

# FRED VINSON AND THE CHIEF JUSTICESHIP\*

JOHN P. FRANK†

**A**FFABLE, KINDLY FRED VINSON was a one-man multi-purpose project. Memory recalls few Americans with as many careers and as many successes. He was an influential Congressman, a lower court judge, head of a great lending agency, a Cabinet member, a friend and adviser of Presidents. Perhaps the pinnacle of his career, if not in prestige then in accomplishment, was his World War II service as head of the Offices of Economic Stabilization and of War Mobilization and Reconversion. Many an eye-witness account of those years pays tribute to his shrewdness, his judgment, and his tact.

He made, indeed, a more outstanding personal success in some of these other roles than he did as Chief Justice of the United States. On the Supreme Court, his record was more that of a team man than an outstanding individual figure. To borrow a phrase from the baseball he loved so well, his individual attainments as a jurist do not put him in the same league with such lofty eminents as Marshall, Taney, Waite, Taft, Hughes, or Stone. His place in judicial history rather will be based upon his role as a member of a group which together turned the course of American jurisprudence, and will gain its color from his engaging personal qualities.

This essay will record impressions of his individual accomplishments, his views, and his part in the general movements of the seven years of his service as thirteenth Chief Justice of the United States.

## I. THE OPINIONS AND THEIR QUALITIES

Chief Justice Vinson used his power of assigning opinions generously. Indeed, he shared the plums with so lavish a hand that sometimes a whole year might go by without his having reserved anything of real significance

\* This article is the seventh in an annual series on the work of the Supreme Court in the preceding term. The death of Chief Justice Vinson, whose service on the Bench began with the first term reported in this series, makes it desirable to broaden the scope of this year's article to review some aspects of his Supreme Court career. In order at the same time to continue the annual series, wherever possible examples have been taken from the 1952 term decisions, and the tabular data which have previously been included in these articles are incorporated here. The term itself was substantively light, the postponement of the school segregation cases (discussed in the text above) putting off the major business of the year; hence concentration of this article on the late Chief Justice is not at the expense of much significant detail on other matters. The earlier articles are at 15, 16, 17, 18 *Univ. Chi. L. Rev.* 1 (1947-50); 19 *ibid.* 165 (1951); 20 *ibid.* 1 (1951).

† Associate Professor of Law, Yale University.

for himself. As a result, the number of Vinson majority opinions of any profound public consequence can be counted on one hand. In the field of freedom of speech, *Douss* and *Dennis*; in the field of race relations, the Restrictive Covenant Cases and *Sweatt v. Painter*; these and the *Lewis* Case are about it. To these must be added the steel seizure dissent and, arguably, one or two other majority opinions.<sup>1</sup> The number is sufficiently manageable to permit each to be mentioned here, although each has already been reviewed so extensively that comment can be brief.

a) *Race relations*.—*Shelley v. Kraemer*, 334 U.S. 1 (1948) (The Restrictive Covenant Cases), and *Sweatt v. Painter*, 339 U.S. 629 (1950). The first held racial restrictive covenants unenforceable, in equity, and the second invalidated segregation at the University of Texas law school in terms broad enough to reach graduate education generally. These are first class opinions, and the Restrictive Covenant Cases, particularly, involved great complexities; of course each contains points which someone else might have handled differently, but this only highlights the attention to considerations of strategy which may account for the manner of execution of details.<sup>2</sup> The Restrictive Covenant Cases identify the problem fairly, analyze the authorities thoughtfully, get into the fundamental reasons for the decision, and are presented in good, clear, lawyer's prose. The Texas law school case does not go nearly as far as many, including this writer, hoped it would,<sup>3</sup> but the analysis of the factors that made the law school which was open to Negroes "substantially unequal" gets to the fundamentals in a remarkably concise way.<sup>4</sup>

<sup>1</sup> Each of the cases mentioned in this paragraph is fully identified in the immediately subsequent paragraphs. One other noteworthy opinion in the majority is *Oyama v. California*, 332 U.S. 633 (1948), invalidating at least some restrictions on land sales in California to persons of Japanese descent or Japanese aliens. Other salient, though less significant, opinions are discussed in the text, *infra*.

<sup>2</sup> For example, *Shelley v. Kraemer* "distinguished" rather than overruled *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926), despite the fact that at the page cited, the Court in *Corrigan* brushed aside the identical argument accepted in *Shelley v. Kraemer*; *Corrigan* had subsequently been accepted as a ruling on this point, and certiorari had been denied. See, e.g., *Mays v. Burgess*, 147 F. 2d 869 (App. D.C., 1945), cert. den. 325 U.S. 868, 896 (1945). No one can know whether the Chief Justice accepted the distinction or merely thought it tactful to make one.

<sup>3</sup> See Brief of Law Teachers in the *Sweatt* case, 34 Minn. L. Rev. 289 (1950), which urged invalidation of the whole system of segregation.

<sup>4</sup> The opinion reduced the differences between the two schools to two fact-filled paragraphs, concluding: "The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education

b) *Free speech*.—*American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), and *Dennis v. United States*, 341 U.S. 494 (1951). The first upheld the non-Communist oath requirement of the Taft-Hartley Act,<sup>5</sup> and the second held valid the Smith Act.<sup>6</sup> These two are not equal in their execution. *Dennis*, assuming its point of view, is a good opinion; in *Douds*, Vinson's usual clarity is wanting.

Contemporary society has been ingenious in adding to the classic fine and imprisonment new ways of preventing objectionable political conduct and opinion. One of those novel devices was utilized in the Taft-Hartley Act, which conditions access of unions to the National Labor Relations Board upon the filing of oaths by union officers that they are not affiliated with the Communist Party and that they neither "believe in" nor are members of any organization "that believes in" the overthrow of the government.

Three members of the Court, for whom the Chief Justice spoke, upheld the Act in both its membership and its belief provisions. Justice Black dissented altogether, and Justices Frankfurter and Jackson dissented as to the beliefs. A central problem in the case is the extent to which an economic sanction—here the loss of a union position—should be subject to the same standards of appraisal under the First Amendment as would a more conventional criminal sanction. To put it another way, how relevant is the First Amendment to a statute imposing a "merely" economic sanction?

The Chief Justice posed this great question more clearly than he answered it. His thought process is seen by putting text excerpts in parallel columns, with emphasis added:

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offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School." 339 U.S. 629, 634 (1950).

The Restrictive Covenant Cases were so widely reviewed that it would be invidious to select particular articles for citation. Suffice it to say that a review of 25 of them reveals an almost total absence of criticism of Vinson's technical handling of the case. For laudatory comments see Ming, *Racial Restrictions and the Fourteenth Amendment*, 16 *Univ. Chi. L. Rev.* 203, 214 (1949); and (with a little criticism interspersed), Scanlan, *Racial Restrictions in Real Estate*, 24 *Notre Dame Lawyer* 157 (1948). Typical law review response to *Sweatt v. Painter* (none of which was critical of Vinson's execution of the case) was that he had, with cautious political judgment, gone about as far as he could in the particular case and at the same time had undermined segregation practices for further assaults. See case notes, 36 *Va. L. Rev.* 797, 800 (1950), 30 *B.U. L. Rev.* 565, 568 (1950).

<sup>5</sup> 54 Stat. 670-71 (1940), 18 U.S.C.A. § 2385 (1951). Justices Douglas, Clark, and Minton did not participate in the *American Communications* case.

<sup>6</sup> 61 Stat. 136 (1947), 29 U.S.C.A. § 151 et seq. (Supp., 1951).

[After analogizing to valid conditions on holding bank directorships] *If no more were involved than possible loss of position, the foregoing would dispose of the case. But . . . Congress has undeniably discouraged the lawful expression of political freedoms as well. . . . Men who hold union offices often have little choice but to renounce Communism or give up their offices. . . . To the grave and difficult problem thus presented we must now turn our attention.* Pp. 392-93.

[The Act] leaves those few who are affected free to maintain their affiliations and beliefs *subject only to possible loss of positions* which Congress has concluded are being abused. . . . P. 404.

[T]o attack the straw man of "thought control" is to ignore the fact that *the sole effect of the statute* upon one who believes in overthrow of the Government . . . is *that he may be forced to relinquish his position* as a union leader. P. 408.

In other words, by the Chief Justice's own statement of the problem, the issue is whether an act is valid in which *more* "than possible loss of position is involved," and the answer is that the Act is valid because *only* a possible loss of position is involved.<sup>7</sup>

The opinion discusses more fully than it illuminates the "clear and present danger" test, which, as treated here, reduces to a judicial duty of "weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct . . . and that Communists . . . pose continuing threats to that public interest when in positions of union leadership."<sup>8</sup> In making this balance, the opinion scrupulously goes no further than the immediate situation demanded, and it has subsequently been interpreted very narrowly to mean no more than that the government could condition access to the benefits of its own administrative agency, the Labor Board, upon making the required showing.<sup>9</sup> How far the government may go in imposing such conditions is unclear from *Doufs*, which declares only that there are limits; once that practice is begun the scope of these limits is necessarily so obscured that perhaps no more could be expected.

In other words, Chief Justice Vinson decided the *Doufs* case without attempting to create an intellectual standard for the future. In *Dennis* he attempted to supply that intellectual standard. Here was no question of a novel sanction: the issue was whether the defendant Communist leaders

<sup>7</sup> Cf. Judge Learned Hand on Justice Cardozo: "He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table. . . ." 48 Yale L. J. 379, 380 (1939).

<sup>8</sup> 339 U.S. 382, 400 (1950).

<sup>9</sup> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

could be imprisoned for allegedly conspiring to overthrow the government at some undefined but distant future time.

In *Dennis*, Vinson struggled to bring his balancing approach, seen in the *Doufs* quote above, into the Holmes-Brandeis tradition. This attempt to bring old prophets to the support of the new faith stands at about the margin between technical success and failure. Few of the commentators are persuaded that there is really much resemblance between the Holmes-Brandeis position (which was in fact brilliantly expounded by Justice Douglas in his *Dennis* dissent) and the Vinson doctrine.<sup>10</sup> Indeed, Vinson himself did not long adhere to the masquerade; their doctrines are finally put aside with the words, "Justices Holmes and Brandeis were . . . not confronted with any situation comparable to the instant one."<sup>11</sup> We thus get a transformed clear and present danger rule which, as phrased by Judge Learned Hand and adopted by Vinson, makes the issue "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>12</sup> The balancing of interests thus contemplated is to be rested on judicial notice and a presumption of legislative validity; it does not require facts in the record to establish just what the "gravity of the evil" is.

*Dennis* clearly is the founding ground of an almost awesomely significant new era in American jurisprudence; it is in terms of practical consequences probably the most important opinion of Chief Justice Vinson.<sup>13</sup>

<sup>10</sup> The commentators, whether in favor of the *Dennis* result or critical of it, all agree that Vinson very materially has changed the clear and present danger test; as Antieau puts it, he substitutes a "perhaps and probable" test, *Dennis v. United States*, 5 Vand. L. Rev. 141 (1952). Notes which recognize the Vinson opinion as a change in the law are: 40 Geo. L. J. 304 (1952); 50 Mich. 451 (1952); 36 Minn. 96 (1951); 31 B. U. L. Rev. 544 (1951). For analysis of the "transmutation of the clear and present danger test" in the various *Dennis* opinions, see Rostow, *Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193, 217 et seq. (1952).

<sup>11</sup> 341 U.S. 494, 510 (1951).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Dennis* was the only case cited to sustain the proposition that the First Amendment does not protect an alien against deportation for having been a member of the Communist Party. *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952). See Comment 20 Univ. Chi. L. Rev. 547, 553 (1953). And although not specifically referred to it has been the key decision in a number of recent cases limiting the protection of the Amendment to "subversives": e.g., *Garner v. Los Angeles Board*, 341 U.S. 716 (1951) (upholding validity of non-Communist affidavit for municipal employees); *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding constitutionality of New York's Feinberg Law, making ineligible for public employment all members of organizations which "advocate the overthrow of the government. . .").

The decision itself, upholding the validity of the Smith Act, was the signal for other prosecutions under the Act throughout the country. The Supreme Court at the 1952 Term refused to review the convictions obtained in the first of these to come before them, *Frankfeld v. U.S.*, 344 U.S. 922 (1953), Justices Black and Douglas dissenting. The validity of similar state laws was left in doubt, the Supreme Court vacating the judgment of a district court which had upheld the Michigan Communist Control Bill, ordering postponement until the state courts had construed it. *Albertson v. Millard*, 345 U.S. 242 (1953), Justices Black and Douglas dissenting.

c) *Industrial crisis*.—The two most colorful Vinson opinions, particularly in terms of the momentary excitement from which they emerged, involved government seizure of private property to control industrial disputes. One was *United Mine Workers v. United States*, 330 U.S. 258 (1947) (the *Lewis* case), arising from the government's operation of the coal mines; the other was the recent steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

There is nothing fresh to be said on either of these well worn topics, but a word may be offered on the two Vinson opinions from the standpoint of style and execution. What the two cases have most in common is that each involves a situation in which any conscientious and patriotic judge *might* feel the situation so necessitous that he would plunge toward a result regardless of what the prior law may have been.

*United Mine Workers v. United States*, in particular, is one of those block-buster opinions which smashes its way to its result. To "get Lewis" and to break the coal strike it was necessary to hold either (a) that the Norris-LaGuardia Act was inapplicable to government-seized properties; or (b) that Lewis was obligated to obey the temporary injunction even though the court which issued it had no jurisdiction. It is doubtful that many lawyers would have thought that either of these propositions was the law three months before this episode arose, but, to paraphrase a passage in another Vinson opinion, "they are the law today."<sup>14</sup> The Chief Justice embraced *both* positions in an opinion which is creative (necessarily), forceful, and thoroughly well presented. It is in an intellectual sense a brutal opinion, because the opposing precedents are simply ignored, the writer not bothering either to distinguish or overrule them;<sup>15</sup> but when a result is being reached from the necessities of the situation rather than from the doctrine of the cases, this is perhaps as good a way to do it as any.<sup>16</sup>

Vinson's dissent in the steel seizure case is perhaps his strongest single opinion. It is, again, an opinion of necessity, or of what the Chief Justice

<sup>14</sup> See discussion of *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), p. 220 *infra*. A leading analysis of the precedents is Cox, *The Void Order and the Duty To Obey*, 16 *Univ. Chi. L. Rev.* 86, 109 (1948): "Whatever may be said about the historical basis of the doctrine of the non-frivolous order, the decision in the Mine Workers case has given that doctrine a stature that it has not heretofore possessed." And see note, 60 *Harv. L. Rev.* 811, 813 (1947), on the readily distinguishable nature of the Chief Justice's one precedent.

<sup>15</sup> See particularly the cases collected by Mr. Justice Rutledge in his dissenting opinion to which the Chief Justice makes no reference.

<sup>16</sup> If, of course, the emergency warrants that result. Justice Murphy, dissenting, took another view: "[T]hose factors do not permit the conversion of the judicial process into a weapon for misapplying statutes according to the grave exigencies of the moment."

conceived the necessity to be; but it offers a real, large-scale exposition of the emergency powers of the President. In the steel seizure dissent, Vinson chose the device of claiming for the President far more power than was needed for the case at hand, so that the particular power claimed therein should a fortiori be within those of the executive. An alternative strategy might have been to take much narrower ground,<sup>17</sup> and in every other important Vinson opinion except these two seizure cases, he took narrow ground when it was available. That he should have departed so far from his own accepted practice in these two cases is some indication of the emotional intensity with which he must have regarded them.

d) *The 1952-53 Term.*—Concentration on a few outstanding cases may give a mistaken emphasis to the picture of a role of a member of the Court which can be balanced by brief consideration of a typical year's contribution. The 1952-53 Term is a fair sample of Vinson's work, since his opinions were somewhat more significant in some years, less in others. Out of 104 opinions of the Court, Vinson wrote 11.<sup>18</sup> Six involved extremely narrow points, points so minute that they will interest only a small fragment of the Bar, much less the general public. These were whether a particular state court opinion should be remanded for clarification before Supreme Court review; whether a Court of Appeals opinion had been appealed within the ninety days permitted by statute; what the (rare) en banc procedure of the Courts of Appeals should be; whether a particular unusual tax loss should be assigned to one year or another; which state's Statute of Limitation applies to wrongful death actions brought in Federal Court outside the state of the accident; whether a state court might enjoin the bringing of a Federal Employees' Liability Act suit in another state, a point which will have practical consequence in a minority of the states.<sup>19</sup>

<sup>17</sup> The case is discussed in some detail in the 1951 Term article, pp. 3-17, with particular reference to this exact point at 15-16. Since no one doubts that the government can, one way or another, take possession of industrial property in war time, the precise issue narrowly considered is whether Congress has the eminent domain power exclusively, or whether, in some limited circumstances, this power is shared by the Executive. To quote the 1951 Term article, p. 15, Vinson's "argument blends together every brave act or daring contemplation of past Presidents, without regard to any particular relation to eminent domain. George Washington quashed the Whiskey Rebellion and proclaimed neutrality in the Napoleonic Wars. The Louisiana Purchase, the Emancipation Proclamation, and the breaking of the Pullman Strike are all recounted, and so is the defense of Iceland by President Roosevelt."

<sup>18</sup> The figures above are based on the same counting method used throughout this series. Included are only cases which were argued, and which were decided with an opinion of greater substantiality than a mere order with citations. Excluded are simple companion cases.

<sup>19</sup> The cases alluded to, in order, are: *Dixon v. Duffy*, 344 U.S. 143 (1952); *Fed. Trade Comm. v. Minneapolis Honeywell Co.*, 344 U.S. 206 (1952); the *Western Pacific Railroad Case*, 345 U.S. 247 (1953); *Healy v. Comm'r Int. Rev.*, 345 U.S. 278 (1953); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Pope v. Atl. Coast Line R. Co.*, 345 U.S. 579 (1953).

A seventh case involved a somewhat larger question, but with an answer so obvious that everything worth saying could be and was said in a few paragraphs: it was not difficult to hold invalid a system of selecting juries in which the names of prospective jurors went into the jury box on cards colored in accordance with the race of the jurors.<sup>20</sup>

Those seven cases gave no opportunity for judicial greatness—it is doubtful if a Holmes could have made anything out of such ingredients, and certainly Vinson did not. Any broadly important personal written work must necessarily lie in the four remaining opinions, or in dissent.<sup>21</sup>

Two, while scarcely earthshaking, were of more than passing significance. One of them, *United States v. Reynolds*,<sup>22</sup> raises an intriguing, if most unusual, question: what shall be done when the government is sued for negligence—in this case resulting from a plane crash—and the plaintiff in the course of pre-trial discovery attempts to probe into what the government regards as a military secret? An Air Force regulation, under an appropriate statute, forbade disclosure of the papers in question without the approval of the Secretary of the Air Force, who would not give it; and the District Court thereupon issued an order under Federal Rule 37 that the facts as to negligence should be taken as established in favor of the plaintiff. The precise matter for decision was the extent to which a district judge should satisfy himself that information which the military claimed as secret really *was* secret, and was not merely over-classified; and the Chief Justice dealt with the question in a well-presented, thoughtful, comprehensive manner. After full analysis of the precedents and guiding principles, he concluded that the necessity of secrecy far outweighed any benefit to the plaintiffs on the particular facts.

Second of these lesser cases was *United States v. Nugent*.<sup>23</sup> Conscientious objectors are entitled under the Selective Service Act to a "hearing" before the Department of Justice after "appropriate inquiry" by the Department, usually undertaken by the F.B.I. The issue was whether this right to a hearing includes the right to know the content of the F.B.I. reports

<sup>20</sup> *Avery v. Georgia*, 345 U.S. 559 (1953).

<sup>21</sup> Vinson's dissents were most infrequent, in part because, as is shown below, he was almost always in the majority on significant matters, and in part because, one may suspect, he disapproved of insubstantial dissents. At the 1952 Term he did dissent with opinion in *Brock v. North Carolina*, 344 U.S. 424 (1953), and *Barrows v. Jackson*, 346 U.S. 249 (1953), discussed in the text p. 236 *infra*. The first of these cases involved a difficult double jeopardy point, and the second a very basic issue concerning the scope of Vinson's own Restrictive Covenant opinions. The dissents are well presented, and very probably occupied more of Vinson's time than any of the seven minor majority cases mentioned above with the possible exception of the en banc case, *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247 (1953).

<sup>22</sup> 345 U.S. 1 (1953).

<sup>23</sup> 346 U.S. 1 (1953).



and particularly the identity of unfavorable witnesses. Palpably a person does not, for normal purposes, receive a fair hearing if he does not know what the charges against him are nor what the evidence is; nonetheless the Chief Justice held that the need of expeditious disposition of conscientious objector cases is such that the normal safeguards might be by-passed under the Act and that this procedure did not violate the Fifth Amendment. If the holding permitted such a flimsy hearing for administrative purposes generally, this would indeed be a body blow to due process; but the Chief Justice was careful to limit it to the peculiar circumstances of Selective Service, and it presumably has no application in other fields.

The two major Vinson opinions of the year, in terms of broad-gauge significance, are *United States v. Caltex, Inc.* and *Burns v. Wilson*, both involving basic issues of government powers and responsibilities in wartime.<sup>24</sup>

*Caltex* arose from the Japanese occupation of the Philippines. Two weeks after Pearl Harbor, as it became apparent that the Japanese would occupy the Islands, an appropriate Army engineer notified American petroleum companies around Manila that their property was "requisitioned." Within a few hours of the time at which the property would have fallen into Japanese hands, American soldiers demolished it to keep the Japanese from getting it. This action was unquestionably wise; the sole problem was whether the government must pay for plants which it had destroyed. Whether the property would have been destroyed later by the Japanese, or would have been injured in the course of reoccupation, is of course purely speculative.

Whether the United States must pay for the property of its citizens which it destroys in a scorched-earth withdrawal from its own territory is a great issue. Vinson's decision, that the Fifth Amendment does not compel the government to pay, may have vast significance to the mainland United States if ever we are invaded. The conclusion, in the opinion of this writer, is sound; but no one is likely to say that the opinion represents the process of Supreme Court adjudication at its best.

In general structure, the opinion is concise almost to the danger point of seeming off-hand. After the facts, it is six paragraphs, or less than several of the opinions on the narrow points mentioned earlier. Indeed, it is short enough to permit a paragraph by paragraph synopsis. The first paragraph identifies the two main dicta thought to require payment;<sup>25</sup> the second

<sup>24</sup> 344 U.S. 149 (1952), and 346 U.S. 137 (1953).

<sup>25</sup> *Mitchell v. Harmony*, 13 How. (U.S.) 115 (1852); *United States v. Russell*, 13 Wall. (U.S.) 623 (1871).

paragraph quotes the one dictum against payment;<sup>26</sup> and paragraph three cites a somewhat tangential case as accepting the dictum that payment was unnecessary.<sup>27</sup> Assuming the latter passage to be in point, the authorities are balanced. with two dicta on each side.

We are thus left with three paragraphs to tell which line is to be followed. The first of these states the result: "[W]hether or not the principle laid down [in one of the non-payment cases] was dictum when . . . enunciated . . . it is law today." The next paragraph reverts to the facts leading to the unanswerable climax which neither side controverted: the property "was destroyed that the United States might better and sooner destroy the enemy."

With one paragraph to go, the reader knows only that this property was destroyed in the interest of the general welfare of the United States, and that the American citizen who owned the property must bear the full loss. The last paragraph merely restates the conclusion.

When the Army destroys the property of some of us for the benefit of all of us, there ought to be some identifiable reason why we should not all share the loss. The decision might be on the basis of clear authority; here that possibility is unavailable, since the authorities are all dicta and quite at odds.<sup>28</sup> A second possibility might be logic, which is barely attempted

<sup>26</sup> *United States v. Pac. R. Co.*, 120 U.S. 227 (1887). The issue in this case was whether the railroad had to pay the government for four bridges built by the government on the railroad's property, but not at the railroad's request. The four bridges replaced bridges which had been destroyed in the Civil War, two of them having been destroyed by each side. The actual holding was that the railroad was not liable for bridges built on its property by the government for the government's own purposes.

<sup>27</sup> Vinson's treatment of the relation of these two cases is so remarkable as to be worth a word of detail. In *Caltex*, he quotes five sentences from *Pacific Railroad*, 120 U.S. 227 (1887), and then, a moment later, says: "And what was said in the *Pacific Railroad* case was later made the basis for the holding in *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909). . . ." 344 U.S. 149, 154 (1952). He does not point out that the five sentence passage he extracted from *Pacific Railroad* is *not* the passage quoted in *Juragua Iron*; rather a quite different passage was used. 212 U.S. 297, 307 (1909). This was almost inevitable, since *Juragua* involved the unrelated situation of destruction of property in an enemy country (Cuba).

<sup>28</sup> In its sixth footnote, the opinion mentions a few cases on related problems. There is a considerable body of authority on practice in connection with the War of 1812, where there were several instances of destruction or taking of property to keep it out of enemy hands, with which the Court does not seem to have been acquainted by counsel. See on 1812 experience, *American State Papers*, Class IX, Claims No. 243, p. 424 (whiskey and gunpowder owned by traders destroyed to prevent capture by hostile Indians who had surrounded the fort of Chicago); No. 258, p. 441 (rope walks and considerable quantity of finished rope destroyed at Baltimore upon approach of British during War of 1812); No. 266, p. 446 (small house in Alexandria used as storehouse destroyed when stores were destroyed to prevent their capture by the British in War of 1812). Indemnification was permitted in the latter two cases; in the first it was refused on the ground that speculation was the reason for the presence of the stores.

here; John Marshall might have done it that way.<sup>29</sup> A third possibility is the way of Chief Justice Stone; the circumstances might be analyzed for practical reasons of social policy which require this result. It may be—this writer suspects that it is—so expensive to pay the cost of such a retreat as that of the Russians in World War II from Kiev to Stalingrad that the attempt should not be made for fear of breaking the country's war effectiveness. Barring that circumstance, what reason is there why a man should not be paid who contributes his bit to the common good? But if the late Chief Justice had any such notion of social policy underlying his decision, there is no hint of it here.

The final Vinson opinion of 1952-53 was *Burns v. Wilson*,<sup>30</sup> on the scope of civil court review of military justice proceedings. In terms of sheer quantity, the volume of military criminal cases is the largest body of criminal cases under one jurisdiction in America. In 1945, there were 730,000 trials by courts martial, and the peacetime average is anticipated to be about 280,000. The whole volume of criminal cases in the state of New York for a year is about 207,000, and the federal criminal business at its peak was about 37,500 cases.<sup>31</sup>

It follows that any basic decision on the extent that federal courts will review these hundreds of thousands of courts martial is of the most prodigious importance. *Burns v. Wilson* was such a case. Petitioners had been convicted by courts martial for murder and rape, and had been sentenced to death. They petitioned for habeas corpus in an appropriate district court, alleging that they had been illegally detained, convicted on coerced confessions, and were denied counsel as well as other constitutional rights. The opinion of the Chief Justice held that the district court had jurisdiction to insure that constitutional rights were protected by the military courts, but only to the limited extent of determining that the various questions raised had been honestly considered by the military courts of review. The district court itself could not review the merits of the

<sup>29</sup> The only attempt at argument by logical parallel is the one sentence assertion that if the army had relinquished the property to the Japanese and then destroyed it, there would have been no recovery.

<sup>30</sup> 346 U.S. 137 (1953). The opinion was not accepted by a majority of the Court, Justice Jackson concurring in the result without opinion, and Justice Minton taking the more extreme position that the federal courts have no function in review of the decisions of military courts once the jurisdiction of the latter has been established. Justices Black and Douglas dissented and Justice Frankfurter believed that there had been insufficient time to consider the record adequately for decision.

<sup>31</sup> The figures are taken from Karlen and Pepper's illuminating *Scope of Military Justice*, 43 J. Crim. L. & Criminology 285 (1952).

constitutional claim of petitioners once it was established that those merits had been reviewed by the military.

Without reference to its conclusion (with which this writer does not agree), *Burns v. Wilson* is a good opinion. Complete originality was not called for since this case is fourth of a series,<sup>32</sup> but it illuminates the earlier cases and gives clear grounds drawn from practice and tradition for its result. It is, from the standpoints of clarity and persuasive use of materials, the best, as well as probably the most important, opinion of the Chief Justice for the year.

These were the majority opinions of Fred Vinson for a year: eleven opinions, seven minor, two of some importance, and two of considerable importance.<sup>33</sup> Of the latter two, the war demolition case will achieve substantial significance if, in some future war, our forces withdraw in our own territory, destroying as they go. The other, the court martial case, will have a large effect on work-a-day American life, as long as substantial numbers of citizens are in the armed forces.<sup>34</sup>

<sup>32</sup> For general principles, *Hiatt v. Brown*, 339 U.S. 103 (1950); and for more immediate application, *Gusik v. Schilder*, 340 U.S. 128 (1950); *Whelchel v. McDonald*, 340 U.S. 122 (1950).

<sup>33</sup> The Chief Justice was also the author of an opinion, in which three justices joined, resulting in the disbarment from practice before the Supreme Court of one of the attorneys in the Dennis case, who had been convicted for contempt in his conduct of the trial. In *re Isserman*, 345 U.S. 286 (1953). Isserman had been disbarred in his home state of New Jersey and under the Supreme Court's practice was required to show cause why he should not be disbarred by it also. It takes a majority vote to show cause; Justice Clark disqualified himself, hence the view of Vinson and his colleagues prevailed over that of Justice Jackson, who was joined by Justices Black, Frankfurter, and Douglas. Here again, the Chief Justice decides against the individual, out of fear for the safety of an institution: "There is no vested right in an individual to practice law. Rather there is a right in the Court to protect itself, and hence society, as an instrument of justice." Yet the precise nature of the danger is never revealed. "[W]e do not lay down a rule of disbarment for mere contempt; rather we have considered the basic nature of the actions which were contemptuous and their relationship to the functioning of the judiciary. . . ." No more is said on the point. Justice Jackson, on the other hand, who had also written the Supreme Court opinion upholding the contempt conviction, shows that previously contempt per se was not sufficient for disbarment, that no conspiracy to obstruct justice was shown and Isserman's conduct before the Supreme Court has been unexceptionable.

<sup>34</sup> This was a light load compared with that of his predecessors in their last full years on the Court. In his final complete term Chief Justice Stone wrote seventeen majority opinions. At least eight of his majority opinions and dissents, each with great skill in its execution, were of considerable significance.

Major Stone opinions were *Steele v. Louisville & N. Ry.*, 323 U.S. 192 (1944), a basic case on race discrimination in labor unions; *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945), non-user does not vitiate a patent; *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 468, dissent, in which Georgia attempted to improve its freight rate situation; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, the leading modern case on the original package doctrine; *Corn Products Ref. Co. v. Federal Trade Comm.*, 324 U.S. 726, a key case on basing points and the Clayton Act; *Alabama State Fed. of Labor v. McAdory*, 325 U.S. 450 (1945), a significant case on standing to raise constitutional questions; *Southern Pac. R. Co. v. Arizona*, 325 U.S. 761, perhaps

Perhaps the most striking personality quality of Vinson's opinions is their odd lack of personality. Chief Justice Marshall functioned without law clerks; Hughes had one; Stone began the era in which a Chief Justice had two. Chief Justice Vinson had three law clerks, an administrative assistant, and a little staff of secretaries and messengers. This gave him an opportunity to be somewhat more of a supervisor than an immediate participant in the detail work of his office. Yet judicial personality is largely a matter of details; the Holmes epigram, the Black way with facts, the Frankfurter vocabulary, the Brandeis footnote, the Stone pragmatism cropping up in unexpected places.

The result is that the experienced reader can spot many of the opinions of the Justices just mentioned without knowing their author. With Vinson this was rarely true. There is, instead, an unevenness of quality in Vinson, some of his good opinions being excellent and some of the others being a far cry from it, sometimes in prose and frequently in legal detail.<sup>35</sup> Obviously any Justice has his range; Vinson's was unusually wide. Most of his opinions are, so far as impression of a personality is concerned, simply indistinct.

One distinct intellectual trait was an inclination, doubtless borrowed from his great success as a conciliator in Congress and in administrative

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Stone's leading opinion on state regulations of commerce; and *Bridges v. Wixon*, 326 U.S. 135, 166 (1945), dissent, on review of alien deportation orders.

Chief Justice Hughes, in his last year, was slowing down—he was seventy-nine—but some four or five of his opinions were on big themes and each had the impress of his personality: *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940), a leading case on the weight to be given subordinate state court decisions under the Erie rule; *Cox v. New Hampshire*, 312 U.S. 569 (1941), a major limitation on rights of street use by religious groups; *Skiriotes v. Florida*, 313 U.S. 69 (1941), on rights of a seaboard state to control fishing in adjacent waters in view of federal and international law; and *Mitchell v. United States*, 313 U.S. 80 (1941), a landmark case on racial discrimination by interstate railroads. A case of less general interest that year, but still of some real consequence, was *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940), holding that employers subject to backpay awards should be given the benefit, in the computation, of amounts received by the employee on work relief.

<sup>35</sup> The best opinions are described or listed at various points in this article. One opinion which caused the Chief Justice a belated headache was *United States v. Alcea Band*, 329 U.S. 40 (1946), which held that an Indian tribe was entitled to judgment for a taking by the United States, not on "moral" but on "legal" grounds. What those grounds were was left unspecified, but the clear implication of the citations was that this was a just compensation claim under the Fifth Amendment, there being no other imaginable legal basis. (For details, see 1950 Term article, at 220.) But if the basis was just compensation, the Indians were entitled to interest, which the Indians duly claimed. The case thus returned to the Court, four years after the first decision, on the interest issue; the Court in a brief per curiam, 341 U.S. 48 (1951), refused the interest, denied that the first case had rested on the Fifth Amendment, and saved face by avoiding identification of what it had rested on. It is quite possible that no one knew what the basis of the earlier opinion was. The 1950 Term article, 220–21, quoted extensively from *Jordan v. DeGeorge*, 341 U.S. 223 (1951), as a sample of the kind of prose which happily was rare in Vinson as it is in most Supreme Court opinions.

duties, to go *around* his difficulties when he did not need to face them squarely. His opinions are full of exceedingly neat distinctions or of disposition of precedents with a silent treatment.<sup>36</sup> Yet on those rare occasions when he felt that a precedent *must* be overruled, he was willing to do so.<sup>37</sup>

Vinson's strongest asset was, in most cases, comprehensive, succinct precision. Almost by definition, these are qualities which, because impersonal, are not an individual "trademark" in the craft. It is something like the best law review note style, and yet is better; for the Vinson opinions were never cluttered with surplus erudition, and they have a clarity in result that almost always lets the reader know just where he is. He made something of an art of his opinions on minor subjects; they are of a sort most gratifying to the bar. Appended in the note is a list of fine samples.<sup>38</sup>

## II. THE VIEWS OF THE CHIEF JUSTICE

Earlier, this essay listed the four major opinions of the Chief Justice in his last year, and the half dozen major opinions of his Supreme Court career. The two race relations cases in that group of ten must be separated, for on this subject Vinson clearly had a distinct philosophy. The most striking aspect of the other eight is that, although they have nothing else in common, all support the state as against the individual. Be it an evidence case, an eminent domain case, a civil rights case or an industrial crisis case, in the Vinson view, the government won.

This is not by remotest implication to suggest that Vinson was wanting in independent views. He was a man of integrity and conviction. But his convictions lay along a certain line; given a choice between the individual's freedom and what he honestly felt to be the needs of the state, Vinson put the needs of the state first. Therein lay his concept of patriotism. Of course almost any honest judge puts the needs of the state ahead of the

<sup>36</sup> See for examples the discussion of the Restrictive Covenant and Lewis cases, *supra*, and the treatment of precedents in *Dennis v. United States*, *supra*; and see 1947 Term article, p. 48.

<sup>37</sup> *Williams v. Austrian*, 331 U.S. 642, 647 et. seq. (1947), by Vinson, a bankruptcy jurisdiction case, overruled *Bardes v. Hawarden Bank*, 178 U.S. 524 (1900), and *Schumacher v. Beeler*, 293 U.S. 367 (1934); and Vinson joined in the explicit overruling of *Trupiano v. United States*, 334 U.S. 699 (1948), by *United States v. Rabinowitz*, 339 U.S. 56 (1950). In a larger sense, the very essence of his Supreme Court career was one gigantic overruling; for his largest significance, as is developed below, is his part in the new departure from the civil liberties moorings of the Constitution prior to his accession. This change became a revolution with the deaths of Justices Murphy and Rutledge; about 20% of the cases at the 1949 Term came to results opposite to what they would have been if those Justices had lived. (See the 1949 Term article.)

<sup>38</sup> *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129 (1946); *Ex parte Collett*, 337 U.S. 55 (1949); *United States v. Aetna Casualty Co.*, 338 U.S. 366 (1949); *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951); *United States v. Hayman*, 342 U.S. 205 (1952). Many others could be listed.

rights of the individual when the public welfare imperatively demands it. The difficulty arises in determining where that point of necessity is. Vinson had what might be described as a low threshold of crisis surprising in so generally affable and unexcitable a man. He saw full-blown emergencies where someone else might have thought there were only shadows; whenever the government sent out the fire engines, Vinson saw a fire. Hence he was very quick to sacrifice the individual right to the common good.

Is it entirely coincidence that twice in Vinson's short career the Court took the extraordinary step of advancing a case to hearing without the review of the Court of Appeals,<sup>39</sup> and that in addition he personally called a special term to hear the Rosenberg matter? Would another Chief Justice not have desired to let at least two of those matters take their normal course? This writer, agreeing on the merits that the Supreme Court should not, after deliberation, have reversed the Court of Appeals, is utterly unable to comprehend why the Rosenbergs had to be whisked into the electric chair to meet a Department of Justice timetable.<sup>40</sup> Normal procedure would have closed that case in the fall of 1953; it is hard to identify the "emergency" which required the electrical switch to be thrown weeks before the Chief Justice could get out his opinion explaining the legality of the execution. Any justification for the refusal to allow the doubtful members of the Court time even to look into the disputed point must rest on the political ground that Communists were using the case for agitation. But it is hard business to take lives in haste because our enemies annoy us, and we have surely not improved the world's impression of our institutions by an agitated last minute rush to execute the defendants before we can even say why. As Mr. Justice Frankfurter forcefully stated:

Painful as it is, I am bound to say that circumstances precluded what to me are indispensable conditions for solid judicial judgment. . . . It is almost mathematically demonstrable that there just was not time within twelve waking hours to dig out, to assess, to assemble, and to formulate the meaning of [the significant] legislative mate-

<sup>39</sup> The Lewis and steel seizure cases, *supra*. A collection of cases on this use of the certiorari power, Robertson and Kirkham, *Jurisdiction of the Supreme Court* 235 n. 2 (Wolfson and Kurland edition, 1951), reports only one case taken up in this fashion because of emergency circumstances between 1937 and the Lewis case; *Ex parte Quirin*, 317 U.S. 1 (1942) (treason conviction):

<sup>40</sup> The Rosenbergs were sentenced April 5, 1951; affirmed, 195 F. 2d 583 (C.A. 2d, Feb. 25, 1952); rehearing denied, 195 F. 2d 609 (April 8, 1952); cert. den., 344 U.S. 838 (1952); reh. den., 344 U.S. 889 (1952); motion to vacate sentence denied, 108 F. Supp. 798 (S.D. N.Y., Dec. 10, 1952); affd., 200 F. 2d 666 (C.A. 2d, Dec. 31, 1952); motion for reduction of death sentence denied, 109 F. Supp. 108 (S.D. N.Y., Jan. 2, 1953); cert. den. on motion to vacate sentence, 345 U.S. 965 (May 25, 1953); (stay of execution vacated at same time); application for stay of execution to Mr. Justice Jackson, June 12, 1953, referred to full Court by him, denied 345 U.S. 989 (June 15, 1953); pet. for rehearing denied as to May 25th certiorari, 345 U.S. 1003 (June 15, 1953); motion for leave for original writ of habeas corpus denied, 346 U.S. 271 (June

rials. . . . Neither counsel nor the Court, in the time available were able to go below the surface of the question raised by the application for a stay which Mr. Justice Douglas granted. . . . We have not had in this case carefully prepared argument. We have not had what cannot exist without that essential primary. We have not had the basis for reaching conclusions and for supporting them in opinions. Can it be said that there was time to go through the process by which cases are customarily decided here? . . .<sup>41</sup>

Over and over again Vinson faced the question of whether a particular crisis required suppression of individual rights. His is the expression of that issue in terms of "weighing" the freedom against the "public interest" of some counter course. In *Douds* he accepted the Congressional judgment that the menace of political strikes required the oath device as a control. In *Dennis*, with no facts in the record, he accepted the imminence of the domestic Communist menace as against Justice Douglas' outspoken dissenting view: "It is safe to say . . . that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear or panic could think otherwise."<sup>42</sup>

It was this willingness to accept what might be called "emergency by assertion" that led to the Chief Justice's famous steel seizure dissent. The Chief Justice resolved the issue in favor of the power of the President to

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15, 1953); stay granted by Mr. Justice Douglas, June 17, 1953, reported 346 U.S. (appendix to Douglas opinion on main Rosenberg case); stay vacated, 346 U.S. 273 (June 19, 1953); execution, June 19, 1953.

<sup>41</sup> 346 U.S. 273, 301 at 303 et seq. (1953).

Humanitarian impulses, stimulated in part by Communist politics led to intense international interest, particularly in France, see N.Y. Times, p. 15 (June 17, 1953). The Manchester Guardian editorial urging reprieve on political and humanitarian grounds, June 17, 1953, p. 6, concluded: "The interest of communism would be served by their execution. That is a good reason for countermanding it." The adverse publicity created by the case was augmented by the American press, whose sadistic and detailed coverage of the execution gave the effect of a national hook-up to the episode, and could hardly make it more palatable: "Rosenberg's chest bulged straining against the straps. His fists clenched in tight knots. His neck and shoulders turned crimson. There were three massive charges of electricity. . . . He was dead in 2¼ minutes." Similar treatment, for whatever reason, did not quite kill Mrs. Rosenberg, and it had to be done over again. Meanwhile the ten and six year old children of the spies were under press observation at the home of friends. At the critical moment, the ten year old boy cried out, "That's it. That's it. Goodby. Goodby." Meanwhile the younger child was planning a card for Father's Day, which was that weekend. Phoenix, Arizona, Gazette, p. 1 (June 20, 1953).

The American press was not without criticism of the incident, and in particular the Supreme Court's role therein. In a lengthy editorial after the execution the St. Louis Post-Dispatch wrote: "A second lesson is that a case of such gravity and so adaptable for propaganda distortion by Communists around the world should be handled by the Supreme Court surely and without undue delay. There should be no such confusing and undignified, last-minute judicial scramble as that which became part of the history of the Supreme Court last week. The standing of a case and the courts which handle it all suffer when an adjudication so hasty occurs." St. Louis Post-Dispatch, § 2, p. 2b, col. 2 (June 21, 1953).

<sup>42</sup> 341 U.S. 494, 589 (1951).



take the steel properties despite his absence of statutory authority or, in some views, despite the statutory prohibition. His opinion rings with phrases indicative of the underlying structure of his thought. Thus in his last two pages: "gravity of the emergency . . . avert disaster . . . preserve legislative programs from destruction . . . immediacy of the threatened disaster . . . the disastrous effects that any stoppage in steel production would have."<sup>43</sup> In the year that has followed the steel decision, there is

TABLE 1  
DISTRIBUTION OF VOTES IN NON-UNANIMOUS  
CIVIL RIGHTS CASES, 1952 TERM<sup>44</sup>

	IN BEHALF OF CLAIMED RIGHT		IN DENIAL OF CLAIMED RIGHT	
	Number	Per Cent	Number	Per Cent
Vinson.....	5	25	15	75
Black.....	18	95	1	5
Reed.....	4	21	15	79
Frankfurter.....	15	75	5	25
Douglas.....	17	85	3	15
Jackson.....	4	22	14	78
Burton.....	6	30	14	70
Clark.....	5	25	15	75
Minton.....	4	20	16	80

little appearance that the event will bear out these lugubrious predictions; one wonders whether some of the other "emergencies" which seemed to the Chief Justice to require strong action would ever have come to the point of disaster, had the Court shown greater concern for the rights of the individual rather than fear for the safety of the state.

a) *Civil rights*.—Perhaps because of his sense of the needs of government, the Chief Justice almost never decided a difficult civil liberties case in favor of the individual. Where there was sufficient room for reasonable difference of opinion to permit the Court to divide, Vinson voted against the claimed right. Since during his Chief Justiceship, most debatable civil rights were decided against the individual by the Court, his position in this respect was not notably different from that of the majority of his colleagues.

<sup>43</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 709 (1952).

<sup>44</sup> The proper use and the limitations on this data have been discussed in each preceding article. In a capsulated way, the figures identify polar views, and help to suggest the degree to which a given Justice believes that a civil liberty value in a case should or should not control its decision. Any Justice who almost invariably votes for or against the claimed right must be putting either a very high or a very low value on civil liberty generally; nothing else could push him to the ends of the scale in this fashion, particularly in such a heterogeneous mixture of

TABLE 2  
DISTRIBUTION OF VOTES IN NON-UNANIMOUS CIVIL  
RIGHTS CASES DURING VINSON CHIEF  
JUSTICESHIP—1946-53<sup>45</sup>

	IN BEHALF OF CLAIMED RIGHT		IN DENIAL OF CLAIMED RIGHT	
	Number	Per Cent	Number	Per Cent
Vinson.....	21	17	106	83
Black.....	102	81	24	19
Reed.....	21	17	106	83
Frankfurter.....	72	57	55	43
Douglas.....	96	83	19	17
Jackson.....	34	27	90	73
Burton.....	33	26	95	74
Clark.....	14	25	41	75
Minton.....	9	13	58	87

cases. Those Justices more or less in the middle—Justice Frankfurter for example—are, presumably allowing other values, unrelated to civil liberties as such, to have a greater weight in the decisions than their colleagues.

The twenty cases (disqualifications give some Justices less) included in this year's table are: *Mandoli v. Acheson*, 344 U.S. 133; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94; *Dixon v. Duffy*, 344 U.S. 143; *Schwartz v. Texas*, 344 U.S. 199; *Edelman v. California*, 344 U.S. 357; *Brock v. North Carolina*, 344 U.S. 424; *United States ex rel. Smith v. Baldi*, 344 U.S. 561; *Brown v. Allen*, 344 U.S. 443; *Chew v. Colding*, 344 U.S. 590; *United States v. Kahriger*, 345 U.S. 22; *Orloff v. Willoughby*, 345 U.S. 83; *Albertson v. Millard*, 345 U.S. 242; *Heikkila v. Barber*, 345 U.S. 229; *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206; *Poulos v. New Hampshire*, 345 U.S. 395; *Terry v. Adams*, 345 U.S. 461; *United States v. Nugent*, 346 U.S. 1; *Barrows v. Jackson*, 346 U.S. 249; *Burns v. Wilson*, 346 U.S. 137; *Stein v. New York*, 346 U.S. 156.

Unanimous civil rights cases were: *Wieman v. Updegraff*, 344 U.S. 183 (1952); *United States v. Rumely*, 345 U.S. 41 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Avery v. Georgia*, 345 U.S. 559 (1953); and *District of Columbia v. Thompson*, 346 U.S. 100 (1953), all holding in favor of the claimed right.

<sup>45</sup> Data for the preceding years is taken from the articles on earlier terms. Since Justices Clark and Minton served only the last four of the years of the Vinson Chief Justiceship, their participations are many fewer than the others. Justices Murphy and Rutledge, who served with Vinson for his first three years, for those years had the following record:

NON-UNANIMOUS CIVIL RIGHTS  
CASES, 1946-48 TERMS

	IN BEHALF OF CLAIMED RIGHT		IN DENIAL OF CLAIMED RIGHT	
	Number	Per Cent	Number	Per Cent
Vinson.....	8	14	49	86
Murphy.....	53	95	3	5
Rutledge.....	52	93	4	7

Notable instances of Vinson opinions restrictive of civil rights have been mentioned. Since he wrote comparatively rarely, his greatest influence was necessarily his vote; suffice it to say generally that he cast his vote in favor of restricting freedom of speech, increasing the breadth of searches and seizures, decreasing the freedom from forced confessions, and maintaining the limits on the right to counsel. Necessarily in so doing, he frequently helped to reverse the trend of the law.

A salient example of this role as a participant in a shift in legal development is found in *Stein v. New York*,<sup>46</sup> decided on the last regular decision day of Vinson's service. Like so many of the confession cases, this one involved detention incommunicado without charges, during which time the defendants were interrogated by the police. As is common as a result of this practice, the defendants contended and the police denied that brutality was used; after the interrogation, one defendant had a broken rib and various bruises, another had many bruises all over his body, and a third had one bruise, but there was police evidence that these bruises *could* have been sustained prior to the arrest. Two of the three defendants confessed, and their confessions were self-confirming in the sense that they could scarcely have known what they were confessing unless they were indeed guilty.

The confessions were given to the jury, and the issue was whether this constituted a denial of due process. The Court, in an opinion by Justice Jackson in which the Chief Justice joined, affirmed the convictions. Some years ago Justice Jackson as a *dissenter* had argued that self-confirming confessions, even if coerced, should be viewed a little less distastefully than others<sup>47</sup> despite the then more conventional view that the object of excluding forced confessions was not only because they were inherently untruthful but also because police brutality is too ugly to be encouraged even if it works.<sup>48</sup> In the *Stein* case the self-confirming quality of the confession became a major element in the Court's approval of it.<sup>49</sup>

<sup>46</sup> 346 U.S. 156 (1953).

<sup>47</sup> *Watts v. Indiana*, 338 U.S. 49, 57, 60 (1949), "[O]nce a confession is obtained it supplies ways of verifying its trustworthiness."

<sup>48</sup> For analysis of the philosophy underlying objection to forced confession, see *Chambers v. Florida*, 309 U.S. 227, 236-39 (1940), and see 240-41: "The Constitution proscribes such lawless means *irrespective of the end*." (Emphasis added.)

<sup>49</sup> *Stein v. New York*, 346 U.S. 156, 168 (1953) (statement of facts emphasizes accuracy of Stein's confession), and 185. At the latter page, the subject under discussion is whether the confessions were psychologically coerced, and the controlling evidence to the contrary, in the Court's eyes, is achieved by *accepting the confessions as true*: "The inward consciousness of having committed a murder and a robbery and of being confronted with evidence of guilt which they could neither deny nor explain seems enough to account for the confessions here."

Essentially the Court held that it was within the discretion of the jury to conclude that the confessions were not coerced. But the verdict was general; there is no way of knowing whether the jury did so conclude or whether it concluded that the confessions were coerced, but that this was harmless since there was other evidence to convict. Justice Jackson thereupon held the conviction good *even if the confessions were forced*. Every previous case on the subject—Justice Jackson himself listed four<sup>50</sup>—has said that the admission of a coerced confession requires a new trial. Justice Jackson dismissed these as “dicta about a proposition not essential to the result,” holding in substance that a jury with a forced confession in its hands is still free to convict despite the fact that its judgment has been corroded by the most poisonous possible evidence. Justices Black, Frankfurter, and Douglas dissented, and it can only be regretted that Chief Justice Vinson did not share this conclusion of Justice Frankfurter:

It is painful to be compelled to say that the Court is taking a retrogressive step in the administration of criminal justice. . . . By its change of direction the Court affords new inducement to police and prosecutors to employ the third degree, whose use the Wickersham Commission found “widespread” more than thirty years ago and which it unsparingly condemned as “conduct . . . violative of the fundamental principles of constitutional liberty.” . . .<sup>51</sup>

If in all of the conventional fields of civil liberty, the Chief Justice was prepared to turn back the clock on individual rights, it was not surprising that in the new civil liberties matters, where there were fewer precedents to thrust aside, his views were almost 100% on the side of the state. He upheld loyalty oaths,<sup>52</sup> approved the use of the Attorney General’s list of subversive organizations,<sup>53</sup> and had no objection to the increasingly severe treatment of aliens.<sup>54</sup> A recent instance of the alien cases, noteworthy principally because to some at least it conveys the most brutal shock to

<sup>50</sup> *Ibid.*, at 189. The cases were: *Maliniski v. New York*, 324 U.S. 401 (1945); *Lyons v. Oklahoma*, 322 U.S. 596 (1944); *Stroble v. California*, 343 U.S. 181 (1952); *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

<sup>51</sup> 346 U.S. 156, 201-2 (1953).

<sup>52</sup> E.g., *Garner v. Board of Public Works*, 341 U.S. 716 (1951); *American Communications Association v. Douds*, 339 U.S. 382 (1950); but cf. *Wieman v. Updegraff*, 344 U.S. 183 (1952), to the effect that such oaths may be imposed concerning affiliation with organizations only when there is scienter.

<sup>53</sup> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 187 (1951), joining in dissent by Justice Reed.

<sup>54</sup> See, e.g., *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (exclusion of war bride at unlimited discretion of Attorney General); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation of alien who had been Communist as a young man more than a decade before act was passed making this a ground for deportation); *Carlson v. Landon*, 342 U.S. 524 (1952) (aliens held without bail at discretion of Attorney General if charged with Communism).

the moral sense of any of the opinions in this tragedy-laden area, is the case of Mezei, the famous Flying Dutchman or Wandering Jew depending upon the mythology from which one draws his analogies.<sup>55</sup> The case has special symbolic import for purposes of this essay because it exemplifies the basic "Vinson team" at work; the majority consisted of the four Truman appointees (Vinson, Burton, Minton, and Clark) plus their frequent fifth, Justice Reed.

Mezei was born in Gibraltar of Hungarian or Rumanian parents and came to the United States in 1923. In 1948 he left his home in Buffalo to visit his dying mother in Rumania. He got to Hungary, where the Red authorities would neither let him go on or come back, but obtained an exit visa and returned to the United States in February, 1950. He was held at Ellis Island without charges, and finally was ordered excluded by the Attorney General, without hearing, on the "basis of information of a confidential nature." He was put back on a boat, and twice crossed the ocean; but he had no place to go. The Red countries would not have him, and the Western European and Latin American countries, apparently intimidated by our unidentified fears, would not let him land. The legal issue was whether the Attorney General has the power to condemn a returning alien who has lived in the United States for 25 years to stay at Ellis Island or to wander the seas for the rest of his life, and this without any hearing and without any identification of the charges against him.

By five to four, the Supreme Court, in an opinion by Justice Clark in which Chief Justice Vinson concurred, held that the Attorney General did have this power. Justices Black, Frankfurter, Douglas, and Jackson dissented, and a few words from Justice Jackson's eloquent dissent will show their attitude:

This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him. . . . Since we proclaimed him a Hercules who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established, and less stable feared to take him off our timorous hands. . . . [He should have] a fair hearing with fair notice of the charges. It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of the country. No one can make me believe that we are that far gone.<sup>56</sup>

<sup>55</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

<sup>56</sup> *Ibid.*, at 219 et seq. As of April 30th, 1953, Mezei had made application to twenty-five countries for entry, but was still at Ellis Island. The Attorney General was studying the case. *N.Y. Times*, p. 19 (April 30th, 1953). While the cause of the Government's action is necessarily a mystery, it is supposed that the reason may be Mezei's association with an insurance society which is on the Attorney General's list of subversive organizations. Mezei was connected with a

In two significant cases Vinson himself was the author of restrictive interpretations of the Bill of Rights which were not called for by the precedents. These were *Harris v. United States*,<sup>57</sup> a search and seizure case, and *Feiner v. New York*,<sup>58</sup> a free speech problem. *Harris*, in particular, came as a surprise to the bar, the commentators, and the press. The issue was the validity of a search, in *Harris*' apartment in the course of an arrest on a valid warrant for forgery, but without a search warrant, in which the FBI ransacked the defendant's apartment for five hours, allegedly looking for checks. They found nothing connected with the alleged forgery, but in a bedroom drawer they did find a sealed envelope which, after being opened without any legal authority, turned out to contain selective service documents to which the defendant had no right. He was charged with possession of those documents, and the issue was whether the search which obtained them was illegal.

Prior to the *Harris* case, the law had been quite clear that a search incident to a valid arrest could only extend to visible or readily accessible evidence.<sup>59</sup> This was no technicality, but rather a sound judgment of policy. On the one hand, the law would be a fool if it could arrest the murderer and be compelled to leave behind the murder weapon on the floor at his feet; on the other hand, if in a society like ours in which there are myriad plausible grounds for arrest, the police need only mention one and then can rummage through a house seeking what they may find, privacy has borne a dreadful blow. In *Harris*, the Chief Justice upheld the validity of the seizure.

Clearly the *Harris* case troubled the Chief Justice (or at least troubled someone in the five man majority for whom he spoke) because the opinion is as narrow as it can be on those facts. Stressed particularly was the fact that the police were searching for instruments related to the forgery, which might well have been present, and that the actual objects taken were illegally possessed by the defendants. Yet for all the qualifications,

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local workmen's benefit society long before it was absorbed by the offending organization; thereafter he was for a time head of the Buffalo branch of the society. N.Y. Times, p. 1 (April 23, 1953). This is the same organization which was held in *International Workers Order v. McGrath*, reported sub nom. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), to be entitled to a trial, which it has never had, on the issue of whether it was unfairly listed. Mezei is thus doubly damned; he is condemned to a life sentence on Ellis Island, without notice or hearing concerning the nature of his affiliation with an organization which itself had been proscribed without fair notice and hearing!

<sup>57</sup> 331 U.S. 145 (1947).

<sup>58</sup> 340 U.S. 315 (1951).

<sup>59</sup> *Marron v. United States*, 275 U.S. 192 (1927), as limited in *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), and *United States v. Lefkowitz*, 285 U.S. 452 (1932).

the opinion is subject to the observation made by Justice Frankfurter in dissent:

One's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.<sup>60</sup>

The whole course of the Vinson participation in Fourth Amendment cases places him intellectually in the category last described by Justice Frankfurter.<sup>61</sup>

The second restrictive civil rights opinion, *Feiner v. New York*, was a curious episode. It involved the classic problem of whether, when speech is otherwise legal but is offensive to some of its auditors, the police should arrest the speaker or, instead, should attempt to control those in the crowd who would disrupt the speech.<sup>62</sup> *Feiner* was giving a street corner speech for Wallace; his text was in poor taste but whether it was incendiary was a matter of interpretation of the facts. Certainly there was nothing about it which would have warranted suppression had not one or two of the auditors threatened violence. The police, without making any effort to control the crowd, arrested *Feiner* for disorderly conduct.

Just what Chief Justice Vinson's *Feiner* opinion does to the law of this subject is not wholly clear; indeed, the last previous Supreme Court case on the point, then only two years old, is not mentioned.<sup>63</sup> On the one hand the majority would not give "overzealous police officials complete discretion to break up otherwise lawful meetings"; on the other, it would permit arrests where the speech is an "incitement to riot." How these areas are to be told apart is a mystery which the Chief Justice leaves to his successors.

What has been said should not leave the impression that Vinson was a kind of upper-case McCarthy. He was nothing of the sort. He had no free hand to make policy, and no one can know how heavily his innermost thoughts were moved by conceptions of the limited functions of the judiciary. Moreover the trend of his opinions was not without exceptions: In *Stack v. Boyle* he blocked the practice of setting bail at impossible amounts

<sup>60</sup> 331 U.S. 145, 157 (1947).

<sup>61</sup> For full analysis, see Reynard, *Freedom from Unreasonable Search and Seizure*, 25 Ind. L. J. 259 (1950).

<sup>62</sup> For discussion of the 19th and 20th Century experience, see *Prohibition of Lawful Assembly When Opposed by Threat of Violence*, 24 Ind. L. J. 78 (1949).

<sup>63</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949).

for citizens accused of offenses as Communists.<sup>64</sup> He upheld the rights of Jehovah's Witnesses to distribute their literature and to preach in public places.<sup>65</sup> He consistently pressed Illinois, in particular, to adopt a fair post-conviction review procedure.<sup>66</sup> At his last term, in *Brock v. North Carolina*,<sup>67</sup> he wrote a striking dissent protesting the Court's action in upholding a conviction of a man on his second trial after first trial had been halted by the state because it unexpectedly found that certain witnesses on whom it relied would not then give the testimony the state wanted, though there was reason to suppose that they would, as indeed they did, perform satisfactorily later. In a thoroughly researched opinion, Vinson strenuously condemned as double jeopardy the practice of permitting the state under any guise to give a case a preliminary run, find out its weaknesses, and then come back again to do better if it could.

Even in the loyalty and legislative investigation area, there were limits to the Chief Justice's tolerance of contemporary practices. Of profound significance as the first case in many years to limit legislative inquiries was *United States v. Rumely*,<sup>68</sup> at the 1952 Term, an opinion by Justice Frankfurter in which the Chief Justice joined. Rumely had refused to answer questions concerning who had bought certain large quantities of his publications, which were designed to be distributed to the general public in the hope that they in turn would influence Congressmen on particular legislation. The Committee asking the questions was, under its authorizing resolution, investigating "lobbying." If lobbying is anything more than buttonholing legislators in the Capitol corridors, then pretty clearly the term would include what Rumely did. Yet as a matter of English grammar, the word *could* be construed to exclude such secondary or large scale pressure activity. The Frankfurter opinion took the view that, where difficult constitutional questions as to the scope of a Committee's power are presented, the authorizing resolution is to be given the narrowest possible construction consonant with English usage. Widespread application of this principle may have great effect on many outstanding cases.<sup>69</sup>

<sup>64</sup> 342 U.S. 1 (1951). Cf. for his different views on related bail problems of aliens, *Carlson v. Landon*, 342 U.S. 524 (1952).

<sup>65</sup> *Niemotko v. Maryland*, 340 U.S. 268 (1951); and he joined in the opinion of Justice Douglas in *Fowler v. Rhode Island*, 345 U.S. 67 (1953). But cf. *Poulos v. New Hampshire*, 345 U.S. 395 (1953), discussed in note 99 infra.

<sup>66</sup> *Jennings v. Illinois*, 342 U.S. 104 (1951); see 1951 Term article, pp. 47-49.

<sup>67</sup> 344 U.S. 424 (1953).

<sup>68</sup> 345 U.S. 41 (1953).

<sup>69</sup> Facts are unavailable for a serious estimate of the effect, but the writer has a strong impression that in recent years Congressional Committees of investigation have been proceeding almost without regard to the exact terms of their authorizing resolutions.



But Vinson's largest affirmative contribution to the law of civil rights was in connection with race relations. His restrictive covenant and segregated law school opinions were discussed earlier. He wrote one of the opinions in the case invalidating racial exclusion of Japanese from California land holding, and joined in the opinion invalidating restrictions on their fishing rights.<sup>70</sup>

In the race relation cases generally, Vinson was a middle-of-the-roader, usually taking the position which would reach the immediate result and yet have the least effect on our peculiar institutions. In the Restrictive Covenant Cases, he was very careful to preserve the concept of "state action" as a limitation on the Fourteenth Amendment, going almost gratuitously out of his way to reaffirm cases on that subject not immediately in issue.<sup>71</sup> While he joined in the cases clearing up what remained of the "white primaries,"<sup>72</sup> at the 1952 Term, he did not join Justices Black, Douglas, and Burton in taking the further position that the prohibition of the Fifteenth Amendment applies as much to state tolerance of discriminatory voting practices as it does to affirmative discrimination by the state itself.<sup>73</sup> His Texas law school segregation opinion was carefully limited to the actual facts of inequality; it went beyond the needs of the immediate situation in that it established factors of comparison which apply to graduate education generally, but it definitely refused to consider the more basic question of the validity of segregation, assuming that under segregation there can ever be "equality" in fact.

Hence there is no way of knowing how the Chief Justice would have voted in the grade school segregation cases if they had been decided. The somewhat technical nature of his approach to all of these cases made him capable of assuming even a lonely position in derogation of Negro rights. Thus at his last term he was the sole dissenter in a case holding that the rule of his restrictive covenant opinions applied to damages actions for selling to Negroes between white neighbors and a white vendor.<sup>74</sup> The Restrictive Covenant Cases had held that the Negro could not be enjoined from occupying land he had bought; if the white neighbor could collect damages from the vendor on the transaction, the sale would be

<sup>70</sup> *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948).

<sup>71</sup> "Since the decision of this Court in the Civil Rights Cases, the principle has become firmly imbedded in our constitutional law. . . ." etc. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

<sup>72</sup> Cf. *Schnell v. Davis*, 336 U.S. 933 (1949).

<sup>73</sup> *Terry v. Adams*, 345 U.S. 461 (1953).

<sup>74</sup> *Barrows v. Jackson*, 346 U.S. 249 (1953).

equally frustrated, this time because it would not be made. Yet on the ground that the protection of the Fourteenth Amendment was not intended for either of the immediate parties to the suit, Vinson was willing to nullify the result of his own leading opinion.<sup>75</sup>

b) *Economic problems.*—The most paradoxical aspect of the Vinson record on the Court is that the former chairman of the Ways and Means Committee, the former wartime director of economic affairs, the former head of the Reconstruction Finance Corporation, the former Secretary of the Treasury made his judicial reputation largely in the field of civil liberty. In matters of economic policy, there is no cluster of cases from which one can draw anything approaching a Vinson economic philosophy.

The major anti-trust opinions of recent years were written by others. During the e years, anti-trust law stayed about where it was; there were no sensational advances. Since the trend to monopolization was meanwhile increasing in fact,<sup>76</sup> the main effect of the works of the Court in Vinson's years was that of standing by to let the economy go.

To find *any* significance in the Vinson economic opinions broad enough to have any prospect of seeming still vital 20 years from now, one is fairly well restricted to the *United Mine Workers* case, the steel seizure case, and the war-time demolition case already mentioned. Otherwise, one must reach for lesser matters, as for example his two excellent opinions invalidating state strike restrictions as encroachments on the right to strike as established in federal law.<sup>77</sup>

These latter opinions suggest that Vinson was not much worried about any abstract concept of "states' rights." He had been a national statesman too long to have any lingering sentimentality for state prerogatives outside their fair province; he would not strain to save a state law by any extreme effort to find that it did not conflict with a federal statute. Perhaps a similar "nation first" spirit accounts for his adherence to the majority in the cases establishing (momentarily at least) national supremacy over the offshore oil.<sup>78</sup> If there is a single substantial instance in which

<sup>75</sup> The suit was between two parties to a restrictive covenant, the defendant having breached it by selling his property to a Negro. That sale was already completed, and would not be immediately affected by the outcome of the action for damages. The Chief Justice said, "The plain, admitted fact that there is no identifiable non-Caucasian before this Court who will be denied any right to buy, occupy or otherwise enjoy the properties involved . . . is decisive for me." *Ibid.*, at 262.

<sup>76</sup> See Mund, *Government and Business* (1950), *passim*; but cf. for another view Adelman, 33 *Rev. Econ. Statistics* 269 (1951).

<sup>77</sup> *Int. Union, UAW v. O'Brien*, 339 U.S. 454 (1950); *Bus Employees v. Wisconsin Bd.*, 340 U.S. 383 (1951).

<sup>78</sup> *United States v. California*, 332 U.S. 19 (1947); *United States v. Texas*, 339 U.S. 707 (1950).

Vinson ever drew back from an expansion of federal power at state expense, it is not now recalled. Hence he went along with the majority opinion at the 1952 Term upholding the validity of the federal tax on persons engaged in gambling. The object was obviously to suppress a vice which would normally be regarded as a matter of state concern; but, said the Court, "As is well known, the constitutional restraints on taxing are few."<sup>79</sup>

One large direct consequence of Vinson's succession to the Bench involved this area of state-federal supremacy. He brought to the Court an *attitude*, more important than any single decision, of great hostility toward any state burdens on commerce. Doctrine immediately before his time had been largely developed by Chief Justice Stone with considerable leniency toward state regulation and taxation and toward the development of a practical, rather than a verbal, solution of these difficult problems.<sup>80</sup> In this area, Vinson did not take the middle position; he was unwilling to allow taxes or regulations burdening commerce without elaborate considerations of "multiple burdens," weighing of local advantage against national needs, and the like.<sup>81</sup> His views sufficiently changed the balance of power as to state regulations that the Stone views are fighting for their lives;<sup>82</sup> and in Vinson's first term, in the tax field, the Stone approach was largely abandoned.<sup>83</sup>

c) *Other matters.*—A great many of Vinson's opinions were on procedure and jurisdiction. They did not happen to cluster around particular subjects sufficiently to permit of any rational integration by way of review. This is regrettable because here is some of his finest work. Which is outstanding is of course a matter of taste; this writer particularly admires his dissent on the issue of the validity of the statute permitting District of Columbia residents to sue in diversity.<sup>84</sup>

One Vinson opinion of major importance remains: *Sherrer v. Sherrer* is a

<sup>79</sup> *United States v. Kahriger*, 345 U.S. 22, 28 (1953).

<sup>80</sup> See Wechsler, *Stone and the Constitution*, 46 Col. L. Rev. 764, 785 et seq. (1946).

<sup>81</sup> See *Independent Warehouses v. Scheele*, 331 U.S. 70, Jackson-Vinson opinion at 91 (1947); *Breard v. Alexandria*, 341 U.S. 622, 645 (1951) (dissent); cf. *Norton Co. v. Dept. of Revenue*, 340 U.S. 534 (1951).

<sup>82</sup> See *Hood & Sons v. Du Mond*, 336 U.S. 525 (1949). The possible continued vitality of the Stone approach is not yet settled; of the new appointees, Justice Clark in particular approaches the cases much as Stone did, and has written several times in the field. See his *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); and his dissent in *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602, 610 (1951).

<sup>83</sup> *Freeman v. Hewit*, 329 U.S. 249 (1946); see also the *Spector* case, 340 U.S. 602 (1951).

<sup>84</sup> *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 626 (1949).

major contribution to the solution of the quickie divorce problem.<sup>85</sup> Prior to *Sherrer* and its companion case the situation had been badly confused, leading to Justice Jackson's very pertinent observation, "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married, and, if so, to whom."<sup>86</sup> *Sherrer* gave the needed clarification. The second *Williams* case had established that Florida and Nevada divorces based on constructive service are no better than the other states want to make them;<sup>87</sup> now it was established that divorces in those or other quickie states based on actual service and actual participation are fool-proof. The practical effect of *Sherrer* is to give legal recognition and accommodation to the observable fact that divorce in the United States is usually about as much a consensual status, depending upon agreement among the parties, as is marriage, at least for those who can afford a trip.<sup>88</sup>

### III. APPRAISAL

John Marshall served 35 years, Taney almost 30, Stone 20 counting both of his positions. Fred Vinson was a member of the Supreme Court for seven years. This can be long enough to leave a heavy impress; Justice Frankfurter has thought Justice Moody, who served only four years, one of the great figures of our judicial history;<sup>89</sup> and others consider Justice Curtis (1851-57) as a power on the Bench.

But in terms of any likely expectancy, seven years is not enough for real opportunity. It is little more than one Senate term, a sort of judicial novitiate. Appraisal, then, must be a conscious viewing of a fragment. Perhaps a longer tenure would have told a different story; certainly it would have told more of a story.

For example, in the field of judicial administration one knows almost nothing about this Chief Justice. The volume of actual decided cases, with written opinions, declined almost constantly throughout these years, reaching a point in 1951 and 1952 which pulled the volume of the Court's business to its lowest level in a century.<sup>90</sup> Some critics have thought that

<sup>85</sup> 334 U.S. 343 (1948).

<sup>86</sup> *Estin v. Estin*, 334 U.S. 541 (1948).

<sup>87</sup> *Williams v. North Carolina (II)*, 325 U.S. 226 (1945).

<sup>88</sup> Professor Fowler Harper, editor of *Problems in Family Law* (1952), advises that, on the basis of numerous interviews with divorce practitioners, the general run of problems on foreign divorces seems well settled since *Sherrer*. The rare and intricate problem may still remain; cf. *Sutton v. Leib*, 342 U.S. 402 (1952).

<sup>89</sup> Cf. *Adamson v. California*, 332 U.S. 46, 59 (1947).

<sup>90</sup> The pre-war volume was around 200 cases a year. In Vinson's years the numbers were: 1946, 142; 1947, 119; 1948, 122; 1949, 94; 1950, 88; 1951, 89; 1952, 104. On the counting method, see note 18, *supra*.

the Court is turning away too much business with its use of its certiorari discretion;<sup>91</sup> be that as it may, the end result is that there was no great bulk of business to administer. Some of the Vinson terms were longer than might have been thought to be necessary for this volume of business, and on occasion what seemed an abnormally large number of cases were carried over for reargument;<sup>92</sup> but all this is not very significant at most. Putting together all the odds and ends of facts and rumor concerning administration, the most that one can say with assurance is that Charles Evans Hughes' reputation as the top administrator of the Court in the 20th Century was not seriously menaced by Fred M. Vinson.

The most peculiar reargument episode of Vinson's Chief-Justiceship was undoubtedly the series of orders concerning the grade school segregation cases. The South Carolina school case, *Briggs v. Elliott*,<sup>93</sup> was in the Court at the beginning of the term in the fall of 1951. The Court held *Briggs* for six months and then remanded it for what appeared to be almost superfluous proceedings below. The case duly came back again in the fall of 1952 quite unaffected by the required lower court proceedings, and was postponed again until December, 1952—which is to say, until after the election. It was then argued most elaborately by very distinguished counsel. In June, 1953, reargument was ordered for the fall of 1953, and the matter was subsequently postponed until December, 1953. It will presumably be argued in 1953 and, perhaps, decided then.<sup>94</sup> The case is

<sup>91</sup> That has been the theme of this series of articles; see particularly 1950 Term, pp. 216-17, 231-34. For more comprehensive discussion see the annual series of Professor Harper and collaborators beginning in 99 U. of Pa. L. Rev. 293 (1950).

<sup>92</sup> Four cases were carried over for reargument from the 1951 to the 1952 Term: *United States ex rel. Smith v. Baldi*, decided at 344 U.S. 561 (1953); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *United States v. Henning*, 344 U.S. 66 (1952); and the *Brown v. Allen* group, 344 U.S. 443 (1953); and meanwhile the segregation cases were being carried along, see next note and text. In addition to the school cases, a group of Labor Board cases was carried for re-argument from the 1952 to the 1953 Term, *Radio Officers v. NLRB*, No. 5 at the October, 1953 Term, as was *Maryland Casualty Co. v. Cushing*, No. 11 at the October, 1953 Term.

<sup>93</sup> 342 U.S. 350 (1952), Justices Black and Douglas dissenting.

<sup>94</sup> *Briggs v. Elliott* was docketed in the fall of 1951 and remanded on January 28, 1952, 342 U.S. 350. It duly returned and jurisdiction was noted on June 9, 1952. Meanwhile the appeal in *Brown v. Topeka* was filed in November, 1951, and no action was taken until probable jurisdiction was noted along with *Briggs v. Elliott* on June 9th. On Oct. 8, 1952, probable jurisdiction was noted in *Davis v. County School Board*, 344 U.S. 1, and at the same time an order was issued postponing argument in the first two cases from the scheduled date of October 13th to a date in December, by which time it was anticipated that a fourth case, *Bolling v. Sharpe*, would be ready to be included; and certiorari was granted in the *Bolling* case, on Nov. 10, 1952, 344 U.S. 873. But before the December argument still another case had turned up, *Gebhart v. Belton*, cert. granted November 24, 1952, 344 U.S. 891.

After elaborate argument, the whole group was then set for reargument by order of June 8, 1953, with certain specific questions listed for discussion, the reargument to be October 12

thus well on its way to the category of the great delayed decisions, like the Charles River Bridge Case (six years), or the Lottery cases (three years). As with those cases, the special tension attached to the matter takes it out of the category of normal administrative questions.

In two aspects of administration, Vinson was highly successful. His assignment of opinions was extremely fair; since as was shown earlier, he often skimmed himself, it was fair to the point of leaning over backwards. There has been no hazing period of dull statutory and tax cases for the younger Justices, no playing of favorites. The plums—the big and the interesting cases—were, within the limits of agreement, fairly passed around. Also, his work with the Judicial Conference, in which he took great interest, was well done and fruitful. He helped to develop the status of the Conference, backed its legislation, and took enormous pride in its accomplishments.<sup>95</sup>

If there is a common impression that Vinson inherited a quarrelsome and divided Court and somehow welded it into an harmonious whole, the impression is pretty clearly wrong. It is based largely on the unusual outbreak by Justice Jackson against Justice Black immediately subsequent to Vinson's selection as Chief Justice. Justice Black bore the attack in total silence, and Justice Jackson never repeated it after his return from Nuremberg. There is no reason whatsoever to suppose that the proper silence of the one Justice and the belated silence of the other were the result of any effort of the Chief Justice.<sup>96</sup>

The Chief Justice undoubtedly did his best to reduce what has seemed to many the excess of dissents and concurrences; he very rarely accomplished either. But the will of one man, Chief Justice or not, is not enough to have any great effect as to dissents. The bulk of his own outstanding opinions were for a less than unanimous Court, and in a surprisingly large number, he did not unequivocally speak for five Justices. In *United Mine Workers*, two others subscribed in full to his opinion, in *Doubs* three, in

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1953, 345 U.S. 972; and subsequently the time for filing briefs was extended to December, 1953. For some discussion of the political aspects of these postponements, see Frank, *Can Courts Erase the Color Line*, 2 *Buff. L. Rev.* 28, 37 (1952).

The Court also permitted two related cases to remain on its docket without acting on the petitions for certiorari. In *Holcombe v. Beal*, involving the right of Negroes to use the municipal pool the petition had been filed in June during the last week of the 1951-52 Term; *Hawkins v. Florida*, a graduate school segregation case, was filed in late October.

<sup>95</sup> A good expression of this attitude is *United States v. Hayman*, 342 U.S. 205 (1952), involving a challenge to the validity of a bit of legislation which had originated with the Judicial Council.

<sup>96</sup> For fuller discussion see Frank, *Mr. Justice Black*, chap. VII (1949).

*Dennis* three, in *Burns* three, in *Oyama* two, and in the steel seizure case he dissented for two others. Of his greatest opinions, only the Restrictive Covenant and law school segregation cases approximated unanimity.<sup>97</sup>

But while Vinson's exact doctrines were not often unequivocally accepted, his views as to results usually prevailed. He was almost invariably in the majority. The figures for the most important cases of the 1952 Term are printed here to complete the data for previous terms, but this one year's figures are a little misleading. Putting together all of the important cases of the past seven years, Vinson was in the majority slightly more often than any other Justice.

TABLE 3  
VOTING DISTRIBUTION IN MAJOR AND IMPORTANT CASES<sup>98</sup>  
1952 TERM

	MAJORITY VOTES			DISSENTING VOTES		
	Major	Important	Total	Major	Important	Total
Vinson.....	6	27	33	1	6	7
Black.....	3	16	19	4	15	19
Reed.....	6	32	38	0	1	1
Frankfurter....	4	24	28	3	7	10
Douglas.....	3	15	18	4	17	21
Jackson.....	6	30	36	1	5	6
Burton.....	6	28	34	0	3	3
Clark.....	7	27	34	0	2	2
Minton.....	5	30	35	1	3	4

<sup>97</sup> These cases are each cited *supra* in connection with their substantive discussion.

The factual basis is not apparent for such common newspaper assertions as the *Washington Star's*, "Chief Justice Vinson was credited with substantial progress in trying to reconcile differences or prevent public signs of bickering on the bench." *Washington Evening Star*, p. A-6 (Sept. 8, 1953). Max Lerner, *N.Y. Post*, p. 30 (Sept. 9, 1953), credits Vinson with trying "to cut down judicial wrangles," saying, "He tried very hard to get his associates to stop writing so many dissenting and concurring opinions." Again, no evidence is cited. This is not to say that these observations may not have been true, but merely that no outsider could know about them from any published source. My suspicion is that this is one of those amiable falsehoods ordained to become legend.

It is true that Vinson's own manner, as exhibited to outsiders at least, was always affable toward his brethren. A rare exception at the 1947 Term, headlined by the *Louisville Courier Journal*, Apr. 30, 1948, "Vinson Hushes Up Frankfurter in Unusual Supreme Court Flare-Up," was certainly a trifling instance. For details see 16 *LW* 3329 (1948).

A good indication of Vinson's temperate manner is the steel seizure dissent, in which Vinson may well have felt stronger, and hence have been more tempted to excess, than in any other opinion. Justices Jackson and Clark as Attorneys General and steel company counsel John W. Davis as Solicitor General had each taken previous positions which a reasonable man might have thought in conflict with their positions in this case. Vinson squeezed the last juice from these incongruities without being in any way offensive or personal.

<sup>98</sup> Cases listed as major are *United States v. Caltex*, 344 U.S. 149 (1952), the war damage liability case discussed above; *United States v. Kahriger*, 345 U.S. 22 (1953), the gambling tax

The most important conclusion, of course, defies numerical analysis. Was Vinson as to his colleagues of the majority a leader, a follower, a co-worker, or some of each? No one outside the Court can know, and guess work would be profitless. The Justices with whom Vinson most completely agreed were his three fellow Truman appointees, Burton, Clark, and Minton, but above all, Reed. Jackson commonly came to the same results as Vinson, but very often in quite different ways. Of the basic "Vinson bloc" of Reed, Burton, Clark, and Minton, the bulk of the most important opinions were written by Reed, as befitted his seniority and ability. This was particularly noticeable in Vinson's last year on the Bench when Reed, at the height of his powers, had an outstanding year.<sup>99</sup> Figures on agree-

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case discussed above; *United States v. Rumely*, 345 U.S. 41 (1953), the decision closely confining Congressional Committees within the scope of their authorizing resolutions; *Terry v. Adams*, 345 U.S. 461 (1953), the decision on a Texas variant of the white primary, which draws its special significance from the fact that three Justices repudiated the "state action" limitation on the Fifteenth Amendment; *Barrows v. Jackson*, 346 U.S. 249 (1953), the damages case on restrictive covenants; *Burns v. Wilson*, 346 U.S. 137 (1953), the case on civil review of military courts discussed above; *Stein v. New York*, 346 U.S. 156 (1953), a basic confession case.

Cases listed as important are *Federal Power Comm. v. Idaho Power Co.*, 344 U.S. 17 (1952); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *United States v. Cardiff*, 344 U.S. 174; *Wieman v. Updegraff*, 344 U.S. 183; *United States v. C.I.T. Credit Corp.*, 344 U.S. 218 (1952); *Schwartz v. Texas*, 344 U.S. 199 (1952); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *King v. United States*, 344 U.S. 254 (1952); *American Trucking Ass'n v. United States*, 344 U.S. 298 (1953); *Brock v. North Carolina*, 344 U.S. 424 (1953); *FTC v. Motion Picture Co.*, 344 U.S. 392 (1953); *NLRB v. Dant*, 344 U.S. 375 (1953); *Brown v. Allen*, 344 U.S. 443 (1953); *Chicago v. Willett Co.*, 344 U.S. 574 (1953); *Bode v. Barrett*, 344 U.S. 583 (1953); *Chew v. Colding*, 344 U.S. 590 (1953); *American Newsp. Pub. Ass'n v. NLRB*, 345 U.S. 100 (1953); *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953); *Ramspeck v. Federal Trial Examiners*, 345 U.S. 128 (1953); *Local Union v. Graham*, 345 U.S. 192 (1953); *Heikkila v. Barber*, 345 U.S. 229 (1953); *United States ex rel. Chapman v. Federal Power Comm.*, 345 U.S. 153 (1953); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *United States v. PUC*, 345 U.S. 295 (1953); *Dameron v. Brodhead*, 345 U.S. 322 (1953); *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953); *Times-Picayune Co. v. United States*, 345 U.S. 594 (1953); *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Dalehite v. United States*, 346 U.S. 15 (1953); *United States v. Nugent*, 346 U.S. 1 (1953); *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953).

<sup>99</sup> Important Reed opinions were *United States v. Kahriger*, 345 U.S. 22 (1953), the gambler's tax case; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), on a difficult problem of separation of church and state; *American Trucking Ass'n v. United States*, 344 U.S. 298 (1952), an important Interstate Commerce Commission case; *NLRB v. Dant*, 344 U.S. 375 (1953), on a very important detail of the timing of filing non-Communist affidavits in Labor Board matters; *Brown v. Allen*, 344 U.S. 443 (1953), involving several matters of fair trial and the effect of the denial of the writ of certiorari in these cases; *United States v. Public Utilities Comm.*, 345 U.S. 295 (1953), on the coverage of the Federal Power Act; *Dameron v. Brodhead*, 345 U.S. 322 (1953), on validity of exemption of soldiers' property from tax; *Poulos v. New Hampshire*, 345 U.S. 395 (1953), on the extent to which an applicant for street use for religious purposes must exhaust his state remedies; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953), a sovereign immunity problem; *Dalehite v. United States*, 346 U.S. 15 (1953), on the scope of the Federal Tort Claims Act as applied to the Texas City disaster of 1947. In



ments follow. Whether Reed's role in getting to the results was as great as his role in expressing them cannot be known.

There is a needful lesson to be learned from the career of Vinson as Chief Justice. It is perfectly apparent that Vinson was not the success in the Chief Justiceship that he was in some of his other offices. Those who observed him as Director of the Office of Economic Stabilization report him at his best, and it was a great best. In that Office he showed a capacity to master large areas of factual information quickly, to adjust differences of opinion, to be decisive and yet conciliatory, and above all else to originate action programs. Reasonable and patriotic public servants might disagree with his action, just as reasonable men might later differ with his opinions, but he did act.

Yet in all this, in his other administrative, and in his legislative work, he had staff to assist, to do the writing, the drafting, the detail work. What was reserved for him was usually the ultimate Yes or No, or the task of negotiating to some ultimate Yes or No. This capacity to decide and to

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other words, of the forty most important cases of the year, Reed wrote the opinion in about twenty-five per cent.

Most of these opinions were extremely successful. The Dant and Standard Oil cases are very clear and compelling. The Kedroff case called for abundant reference to material on church history; a comprehensive check of the footnotes shows the material all much in point.

Since Reed to so large an extent *was*, author-wise, "the Vinson Court," it may be appropriate to note a few dissatisfactions as well. *Brown v. Allen*, so far as Reed's opinion is concerned, was a dissent on the issue of the effect of denial of certiorari; many re-readings leave simply incomprehensible just what weight Justice Reed thought should be given by the District Court to the denial. Kahriger really attempts no distinction of the Child Labor Tax case, 259 U.S. 20 (1922), which is thrust aside in a sentence and a footnote—perhaps no more than can be done without overruling it.

The prose of the introduction and first part of the Poulos case has an unusually lumpy, parenthetical quality making for poor understanding on a first reading. Moreover, as a result of this decision a speaker deprived of a license arbitrarily must go to court to vindicate his rights before speaking as if he had wished to "erect structures, purchase firearms . . ." etc. 345 U.S. 395, 409. Justices Black and Douglas dissented, urging that speech deserves special protection. Black declared that "This to me is a subtle use of a creeping censorship loose in the land." 345 U.S. 395, 422.

In the Texas City disaster case, the issue was whether the government could be held liable under the Tort Claims Act for the explosion of government manufactured and exported fertilizer. The defense was that the government's act was not "mere negligence." Rather, if negligence at all, it was negligence raised to the high level of "discretion," since the real negligence, if any, was in undertaking to manufacture so explosive a fertilizer in the first place. The line between the two is blurred by the Tort Claims Act itself; but Justice Reed's exemption of this series of events from liability because "discretionary" seems so all inclusive that it would also exempt the consequences if an agency head told his truckers to drive fast or if an army general deliberately, though needlessly, sent his airplanes low over a city. Justice Reed puts it thus broadly: "Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." 346 U.S. 15, 36 (1953). It seems almost inevitable that this language will some day have to be modified; it certainly went beyond the exact needs of this case.

decide wisely, is only one of several required of a Supreme Court Justice. The qualities of a great Justice include wisdom, but in addition they include knowledge, skill, and diligence in some combination. Vinson's career developed wisdom; it did not develop in equal degree the *kinds* of skill and knowledge of a Taney or a Taft.

Vinson's career epitomizes one of the great problems in the selection of a modern Supreme Court Justice, one for which there is no ready answer. Our Justices commonly come from the figures of public life, from the Cabinet or the Congress. The complexities of modern life now require that those offices be held by men who can delegate almost every aspect of their

TABLE 4  
AGREEMENTS AMONG JUSTICES IN MAJOR AND IM-  
PORTANT CASES, 1952 TERM<sup>100</sup>

	Vin- son	Black	Reed	Frank- furter	Douglas	Jack- son	Bur- ton	Clark	Min- ton
Vinson.....		17	30	19	18	26	26	29	28
Black.....	17		16	23	29	14	14	13	16
Reed.....	30	16		23	17	27	31	31	33
Frankfurter....	19	23	23		19	24	25	21	22
Douglas.....	18	29	17	19		11	14	14	15
Jackson.....	26	14	27	24	11		23	26	25
Burton.....	26	14	31	25	14	23		28	33
Clark.....	29	13	31	21	14	26	28		29
Minton.....	28	16	33	22	15	25	33	29	

work except decision making. The jobs are too big to leave details to the leaders. If Franklin D. Roosevelt had spent as much time on his state papers as Abraham Lincoln spent on his, he would have had no time left to direct World War II. A Senator from a large state in particular can seldom, if ever, be a Clay or a Webster; he must be the head of an office. We live in an age of the staff researcher, the ghost writer, the first draft man; they are imperative for most important public figures. And so we develop a breed of public man who works that way.<sup>101</sup> But the business of the Supreme Court has not gained in either complexity or volume in any thing like the complexity and volume of the remainder of public affairs.

<sup>100</sup> These are the cases cited in Note 98, *supra*.

<sup>101</sup> See, e.g., the episode concerning Interior Secretary McKay and his testimony before a House Committee on May 6, 1953, as reported *N.Y. Times*, p. 12 (May 7, 1953). McKay testified that certain unspecified personnel changes had been made in the Tariff Commission, as a result of which a given policy should be followed. Rep. Eberharter interrupted to ask what the changes were. Said McKay, "I must admit I don't know. I thought it had changed. I didn't write this particular paragraph. I suppose it had changed." Replied Mr. Eberharter, courteously taking the Secretary's bobble in stride, "The person who wrote your statement must have meant that the Commission had a new member." McKay, "I suppose so."

Perhaps it should; but the fact is as noted a moment ago, the volume of Supreme Court business of late is around the Civil War level; and the increase in complexity, while great, is not overwhelming.<sup>102</sup>

In short, our society is filling the familiar reservoir of public officials from which we draw Supreme Court appointees with men who are equipped to handle broad responsibilities better than even great details; they are not quite cut out for the judicial job. Such men, when they transfer to the judiciary, may try to carry their institutional pattern with them; Vinson, as has been noted, turned the once lonely job of Chief Justice of the United States into a staff operation. Yet such a transfer can never be a complete success. Vinson, without doubt, was responsible for every vote he ever cast, for every Yes or No; but a judicial opinion is a mass of subordinate decisions, and nothing in the exigencies of the office require that these be left to subordinates to make.

In his total impact on American law, Vinson will probably be remembered as the symbol of the judicial age which reversed the trend of the Hughes-Stone periods toward judicially enforced civil liberty. Civil liberty doctrine had developed between 1918 and 1930 in the dissents of Holmes and Brandeis. The replacement of Chief Justice Taft and Associate Justice Sanford by Chief Justice Hughes and Justice Roberts in 1930-31 carried the Holmes-Brandeis spirit into the majority even before the New Deal appointments,<sup>103</sup> and, thereafter expanded upon it in a dozen new ways. This new era of judicial liberty winked out during Vinson's Chief Justiceship; the spirit of Taft and Sanford is in effect renewed again, with Black and Douglas as the principal dissenters. Vinson will be remembered as the Chief who presided at the liquidation of the new liberalism in jurisprudence.

He will also be remembered as a friendly, unassuming man who loved his country ahead of any personal or provincial interest; who relinquished security and comfort to serve it well in its wartime need; who, if he ever erred in his judgments, erred in the direction he thought his country's safety required. And he will be remembered as a Judge who, in two great opinions, did much to break the grasp of racial prejudice in the land.

<sup>102</sup> For a synopsis of this development, see Frankfurter and Landis, *The Business of the Supreme Court*, chap. 8 (1927).

<sup>103</sup> See, for examples, *Near v. Minnesota*, 283 U.S. 697 (1931), and *Herndon v. Lowry*, 301 U.S. 242 (1937) on free speech; *Brown v. Mississippi*, 297 U.S. 278 (1936), on forced confessions; and *Powell v. Alabama*, 287 U.S. 45 (1932), on the right to counsel.