North Dakota Law Review

Volume 51 | Number 3 Article 2

1974

System Support Politics and the Congressional Court of Appeals

Albert P. Melone

SYSTEM SUPPORT POLITICS AND THE CONGRESSIONAL COURT OF APPEALS

ALBERT P. MELONE*

Constitutional historians will surely characterize the Warren Era as one in which the Supreme Court was subjected to severe attack. Court decisions concerning such matters as segregation, internal security, school prayer and criminal justice precipitated hostile reaction from a variety of groups. Public opinion studies indicated substantial citizen dissatisfaction with the Warren Court.[1] At least two modern Presidents, Eisenhower and Nixon, reacted to several landmark decisions with something less than enthusiastic support. A study on the relationship between Congress and the Court concluded that the widely held academic belief that Congress treats the Court with great reverence is far from true.[2]

While analysis of legislative roll-call votes has proven to be a useful tool, a more complete appraisal of Court-Congress relations entails an understanding of the subtle influences of the legal profession within the legislative system. The study of interest groups, particularly the American Bar Association, can be instructive as to the dynamics of inter-institutional conflict within the general framework of systems analysis.

I. LAWYERS, CONGRESS AND SUPPORT

Lawyers are among a relatively small group who are strategically located in the social structure to promote elite support and public respect for the Supreme Court. By virtue of its great social prestige and unusual access to centers of governmental power, a well organized bar association may inhibit and combart attacks upon the judicial system. Bar organizations and ethical codes admonish lawyers to promote favorable public images toward the judiciary.[3] Indeed, most lawyers studied in one midwestern state believe it is

* Asst. Prof. & Chairman, Dept. of Political Science, North Dakota State University; Ph.D., 1972, University of Iowa.

1. Beiser, *Lawyers Judge the Warren Court*, 7 L. & SOC'Y REV. 139 (1972); Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Change*, 2 L. & SOC'Y REV. 357, 370 (1968).

2. Schmidhauser, Berg & Melone, *The Impact of Judicial Decisions: New Dimensions in Supreme Court—Congressional Relations*, 1945-1968, 1971 WASH. U.L.Q. 209, 238 (1971).

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 9, E.C. 9-1 (1970).

their professional responsibility to promote positive public attitudes toward the judiciary.[4]

While lawyers may feel a professional responsibility to aid in the promotion of public respect for courts, the available evidence suggests that specific disapproval of Warren Court decisions has made explicit general support difficult to articulate. A bare majority of Rhode Island attorneys favorably assessed the Warren Court.[5] Studies indicate that in terms of roll-call behavior, lawyer-legislators are no more supportive of the Supreme Court than non-lawyer legislators.[6] Asking their attitude toward the Supreme Court in business and civil liberty matters, Alan F. Westin wrote in 1960 to thirty-five general counsels of the top one hundred industrial, merchandising, financial, utility and transportation enterprises. He reports that twenty-five responded and "their answers were overwhelmingly hostile and angry about the Court on both matters."[7] It should be emphasized that attorneys, as is the case for the lay public, may maintain general support for the legal system yet at the same time exhibit low specific support for certain Court decisions: both attitudes are not mutually exclusive.

Yet public speech is not the only way lawyers may promote public respect for and induce elite support of the judicial system. The "Congressional Court of Appeals" provides an important forum in which the organized bar may exert its influence.[8] Supreme Court rulings involving statutory and constitutional interpretations have sometimes precipitated hostile and retaliatory Congressional reaction. Legislation is introduced and passed which seeks to nullify a Court decision by rewriting a statute, removing appellate jurisdiction or changing the Constitution itself. Probably the most often used and certainly the least visible technique is statutory revision. The alteration of the Federal Fair Labor Standards Act section concerning the word "work" is probably the most celebrated example.[9] Yet there are cases, and no one really knows how many, where organized interest groups turn to the Congress, the "super-court", for relief from a Supreme Court decision with little if any notoriety. For

4. Wagner, *Avenues of Legal Profession Influnce on Public Attitudes Toward Courts*, (paper presented at the meeting of the Western Political Science Association, 1973) 1-2.

5. Beiser, *supra* note 1, at 139.

6. Brady, Schmidhauser & Berg, *House Lawyers and Support for the Supreme Court*, 35 J. POL. 724 (1973); Green, Schmidhauser & Berg, *Variations in Congressional Responses to the Warren and Burger Courts*, (paper presented at the meetings of the Western Political Science Association, 1974) 4, 11, 12, 16; Green, Schmidhauser, Berg & Brady, *Lawyers in Congress: A New Look at Some Old Assumptions*, 26 WEST. POL. Q. 440 (1973); Schmidhauser, Berg & Melone, *supra* note 2, at 238.

7. Westin, *Corporate Appeals to Congress for Relief from Supreme Court Rulings* (paper presented at the meeting of the American Political Science Association, 1962) 10.

8. Apparently it was Alan F. Westin who coined the phrases "Congressional Court of Appeals" and the "Super Court." See Westin, *supra* note 7. For an elaboration on Westin see J. SCHMIDHAUSER & L. BERG, THE SUPREME COURT AND CONGRESS 140-41 (1972).

9. For an excellent case study, see: R. Morgan, *The Portal-to-Portal Pay Case*, 50-82 (Pritchet & Westin ed. 1963).

example, the 89th Congress, importuned by big business groups and the American Bar Association, passed H.R. 11256, a bill relating to the priority of federal tax liens and levies. This bill, later to become Public Law 89-719, overruled two Supreme Court decisions and passed both the House and the Senate without a roll call division.[10] While more is known about the removal of appellate jurisdiction and constitutional amendments, little information is available on the role of interest groups as a sub-system in "Congressional Court of Appeals" activities. Even less is known about the one organized interest group which is ideally suited to aid the Court in its legislative struggles. The American Bar Association, with its favorable public and congressional reputation for neutrality and objectivity, its unusual access and its great influence, is ideally situated to applaud or condemn the Court.[11]

Scholars have attempted to classify types of anticourt legislation and while these classifications are useful the various typologies do not satisfy the needs of systems analysis with respect to interest group studies.[12] For our purposes, all attempts to alter negatively a Court ruling, Court structure or jurisdiction are deemed Court-curbing devices. Not all Court-curbing devices, however, have systemic ramifications. Congress may clarify its intent by rewriting a statute without removing authority from the Court to hear such cases. A constitutional amendment may overrule a decision without casting aspersions on the wisdom or integrity of the Court. In short, the Court's authority may remain intact while at the same time reversing decisions perceived to be deliterious. Such attempts are termed specific support controversies. Institutional support controversies, on the other hand, entail attempts to limit the jurisdiction or diminish the Court's authority to settle cases or controversies under Article III of the Constitution. Institutional support controversies have systemic ramifications because they fundamentally involve issues of boundary definition. While the Constitution provides for some boundary flexibility, each branch of government is assured of authority within its respective realms. Our classification, however, is complicated by the Article III grant to Congress to regulate the appellate jurisdiction of the Supreme Court. Yet to remove what it has given is to alter a once established and enlarged boundary. The re-

10. Schmidhauser, Berg & Melone, *supra* note 2, at 214.

11. While the A.B.A. has the reputation for objectivity and neutrality the facts are otherwise. See Melone, *Agency Politics: The American Bar Association, Business and Public Policy* (paper presented at the meetings of the Western Political Science Association, San Diego, Calif., 1973).

12. *See, e.g.*, J. SCHMIDHAUSER & L. BERG, *supra* note 8, at 144-46; Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926-27 (1965); Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PENN. L. REV. 157, 158 (1960); Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377, 382 (1965).

moval of appellate jurisdiction may be an acceptable constitutional practice, but it can create equilibrium problems for the judicial system. Without institutional support, the Court's relative independence is subject to serious impairment, thereby affecting predictable expectations so necessary for the maintenance of the judicial system.

Moreover, it is clear that the use of support controversies entails a systems model. This model permits conflict within stipulated definitions of equilibrium. If an interest group is concerned with preserving the system, and the legal profession most certainly is, it can still fail to offer the Court specific support in particular Court-Congress altercations. But if disagreements with the Court result in removal of institutional support then system maintenance becomes a serious issue. Fear of the latter result is summed up by Attorney General Rogers in a letter to the Senate Judiciary Committee considering legislation designed to limit the appellate jurisdiction of the Supreme Court. He wrote:

> This type of legislation threatens the independence of the judiciary. The natural consequences of such enactment is that the courts would operate under the constant apprehension that if they rendered unpopular decisions, jurisdiction would be further curtailed. Indeed, if the principle of this legislation should be approved, similar punitive enactments might be threatened against other Federal Courts.[13]

II. ABA SUPPORT FOR THE COURT

As the ostensible representative of the legal profession, the American Bar Association has the professional duty to support the legal system generally. But this task is complicated by cross-pressures emitting from, at least in part, the attorney-client relationship. Many ABA leaders have for clients some of the nation's wealthiest business enterprises and tend to come from the upper reaches of the stratified bar.[14] This evidence is supplemented by the knowledge that the ABA shares many public policy goals and even takes part in their formulation with the representatives of big business.[15] As already noted, many Warren Court decisions, particularly those concerning civil liberties, were greeted in some quarters, including business, with regret and hostility. The point being that in the face of clientele interests and general ideological proclivities the Association's professional responsibility to support the Court was difficult to meet. The attempt to reconcile general institutional support with specific disapproval of certain Court decisions engendered a

13. *Hearings on S. 2646 Before the Subcomm. to Investigate the Internal Security Act and Other Internal Security Laws of Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 573-74 (1958).
14. A. Melone, *Lawyers and the Republic: The American Bar Association and Public Policy* 39-106 (1972) (unpublished Ph.D. Dissertation, University of Iowa).
15. *Id.*

most interesting *modus operandi.*

Representing a high point in post-war ABA-Court relations, the ABA drafted in 1954 a proposed constitutional amendment which would have frozen the number of Supreme Court justices at nine, provided for mandatory retirement at age seventy-five and Congress would relinquish its control over the Court's appellate jurisdiction in cases involving matters of constitutional law.[16] This proposal passed in the Senate but died in the House. Walter F. Murphy attributes the Senate's willingness to give up its traditional political weapons against the Court as an expression of its approval of the Vinson Court's affirmation of congressional authority in internal security measures, and to the Court's denial of presidential authority in the *Youngstown Sheet and Tube v. Sawyer*[17] steel seizure case.[18]

The school desegregation case, *Brown v. Board of Education,*[19] and the federal pre-emptive case, *Pennsylvania v. Nelson,*[20] infuriated the segregationists and many ultra-security conscious Congressmen.[21] The *Brown* decision ended *de jure* segregation in public education with Warren's judicial pronouncement that separate but equal facilities are inherently unequal. The *Nelson* decision struck down concurrent state anti-sedition acts. The Court ruled that the federal government had implicitly pre-empted the sedition field with its many laws and that therefore the state laws could not be constitutionally enforced.[22] The Southern segregationists and those Northern Congressmen interested in internal security found a way to vent their Court induced anger with the introduction in 1955 of H.R. 3, "A Bill to Establish Rules of Interpretation Governing Questions of the Effect of Acts of Congress on State Laws." H.R. 3 sought to permit concurrent state jurisdiction with the federal government and thereby to effectively overrule the *Nelson* decision.

This bill provided in part:

> That no Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of any State laws on the same subject matter, unless such Act contains an express provision to that effect.[23]

What H. R. 3 sought, therefore, was a modification of the implied preemption doctrine so as to permit concurrent federal-state jurisdic-

16. *Hearings on S.J. Res.* 44 *Before a Subcomm. of the Senate Comm. on the Judiciary,* 83d Cong., 2d Sess. at 28-31 (1954).
17. 343 U.S. 579 (1952).
18. W. MURPHY, CONGRESS AND THE COURT 76-78 (1962).
19. Brown v. Board of Education, 347 U.S. 483 (1954).
20. Pennsylvania v. Nelson, 350 U.S. 497 (1956).
21. Murphy, *supra* note 18, at 86-91.
22. 350 U.S. at 504-05. This is the doctrine of federal supremacy.
23. *Hearings on H.R.* 3, *H.R.* 10335, *H.R.* 10334, *Before Subcomm. No.* 1 *of the House Comm. on the Judiciary,* 84th Cong., 2d Sess., sec. 9, pt. 2 at 97-98 (1956).

tion unless Congress provides otherwise.

As Professor Murphy vividly illustrates, the attack upon the Court was quite severe.[24] Yet H.R. 3 was not an institutional attack upon the Court. The bill sought to clarify legislative intent by overturning the implied pre-emption rule. It did not limit the Court's ability to hear and dispose of cases involving federal supremacy; it attempted to specify congressional intent.

The ABA supported passage of H.R. 3.[25] Yet, interestingly, the ABA's justification was not limited to the field of state sedition laws. The ABA standing committee on Jurisprudence and Law Reform argued that concurrent state laws in the field of commerce, labor, banking, and communication are subject to federal pre-emption under the *Nelson* doctrine.[26] It is little wonder that various big business organizations appeared to testify on behalf of H.R. 3 and labor groups appeared in opposition to passage.[27] While the ABA maintained that the legislation would eliminate uncertainties in the law, it must have been known that state legislatures tend to be stronger defenders of business than the modern Supreme Court.[28]

Perhaps the strongest attack on the Supreme Court in the post-war era was the introduction of the Jenner Bill in 1957. Senator William E. Jenner of Indiana, with the assistance of the staff of the Senate Internal Security subcommittee, drafted S. 2646, which would have removed appellate jurisdiction from the Supreme Court in five classes of cases. They were: contempt of Congress; Federal Loyalty-Security Program; state anti-subversive statutes; regulation of employment and subversive activities in schools; and admission to the practice of law in any state.[29] These five legislative classes were included in the bill as a direct response to Supreme Court decisions.[30]

The ABA's testimony on the Jenner bill reveals its general legislative strategy in Court related matters. It reserved the right to

---

24. Murphy, *supra* note 18, at 86-92.
25. 80 A.B.A. REP. 145 (1955).
26. *Id.* at 255-60.
27. Interest group alignment on H.R. 3, "to establish rules of interpretation governing questions of the effect of acts of Congress on state laws." *Hearings on H.R. 3 Before a Subcomm. of the House Comm. on the Judiciary*, 84th Cong., 2d Sess. (1956).

	For Passage	Against Passage
American Bar Association	X	
American Farm Bureau Federation	X	
Missouri State Chamber of Commerce	X	
National Association of Attorneys General	X	
National Association of Manufacturers	X	
National Lumber Manufacturers Association	X	
AFL-CIO		X
National Association for the Advancement of Colored People		X
Railway Labor Executives		X
United States Justice Department		X

28. 80 A.B.A. REP. 255-60.
29. Murphy, *supra* note 18, at 155-56 (1955).
30. The Supreme Court in Watkins v. United States, 354 U.S. 178 (1957) overruled a

disagree with any decision of the Supreme Court, but strongly opposed the removal of appellate jurisdiction. It argued that the bill was "contrary to the maintenance of the balance of powers set up in the Constitution between the executive, legislative and judicial branches of government."[31] Its position on the bill placed the ABA in disagreement with groups which strongly disapproved of various Supreme Court decisions.

TABLE 1

INTEREST GROUP ALIGNMENT ON S. 2646, "LIMITATION, APPELLATE JURISDICTION OF U.S. SUPREME COURT"[32]

	For Passage	Against Passage
AFL-CIO		X
American Bar Association		X
American Civil Liberties Union		X
Americans for Democratic Action		X
Emergency Civil Liberties Committee		X
National Association for the Advancement of Colored People		X
Religious Freedom Committee, Inc.		X
Republican Administration		X
Workers Defense League		X
Abe Lincoln National Republican Club	X	
American Coalition of Patriotic Societies, Inc.	X	
Anti-Communist League of America	X	
Congress of Freedom, Inc.	X	
Constitution Party of Virginia	X	
Defenders of American Constitution	X	
Federation for Constitutional Government	X	
Ladies of the GAR	X	
National Review	X	
States Rights Party of Louisiana	X	
Veterans of Foreign Wars	X	
Women's Patriotic Conference	X	

contempt of Congress conviction by sustaining Watkins' contention that a Congressional investigation of Communist infiltration into labor unions overstepped its legitimate legislative authorty. This decision accounts for Jenner's first class of cases to be removed from the Courts' appellate jurisdiction. The case of Yates v. United States, 354 U.S. 298 (1957) reversed the "Smith Act" convictions of several Communist leaders and precipitated the second class of cases to be removed from the Courts' jurisdiction—the federal loyalty-security program. The Pennsylvania v. Nelson, 350 U.S. 497 (1956), decision has already been mentioned as one which caused Congressional concern. Jenner's bill went beyond H.R. 3 by proposing to remove altogether appellate jurisdiction in all state anti-subversion statutes and regulation of employment cases. In Sweezy v. New Hampshire, 354 U.S. 234 (1957) the Court held that a New Hampshire Attorney General could not compel a university professor to answer a number of questions concerning his political beliefs. To counter this decision Jenner proposed his fourth limitation—the removal of jurisdiction from the Court in school subversive activities cases. Jenner's final proposal was the removal of Court jurisdiction in cases involving bar admission. The Supreme Court in two cases, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), and Konigsberg v. State Bar, 353 U.S. 252 (1957), overruled the respective state bar admission examiners for denying due process by their refusal to admit the petitioners to the practice of law because of past membership in the Communist Party.

31. *Hearings on S. 2646 Before Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. (1958).

32. *Hearing on S. 2646 Before the Subcomm. of the House Comm. on the Judiciary*, 85th

What has emerged is a legislative strategy in which the ABA may dissent from specific decisions and yet maintain general institutional support for the Supreme Court. It does not wish to attack the Supreme Court as an institution by such a direct means as the removal of appellate jurisdiction. Yet, quite legitimately and consistent with its professional duty, the Association has been willing to recommend overturning decisions deemed to be undesirable by the device of specific legislation, as was the case with H.R. 3. This ABA strategy is perfected in the testimony of ABA President, Ross L. Malone. Malone's 1959 testimony concerned a number of proposed anti-subversion bills designed to circumvent various Supreme Court decisions. He first states clearly that the ABA opposes any limitation upon the appellate jurisdiction of the Court. But then he recommends to the Congress that "whenever there are grounds to believe that weaknesses in internal security have been disclosed as a result of Court decisions, remedial legislation should be enacted by the Congress."[33] Malone then proceeds to recommend statutory reversals of the landmark Supreme Court decisions in[34] *Watkins v. United States*,[35] *Yates v. United States*,[36] *Bonetti v. Rodgers*,[37] *United States v. Witkovick*[38] and *Pennsylvania v. Nelson*.[39]

A constitutional amendment is another device for overturning a Supreme Court decision. The eleventh amendment is the classic example of an attempt to restrict the Court's appellate jurisdiction.[40] But not all proposed constitutional amendments are as direct nor is it always necessary to launch institutional attacks to accomplish the desired result. The ABA's position on the Bricker and reapportionment amendments are good examples.

Essentially an executive-curbing proposal, the Bricker amendment was also an attempt to limit the implications of several Court decisions. In 1953 Senator Bricker of Ohio and 63 co-sponsors (45 Republicans, 19 Democrats) introduced S.J. Res. 1.[41] This proposed

---

Cong., 2d Sess. (1958). Table 1 reveals that the A.B.A. found itself in agreement with left wing and in opposition to right wing citizen groups.

33. *Hearings on S. 3, S. 294, S. 527, S. 1299, S. 1300, S. 1301, S. 1302, S. 1303, S. 1304, S. 1305, S. 1646, H.R. 1992, H.R. 2369, Before Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1959).

34. *Id.*

35. 354 U.S. 178 (1957).

36. 354 U.S. 298 (1957).

37. 356 U.S. 691 (1958). The *Bonetti* decision overturned a deportation proceeding relating to aliens who became members of the Communist Party.

38. 353 U.S. 194 (1957). The *Witkovick* decision overturned an interpretation of immigration and nationality act which required the appellee to answer questions concerning his relationship with the Communist Party.

39. 350 U.S. 497 (1956).

40. The Supreme Court in the case of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), accepted jurisdition of a suit against a state by a citizen of another state. This decision provoked angry reactions by proponents of states' rights and the Congress moved quickly to limit the Courts' jurisdiction. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 375 (13th rev. ed. 1973).

41. CONG. Q. SERV., CONGRESS AND THE NATION 1945-1964, at 110 (1965).

constitutional amendment sought a limitation of presidential treaty-making and international agreement authority and sought to curb what was viewed by some as the dangerous dictum in *Missouri v. Holland.*[42]

If this proposed amendment had become part of the Constitution, needless to say, presidential authority in the field of foreign affairs would have become severely limited. Former ABA president Frank E. Holman, speaking for himself but expressing the view of many of the proponents of the Bricker amendment, believed that:

> some 200 treaties proposed or in preparation by the United Nations covering a wide range of political, social and economic matters contained provisions at variance with federal or state law.[43]

He also said that the United Nations Charter is a very dangerous treaty in that the vast array of proposed agreements posed a future threat when, "a sufficiently internationally and socialistically minded President and Senate will be ready to sponsor and ratify" them.[44]

The official ABA position revealed concern over the implications of several Supreme Court decisions. Presumably passage of the Bricker amendment would clarify the proper role of the President and of Congress in foreign affairs. George A. Finch, testifying before the Senate Judiciary Committee, stated the official ABA position:

> The adoption of the proposed amendment would remove the doubt expressed by Mr. Justice Holmes in *Missouri v. Holland* that treaties must be made in pursuance of the Constitution, because Article VI now reads that treaties need only be made under the authority of the United States, which may mean no more than "the formal acts prescribed to make the convention." Namely, that if we conclude any treaty on any subject, and the Senate agrees to it by a two-thirds vote, then that is a treaty under the authority of the United States without reference to any other provisions of the Constitution. That is what Mr. Justice Holmes means, and it cannot mean anything else.
>
> The proposed amendment will prevent further development of the dicta of Mr. Justice Sutherland in the Curtiss-Wright case (1936, 299 U.S. 304) that the treaty power does not rest in grant in the Constitution—we take it another step—but is inherent in the sovereignty of the Nation, a view

42. 252 U.S. 416 (1920). The Bricker amendment contained four basic proposals: (1) A provision of a treaty which denies or abridges any right enumerated in the constitution would have no force or effect; (2) No treaty would be construed so as to permit any foreign power or international organization to supervise, control or adjudicate rights of citizens of the United States; (3) A treaty could become effective as internal law in the United States only after enactment of appropriate Congressional legislation; and (4) All executive agreements between the President and any international organization, foreign power or official would be subject to limitations imposed on the treaty-making power. CONG. Q. SERV., *supra* note 41, at 110.

43. CONG. Q. SERV., *supra* note 41, at 111.

44. *Id.*

> which found support in the minority opinions of the Supreme Court in the recent steel-seizure case (*Youngstown Co. v. Sawyer* (1952, 343 U.S. 579)).[45]

Another, and perhaps a less high-minded explanation for the ABA's policy position on the Bricker amendment might be found in the statement provided by the United States Chamber of Commerce. The Chamber's position is cited because both the ABA and the Chamber have participated in low profile big business summit conferences which have discussed, as part of their proceedings, legislative proposals favorable to big business.[46] Moreover, between 1953 and 1968 the ABA and the Chamber made joint appearances before congressional committees on at least twenty-six different occasions and agreed seventy-seven per cent of the time.[47] Interestingly, the Chamber's representative before Congress is none other than the ABA's own, Charles S. Rhyne. Rhyne was a member of the ABA's House of Delegates from 1944-1954, a chairman of various ABA committees,[48] and later president of the organization during the 1957-1958 term.[49] Rhyne, testifying on behalf of the Chamber said:

> Businessmen of the Nation are greatly concerned at the flood of agreements vitally affecting domestic rights and property which is pouring out of the United Nations and its specialized agencies in an ever-increasing stream. They know it is virtually impossible to cover all of the hundreds of conferences held each year all over the world and there to effectively protect their interests. They believe that the best answer to these problems is in adoption of a constitutional amendment which prevents treaties from overriding the Constitution and which provides that treaties will not become domestic law—to either create or destroy rights and property interests—until and unless and only to the extent that the Congress incorporates them into domestic law. The policy here recommended will leave the treaty making power in full force and effect as to all matters genuinely within the sphere of international agreements. This policy will not affect the United Nations collective-security efforts which everyone applauds. But it will stop the unwitting, or intentional change or destruction of domestic rights in the great outpouring of new proposed treaties, by virtue of our Constitution's "supremacy" clause. A constitutional amendment will achieve an immediately effective result by ending all the uncertainties in this field created by differing views, unclear court decisions, and absence of authoritative court decisions on important questions. Only in this way will our system of free enterprise, the keystone which makes ours the greatest na-

45. *Hearings on S.J. Res.* 1 *and S.J. Res.* 43, *Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. (1953).
46. D. HALL, COOPERATIVE LOBBYING: THE POWER OF PRESSURE 32-34, 88-212 (1969).
47. A. Melone, *supra* note 14 at 313.
48. *Hearings*, *supra* note 45, at 571.
49. 83 A.B.A. REP. 1 (1958).

> tion on earth, be adequately protected in a world where peace or war depends upon our system keeping us the strongest nation on earth.[50]

I suspect that most view the Bricker amendment solely in terms of an attempt to limit executive powers. As we have seen however, it also had at least an ancillary potential benefit for business interests. The ABA's rather esoteric constitutional argument and the Chamber's clearly stated business enterprise argument combine to produce, at the very least, a partial explanation for why some interest groups sought the adoption of the Bricker amendment. The ABA's nervous reading of various Supreme Court decisions expresses the fear that international treaties and agreements may operate as internal law to the detriment of existing domestic law. The Chamber takes the ABA argument to a lower level of abstraction by stating that some international treaties and agreements may abrogate domestic rights and property. Through the medium of an executive-curbing amendment, the ABA hoped to correct what it believed to be the "dangerous dicta" of several Court decisions. The Court's power to interpret the Constitution was not assaulted; yet a remedy consistent with the bar's duty to support the judiciary was offered.

Another example of specific disapproval while rendering institutional support for the system is the Association's position on a constitutional amendment which would have reversed the Court's decision in *Reynolds v. Sims*.[51]

The 1962 Supreme Court decision of *Baker v. Carr*[52] held that the denial of equal protection due to malapportionment of state legislative districts presents a justiciable constitutional cause of action upon which the appellants were entitled to a trial and a decision. A series of implementation decisions followed, of which the 1964 case of *Reynolds v. Sims*[53] was probably the most controversial. This decision held that both houses of a state legislature must be apportioned according to population.[54] In 1965 the ABA endorsed and supported a proposed constitutional amendment, S.J. Res. 2, to the effect that one house of a bicameral legislature might be apportioned according to factors other than population.[55] These factors could include geography, county and city lines, economic conditions and history.

---

50. *Hearings, supra* note 45, at 590.
51. 377 U.S. 533 (1964).
52. Baker v. Carr, 369 U.S. 186, 227 (1962) (Frankfurter, J., dissenting).
53. 377 U.S. 533 (1964).
54. *Id.* at 576.
55. *Hearings on S.J. Res.* 2, 37, 38, 44, *Before the Subcomm. on Const. Amend. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., at 357 (1965) [hereinafter *Const. Hearings*].

From one perspective the ABA recommendation may be viewed as an attack upon the Supreme Court. The Court made a decision and the ABA sought to reverse it. From an economic and ideological perspective, it is not difficult, at least in part, to ascertain ABA motives. As would be expected various farm groups opposed the *Reynolds* decision for it was believed that a precipitous change in the rural dominance of state legislatures would occur.[56] Interestingly enough, big business was also present in the fight for the amendment. It is probable that rural dominated legislatures are more likely to oppose taxation and labor proposals detrimental to business interests. Once again the ABA supported a Court-curbing proposal which also benefited business.

While its position on the reapportionment issue may be construed as an attack upon the Court, the ABA exercised great restraint in its approach to the problem. In 1963 the influential Council of State Governments proposed a constitutional amendment to remove apportionment controversies from the jurisdiction of the federal courts. The ABA standing committee on Jurisprudence and Law Reform endorsed the Council's proposal and asked the Association's House of Delegates in its 1963 Annual meeting to approve the recommendation. The House of Delegates not only failed to accept the Committee's recommendation but also voted to disapprove and oppose the Council of State Governments' proposal.[57]

The argument in favor of the Council's proposal was summed up by Louis C. Wyman, Chairman of the ABA Committee on Jurisprudence and Law Reform. He said that the

> effect of *Baker* was to give nine men the authority to run the legislatures of the 50 states . . . and the Committee believes there are some powers that the states have reserved to them under the Tenth Amendment . . . for citizens who believe they do not have the proper representation in their own legislatures the proper place to go is to their state supreme courts.[58]

He also argued that the committee's resolution would tend to draw a line which needs to be drawn against an all-powerful, all-pervasive centralized national government.[59] But those voices expressing interest in supporting the Court won the day; a view succinctly presented by Philadelphia attorney David Berger. He opposed the Council of State Governments' proposal

> because the question now is the independence of the federal judiciary. Mr. Berger stressed that to say an issue which is

56. Actually the impact of reapportionment was overestimated at the time. *See, e.g.*, Brady & Edmonds, *One Man, One Vote—So What?* TRANS-ACTION 41-46, March, 1967.
57. 88 A.B.A. REP. 413-18 (1963).
58. *Id.* at 417.
59. *Id.* at 416.

> essentially a constitutional question is beyond the jurisdiction of the federal courts and the highest court of our land is a sheer anomaly.[60]

By 1965 dissatisfaction with the development of the doctrine in *Baker* moved the ABA to support S.J. Res. 2. Yet its tactic was consistent with the general strategy of rendering the Court general institutional support. Representing the Association before Congress, Earl F. Morris carefully avoided a direct attack upon the Court. At one point Mr. Morris emphasized the desire not to attack the Court by stating that the ABA has chosen to argue its case "not from the vantage point of whether the Supreme Court was right or wrong in its application of the Fourteenth Amendment."[61] He argued that regardless of whether one could agree or not with the Court's application of the fourteenth amendment, corrective action should take place for the protection of states' rights and representative government.[62]

The Association's position may be summarized in the following fashion. First, the reapportionment decisions may or may not have been proper constitutional interpretations. Second, and related to the first point, the Court under the Constitution possesses legitimate authority to review reapportionment cases. But finally, wisdom dictates that the Constitution be amended to grant representation on some basis other than population. Importantly, the judiciary would retain its general systemic function while rectifying perceived inimical results stemming from a series of Court decisions.

As can be seen from an inspection of Table 3, the ABA position on the Bricker and reapportionment amendments is consistent with business and right wing citizen groups and in disagreement with labor and left wing citizen groups. Obviously, statutory reversal and removal of appellate jurisdiction are not the only methods to appeal Court decisions. Interest groups placed in a weak position by Court decisions may also utilize the constitutional amendment as an appeal device.

TABLE 2

GROUPS FOR AND AGAINST COURT-CURBING AMENDMENTS, BRICKER AND DIRKSEN AMENDMENTS

(BRICKER AMENDMENT, S.J. RES. 1)[63]

	For Passage	Against Passage
American Bar Association	X	
American Legion	X	
American Medical Association	X	

60. *Id.*
61. *Const. Hearings, supra* note 55, at 360.
62. *Id.* at 358.
63. *Hearings on S.J. Res.* 1 *Before the Subcomm. of the Senate Comm. on the Judiciary,* 83d Cong., 1st Sess. (1953).

Christian Science Committee on Publication	X	
Conference of State Manufacturers Association	X	
Daughters of the American Revolution	X	
Military Order of the World Wars	X	
National Association of Attorneys General	X	
National Association of Manufacturers	X	
National Defense League of America	X	
National Economic Council, Inc.	X	
National Society of New England Women	X	
National Sojourners, Inc.	X	
Southern States Industrial Council	X	
Steuben Society of America	X	
United States Chamber of Commerce	X	
Veterans of Foreign Wars	X	
Wheel of Progress	X	
AFL-CIO		X
Air Transport Association		X
American Association for the Advancement of the United Nations		X
International Association of Machinists		X
American Association of University Women		X
American Civil Liberties Union		X
Americans for Democratic Action		X
American Jewish Congress		X
Association of the Bar of the City of New York		X
Collegiate Council for United Nations		X
Friends Committee		X
General Board of Christian Social Concern, Methodist Church		X
National-Defamation League		X
National Foreign Trade Council		X
Republican Administration		X
Students for Democratic Action		X
United World Federalists		X
Women's International League for Peace and Freedom		X
Young Women's Christian Association of the U.S.A.		X

(DIRKSEN REAPPORTIONMENT AMENDMENT, S.J. RES. 2)[64]

American Bar Association	X
American Farm Bureau Federation	X
Legislature Representation	X
Liberty Lobby	X
National Association of Manufacturers	X
National Association of Real Estate Boards	X
National Cotton Council of America	X
National Council on Farmers Cooperatives	X
National Farmers Union	X
National Livestock Feeders Association	X
National Milk Producers Association	X

64. *Hearings on S.J. Res.* 2 *Before the Subcomm. of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965).

United States Chamber of Commerce	X	
AFL-CIO		X
Alliance for Social, Economic and Political Progress		X
American Civil Liberties Union		X
American Ethical Union		X
American Jewish Congress		X
American Veterans Committee		X
Americans for Democratic Action		X
International Ladies Garment Workers Union		X

III. CONCLUSIONS

The law plays a special role in the political system. Although it is sometimes used by interest groups to achieve special ends, the law is fundamentally a device for system maintenance. What is believed to be legitimate political argument and dissent is confined within the boundaries laid down by law. The American Bar Association has taken it upon itself to aid in the boundary defining process. The Association's ruling elite tends to be populated by the upper strata of the legal profession which generally has been supportive of the status quo and as such has a special interest in maintaining the system. The Warren Court, however, placed difficult demands upon the Association. Many Warren Court decisions were greeted with regret. The Association was faced with the difficult task of reconciling specific disapproval of Court decisions with general institutional support.

The ABA has rendered the Court institutional support by its opposition to proposals which would remove appellate jurisdiction and by failing to join attempts to diminish its authority. Yet, it has been willing to recommend various ways to circumvent Court decisions. The statutory reversal technique appears to be the most favored device and it tends to possess the added virtue of low public visibility. The constitutional amendment has also been recommended but only as a remedial measure and not in diminution of the Court's constitutional authority.

The ABA stategy is consistent with both congressional and public attitudes. In the post-War period Congress has supported reversal attempts more often than direct institutional attacks upon the Court. It should be noted that the distinction between types of Court-curbing actions is more meaningful for Northern Democrats in the House than it is for those Congressmen who commonly comprise the Conservative Coalition. The data for the Senate reveals a similar pattern.[65] To the extent that the ABA has limited its Court-curbing activities to statutory reversals and supported the Court against institutional attacks, it is consistent with known public atti-

65. Schmidhauser, Berg & Melone, *supra* note 2, at 215.

tudes. Murphy and Tanenhaus have found that specific support ("the extent to which people praise or criticize particular decisions and the performance of individual justices") is low among the United States population and that those who criticize specific decisions of the Court outnumber those who praise its specific decisions.[66] Conversely, diffuse support ("the degree to which people think a court carries out its overall responsibilities in an impartial and competent fashion") is relatively high and many people who are critical of the Court's specific decisions nonetheless support the institution itself.[67] Apparently then, the general ABA strategy is consistent with both elite (congressional) and mass public opinion.

A further finding emerges from the text. Often civil liberty and constitutional amendment issues involve more than is at first discernible. The ABA's support of H.R. 3, for example, goes beyond the desire to preserve the state right to punish seditious behavior. The ABA was also concerned with the implications of the *Nelson* decision in the field of commerce, labor, banking, and communication. A nationally-minded Supreme Court which, incidentally, might also be anti-business, may strike down state legislation in favor of national legislation unfavorable to business interests. Again, the Association's position on both the Bricker and reapportionment amendments may involve more then esoteric constitutional argument. Econmic interests were at stake in both proposals. It might seem that I have belabored this point. Yet it is important when analyzing ABA behavior. The agency relationship between the ABA and big business is the nexus between ideological predispositions and the Association's Court related behavior.[68] Importantly, the Association was pulled by its professional responsibility to support the Court. General institutional support was made difficult because: (a) many ABA leaders did not agree with various Court decisions, and (b) many Court decisions were detrimental to big business interests. The Association needed a method to render the Court institutional support while simultaneously upsetting the results of specific decisions deemed unwise. The method settled upon is the rather sophisticated device of recommending statutory reversals and related tactics without doing severe damage to the Court's authority. Effecting a desirable ideological and vested interest result, the Association has also been able to fulfill its institutional support function.

The ABA and bar groups generally have a unique problem. Unlike ordinary interest groups it is constrained by a professional responsibility to support the judicial machinery. Yet lawyers have

66. Murphy & Tanenhaus, *supra* note 11, at 371.
67. *Id.* at 373-74.
68. Melone, *supra* note 11, at 10-12.

passions, desires and immediate interests to nourish and protect. The reconciliation of specific disapproval with institutional support teaches us much about the art of system maintenance.