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THE COURT OF THE UNION
or *JULIUS CAESAR* REVISED

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Dean O'Meara's subpoena was greeted by honest protests from me that I had nothing to contribute to the "Great Debate" over the proposed constitutional amendments that are the subject of today's conference. The Dean, apparently of the belief that suffering might help this audience toward moral regeneration, suggested that I come anyway. I proceed then to prove my proposition and to test his hypothesis.

I have chosen as a title for this small effort: "Julius Caesar Revised." "Revised" because, unlike Mark Antony, I have been invited here not to bury Caesar but to praise him. Our Caesar, the Supreme Court, unlike Shakespeare's Julius, does not call for a funeral oration, because the warnings of lions in the streets — instead of under the throne — were timely heeded as well as sounded. Caesar was thus able to rally his friends to fend off the death strokes that the conspirators would have inflicted. The conspiratorial leaders were the members of the Council of State Governments. The daggers they proposed to use were the chief justices of the various high state courts, to whom they would entrust, under the resounding label of "The Court of the Union," the power to review judgments of the Supreme Court of the United States whenever that tribunal dared to inhibit the power of the states. It should be made clear that the chief justices of the states would be the instruments of the crime and not its perpetrators. You will recall that when these chief justices spoke through their collective voice, the Conference of Chief Justices, in condemnation of some of the transgressions of the Supreme Court, they asked only that the physician heal himself. They did not propose any organic changes, however little they liked the Court's work. Their report stated:[1]

> . . . when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos.

Even in the absence of Caesar's murder, however, it is possible to pose the issue raised by Brutus: whether our Caesar has been unduly ambitious and grasping of power. And implicit in this question is a second: if Caesar's ambitions do constitute a threat to the republic, is assassination the appropriate method for dealing with that threat?

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1 REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS, August, 1958.

The second question is easier to answer than the first. Whether Caesar be guilty or not, it would seem patently clear that his murder, as proposed, must be resisted. Its consequences could only be costly and destructive civil conflict resulting in the creation of a new Caesar in the place of the old one, a new Caesar not nearly so well-equipped to perform the task nor even so benevolent as Julius himself.

It is probably because of the obvious absurdity of the method chosen for limiting the Supreme Court's powers that there is today even more unanimity in opposition to the proposal than existed when Caesar was last attacked — not by the current self-styled patricians, but by the plebeians under the leadership of Franklin Delano Roosevelt. For then it was only the conservatives that came to the defense of the Court; the liberals were prepared to destroy it. Today, as Professor Charles Black has made clear, even if in rather patronizing tones, the conservatives are solidly lined up in defense of an institution many of whose decisions are repugnant to them.[2] The conservatives would seem to be concerned with the preservation of the institution; the liberals with the preservation of the benefits that the current Court has awarded them. For the latter the contents of Caesar's will appears to make the difference.

It would seem, therefore, that only those close to the lunatic fringe, the Birchers and the White Citizens Councils and others of their ilk, are prepared to support the purported court-of-the-union plan. Even in the Council of State Governments the proposed amendment was supported by a majority of only one vote. The few legislatures that have voted in support of this amendment are those normally concerned with their war on Robin Hood and similarly dangerous radicals. I do not mean to suggest that the Court is not in danger of being restrained. But I do think that the proposed method of destruction is not a very real threat unless this country is already closer to Gibbon's Rome than to Caesar's.

On the other hand, to say that the plan for a Court of the Union is an absurdity is not to answer the question whether Caesar suffers from an excess of ambitions. The Great Debate called for by the Chief Justice at the American Law Institute meeting last May has not really concerned itself with this problem. The Great Debate has taken the form of rhetorical forays. Each side argues that the proposed limitation on the powers of the Court would result in the removal of national power and the enhancement of the power of the states. The forces of Cassius and Brutus argue that this is a desirable result because the dispersal of government power is the only means of assuring that individual liberty will not be trodden under the tyrannous boots of socialist egalitarianism. Antony contends that the adoption of the proposal would be to return us to a fragmented confederation impotent to carry on the duties of government in the world of the twentieth century. Roosevelt's words about a "horse and buggy era" are this time used in defense of the Court. With all due respect, I submit that the essential question remains unanswered. The Talmud tells us that ambition destroys its possessor. Does the Court's behavior invite its own destruction?

2 BLACK, THE OCCASIONS OF JUSTICE 80 (1963).

In what ways is it charged that this Caesar seeks for power that does not belong to him? Some such assertion can be rejected as the charges of disappointed suitors. But there are others that cannot be so readily dismissed on the ground of the malice of claimant. Allow me to itemize a few of the latter together with some supporting testimony:

Item: The Court has unreasonably infringed on the authority committed by the Constitution to other branches of the Government.

Listen to one of the recent witnesses:

> The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.
>
> This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

This is not the charge of a Georgia legislator. These are the words of Mr. Justice Harlan, spoken as recently as last February 17, in *Wesberry* v. *Sanders*.[3]

Item: The Supreme Court has severely and unnecessarily limited the power of the states to enforce their criminal laws.

Thus one recent critic had this to say:

> The rights of the States to develop and enforce their own judicial procedures, consistent with the Fourteenth Amendment, have long been recognized as essential to the concept of a healthy federalism. Those rights are today attenuated if not obliterated in the name of a victory for the "struggle for personal liberty." But the Constitution comprehends another struggle of equal importance and places on [the Supreme Court] the burden of maintaining it — the struggle for law and order. I regret that the Court does not often recognize that each defeat in that struggle chips away inexorably at the base of that very personal liberty which it seeks to protect. One is reminded of the exclamation of Pyrrhus: "One more such victory . . . , and we are utterly undone."

This, I should tell you, is not the Conference of Chief Justices complaining about the abuses of federal habeas corpus practices; it is Mr. Justice Clark expressing his dissatisfaction in *Fay* v. *Noia*.[4]

Item: The Court has revived the evils of "substantive due process," the cardinal sin committed by the Hughes Court, and the one that almost brought about its destruction.

Here another expert witness has said:

> Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached

3 376 U.S. 1, at 48 (1964) (dissenting opinion).
4 372 U.S. 391, 446-47 (1963) (dissenting opinion).

> today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

This is the hand as well as the voice of Mr. Justice White in *Robinson* v. *California.*[5]

Item: The Court has usurped the powers of the national legislature in rewriting statutes to express its own policy rather than executing the decisions made by the branch of government charged with that responsibility.

Listen to two deponents whose right to speak to such an issue is not ordinarily challenged.

> What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty of discovery of all defects; in short, it has made the B&O the insurer of the condition of all premises and equipment, whether its own or others, upon which its employees may work. This is the wholly salutary principle of compensation for industrial injury incorporated by workmen's compensation statutes, but it is not the one created by the F.E.L.A., which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional common-law rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obliged to apply.

No, those are not the words of Mr. Justice Frankfurter, but those of his successor, Mr. Justice Goldberg, in *Shenker* v. *Baltimore & Ohio R. Co.*[6]

Listen to the same criticism in even more strident tones:

> The present case . . . will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature.

Here we have Mr. Justice Douglas in dissent from the opinion of Mr. Justice Black in *Arizona* v. *California.*[7]

Item: The Court writes or rewrites law for the purpose of conferring benefits on Negroes that it would not afford to others.

I offer here some testimony endorsed by Justices Harlan, Clark, and Stewart, in *N.A.A.C.P.* v. *Button:*[8]

> No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved. No worse setback could befall the great principles established by *Brown* v. *Board of Education,* 347 U.S. 483, than to give fair-minded persons reasons to think otherwise. With all respect, I believe that the striking

5 370 U.S. 660, 689 (1962) (dissenting opinion)
6 374 U.S. 1, 14-15 (1963) (dissenting opinion).
7 373 U.S. 546, at 628 (1963) (dissenting opinion).
8 371 U.S. 415, 448 (1963) (dissenting opinion).

> down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

Item: The Court disregards precedents at will without offering adequate reasons for change.

Mr. Justice Brennan puts his charge in short compass in *Pan American World Airways, Inc.*, v. *United States:*[9]

> The root error, as I see it, in the Court's decision is that it works an extraordinary and unwarranted departure from the settled principles by which the antitrust and regulatory regimes of law are accommodated to each other.

Item: The Court uses its judgments not only to resolve the case before it but to prepare advisory opinions or, what is worse, advisory opinions that do not advise.

The testimony here includes the following:

> The Court has done little more today than to supply new phrases — imprecise in scope and uncertain in meaning — for the habeas corpus vocabulary of District Court judges. And because they purport to establish mandatory requirements rather than guidelines, the tests elaborated in the Court's opinion run the serious risk of becoming talismanic phrases, the mechanistic invocation of which will alone determine whether or not a hearing is to be had.
>
> More fundamentally, the enunciation of an elaborate set of standards governing habeas corpus hearings is in no sense required, or even invited, in order to decide the case . . . and the many pages of the Court's opinion which set these standards forth cannot, therefore, be justified even in terms of the normal function of dictum. The reasons for the rule against advisory opinions which purport to decide questions not actually in issue are too well established to need repeating at this late date.

This is not the plea by academic followers of Herbert Wechsler for principled decisions nor even an argument by Wechsler's opponents for *ad hoc* resolutions. It is the view of Mr. Justice Stewart in *Townsend* v. *Sain.*[10]

Item: Not unrelated to the charge just specified is the proposition that the Court seeks out constitutional problems when it could very well rest judgment on less lofty grounds.

Here is the Chief Justice himself speaking in *Communist Party* v. *Subversive Activities Control Board:*[11]

> . . . I do not believe that strongly felt convictions on constitutional questions or a desire to shorten the course of this litigation justifies the Court in resolving any of the constitutional questions presented so long as the record makes manifest, as I think it does, the existence of non-constitutional questions upon which this phase of the proceedings can and should be adjudicated. . . . I do not think that the Court's action can be justified.

Item: The Court has unduly circumscribed the Congressional power of investigation.

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9 371 U.S. 296, 319 (1963) (dissenting opinion).
10 372 U.S. 293, 327 (1963) (dissenting opinion).
11 367 U.S. 1, 116 (1961).

The testimony I offer here is not that of the chairman of the House Un-American Affairs Committee nor that of the Birch Society. It derives from Mr. Justice White's opinion in *Gibson* v. *Florida Legislative Investigation Committee:*[12]

> The net effect of the Court's decision is, of course, to insulate from effective legislative inquiry and preventive legislation, the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence.

Item: I will close the list with the repeated charge that the Due Process Clause of the Fourteenth Amendment as applied by the Court consists only of the "evanescent standards" of each judge's notions of "natural law." The charge is most strongly supported by the opinions of Mr. Justice Black in *Adamson* v. *California* [13] and *Rochin* v. *California,*[14] which I commend to you.

I close the catalogue not because it is exhausted. These constitute but a small part of Brutus's indictment and an even smaller proportion of the witnesses prepared to testify to the Court's grasp for power. These witnesses are impressive, however, for they are not enemies of the Court but part of it. Moreover, their depositions may be garnered simply by thumbing the pages of the recent volumes of the United States Reports, which is exactly the way my partial catalogue was created.

Let me make clear that this testimony does not prove Caesar's guilt, but only demonstrates that these charges cannot be dismissed out of hand. The fact that they are endorsed by such irresponsible groups as would support the proposed constitutional amendment does not add to their validity. But neither does such support invalidate them.

What then of Antony's defenses of Caesar?

First is the proposition that our Caesar has done no more than perform the duties with which he is charged. We have it from no less eminent an authority than Paul Freund that the Court has not exceeded its functions and he defines them thus:[15]

> First of all, the Court has a responsibility to maintain the constitutional order, the distribution of public power and the limitations on that power. . . .
>
> A second great mission of the Court is to maintain a common market of continental extent against state barriers or state trade preferences. . . .

12 372 U.S. 539, 585 (1963) (dissenting opinion).
13 332 U.S. 46, 68 (1947) (dissenting opinion).
14 342 U.S. 165, 174 (1952) (concurring opinion).
15 Freund, *The Supreme Court Under Attack,* 25 U. PITT. L. REV. 1, 5-6 (1963).

> In the third place, there falls to the Court a vital role in the preservation of an open society, whose government is to remain both responsive and responsible. . . . Responsive government requires freedom of expression; responsible government demands fairness of representation.

And so, Professor Freund suggests, the Court has done no more than its duty and he predicts that we shall be grateful to it:[16]

> The future is not likely to bring a lessening of governmental intervention in our personal concerns. And as science advances into outer and inner space — the far reaches of the galaxy and the deep recesses of the mind — as physical controls become possible over our genetic and our psychic constitutions, we may have reason to be thankful that some limits are set by our legal constitution. We may have reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decision-making, and participation in our secular destiny, for our days and for the days we shall not see.

It is not clear to me that the second defense is really different from the first. Here we are met with the proposition that the Court, politically the least responsible branch of government, has proved itself to be morally the most responsible. In short, the Court has acted because the other branches of government state and national have failed to act. And a parade of horribles would not be imaginary that marched before us the abuses that the community has rained on the Negro; the evils of McCarthyism and the continued restrictions on freedom of thought committed by the national legislature; the refusal of the states and the nation to make it possible for the voices of the disenfranchised to be heard, either by preventing groups from voting, or by mechanisms for continued control of the legislature by the politically entrenched, including gerrymandering, and subordination of majority rule by the filibuster and committee control of Congress; the police tactics that violate the most treasured rights of the human personality, police tactics that we have all condemned when exercised by the Nazis and the Communists. This list, too, might be extended almost to infinity. There can be little doubt that the other branches of government have failed in meeting some of their essential obligations to provide constitutional government.

The third defense is that which I have labelled the defense of Caesar's will. It is put most frankly and tersely by Professor John Roche in this way:[17]

> As a participant in American society in 1963 — somewhat removed from the abstract world of democratic political theory — I am delighted when the Supreme Court takes action against "bad" policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, *inter alios*, that Supreme Court Justices could proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954,

16 *Id.* at 7.
17 Roche, *The Expatriation Cases: "Breathes There the Man, With Soul So Dead. . . ?"* 1963 SUPREME COURT REVIEW, 325, 326 n.4.

> I would unhesitatingly have supported the constitutional death-sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them.

There then are the pleadings. I do not pretend to a capacity to decide the case. It certainly isn't ripe for summary judgment on the pleadings. I am fearful only that if the case goes to issue in this manner, the result will be chaos whichever side prevails. For, like Judge Learned Hand, I am apprehensive that if nothing protects our democracy and freedom except the bulwarks that the Court can erect, we are doomed to failure. Thus, I would answer the question that purports to be mooted today, whether the court-of-the-union amendment should be promulgated, in the words of that great judge:[18]

> And so, to sum up, I believe that for by far the greater part of their work it is a condition upon the success of our system that the judges should be independent; and I do not believe that their independence should be impaired because of their constitutional function. But the price of this immunity, I insist, is that they should not have the last word in those basic conflicts of "right and wrong — between whose endless jar justice resides." You may ask then what will become of the fundamental principles of equity and fair play which our constitutions enshrine; and whether I seriously believe that unsupported they will serve merely as counsels of moderation. I do not think that anyone can say what will be left of those principles; I do not know whether they will serve only as counsels; but this much I think I do know — that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.

I find then that I have come neither to praise nor to bury Caesar. I should only remind those who would destroy Caesar of the self-destruction to which the noble Brutus was brought; nor can the Antonys among us — who would use Caesar for their own ends — rejoice at his ultimate fate. For Caesar himself, I should borrow the advice given Cromwell by Wolsey: "I charge thee, fling away ambition: By that sin fell the angels."

18 HAND, THE SPIRIT OF LIBERTY 164 (2d ed. 1953).