.

98. Jackson had recently, in August 1940, drafted an opinion for Roosevelt defending the legality of the so-called "destroyers-for-bases" deal, which involved the transfer of fifty American destroyers to Great Britain, despite the seeming prohibition of the Neutrality Act of 1917. *See* P. GOODHART, FIFTY SHIPS THAT SAVED THE WORLD 60, 187–88 (1965).

99. N.Y. Times, Feb. 13, 1941, at 1, 15. Bridges responded that "this new attack amounts to persecution. How many times must a man be cleared of the same charge before they leave him alone?" *Id.* at 15.

100. U.S. DEPARTMENT OF JUSTICE, MEMORANDUM OF DECISION IN THE MATTER OF HARRY RENTON BRIDGES (1941); see also C. LARROWE, *supra* note 37, at 226–37, for an account of the Sears hearing.

factors complicated Biddle's task. Three months before he received Sears' deportation recommendation, Germany had invaded the Soviet Union and Bridges had shifted to fervent support of the Allied cause.[101] Conscious of the pressures to overrule Sears and dismiss the warrant, Biddle nonetheless decided—despite the unanimous opinion of the Board of Immigration Appeals that the testimony accepted by Sears was suspect—to order Bridges' deportation.[102] This decision upset President Roosevelt, for whom politics almost always took precedence over law. "I'm sorry to hear that," Roosevelt responded when Biddle informed him of the decision. But the President knew that the judicial wheels turned slowly. "I'll bet," he told Biddle, "that the Supreme Court will never let him be deported. And the decision is a long way off."[103]

Roosevelt's prediction was accurate on both counts. Three years elapsed between the time Bridges was served with the deportation order and the Supreme Court's decision in June 1945—two weeks after the German surrender—to vacate the order. Writing for the five-member majority, Justice Douglas cut a narrow path of statutory interpretation, holding that Judge Sears had relied on unsworn testimony and had misconstrued the term "affiliation" in his report.[104] This evasion of the central issue, that of the vendetta against Bridges for his labor militance and political views, provoked an acidulous concurrence from Justice Murphy, directed both at Douglas and Biddle:

> The record in this case will stand forever as a monument to man's intolerance of man. Seldom if ever in the history of this nation has there been such a concentrated and relentless crusade to deport an individual because he dared to exercise the freedom that belongs to him as a human being and that is guaranteed to him by the Constitution.[105]

The crusade to deport Harry Bridges left a lasting stain on the record of the Roosevelt administration. Despite his ultimate success in gaining American citizenship, made possible after the Supreme Court reversed a perjury conviction obtained by Truman's Justice Department,[106] Bridges spent the better part of two decades before inquisitorial bodies and in

101. *See* F. BIDDLE, *supra* note 74, at 299.

102. *Id.* at 297–302. Biddle confessed that the evidence in the Sears report on the question of Bridges' alleged Communist Party membership "was not overwhelming." But he professed "little doubt" that Bridges was a Communist, and placed great emphasis in explaining his decision on "the effect on the war effort that the removal of Bridges might have." *Id* at 300; *see also* C. LARROWE, *supra* note 37, at 238–42

103. F. BIDDLE, *supra* note 74, at 302.

104. Bridges v. Wixon, 326 U.S. 135, 141–49, 150–56 (1945).

105. *Id.* at 157.

106. Bridges v. United States, 346 U.S. 209 (1953). See also C. LARROWE, *supra* note 37 for an account of Bridges' perjury trial and subsequent judicial proceedings.

court. Political in motivation, the charges against him were nonetheless cast by successive attorneys general into legal form and pursued in the face of clear judicial precedent. Bridges survived the "communist" charges, but his ordeal left the Justice Department with an unhealed wound.

It is ironic that the Smith Act, largely intended to force the deportation of Harry Bridges, failed in its primary purpose but succeeded in establishing, almost without debate, the first peacetime sedition law since 1798.[107] It is equally ironic that the Justice Department, during the Roosevelt administration, avoided prosecuting Communist Party leaders under the provisions designed to punish advocates of revolutionary doctrine. The congressional sponsors of these provisions had directly aimed them at the "Bolshevik" allies of the Soviet Union.[108] The German invasion of Russia in June 1941, however, changed the erstwhile revolutionaries into ardent patriots and immunized the party's leaders from prosecution until Cold War politics gripped the Truman administration.[109]

The final irony of the Smith Act is that its first victims were members of the miniscule Socialist Workers Party (SWP), a Trotskyite group that detested the Communist Party and its Stalinist policies. The SWP's vocal opposition to Roosevelt's wartime alliance with Stalin made its leaders obvious targets for federal surveillance. Domestic political factors, however, had a greater impact on the decision to bring Smith Act indictments against SWP leaders. The party's bastion was in Minneapolis, among members of the Teamsters Union. In June 1941, the SWP-led Teamsters local withdrew from the American Federation of Labor and joined the Congress of Industrial Organizations. This threat to his leadership prompted Dan Tobin, the Teamsters president and a Roosevelt ally, to appeal for federal action against the SWP apostates. Tobin's request brought immediate action. On June 28, federal marshals raided the SWP's Minneapolis office and twenty-nine party leaders were subsequently indicted for Smith Act violations.[110]

Francis Biddle authorized the SWP prosecutions as acting attorney general and publicly trumpeted the indictments as the opening shot in a national drive against radicals and communists.[111] Eighteen of the defendants were convicted and sentenced to prison. Although the SWP leaders

107. Act of July 14, 1798, ch. 74, 1 Stat. 596 (1798).

108. *See, e.g.*, 86 CONG. REC. at app. 4085–88 (remarks of. Rep. Leland Ford).

109. The Supreme Court upheld the Smith Act convictions of eleven Communist Party leaders in Dennis v. United States, 341 U.S. 494 (1951). For an account of the Smith Act prosecutions, see M. BELKNAP, COLD WAR POLITICAL JUSTICE (1977).

110. *See* R. GOLDSTEIN, *supra* note 28, at 252–53; Pahl, *G-String Conspiracy, Political Reprisal or Armed Revolt? The Minnesota Trotskyite Trial*, 8 LABOR HISTORY 30 (1967).

111. Pahl, *supra* note 110, at 44–45.

refused to disavow the "revolutionary aims" of the party, none of the documents submitted as evidence at the trial went beyond advocacy of "mass action, propaganda and mass agitation" as complements of the party's participation in trade union work and electoral campaigns. Nonetheless, the federal appellate court that upheld the convictions professed no doubt that "force was the ultimate means" intended in the party's campaign against capitalism.[112] Ruling in 1943, the Supreme Court refused to review the convictions and the SWP leaders served their sentences.[113]

Much later, writing in his memoirs, Biddle confessed that "I have since come to regret that I authorized the prosecution" of the vocal but isolated Trotskyites. He admitted that "by no conceivable stretch of a liberal imagination" had the defendants ever posed a "clear and present danger" to the government they were charged with conspiring to overthrow.[114] Wartime pressures also prompted another sedition prosecution intended to balance the political scales. Responding to a flurry of notes from Roosevelt that were attached to "scurrilous attacks on his leadership" in the publications of American fascists, Biddle approved in June 1942 the indictment of twenty-six Nazi propagandists. The resulting trial, which Biddle described as a "shockingly dreary and degrading experience," ended in a mistrial when the trial judge died. The indictments were ultimately dismissed, and Biddle admitted his embarrassment but not remorse at this second use of the Smith Act.[115]

No single episode more dishonored the civil rights and liberties record of the Roosevelt administration than the forced evacuation from the West Coast of 110,000 Americans of Japanese ancestry.[116] The travail of this friendless and frightened minority began eleven weeks after the Japanese attack on Pearl Harbor, when Roosevelt signed Executive Order 9066 on February 19, 1942.[117] Predicated on the need to protect military installa-

112. Dunne v. United States, 138 F.2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943). The court based its conclusion that "force was the ultimate means to be used by the Party in the overthrow of the Government" on the finding that "Defense Guards" made up of union members were designed "to use force in protection of the unions." *Id.* at 149 (emphasis added).

113. Dunne v. United States, 320 U.S. 790 (1943) (writ of certiorai denied).

114. F. BIDDLE, *supra* note 74, at 152.

115. *Id.* at 235–43. Biddle admitted that pressure from Roosevelt had directly influenced his decision to secure the sedition indictments. *Id.* at 238

116. The account below is based largely on P. IRONS, JUSTICE AT WAR (1983). This book, which discusses the evacuation decision and the political and bureaucratic forces that produced it, is primarily concerned with the four test cases that reached the Supreme Court as challenges to various elements of the internment program. These cases are discussed *infra* in text accompanying notes 129–43.

117. 7 Fed. Reg. 1407 (1942). See also P. IRONS *supra* note 116, at 3–63 for discussion of the pressures that led to the evacuation decision and of the internal debate within the government that preceded issuance of the executive order.

tions from the threat of espionage and sabotage, this presidential edict resulted in the internment of Japanese Americans in concentration camps—euphemistically called "Relocation Centers"—scattered from the California desert to the swamps of Arkansas. Before those camp residents certified as "loyal" by federal officials were released from confinement, they spent an average of 900 days under armed guard, imprisoned without charge or trial.[118]

Historians and legal commentators have since condemned the evacuation decision and internment program with virtual unanimity.[119] More disturbing than these retrospective judgments is the fact that those who framed the "military necessity" rationale for the incarceration of Japanese Americans were conscious at the time of its falsity. Nonetheless, over the ineffectual protests of two Justice Department lawyers, military claims that Japanese-Americans had committed acts of espionage were presented to the Supreme Court in the test cases that challenged the constitutionality of the internment program.[120]

Responsibility for the treatment of Japanese Americans rests with high-ranking officials in each branch—executive, legislative, and judicial—of the federal government. The evacuation decision, which resulted largely from political pressure applied on the War Department by California officials and members of the West Coast congressional delegation,[121] was framed by a military officer who admitted that "no one has justified fully the sheer military necessity for such action."[122] Secretary of War Henry L. Stimson, who approved the executive order sent to the White House for Roosevelt's signature, privately confessed his conviction that "it will make a tremendous hole in our constitutional system."[123] Attorney General Francis Biddle also swallowed his doubts about the necessity for the

118. P. IRONS, *supra* note 116, at 64–74.

119. *See, e.g.*, R. DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II (1972); M. GRODZINS, AMERICANS BETRAYED (1949); J. TEN BROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR, AND THE CONSTITUTION (1954); Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945); *see also* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1983). This report of a congressional commission established in 1980, based on the testimony of some 750 witnesses and review of thousands of goverment documents, concluded that the internment was not justified by "military necessity" but resulted from a combination of "race prejudice, war hysteria, and a failure of political leadership." *Id.* at 18.

120. *See* P. IRONS, *supra* note 116, at 278–92. The espionage claims were made in U.S. DEPARTMENT OF WAR, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 8 (1943).

121. *See* P. IRONS, *supra* note 116, at 38–44, 50–53.

122. *Id.* at 50. This officer, Colonel Karl R. Bendetsen, was on the staff of the judge advocate general and worked closely with, and under the direction of, Assistant Secretary of War John J. McCloy. Bendetsen was later appointed to direct the evacuation and internment program under General John L. Dewitt, commander of the Western Defense Command.

123. *Id.* at 55.

executive order. Justice Department lawyers had strenuously argued to Biddle that evacuation of a single racial group would be unconstitutional.[124] Biddle later explained his capitulation to Stimson on the grounds that "I was new to the Cabinet, and disinclined to insist on my view to an elder statesman whose wisdom and integrity I greatly respected."[125]

More than any other government official, Assistant Secretary of War John J. McCloy assumed the responsibility for guiding the executive order to Roosevelt's desk. Determined to overcome Stimson's constitutional qualms and Biddle's objections to evacuation, McCloy prevailed in a dramatic show-down with the objecting Justice Department lawyers, who were distressed to learn that the attorney general had bowed to Roosevelt's entreaties and McCloy's insistence.[126] McCloy wasted no time in directing the West Coast military commander, General John L. DeWitt, to begin the evacuation of Japanese Americans from their West Coast homes.[127] McCloy also took the initiative in pushing through Congress the legislation that placed criminal penalties behind Dewitt's curfew and exclusion orders, the initial steps in the internment program.[128]

Given the unenviable choice between barbed-wire compounds and prison bars, it is hardly surprising that only a handful of Japanese Americans challenged DeWitt's orders in the courts. Three young men appealed their criminal convictions to the Supreme Court. Minoru Yasui, a lawyer and reserve Army officer who had been turned down for active service, brought a test case against the curfew in Portland, Oregon. Gordon Hirabayashi, a college senior and Quaker pacifist, deliberately violated the curfew and exclusion orders in Seattle. Fred Korematsu, a shipyard welder, had been arrested for violating an exclusion order in San Leandro, California. The final case to reach the Supreme Court involved a young woman, Mitsuye Endo, who filed a habeas corpus petition after reporting for internment in California.[129]

124. *Id.* at 44–45, 52–56, 61–63.

125. F. BIDDLE, *supra* note 74, at 226. Biddle also noted that Roosevelt was not troubled that evacuation of Japanese Americans would constitute a basic violation of civil rights and liberties. "If anything, he thought that rights should yield to the necessities of war." *Id.*

126. P. IRONS, *supra* note 116, at 61–63. When Biddle announced his agreement with the War Department, his two assistants at the meeting, Edward J. Ennis and James H. Rowe, Jr., were devastated. "Ennis almost wept," Rowe later said. "I was so mad that I could not speak at all myself . . . " *Id.* at 62.

127. *Id.* at 64.

128. *Id.* at 64–68. The statute passed by Congress to enforce Roosevelt's executive order, Pub. L. No. 77-503, provided a maximum one-year sentence for violation of any military orders issued under authority of Executive Order 9066. Ch. 191, 56 Stat. 173 (1942).

129. P. IRONS, *supra* note 116, 75–103.

Confining its initial rulings to the curfew issue, the Supreme Court unanimously affirmed in June 1943 the convictions of Yasui and Hirabayashi.[130] Chief Justice Harlan Fiske Stone, in the *Hirabayashi* opinion, cited the Army's claim that the "racial attachments" to their ancestral homeland made reasonable the suspicion that Japanese Americans posed a danger of espionage and sabotage. Refusing to question the judgment of military officials, Stone wrote that "it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."[131] At the time, Justice Department lawyers were aware that military intelligence reports contradicted the Army's "disloyalty" claim. The Court, however, was not aware of this when it decided these first cases, because Solicitor General Charles Fahy rebuffed Justice Department lawyers' efforts to bring these reports to the Court's attention, despite objections that failure to do so "might approximate the suppression of evidence."[132]

Eighteen months passed before the Supreme Court ruled on the two remaining internment cases. During this time President Roosevelt paid more attention to partisan factors than to the plight of Japanese Americans. Secretary of War Stimson informed Roosevelt in May 1944 of the Army's opinion that the internment program could be safely ended. Concerned about the potential electoral consequences of such a move, the President brushed aside this request.[133] Despite the urgings of military leaders and Cabinet members, Roosevelt held the Japanese Americans hostage to political concerns until the Supreme Court forced his hand in the *Endo* case. Decided in December 1944, this decision finally opened the gates of the internment camps.[134]

Though the Court held unanimously in *Endo* that Congress had not authorized an indefinite internment program, the Justices split over the constitutionality of the military orders that preceded and led to internment. The Supreme Court's bitter division in the *Korematsu* case reflected two factors: the shifting tides of war toward the United States and its allies; and recognition that racism had motivated the internment. With ultimate wartime victory in sight, the Court's unanimity in *Hirabayashi* and *Yasui* eroded. The *Korematsu* opinion, written by Justice Hugo Black for a six-member majority, was defensive in tone and narrowly circumscribed in

130. Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

131. *Hirabayashi*, 320 U.S. at 93, 96–98.

132. P. IRONS, *supra* note 116, at 202–06.

133. *Id.* at 268–77.

134. *Ex Parte* Endo, 323 U.S. 283 (1944). Justice William O. Douglas, who wrote for a unanimous Court, confined his opinion to the narrow question of whether Congress had expressly authorized the internment camps, finding it had not. Douglas did, however, hold that "initial detention in Relocation Centers" was lawful. *Id.* at 301.

upholding the exclusion orders.[135] General DeWitt's public comment that "a Jap's a Jap,"[136] and the claim in his official report on the internment program that Japanese Americans belonged to "an enemy race,"[137] clearly embarrassed Black.[138] Asserting that Korematsu had not been ordered to leave his home town "because of hostility to him or his race," Black rested his opinion on unspecified "evidence of disloyalty" among the Japanese Americans.[139] Justice Frank Murphy, the most outraged of the three dissenters, found no such evidence in the record and retorted that internment represented nothing more than the "legalization of racism."[140]

Perhaps the most disturbing aspect of the *Korematsu* case was the high-level decision to prevent the Supreme Court from learning of the existence of official reports that refuted the "military necessity" rationale for internment. In his *Final Report* to the War Department on the program, General DeWitt had charged Japanese Americans with the commission of acts of espionage, including the transmission of visual and radio signals to Japanese submarines off the West Coast.[141] Two Justice Department lawyers, suspicious of DeWitt's claims, persuaded Attorney General Biddle to order investigations by the FBI and the Federal Communications Commission. The reports of these agencies to Biddle conclusively refuted DeWitt's unsupported allegations.[142]

Convinced that the "lies" and "intentional falsehoods" in the DeWitt report should be brought to the attention of the Supreme Court, the two lawyers added a footnote to the government's *Korematsu* brief that alluded to the countering reports and disavowed any reliance on the espionage claims. But after the last-minute intervention of Assistant Secretary of War John McCloy, Solicitor General Charles Fahy pulled the brief from the printing press and excised the confessional footnote from it.[143] Bureaucratic politics thus prevailed over professional ethics and the integrity of the judicial system.

---

135. Korematsu v. United States, 323 U.S. 214 (1944).

136. P. IRONS, *supra* note 116, at 193.

137. *Id.* at 58, 336.

138. *Id.* at 336–37.

139. *Korematsu*, 323 U.S. at 223.

140. *Id.* at 242 (Murphy, J., dissenting). The other dissenters were Justices Owen Roberts and Robert Jackson.

141. U.S. DEPARTMENT OF WAR, *supra* note 120, at 4, 8.

142. P. IRONS, *supra* note 116, at 278–84.

143. *Id.* at 284–92. McCloy, in his 1981 testimony before the Commission on Wartime Relocation and Internment of Civilians, doggedly defended the internment program, characterizing it as "retribution" for the Japanese attack on Pearl Harbor. *Id.* at 351–54.

POLITICS AND PRINCIPLES—THE ROOSEVELT RECORD IN RETROSPECT

Any fair assessment of the Roosevelt record on civil rights and liberties must balance accomplishments with failures. More importantly, such an assessment must judge Roosevelt's record against those of the presidents who preceded and followed him, in particular those who share the "progressive" mantle that historians have draped over his shoulders. Woodrow Wilson, another wartime president, permitted his attorney general to unleash a "Red Scare" that led to the imprisonment or deportation of hundreds of political dissidents. Harry Truman, who displayed a genuine commitment to the civil rights of black Americans, approved an "employee loyalty" program that paved the way for the excesses of McCarthyism.[144] More conservative presidents have devised "enemies lists" and have pressured the Justice Department to support tax credits for racially segregated private schools.[145] In truth, no twentieth-century president has displayed a consistent and unbending commitment to principles of civil rights and liberties. Political factors, often affected by foreign policy crises, have diminished the support given by even the most progressive presidents to constitutional principles.

Franklin D. Roosevelt was no exception to this pattern, although the balance sheet of his administration includes some positive accomplishments. After six years of neglect under the direction of Homer Cummings, the Justice Department turned its attention to such problems as police brutality against blacks and the repression of religious sects. Those who succeeded Cummings as attorney general during the Roosevelt administration brought a number of significant prosecutions under the civil rights statutes, which had gathered dust since their passage after the Civil War. However constrained by inadequate funding and the lack of judicial precedent to back up effective enforcement, the efforts of the CRS cannot be dismissed.

In the final analysis, however, the debits on this ledger outweigh the credits. The persecution of Harry Bridges and the Smith Act prosecutions evidenced both a capitulation to political pressures and a disregard for the dictates of due process. Politics and prejudice combined to bring about

144. *See* R. GOLDSTEIN, *supra* note 28, at 298–305.

145. The crimes of the Nixon administration and its assaults on civil liberties have been exhaustively documented. *See, e.g.*, R. BEN-VENISTE & G. FRAMPTON, JR., STONEWALL (1977); L. FRIEDMAN, UNITED STATES V. NIXON (1974); U.S. GOVERNMENT, WATERGATE SPECIAL PROSECUTION FORCE, FINAL REPORT (1975). For the adverse decision by the Supreme Court on the tax credit policy of the Reagan administration, see Bob Jones University v. United States, 103 S. Ct. 2017 (1983) (nonprofit private schools that employ racially discriminatory admission standards on the basis of religious doctrine do not qualify as tax-exempt organizations under the Internal Revenue Code, nor are contributions to such schools deductible as charitable contributions).

the wartime internment of Japanese Americans, the ugliest blot on the Roosevelt record. In addition, later administrations based assaults on civil liberties on programs initiated by Roosevelt; he authorized the Justice Department to engage in the warrantless wiretapping of suspected "subversives," and permitted the FBI to compile a "Security Index" of persons targeted for summary arrest and imprisonment during times of "national emergency."[146] The "Huston Plan" of the Nixon administration, which proposed "surreptitious entries" and other illegal practices as part of a domestic intelligence program,[147] had its origins in FBI activities that Roosevelt had approved.

This article has placed great emphasis on the role of the men who served under Roosevelt as attorney general in setting the "moral tone" for the Justice Department in its task of enforcing the laws intended to protect civil rights and liberties. The contrast between Homer Cummings and Frank Murphy, in particular, illustrates the importance of this fundamentally personal factor. But the men who direct the Justice Department are chosen by the President and serve at his pleasure. When politics and principles clash in significant cases, the resulting conflicts are most often resolved in the Oval Office of the White House. The "moral tone" set by Franklin D. Roosevelt in the crucial area of civil rights and liberties was, regrettably, one more of disdain than determination.

146. *See* R. GOLDSTEIN, *supra* note 28, at 298–306.
147. *Id.* at 485–86.