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Manley Ottmer Hudson

Death Comes at age 73 To Int. Law Scholar

Manley Ottmer Hudson, Bemis Professor of International Law, Emeritus, died last Wednesday, April 13, at the age of 73. Professor Hudson had retired from the Law School in 1955, following a period of service to the Law School that spanned 40 years, first



Prof. Manley O. Hudson

as a Torts professor and later as an authority in the field of international law.

Professor Hudson, who was born in St. Peter's, Mo., received bachelor's and master's degrees from William Jewell College in Li-

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A Tribute to Prof. Hudson By Dean Roscoe Pound

I first met Manley Hudson when he came to the Law School as a graduate student in 1916. He had graduated in 1910, just before I came here as a teacher, and had been teaching in the Law School of the University of Missouri. Feeling that law teaching was the calling he wished to pursue, he came to take advantage of the opportunity for further study which the Harvard Law School was developing.

He took the two courses I was then giving for those preparing to teach law — Jurisprudence as one of the social sciences, and Roman Law as an introduction to Comparative Law. He also took an active part in the seminars I gave as supplements to each. He proved to be exceptionally diligent, reading far beyond what I had prescribed, and following up points I had indicated as proper for further study, beyond the limits of each course.

His main interest had been in the law of property — as was not unusual in one taught by John Chipman Gray. Indeed, Gray's influence was manifest in Hudson's early bent for analytical jurisprudence. He diligently read every line of Austin and, although he soon moved far beyond Austin, the precision of logical definition in Austin and the law of property appealed to him strongly.

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Harvard Law Record

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Hearsay

Attention all Class Marshals, look at your batons. Are you a *Marshal*, or are you a *Marshall*?

The RECORD inadvertantly spelled that title with two *lls*. Shortly, Charles M. Thorp, Jr. wrote to inquire why Harvard Law School uses two *lls* in *Marshal*; for not only did the RECORD double the *l* on March 24th, but so did the engraver who made Mr. Thorp's baton, the symbol of his office as Marshal of the Class of 1919.

The only *Marshall* with two *lls* in our dictionary is defined: "The Micronesian language of the Marshall Islands." No one in the office of the Secretary of the Harvard Corporation or in the office of the University Marshal remembers the use of Class Marshal with more than one *l*.

Because the extra *l* is obviously *ultra vires*, we make the modest proposal that all Class Marshals look at their batons to determine whether or not they are *Marshals* or *Marshalls*. If they find that they are *Marshalls*, then undoubtedly they ought to arrive at commencement on June 16, prepared to take an exam in their proficiency in the Micronesian language of the Marshall Islands.

CALENDAR

Thursday, April 21

Two more in the series of lectures being given by GEORGE F. KENNAN on "Soviet Foreign Policy in the Stalin Era" will be presented in Sanders Theater at 4 p. m. on Thursday, April 21 and Tuesday, April 26.

The Fletcher School of Law and Diplomacy of Tufts University will present a series of lectures by The Honorable Eugene R. Black, President of the International Bank for Reconstruction and Development, on "The Diplomacy of Economic Development," in Cohen Auditorium, Talbot Avenue, on Thursday, April 21 and Friday, April 22.

Friday, April 22

The REPUBLICAN CLUB will hold its last luncheon meeting of the year in the Mallory-Smith Room of Harkness Commons at 1 p. m. Ralph H. Bonnell, Republican National Committee member, will discuss the 1960 elections.

The HARVARD CLASSICAL PLAYERS will present "Mostellaria" by Plautus, in the Quincy House Dining Room at 8:30 p. m. on Friday, April 22 and Saturday, April 23. Tickets can be obtained at the Coop.

Sunday, April 24

The FORD HALL FORUM will present Dr. Joachim Prinz, president of the American Jewish Congress, speaking on "The German Dilemma: An Analysis of Anti-Semitism and Neo-Nazism in Present-Day Germany" at 8 p. m. in Jordan Hall.

Wednesday, April 27

The HARVARD LAW WIVES will meet in Harkness Commons at 7:30 p. m. A demonstration of flower arrangements will be given.

FUTURE EVENTS

The INTERNATIONAL LAW CLUB will meet in the Wheeler Room, Holmes Hall, on Friday, April 29 at 4 p. m. Dr. Wilfried A. Hofmann will speak on "Legal Aspects of the So-Called German Miracle."

The HONORABLE FELIX FRANKFURTER will speak informally to students in the James Barr Ames Courtroom, Austin Hall, on Saturday, April 30 at 4 p. m.

Mr. Justice Stewart Presiding

Ames Verdict to Frankfurter

A Yale man charmed the Harvard Law School last week, when he presided in the United States Court of Appeals for the Ames Circuit, where third year finalists from the Frankfurter Club and the Root Equity Club argued the case of the *United Nations v. Ames Business Machine Company, Inc.* In a one sentence opinion, circuit-riding Mr. Justice Stewart announced that a divided court awarded the decision to the Frankfurter Club on the basis of oral and written arguments, citation and summary of authorities, and the answering of questions.

On the court with Mr. Stewart were Honorable Curtis Bok, of the Pennsylvania Supreme Court, and Honorable J. Edward Lumbard, LL.B. '25, of the United States Court of Appeal for the Second Circuit. The counsel who argued before them were Arthur I. Settles, Sunnymeade, Calif., and Richard T. Watson, Maple Heights, Ohio, for the Frankfurter Club; and John G. Milano, Irvington, N. J., and John R. Stahr, Reno, Nevada, for the Root Equity Club.

On the victorious Frankfurter brief were Michael P. Arra, Mt. Kisco, N. Y.; Charles S. Blankstein, Greenboro, N. C.; Stephen I. Hochhauser, Ossining, N. Y.; David A. Rakov, Newton, Mass.; Herbert J. Korbel, New York, N. Y.; and Burton A. Schwalb, Hyde Park, Mass.

Captured Audience

Throughout the argument, the good nature of the presiding Justice captured both the counsel and the spectators in the James Barr Ames Courtroom, as he alternated between tension relieving levity and amazingly brief and complete restatements of the arguments made by counsel.

The case grew out of a claim by the United Nations that business machines it purchased from the Ames Business Machine Company, Inc. were defective. After considerable delay, the U. N. demanded that the dispute be arbitrated, in accordance with an arbitration clause in the sales contract. The Business Machine Company refused to arbitrate and claimed that payment of \$4,036 by it to the U. N. was a full satisfaction of its liability under the contract. It also raised the de-

fenses of laches, and the Ames and New York statutes of limitations.

The United Nations brought this action in the United States District Court for the District of Ames. The Business Machine Company moved to dismiss under Fed. R. Civ. P., 12 (b), and the United Nations moved for a transfer of the case to the United States District Court for the Southern District of New York. Both motions were denied. The District Court found jurisdiction under 22 U. S. C. §228 (a), the Immunities and Privileges Act, although the United Nations had also alleged jurisdiction under 28 U. S. C. §1331, 28 U. S. C. §1332, and 28 U. S. C. §1345. The motion for change of venue was denied, because the respondent was not amenable to service of process in New York, though the District Court found that, but for this barrier, "these facts constitute a sufficient cause for transfer . . . for the convenience of parties and witnesses and in the interest of justice."

Also in the District Court, the United Nations was granted a motion to strike the defense of accord and satisfaction, but was denied a motion to strike the defense of the Ames and New York statute of limitations.

Summary Judgment

The Ames Business Machine Company, Inc. was finally granted a motion for summary judgment because of the petitioner's failure to state a claim upon which relief could be granted and the District Court entered judgment for the respondent. The District Court found that in order to enforce the arbitration clause under the Federal Arbitration Act it must first find jurisdiction under Title 28 U. S. C.; whereas in this case it found jurisdiction under Title 22. Therefore, after an analysis of relevant state and federal law, the District Court "held in this case that the agreement to arbitrate cannot be enforced."

In the United States Court of Appeals for the Ames Circuit, the two teams submitted their briefs and presented their oral arguments on the rulings made by District Judge Malcolm Longworthy. The appellate court refrained from expressing an opinion on the legal issues involved, on the advice of a sec-

ond year member of the Board of Student Advisers.

Burton A. Schwalb, who was originally scheduled to argue for the Frankfurter Club, withdrew because of family illness and was replaced by Mr. Watson.

G.O.P. Congressmen View '60 Issues

In a prelude to the 1960 campaign, three Republican members of the House of Representatives discussed before the Harvard Law-Graduate Young Republican Club last week a few of the issues that are expected to figure prominently in the campaign.

Rep. Melvin R. Laird of Wisconsin, a member of the House Appropriations Committee, said the Republican Party offers the best opportunity to young people for participation in government. Every Republican member of Congress has a voice in Republican policymaking, in contrast with the situation in the Democratic Party, where Congressional policy is determined by Speaker Rayburn and Senate Majority Leader Johnson.

Moreover, there is unity of purpose among Republicans, whereas the Democratic Party is a "marriage of convenience" and therefore not in a position to assume national leadership.

Defense Spending

Rep. Laird predicted that defense spending would be the Democrats' principal issue in the campaign. He called attention to the fact the Democrats on the Appropriations Committee have supported reductions in the defense budget for the last six years, and he predicted that they would do so again this year.

Speaking on the farm problem, Rep. Clifford G. McIntyre of Maine, a member of the House Agriculture Committee and New England's representative on the Republican Policy Committee, said that the farm surplus problem is the result of the failure of Democrat controlled Congresses to make production adjustments after World War II. A Democratic Congress also passed a minimum acreage provision which has never been removed.

Production must somehow be reduced to a level which meets the demand of the market and does not require government storage. Rep. McIntyre felt that some constructive legislation is possible in this session of Con-

gress, at least as to wheat.

Questioned as to the effectiveness of the program of distributing surpluses to needy people abroad, Rep. McIntyre explained that such distribution is far more difficult than it may seem, due to inadequate port and storage facilities abroad, and to the fact that many of the needy in other countries simply don't know how to use corn and wheat.

Labor Reform

Labor reform was the issue discussed by Rep. Robert P. Griffin of Michigan, a member of the House Education and Labor Committee and co-author of the Landrum-Griffin Bill. Rep. Griffin, a 1950 graduate of Michigan Law School, criticized so-called liberals for opposing the bill of rights which was written into the labor reform bill. True liberals, he said, should have worked for passage of the bill of rights.

He noted that all the Democrat Presidential hopefuls in the Senate voted against the bill of rights, with the exception of Senator Humphrey, who was so certain the bill would be defeated that he was absent at the time of the vote. Vice-President Nixon broke a tie by voting in favor of the bill of rights.

Rep. Griffin made clear that he does not advocate a federal right-to-work law. But if a worker must belong to a union in order to retain his job, then his rights should be safeguarded by the government. Rep. Griffin said that he has not found any rank and file union members opposed to the fundamentals of the bill of rights.

He concluded the discussion by expressing his belief that increasing rank and file participation in union affairs will result in more responsible unionism.

—Matia

Student Bar Will Hear Judge

Judge Sidney Squire of the New York State Court of Claims will talk to the Student Bar Association on Trial and Appellate Experiences in the Wheeler Room of Holmes Hall at 1:40 p. m. today.

Judge Squire has been on the Court of Claims since 1956. Prior to that, he served as Executive Deputy Secretary of State to Carmine G. DeSapio and as a senior partner in Squire & Leavitt, Brooklyn, New York. He is a former chairman of the Municipal Legislation Committee of the Brooklyn Bar Association and former trustee of the Federal Bar Association of New York, New Jersey, and Connecticut.

S.E.C. Chairman Describes Operations

The Hon. Edward Gadsby, Chairman of the Securities & Exchange Commission, addressed the final meeting of the Bull & Bear Club last Thursday. To an overflow crowd, Mr. Gadsby discussed the operating divisions of the S. E. C. and the manner in which they handle the problems arising under the Acts



Mr. Gadsby

which the S. E. C. is charged with administering: problems which have markedly increased with the flood of new registrations and secondary distributions that come into a high market.

He pointed out that the S. E. C. has not succumbed to Parkinson's Law, and prides itself on its policy of availability for consultation, which keeps the misunderstandings that would lead to more formal proceedings to a minimum.

Praising the work of the S. E. C.'s regional and branch office, Mr. Gadsby credited these "eyes and ears of the Commission" with spotting and stopping the "fast buck boys" before they could do too much damage. In response to a question from the floor, Mr. Gadsby conceded that Earl Belle was currently ensconced in extradition-proof Brazil with a few hundred thousand dollars bilked from investors

and employees of Cornucopia Gold Mines, but he pointed out that before the days of the S. E. C. Belle would have been on Fifth Avenue with several million.

Mr. Gadsby gave a quick sketch of all the steps involved in the issue of a new security, from inception to sale, and the function of the corporate lawyer in the process. He concluded with some authoritative comments on what the investor should watch for, and watch out for, in analysis of a prospectus.

Coexistence Seen As Foundation of Law

The coexistence of sovereign states is, today, the "foundation of all law," according to Professor Ludwik Ehrlich of the University of Krakow, who spoke to a recent meeting of the International Law Club.

Making it clear at the outset that he was interested in provoking critical comment on his ideas, Professor Ehrlich began by stressing the importance of finding and understanding fundamental rules. These rules, he declared, facilitate both the understanding and application of international law, while at the same time drawing man closer to world government.

The basic principles were likened to the broad principles of the common law. In the long run, states feel bound by such rules. The overriding concern then becomes the good faith practiced by the individual sovereign states, with the presence or absence of good faith being the essential difference between existence and coexistence.

Basic Principles

Professor Ehrlich outlined the basic principles he would adopt toward the furtherance of coexistence. First is the right of every state to exist. Following this is a presumption of equality of states, which in turn must involve reciprocity. Another principle concerns the carrying out of accepted obligations in a spirit of good faith. In this connection, Professor Ehrlich argued "there is no place in international law for formalism, for words rather than substance."

Continuing with his proposals, the Professor noted, as a fourth principle, the right to carry into execution the rights that have

been given. This ancient doctrine was compared to the doctrine of implied powers in American law.

The final principle was that of due proportion. This would prohibit, for example, the imposition by treaty of a greater burden than is necessary to execute the thing desired.

In conclusion, Professor Ehrlich explained how some of these principles may apply in practice. Throughout his talk, he emphasized that the starting point of the development of international law is that a state must be bound by its own word.

— Amitay

Death Comes to Prof. Hudson

(Continued from page 1)

berty, Mo., before being graduated from the Harvard Law School in 1910. In 1917, he received the degree of Doctor of Juridical Science from the Law School.

Over the years, Professor Hudson was associated with many international organizations. In 1930, he went to the Hague as a member of the American delegation to the Conference for the Codification of International Law. In 1933, and again in 1939, he was appointed to the Permanent Court of Arbitration. In 1936, he was elected as a judge of the Permanent Court of International Justice, receiving one of the largest votes in the history of the Court. Hudson accepted the renomination in 1939 and served on the Court until 1946.

Following World War II, in addition to his work for the United Nations, Professor Hudson served as President of the American Society of International Law. The Society in 1956 established a gold medal in honor of Professor Hudson, to be given "for distinguished service in the field of international law and international relations." He was its first recipient.

His writings in the field of international law have been numerous. Most notable of his works are *International Legislation*, a nine-volume work that has been called the "statute book of the world," and his *World Court Reports*.

At the Law School, Professor Hudson was noted for his seminar in International Law.

He encouraged the participants to write notes covering aspects of the casebook materials for possible publication in future editions. He would also begin every class with a discussion of the current new stories that covered his subject. His seminar was always crowded, and the students thrived under the white-haired gentleman who, whenever a word was inaccurately used, would wave his hands and declare, "I won't have that. Won't have it at all. Won't have it in this room."

Professor Hudson is survived by his widow, Janet, and two sons, Manley Ottmer, Jr., LL.B. '56 *m.c.l.*, and Peter, a student at Harvard College.

Tribute by Dean Pound

(Continued from page 1)

Hudson was a tireless worker from the beginning, working unremittingly day and night, Sundays and holidays, and following every point and detail until he had satisfied himself that he knew and understood it.

When he began to teach here, the only opening of promise was in Torts, which I was giving up in succeeding to the deanship. He made notable progress in that subject, as shown by his article on the Turntable Cases, in 32 *Harvard Law Review* in 1923. The article is exceptional in itself, but is characteristically significant in its appended apparatus of nearly four pages of carefully selected and classified cases from 40 states as "a guide to the present status" of the Turntable Cases in American law.

But the First World War turned his interest and attention to International Law, and the death of Professor Westengard gave him the opportunity to make that subject his life work. Except for three notable papers in the *Harvard Law Review*, his writing was confined thereafter to International Law.

In the card catalogue of the Harvard Law Library, his writings between 1926 and 1954 take up 383 cards. His year-by-year discussions of the work of the Courts, set up since the First World War toward a world regime of justice, are a life's work in themselves.

His work will stand out in the roll of those who have striven to make straight the paths of peace.

— Roscoe Pound

Many Years of Service

Retirement of William E. McCurdy

First year students in Harvard Law School next fall will no longer be able to learn Contracts from the teacher who buys and sells his horse, "Dobbin." Third year men in Domestic Relations will miss the man who since 1923 has developed that course single-handedly. For this June will mark the retirement of Professor William Edward McCurdy, under whom unnumbered students have studied law since the day 37 years ago when he joined Dean Pound and Professors Scott and Williston on the Law School faculty. In the intervening years, this devoted teacher and exhaustive writer and scholar has quietly but steadily been adding his very great contribution to the development of the school and the law.

Professor McCurdy graduated from Harvard College in 1916 and became an assistant in history at the college before serving in the United States Army during 1917 and 1918. After the war, he entered the Harvard Law School, becoming book review editor of the *Law Review* and a winning oralist in the finals of the Ames Competition. Dean Pound says that, as a student, Professor McCurdy was, "exceptionally discriminating as well as accurate in stating the facts of a case, and critically logical in deducing principles of law."

He received his LL.B. in 1921, and was Ezra Ripley Thayer Teaching Fellow at the Law School while studying for his S.J.D., which he received in 1922. At this point Professor McCurdy made what was to be his only departure from law teaching in the next 23 years, becoming legal secretary to Mr. Justice Brandeis for a year. After that, he became an Instructor in Law in 1923, Assistant Professor in 1924, and has been Professor of Law since 1928.

Various Courses

Professor McCurdy has taught Sales, Bankruptcy, Creditors' Rights, and Wills, in addition to his current courses in Contracts, Family Law, Community Property, and Domestic Relations. Since very early in his career as teacher and writer, he has been pre-eminent in the two fields of Sales and Domestic Relations. His writing in these areas has buttressed that part of the law. His

"Commerical Letters of Credit," (in 35 *Harvard Law Review*) written in 1922, has been widely quoted; and hardly a tort case in the field of Domestic Relations has been decided since 1930 without reference to his "Torts Between Persons in Domestic Relations," in 43 *Harvard Law Review*. His "torts" article was a guidepost for subsequent litigation in domestic relations and influenced courts to allow recovery in actions between spouse and spouse, and parent and child. These ideas have recently been elaborated in three articles in the *Villanova Law Review*.

His influence in the field of domestic relations has also been reflected in the develop-



Prof. McCurdy

ment of the course itself, since he began teaching it at Dean Pound's request in 1923. This course has grown from a single course in "Persons," dealing principally with married women and infants, to two separate semester courses in Domestic Relations, which cover a wide range of topics.

Influence Great

Professor McCurdy's influence has also been great in the law of Sales. It has been in this area, moreover, that has resulted in one of the more fabled stories about the Professor. When he returned from his year with

Justice Brandeis to teach Sales, the rumor was circulated that he had married Professor Williston's daughter. As Professor McCurdy tells it, he inherited the legend from a young professor, who had preceded Professor McCurdy as Thayer Teaching Fellow and Assistant Professor in Contracts and Sales, and about whom the same story had been told. But as Professor McCurdy points out, it just isn't so!

Professor McCurdy retained his interest in the law of sales, and his new casebook on



Dobbin and Friend

Sales Transactions was published last spring. In this he correlated case material with statutes such as the Uniform Sales Act and the Uniform Commercial Code, but yet managing a comprehensive treatment of general principles developed under common law and statutes.

As well as accepting summer or visiting teaching positions at the universities of Wisconsin, Cornell, North Carolina, and Texas, Professor McCurdy has been a member of the American Law Institute's groups for the Restatements of Contracts, Restitution, and Torts. He interrupted his teaching in 1945 to serve as Special Advisor to the Director of the Legal Division of the Office of the Military Government of the United States in Germany (OMGUS). He served as Associate Director and Acting Director of that office from 1947 to 1949.

Next fall will find him returning to teach in Georgia, in the state where he lived as a boy. He will be Visiting Professor at the Walter F. George School of Law, of Mercer University, Macon, Georgia. There he will teach Sales, Domestic Relations, and Security Transactions.

To many of his students, however, Professor McCurdy will perhaps best be remembered for the various and sundry legal difficulties unwittingly caused by his hypothetical horse Dobbin, his canary Susie, and his cow Bessie. Over the desk in his office hangs a certified deed to a live canary, Susie, deeded him by his Contracts class in 1956 (the canary, sad to relate, has since died). On his desk stands one of several bronze replicas of the horse, Dobbin, which similarly have been presented to him by appreciative students.

In 1955, one particularly enthusiastic class presented him with a live horse (the transaction, however, was only symbolic, as he notes with some relief). The poem of presentation accompanying this transaction perhaps best exemplifies the regard in which Professor McCurdy is held by his students.

"Come now Dobbin, for this one last transaction,

With the hope that we might reach accord and satisfaction

For services rendered to some one hundred and thirty

By a wonderful professor, William E. McCurdy."

— Winslow & Fremont-Smith

Student Bar Officers

The Student Bar Association has selected their officers for the 1960-61 academic year, electing Robert L. Frome, 2L, Kew Gardens, N. Y., as President.

Other new officers are Garret A. Hobart, IV, 2L, Cambridge, Mass., Vice-president for Luncheon Speakers; Stephen Schlissel, 1L, Long Beach, N. Y., Vice-president for Evening Speakers; Donald Bright, 2L, Great Neck, N. Y., Vice-president for Tours; Barry Bloom, 2L, Hewlett, N. Y., Vice-president for Publicity; and Sydney Traum, 2L, Belle Harbor, N. Y., Secretary-Treasurer.

These officers will serve until the spring of 1961.

Against the Item Veto

By Hon. Clarence Cannon

This article presents the arguments against any proposal to give the President an item veto, thus answering the proposals of Senator Kenneth B. Keating, which appeared in the RECORD on February 11, 1960.

The proposition to clothe the President of the United States with power to exercise an item veto on appropriation bills was first introduced in the Congress in 1876. It has since been advocated and agitated many times. A number of Presidents have urged it. It is found among suggestions advanced



The Hon. Clarence Cannon

by the major periodic movements of reform of the Federal fiscal or legislative machinery. But its failure of adoption after 85 years of repeated consideration is perhaps the best indication of its lack of merit.

The item veto proposition is advanced in the name of economy and for the purpose of disencumbering appropriation bills of so-called legislative riders. It is sometimes asserted by the Executive, whose power would be greatly strengthened, and others in sympathy with the idea, that the item veto would permit the Executive to prevent, or

nullify, or at least discourage, actions characterized as "evils" of the legislative process in inserting appropriations or legislative riders not to his liking either as to amount or purpose, or both. Thus, the item veto would vastly increase the Executive power while weakening the legislative control of the purse.

The Congress ought to concentrate on effective measures to strengthen its exercise of control of the national purse, not weaken it. In recent years, various devices — some sponsored by the executive branch — to get money out of the Federal Treasury through the side doors and the back doors, rather than the front door, have gained in popularity. Through these sundry methods of diffused action in response to the financial needs of the Government, the Congress has made such inroads on its traditional *annual* appropriations process that it has in practice deprived itself of a significant measure of effective control of the purse.

Substantial Segment

A substantial segment of new authority to obligate the Government is insulated from effective annual determination in the appropriation bills by reason of such items as permanent appropriations, permanent contract authorizations, authorizations to expend from public debt receipts contained in legislative rather than appropriation bills, and specific formulae in various grant-in-aid and other programs in basic legislation beyond practicable reach of the annual appropriations process. Substantial amounts of authority to obligate, and even to actually spend, are

The Honorable Clarence Cannon from the 9th District in Missouri has served in the United States House of Representatives since 1923. For many years he was parliamentarian for the House and for the Democratic National Convention. He has authored many books and articles on Procedure, including Procedure in the House of Representatives and the National Convention Parliamentary Manual. He is presently the Chairman of the House Appropriations Committee.

granted in other than the regular appropriation bills. Basis for effective *annual* determination of expenditure levels is undermined. The Congress cannot continue to place large segments of the budget beyond reach of *annual* determination without further seriously impairing the practical limits of exercise of effective control of the purse through the traditional means of the appropriation bills.

The alleged "evils" for which the item veto is advanced as a cure are exaggerated. It is axiomatic that virtually every piece of legislation adopted in every Congress represents a compromise—whether an appropriation bill or a legislative bill. It would be a rare occasion indeed when members of the House and the Senate did not disagree with one or more items in a bill sent to the President. Yet they often vote for passage of the bill because of concurrence with the major purposes or features or the great majority of items encompassed.

Proponents of item veto plead that, without it, the Executive must "accept the wasteful and extravagant items along with the useful and necessary ones." Wasteful and extravagant—in whose opinion? Useful and necessary—in whose opinion? In the opinion of one person—the President? [—possibly on occasions with advice of the special interest department with a gimlet-hole view of Government finances and the necessities of the occasion?] Or in the opinion of a majority of the directly elected representatives of the people?

Let us concede that there are wasteful and extravagant propositions in virtually every appropriation bill—in somebody's opinion. And the same is certainly true of the Executive budget from the President—in somebody's opinion. There has never been a budget that could not be reduced and generally the Congress does reduce it—re-

gardless of the party in control.

Under our Constitutional separation of powers, it is the function of the executive to propose and the function of the legislative to dispose. And this power to dispose is final and absolute. Of all the legislative prerogatives, the power to appropriate is the most vital. Not a wheel of Government can turn without motivation of an appropriation. Basic authorizing statutes for the most part are broad in scope and grant to the executive rather wide latitude. The one continuing and recurring procedure for Congressional control over governmental activities within such statutes is the *annual* appropriations review and legislative provision of funds.

Money Bills

The annual money bills implement programs and activities previously authorized by law—programs which have in the legislative authorizing stage already run the gauntlet, including the opportunity for Executive veto. The subsequent act of appropriation thus represents the stage of final and, necessarily, conclusive action by the elected representatives of the people, each of whom must accept his own responsibility for his participation before his own constituency. Responsibility for appropriation of the people's tax funds would be unwisely diffused if impinged upon by an item veto.

The present budget system, enacted in 1921, greatly increased the Executive power in Government finance matters. The executive budget concept was established. The budget is the President's budget.

He has the sole power to include, or exclude, whatever items or amounts or restrictive provisions which in his judgment are necessary. Not the judgment of someone else; exclusively his own judgment. Under the law he is directed to include that which he deems necessary. But the item veto on appropriation bills would be tantamount to permitting the President to tell the Congress what to include in appropriation bills. It would, in effect, transfer from the legislative to the executive branch of the government the control of the purse.

Incidentally, force of logic compels the suggestion that the item

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veto would be as appropriate in application to legislative authorization bills as to appropriation bills. And as far as is known, the President for the first time advocated this application in his budget message of January, 1959. The genesis of the appropriating process is in the initial authorization statutes. The Executive is not infrequently — sometimes vigorously — opposed to a specific item, provision, or restriction in basic authorizing legislation submitted for Presidential approval. The fundamental purpose of Executive veto is now fulfilled under the Constitutional provision according the President opportunity to take exception to a proposition of legislation in the first instance. That same recourse is available to him on appropriation bills and he has used it at his discretion.

Without Substance

Proponents of the item veto seek to justify it on the grounds that, without it, the President is reluctant to veto a bill providing for many necessary functions in order to register his objections to individual items or provisions. The argument is without substance, as the Congress has never, and certainly would never, adjourn without providing appropriations for the necessary functions of Government.

Furthermore, a vetoed bill assumes high privilege in the House and is almost always disposed of at once — in any event, expeditiously. More important, perhaps, is the record of disposition, for in the majority of instances of appropriation vetoes, Congress has yielded to the President and passed legislation omitting the offensive matter. There is no evidence that the public interest suffered by reason of delaying final settlement long enough to dispose of a vetoed appropriation bill.

The item veto would also encourage executive capriciousness. We

have seen this happen more than once through unwarranted use of the provisions of the anti-deficiency statute permitting the Executive, under certain defined conditions, to withhold expenditure of appropriations. An appropriation is not a mandate to spend every dollar provided, but neither was the impounding clause of the anti-deficiency law intended to provide the Executive with a statute to thwart the clear will of the Congress. To provide item veto power would be to give the Executive a club which could be held over individual Members, and even whole delegations, to coerce their cooperation on wholly unrelated legislative propositions in which the Executive was especially interested.

More Checks

Legislative enactment of the appropriation bills is surrounded by far more checks and balances than is the preparation of the executive budget. As noted, the executive budget is whatever the President determines it shall be. It is prepared behind closed doors. It can include, or exclude, any proposition the President wants to include, or exclude — and in any amount. It is not subject to a parliamentary point of order. It is not materially restrained by any act of Congress or rule of either House.

In contrast, the appropriation bills are subject to several hurdles and must run a number of gauntlets at both ends of the Capital. Items not previously authorized by basic law and provisions of legis-

lation are subject to deletion on objection of a single Member. Only by majority consent, or vote, are propositions of legislation included in appropriation bills, and most of these are administrative and facilitating, or restrictive, in character; and again, many of them will be found to have been recommended by the President in his budget. Furthermore, only by majority action in both Houses is the President's budget exceeded. But the President, without consulting anyone, can submit budget increases above the previous year's appropriation.

Drawing a suitable definition of an "item" would entail serious complications and dispute as regards its application to specific instances. What is to be embraced by the term "item"? Is it to be a separate paragraph of a bill or only a portion? Where many projects are financed in a single lump-sum appropriation, and thus not separately identified in the bill, is it the lump-

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sum total or only a portion? Would it apply to restrictive or prohibitive language intended to deny use of the funds for a certain object or to require their use in a specific manner and no other? Implicit in the legislative power of the purse is the right to prescribe the conditions of expenditure and to deny use of the appropriation for a purpose or object even though previously authorized by law. Would "item" veto embrace the power to strike such conditions or restrictions?

There have been instances where the Congress inserted appropriations and provisions not budgeted by the Executive and the action proved beyond question to have been in the national interest. There will be others which the item veto could threaten.

Finally, the legislative appropriations process would resemble a one-way street if the item veto were adopted. The executive would

have a greater voice, the legislative branch correspondingly less, in the final determination. We need just the opposite.

The Constitutional separation of powers is a two-way street—the Executive to propose appropriations and related provisions he deems necessary, and the legislative to enact such appropriations and related provisions as it deems in the public interest. The legislative prerogative of the elected representatives of the people must not be diluted. To permit otherwise would impair Member's ability to act in response to the wishes of the people they are elected to serve.

A real grasp of the full dimensions of the one-way character of this proposition can be had from the following statement of the Director of the Budget, as principal spokesman of the Executive branch, made to the Committee on the Judiciary of the House of Represent-

atives in May, 1957 in support of the item veto proposal:

"I think it ought to be made clear in whatever bill is reported that authority would be granted to veto legislative provisions as well as appropriation items, and that the authority to veto an appropriation item would include authority to reduce an appropriation—but only to the extent necessary to permit the disapproval of amounts added by the Congress for unbudgeted programs or projects, or of increases by Congress of amounts included in the budget."

The import of this statement is clear. Implicit in such reasoning is the assumption that the executive is all wise and superior in judgment as to how much should be appropriated from the Treasury and for what purposes.

I am certain the Congress could never seriously entertain such an absurdity as the item veto.

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Letters to the Editor

(Upon an inquiry for permission to publish Mr. Price's poem, the following letter and poem were received.)

To the Editor:

I believe it is considered the Right Thing, when publication is suggested, to assume an air of becoming modesty, and (rather insincerely) to deprecate one's work. I have trouble doing so; but, realizing that they did these things so much better in the days of Euphues and His England, I borrow some words from Sir Walter Raleigh. In a classic work it is reported that he,

"rousing up, did smile and simpering say: 'Most Gracious Majesty, 'Twas I that did it; but, indeed, it was so poor and fragile a note compared with such as I am wont to furnish, that in sooth I was ashamed to call ye weakling mine in so august a Presence. It was nothing—less than nothing, Madam...'"

But like other budding* poets, I am secretly delighted at the prospect of Publication for my "Metallic Judge." Perhaps, however, you should be advised that the Honorable Macklin Fleming, to whom it was addressed, is a Yale Man.

Sincerely,
Peery Price

*My class in the Law School, in case you had not checked, was 1925.

P. S. I am not unaware that not every one appreciates the Euphuistical style; nor that the cup-bearer remarked, after Raleigh's performance, "God dams this windy ruffian

and all his Breede! I would that Helle might catch him."

P. P. S. And if you do not recognize, or have not read, Mark Twain's "1601," I earnestly recommend that you do so.

THE METALLIC JUDGE

Hester Thrale (Mrs. Piozzi), in a MS. note in one of her copies of Boswell, observes: "A Brazen face, an Iron constitution, and a Leaden bottom are said by Sir John Popham to be necessary for every good judge; the last named requisite is for the purpose of holding him in his seat to hear senseless arguments."

I am sure each fledgling justice
From his friends gets much advice:

How to keep a just decorum,
How to rule with words concise.

But a horrid thought must strike him:

Their intentions are the best,
But they have no working knowledge

Their conjectures to attest.

Therefore I have done some research—

Found advice from one who knows—

You have heard from Sir John Popham,

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(A great jurist, I suppose).

I expect you'll heed his saying—

And your face will reinforce
With a shining piece of metal
(Pierced with speaking holes, of course.)

And your constitution, surely,
You will guard against decay
And you'll nod when asked the question

"Have you had your iron today?"

Thus you'll solve the dual problem
Of the iron and of the brass—
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With a mammoth brazen head,
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To the Editor:

As I recall, over the portal of Langdell Hall is the following inscription:

"Justice Under Law,
Not Under Man."

The writer of the editorial appearing at page seven of the March 10 issue of the RECORD appears to have been oblivious of this precept. Perhaps it should be called to his attention. If this editorial is representative of thinking in the Law School today, many of us old timers will be alarmed that such change has taken place.

J. W. Keerans,
LL.B. '31

To the Editor:

The intense emotionalism of those who want Caryl Chessman put to death, as shown in the California legislature and the RECORD's letters column, deserves analysis.

It is said that Chessman has made the judicial process a joke by 12 years' successful avoidance of the executioner. If he were to die naturally before the sentence can be carried out, the labor of the

courts would be ultimately frustrated. Attorneys who see the judicial process as the terrestrial version of divine justice predictably take offense when a clever scoundrel exposes its slowness and unsureness.

The issue in this case is not the court reporter's notes; it is the impending extermination of an intelligent man — and not for murder or espionage, the traditional capital offenses. The trouble here is that it was discovered too late that Chessman was bright, and not a typical member of the luckless 50 chosen each year out of the thousands who commit murder to be publicly executed in order to deter crime.

I think that Chessman will have to die by popular demand. No less a man than Richard Nixon has disapproved a reprieve, and he is closer to the public pulse than Gallup. But is this not the final insult to the sanctity of the judicial process — when a case is too notorious, it becomes a matter not of law but of politics.

Chessman himself deserves little sympathy. He has gained fame, fortune and influence grossly disproportionate to his crimes, committed every day with more skill by far lesser men. But he has learned the Ames competition, and has done well for a late starter. It is no sweat to live 12 years ad-

jacent to the gas chamber when what one may have merited was immediate annihilation by inhalation. He has made his point well, and death would seal the case.

The absurdity of this entire protracted, expensive, international affair is not that it shows the inconsistency and ambivalence of our society, which often does its worst as it tries to do its best. It is that rape and murder are grievous wrongs, whether committed by Caryl Chessman, a lynch mob, or their elected deputies. The judicial seal on a death warrant does not make it a holy writ.

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Conservatives especially should take pride in the man-against-the-state aspects of Chessman's struggle. And the bar in general should recognize this case for the actual human values involved, rather than sputter and fume because our profession appears denigrated by a self-educated convict's skill at appellate advocacy.

Henry J. Stern
LL.B. '57

To the Editor:

I think readers of the RECORD might be interested in a little personal sequel I have to the Chessman story.

After reading the RECORD's editorial on the Chessman case, I received my copy of *Time* magazine in the mail and read *Time*'s lengthy account of the Chessman episode. I was surprised that *Time* omitted the crucial facts, which the RECORD stressed, of the prosecuting attorney's uncle's transcription of the stenographic notes of the Chessman trial and the assistance furnished to the uncle by the prosecuting attorney himself.

To my mind, these facts mean the difference between an over-publicized but legally uninteresting

case and a case involving deprivation of constitutional rights. That same day I wrote a letter to *Time*, and sent it air-mail, asking them why these facts were omitted in an article which otherwise was so detailed as to list fully four separate jobs which Chessman's father had had. I asked whether the omission was one of oversight or intended to discredit Chessman. I expected to have these questions answered in some way or other in the Letters to the Editor columns, which *Time* includes in every issue.

But *Time*, one of the world's most widely-circulated news magazines and a leading exponent of freedom of the press, never printed my letter nor sent me a personal reply. They have printed 13 letters about the Chessman article, however. In the April 4th issue, a reader congratulates *Time* for "objective reporting at its finest." And again, on April 11, "I must congratulate you on the completely dispassionate, logical, objective and impersonal manner in which you presented the facts in the Chessman dilemma."

Anthony A. D'Amato,
2L



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