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THE UNITED STATES SUPREME COURT: 1951-52*

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NOBODY WILL SAY it was a quiet term. The total number of cases decided was again small, only eighty-nine all told. There was the usual quota of trivia, and maybe a little over; more piddling points on statutes of limitations, for example, than posterity is ever going to want to know about.

But there was enough serious national business to make the term memorable. Every region felt the effects; Hollywood won a slight reprieve from censorship, while school children and their teachers in New York got no reprieve at all from school time religious training and loyalty purges, respectively. Illinoisans were warned to hold their tongues if they would disparage groups, Oregon discovered that maltreatment by its medical organizations of experiments in group medicine occurred too long ago to count, and the South postponed for a year any consideration of its basic problem of school segregation. In more international perspective, a Japanese-American traitor and military courts in Germany were subjects of decisions, and aliens within the United States had a murderously bad time with a series of cases reflecting a renewed chauvinism in legislative policy. Finally there was the steel case.

The general tone of the term will be suggested by these figures. More than a quarter of the cases involved civil rights. In twenty civil rights

* This article is the sixth in an annual series. The purposes of the series are (a) to present a concise summary of the most interesting of the cases; (b) to comment briefly on their apparent general social significance; and (c) to make some record of factors observed concerning the institutional functioning of the Court. Shot through each purpose is that sense of personal relief which an author gets from expressing his own views as to the proper decisions of the cases. The preceding articles, covering the 1946 through 1950 Terms, are at 15, 16, 17, 18 *Univ. Chi. L. Rev.* 1 (1947-50), and 19 *Univ. Chi. L. Rev.* 165 (1951).

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cases, the Court divided. In fifteen of the twenty, it decided against the claimed right.

I. HIGH SPOTS OF THE YEAR

Dramatic high spot of the year was *Youngstown Sheet & Tube Co. v. Sawyer*¹ in which the Court and the Constitution were precipitated squarely into the middle of the row between the President and Congress over labor policy. A nationwide steel strike was the most immediate consequence of the decision, and although for a few days it looked as though settlement might come easily, that hope soon disappeared and a steel shortage began to bite into defense production. In the long run the resolution of "the constitutional question," as it was described in the press, was a marked step toward restoring the balance of power between the Congress and the President, a balance which was tipping ever more toward the latter. Whether Congress would have the wit to make use of its renewed lease on power was an issue by no means resolved at Term's end.

The law, in *Burstyn, Inc. v. Wilson*,² finally recognized that movies were out of the nickelodeon stage by extending them some constitutional protection from censorship or, at least, from capricious censorship. Other major civil rights cases were *Zorach v. Clauson*,³ which modified markedly the Court's previous decision on release time and gives constitutional validity to the New York system of encouraging religious training; *Adler v. Board of Education*,⁴ upholding New York's Feinberg Law, aimed at insulating the teaching profession from disloyal associations; and *Beauharnais v. Illinois*,⁵ upholding conviction of a man who circulated a petition for racial zoning to the Chicago City Council because the petition asserted that Negroes were rapists, marihuana users, and knife carriers. The National Association for the Advancement of Colored People, incidentally, stood on principle and *opposed* the validity of the state statute involved.⁶

Legislatively, in 1951-52, the United States continued to treat most lavishly the alien who stayed in his home country (six plus billion dollars for mutual assistance) and most severely the alien seeking refuge on our own side of the Statue of Liberty (a new McCarran Act). Judicially, the Court threw its own set of harpoons into the alien who has come within our midst. One case in the spirit of most unparalleled severity was *Hari-*

¹ 72 S. Ct. 863 (1952).

² 343 U.S. 495 (1952).

⁴ 342 U.S. 485 (1952).

³ 343 U.S. 306 (1952).

⁵ 343 U.S. 250 (1952).

⁶ While the NAACP was not a direct party, its General Counsel, Mr. Thurgood Marshall, signed the petition for rehearing.

siades v. Shaughnessy,⁷ which in its extremest instance sanctioned the deportation of an Italian who had been a Communist for a short time as a young man, but who had been quite disassociated from such activities for more than twenty years, and whose association had terminated more than ten years before Congress made such association a deportable offense. Even more extreme was *Carlson v. Landon*,⁸ a decision permitting the Immigration Service to put suspected aliens in jail and hold them *without bail*, apparently indefinitely. This is the closest equivalent to a *lettre de cachet* in American history since the Civil War.

II. REGULATION OF BUSINESS AND LABOR

Labor

There was one major labor relations problem at the 1951 Term. That was the *Youngstown Steel* seizure case.⁹

In December, 1951, it became apparent that the steel industry was headed for labor trouble.¹⁰ There had been no contract adjustment for two years, and the labor contracts were about to expire. Collective bargaining was unsuccessful, and a strike, potentially disastrous to military output for the Korean war, for the mutual assistance program, for the national defense and for domestic consumption, was clearly impending.

In light of a singularly unco-ordinated Congressional labor policy, President Truman, if he was to act at all, had two basic choices. He could proceed under the Taft-Hartley Act provision dealing with national emergency strikes,¹¹ causing a panel to investigate the situation and report to him and getting an eighty day federal court injunction while the country and the parties mulled over the report. Sometime in the latter part of the eighty day period he could, for the umpteenth time in his two terms, ask

⁷ 342 U.S. 580 (1952).

⁸ 342 U.S. 524 (1952).

⁹ 72 S. Ct. 863 (1952). The discussion following is a deviation from the usual pattern of this article in that it expands at some length on the steel case. This course is followed in part because of the interest and importance of the subject, and in part because there were no other cases of major economic significance this year. The other labor cases were *NLRB v. American Nat'l Ins. Co.*, 72 S. Ct. 824 (1952), a decision which may have vast repercussions to collective bargaining since it appears to permit employers to exclude from discussion so-called "management function clauses," and *Int'l Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952), holding that actions for damages for jurisdictional strikes may be brought under the Taft-Hartley Act without prior reference to the Labor Board.

¹⁰ The author was among counsel to the government in the Montgomery Ward seizure litigation in World War II, and in the discussion following has drawn with freedom on the brief in that case. He has also drawn at will from his *The Future of Presidential Seizure*, 46 *Fortune*, No. 1, at 70 (July, 1952).

¹¹ 61 Stat. 152 (1947), 29 U.S.C.A. §§ 171-80 (Supp., 1951).

the Congress to do something about emergency strikes, and beyond that, he was utterly powerless.

The second alternative was to proceed under the Defense Production Act through the Wage Stabilization Board,¹² a tripartite body which might be able to handle the situation through hearings and an award, although the award would have to be accepted voluntarily by the parties. The President chose this course; the Board recommended a wage increase, and the only serious remaining issue appeared to be how much of a compensating price increase the government would allow the industry. At that point, Defense Production Administrator Wilson kicked over the traces and publicly disapproved the wage recommendation. This led to Mr. Wilson's retirement from his government position, but the break in administration ranks proved fatal as the industry, following Wilson's lead, firmly resisted the concessions to the union.

As it became apparent that the industry would not accept the Board's recommendations, a strike again became imminent. And again the President's basic alternatives were two: he could now invoke the Taft-Hartley Act and win an additional eighty days delay or, so he thought, he could seize the steel properties, take them into the possession of the government, and put the Stabilization Board's orders into effect himself.¹³

The first alternative seemed to him appallingly unfair. A new investigating panel could only chew over the identical evidence which had just been before the Board, and the Board's proceedings had already delayed the strike for ninety-nine days and thus frustrated what had been found to be the union's just demands for that long. Moreover, one may suspect, the President had very little sympathy in the Spring of 1952 for using a statute which had the name "Taft" in it.

The President thereupon chose the seizure device. An appropriate order was issued, a few flags were run up, and by operation of a remarkable legal fiction, Secretary of Commerce Sawyer was for the moment czar of the nation's steel industry.

The industry rushed to court, and the lawsuit proceeded in a welter of hyperbole on both sides. While the government contended for an unlimited conception of Presidential power and the Solicitor General announced

¹² 64 Stat. 803 (1950), 50 U.S.C.A. App. §§ 2101-23 (1951).

¹³ The discussion above omits two lesser alternatives. The requisition provision of the Defense Production Act of 1950, 64 Stat. 799 (1950), 50 U.S.C.A. § 2081 (1951), was unavailable in part for the practical reason that the President did not have in his official pocket the enormous down-payment required to be made under the statute, and in part because that kind of payment-in-advance system is singularly inappropriate for a very short term, but indefinite, taking. The second is the Selective Service Act of 1948, discussed in note 38 *infra*.

to an astonished Court of Appeals that an adverse decision would "repeal" the Emancipation Proclamation and re-establish slavery, the industry proclaimed that a decision against it would "repeal" Magna Carta. The trial court gave a preliminary injunction against the government; the Court of Appeals of the District of Columbia granted a stay; and the Supreme Court granted certiorari immediately. The case was argued a week after it came to the Court and was decided in June—three weeks later.

The issues, though somewhat narrower than whether the principles of the great Charters of the Anglo-Saxons or of the black race should be undone, were broad enough. Not involved was the question of whether Congress had the power to authorize the seizure of basic industrial properties to terminate labor disputes; everyone agreed that Congress could do this as part of its eminent domain power. The question was whether, in the absence of authorizing Congressional action, (a) the statutes on the books should be read as by their own force precluding Presidential action, and if not, (b) whether the President had an eminent domain power of his own which could be invoked for such an emergency as that then confronting the United States. Appraisal of the Court's answer required consideration of the background of executive seizure powers and of the nature of plant seizure.

(a) *Executive power*. While the law books commonly announce that the eminent domain power is purely legislative in origin, there have been important exceptions, for there are executive powers which antedate the parliamentary system. As long ago as the reign of Elizabeth, persons had been licensed by the crown to go upon private property to take saltpetre, and the matter became a subject of litigation before Lord Coke.¹⁴ Saltpetre was used in the manufacture of a newfangled product called gun powder, "devised within time of memory," said the Court, but already so valuable as to be essential to "the necessary defence of the realm." The Court approved the taking because "the ministers of the King ought to make provision of saltpetre which will endure a long time, and when need is, to make it into gunpowder, which may be made before the navy can to put in readiness."

The saltpetre case is so palpably not the steel case that it would be irrelevant but for one thing: it drew the original line, which has lasted with much deviation since, of *emergency* as the boundary of the executive taking power. Lord Coke's court specifically declared that if, instead of saltpetre, the King desired gravel for the repair of one of his palaces, he could not

¹⁴ The Saltpetre Case, 12 Co. Rep. 12, 13 (1607).

take it; saltpetre was different because its use "extends to the defense of the whole realm, in which every subject has benefit."

What developed between the middle of the sixteenth and the middle of the nineteenth century was a theory of emergency executive taking powers which had its ultimate complication in a matter far remote from eminent domain, the doctrine of sovereign immunity. On the one hand, there were obviously occasions when property "must" be taken. Property in the path of a fire might be destroyed to stop the fire, and property about to fall into enemy hands might be destroyed so that it would do the enemy no good.¹⁵ On the other hand, it is usually unfair to make the individual bear the whole cost of the common good, and under the doctrine of sovereign immunity there was no way of requiring the community to pay for what the executive might do.

The result was an emergence, before 1850, by practice and by judicial decision, of a noncompensable executive taking power for immediate emergencies, principally of war and of fire. During the Revolution and the War of 1812, property was repeatedly "impressed" when needed for immediate military purposes. During the Revolution, Rhode Island College was taken over for a hospital, and in 1812 General Jackson took what he needed for his army at New Orleans.¹⁶ In 1813 the House Committee on Military Affairs, backing up a General who had seized several boats, said, "In the circumstances of war, such exigencies will frequently occur in which the commanding officer will stand justified in taking, by force, such necessities, either for support or conveyance, as are absolutely indispensable and which cannot be obtained by any other means."¹⁷

Those early episodes were never considered by the Supreme Court. The first case before those Justices arose out of the Mexican War when a trader named Harmony took a large wagon train from peaceful Independence, Missouri, to the very edge of danger at El Paso, Texas. He quickly discovered that he had come too close to the front.

Also at El Paso was an American force of 1,000 men, under Colonel Doniphan, planning to attack Chihuahua, 300 miles away. But Doniphan's force was too small for comfort, and he feared a surprise attack as he marched. Suddenly inspiration came. Lt. Colonel Mitchell, of Doniphan's staff, seized all the wagons in the vicinity, including Harmony's,

¹⁵ Leading cases are *Respublica v. Sparhawk*, 1 Dall. (U.S.) 357 (1788) (war destruction); *Mayor of New York v. Lord*, 18 Wend. (N.Y.) 126 (1837) (fire).

¹⁶ *American State Papers (Class IX, Claims) No. 86*, p. 197 (1797); *No. 584*, p. 833 (1822); *No. 590*, p. 838 (1822); and numerous others in the same series.

¹⁷ *Ibid.*, No. 461, p. 649 (1818).

and pressed all the teamsters into service. Doniphan's force took the wagons with them to Chihuahua, forming them into corrals at night for the protection of the soldiers as they slept. Eventually the wagons fell into the hands of the enemy.

When Harmony got back to safety, he sued Mitchell for the value of his wagons, asserting that the military had no right to take his property even in the emergency at El Paso. Therefore, said Harmony, the taking was a personal theft by Mitchell for which he should have to pay Harmony. The trial court gave judgment for Harmony for \$90,000, which Colonel Mitchell, whose compensation was \$187.00 a month, would have found hard to pay.

Congress promptly passed an Act committing the government to pay any judgment which the Supreme Court might sustain against Mitchell and directing the Attorney General to defend the Colonel. The Attorney General argued that the emergency justified the seizure.

Nonetheless the Supreme Court affirmed the judgment for the trader Harmony. Chief Justice Taney admitted that there were occasions when "a military officer, charged with a particular duty, may impress private property into the public service or take it for public use." But what were those occasions? Said Taney:

The danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit to delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.¹⁸

Mitchell v. Harmony makes verbal sense in its statement of the doctrine of emergency. It makes practical sense in that the United States got the wagons, and paid for them by assuming Mitchell's debt, which is fair enough. It makes no sense at all as an application of its doctrine to its facts, since it puts the test of "emergency" and then holds that Colonel Doniphan's situation was not an emergency. Since a more extreme life and death military emergency would be hard to imagine, one must assume that the Court made sound law and then twisted its facts because this was the only way it could reach the just result of letting the United States foot the bill.

With the establishment of the Court of Claims a few years later, and the partial waiver of sovereign immunity, the necessity for this disjunction

¹⁸ *Mitchell v. Harmony*, 13 How. (U.S.) 115, 133-34 (1852).

of law and fact passed. From the Civil War to the Twentieth Century, he verbal test of executive emergency power remained what it was in *Mitchell v. Harmony*, but the factual standard perceptibly dropped. A line began to develop between "extreme emergency" takings which, harking back to the early fire destruction cases, were noncompensable; and the "minor emergency" takings, which were considerably less pressing and which were compensable. Destruction of a toll bridge in the course of the Civil War by the armed forces, to keep it out of enemy hands, was (a) legal and (b) noncompensable.¹⁹ The taking of river steamers on the Mississippi, far from the field of battle, for troop movements was (a) legal and (b) compensable.²⁰ The farthest reach of the doctrine that almost any executive wartime taking was legal, so long as it was paid for, was a Spanish-American War Court of Claims decision, *Alexander v. United States*.²¹ There the taking of a farm in Pennsylvania for military training purposes was upheld although the actual hostilities were over and, in any case, had never been any closer than Cuba.

Meanwhile, as law was developing through decisions, it was also developing through executive practice and Congressional acquiescence. All the takings mentioned so far were by military subordinates. President Lincoln himself directed the taking of the railroad and telegraph lines between Annapolis and Washington.²² Senator Ben Wade of Ohio, a leader of the Republican party, said the Government "may seize upon private property anywhere, and subject it to the public use by virtue of the Constitution."²³ Senator Cowan said that when Congress declares war, it gives the President "all the powers necessary to attain the desired end; and among other things it confers on him power, as has been well said, to impress horses, railroads, telegraph lines, men, teams, everything of that kind into his service, and compel them to work according to his plan and pattern."²⁴

It gives a false sense of precision to summarize this mass of essentially unco-ordinated practice and decision; but, with due allowance for the haziness of the sources, it seems to have been generally accepted at the turn of the twentieth century that there was an executive power, at least in times of declared war, to take property in case of emergency, so long as

¹⁹ *United States v. Pacific Ry. Co.*, 120 U.S. 227 (1887).

²⁰ *United States v. Russell*, 13 Wall. (U.S.) 623 (1871).

²¹ 39 Ct. Cl. 383 (1904).

²² 2 War of the Rebellion Official Records 603-4 (Series I, 1880).

²³ Cong. Globe, 37th Cong. 2d Sess. 509 (1862).

²⁴ *Ibid.*, at 516. For similar statements see Fessenden, *ibid.*, at 512, Browning, *ibid.*, at 510, 520, and Grimes, *ibid.*, at 520.

it was paid for and, in even more extreme emergencies, without paying for it.

This nonstatutory taking power should be regarded as part of the President's war power. His power in peacetime is something else again. President Theodore Roosevelt gave serious thought to seizing the coal mines to prevent a coal shortage during the strike of 1902, and probably would have done so if the strike had not been settled.²⁵ In 1914 the American Federation of Labor asked President Wilson to take over the coal mines of Colorado during a strike.²⁶ In 1922, President Harding gave serious consideration to taking such action during a coal strike.²⁷ But the taking power was not used in any of these instances, and so its exercise in peacetime has never been tested.

Nor was it tested in World War I. In that War many properties were taken, but the statutes passed by Congress were broad enough to make unnecessary the taking of property by the President on his own. There were those who were confident that he had the power if he needed it. Warren G. Harding, then a Senator, said, "[I]f there were a real war emergency, if there were a present necessity for the seizure of the lines of communication in this country, the Chief Executive would take them over, else he would be unfaithful to his duties as such Chief Executive. . . . [I]f the President believes that there is such an emergency, he ought to seize them."²⁸

The real beginnings of large scale takings came with World War II.²⁹ These were of three types. First were the pre-Pearl Harbor takings by President Roosevelt for the purpose of settling industrial disputes which interfered with aid to England and the tooling up for the War. Second were the seizures between Pearl Harbor and the adoption of the War Labor Disputes Act of 1943, which explicitly gave a statutory base for seizures. Third were the seizures under that Act.

The seizures of the third class are obviously distinguishable from the steel case because of their statutory base. The seizures of the second class are distinguishable, if at all, only by the substantial difference that they occurred in the midst of war which was (a) total and (b) declared. There were five seizures of this class. The three seizures of the first class (pre-

²⁵ 20 Works of Theodore Roosevelt 466 (1926).

²⁶ Woodrow Wilson Papers, File VI, Box 393, Nos. 901, 902 (Mss. Div., Lib. Cong.).

²⁷ 74 Literary Digest 8-10 (July 29, 1922).

²⁸ 56 Cong. Rec. 9064 (1918).

²⁹ For details, see Appendix No. 2 to Justice Frankfurter's opinion in the instant case, *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 900 (1952).

Pearl Harbor) are not, on any substantial basis, distinguishable at all from the steel case; for just as the steel seizure came during the period of tooling up for conceivable war with Russia, so the 1941 seizure came during the period of tooling up for World War II.³⁰ If there is any distinction between the two periods, the emergency of 1952 may be more severe than that of 1941, since in 1952 the United States was already directly engaged in shooting it out with the enemy.

(b) *The nature of seizure.*³¹ Seizure, as it has been used, has simultaneously the form of an exertion of the eminent domain power, and the substance of regulation. Theoretically, the government is acquiring property, as if for a public building; actually it is enforcing a clumsy system of compulsory arbitration. When a plant is seized, not much happens. A few flags may be run up, a few notices posted declaring that the property has been taken by the United States. In the steel case, the President signed Executive Order No. 10340, and Secretary Sawyer, seizing the property, told a few steel men that they should continue on the job as government managers.

Typically in seizure cases, the government once in possession quiets the particular labor trouble which brought it in and otherwise leaves company administration alone. If the seizure is caused by the employer's refusal to accept a government wage recommendation, the government usually puts the recommendation into effect by its own order as "new owner," and does nothing else. It seemed about to do just this in the steel case but for restraining court orders. If the government is supporting the employer in a particular case, as against union demands, it either does nothing at all or gets an injunction to break a "strike against the government." The John L. Lewis case, with its \$750,000 fine against the union, shows that seizure is an effective strike-stopping device.

In the general sense of its bearing on the struggles of capital and labor, seizure is neutral. It is a device for carrying out government "recommendations," and it gets its pro-management or pro-labor flavor only insofar as the underlying order is pro-management or pro-labor. Management, labor, and politicians commonly take stands on seizure-in-general instead

³⁰ A reader will share the sense of pain Justice Jackson must have felt when he attempted to wriggle out of the fact that the first pre-World War II seizures, that at North American Aviation, was on his opinion as Attorney General. See his opinion, *ibid.*, at 877 n. 17. It would have been better if he had stopped with his forthright, "I should not bind present judicial judgment by earlier partisan advocacy." *Ibid.*

³¹ Two admirable articles on seizure are Johnson, *Administrative Problems of Government Seizure in Labor Disputes*, 11 *Pub. Admin. Rev.* 189 (1951), and Willcox and Landis, *Government Seizure in Labor Disputes*, 34 *Cornell L.Q.* 155 (1948). Many of the facts in the section following come from them.

of recognizing that what they are really for or against is the underlying order in the particular case. In the recent case, one may suspect that labor-sympathizing Senators Morse and Humphrey and Inland Steel's Randall took their stands respectively for and against the President's power on the constitutional question because they were, respectively, for and against the administration's wage-price proposals for steel. In World War I, the conservative Harding, then a Senator, was willing to underwrite a seizure power, probably because within the immediate range of his vision it would be used for anti-labor purposes. After President Roosevelt's pre-Pearl Harbor seizure of North American Aviation, extremely conservative Dirksen of Illinois approved because the particular seizure operated to hamper Communists in a labor organization.³²

Of the fifty World War II seizures, about half were used to compel employer compliance and about half to compel employee compliance with War Labor Board orders. Justice Douglas, in his concurring opinion in the steel case, put it this way:

Today a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production. Yet tomorrow another President might use the same power to prevent a wage increase, to curb trade unionists, to regiment labor as oppressively as industry thinks it has been regimented by this seizure.³³

In one of the paradoxes of democratic government, the main strength of seizure as a device for settling labor disputes is its very cumbersomeness, its legal mysto-magic, its flummery. Simplicity is not always a prime virtue in a democracy. In terms of the immediate objective of settling a labor dispute, seizure is certainly a roundabout way of getting to its ends. If simplicity were the only value, a far simpler device in a dispute over wages would be an administrative hearing followed by an enforceable order deciding what wages were to be.

Seizure required some form or pretense of an actual taking, a structure of government control, and endless accounting for all the incidents of the period of government "management."

Because seizure is basically a masquerade, a pretense of government control, it may even require costumes and fancy titles. In one of the railroad seizures, the railroad managers were put into uniform, turned into colonels, and eventually became entitled to retired officers pay because they continued to do the identical jobs they had done before.

The hocus-pocus helps give seizure the value which has made it the most useful device yet worked out for settling labor disputes in emergen-

³² 87 Cong. Rec. 5974 (1943).

³³ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 888 (1952).

cies. Its very fanciness, its unusual associations, make it look like less of a menace to free collective bargaining in peacetime. And if the terms of the seizure are not so pleasant for either side that it becomes willing to put up with seizure indefinitely, seizure will stimulate collective bargaining.

(c) *The decision.* The Court invalidated the taking, 6 to 3, with seven different opinions covering 133 pages. All that was absolutely clear as a result was that this particular seizure was invalid.

The "opinion of the Court," delivered by Justice Black, was concurred in by Justices Frankfurter, Douglas, Jackson, and Burton. Justice Clark, voting to invalidate, did so on separate grounds. Each of the Justices who joined Black's opinion also filed a separate opinion, and on separate grounds; and it is obvious from the diversity of their views that the Black opinion is at least a diplomatic triumph. As Justice Jackson said from the Bench, as a preface to his own opinion, "Justice Black's opinion is the least common denominator on which five of us can agree."

The "least common denominator" is pointedly and necessarily concise, leaving many questions unanswered. The discussion of the constitutional question is in six paragraphs, less than three pages.³⁴ The power of the Commander-in-Chief is not adequate "to take possession of private property in order to keep labor disputes from stopping production." The executive powers apart from those of Commander-in-Chief do not extend to law-making: "The Constitution limits [the President's] functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Other Presidents may have taken possession of private property to settle labor disputes; but Congress has not lost its "exclusive" powers thereby.

From this opinion, by itself, one might conclude that the President is without power, even in time of total war, to take property without statutory authority as a means of settling labor disputes. That view is confirmed by the concurrence of Justice Douglas, who found that the sanctions for settling labor disputes were for Congress to determine. He put the legal dilemma: Seizure is a taking, an exertion of the eminent domain power; all takings require, under the Fifth Amendment, payment of just compensation, and the steel companies are entitled to theirs. Where will the money come from? Only from Congress: "The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected."³⁵

³⁴ *Ibid.*, at 866.

³⁵ *Ibid.*, at 887. For discussion of the compensation aspects of plant seizures, see *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), and 1951 Term article at 167-70.

But the other opinions are not so conclusive:

1. Justice Frankfurter³⁶ excluded from consideration the powers of the President in the absence of statute, and "the powers that flow from declared war." Since he read the legislative history of the Taft-Hartley Act as one in which "Congress has expressed its will to withhold this power from the President as though it had said so in so many words," nothing in his opinion bears on the powers of the President after the expiration of the Taft-Hartley eighty day period, assuming that Congress did nothing further during the period by way of settling the strike on its own.

2. Justice Burton's opinion³⁷ rests squarely on Taft-Hartley; he spoke of "the clarity of the congressional reservation of seizure for its own consideration." But his list of issues not decided reads like so many negative pregnant: This is not the case "in which Congress takes no action and outlines no governmental policy." This is not the case of "imminent invasion or threatened attack." This is not a claimed exercise of the powers of Commander-in-Chief of a nation "waging, or imminently threatened with, total war."

3. Justice Clark, concurring only in the judgment of the Court, also had his reservations. He fully accepted the theory of Presidential emergency power, a power which "depends upon the gravity of the situation confronting the nation." He apparently thought the Korean and Cold War situation quite grave enough, except for the fact that "Congress had prescribed methods to be followed by the President in meeting the emergency at hand." The weight he gave to the Taft-Hartley Act is not clear since he rested primarily on the failure to exhaust a seizure provision of the Selective Service Act of 1948, a statute which had seemed virtually irrelevant to his eight brethren.³⁸

³⁶ *Ibid.*, at 867 et seq.

³⁷ *Ibid.*, at 880 et seq.

³⁸ *Ibid.*, at 882. The applicable provision of the Selective Service Act, 62 Stat. 625 (1948), 50 U.S.C.A. App. § 468 (1951), discussed by Justice Clark are subsections (a), (b) and (c). Those sections give to the President the power to seize industrial facilities which "fail" to produce materials on compulsory orders, which the President is authorized to make. Justice Clark's theory is that the President should have placed compulsory orders with strike-bound plants, and then seized. However the provision applies only to procurement "exclusively for the use of the armed forces of the United States, or for the use of the Atomic Energy Commission." (Emphasis added.) A very small fraction of steel is used exclusively for this purpose. Most defense steel comes into government hands indirectly, through private processors. Yet the President is allowed to seize and operate only "for the production of such articles or materials as may be required by the Government."

This section is not open to the interpretation that the government may also place compulsory orders with steel producers for the benefit of other defense producers and then seize in case of a strike, because another subdivision of the same general section deals with the very subject of steel supplies for defense contractors. Subdivision (h) of this very section deals with

4. Of the majority opinions, that of Justice Jackson remains.³⁹ Because this opinion assumes the most serious point in issue in a sentence, its twenty pages are almost tangential to the discussion in which the rest of the Court was engaged; and yet its common sense does permeate the underlying issues of policy.

Justice Jackson approached the problem by dividing Presidential powers into three areas. First is the area in which the President acts in coordination with Congress, by executing its acts. That case, *ex hypothesi*, is not this case, since Congress had not authorized seizure. Second is the area of Presidential powers concurrent with those of Congress, which is to say that the President may act until Congress precludes his further action. Third is the area of exclusive Presidential power, in which Congress is incapable of limiting him.

In this view, the issue necessarily must become whether seizure is in the second category, i.e., whether Congress has precluded Presidential action. The case is concededly not in category one, and (apart from Justice Jackson's opinion) no lawyer has yet been heard seriously to suggest that it belongs in category three. It was conceded by the government and by the dissent, and indeed can scarcely be rationally doubted, that *if* Congress had precluded seizure as a remedy, the President might not seize.

Justice Jackson thus made his case absurdly easy for himself by taking the case out of the second category with little more than the simple assertion that "It seems clearly eliminated." Listing the relevant statutes, he disposed of the point with the observation that the President had chosen "a different and inconsistent way of his own." Once the word "inconsistent" is used, the case is over; but the Justice nonetheless proceeds to analyze for the remainder of his opinion the point nobody argued, namely whether the President may fly into the teeth of Congressional will. The answer, not unexpectedly, is No.

But though his choice of questions to be answered may be odd, the Justice's underlying premise is clear. He obviously believes that in this Re-

steel explicitly and exclusively and provides for orders for the benefit of contractors who in turn have "orders for steel products or steel materials required by the armed forces." The clause was added in Conference, at the insistence of the House Conferees, who reported to the House that without it there would be nothing in the bill "empowering the President to require producers of steel to make available to manufacturers having orders for steel products" the necessary steel. This subdivision also permits seizure, but only on one condition: that the producers refuse to allocate such steel as they do produce in accordance with government orders. If they produce nothing, because of a strike, there is nothing to allocate, and hence the section has no application at all in the instant case. See H.R. Rep. No. 2438, 80th Cong. 2d Sess. 50 (1948).

³⁹ 72 S. Ct. 863, 869 (1952).

public the President has power enough without adding any more. "[A]lmost alone, he fills the public eye and ear . . . he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness." The country will not suffer "if the Court refuses further to aggrandize the Presidential office, already so potent and so relatively immune from judicial review, at the expense of Congress."⁴⁰

5. The dissent of the Chief Justice, joined by Justices Reed and Minton, is twice the length of the text of the longest of the other opinions, and approaches its objective on a grand scale.⁴¹ As a matter of strategy, the opinion might have analyzed the constitutional issue in terms of the simple question of whether the Executive does or does not have one particular power, that of eminent domain. The opinion starts from this point, but expands prodigiously. It tells the story of the Korean struggle in its full economic and legislative setting, and paints a picture-in-implication of a beleaguered President struggling through the darkness, with a Congress refusing to provide the necessary light. The Taft-Hartley Act is highlighted as part of a hash of confused labor legislation which, at most, does not prohibit seizure.

The Chief Justice lays about with a heavy hand, thwacking by quotation of allegedly inconsistent prior positions Justices Jackson and Clark and steel counsel John W. Davis. Each, as former Attorney General or, in the case of Mr. Davis, Solicitor General, deserved at least some twitting for statements made in office. The affirmative argument is essentially that the President has a power of "leadership," particularly in "national emergencies" when it becomes his duty "to save [legislative] programs until Congress could act."

To sustain this premise, the 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.

The central theory of this historical assembly is that if Presidents could do such great deeds, they can, a fortiori, make industrial seizures. The examples cited "go far beyond the extent of power necessary to sustain the President's order to seize the steel mills." This is, of course, at once the strength and the weakness of those precedents. To take the dissenting po-

⁴⁰ *Ibid.*, at 879.

⁴¹ *Ibid.*, at 929.

sition, one must apparently concede that there is no limit to "leadership" in "emergencies," so long as willingness to accept Congressional leadership, if ever exercised, is conceded.

(d) *The future of seizure.* The decision, while wisely putting general principle ahead of the interest of the immediate situation, nonetheless did leave the country with no presently available sound basis for quelling production disruption in emergencies. The Taft-Hartley Act provides no solution at the end of its eighty day waiting period; but even more important is its failure to kindle that sense of fairness to both sides on which, in the last analysis, a successful labor program depends. In the steel case, had the President invoked Taft-Hartley instead of seizure, the union would have been stalled six months (the actual mediation period plus the putative Taft-Hartley period) with nothing to show for their delay.

Because this is so, the Court went out of its way to make clear that the Congress has all the power it needs to deal fairly with the situation. The case is in a sense reminiscent of another steel case ten years ago. There, in *United States v. Bethlehem Steel Corp.*,⁴² argued within forty-eight hours of Pearl Harbor, the issue was whether the government could recover money allegedly extracted from it by duress in the high-jacking war contracts of World War I. Justice Black's opinion for the Court, perceiving the inanity of a system of profit control left to depend on sporadic law suits twenty-five years after the event, rejected the claim of duress and drew a clear picture of the power of Congress to deal with war profits instantly. Within two months, under the direct spur of the *Bethlehem* decision, Congress passed the first Renegotiation Act of World War II.

In the steel seizure case, Black's opinion again specified the powers of Congress:

It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy.⁴³

That is enough power to sustain any emergency labor program Congress may propose. The power "to settle labor disputes" will sustain even direct compulsory arbitration, at least within the limits of the 13th Amendment.

At the same time, the opinions do not leave the country powerless in a total war emergency if Congress fails to create a system of its own. If total war comes, the three dissenting Justices and perhaps (with diminishing degrees of certainty) Justices Burton, Clark, Jackson and Frankfurter

⁴² 315 U.S. 289 (1942).

⁴³ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 867 (1952).

will sustain purely executive seizure. Such a result would not be incompatible with their opinions here. Indeed, if the Taft-Hartley eighty day period expired without Congressional action, several of these Justices might sustain executive seizure even in a cold war period.

The real challenge of the opinions is to Congress. Justice Jackson put it this way:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "The tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.⁴⁴

Monopoly and Free Enterprise

Unlike other recent terms, there were no momentous trade regulation cases in 1951-52. An economic historian doing a study of the United States in the 1950's would probably not give even footnote mention to any of this year's decisions.

The Court did deal with a minor problem in the concentration of communication. It upheld a Sherman Act injunction against a Lorain, Ohio, newspaper publisher who attempted to strangle a local radio station by refusing to accept ads for the paper from those who also advertised on the radio. One problem, readily solved, was that of identifying the "commerce" restrained, since the monopoly of the advertising was based on local contracts in an Ohio small town.⁴⁵

The Sherman Act was not, however, broad enough to reach an alleged restraint on medical practice in Oregon.⁴⁶ At bottom was the resistance of state medical association leaders to contract, or group, medicine; but the actual warfare between the groups and the profession was won by the groups almost ten years ago. They are here to stay; the cruder forms of infighting are over, and the Court held that past wars are irrelevant for purposes of obtaining a decree now. With a fine intention to join what they could not lick, the state association then set up its own system of contract medicine, controlled by itself. The government proceeded against the state association and its affiliates, first on the ground of its attempt to monopolize medical practice by driving the contract groups out of business, and second on the ground of restraint of competition in that the Association kept its own state contract medicine organization out of

⁴⁴ *Ibid.*, at 879-80.

⁴⁵ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

⁴⁶ *United States v. Oregon State Medical Soc.*, 343 U.S. 326 (1952).

counties where Association-affiliated local groups sought the same business.

On the first count the Court refused an injunction, particularly in view of the pre-1941 age of many of the Association's misdeeds. On the second, it found the restraint, such as it was, not "unreasonable," since it saw no advantage in having the same doctors on two local lists, one sponsored by a state and the other by the county medical association. On this, as on the whole case, the decision was basically an acceptance of the facts as found by the trial court. Moreover, it found no commerce involved in this local division of the market. The Court said in essence that the "furnishing of prepaid medical care on a local plane" is not "interstate commerce." The occasional payments for the benefits of persons who moved out of state it found "sporadic and incidental."

(The Court observed "in passing" that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." In further recognition of the sometimes peculiar ethical sense of the medical and allied professions, the Court in a tax case held the third of the retail cost of eyeglasses kicked back by optical companies to the eye doctors who sent them patients was deductible as ordinary and necessary business expense.⁴⁷ The medical profession, however, stands alone on this profitable island of ethics; payment of attorneys' fees for contesting a federal gift tax was not deductible.⁴⁸)

A case which covered no new ground, but nonetheless made a contribution to general understanding by its succinct application of principle was *United States v. New Wrinkle, Inc.*⁴⁹ In 1937 two patent holders on a type of paint formed a patent holding company to license use of their patents to those who would charge minimum prices for the paint. By 1948, 200 companies, amounting to the entire industry, were licensed and the licensing company had, by progressively more complicated licenses, rigidified the most minute details of the sales practices of the industry. The issue in the action to enjoin this license system was whether, under the *General Electric*⁵⁰ rule, the price fixing was a legitimate condition of a patent license. The Court held that it was not legitimate, following its *Line Ma-*

⁴⁷ *Lilly v. Comm'r*, 343 U.S. 90 (1952).

⁴⁸ *Lykes v. United States*, 343 U.S. 118 (1952). The statutory interpretation problems in these two tax cases are of course wholly different, the second dealing with a gift tax provision which has no relevance in the first. The point being made above is only that as between two professions, the doctors get all the breaks.

⁴⁹ 342 U.S. 371 (1952).

⁵⁰ *United States v. General Electric Co.*, 272 U.S. 476 (1926).

terial and *U.S. Gypsum*⁵¹ holdings that the *General Electric* rule does not sanctify patent pools; and, moreover, that industry wide license agreements "establish a prima facie case of conspiracy."

Other Problems of Business

In 1951 there was a miscellany of unrelated business problems of no broad social significance. In the tax field, an extortioner is now, five to four, subject to income tax on the money he extorts, though an embezzler still is not.⁵² While a high authority has informally advised this writer that the decision is of some consequence, it seems doubtful that because of it any appreciable number of extortioners will either stop their extorting or start sharing the proceeds with the government; and it seems equally unlikely that any number who escape conviction on the substantive offense will be picked up by the Bureau.

Government construction contracts usually provide that the department head's conclusions of fact are final. There is an implied exception for cases of fraud. In *United States v. Wunderlich*,⁵³ the Court of Claims found a decision by the Secretary of Interior "arbitrary," "capricious" and "grossly erroneous." But, said the Supreme Court, this does not equate to fraud—the Secretary's determination is final unless he is guilty of "conscious wrongdoing, an intention to cheat or be dishonest." Justices Douglas and Reed, dissenting, regretted giving, in practical operation, the power of a "ruthless master" to a contracting officer; and Justice Jackson, dissenting, made very clear that no precedent required this result.

A substantial new development in the interstate tax area was *Standard Oil Co. v. Peck*.⁵⁴ It held, as a matter of due process, that Ohio might not place an ad valorem personal property tax on the ships of an Ohio corporation which operated on the Mississippi River, but were in Ohio waters only negligibly. Concededly under earlier cases, the state of corporate domicile had a fair claim to tax the property. The issue had been one of tax situs, and unless the vessel acquired tax situs elsewhere, it was presumed to be subject to taxation at its corporate home. Ocean going vessels, obviously wanting in situs elsewhere, were taxable at the state of incorporation,⁵⁵ and so were interstate railroads and airlines.⁵⁶

⁵¹ *United States v. Line Material Co.*, 333 U.S. 287 (1948); *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

⁵² *Rutkin v. United States*, 343 U.S. 130 (1952).

⁵³ 342 U.S. 98 (1951).

⁵⁴ 342 U.S. 382 (1952).

⁵⁵ The leading case is *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1911).

⁵⁶ *N.Y. Central R.R. v. Miller*, 202 U.S. 584 (1906); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).

The *Peck* case, in ending this condition for vessels on inland waters, introduced a new precedent and a new rule. The precedent was *Ott v. Mississippi Barge Line*,⁵⁷ which had held that vessels on inland waters were subject to taxation by a state in which they operated, so long as the tax was apportioned to the number of miles the vessel operated in the state. The case is obviously tangential, since the taxing state there was not the state of domicile, and the record showed that some of the property involved had gained tax situs in that state. In the instant case, there was no showing that the vessels were with great frequency in any one state, and it was clear that they were not in fact taxed elsewhere. For the Court it was enough that they might *conceivably* be taxed elsewhere, and it said

The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operation.⁵⁸

Justice Minton, dissenting, warmly protested the use of the doctrine of avoidance of multiple taxation when its effect, as here, was to permit the corporation to avoid even single taxation.

Last of the miscellaneous business cases was the decision⁵⁹ upholding an old Missouri statute which provides that employees of businesses in the state may have up to four hours off on election days to vote—and that their employer must pay them for the time off. Justice Douglas, for the Court, conceded that “The legislative power has limits,” but found this simply another form of minimum wage requirement, and that its object of getting out the vote was perfectly permissible.

The statute, though probably unwise, seems so clearly valid under the decisions of recent years on due process that it would go unnoticed were it not for the dissent of Justice Jackson. This dissent is a minor milestone in that it is believed to be the first occasion on which any Justice appointed in the past fifteen years has voted to invalidate any business regulatory statute on the good old due process ground that the statute is so offensive policy-wise that it should not be allowed to stand. Justice Jackson had no precedents, but he excoriated the statute on the merits:

Because a State may require payment of a minimum wage for hours that are worked it does not follow that it may compel payment for time that is not worked. . . . I do not question that the incentive which this statute offers will help swell the vote; to

⁵⁷ 336 U.S. 169 (1949).

⁵⁸ *Standard Oil Co. v. Peck*, 342 U.S. 382, 384–85 (1952).

⁵⁹ *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

require that employees be paid time-and-a-half would swell it still more, and double-time would do even better. But does the success of an enticement to vote justify putting its cost on some other citizen?⁶⁰

It is only the touch of a vanished hand, but even the faint sound of this voice once still reminds us that the natural law conception of due process, as applied to business regulations, may return to our midst again.

III. CIVIL RIGHTS

Aside from the movie case⁶¹ and one bail case,⁶² human liberty made no important progress in any Supreme Court decisions this year. It lost considerable ground. As was noted earlier, of twenty divided civil rights cases this year, the decision went against the claimed right in fifteen; and most of the remaining five cases were insubstantial.

(a) *Speech, Press, Movies*. The principal free speech decision of the year was *Adler v. Board of Education*,⁶³ upholding New York's Feinberg Law. A principal harassment device of the current Repression had been that of proving guilt not by deed, but by association; that is to say, proving the guilt of the accused by showing that he associated with *X* who associated with *Y* and so on to the Communist who polluted the whole circle, or by showing membership in a group which is found to have malign objectives. The Court had not previously come squarely to grips with that device.⁶⁴ In the *Adler* case it explicitly took up that matter. It found the device more than merely permissible; it found it just dandy.

The Feinberg Law aimed in the general direction of protecting the school children of New York from Communist propaganda. One method of giving such protection would be to punish those who in fact actually propagandized students; but, as the Court synthesized the legislative finding, "This propaganda . . . is sufficiently subtle to escape detection in the class room."⁶⁵ Hence the legislature sought a litmus paper test under which the color pink would show without the necessity of considering what the teacher actually did while teaching.

It found its solution through the device of excluding from teaching those affiliated with offensive organizations. The actual mechanics are these: The State Board of Regents makes a list of organizations which

⁶⁰ *Ibid.*, at 426-27.

⁶¹ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁶² *Stack v. Boyle*, 342 U.S. 1 (1951).

⁶³ 342 U.S. 485 (1952).

⁶⁴ The case most nearly in point is *Garner v. Los Angeles Board of Education*, 341 U.S. 716 (1951), on the Los Angeles municipal oath.

⁶⁵ *Adler v. Board of Education*, 342 U.S. 485, 490 (1952).

“advocate, advise, teach, or embrace the doctrine” of either (a) forceful overthrow of the government, or (b) the “necessity or propriety of adopting any such doctrine.” The organization may, if it will, appeal to the courts for review of its inclusion, although if it does not have sufficient interest to do so, the individual teacher is subsequently precluded from raising the question. Membership in the organizations becomes “prima facie evidence of disqualification for appointment to or retention in any” teaching position. The suspected teacher must then present “substantial evidence” to rebut the presumption that he is subversive.

Two main constitutional objections were raised to the Feinberg Law, one central and the other peripheral. The central objection was that under the First Amendment, teachers have an equal right with anyone else to be members of organizations when membership is not unlawful for others. Hence, runs the argument, their jobs can not be made dependent on legal political associations. The peripheral objection is that the prima facie presumption clause of the Act creates a presumption unconstitutional under the due process clause. But, under the precedents, the presumption is not more extreme than has been upheld before, and Justice Minton for the majority had no serious difficulty in overcoming this obstacle.⁶⁶ The dissenters did not object on this point.

The real issue is the first one, the substantive right of the individual teacher to belong to organizations on the list without prejudice to his position. Here Justice Minton is concise and blunt:

1. This is not an interference with free speech because persons “have no right to work for the State in the school system on their own terms.” Teachers have an option to conform or get out: “If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.”⁶⁷

2. Obviously, teachers may be discharged if they directly advocate overthrow of the government themselves, citing *Gitlow v. New York*. (The citation is of interest only because this is the first time in over twenty years that the *Gitlow* case has been cited with approval for its substantive holding; only last year this same Court declared that the minority rather than the majority opinion was the law.)⁶⁸

⁶⁶ The line between permissible and impermissible presumptions in civil cases is thin, cf. *Western & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929) (impermissible), and *Mobile, J. & K.C. R.R. v. Turnipseed*, 219 U.S. 35 (1910) (permissible), but the *Adler* case seems clearly comparable to *Turnipseed*.

⁶⁷ Both quotes are from 342 U.S. 485, 492 (1952).

⁶⁸ 268 U.S. 652 (1925). In *Dennis v. United States*, 341 U.S. 494, 507 (1951), the Chief Justice after discussing *Gitlow* said, “Although no case subsequent to *Whitney* and *Gitlow*

3. They may, equally, be discharged if they are members of organizations which have such objectives. The Court is not disturbed by the conception of guilt by association: "One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep." Indeed, the opinion contains words of exhortation to the effect that this is just what the school systems ought to do: they "have the right and the duty."⁶⁹

The *Adler* opinion, like it or not, has the great merit of candor. There is no aura of pretense to it, no seeming but insubstantial reservation of individual right, not even a conventional bow to the usages of academic freedom. It is the legal statement of the popular aphorisms, "If he doesn't like it here, let him go back where he came from"; and Walter Winchell's, "If a bird goes around with ducks, it's a duck."

It evoked a dissent from Justice Douglas, joined by Justice Black, which makes head on collision. The vice of the statute is guilt by association rather than by deed. It is

certain to raise havoc with academic freedom. Youthful indiscretions, mistaken causes, misguided enthusiasms—all long forgotten—become the ghosts of a harrowing present. Fearing condemnation, [the teacher] will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled.

The law inevitably turns the school system into a spying project. . . . What was the significance of the reference of the art teacher to socialism? Why was the history teacher so openly hostile to Franco Spain? Who heard overtones of revolution in the English teacher's discussion of the Grapes of Wrath? . . . Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. [This does not at all mean that the classroom may become a Communist cell.] . . . But the guilt of the teacher should turn on overt acts. So long as she is a law abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.⁷⁰

The most puzzling aspect of *Adler* is its scope. Under the recent decisions, it is obvious that public employees are fair game for the loyalty

has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." In *Beauharnais v. Illinois*, 343 U.S. 250, 295 (1952), Justice Jackson in an individual dissent says, "As the principle by which to judge the constitutionality of this statute, I accept the dissent in *Gitlow*." Yet both join in *Adler*, in which, as noted, the *Gitlow* majority opinion is the sole authority cited on the point discussed above.

⁶⁹ Both quotes are from 342 U.S. 485, 493 (1952).

⁷⁰ The Douglas dissent is at 342 U.S. 485, 508-11 (1952).

hunt. Federal, municipal, and state loyalty programs have now been upheld.⁷¹ How about private employment? Can Congress or legislatures exclude persons from all jobs because of their associations, or merely from public positions?

The *Douds* case⁷² held that Communists could be excluded from key posts in labor relations, but it by no means answered the whole question as to the scope of power. Whether *Adler* moves further depends on the one point on which it is confusing. Was it following what might be called the "outlaw theory" of public employment,⁷³ holding essentially that public employees have no rights in their jobs and therefore have no standing to raise free speech objections if their jobs are taken from them; or, in the alternative, was it holding the Act valid under the First Amendment? If the latter, then presumably a similar act would be equally valid as to *any* employees, public or private, whom the legislature can reach with the police power, at least so long as they are in a "sensitive area."

On the one hand, the opinion states the issue in terms of the absence of a "right" in public employment; apparently teachers have none, although in passing there is a suggestion that they must be dealt with on "reasonable terms." On the other hand, the statute is justified in terms of the school as a "sensitive area," a center of the states' "vital concern," as to which the state, as quoted above, has "the right and the duty to screen the officials, teachers, and employees." These observations might be equally applicable to dairy employees (protection against germ warfare), employees of steel mills (there ought to be a "vital concern" in the avoidance of waste of materials), and television performers (Howdy Doody's propaganda, if any, is certainly "sufficiently subtle to escape detection" on the air, and he reaches far more "young minds" than any teacher does). It is not clear whether or not *Adler* would be a precedent to uphold a law aimed at employees in those classes.

The Court, in *Beauharnais v. Illinois*,⁷⁴ did uphold one statute which clearly limits the speech of everyone. The issue there was the validity of Illinois' so-called group libel law, as applied to a person who was circulating a petition to the Chicago city council to adopt an ordinance segregating the city on racial lines.

⁷¹ *Garner v. Los Angeles Board of Education*, 341 U.S. 716 (1951); *Bailey v. Richardson*, 341 U.S. 918 (1951); and the *Adler* case.

⁷² *American Communication Ass'n v. Douds*, 339 U.S. 382 (1950), upheld an exclusionary statute for union officials, stressing that the number of persons involved was small and their positions crucial.

⁷³ *United Public Workers v. Mitchell*, 330 U.S. 75 (1942).

⁷⁴ 343 U.S. 250 (1952).

Two documents are relevant, the statute and the petition. The statute makes it an offense "to manufacture, sell . . . advertise or publish, present or exhibit" any "lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" if it exposes those citizens "to contempt, derision, or obloquy or . . . is productive of breach of the peace or riots."

Beauharnais violated this statute by displaying a "lithograph," or printed matter as the Illinois Supreme Court defined that term, through his agents, on Chicago's street corners. The lithograph was a leaflet of about sixty lines plus an application form for membership in defendant's organization, the "White Circle League of America." The top of the leaflet in large type proclaimed: "Preserve and protect white neighborhoods." It disclaimed being "against the Negro," but spoke of the Negro "invasion" of the South Side of the City, alluded to Communism "rife among the Negroes," and asked the city authorities for action "through the exercise of the Police Power" to stop these Negro encroachments.

The application form and the petition just described occupy about two thirds of the leaflet. It was not contended that anything in them violated the statute. The remaining third is an appeal for membership in the White Circle League to oppose the Truman civil rights program which, with kindred movements, has "the object of mongrelizing the white race." There is further need to defend against the "rapes, robberies, knives, guns and marihuana of the Negro." It accepts the "challenge" to the white race, which it proclaims will never suffer itself to be the victim of "forced mongrelization."

The defendant was convicted of violating the Illinois statute, and the Supreme Court upheld the validity of the act. Justice Frankfurter for the Court described the statute as a criminal libel law. It would unquestionably be libelous falsely to charge an individual "with being a rapist, robber, carrier of knives and guns, user of marihuana," and it can be equally libelous to say the same thing about groups. Illinois has had serious troubles with racial tensions, and while this legislation may very possibly not help, "It would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power."⁷⁶ The clear and present danger test is irrelevant, because it does not apply to libelous any more than to obscene speech.

Four Justices dissented. Justice Jackson's⁷⁶ was almost as much a con-

⁷⁶ *Ibid.*, at 262.

⁷⁶ *Ibid.*, at 287.

currence as a dissent, but was indeed provocative. In concurring vein, he observed that this legislation would be invalid under the First Amendment, if the First Amendment were applicable; but further consideration had now led him to reverse his own position of many years standing that the First Amendment is to be considered as applicable to the states via the Fourteenth. That latter amendment makes not the precise terms of the First Amendment applicable to the states, but only "the general principle of free speech." Group criminal libel laws may be valid for states; this particular application, however, was invalid because the trial court did not permit the defendant to offer proof of the truth of the matter published. In Justice Jackson's view this is part of substantive due process.

Justice Reed,⁷⁷ joined by Justice Douglas, dissented on the ground that the statute was void as vague, in its use of such general terms as "virtue," "derision" and "obloquy."

Justices Black and Douglas together, and Justice Douglas individually, also dissented on the merits of the legislation. Justice Black's major objections were, first, that the document was a bona fide petition to lawfully constituted authorities asking them to take action of a sort at least arguably within their powers. The right to petition is thus abridged. Second, the Court applies the so-called "rational basis" test to the legislation, ignoring the higher standard to which laws interfering with First Amendment rights had previously been held. Third, group libel laws are so fundamentally different from individual libel laws that they should not be allowed at all; so much modern legislation involves huge groups that it is almost impossible to talk about major areas of public affairs without running the risk of offending some group. There is nothing here for judicial review on a case by case basis:

To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems . . . far-fetched to me. . . . I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases."⁷⁸

It remains to appraise. In this critic's opinion, the decision is unsound, and a most undesirable deviation from precedent, on three separate grounds.

First, it is wrong on its facts. What this defendant had to say about Negroes, however offensive it may be, was well within the style in which vast numbers of excitable Americans do talk about groups. Without question, the defendant was within his rights in petitioning for a system of seg-

⁷⁷ *Ibid.*, at 277.

⁷⁸ *Ibid.*, at 275.

regation by zoning. Just such legislation, though probably unconstitutional in any guise,⁷⁹ has been familiar enough in American cities, and Americans ought to be free, however mistaken their motives, to try to devise a valid separation system if they want to. Equally, the defendant is within his rights in organizing to resist the President's civil rights program; a minor political party, dominant in some Southern states in 1948, took a position much more extreme and vigorous than his, and, most seriously, it would presumably be illegal for their candidate for President to campaign in Illinois under this decision.

The only passage of the leaflet which conceivably portrays Negro "depravity, criminality, unchastity, or lack of virtue" is the line which refers to their "rapes, robberies, knives, guns, and marihuana." This is approximately one per cent of the leaflet, buried in its middle; and while it is not nice talk, it certainly reaches no new depths in the hyperbole of American politics.

The factual aspects of the case are worth dwelling on because they highlight the evil of this kind of legislation. Granting that the First Amendment is not an absolute, and that grave enough circumstances may warrant suspension of the right of speech, this passing nastiness is no substantial menace to anything. Every repression of free speech, on the other hand, is a menace to an American ideal.

Second, it is wrong on its law. The most significant aspect of the case is the ultimate triumph of the so-called "rational basis" approach of Justice Frankfurter to the testing of state legislation challenged under the First Amendment. In this the Justice has been more consistent than the Court. The battle began with the flag salute cases, in which Justice Frankfurter was driven to momentary defeat, still proclaiming that flag salute legislation was valid because legislators might rationally suppose that such legislation promoted the legitimate goal of national unity.⁸⁰ It was Justice Stone first,⁸¹ and Justice Jackson later,⁸² who proclaimed the counter philosophy that, where the First Amendment is involved, a rational basis is not enough to support legislation.

The standard of review in this area is dispositive of the case. If a legislative rational basis is enough to sustain a requirement that children salute the flag each morning, for example, then that requirement should be held

⁷⁹ Cf. *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁸⁰ Cf. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁸¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

⁸² In the *Barnette* case, 319 U.S. 624 (1943).

valid for it is not irrational in the sense of being fraudulent, capricious, or downright deranged. It is simply wrong. So with the group libel law; it is not legislative madness, it is simply legislative error.

Of late, the Court has been tacitly but not avowedly applying the rational basis test to free speech restrictions. In the *Beauharnais* case it comes all the way and gives the name to the deed. Justice Jackson recants,⁸³ the rest of the majority is substantially entirely post-Stone, and Justice Frankfurter marches triumphantly along in the same path he has regularly followed. Persistence wins, and perhaps the flag salute will again have a turn at being valid if it comes back again.

But the late Chief Justice Stone was right in the first place. He contended that First Amendment rights could not be left to the chance of legislative experimentation because repression of those rights blocks the one device by which electorate can induce the legislature to change its mind; an "experiment" with the suppression of free speech has the lasting qualities of an experiment with suicide. Justice Frankfurter concedes that this may be bad legislation, but says that this "is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues."⁸⁴

But the very statute in question blocks the path of its repeal. This is no case of, e.g., anti-oleomargarine legislation which may be passed today and repealed tomorrow. The only people with a substantial, nontheoretical interest in repealing the Illinois group libel law are those who have something critical they want to say about Negroes, Jews, Italians, Irish, Catholics, Spanish Americans or some other group. This one may want the law repealed so that he may campaign more effectively, as *Beauharnais* campaigned, for a greater degree of segregation. That one may want it repealed so that he can more freely oppose a Presidential candidate who endorses a Fair Employment Practices Commission. A third wants to protect public school funds from what he sincerely regards as a "Catholic menace."

None of them can candidly attempt to build up popular support for the repeal of this legislation without stating their underlying objectives, and yet they can not state their objectives without risking violation of this vague, shotgun type law they seek to repeal. In this field, experimentation is stopped dead.

Third, the case is wrong in principle. *Beauharnais* certainly has a right

⁸³ Indeed, Justice Jackson in effect repudiated his former position in *American Communication Ass'n v. Douds*, 339 U.S. 382, 423 n. 1 (1950).

⁸⁴ *Beauharnais v. Illinois*, 343 U.S. 250, 262 (1952).

to say that *some* Negroes are marihuana users, knife carriers, and rapists. He also had a right to imply that *all* are. There is social loss in permitting him such conduct; but the country was committed 160 years ago to the proposition that the resultant gain in freedom is worth the loss. As Justice Jackson's opinion shows, there is no substantial difference between the Illinois law and the Sedition Act of 1798 except that the former forbids disparagement of racial and religious groups, and the latter forbade disparagement of political groups.⁸⁵ The National Association for the Advancement of Colored People rose far above self-interest in opposing this prosecution.

The major, and indeed the only, "pro" free speech cases of the year were those concerned with movie censorship. In the *Miracle* case,⁸⁶ the Court caught up with an anachronism.

In 1915, the Court in the *Mutual Film* case⁸⁷ held that the First Amendment and the Fourteenth were irrelevant to movie censorship; that movies were simply and exclusively business of producing spectacles for profit, and not any "part of the press of the country," or of any concern as "organs of public opinion."

This may have been true in those pre-Birth of a Nation days; but scarcely anyone would now doubt that movies, though still profit seekers in the same sense that the press seeks profit, have become a most important "organ of public opinion." While the proportion of its focus on public matters is much smaller than that of the press, its practical effectiveness may be far greater.⁸⁸

In the *Miracle* decision, the Court finally overruled the *Mutual Film* case and held that movies, too, are entitled to at least some kind of freedom from censorship.

The Miracle is a forty minute film produced in Italy, in Italian with English subtitles. Its subject is the seduction of a demented goat tender by someone she supposes to be St. Joseph, and her resultant illusion that she has conceived immaculately. There are sharp differences of opinion among

⁸⁵ The parallel language is: Illinois statute, Ill. Rev. Stat. (1951) c. 38, § 471: "manufacture, sell, or offer for sale, advertise, or publish" the named categories of publications "which publication portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens . . . and . . . exposes the citizens of any race . . . to contempt, derision, or obloquy." The Sedition Act, 1 Stat. 570 (1798): "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States or the President of the United States, with intent to defame . . . or bring them, or either of them, into contempt or disrepute.

⁸⁶ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁸⁷ *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915).

⁸⁸ The literature is voluminous. See, e.g., Inglis, *Freedom of the Movies* (1947).

the acquaintances of this writer who have seen it as to whether it is, by ordinary movie-goer standards, a good or a poor movie; but no one has suggested that it is, in a pornographic sense, vulgar. Reviewers comments are collected in a note to Justice Frankfurter's concurring opinion which shows that professional opinions ranged from "leaves a very bad taste in one's mouth" (N.Y. Herald Tribune) to "overpowering and provocative" (N.Y. Times).⁸⁹

Under New York censorship law, licenses are to be given by a state official supervising movie censorship unless the movie is "obscene, indecent, immoral, inhuman, sacrilegious, or . . . would tend to corrupt morals or incite to crime." This movie was licensed under that statute, and ran for eight weeks at a small New York specialty theater which concentrates on foreign productions.

During this period the picture was denounced as sacrilegious by New York's Cardinal Spellman and was picketed by the Catholic War Veterans.⁹⁰ The state licensing authority thereupon re-inspected the picture, found it sacrilegious, and withdrew its license.

The Court, in an opinion by Justice Clark, suggested that movies, for the very reason of their great impact on the popular mind, might have to be subject to community control; but that this necessity, even if it exists, "does not authorize substantially unbridled censorship such as we have here." The *Mutual Film* case, it observed, antedated the whole conception that freedom of speech and of the press were protected in any degree by the Fourteenth Amendment; and the case was overruled as obsolete.

Since movies may not be subject to unlimited censorship, the next question considered by Justice Clark is whether the particular kind of censorship used in New York is permissible. It is not valid because, says the Justice, it is a previous restraint, a licensing device which is to be especially condemned unless there is some special justification for it. Such a special justification would have to be a narrow exception, and a test as elusive as "sacrilegious" is far too imprecise to do. Justices Reed, Frankfurter, and Jackson concurred specially, the Frankfurter-Jackson opinion concluding that the term "sacrilegious," as used by the New York authorities, has no meaning with which a court can review an administrative agency.

A week after the *Miracle* decision the Court reversed without opinion (other than the citation of the *Miracle* case and one other decision on the

⁸⁹ *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 n. 14 (1952).

⁹⁰ These details are taken from Justice Frankfurter's opinion which also makes clear that Catholic opinion here and abroad was by no means unanimously opposed to the circulation of the movie. On the merits of the movie itself, the Washington rumor is that at least some of the Justices who saw the film thought it very poor entertainment.

requirement of statutory definiteness) a Texas decision upholding the conviction of a Texas theater operator who displayed the movie *Pinky* after being denied a license by local censors.⁹¹ *Pinky*, an American made movie, is the story of a Negro girl so close to the color line that she passed as white in the North, became engaged to a white man there, and then returned to the South. The Texas censorship authorities found the film objectionable for reasons related to the fact that it suggested, without complete disapprobation, the possibility of "miscegenation."

The *Miracle* and *Pinky* cases require either the scuttling or the rewriting of state movie censorship laws. Such laws have as their purpose the desire to prevent obscenity or other offenses against dominant religious, economic, or pressure groups. Justice Clark's opinion is particularly careful to put aside without a ruling the question of obscenity when raised "under a clearly-drawn statute."

While the decision is momentous and long overdue, its practical consequences in terms of movies to be seen are likely to be extremely narrow. *Pinky* is an extreme exception among American movies in dealing with a controversial subject; and the Legion of Decency and private censorship within the industry would have strangled *The Miracle*, if it had been an American production, long before it reached the New York censorship office. The industry shivers under attack from anyone with a loud voice, and at the moment is in the process of sifting over 200 of its personnel for no better reason than that the American Legion has some doubts about them.⁹² The largest practical results may be to a few so-called "art theaters" around the country, where foreign films reach only a trifling audience.

But, in the long run, it may have the effect of contributing a little courage to a TV-scared, pressure-group-scared, Un-American-Activities-scared industry. At least the producers, if they can't talk back to anyone else, can now at least have the pleasure of cocking a snoot at the policeman.

(b) *Religion*. Four years ago the Court, in *McCullum v. Board of Education*,⁹³ invalidated the Champaign, Illinois, release time system for giving religious education to children in the public schools. The result has been a

⁹¹ *Gelling v. Texas*, 343 U.S. 960 (1952).

⁹² N.Y. Times § 1, p. 1, col. 2 (May 23, 1952); N.Y. Times § 2, p. 1, col. 1 (June 1, 1952).

⁹³ 333 U.S. 203 (1948). For a collection of references to the abundant literature on the subject, see Note to the *McCullum* case in Frank, *Cases and Materials on Constitutional Law* 874 (rev. ed., 1952).

flood of debate, pro and con, which has by far eclipsed all other Supreme Court decisions of the last decade in popular attention.

At the term just passed, it turned out that the *McCollum* case had needlessly excited the public; it was all a matter of form. The Illinois system had offended against the constitutional principle of separation of church and state in two respects; first, the religious education, though carried on by private instructors, was physically on the school property; and second, the whole school machinery was used to insure that the children whose parents wished them to attend the religious training did in fact do so.

This year in *Zorach v. Clauson*⁹⁴ the Court upheld the New York release time system. That system differed from the Champaign system in one, and one only, important respect; the religious education was off the school premises. Otherwise the school machinery was used in the same way to round up the children and deliver them to their religious tutors.

The *Zorach* case falls about half-way between an overruling and a distinction of the *McCollum* decision. In its most important respects, it limits to the point of overruling. In *McCollum* the Court had separately stated the vices of the Champaign system; "not only" were the public school buildings used, but "also" the compulsory school machinery was used to insure the presence of the children in religious classes. This latter element, alluded to as a separate and distinct item, had been termed "not separation of church and state." As Justice Jackson, dissenting in *Zorach*, said, "The distinction attempted between [*McCollum*] and this is trivial, almost to the point of cynicism, magnifying its nonessential details and disparaging compulsion which was the underlying reason for invalidity."⁹⁵

On the other hand, Justice Douglas, for the 6-3 majority, found no inconsistency; after all, in *McCollum*, in which he was of the majority, the religious education had been on school property, and here it was not. Parents and students have a free choice as to whether they will take the religious education or not. (So, in equal degree, did they in *McCollum*.) Too many concessions cannot be made to the "fastidious atheist or agnostic." This is not mingling of church and state; it is merely a "systematized program" of "cooperation." After all, "We are a religious people whose institutions presuppose a Supreme Being," and the Constitution does not require "a callous indifference to religious groups." This is mere neutrality, a suspension of governmental operations "as to those who want to repair to their religious sanctuary for worship or instruction." "We follow the *McCollum* case" without expanding it into "hostility to religion."

⁹⁴ 343 U.S. 306 (1952).

⁹⁵ *Ibid.*, at 325.

The majority opinion is by no means a complete concession to the anti-*McCullum* point of view; for example, it reaffirms the *McCullum* dictum that "Government may not finance religious groups." But it does undercut *McCullum* to the extent that it approves religious education during school time, the school stimulating the taking of the religious training by occupying the remaining children with busy work and by directing the religious students, with all the force of the schools' prestige behind the directive, to go the place of religious training. As Justice Douglas notes, it is not clear *from the record* whether "the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy." What we do not know from the record, we do know as a matter of fact. Under the New York system, "In enforcing the truancy law upon release time truants, some school districts interview the child to find out why he did not attend the religious instruction. Other districts, if the child is frequently truant, refuse him permission to be released for religious instruction. Still others use these techniques jointly."⁹⁶ In other words, the schools use truancy pressures to insure the delivery of their charges.

The very reason that such facts are not in the record is the occasion of the dissent of Justice Frankfurter. There is no factual record in the *Zorach* case, and there should have been. The complaint alleged that the children are in fact coerced into attendance. The majority concedes that if in fact there was coercion, the practice would be unconstitutional. Yet the trial court refused to permit the introduction of that very evidence, considering it irrelevant. As Justice Frankfurter says, "When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established."⁹⁷

But the largest vice of the decision is less its holding than its tone. It adopts as precedents the very practices that were considered relevant only by the single dissenting Justice in the *McCullum* case.⁹⁸ Its passing derogation of the "fastidious agnostic," its approval of "cooperation" between church and state, betoken a retreat which may extend across the boards.

Justice Black, author of *McCullum* and dissenter here, was unrepentant of his earlier stand. Recognizing the "searching examination" to which *McCullum* had been exposed in the intervening years, he chose the occasion "to reaffirm my faith in the fundamental philosophy" expressed

⁹⁶ Released Time Reconsidered: The New York Plan Is Tested, 61 Yale L.J. 405 (1952).

⁹⁷ 343 U.S. 306, 322 (1952).

⁹⁸ E.g., prayers in legislatures, the Thanksgiving Day proclamations, "So help me God" in the courtroom, etc.

earlier. In the instant case, "the sole question is whether New York can use its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery." Whatever else it is, this is no separation of church and state, and "Government should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice."⁹⁹

As for practical consequences, release time involved about 2,000,000 students in 2,200 communities across the country in 1952.¹⁰⁰ About eleven per cent of the school systems abandoned released time altogether after *McCullum*, four state Attorneys General interpreting *McCullum* as requiring this. Others had, after *McCullum*, retreated a step by taking released time out of the schoolhouse proper, and following the New York system. These systems are now saved; those who abandoned released time altogether after *McCullum* may now, if they wish, put it back in this faintly modified form.

(c) *Privacy*. One of the troubles with modern government and with modern science, for all their virtues, is that as each expands it becomes harder and harder for the individual to draw into himself and be alone if he wishes. This right of privacy, this capacity of the law abiding individual to be some place where neither his government, nor salesmen, nor anyone else can get at him ought to be the last bulwark of human dignity in this mechanical age. Our affirmative liberties,¹⁰¹ our right to speak, our right to petition—perhaps these must dwindle in the world in which we live. If they must, then at least we should preserve a liberty to be let alone.

When Brandeis wrote his seminal article on the right of privacy in 1890, he foretold the day when man would be tracked to his last lair by snooping, penetrating mechanical gadgets.¹⁰² When Orwell composed his nightmare of 1984, the ultimate horror he could think of in the extremest reaches of the destruction of human dignity and independence was the telescreen by which Big Brother could know everything happening in a man's house.¹⁰³

⁹⁹ 343 U.S. 306, 320 (1952).

¹⁰⁰ The facts here are taken from the Note, *op. cit. supra* note 96.

¹⁰¹ The phrase is suggested by Freund, *On Understanding the Supreme Court* 22 (1949).

¹⁰² "[N]umerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" Warren and Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 195 (1890).

¹⁰³ The comparison with Orwell is suggested in Judge Frank's dissenting opinion in the case about to be discussed, *United States v. On Lee*, 193 F. 2d 306, 311, 317 (C.A. 2d, 1951).

Episode one. On Lee, a Chinese laundryman who doubtless peddled opium in his spare time, was out on bail pending his trial. He was running his laundry and minding his own business when Chin Poy, a former employee, dropped in for a visit. What On Lee did not know—who would?—was that Chin Poy was wired for sound with a Dick Tracy-like gadget which carried the conversation to a Narcotics Bureau agent some distance away. The conversation, as reported by the agent, was introduced into evidence against On Lee and was challenged as a violation of the search and seizure provisions of the Fourth Amendment, of the Federal Communications Act, and of general principles of fair play.

Episode two. In February, 1949, the Capital Transit Co., to pick up an extra \$15,264 a year, began broadcasting a conglomerate of music, news, announcements, and ads on an eight hour a day schedule on 212 busses and streetcars. The return to Capital went up as more units were added. Most Washingtonians work in a fairly small area, in which there is not enough parking space to handle even a small part of the employees should they use their own cars. Taxis are no regular solution. The practical result is that most Washingtonians are a captive audience and are compelled to listen to Capital's choice of entertainment and salesmanship whether they want to or not. While similar captive audience salesmanship applied to the crowds in Grand Central Station in New York was prohibited by state authorities after a vigorous popular protest led by *The New Yorker* magazine, the District of Columbia Public Service Commission refused to forbid the practice for Capital Transit. For what relevance it has, it should be noted that a substantial majority of Capital's passengers approved of the programs.¹⁰⁴

Résumé. Under this year's Supreme Court decisions, Capital Transit's passengers must listen to its radio or stay home.¹⁰⁵ Chin Poy's distant friend in the Narcotics Bureau may lawfully eavesdrop by radio to hear On Lee.¹⁰⁶

The trouble with the practices underlying these decisions is that in the war between man and machine, they give all the edge to the machine.

The captive audience bus case, of course, presents a problem hard to solve through constitutional law. The radio broadcasting may be offensive and a nuisance, but it is difficult to turn it into a violation of due process.

¹⁰⁴ The facts are taken from the opinion of the Court, *Public Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952). The preference data are based on a self-serving poll taken at the Company's behest, and the questions as set forth in the opinion seem sufficiently loaded to make precise estimates dubious. The net effect, however, is clearly one of passenger acceptance.

¹⁰⁵ *Ibid.*

¹⁰⁶ 72 S. Ct. 967 (1952).

However, it is not impossible; the Court of Appeals of the District of Columbia (Edgerton, Fahy, and Bazelon, JJ) found it a deprivation of a liberty to be let alone, at least as to the commercials and the announcements.¹⁰⁷ Justice Douglas, dissenting in the Supreme Court, thought that even on busses and streetcars, there is a right to be free of "coercion to make people listen." He conceded that these particular programs were not propaganda-slanted, "But the vice is inherent in the system. Once privacy is invaded, privacy is gone. Once a man is forced to submit to one type of radio program, he can be forced to submit to another."¹⁰⁸

Justice Burton, for the majority, did not go so far as to say that the individual loses all right of privacy when he steps into a commercial vehicle; but there is no perceptible or identifiable amount left. The right of privacy, said Justice Burton, "is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." The criterion for the Public Service Commission is not privacy, but "general public convenience, comfort and safety."¹⁰⁹

The New Yorker, still resisting, gloomily pondered the consequences if the next advertising stunt should be the spraying of the busses by a perfume company. Whether scent or sound, it concluded, "The franchise of a bus company should not include the right to spray anybody with anything at all."¹¹⁰

Bus broadcasting is annoying, perhaps, but it is less serious by itself than as a token of things to come in the direction of forced listening. Moreover, it takes highly creative and extraordinarily novel constitutional law to do anything about it. But *On Lee's* case is deadly serious by itself, and as to it there was no appreciable balance of doctrine in favor of the majority.

The closest precedents are the *Olmstead* and *Goldman* cases.¹¹¹ In *Olmstead*, the Court, 5 to 4, upheld wiretapping as a reasonable search and seizure. The decision evoked the famous Holmes protest against "dirty business." In *Goldman*, the Court, 5 to 3, held that the attachment of a detectaphone to the outside of a room for the purpose of magnifying sounds within and thus eavesdropping on conversations was not substantially different from wiretapping, and therefore was permissible.

¹⁰⁷ 191 F. 2d 450 (C.A. D.C., 1951).

¹⁰⁸ *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 469 (1952).

¹⁰⁹ *Ibid.*, at 464-65.

¹¹⁰ 28 *The New Yorker*, No. 16, at 17 (June 7, 1952).

¹¹¹ *Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942).

Those decisions ought to be overruled; they narrow individual privacy to the point of disappearance. But they at least did not permit the police to hide their gadgets on the inside of a man's home. Judge Jerome Frank, in his comprehensive and persuasive dissent in the Court of Appeals, readily distinguished *Olmstead*: "There the Court held that wiretapping did not violate the Amendment, basing its decision in large part on the fact that interception of the phone message involved no entry. The Court said, 'There was no entry of the houses or offices of the defendants.' This fact the Court noted five times."¹¹²

In *On Lee*'s case the Supreme Court chose to ignore that distinction, obscuring all that is important behind the fact that, since Chin Poy was a licensed invitee, this was not really trespass in the classic sense. But who cares? If carrying a secret broadcasting device into a man's place of business or home is not the trespass Lord Coke had in mind, then the concept of trespass needs to catch up with twentieth century scientific ingenuity.

Justice Black dissented on the ground that, without regard to the search and seizure problem, such practices should not be allowed by the Supreme Court in its capacity as supervisory authority over federal criminal justice. Justice Burton embraced the position of Judge Frank below, getting over the trespass point with the practical observation that carrying in the transmitter amounted to surreptitiously bringing in the agent with him. Justice Douglas dissented on the broader ground that he had erred years before in accepting *Goldman*; it and *Olmstead* should be overruled for the "decisive factor is the invasion of privacy against the command of the Fourth and Fifth Amendments."¹¹³

Justice Frankfurter dissented in an eloquent short statement.¹¹⁴ He would not "approve legally what we disapprove morally. . . . The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law." Since we first approved wiretapping, "we have gone from inefficiency to inefficiency, from corruption to corruption." This method of law enforcement "puts a premium on force and fraud, not on imagination and enterprise and professional training."

The great insight of Justice Frankfurter's position is its identification of the moral vice of snooping. That vice is bad enough when it brings an undoubtedly guilty opium peddler to book. But there is no way to confine its use to the guilty. The disheartening aspect of Justice Burton's opinion is its refusal to take the great social issue of privacy out of the context of trespass and consider it in terms of human dignity.

¹¹² *United States v. On Lee*, 193 F. 2d 306, 312 (1951).

¹¹³ *United States v. On Lee*, 72 S. Ct. 967, 977 (1952).

¹¹⁴ *Ibid.*, at 974-76.

Tacitus, in the *Annals*, describes the ways of informers in the reign of Tiberius: They did not distinguish "between kinsfolk and strangers, between friends and unknown persons, between things of yesterday and things obscured by time. Words uttered in the street, or across the dinner-table, on any subject whatever, were noted for accusation, every man hurrying to be first to make down his victim; some few acting in self-defence, the greater number as if infected by some contagious malady."¹¹⁵

The way to stamp out prying by electricity is to make its fruits useless and thus put some limitation on our own usage of Tiberius. Even without such gadgets, in Washington today the casual banter of cocktail hour chatter has been known to be turned in to the authorities by guests within twenty-four hours. If secret devices such as that used to convict On Lee are permitted, what host can know as he looks around his own dinner table whether every word uttered is being recorded on a distant sound track? Such fears are not far-fetched. As Judge Frank's dissent points out, this was done in Nazi Germany where secret conversations had to be held in bathrooms because they were more difficult to tap.

(d) *Immigrants*. Rep. Albert Johnson, author of the Immigration Act of 1924, caught the spirit of that time in a phrase when he said, "The day of unalloyed welcome to all peoples, the day of indiscriminate acceptance of all races, has definitely ended."¹¹⁶ In 1952, in a new McCarran Act passed over the veto of President Truman, the Congress reaffirmed the basic principles of Rep. Johnson's Act; but despite Rep. Johnson's vigilance, in 1952 rascals were still in our midst, and the McCarran Act took vigorous steps to see that they did not remain.

American immigration policy since the Revolution has been a peculiar mixture of xenophobia, or hysterical fear of strangers, and encouragement of settlement. President Truman's veto message on the McCarran Act, after blasting at the national origins quota system as "based upon assumptions at variance with American ideals," then turned to the effect of the Act upon aliens already within our borders: "Our resident aliens would be more easily separated from homes and families under grounds of deportation, both new and old, which would specifically be made retroactive. Admission to our citizenship would be made more difficult; expulsion from our citizenship would be made easier. Certain rights of native-born, first generation Americans would be limited. . . . Some of the new grounds of deportation which the bill would provide are unnecessarily severe." Referring to the provision authorizing deportation for undefined "activities

¹¹⁵ 1 Ramsey, *Annals of Tacitus*, Book VII-4, 367 (1904).

¹¹⁶ Garis, *Immigration Restrictions* viii (1927).

'prejudicial to the public interest,' " the President said, "These provisions are worse than the infamous Alien Act of 1798, passed in a time of national fear and distrust of foreigners, which gave the President power to deport any alien deemed 'dangerous to the peace and safety of the United States.' . . . Such powers are inconsistent with our Democratic ideals."¹¹⁷

Senator McCarran described the President's veto as an "un-American-Act" by which the President "has adopted the doctrine promulgated by the Daily Worker." The Congress passed the bill over the President's veto.¹¹⁸

During the same months that Congress was legislating, the Court was deciding cases of vital concern to aliens. Nothing that was decided will disturb Senator McCarran. Indeed, after the decision of the most important case of the year concerning aliens, *Harisiades v. Shaughnessy*, Senator McCarran announced that the opinion of the Court "amply justified" the position he had been holding.¹¹⁹

The two major decisions concerning aliens were the *Harisiades* case and *Carlson v. Landon*.¹²⁰ The issue in the *Harisiades* case was the validity of the provision of the Alien Registration Act of 1940 for deportation of Communists even though party membership might have terminated before the passage of the Act. Of the group of cases presented under this name, the most extreme was that of Mascitti, an Italian who came to this country in 1920 at sixteen, was associated with Communist organizations from 1923 to 1929 and has been completely dissociated from such activities since that time. He has an American wife and child. The main issues were whether the Act denies due process, abridges freedom of speech, or is *ex post facto*.

Justice Jackson, for a Court which divided six to two, upheld the Act.¹²¹ He first reaffirmed the broad power of Congress to deport aliens; their "ambiguous status within the country is not [a] right but is a matter of

¹¹⁷ The message is taken from N.Y. Times § 1, p. 14, col. 7 (June 26, 1952).

¹¹⁸ *Ibid.*

¹¹⁹ 342 U.S. 580 (1952); the quotation of Senator McCarran is from N.Y. Times §1, p. 1, col. 6 (Mar. 11, 1952).

¹²⁰ 342 U.S. 524 (1952). Minor cases concerning aliens were *Jaeger v. Carusi*, 342 U.S. 347 (1952), holding that the power of the Attorney General to deport alien enemies to Germany ended with the Joint Resolution of Congress terminating the war with Germany; *Bindzyck v. Finucane*, 342 U.S. 76 (1951), holding that denaturalization proceedings must be brought in federal courts exclusively; and *United States v. Spector*, 343 U.S. 169 (1952), upholding a criminal penalty applies to aliens who have been ordered deported and fail to make timely application for passports.

¹²¹ The quotes following are from the Jackson opinion at 342 U.S. 581, 586-87, 590, 591, 594, and the Frankfurter opinion at 597-98, 610, and the Douglas opinion at 599.

permission and tolerance." The most the alien has is "a precarious tenure."

This raises for the Court the question of whether there is any limitation at all on the deportation power, whether Congress can be utterly capricious. Says the Justice, "[We] must tolerate what personally we may regard as a legislative mistake."

Justice Jackson reasons it through this way: We cannot say that "congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense." After all, the Constitution does not obstruct the draft of the soldier who "is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that . . . its hardships must be spared the Communist alien."

This, I submit, is not argument. It is the substitution of a red, white and blue hair shirt for the traditional judicial costume. The issue is not whether the United States has power to fight Communism with all its might, nor whether aliens shall be coddled while citizens bleed. The issue is whether an alien who stopped being a Communist as soon as he reached maturity, and that many years ago, can be deported. It sheds no light on that question to weep over the Flag.

But the issue, the Court suggests, is not judicial, it is political. Justice Frankfurter, concurring, says, "whether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress. . . . [T]he place to resist unwise or cruel legislation touching aliens is the Congress, not this Court."

Justice Douglas, dissenting, joined by Justice Black, would overrule the 1893 decision which gave to Congress these awesome powers over aliens. Under the decisions, aliens are entitled to due process in relation to the minor regulations of their lives or their businesses; they are entitled to fair trial, to habeas corpus, to equal rights of employment. "If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity." The dissent concedes that Congress has some right to uproot aliens and break up their families, but this should be done only on an actual showing of their menace. Here Congress "has ordered these aliens deported not for what they are but for what they once were. Perhaps a hearing would show that they continue to be people dangerous and hostile to us. But the principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred."

Justice Jackson's opinion also touches the two remaining points. As for the argument that the statute denies the aliens free speech by precluding their membership in political parties others may still join, the matter is decided against the alien by the *Dennis* case upholding the conviction of the Communist leaders. As for the argument that the law is ex post facto, punishing conduct that was not illegal when committed, there is a simple answer. The ex post facto clause applies only to criminal penalties. As Mr. Mascitti says good-bye to his home, his family, his job, and returns to take up his life again in an Italy he has not been in since he left it as a boy thirty-two years ago, he will have the comfort of knowing that he has been convicted of no crime. As Justice Jackson says, "Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."

In *Carlson v. Landon*,¹²² the issue was whether the Attorney General might cause to be held without bail, at his own discretion, aliens charged with being Communists. The case is dramatized by the fact that at the same Term, in *Stack v. Boyle*,¹²³ the Court held that citizens charged under the criminal law with offenses as Communists were entitled to bail on the same basis as all other persons accused of crime.

The result of the two cases put together is that citizens charged with Communism as a substantive crime are entitled to bail until they are proven guilty. Aliens, caught up in the "civil proceedings" of deportation are not entitled to bail until they are proven guilty. Since the Attorney General obviously can not personally pass on all these cases, the practical effect is that the Immigration Service can, at its own discretion, put aliens in jail indefinitely. The sole limitation is the case of "clear abuse," a standard which will rarely be met.

The substantial question in the case is whether elimination of bail violates the mandate of the Eighth Amendment, "Excessive bail shall not be required. . . ." Justice Reed¹²⁴ for the Court disposes of the point neatly. The Eighth Amendment provides only that bail shall not be excessive *where there is bail*. It is one thing to say that bail may not be too high, and quite another to say that it may not be refused altogether. As Justice Burton replied in dissent, "The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances it does not prohibit the denial of bail, which comes to the same thing."

The decision was five to four, and there were additional separate dissents by Justices Black, Frankfurter, and Douglas.

¹²² 342 U.S. 524 (1952).

¹²³ 342 U.S. 1 (1951).

¹²⁴ The discussion by Justice Reed is at 342 U.S. 544; that by Justice Burton, *ibid.*, at 569.

Justice Black described the denial of bail as "shocking," and likely to amount to a life sentence for a mere charge, particularly for one elderly petitioner and for another whose health was bad and whose case had already been in leisurely bureaucratic and court proceedings for four years. He stressed the case of one petitioner, Zydok, in this country for thirty-nine years, who had five grandchildren, whose sons were in the army, and who himself, while working as a waiter, sold \$50,000 worth of war bonds and donated blood seven times during World War II. He thought it a denial of due process to deny bail to persons concerning whom there was not even a suspicion that they might leave the jurisdiction. As for the Court's reading of the Eighth Amendment, it could be given "this weird, devitalizing interpretation" only "when scrutinized with a hostile eye." Justice Frankfurter most persuasively argued that the practice of making aliens "unbailable" was not authorized by the statute claimed to support it.¹²⁵

(e) *Race Relations*. The only significant race relations decision of the year was *Brotherhood of R.R. Trainmen v. Howard*,¹²⁶ pushing a step farther the doctrine that the Brotherhoods could not expect to be exclusive bargaining agents for their Negro members if the brotherhoods themselves were going to discriminate against the Negroes because of race.

Of highest interest is a matter on the horizon for the 1952 term. Throughout the year the Court engaged in the most remarkable process of delay of consideration of two cases challenging grade school segregation, one from Kansas and the other from South Carolina. After holding the South Carolina petition for certiorari on its docket for months, the Court sent it back to the trial court for almost superfluous further proceedings, from which it quickly returned, and the Kansas case was allowed to lie unnoticed on the docket all year. At the end of term, both cases were accepted for argument in the Fall.¹²⁷

The most likely explanation of this highly unusual procedure is that the Court wished to avoid consideration of so inflammable a topic in an elec-

¹²⁵ The Black dissent is at 342 U.S. 547; that of Justice Frankfurter, *ibid.*, at 558.

¹²⁶ 72 S. Ct. 1022 (1952).

¹²⁷ The South Carolina case, *Briggs v. Elliot*, 342 U.S. 350 (1952), was appealed by the Negroes involved because the order of the trial court provided only that the school facilities should be equalized, rather than that segregation was unconstitutional *per se*. The Court remanded the case for further consideration of a report filed in the trial court on the factual issue of segregation, a report the trial court would not have had if the Supreme Court had not delayed action four months and, moreover, a report which was irrelevant to the only issue on which the appellants sought review. Justices Black and Douglas, noting the irrelevancy, thought the case should be set for argument at once. On the last day of the term, the Court did grant a new appeal from the consideration of that report, 72 S. Ct. 1078 (1952). The appeal was followed in the Kansas case at the same time, *Brown v. Board of Education*, 72 S. Ct. 1070 (1952).

tion year. The Court's decision of *Morgan v. Virginia*¹²⁸ became an issue in the election of 1948 which helped unseat Governor Arnall in Georgia and send Governor Talmadge into office. The decision of *Sweatt v. Painter*¹²⁹ between the first and second primaries in North Carolina in 1950 was undoubtedly the factor which unseated liberal Senator Frank Graham of that state and sent Willis Smith to the Senate. The Court can scarcely be blamed if it wants to insure that the decision of this question should be unencumbered by thoughts about November, 1952.

(f) *Contempt*. On October 13th, 1949, as reported by Life Magazine a few days later, Judge Harold Medina, at the end of the great Communist trial, sternly "called the Communists' lawyers before him and, as the courtroom gasped, gave six of them sentences varying from 30 days to six months in jail for contempt of court. Judge Medina's frown gave way to a look of sober satisfaction as he turned, his black robes swirling softly, and then proceeded from the courtroom."¹³⁰

On March 10th, 1952, one may suspect that Judge Medina's look was equally sober, but less satisfied. On that day the Supreme Court upheld his contempt sentences.¹³¹ The five majority Justices saw in the issue which had survived the lower court proceedings only a narrow procedural question which they disposed of without passing on the Judge's own conduct. The three minority Justices, seeing in the case a necessity to consider that conduct, proceeded to give Judge Medina what may well be the most severe scolding for judicial misbehavior ever given a lower federal judge by a bloc of Supreme Court Justices. The rebuke was all the more striking because its most comprehensive statement was by Justice Frankfurter, noted for his almost extreme courtesy to the lower federal bench.

The eleven month trial had been remarkable throughout. It came to Judge Medina at a time when, after a brilliant career as a teacher, a courtroom lawyer, and as the outstanding cram-course lecturer in the country, he was still a most inexperienced judge. His professional career had seen the growth of an irrepressible oral ability which he had tamed only within the confines of lecturer and advocate. The judicial art of listening was foreign to him, and as the long trial progressed, it proved to be unavailable. The record fully supports the conclusion of Justice Frankfurter that Judge Medina allowed his courtroom to become "an undisciplined debating society. . . . Too often counsel were encouraged to vie with the court in dialectic, in repartee and banter, in talk so copious as inevitably to

¹²⁸ 328 U.S. 373 (1946).

¹²⁹ 339 U.S. 629 (1950).

¹³⁰ 27 Life, No. 17, at 31 (Oct. 24, 1949).

¹³¹ *Sacher v. United States*, 343 U.S. 1 (1952).

arrest the momentum of the trial and to weaken the restraints of respect that a judge should engender in lawyers. . . . He indulged them, sometimes resignedly, sometimes playfully, in lengthy speeches . . . incontinent wrangles between court and counsel."¹³²

The proceedings in this most difficult case were further complicated by the Judge's almost morbid preoccupation with his physical well-being.¹³³ As Justice Frankfurter said, "His self-concern pervades the record." It was further complicated by a sense of religious mission which might to some equally religious men seem blasphemous.

In an article on his religious experience in relation to contempt of court,¹³⁴ the Judge described the divine guidance which came to him when he was "singled out to uphold American justice in an evil crisis." He quickly gained a "solemn feeling" that his courtroom rulings were "part of a universal fabric, part and parcel of moral law, divine in origin." In a crisis, "Someone else had showed me what to do."

This personal sense of divine guidance gave the judge an assurance and strength adequate to surmount the perils of his martyrdom. In one crisis of the trial, weary, he lay down and "asked God to take charge of things and that His will be done. . . . That brief period of communion with my Maker saved my life and saved the trial." At times as he smote those who strove against him, one senses that the power of an Avenging Angel gripped his arm. As he puts it, when he gave his first contempt sentence during the trial, "If ever a man felt the presence of Someone else beside him, strengthening his will and giving him aid and comfort, it was I on that day."

The legal issues which survived this manifestation of the divine will did not include the question of whether the lawyers were, in fact, in contempt. There is scarcely room for doubt that they were, some of them grossly so. Judge Charles Clark, dissenting in the Court of Appeals, conceded that their conduct was "abominable."¹³⁵ None of the Supreme Court attempted to defend their total behavior, which, taken by itself, the record shows to have been indefensible. The large factual issue remaining was whether that conduct could be viewed by itself, or whether counsel's behavior was

¹³² *Ibid.*, at 38. The Frankfurter opinion from which various quotes are taken is *ibid.*, at 23-42, and the Appendix is *ibid.*, at 42-89.

¹³³ See, e.g., Alexander, *Ordeal of Judge Medina*, 223 *Sat. Evening Post* 17 (Aug. 12, 1950); Daniel, *Judge Medina* 232-33 (1952).

¹³⁴ Medina, *Someone Else on the Bench*, 59 *Reader's Digest* 16 (August, 1951).

¹³⁵ Judge Clark continues: "Yet such *natural emotional reaction* does not of itself prove that they should be imprisoned without a hearing weeks or months after the events." (Emphasis added.) 182 F. 2d 416, 463 (C.A. 2d, 1950).

an inevitable response to judicial goading. As stated succinctly by Justice Douglas, the issue was "whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted."¹³⁶

That factual issue permeated these legal questions:

First, whether Federal Criminal Rule 42 required Judge Medina either to give the attorneys a hearing himself or to refer the contempt matter to another judge for hearing and sentencing.

Second, whether the conduct of Judge Medina exhibited such extreme bias and eccentricity that as a matter of sound supervision of the federal courts, the sentences should not be allowed to stand.

Third, whether the blending of a general conspiracy charge against the lawyers by Judge Medina with his specific charges of misdeeds required a reversal.

To dispose of the third question first, Judge Medina, as he has said off the record, early came to the conclusion that the Communists were trying "to wear me down until I lost my self control and occasioned a mistrial."¹³⁷ When, at the end of the trial, therefore, Judge Medina handed down his sentences, he did so on forty counts. The last thirty-nine were specific misdeeds occurring in the courtroom. The first was a general conspiracy charge of systematic disruption of the trial. The whole was prefaced by a statement in which he said that he would have been inclined to overlook many of the misdeeds except that he found there had been "an agreement between these defendants, deliberately entered into in a cold and calculating manner" to make the trial impossible, force a mistrial, and ruin the Judge's health.¹³⁸

If such an agreement existed, it was of course contemptuous. But under Rule 42(a),¹³⁹ a judge may give a summary contempt sentence only for contempt which he "saw or heard," which is "committed in the actual presence of the court." All out of court contempt is subject to Rule 42(b) which requires, at a minimum, notice and hearing, and may require transfer to another judge. In this case the conspiracy, assuming as may well be true that it existed, obviously occurred out of court. Hence the Court of Appeals (Judge Frank on this issue joining Judge Clark who dissented on the whole case) *reversed* on the conspiracy count, and that conclusion was not reviewed by the Supreme Court.

¹³⁶ 343 U.S. 1, 89 (1952).

¹³⁷ Reader's Digest, op. cit. supra note 134.

¹³⁸ 182 F. 2d 416, 430 (C.A. 2d, 1950). The contempt certificate is set out *ibid.*, at 430-53.

¹³⁹ Fed. Rule Crim. Proc. 42(a) and rules following.

Nonetheless the Court of Appeals (Judge Clark dissenting as to this) held that since the sentences on all counts were concurrent, the reversal on the conspiracy count was immaterial. The Supreme Court affirmed this ruling. This, while undoubtedly permissible under the technical rule as to concurrent sentences,¹⁴⁰ was on the facts most unjust since, by his own statement, the severity of Judge Medina's sentences was obviously the product of his decision on the very point on which he was overruled. This is particularly apparent in the case of McCabe, who received a thirty day sentence. Apart from the conspiracy, if any, there were five counts against McCabe for misdeeds in an eleven month trial. While they undoubtedly show contempt, a severe rebuke or a small money fine would have been more than adequate punishment.¹⁴¹

Turning to the issue of the interpretation of Rule 42(a), the only matter considered by the majority, the question is narrow. Rule 42(a) permits summary punishment, without charge, notice, or hearing, by the judge against whom the contempt is committed, if it is committed in open court. Rule 42(b) requires notice and hearing for all other contempts and, where the contempt involves "disrespect to or criticism of a judge," requires that another judge shall hear the case.

Conceivably contempt in open court might be punished (a) by the judge then and there, at the moment of contempt, announcing the punishment and immediately enforcing it; (b) by the judge postponing the announcement for a short period of calm and contemplation, and then enforcing it; (c) by the judge either immediately or soon after the episode announcing guilt, but suspending either the sentence or its enforcement until the end of trial; or (d) by the judge waiting until the end of trial both

¹⁴⁰ The cases are collected by Judge Frank, 182 F. 2d 416, 456 n. 6 (C.A. 2d, 1950).

¹⁴¹ The case against McCabe, as set out by Judge Medina in the contempt certificate, 182 F. 2d at 434, 435, 436, 444-45 is this: (1) On February 4, 1949, McCabe uttered a sentence which included the phrase that something the Judge had said "may very well be addressed to some one outside the courtroom." (2) On the same day, some of the lawyers persisted overly in arguing a point. The sole allusion to McCabe in this count is that "The Court told Mr. McCabe that argument was unnecessary." Mr. McCabe apparently thereupon desisted, though two of the other lawyers did not. (3) On January 17th, 1949, the Court observed that counsel were conducting the case in a way "he never thought he would see in a court of justice." Up to this point, so far as the citation shows, McCabe had not been involved; but McCabe then said "in a sarcastic tone," "I will agree, your Honor, on that last point; the way this case has been conducted is one which I certainly hoped that I would never see in a court of justice." The Court responded, "You mean the way it has been conducted by me, I take it." McCabe: "I mean that exactly." (4) On February 18th, 1949, McCabe [in his one apparently premeditated contempt; JPF] asserted that the Judge was timing his statements from the bench to make the newspapers. (5) On June 3d, some of the defendants (not McCabe) were disorderly. None of the lawyers, including McCabe "made any attempt to assist the Court in restoring order."

All of McCabe's charged acts of contempt except the completely negative No. 5 were at least six months before sentence.

to announce guilt (though making threats occasionally) and to assess and enforce the penalty. In the West Coast Communist cases, the judges used devices (b) and (c).¹⁴² Judge Medina used (d).

Thus in this case, the actual determination of guilt and the sentence came months after the episodes which occasioned them. This, claimed the lawyers, was not "summary punishment," the only kind of punishment permitted by Rule 42(a), and therefore the case must fall under Rule 42(b). The Supreme Court's majority held, to the contrary, that the trial judge "if he believes the exigencies of the trial require" may "defer judgment until its completion." Justice Frankfurter's dissenting position in essence was that, since immediate punishment obviously was not necessary to the completion of the trial, which finished without it, and since the contempts were of a sort dominantly personal to Judge Medina, the case should be tried by another judge under Rule 42(b).

This leaves the question of whether, in fact, Judge Medina's conduct of the trial was such that the parties and the Judge were, if one may borrow a conception from tort law, in *pari delicto*. On this the majority expressed no opinion. Justice Black found that Judge Medina showed "such bitter hostility to the lawyers that the accuser should be held disqualified to try them."¹⁴³ In one instance he found that "Candor compels me to say that in this episode the decorum and dignity of the lawyer who had just been sent to prison loses nothing by comparison with" that of the Judge. Justices Douglas and Frankfurter have been quoted above. But the crowning evidence of the Judge's own responsibility is an extensive appendix to Justice Frankfurter's opinion consisting of quotations from the record which will leave most lawyer readers with an uncomfortable, embarrassed sense that the endless, superfluous talk which stretched out the Communist case was by no means all from the front of the Bench.¹⁴⁴

(g) *Criminal Procedure*. About ten per cent of the cases of the Term involved forced confessions, the right to counsel, and searches and seizures.

The principal accomplishment of the year in these areas was *Jennings*

¹⁴² The cases are discussed by Justice Frankfurter at 343 U.S. 1, 39-40 (1952).

¹⁴³ *Ibid.*, at 15, 17. Justice Black also discussed the constitutional validity of contempt sentences without jury trial.

¹⁴⁴ It is interesting to note that the current New York and Los Angeles Communist trials are proceeding with smooth efficiency and are running into none of the snags that blocked the first case. This may be in part because Judge Medina blazed the way, in part because more discreet counsel are involved in the present cases. However, observers who were in the courtroom in the first case, and who have first-hand information about the current cases, report that the principal difference is in the orderly, unobtrusive, efficient and quiet way Judge Dimock (New York) and Judge Mathes (Los Angeles) run their courtrooms.

v. Illinois,¹⁴⁵ which seems, if optimism may be permitted where hope has so often been blighted before, to put an end to the Illinois post-conviction procedural tangle. Under familiar principles, prisoners in Illinois as in all other state penitentiaries are entitled to challenge their convictions collaterally if they were denied constitutional rights at their original trials, at least in the absence of waiver. Under equally familiar principles, they must exhaust the state remedy of collateral attack before they may have recourse to the federal district court.

For almost ten years the Supreme Court has been mired in an impossible effort to discover what the Illinois state remedy was, so that it might be known whether it had been exhausted. Finally, under the goading of the sizzling opinion of Justice Rutledge in *Marino v. Ragen*,¹⁴⁶ in which he denounced the Illinois procedure as a series of blind alleys, and under the pressures of the bar, the press, and the law schools¹⁴⁷ of the state, Illinois passed a post-conviction hearing act which promised to give a plain, speedy, and adequate state remedy. Unfortunately, the state courts seemed in the prospect of giving that remedial statute an extremely narrow interpretation which would have re-created the very situation it was intended to remedy.¹⁴⁸

The matter came to a head this year in the *Jennings* case. Here, in a group of three cases, each petitioner, now an inmate of an Illinois penitentiary, claimed to have been imprisoned on a forced confession. Each raised the issue that he had been unable to appeal his original conviction because he was a pauper, and each filed a collateral petition for review under the Illinois post-conviction hearing act. The trial courts denied the petitions of each without consideration of the merits of their claims. In each, the Illinois Supreme Court, as it had in twenty-five cases preceding this which had reached the United States Supreme Court, entered form orders dismissing the appeals as insubstantial.

Chief Justice Vinson, in the reversing opinion, conceded that a violation of constitutional rights might, under appropriate circumstances, be waived by failure to appeal an original conviction; but he held that a right of appeal conditioned upon the possession of money which the petitioners did not have amounted to no right of appeal at all. Since the

¹⁴⁵ 342 U.S. 104 (1951).

¹⁴⁶ 332 U.S. 561 (1947); see also the significant opinion of the Chief Justice in this series, *Young v. Ragen*, 337 U.S. 235 (1949).

¹⁴⁷ E.g. Katz, An Open Letter to the Attorney General of Illinois, 15 Univ. Chi. L. Rev. 251 (1948).

¹⁴⁸ Smith-Hurd Ill. Ann. Stat. (1951), c. 38, Supp. p. 235.

Illinois Attorney General asserted that the post-conviction hearing act was not appropriate for raising petitioners' questions, there appeared to be no state remedy. He thereupon remanded the case with instructions in the alternative. Either the state Supreme Court was to specify exactly how petitioners' claims could be raised under the Illinois Statute, or "petitioners may proceed without more in the United States District Court."

That did it. On remand, the Illinois Supreme Court filed a comprehensive opinion interpreting the state act to give a model review procedure.¹⁴⁹ If Illinois sticks to the blueprint laid down in this opinion, its post-conviction procedures will have moved from about the worst to as good as the best in the country. Whether they will work out that way remains to be seen.

In the field of forced confessions, the Court unanimously in result, though by different routes, held that the police could not use a stomach pump to make a defendant disgorge evidence. Justice Frankfurter, for the majority, reached the result because stomach pumping shocked his conscience and therefore denied due process. Justices Black and Douglas, without consulting their consciences, thought it enough that such evidence was self-incriminatory.¹⁵⁰

(h) *Summary of Civil Rights Positions.* A summary of the positions of the Justices in the divided civil rights cases follows. As always, such data must be read with the greatest care, for they may be misleading. This year, for example, one of the most important civil rights cases, that concerning movie censorship, was unanimous and therefore is not included here. Again, no numerical presentation can make allowance for intensity, or extremes of view. For example Justice Jackson's lone desire to overrule all the cases which have declared that the Fourteenth Amendment makes the First Amendment a specific limitation on the states¹⁵¹ is obviously more significant than some individual vote on the facts of a particular confession case.

¹⁴⁹ *People v. Jennings*, 411 Ill. 21, 102 N.E. 2d 824 (1952).

¹⁵⁰ *Rochin v. California*, 342 U.S. 165 (1952). The various opinions discuss the "conscience test." Another forced confession case was *Stroble v. California*, 343 U.S. 181 (1952), in which the confession was held not forced. Defendant, who had committed a particularly horrible murder of a small child, appears to have had the minimum amount of roughing up that can be expected from any police short of demi-gods. In *Gallegos v. Nebraska*, 342 U.S. 55 (1951), the Court dealt with a most unusual situation in which the confession was forced, if at all, by one state, and the conviction occurred in another.

Miscellaneous search and seizure cases were *United States v. Jeffers*, 342 U.S. 48 (1951); the *On Lee* case, discussed at length above in connection with privacy; and *Stefanelli v. Minard*, 342 U.S. 117 (1951).

¹⁵¹ *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952).

When all the necessary qualifications are made, this table nonetheless has substantial residual value. If a given Justice's decisions put him preponderantly in one column or the other, then the figures contain a clue as to his basic attitudes about civil rights. For example, Justice Minton is the first Justice in the six years that these tables have been accumulated to vote against the claimed right in *every* divided case in which he participated. At a minimum, one may deduce from this that Justice Minton places civil rights lower than many other values on his own scale.

TABLE 1

DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL RIGHTS CASES, 1946-1951

	IN SUPPORT OF CLAIMED RIGHT				IN DENIAL OF CLAIMED RIGHT			
	1951	1946-50	1946-51	Percentage of Total	1951	1946-50	1946-51	Percentage of Total
Vinson.....	3	13	16	15	17	74	91	85
Black.....	18	66	84	79	2	21	23	21
Reed.....	3	14	17	16	17	74	91	84
Frankfurter....	14	43	57	53	5	45	50	47
Douglas.....	16	63	79	83	4	12	16	17
Jackson.....	7	23	30	28	13	63	76	72
Burton.....	7	20	27	25	13	68	81	75
Clark.....	5	4	9	26	12	14	26	74
Minton.....	0	5	5	11	16	26	42	89

TABLE 2

DISTRIBUTION OF VOTES IN NONUNANIMOUS CIVIL RIGHTS CASES, 1949-1951

	IN SUPPORT OF CLAIMED RIGHT		IN DENIAL OF CLAIMED RIGHT	
	1949-51	Percentage of Total	1949-51	Percentage of Total
Vinson.....	8	16	42	84
Black.....	45	88	6	12
Reed.....	9	18	42	82
Frankfurter....	34	68	16	32
Douglas.....	32	84	6	16
Jackson.....	16	31	35	69
Burton.....	17	33	34	67
Clark.....	9	26	26	74
Minton.....	5	11	42	89

There were twenty divided civil rights cases at the 1951 term.¹⁵² Disqualifications result in some Justices having less than that number. The

¹⁵² *Adler v. Board of Education*, 342 U.S. 485 (1952); *Brotherhood R.R. Trainmen v. Howard*, 72 S. Ct. 1022 (1952); *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952); *United States v. Carignan*, 342 U.S. 36 (1951), treated as a divided case on the McNabb point; *Carlson v. Landon*, 342 U.S. 524 (1952); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *United States v. Jeffers*, 342 U.S. 48 (1951); *Jennings v. Illinois*, 342 U.S. 104 (1951); *Keenan v. Burke*, 342 U.S. 881 (1951); *On Lee v. United States*, 72 S. Ct. 967 (1952); *Leland v. Oregon*, 72 S. Ct. 1002 (1952); *Palmer v. Ashe*, 342 U.S. 134 (1951); *Public Utilities Comm'n v. Pollack*,

same data, presented separately for the 1949-51 terms only, makes clearer the relationship of Justices Clark and Minton to the rest of the Court.

IV. LAWYER'S LAW

(a) *Jurisdiction, procedure, and related subjects.* Jurisdictional case of the year and a matter of major importance was *Madsen v. Kinsella*,¹⁵³ upholding the validity of the American court system in Germany.

The case arose when Yvette J. Madsen, an American citizen, murdered her husband, an American Airforce Lieutenant, near Frankfurt. After her arrest by military police, if she was to be tried by any American court in Germany at all, the alternatives were a court martial or a "United States Court of the Allied High Commission." She was tried by the latter, a court with American civilian judges which applied German law. The procedure of such courts is a peculiar merger of military and civil practice, and accords to the defendant some but not all of the constitutional guarantees of the Bill of Rights. For example, there is no jury: Convicted in this court, she appealed to a higher Commission Court and upon affirmance of her conviction was imprisoned in a United States prison in West Virginia.¹⁵⁴

The principal questions in the case, covered in a handsome opinion by Justice Burton, were: First, whether as between courts martial and the Commission courts, the latter had jurisdiction to try the case; second, whether, assuming that such Commission courts might under some circumstances be appropriate, they retained jurisdiction after the occupation passed to civil authorities; and third, whether such a system of courts could be established by Presidential edict, as these were, without statutory basis. There was also a trifling question as to whether, assuming the validity of the court system, the particular offense and defendant were within its jurisdiction. It was readily shown that they were.

The real problem in the case lies in the fact that post-World War II occupations by American troops were a new phenomenon in American ex-

343 U.S. 451 (1952); *Sacher v. United States*, 343 U.S. 1 (1952); *United States v. Spector*, 343 U.S. 169 (1952); *Stefanelli v. Minard*, 342 U.S. 117 (1951); *Stroble v. California*, 343 U.S. 181 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952). Justice Jackson's vote in the *Beauharnais* case is treated as against the claimed right, since it is so on the dominant matter under discussion. In addition, the following civil rights cases were (in result) unanimous: *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Frisbie v. Collins*, 343 U.S. 519 (1952); *Rochin v. California*, 342 U.S. 165 (1952); *Stack v. Boyle*, 342 U.S. 1 (1951).

¹⁵³ 343 U.S. 341 (1952).

¹⁵⁴ As a result there was no problem of whether any American court had jurisdiction to review a conviction abroad, as in *Ahrens v. Clark*, 333 U.S. 826 (1947), and *Eisentrager v. Johnson*, 339 U.S. 763 (1950).

perience, and the precedents could not be expected to have a clean fit. Occupation is of course not new; the Civil and Spanish American War experiences were in point. But never before had a vast system of mixed civil and military courts been established for so many people for so long a time. Such genius as there is to this new system was in the effort to make it "Civilian" and as indigenous to German legal tradition as possible. The danger was that this very effort to make the system more palatable might overthrow it.¹⁵⁵

Here, Mrs. Madsen, on the rational theory that she could not do worse than be convicted again, staked her case on the claim that she should have been tried by a genuine court martial. The government contended that the occupation courts were in the nature of military commissions and that the jurisdiction of such commissions was concurrent with courts martial.

Under the Articles of War, a court martial would have had jurisdiction to try Mrs. Madsen. But under Article 15, their jurisdiction is explicitly made concurrent with that of "military commissions, provost courts, or other military tribunals" if the offenders or offenses "by the law of war may be lawfully triable by such military" tribunals.

This brings the case to its hard point, and here the argument is a little thin, as innovation is wont to be. To come within the exception of Article 15, the Commission courts must be metamorphosed into "military commissions . . . or other military tribunals." This takes doing, particularly since Mrs. Madsen's offense occurred after the Occupation Statute of 1949 when Germany was under control of a civilian High Commissioner reporting to the State Department, the judges were all civilians, and even the word "military" had been carefully stripped from the name of the tribunal. Assuming, *arguendo*, that such a phenomenon as a "nonmilitary" American court can exist in any occupied territory, it is hard to imagine how any could be less military than this.

Nonetheless the Court's practical alternatives were either to approve the system used or upset every conviction for years and compel the use of a hierarchy of genuinely military tribunals. Faced with that alternative, Justice Burton turned the occupation courts into courts "in the nature of military commissions" by sheer *ipse dixit*. True, the government was no longer military, but "it was a government prescribed by an occupying

¹⁵⁵ For description, bibliography and extended discussion of the constitutional problems involved, see Fairman, *Some New Problems of the Constitution Following the Flag*, 1 *Stanford L. Rev.* 587, particularly, 616-45 (1949). The discussion there is so full that the text above will consider only the statutory point.

power and it depended upon the continuing military occupancy of the territory."¹⁵⁶ There is literally no reasoning at all but the sentence quoted to explain just *why* these courts were in the nature of military commissions.

This of course assumes the other point in issue, whether the President had power to create such courts. He obviously has the power to create military commissions, and if these are military commissions, then it follows automatically that his power is adequate to establish them. But Justice Burton was careful to protect the power of Congress to take the matter over: "The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate."

Justice Black dissented: "I think that if American citizens in present-day Germany are to be tried by the American government, they should be tried under laws passed by Congress and in courts created by Congress under its constitutional authority."¹⁵⁷

While this is essentially decision by brute force rather than by reason or precedent, such is the nature of seminal decisions. So were the decisions bringing corporations within the protection of the Fourteenth Amendment, or establishing substantive due process, or extending the Fourteenth Amendment to cover freedom of speech.¹⁵⁸ There would have been no profit in holding that the democratic tradition required the use of a *less* democratic court system in Germany than in fact was used, and this is the only practical choice if one were to say that only genuine courts martial could try these cases.

Two domestic jurisdictional decisions may have some significance. In *Doremus v. Board of Education*,¹⁵⁹ petitioners, who were respectively the parents of a school child and taxpayers, brought suit in a New Jersey state court to invalidate the New Jersey statute under which school begins with the reading of five verses of the Old Testament. The New Jersey courts, though dubious, accepted the standing of petitioners to raise the question. The Supreme Court directed argument on the question of jurisdiction, its attitude being reflected by Justice Jackson in an observation during oral argument, "We won't have anything but religious questions, if we don't

¹⁵⁶ *Madsen v. Kinsella*, 343 U.S. 341, 357 (1952).

¹⁵⁷ *Ibid.*, at 372.

¹⁵⁸ The cases are *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) (one sentence on the critical point and no opinion at all); *Smyth v. Ames*, 169 U.S. 466 (1898) (beginning utility rate review with three paragraphs of assumptions); *Gitlow v. New York*, 268 U.S. 652 (1925) (one sentence on the critical point).

¹⁵⁹ 342 U.S. 429 (1952).

watch out." Meanwhile the claim of the parent became moot since the child graduated from the school system; and the Court, in an opinion by Justice Jackson, held that it could not review the matter for want of a case or controversy since the taxpayer's suit was not a "good faith pocket-book action."

Under *Massachusetts v. Mellon*,¹⁶⁰ a federal law could not be challenged on a taxpayer's suit; but that case clearly reserved the power of the Supreme Court to review cases involving a state statute and a state general taxpayer arising from those states which have an opposite rule. So far as is known, *Doremus* is the first case in which a taxpayer's action treated as giving rise to a justifiable controversy for state purposes has been found inadequate for federal purposes. The *Massachusetts v. Mellon* rule has worked perfectly satisfactorily both in its barring of federal and its permitting of state taxpayer suits, and there is no good reason to limit it.

However the *Doremus* case can perhaps be taken as a sport, peculiar to its facts. The New Jersey court was so obviously anxious to uphold its law that it virtually waived the jurisdictional defense in so many words, and almost overtly gave a purely advisory opinion. In the New York release time case, the Court distinguished *Doremus* because "appellants here are parents of children currently attending schools subject to the released time program," with no discussion at all of financial interests.¹⁶¹ This suggests that if the New Jersey case had been brought by a parent whose child would stay in the school system long enough to outlast the litigation, the identical issue could thus be raised.

Further evidence that *Doremus* was not intended to be a substantial jurisdictional innovation is found in the *Adler* case,¹⁶² upholding New York's Feinberg Law and decided on the same day as *Doremus*. The *Adler* case was a declaratory judgment proceeding, the plaintiffs surviving to the Supreme Court being eight municipal taxpayers suing to enjoin waste of funds by an unconstitutional program. Justice Frankfurter, dissenting alone on this point, claimed *Doremus* as authority and asserted that the *Adler* case too was not a "pocketbook action" and had no real relation to New York city taxes. *Adler* was a standard taxpayer's suit, the interest of the taxpayer in fact being almost always negligible. The majority did not bother to answer the Frankfurter dissent, assuming its jurisdiction without discussion. So long as typical parents cases, like the release time

¹⁶⁰ 262 U.S. 447 (1923).

¹⁶¹ *Zorach v. Clauson*, 343 U.S. 306, 311 n. 6 (1952).

¹⁶² *Adler v. Board of Education*, 342 U.S. 485 (1952).

case, and typical taxpayers cases, like *Adler*, may be brought, *Doremus* does not substantially cut down traditional jurisdiction.

The one serious jurisdictional innovation of the year, so serious if taken at face value that the impulse is strong to suppose that not so much was intended, is *Stembridge v. Georgia*.¹⁶³ The facts are complex and peculiar. Petitioner was convicted of manslaughter in a Georgia trial court, his conviction was affirmed by the state intermediate court (the Court of Appeals) and certiorari was denied by the state Supreme Court. Subsequently petitioner filed a motion for new trial in the trial court, which was denied. This denial was affirmed by the intermediate court. Petitioner then, for the first time, in a motion for rehearing in the intermediate court raised federal constitutional objections to his conviction. This motion was denied on July 17, 1951. On September 12, 1951, the state Supreme Court denied certiorari.

On October 22, 1951, petitioner obtained from the intermediate court an amendment of the record which said in so many words, "this court considered the constitutional question [petitioner] raised and decided it against the contentions of the" petitioner. Petitioner did *not* seek a similar statement from the Supreme Court of Georgia.

The United States Supreme Court, in an opinion by Justice Minton, thereupon dismissed the petition on the ground that the state decision *might* have rested on adequate state grounds. The discussion, after the statement of facts, is only a half dozen sentences, beginning "It is apparent from the record that the Supreme Court of Georgia took no action upon the question of federal constitutional rights raised for the first time on the motion for rehearing in the Court of Appeals."¹⁶⁴

But this could not possibly be "apparent" from the record. All that is in the record from the Supreme Court of Georgia is two denials of certiorari. The second was a denial after decision by the intermediate court which, by its own statement, did pass on the federal question. The most that could possibly be "apparent" from the record is that the state Supreme Court either might or might not have done the same thing.

True, as Justice Minton says, normal Georgia practice requires that constitutional questions first be raised at the trial level, and therefore one may speculate that the state Supreme Court did not pass on the question. But this is pure speculation, for the same rule is equally applicable to the intermediate court, and it *did* pass on the federal question.

Then comes the next step in the argument. "Where the highest court

¹⁶³ 343 U.S. 541 (1952).

¹⁶⁴ *Ibid.*, at 547.

of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. . . . We are without jurisdiction when the question of the existence of an adequate state ground is debatable."¹⁶⁵

But these propositions by no means require, or even indicate, dismissal of a petition. Standard operating procedure when it is debatable whether a decision rests on an adequate state ground is to return it to the state court to find out. In the *Jennings* case,¹⁶⁶ discussed above, involving the Illinois post-conviction procedures, the court did exactly that at this very term after discussion of the merits. In *Dixon v. Duffy*,¹⁶⁷ a case also at this term and which also raised questions of the validity of criminal procedure, there was no opinion by the state Supreme Court. The order of the United States Supreme Court read, "continued for such period as will enable counsel for petitioner to secure a determination from the Supreme Court of California as to whether the judgment herein was intended to rest on an adequate independent ground." In *Palmer Oil Corp. v. Amerada Petrol. Corp.*,¹⁶⁸ also at this term, the case was first continued to permit determination of whether the decision below was on an adequate state ground, and was subsequently disposed of after the information had been obtained.

Justices Black, Frankfurter, and Burton dissented from the dismissal in the *Stembridge* case. Justice Reed went along with the Court, though with apparent qualms on the jurisdictional point. The *Stembridge* practice of dismissing the petition where the existence of a federal question is "debatable" cannot be squared with the *Jennings*, *Dixon*, and *Palmer Oil* practice of remanding or continuing the case for determination of that very point. If the *Stembridge* practice becomes general, it will serve as an easy device for state courts to evade Supreme Court review by abstaining from writing opinions. It is always easy to dream up some adequate state ground the existence of which is "debatable."

(b) *Full faith and credit*. The conflicts cases of the year moved on readily predictable lines. One divorce case holds the now familiar ground that State A may set aside a divorce obtained in State B only on a showing that the parties had not been served or had not participated in the proceedings in State B.¹⁶⁹ A second divorce case, with an unusually intricate fact situ-

¹⁶⁵ *Ibid.*, at 547-48. (Emphasis added.)

¹⁶⁶ *Jennings v. Illinois*, 342 U.S. 104 (1951).

¹⁶⁷ 342 U.S. 33, 34 (1951).

¹⁶⁸ 342 U.S. 35 (1951).

¹⁶⁹ *Cook v. Cook*, 342 U.S. 126 (1951).

ation, was neatly dispatched by Justice Reed.¹⁷⁰ In it, plaintiff got an Illinois divorce from defendant, including an alimony obligation by defendant "for so long as plaintiff shall remain unmarried." Plaintiff did remarry, but this marriage was later validly annulled in New York on the ground that her second spouse was already married. Plaintiff thereupon claimed alimony under the original decree as though she had "remained unmarried." The Court held that while the New York annulment must be given full faith and credit everywhere, it did not control "separable legal rights." Therefore the alimony provision was to be construed in the light of whether under Illinois law an annulled marriage does or does not amount to a remarriage.

V. THE INSTITUTION AND ITS JUSTICES

The Work of the Institution

Once again, the total volume of the Court's work was light. This year the number of cases was 89,¹⁷¹ as compared with 88 for 1950, 94 for 1949, 122 for 1948, and 119 for 1947. Before World War II, the docket usually ran to 200 and more cases a year. So light a total load permitted extended recesses during the term.

As last year, this decline of the docket was a product both of the rigidity of the grant of certiorari and of the decline of cases worth the Court's deciding. The studies by Professor Harper and his collaborators go into the subject so thoroughly that it is unnecessary to cover the same ground here.¹⁷² Suffice it to restate the conclusion of extensive demonstration in previous articles, that the Court, in cutting its work-load down far below the level it can be expected to handle, is not serving the purpose of the Act of 1925 giving it discretionary jurisdiction. An unfortunate example is the Dollar Steamship litigation, in which the government and the private parties involved finally split a financial burden which should have fallen on either one or the other because the Supreme Court persistently refused to decide the legal points involved.¹⁷³ Another is *Remington v.*

¹⁷⁰ *Sutton v. Leib*, 342 U.S. 402 (1952).

¹⁷¹ On the uniform counting method used in these articles, see 1950 Term article, 19 Univ. Chi. L. Rev. 165, 216 n. 215.

¹⁷² Harper and Rosenthal, What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari, 99 U. Pa. L. Rev. 293 (1950); Harper and Etherington, What the Supreme Court Did Not Do in the 1950 Term, 100 U. Pa. L. Rev. 354 (1951).

¹⁷³ For discussion, see 1950 Term article, op. cit. supra note 171, at 235. For continuation of the Court's inaction, see *Land v. Dollar*, 72 S. Ct. 1069 (1952). The parties finally got tired and settled after the Court adjourned for the summer, see N.Y. Times § 2, p. 33, col. 5 (June 13, 1952); 39 Newsweek, No. 35, at 70 (June 23, 1952).

United States,¹⁷⁴ where the Court, over two dissents, declined to review the substantial procedural question of whether a grand jury indictment is valid when the foreman of the grand jury is engaged in a financial venture with the chief witness for the government and the profits depend materially on the outcome of the very case before the grand jury.

The declining certiorari jurisdiction can not be accounted for on the ground of the extraordinary difficulty or importance of what is taken. As a rough estimate, about twenty-five of the cases of the Term were of some substantial importance, and another twenty-five were of some difficulty. Several of the cases taken can only be described as piddling. Examples are *Desper v. Starved Rock Ferry Co.*,¹⁷⁵ a case unique on its facts, in which the issue is whether a particular workman, doing unusual work on the Illinois River, was a "seaman" and hence covered by the Jones Act; *Bruner v. United States*,¹⁷⁶ deciding whether a War Department civilian fire fighter was an "employee" or an "officer" of the United States for Tucker Act purposes; *United States v. Kelly*,¹⁷⁷ interpreting a long since obsolete pay agreement covering holiday work at the Government Printing Office; and *Gardner v. Panama R. Co.*,¹⁷⁸ a tort case involving a unique problem in laches and liability which could not arise again because of change of statutes. There may be some good reason why cases such as these should be heard, but their existence negates any suggestion that the Court is reserving its energy solely for important public questions.

A related matter is the operation of the so-called Rule of Four. The Act of 1925¹⁷⁹ was passed on the assurance to Congress by the Court's representatives that certiorari would be granted when four, not five, Justices voted for it. As has been pointed out in this series of articles before, that promise would be nullified if, after four Justices voted to grant the petition, the remainder thereupon used their majority power to dismiss the petition without deciding the case.

Justice Frankfurter continued this year to attempt to persuade his brethren to adopt this dismissal practice. In *United States v. Shannon*,¹⁸⁰ the Court granted certiorari and decided the case on its merits. Justice Frankfurter declined to vote either way on the merits, arguing that the petition should be dismissed. Justice Douglas, conceding that petitions might be dismissed if improvidently granted, thought this privilege should be restricted to those who have voted to grant the writ. He alluded to the

¹⁷⁴ 342 U.S. 895 (1951).

¹⁷⁵ 342 U.S. 187 (1952).

¹⁷⁶ 343 U.S. 112 (1952).

¹⁷⁷ 342 U.S. 193 (1952).

¹⁷⁸ 342 U.S. 29 (1951).

¹⁷⁹ 43 Stat. 938 (1925), 28 U.S.C.A. § 38 (1950).

¹⁸⁰ 342 U.S. 288 (1952).

Rule of Four, saying "If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule or certiorari would then be impaired."¹⁸¹ The force of this objection was apparent in *United States v. Jordan*.¹⁸² There, four Justices presumably having voted to grant certiorari, the Court heard argument and split four to four on the merits, Justice Frankfurter declining to express any view since he thought the writ should be dismissed. Despite the wish of four, the Court was thus rendered incapable of disposing of the case except by affirming with an equally divided Court.

As for other details of its business management, the Court continued to be extremely strict in barring the filing of briefs amicus.¹⁸³ Its rule seems a peculiar one, since if the Court is going to reserve its energies for public business of high seriousness, it might as well know what various segments of the public think about the matters at hand.

Oral arguments before the Court continued, as they have for many years past, to be less formal presentations of argument by counsel than running discussion between the Bench and counsel. For example in the *American National Insurance* case, with an hour on each side, the Court interpolated 153 questions or observations during the argument of government counsel, and 84 during the argument of private counsel. Government counsel uttered more than six consecutive sentences without interruption only four times after his brief opening. The numerical distribution of the 237 interpolations during the 120 minutes of the two arguments was as follows: The Chief Justice, 12; Justice Black, 30; Justice Reed, 69; Justice Frankfurter, 93; Justice Jackson, 26; Justice Burton, 7; and Justices Douglas, Clark, and Minton none.¹⁸⁴

The distribution of majority opinions among the Justices is shown in Table 3.

TABLE 3

DISTRIBUTION OF MAJORITY OPINIONS

Vinson.....	9	Jackson.....	9
Black.....	11	Burton.....	7
Reed.....	7	Clark.....	9
Frankfurter.....	9	Minton.....	10
Douglas.....	11	Per curiam.....	7

¹⁸¹ *Ibid.*, at 298.¹⁸² 342 U.S. 911 (1952).¹⁸³ On *Lee v. United States*, 343 U.S. 924 (1952), Justices Black and Frankfurter objecting to the operation of the amicus rule.¹⁸⁴ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952). In *Ray v. Blair*, 343 U.S. 214 (1952), the total number of judicial interpolations was 166, divided as follows: The Chief Justice, 58; Justice Reed, 52; Justice Jackson, 27; Justice Burton, 5; Justice Clark, 12; Justice Minton, 12; Justice Douglas, none; and Justices Black and Frankfurter not participating.

The extent to which the views of particular Justices have prevailed can best be measured by concentrating on the most important of the decisions, and for this purpose I have chosen, as objectively as possible on so subjective a matter, the two groups of cases which seem to me to have the most important consequences to society. The first group consists of the seven cases which seem the most significant of the year.¹⁸⁵ The second group of twenty cases are definitely less important, but are not routine.¹⁸⁶ The data in Tables 4 and 5 are taken from these groups. Disqualifications give some of the Justices fewer than a total of twenty-seven.

Justices most often in agreement were Chief Justice Vinson and Justices Reed and Burton. Had Justices Clark and Minton not been out of

TABLE 4
VOTING DISTRIBUTION IN MAJOR AND IMPORTANT CASES

	MAJORITY VOTES			DISSENTING VOTES		
	Major	Impor- tant	Total	Major	Impor- tant	Total
Vinson.....	6	17	23	1	3	4
Black.....	2	13	15	5	6	11
Reed.....	5	15	20	2	5	7
Frankfurter.....	4	13	17	3	3	6
Douglas.....	3	12	15	4	8	12
Jackson.....	5	17	22	2	3	5
Burton.....	6	16	22	1	4	5
Clark.....	6	14	20	0	1	1
Minton.....	6	10	16	1	5	6

so many cases, the incidence of agreement between them and the Chief Justice would doubtless have been even higher.

The Work of the Individual Justices

The Chief Justice does not use his power of assignment, as some of his predecessors have done, to take a great share of the big cases. This year,

¹⁸⁵ *Adler v. Board of Education*, 342 U.S. 485 (1952); *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Carlson v. Landon*, 342 U.S. 524 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952); *Zorach v. Clauson*, 343 U.S. 306 (1952). (At the time this table was compiled, I did not adequately appreciate the significance of *Madsen v. Kinsella*, 343 U.S. 341 (1952). I would now include it as a major case. It would not materially affect any of the tabular data above, since it was unanimous but for Justice Black's dissent; JPF.)

¹⁸⁶ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *Brotherhood R.R. Trainmen v. Howard*, 72 S. Ct. 1022 (1952); *Bindczyck v. Finucane*, 342 U.S. 76 (1951); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Doremus v. Board of Education*, 342 U.S. 429 (1952); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Jennings v. Illinois*, 342 U.S. 104 (1951); *Kawakita v. United States*, 72 S. Ct. 950 (1952); *On Lee v. United States*, 72 S. Ct. 967 (1952); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Morissette v. United States*, 342 U.S. 246 (1952); *Mullaney v. Anderson*, 342 U.S. 415 (1952); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952); *Pa. Water Power Co. v. FPC*, 343 U.S. 414 (1952); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451 (1952); *Ray v. Blair*, 343 U.S. 214 (1952); *Sacher v. United States*, 343 U.S. 1 (1952); *Stack v. Boyle*, 342 U.S. 1 (1951); *Standard Oil v. Peck*, 342 U.S. 382 (1952); *United States v. Wunderlich*, 342 U.S. 98 (1951).

of his nine thoroughly workmanlike majority opinions, none involved earth shaking topics, and some were on distinctly minor themes. Two, *Georgia R. Co. v. Redwine*,¹⁸⁷ involving a claimed suit against a state and an issue of federal versus state jurisdiction, and *Memphis Steam Laundry Cleaner v. Stone*,¹⁸⁸ invalidating a discriminatory Mississippi license tax, are particularly succinct and precise.

TABLE 5
PERCENTAGE IN MAJORITY,
MAJOR AND IMPOR-
TANT CASES

	Per Cent
Vinson.....	85
Black.....	58
Reed.....	70
Frankfurter.....	74
Douglas.....	57
Jackson.....	81
Burton.....	81
Clark.....	95
Minton.....	73

TABLE 6
AGREEMENTS AMONG JUSTICES IN MAJOR AND IMPORTANT CASES

	Vinson	Black	Reed	Frank- furter	Douglas	Jackson	Burton	Clark	Minton
Vinson.....	..	13	20	14	10	18	20	19	19
Black.....	13	..	10	17	19	15	16	11	9
Reed.....	20	10	..	11	15	19	19	14	14
Frankfurter.....	14	17	11	..	15	15	17	12	9
Douglas.....	10	19	15	15	..	15	15	9	6
Jackson.....	18	15	19	15	15	..	17	15	12
Burton.....	20	16	19	17	15	17	..	17	13
Clark.....	19	11	14	12	9	15	17	..	15
Minton.....	19	9	14	9	6	12	13	15	..

The Chief Justice's handsomest opinion from an artistic standpoint (this writer is not completely persuaded on the merits) may well be *United States v. Hayman*.¹⁸⁹ It upholds the validity of Section 2255 of the Judicial Code,¹⁹⁰ detailing the manner in which federal prisoners can collaterally attack their convictions. This balanced and comprehensive opinion covers the background of the statute, the circumstances of its drafting and its application in the instant case. The bill was a product of the Judicial Conference in the period just before the Chief Justice came to preside over

¹⁸⁷ 342 U.S. 299 (1952).

¹⁸⁸ 342 U.S. 389 (1952).

¹⁸⁹ 342 U.S. 205 (1952).

¹⁹⁰ 62 Stat. 967 (1948), as amended, 63 Stat. 105 (1949), 28 U.S.C.A. § 2253 (1950).

that body, and one catches in the interstices of the opinion a sense of his respect for that group.

The Chief Justice, scarcely an apostle of civil liberty, reaches most libertarian results in two cases. One was *Jennings v. Illinois*,¹⁹¹ discussed at length above, finally breaking the Illinois procedural log jam in post conviction cases. The other was in *Stack v. Boyle*,¹⁹² holding that persons charged with political offenses have the same right to bail as anyone else. Regrettably he was unwilling to extend the same principle to aliens facing deportation. Whether in his massive dissent in the steel seizure case it was sound strategy to claim so much more than was needed for the Executive is arguable; assuming that it was, the dissent constitutes a forceful presentation particularly strong in its marshalling of the facts and in the prose of its conclusion. Its oral delivery was unusually effective.

For Justice Black, this was a year of personal disaster. During it he lost his wife, Josephine Foster Black, his constant companion, to whom he was devoted. Despite this shattering loss, he concluded his 15th year on the Bench with as many majority opinions as any other Justice.

In point of view, the Justice remained adamantly opposed to the repressionist spirit of the times. His outstanding expressions of this resistance were his dissent in the case upholding the Illinois group libel law,¹⁹³ in which he attacks the theory that the fundamentals of human liberty are left by the Constitution to be disposed of by rational differences among legislators; and his dissent in the alien bail case,¹⁹⁴ in which he hits with precision, clarity, and force. For the very reason that his stand is so straightforward, it is regrettable that the Justice has not yet done, in these recent years, any comprehensive statement on freedom of speech. We know his results, but not the full details of the logic by which he reaches them; even the group libel case does not attempt this.

Some of his opinions are less satisfying. In *Penn. Water & Power Co. v. Fed. Power Comm.*,¹⁹⁵ involving a possible conflict between the Commission's basic statute and the Sherman Act, it is not clear to this reader whether the simple act of filing an agreement with the Commission does or does not insulate that agreement from the Sherman Act. In *Dice v. Akron, etc. R. Co.*,¹⁹⁶ an FELA case, it is most unclear whether the precedent case involved is overruled or distinguished, and if the latter, how.

¹⁹¹ 342 U.S. 104 (1951).

¹⁹² 342 U.S. 1 (1951).

¹⁹³ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹⁹⁴ *Carlson v. Landon*, 342 U.S. 524 (1952).

¹⁹⁵ 343 U.S. 414 (1952).

¹⁹⁶ 342 U.S. 359 (1952).

Brannan v. Stark,¹⁹⁷ a dissent, involving the validity of payments to milk co-operatives under the Agricultural Adjustment Act, is, most unusually for Black, lengthy out of all proportion to its point. On the other hand, the terse steel seizure opinion¹⁹⁸ is, from a structural standpoint, the best possible way out of a situation in which the Court was so greatly divided; and the dissent in the release time case¹⁹⁹ makes orderly mincemeat of the majority opinion. The dissent in the lawyers' contempt case²⁰⁰ is a flawless presentation of its view.

One of the outstanding opinions of the year was Justice Reed's *Ray v. Blair*,²⁰¹ determining principally whether the Twelfth Amendment precludes Alabama's requirement that candidates for the Electoral College pledge in advance to support their party's nominee. The case was decided with unusual rapidity because of the imminence of an election there, and either the briefs or the Justice's research or both were remarkably comprehensive, because the opinion is a very full, though compact, presentation of this important matter. In other areas, the Justice wrote two majority opinions²⁰² declining to expand in any way his *bête noir*, the *McNabb* rule.

The real mystery about Justice Reed is why, with his broad cultural background and his deep personal humanity, he should be so nearly completely immune to the demands of human liberty. The discussion earlier criticizes the merits of Justice Reed's five to four decision in the alien bail case,²⁰³ under which it becomes routine practice in these United States for an underling in the Department of Justice to tear an alien away from his family and keep him in jail for years on nothing but a charge. Only our Russian adversaries should be expected to treat human beings that way. Yet if that result can be sustained under the Constitution, Justice Reed's opinion makes the best case for it.

Justice Frankfurter's big opinion of the year upheld the Illinois group libel law.²⁰⁴ His presentation here is strong. Equally strong, and devastating in its effect, is the dissent in the lawyers' contempt case.²⁰⁵

¹⁹⁷ 342 U.S. 451 (1952).

¹⁹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952).

¹⁹⁹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

²⁰⁰ *Sacher v. United States*, 343 U.S. 1 (1952).

²⁰¹ 343 U.S. 214 (1952).

²⁰² *United States v. Carignan*, 342 U.S. 36 (1951); *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

²⁰³ *Carlson v. Landon*, 342 U.S. 524 (1952).

²⁰⁴ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

²⁰⁵ *Sacher v. United States*, 343 U.S. 1 (1952).

The Justice's penchant for self-expression continued unabated. In the steel seizure case²⁰⁶ he set a new record, with *two* concurrences (one a brief note), and *two* appendices. The appendices in this case, which collect statutes on seizure and the instances of previous practice, are particularly valuable and relevant; one may doubt whether the same may be said for the quotations from twenty-three dictionaries appended to his movie censorship concurrence.²⁰⁷

The group libel case and the Justice's opinion in the stomach pump forced confession case²⁰⁸ leave the Court thoroughly committed to Justice Frankfurter's natural law conception of due process, and to his theory that laws restrictive of civil liberty must be upheld if there is any rational basis for them. As the Justice puts his own credo in a dissent, we cannot "approve legally what we disapprove morally,"²⁰⁹ except for the rational basis limitation. The acceptance of these concepts is a major victory for the Justice; as was developed more fully above, he has now regained almost all the ground he lost when the first flag salute case was overruled.

In last year's article, Justice Douglas was described as "the batter who couldn't strike out." This year there was one major miss. An admirer can only veil his eyes at the release time opinion²¹⁰ which, quite apart from the result, is unfortunate in tone and totally fails even to discuss the critical issue of why the petitioners were not allowed to offer proof on their claim of coercion.

The Justice has the art of vigorous rhetorical writing without falling into excess, either of verbiage or of vigor; an outstanding example is the dissent in the Feinberg Law case.²¹¹ His dissent in the Communist deportation case²¹² is particularly stimulating in its call for a reconsideration of the whole basis of the power of Congress over aliens, and his position is cogently supported with legal as well as ethical considerations. *Standard Oil v. Peck*²¹³ is an interesting revision of the law on the taxability of ships by the state of their corporate domicile, and his opinions upholding the Missouri statute giving time off for voting²¹⁴ and on the treason of a Japanese-American who renounced his citizenship²¹⁵ are clear and persuasive.

²⁰⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952).

²⁰⁷ *Burstyn, Inc. v. Wilson*, 343 U.S. 496 (1952).

²⁰⁸ *Rochin v. California*, 342 U.S. 165 (1952).

²⁰⁹ *On Lee v. United States*, 72 S. Ct. 967 (1952).

²¹⁰ *Zorach v. Clauson*, 343 U.S. 306 (1952).

²¹¹ *Adler v. Board of Education*, 342 U.S. 485 (1952).

²¹² *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

²¹³ 342 U.S. 382 (1952).

²¹⁴ *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952).

²¹⁵ *Kawakita v. United States*, 72 S. Ct. 950 (1952).

Experience may be making the Justice more critical of excessive administrative discretion than he might have been years ago. His opinion lamenting the limitless discretion of government contracting officers²¹⁶ has been quoted above. In an ICC matter, dissenting alone, he said, "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster. . . . Absolute discretion, like corruption, marks the beginning of the end of liberty."²¹⁷

Two of Justice Jackson's most important opinions this year have been criticized above for that cardinal judicial sin, assuming the point in issue. In the steel seizure case²¹⁸ the Justice's opinion slides, in a phrase and a footnote, past the vital question of whether the Taft-Hartley Act was meant to preclude seizure and devotes pages to a question not argued by anybody, namely whether the President can exercise the seizure power in defiance of the express will of Congress. In the retroactive alien deportation law case,²¹⁹ a major question is whether it makes any difference that the alien may have abandoned his political heresy almost twenty-five years before this decision, and eleven years before the relevant statute was passed. The Justice expatiates on the comparative hardships of deportation and military service (a matter not remotely involved), but does not discuss the possible legal consequences of genuine redemption by good works at all.

This is, however, the only technical criticism of the Justice's opinions, and it is not common to most of them. Even where he is of dubious relevance, his prose is superb and his thought stimulating. This is particularly true in the steel seizure case. In the lawyers' contempt case,²²⁰ the Justice's opinion makes an excellent case for its interpretation of Criminal Rule 42. The opinion he most enjoyed writing is probably *Morissette v. United States*,²²¹ a wonderfully comprehensive and thoughtful discussion of the place of intent in criminal law.

None of Justice Burton's opinions this year are subject to even picayune criticism. His most important is that upholding the occupation court system in Germany.²²² The discussion above suggests that it slips casually

²¹⁶ *United States v. Wunderlich*, 342 U.S. 98 (1951).

²¹⁷ *New York v. United States*, 342 U.S. 882, 884 (1951).

²¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952).

²¹⁹ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

²²⁰ *Sacher v. United States*, 343 U.S. 1 (1952).

²²¹ 342 U.S. 246 (1952).

²²² *Madsen v. Kinsella*, 343 U.S. 341 (1952).

over its hardest point, but there was no alternative if the necessary result was to be reached. His three tax opinions, each of which was of more than casual difficulty and breadth, are of high standard in construction, clarity, and utilization of relevant material. My personal choice as the best from these standpoints, as well as interest, is *Lilly v. Commissioner*,²²³ on the deductibility as business expense of opticians' rebates to eye doctors from sales of glasses. His opinion on the Sherman Act violation of the newspaper publisher who refused the ads of those who also advertised with a radio station in the same area²²⁴ treats each of the several points involved with due weight; one gets the impression from the fineness of the (relevant) factual details that the Justice took special interest in disposing of this problem from his home area in Ohio.

Justice Clark's opportunity of the year was the movie censorship case.²²⁵ To this reader at least, the resulting opinion is in a sense anticlimactic. Students of the subject have been awaiting the overruling of the anachronistic *Mutual Film* case²²⁶ for so long that somehow the great day should be introduced with a legal equivalent of the rolling of drums; one hoped for an opinion in the grand style. Justice Clark treats the case as just another job in a work-a-day world. One must go to the concurrence to gratify a natural curiosity as to what the movie is about and how, in its whole context, the problem arose; and where one might hope for serious analysis of the place of movies in relation to speech and press, the result is very nearly assumed. This may well be the best possible strategy for innovation; all that is meant to be suggested is that for all one's gratitude for what is served, the taste is a little flat.

The Justice's position in the steel seizure case²²⁷ is clear enough. The enigma is why he took it. He was the only Justice to see any, much less crucial, relevance in the seizure provision of the Selective Service Act of 1948, and with so many better reasons for going in either direction, it is hard to understand why he chose this one.²²⁸ Of his less colorful opinions, perhaps the best is *Brannan v. Stark*,²²⁹ on payments to milk co-operatives under the Agricultural Adjustment Act. The subject is difficult, the opin-

²²³ 343 U.S. 90 (1952); the others are *Lykes v. United States*, 343 U.S. 118 (1952), and *Rutkin v. United States*, 343 U.S. 130 (1952).

²²⁴ *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

²²⁵ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

²²⁶ *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915).

²²⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863 (1952).

²²⁸ See note 38 supra.

²²⁹ 342 U.S. 451 (1952).

ion well done and persuasive. Like the steel case, though of course in lesser degree, it found him deciding against the administration. His lesser opinions were all well done.

As has been noted, Justice Minton this year became the first Justice, in the course of the six years this series of articles has been presented, to decide against the claimed civil liberty in every divided civil rights case in which he participated. His position in these cases has the multiple merits of brevity, clarity and candor. The *Feinberg Law case*,²³⁰ discussed above at length, is a good example. There is here no mealy-mouthed set of insignificant qualifications, no pretense of doing less than is being done. Guilt by association? Justice Minton sees nothing wrong with showing personal disqualification by checking the views of associates, and he says so. Free speech for teachers? Justice Minton thinks that if they want free speech so badly, they should get other jobs; and again he says so.

Some of the Justice's positions in this area are particularly hard to accept. He apparently believes that there can be no denial of due process in giving a sentence no matter how captious a judge is, so long as he does not exceed the statutory maximum;²³¹ Justice Minton makes no reservation at all for a duty to deliberate fairly before sentence is imposed. In one right to counsel case,²³² the Court decided that the defendant was not capable of defending himself adequately without a lawyer. Many years earlier the defendant had been institutionalized as an imbecile. Justice Minton, becoming so interested in showing that the defendant was not really, in the technical sense, an imbecile, makes no allowance for the fact that the man, at best, was not very bright.

Outside of the emotion-laden area of civil liberty, where if Justice Minton may be too extreme, his critics may be too harsh, there was a series of excellent Minton opinions. His dissent in the most important Labor Board case²³³ of the year is very good, and a complex alien enemy property problem is analyzed with great skill in *Uebersee Finanz-Korp. A.G. v. McGrath*²³⁴ His lone dissent in *Standard Oil Co. v. Peck*,²³⁵ on the taxability of vessels in inland waters in the state of their incorporation is not merely more persuasive, but also better as a presentation of its view, than the majority opinion.

²³⁰ *Adler v. Board of Education*, 342 U.S. 485 (1952).

²³¹ *Keenan v. Burke*, 342 U.S. 881 (1952).

²³² *Palmer v. Ashe*, 342 U.S. 134 (1951).

²³³ *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

²³⁴ 343 U.S. 205 (1952).

²³⁵ 342 U.S. 382 (1952).

CONCLUSION

The 1951 Term was the last full judicial year in the Presidential terms of Harry Truman. The Truman Court will thus outlast, and possibly long outlast, the tenure of the President who appointed four of the Justices.

It is of course fitting and proper in a democracy that a judiciary, even one exercising the power of judicial review, should take the complexion of changing popular demands and changing administrations. No theorist of democracy supposes that the judiciary should have become static with John Marshall. The judicial function as the gyroscope of American policy is to adjust the needs of society, but to adjust slowly.

The transition from the New Deal Court to the Fair Deal Court has been a great change. In matters of economic policy, the machine runs in the same general direction as did the Roosevelt Court, but such vigor, militancy and spirit of innovation as the earlier Court had is gone. The new static Sherman Act is the best example. In matters of civil rights, the general direction has been reversed. The principal contribution of this Court, whether for good or for evil, has been the introduction of a new era of legislative and executive supremacy over individual liberty.

Justice Frankfurter, in the steel case, refers felicitously to the President as "a representative product of the sturdy democratic traditions of the Mississippi Valley." As the time for the change in the appointing power comes, one wonders whether this President, if he took the time really to know what he had created, would want to do it again.