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TEN CENTS

Board Elects David K. Page As Chairman

David K. Page, 2L of Oak Park, Mich., has been elected chairman of the Board of Student Advisers for the next academic year. The Board also chose John E. Merow, 2L of Little Valley, N. Y., as the new vice-chairman. Mr. Page, who is 22, graduated from Dartmouth in 1955. Mr. Merow received his A.B. from the University of Michigan in 1952 and entered the Law School in 1955 after service in the Navy.

The chairman-elect has selected the other officers who will guide the activities of the Board next year. Karl Berolzheimer, 2L of New York City, will be chairman of the Williston Competition Committee. Mr. Berolzheimer is also a graduate of Michigan, having received his A.B. in 1955. Chosen as chairman of the Projects Committee was Steven C. DeCoster. (See BOARD on page four)

Hamlin Appointed To National Office

Dr. Robert H. Hamlin, LL.B. '53 has been appointed assistant to Secretary Marion B. Folsom of the Department of Health, Education and Welfare.

Dr. Hamlin, who has been awarded degrees in medicine, public health and law, conducted the Medico-Legal Problems seminar here last fall.

Secretary Folsom has indicated that Dr. Hamlin's qualifications will enable him to assist in the development and coordination of departmental policies not only in Washington but throughout the nation.

The appointee did his undergraduate work at Ohio State University and



Robert H. Hamlin

studied medicine at Northwestern University Medical School, where he received his M.D. in 1947.

He interned in Baltimore's Johns Hopkins Hospital, served with the Navy as a senior medical officer in the Pacific during World War II, and from 1950 to 1952 was a member of the Massachusetts Special Commission on the Structure of State Government.

Dr. Hamlin has served as first assistant to the Massachusetts Commissioner of Public Health and has taught in the medical and medical-legal fields at the Harvard School of Public Health and Simmons College as well as at the Law School.

In 1954 he was a special consultant to the medical branch of the Hoover Commission on the organization of the executive branch of the government.

At present Dr. Hamlin is also Director of Public Health in Brookline.



Paul A. Freund

Freund to Teach Abroad Next Year

Paul A. Freund, Charles Stebbins Fairchild Professor of Law, will give a lecture course at Cambridge University in England during the 1957-58 academic year. The course will deal with American constitutional development.

Professor Freund will be the first lawyer to become the Pitt Professor of American History and Institutions, a chair established in 1945, and occupied each year by a visiting American scholar.

While in England, Professor Freund will continue his work on the *History of the Supreme Court*. This work was authorized by act of Congress, pursuant to the bequest of Mr. Justice Oliver Wendell Holmes to the United States.

At the Law School this year, Professor Freund is teaching courses in Constitutional Law and Conflict of Laws, and conducts a seminar on Constitutional Litigation.

Alpert Sees Government Aid As Remedy for Railroad Ills

George Alpert, president of the New York, New Haven and Hartford Railroad told the members and guests of the Bull and Bear Club last Friday that railroads are the "forgotten men" of the national economy, and must have government help if they are to maintain the quality of their service to the public. While municipalities build terminals for airlines, and truckers have their roads constructed with public funds, Mr. Alpert noted that railroads must build and maintain their own terminals and railroads.

Advocating a reform plan for freer competition in the transportation industry, Mr. Alpert urged higher passenger fares, more realistic real estate taxes, greater latitude in fixing freight rates, and direct subsidies in some cases.

The speaker cited passenger service as the chief problem of railroads today. This is particularly true of the New Haven, he said, since that line has the highest percentage of passenger service to its total business of the larger railroads.

Mr. Alpert discussed ways of bolstering an unprofitable railroad, and concluded that the only practical solution is improving the service. The slightest move toward abandonment, he said, creates a storm of protest among the users, which invariably leads to unfavorable response from state legislatures and public utility commissions. Advertising is no solution, he added, since everyone knows of the railroads and their services.

Modern Improvements

As an example of improving service, Mr. Alpert mentioned the new low-slung trains which the New Haven will soon have in operation. He stressed that although modernization of this sort would solve his line's biggest problem, passenger service, the cost is prohibitive under the present regulatory situation. Mr. Alpert stated that the New Haven acquired

Democrats

Senator Henry M. Jackson, Democrat of Washington, will address the Law School Democrats next Sunday at 3:30 p.m. Mr. Jackson, who was elected to the Senate in 1952, will speak in the large meeting room of Harkness Commons. The organization has announced that the meeting will be open to non-members.

Eisenhower Picks Whittaker To Fill High Court Vacancy

Charles Evans Whittaker, 56 year-old Kansas City lawyer and jurist, this week received President Eisenhower's appointment to the Supreme Court post left vacant by the recent retirement of Associate Justice Stanley F. Reed.

Justice Whittaker is the fourth Supreme Court appointment by the President. The jurist moves up to the high bench from the United States Court of Appeals for the Eighth Circuit, comprising seven Midwestern states, where he has sat since June 22, 1956.

Though the appointee was forced to withdraw from school after the ninth grade, he completed his education and formal law training in evening classes in Kansas City schools. During the day he worked as a clerk in a Kansas City firm.

Justice Whittaker passed the Missouri bar in 1924 and subsequently became a partner in the firm of Watson, Ess, Whittaker, Marshall & Enggas, the same firm for which he had clerked. While associated with this firm, he specialized in trial and corporation practice.

In 1954 he received an appointment to the bench of the United States District Court for the Western District of Missouri, a position he held until promoted to the circuit post.

Committee Decides

The Supreme Court appointments of Justice Whittaker and recently-appointed Associate Justice William J. Brennan, Jr., LL.B. '31, are being discussed in the Senate Judiciary Committee this week prior to Senate confirmation.

In his nine months on the Eighth Circuit, Justice Whittaker penned seven decisions for the court and wrote a single dissent.

The appointee steps into the position vacated by Justice Stanley F. Reed, 72, who had been seated by President Roosevelt in 1938. Justice Reed indicated that he was stepping down from the bench because of the continuous strain and the long hours required to keep up with the burden of work.

Justice Whittaker's appointment brings to four the number of Republicans on the Court.

Mitchell Suggests Wage Act Change

Secretary of Labor James P. Mitchell has strongly advocated amendments to the Fair Labor Standards Act, in a statement made on February 25.

Mr. Mitchell proposed distinct extensions of the law to increase the number of private employees to whom the Act would pertain.

The Secretary recommended that all employers doing more than \$1,000,000 of business a year in interstate commerce and having one hundred or more employees should come within the scope of the Act.

He also indicated a need for narrowing the scope of minimum wage exemptions contained in the present Act, "so as to ensure the protection of a minimum wage to employees of these large employers who come within the interstate commerce coverage of the Act..."

Expansive Proposals

In addition, Secretary Mitchell requested congressional sanctions to extend pertinent definitive phrases to new, more inclusive proportions.

The proposals in these bills would cover an employee if he is employed "in or about or in connection with" any enterprise in which the employer is engaged in "any activity affecting commerce."

Mr. Mitchell would then define an "activity affecting commerce" to include any activity "competing with any activity in commerce."

Estimates furnished by the Labor Department indicate that the pro-

(See MITCHELL on page four)

Problems of Nuclear Fallout Discussed at Forum Meeting

Three physicists and a pathologist took a searching look at several phases of the world of the atom before an audience of 200 at the Law School Forum last week.

Dr. Shields Warren, Professor of Pathology at Harvard Medical School, the featured speaker, presented a cautious outline of the medical approach to the problem of radioactive fallout from bomb explosions and accidental explosions of atomic power facilities, which he termed "atomic incidents."

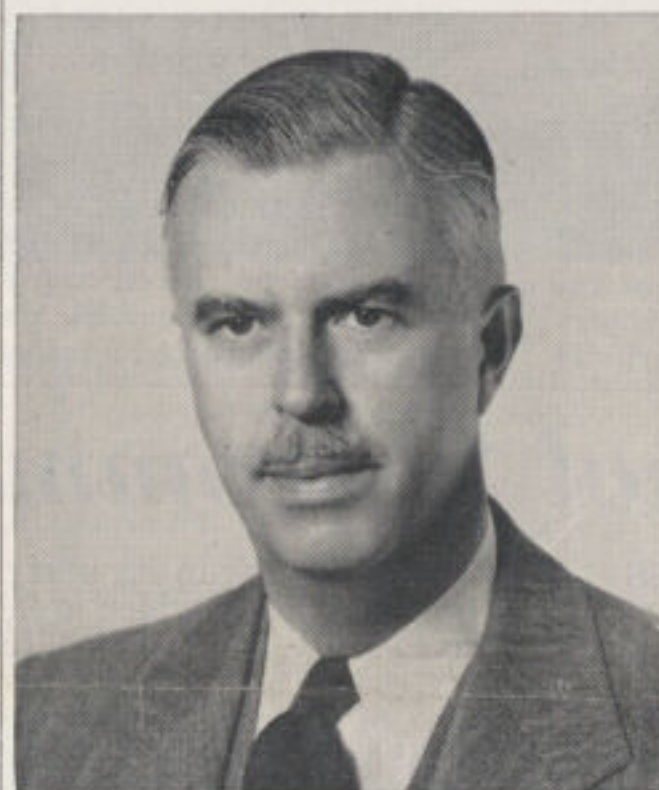
Dr. Warren sounded a somewhat reassuring note by stating that present radioactive fallout is not thought sufficient to be harmful to the world's population. To illustrate the point he indicated that in an individual of average life expectancy, the medical diagnostic procedures received during his lifetime have thirty times greater radioactive effect upon the body than do all bombs exploded to date.

Others on Panel

Dr. Warren was supported by a panel of three experts in various fields of physics.

David F. Cavers, Associate Dean of the Law School who teaches a seminar in Atomic Energy Regulation, acted as moderator for the program.

Dr. Walter Selove, Professor of Physics at the University of Pennsyl-



David F. Cavers

vania, introduced the physicist's approach to the fallout problem in terms of his particular specialty, high energy nuclear physics. He described and discussed the deleterious results of large quantities of radioactive material, but hastened to add that the likelihood of danger seems somewhat remote.

Dr. Louis Osborn, director of the Synchrotron laboratory at the Massachusetts Institute of Technology introduced the human element into the

(See FORUM on page four)

Bar, Coffee Hour To Hear Williams

Paul W. Williams, LL.B. '29, United States Attorney for the Southern District of New York will speak under the joint sponsorship of the Student Bar Association and the Coffee Hour on March 13. The address, to be delivered in the James Barr Ames Courtroom at 8 p.m., will be the fifth and final presentation in the Student Bar's series of speakers.

Mr. Williams will speak on the criminal and civil jurisdictions of the federal district attorney.

A graduate of Harvard College in 1925, *magna cum laude*, the speaker was admitted to the New York bar in 1931, and practiced in New York City. From 1939 he was a member of the firm of Cahill, Gordon, Reindel and Ohl until he assumed his present post.

In 1942, Mr. Williams entered the United States Navy. In 1944 he headed the contract termination division of the Bureau of Aeronautics, and in 1945 was chairman of the Navy Board of Contract Appeals.

As Special Assistant Attorney for New York State from 1952 to 1954, Mr. Williams was in charge of investigations in Saratoga and Columbia counties. He later was a judge on the New York Supreme Court until he was named United States Attorney in 1955.

TMS Committee To Pick Nominees

A nominating committee headed by John P. Driscoll, Jr., 3L of Belmont, has been formed to select a slate of officers to be presented at an election meeting of the St. Thomas More Society to be held in the latter part of March. The committee will seek suggestions regarding prospective officers from any interested members. Other names may be put in nomination in addition to those presented by the committee at the election meeting.

Others serving on the committee are Joseph E. Imbriaco, 3L of Union, N. J., Francis N. Gallagher, 3L of Mt. Carmel, Pa., and William C. McAuliffe, Jr., 2L of Columbus, Ohio.

Gallery

The Defense Studies Program at Harvard is the incubation laboratory for a new kind of professional man: the civilian expert on military policy. Supported by a quarter-million-dollar Ford Foundation grant, staffed by five research associates, three research fellows, and other personnel, the program is sponsored jointly by the Law School, the Graduate Schools of Public Administration, Business Administration, and Arts and Sciences, the Fletcher School of Law and Diplomacy, and The Massachusetts Institute of Technology. The Defense Studies Program conducts courses and carries on research seeking to examine such subjects as the comparative defense policies of East and West, military history, the sociology of military recruitment, the adequacy of present texts on military policy, progress in weapons development, the political relationship between the civilian and the military, and the processes of development of military policy between wars as well as in them.

Purpose: Civilian Control

Dr. Edward L. Katzenbach, Jr., director of the program, feels that its purpose is to make possible intelligent and effective control of an area of life which, though nominally and legally under civilian authority, has always in practice been directed by military personnel who have closely guarded the technical knowledge essential to managing and planning their field. Dr. Katzenbach, a frequent contributor to current publications analyzing military policy, such as *The Reporter*, *The Political Science Quarterly*, *The New York Times Magazine*, *The Journal of International Affairs*, and *The Yale Review*, believes that a basic rationale for the development of civilian study of this field is, "Wars are not won by battles any more; they're won by long series of battles, and this implies policies of preparation strategy and planning of the series which must require civilian authorization."

"The trouble is," he declared, "that our military policy is made by what might be called 'negative appreciation'—the taxpayer's apprehension of the coming blow to his pocketbook rather than by a positive desire to understand and require an adequate, and therefore economical, planning and periodic

re-evaluation of the conduct of our military establishment.

"One cause of the trouble," he explained, is the inadequacy of published information. "Take the present military budgets. They are mystifying. You can't read one of those budgets and find out what we've got, or what we haven't got, or the projected results or alternative spending possibilities. How can a civilian find his authority over the strategy of military preparation and conduct on unintelligibility? You've got to be able to get the technical knowledge. All the learned articles and foreign policy debates about 'fighting lo-



Edward L. Katzenbach, Jr.
Director, Defense Studies Program

cal wars locally' don't mean much until you get the hardware into the discussion. The size, weight, and readiness of some of that hardware has a pretty definite bearing on how much control over the scope of the fighting we can have.

Uncovering "Secrets"

"One of the worst details of the whole situation," continued Dr. Katzenbach, "is that you can get the classified information if you try hard enough and spend a little time learning how to uncover it. The excuse for hiding it, that it 'protects the national security,' really does not often apply. The only people who are excluded are the general public. They are being 'protected against themselves'."

Interdepartmental

"The Defense Studies Program is a bridge between the foreign and the domestic aspects of public administration," he then declared. "The program is necessarily interdepartmental. And it offers a great advantage to the lawyer or law student: an opportunity to get into and look at a government department where the legal-executive relationship has always been fluid and where he has always been supposed to reign supreme, on the basis of our doctrine that civilians should control the military. We publish and provide other law schools with a unique set of readings on our field, dealing with the adequacy of forces, the question of who makes decisions, and the adequacy of the information on which decisions are made. No one, the students included, believes for a single minute that the materials we cover are adequate, but that is exactly what our job is: to criticize what we have, investigate on the spot, and bring into existence new materials for study."

Succeeded Leach

Dr. Katzenbach came to the Law School in 1955 as associate director of the program under Brigadier General Walter Barton Leach of the Air Force Reserve, who is Story Professor of Law. They exchanged responsibilities for the program the following spring. Dr. Katzenbach was formerly a research associate at the Institute of War and Peace Studies, Columbia University, and Assistant Professor of History, Columbia College.

Unusually, for a military policy analyst, Dr. Katzenbach took his A.B. at Princeton in 1940 under the Department of Art and Archaeology. In those days, he recalls, he would have dreamed of going on to study the history of the concept of nature in the Western World. But the war intervened. As a Marine Corps officer, he held a number of administrative positions supervising military training, and was wounded in the Pacific while commanding a reconnaissance company.

Postwar Research

After the war he returned to Princeton to study and teach history, where, after having been chosen a Fellow for 1947-48 and receiving an award the following year to do research in France, he took his doctorate in 1953, writing his thesis on the history of the development of civilian-military relations in France. From 1950 to 1952 he undertook and

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supervised historical research group projects with the Pacific Fleet Marine Force and in the Joint Chiefs' Historical Section, Pentagon. He has lectured at the Naval and Air War Colleges and at the Marine Corps Schools, and holds the rank of Lieutenant Colonel, Marine Corps Reserve. He is a member of the Faculty of Public Administration.

Uncle on Bench

Dr. Katzenbach was born in Trenton, New Jersey, on February 24, 1919. His uncle is known to law students as Katzenbach, J., of the Court of Errors and Appeals of New Jersey, which decided, among others, *Sardo v. Fidelity & Deposit Co.*, 100 N.J.Eq. 332, 134 Atl. 774 (1926), a principal case in the first-year contracts course. Dr. Katzenbach is married and has three children.

"Aside from food and sex," he comments, "people have been spending more for military policy in history than anything else, and half the time doing it wrongly. It is certainly time to start having the right people, those on whom responsibility for it is thrust under our form of government, the civilian authorities and the ordinary citizen, study the subject properly and voice their considered opinions."

—MOSS

Congressional Subcommittee Denounces Bureaucratic Secrecy

By REPRESENTATIVE JOHN E. MOSS

Chairman, House Government Information Subcommittee

A massive accumulation of restrictive regulation challenges the people's basic right to oversee the workings of their federal government.

The pattern of restriction is documented in the Twenty-Fifth Intermediate Report of the House Committee on Government Operations, and in the volumes of hearings that lie behind this report. Case after case is described in which Congressmen and citizens were denied information without good cause. The effect, in every instance, has been harmful to our country's political traditions.

The report summarizes the first year's work of the Special Subcommittee on Government Information, chartered in June, 1955, by Congressman William L. Dawson of Illinois, chairman of the Government Operations Committee.

The Subcommittee, exploring present law, already has documented the need for new legislation broadening public access to official records. It is equally concerned, however, with the deeper problem of the administrators' attitudes toward present law. Many federal agencies apparently have twisted grievously their delegations of authority in an attempt to find justification for their restrictions on information.

As in any area of law, two necessities compete. No official denies, in principle, the public's right to inspect government actions and policies. Neither does anyone—least of all the members of this Subcommittee—question the need to keep secret such classes of information as military security data.

It is the Subcommittee's purpose, nonetheless, to see that the indispensable security systems protect only that information for which the need for secrecy has been demonstrated.

The Burden of Proof

The public and Congress now bear the burden of proving their right to look at papers held by federal agencies. Instead, it should be up to the agency to demonstrate—to the satisfaction of Congress, the courts and the public—the overriding necessity to withhold information.

Congress often has stated explicitly that certain specific records shall be restricted to agency use. Such clauses stand in more than fifty statutes, their subjects ranging from military codes to postal savings deposits. In a much smaller number of statutes, the agency is ordered to make public other specific records.

These orders from Congress to the agencies may deserve review later, but the Subcom-

mittee has begun its study with an exploration of the far wider area where no statute specifically commands either publication or restriction of information. Because a free flow of information about this vast government and its works is essential to the survival of democracy itself, the study is of great importance to the nation. This responsibility made it necessary to reject the advice, tendered from the sidelines to every new inquiry, to start work with a flare of sensation.

There is sound reason to avoid building issues out of personalities or specific instances of restriction. The Subcommittee wishes to convey the point that the restrictions which it is studying concern all the government as an institution, and a whole body of administrative law.

A legislative inquiry has three interests. It must examine the delegation of authority by Congress or the President to an agency. It then must look at the manner in which the agency uses that delegated authority. Finally, the inquiry must find a way to measure the effect—or lack of effect—that the agency's operations have upon our national life. The ultimate reality of law and politics clearly lies here.

Getting the Facts

The first step in the Subcommittee's study was to circulate a questionnaire to the sixty-three departments and agencies of the federal government. They were asked to describe in detail their information policies, defining specifically the types of data not available to the public and the Congress. They were asked to cite the legal authorities upon which they based these policies.

The answers to this questionnaire now provide a solid background against which a balanced inquiry can proceed—an anvil against which the Subcommittee can hammer out individual cases of unwarranted restriction. The questionnaire performed a useful service, incidentally, in forcing many an agency to go through a tangle of unrelated rules and begin to develop, for the first time, a coherent and consistent policy on the availability of information.

The agencies' answers show exactly what delegations of authority are claimed in government information restrictions. It appears there are four of prime importance: two statutes, a Presidential letter and an executive order.

Authorized Secrecy

Executive Order 10-501 establishes the nation's security system for protecting "information affecting the national defense." The order represents an entirely suitable exercise of the President's power.

The President's letter of May 17, 1954, on the other hand, appears to represent the agencies' tendency to assume authority where the

delegation is unclear. The letter authorized the Secretary of Defense to deny a single Congressional investigating group specific information during the Army-McCarthy controversy. No fewer than eighteen other departments and agencies are now citing this letter as grounds for denying data generally to Congressional committees. The Subcommittee believes this to be totally unwarranted, and draws support from an explanatory letter written by the President's special counsel declaring that "the President was exercising a right which is his, and his alone."

The two statutes are 5 U.S.C. §22 and 5 U.S.C. §1002. The first, with a history going back to 1789, is the most widely used of all the authorities. Designed as a housekeeping



Representative John E. Moss
Democrat of California

statute, it gives department heads the power to write regulations providing for the "custody, use and preservation" of their records. This innocuous language has given rise to a jungle of rules restricting Congressional and public access to a vast variety of papers.

In drafting the second statute, 5 U.S.C. §1002, its authors ordered the agencies to inform the public of their doings, but they created broadly phrased categories of exceptions to the rule. These exceptions have been expanded by usage to cover nearly any piece of paper an administrator might wish to shield from public view.

The Subcommittee consequently concludes that delegations of authority to the agencies have been widely misused and inflated.

To carry its point farther, the Subcommittee asked the counsels of many departments and agencies to define the powers delegated by the four authorities. The appalling variety

of the answers demonstrated the Subcommittee's contention that the agencies were, in effect, making up their own law individually as they needed it.

The Subcommittee has used two other devices to follow the legal arguments down to final reality—the law's effect on our national life.

Panels of specialists have been enlisted from the fields most immediately affected by federal information restrictions. Groups of newspapermen and scientists have testified, and interested businessmen may be asked to do so shortly. A somewhat different panel was recruited among lawyers experienced in the field of government information. Their opinions have added great weight to the Subcommittee's legal findings.

These specialists are kept informed of the Subcommittee's progress, and are regularly asked for further advice and opinion. They are able to show where inequitable information rules work their worst damage, and what implications lie in proposed changes. In this fashion, these expert advisers bring into perspective the concrete cases of unwarranted information restriction.

About three hundred cases have been reported so far to the Subcommittee by Congressmen and Congressional committees, newspapermen, trade associations and even the agencies themselves. In each of these cases, someone has felt himself unjustly barred from information.

The Case Method

Generally they are referred to the agency involved, with requests for verification of the facts and for the legal justification. When the answering letter appears incomplete, or where the matter is too complicated to be covered by mail, hearings are called. The agency is asked to reconcile the concrete case of information suppression with its policy as stated in answer to the questionnaire.

It very often happens that this request results in the rewriting of agency rules. This happy solution is not always accomplished, however, and the Subcommittee feels that changes must be made in the language of some of the original Congressional delegations of power to the agencies, to clarify their proper purpose.

An amendment designed to return 5 U.S.C. §22 to its original housekeeping role has been submitted to Congress. Proposals to improve 5 U.S.C. §1002 are being contemplated, and freedom of information clauses are beginning to appear in other bills.

Amendments will be useful, but the real source of the problem lies deeper. It concerns the spirit with which the agencies read the statutes, and the attitude taken by administrators toward the public's right to supervise the federal government.

Chessman Case Presents Difficult Problems: Does Amendment Apply to Prior Conviction?

By FRANK A. OLSON

(In the concluding portion of this article, Mr. Olson traces the course of the Chessman case through the appellate courts of California and the United States.)

While the Chessman case was pending on appeal the Legislature amended §209 of the Penal Code. Chessman argues that this amendment entitles him to a reversal of the two death sentences. In its simplest form the argument is this: The 1933 law under which Chessman was convicted provided that either *detention* of or *carrying away* the victim for the purpose of robbery where bodily harm occurs was punishable by death or a life sentence without possibility of parole in the discretion of the jury. The 1951 amendment omits the *detention* ground but retains *carrying away* the victim. Since the verdict does not state that it is based on *carrying away* the victim, the verdict is ambiguous. It could be based on either ground or both. Since the defendant is entitled to the benefit of an ambiguous verdict where any one ground will not support the judgment, Chessman claims he is entitled to a reversal. (See insert for the texts of section 209 and the amendment, on page four.)

For Chessman to prevail he would have to show (1) that the 1951 amendment applies retrospectively to offenses committed before 1951 but where the judgment had not then become final on appeal; (2) that the verdict was rendered ambiguous by the adoption of the 1951 amendment; and (3) that there is good reason for the California Supreme Court to consider or reconsider his argument.

Is Death Sentence Valid Today?

Does the 1951 amendment apply retrospectively to offenses committed in 1948 where Chessman's conviction had not yet become final on appeal when the amendment took effect?

"It was undoubtedly the rule at common law, and it is the rule in this and other states, that the outright repeal of a criminal statute without a saving clause bars prosecution for violations of the statute committed before the repeal. . . . Until the determination of the appeal, the proceeding is pending in court, and the judgment does not become final until affirmed by the appellate court. If, during the interim, the legislature repeals the statute under which the prosecution is had, it operates as a discharge of the defendant." *Sekt v. Justice's Court*, 26 Cal.2d 297, 304, 159 P.2d 17, 21 (1945). "The amendment of a statute or section operates as a repeal of those parts of the statute or section which are not re-enacted." *Rudley v. Tobias*, 84 Cal. App.2d 454, 457, 190 P.2d 984, 986 (1948). The *detention-kidnaping* would be deemed repealed since it was not re-enacted in the amendment.

Importance of Intent

However, California has a general saving statute, Government Code §9608, which reads as follows: "The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law."

The first clause of the amendment makes *detention-kidnapings* no longer punishable under §209. The second clause grants parole eligibility to all persons "serving a sentence of imprisonment for life without possibility of parole following a conviction

under this section as it read prior to the effective date of this act" without distinction as to whether they carried away or merely detained their respective victims.

Chessman's argument is that the clause granting parole eligibility to past offenders is an "applicable provision of law" which manifests a legislative intention that prosecutions under the repealed part of §209 should not be saved under the general saving statute quoted above. Moreover, California has construed its saving statute strictly in favor of the defendant, as in *Spears v. Modoc County*, 101 Cal. 303, 35 Pac. 869 (1894), where the court held that word "law" in the saving statute did not operate to save a prosecution commenced under a repealed "ordinance".

To hold that an amended statute which excludes future *detention-kid-*

napings from its operation and grants parole eligibility to all past kidnapers serving life sentences nevertheless prescribes capital punishment or life imprisonment without parole for those past offenders who were so unlucky as to have their cases still pending in court when the amendment took effect, might be under the facts of the Chessman case "an error so gross as to amount in law to a denial by the State of due process of law or of some right secured to the plaintiff in error by the Constitution of the United States." *McNulty v. California*, 149 U.S. 645, 647 (1893), a case in which the Supreme Court declined to review the California court's construction of the general saving statute.

Alternative Basis

Actually, the California court never passed on the question of the retrospective operation of the amendment in Chessman's case, but held against him on a different ground, namely, that he *carried away* his victims for the purpose of robbery, an act still punishable by death under the 1951 amendment. The court held in *People v. Chessman*, 38 Cal.2d 166, 190, 238 P.2d 1001, 1016:

"As stated in the *Knowles* case (pp. 180, 183, of 35 Cal.2d, also 217 P.2d 1), if section 209 was regarded as too harsh, the remedy was for the legislature to change it, not for this court to change the plain language of the section by 'interpretation'. The legislature has seen fit to make such a change. At the time of the *Knowles* decision section 209 (as amended in 1933 to define *detention* for armed robbery as kidnapping) provided in material part that 'Every person who . . . holds or detains . . . [another person] to commit . . . robbery . . . shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person . . . subjected to such kidnapping suffers . . . bodily harm. . . . As

amendment also shows a legislative intent that the crime of armed robbery, committed after the 1933 amendment and prior to the later amendment, should not be punishable under section 209; that this legislative intent applies retrospectively to offenses which were committed before the 1951 amendment, but as to which judgment of conviction has not yet become final. If defendant were sentenced to suffer the death penalty for conduct amounting to no more than robbery with infliction of bodily harm, his argument would be relevant. See *Sekt v. Justice's Court*, 26 Cal.2d 297 159 P.2d 17 (1945). (Omission) But the offenses for which defendant received the death penalty here were not mere armed robberies. Defendant by threat of force transported his female victims—Mary for a considerable distance in defendant's car, Regina from the car of Lea to the car of defendant—pursuant to a plan which purposed the commission of robberies and the infliction of bodily harm (the sex crimes)."

Was Jury Misled By Instructions?

It is precisely here that Chessman disagrees with the opinion of the California court. "The movement, at the time it had taken place, could not have been for the purpose of robbery. Moreover—and this the court had ignored altogether—the jury had been instructed that mere seizure or detention (in a nonphysical, purely legal sense, and without any movement whatever) was sufficient to warrant

conviction, and that the 'kidnaping' began with the initial detention and was a 'continuing' offense. Thus, even though the jury may have firmly believed that the robbery intent may have been abandoned by the perpetrator before the victim was moved and even though the jury may also have firmly believed that the movement had been for a purpose other than robbery, it still was required to find guilt under such an instruction (assuming that it believed the defendant was the perpetrator of the offenses)." (*Cell 2455, Death Row*, p. 334)

Presumption

In California it is presumed that the jurors followed the instructions as given to them by the trial judge. *People v. Kinder*, 122 Cal. App.2d 457, 265 P.2d 24 (1954). The Chessman jurors were instructed under the 1933 law that, "No actual robbery need be committed, as the kidnapping is complete once the individual is seized for the purpose of robbery."

In a letter to this writer Prosecutor J. Miller Leavy stated: "The jury's verdict did not, and was not required

territory at the same time. *Butler v. State* 25 Fla. 347, 6 So. 67 (1889). A similar result has been reached in cases where the evidence was legally insufficient to sustain a conviction on one ground and the court was unable to determine on which of two grounds the jury's ambiguous verdict was based. *State v. Sorensen*, 37 Ida. 358, 216 Pac. 727 (1923) (larceny of two animals in a single count) and *People v. King*, 216 App.Div. 240, 214 N.Y. Supp. 537 (1926), *aff'd*, 243 N.Y. 554, 154 N.E. 602 (unlawful possession of two guns).

The same principle has been upheld by the United States Supreme Court: "We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. . . . It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld." *Stromberg v. California*, 283 U.S. 359, 367, 368 (1931).

Says Indictment Was Invalid

On appeal Chessman argued that since the robbery or attempted robbery was complete before the victims were moved to the bandit's car the evidence was insufficient as a matter of law to support a conviction based on carrying away the victims for the purpose of robbery. "No money was taken or any act committed which indicated that appellant was inclined to rob the complaining witness of anything except her virtue, and of course there being no robbery or attempted robbery the charge of kidnapping for the purpose of robbery must necessarily fall." *People v. Welsh*, 7 Cal.2d 209, 212, 60 P.2d 124, 125 (1936).

According to the court, "This argument is without merit. A defendant who engages in a course of conduct toward a female victim which includes robbery or attempted robbery, asportation of the victim, and the commission of sex crimes may present such argument to the trier of fact. But we cannot say as a matter of law that at some point of time during the abductions of his female victims defendant ceased to be a robber and became a kidnaper whose sole purpose was to inflict bodily harm by forcibly (See *CHESSMAN* on page four)

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CHESSMAN

(Continued from page three)

committing sex crimes." *People v. Chessman*, 38 Cal.2d 166, 190, 238 P.2d 1001, 1013 (1951).

However, under California law it would seem that Chessman is entitled to present such evidence to the appellate court at least for the purpose of showing that the verdict is ambiguous, a point not passed upon by the court. "The ambiguity of the judgment in the present case would thus clearly warrant a reversal of the conviction on appeal or other direct attack. . . . The courts of both the United States and California have declared the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights. . . . This examination is made, not to pass upon the sufficiency of the evidence to support the verdict, but to determine what the verdict actually was, so that the court may decide whether it violates constitutional guarantees." *Ex parte Bell*, 19 Cal.2d 488, 500, 122 P.2d 22, 29 (1942).

PENAL CODE §209 (1933)

Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such person for ransom, reward or to commit extortion or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

PENAL CODE §209 (1951)

Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be imprisoned in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

The Chessman verdicts refer to the informations, which join together the detention and carrying away theories with the word "and". Would this indicate that the verdicts will sustain a conviction under the 1951 amendment? "When the pleading charges a series of acts each of which separately or all together constitutes an offense, proof of any one of such acts is sufficient to sustain a conviction." and "Where a statute enumerates in the disjunctive several acts that separately or together constitute the offense, the accusatory pleading, in alleging more than one of such acts, should ordinarily do so conjunctively, or it will be bad for uncertainty." 26 Cal. Jur.2d 538, 540 (1956).

If proof of any one act is sufficient to support a conviction, then it would be unreasonable to suppose that a verdict imports a finding that each and every act alleged was proved. The use of the "and" is merely to avoid faulty pleading. Therefore, it would seem that the use of the "and"

in the Chessman informations would be insufficient to overcome the ambiguity of the verdicts.

A further twist to Chessman's argument is that the jury in exercising its discretion in fixing the sentences at death was allowed to consider the facts under both the detention and carrying away theories, but that had the jury been limited to the facts of the latter theory under the 1951 amendment the death penalties might not have been imposed. Again it would seem that the ambiguity would have to be resolved in the defendant's favor.

Apparently Chessman's lengthy brief on appeal was filed shortly before the Legislature amended section 209. The amendment argument appears nowhere in that brief. From reading the opinion it is doubtful whether Chessman's argument on the amendment was fully presented to and considered by the court. Why?

Here is Chessman's explanation: "I wrote the court, setting forth my opinion that the death sentences—putting aside the question of who had committed the acts forming the basis of the crimes—were void because of this legislative amendment. Should the court be in doubt about this, I

in an attempt to obtain relief he should also be entitled to transmit legal propositions. To do either requires reasonable opportunity to prepare the facts and the law. If that requires legal research then a reasonable opportunity therefor should be given. The order of the trial court here did not go beyond the bounds of reason. . . . The majority decision here is another, in a long line of decisions by this court, in which this petitioner has been denied his constitutional rights." 279 P.2d 32.

In actual practice the right of Chessman and other inmates to do legal research in their own cells has seldom been curtailed. However, by order of the Director of Corrections inmates on Death Row (including Chessman) are no longer permitted to write books or articles for publication.

The amendment argument having been lost in the shuffle and the appeal decided against him on all issues, Chessman soon found himself engaged in a long habeas corpus struggle over the preparation of the transcript of his trial.

—END

Alumni Notes

LL.M. '40 — Paul P. Lipton has announced that Richard A. Petrie has become associated with him in a practice limited to state and federal tax matters. Their law office is located at 625 North Milwaukee Street, Milwaukee 2, Wisconsin.

LL.B. '52 — Norman B. Silk writes that after graduation he was law clerk to former Chief Justice Stanley E. Qua, LL.B. '04, of the Massachusetts Supreme Judicial Court, served three years in the Air Force as a legal officer, and was released from active duty in August, 1956. He is now associated with Ely, Bartlett & Brown, 294 Washington Street, Boston 8, Massachusetts.

LL.B. '53 — Benjamin M. Wall is now associated in the general practice of law with Robert W. Haney at 610 Service Life Building, Omaha, Nebraska.

LL.B. '53 — Melvin L. Zurier, who has been serving with the Air Force Judge Advocate General's Department on active duty since January 1954, is to be released next month. He will then return to his home in Providence where he will be associated with the firm of Weller, Reynolds & Johnson, 832 Industrial Bank Building, Providence 3, Rhode Island.

BOARD

(Continued from page one)

2L of St. Paul, Minn. William H. Gorham, 2L of Wellesley was selected chairman of the Development Committee. Both Mr. DeCoster and Mr. Gorham graduated from Princeton in 1955.

Philip A. McKinsey, 2L of Frankfort, Ind., was named chairman of the Second Year Facts Committee. Mr. McKinsey is a 1955 graduate of Wabash College. The Second Year Administrative Committee will be headed by Joseph E. Mullaney, Jr., 2L of Fall River. Mr. Mullaney received his A.B. from Holy Cross in 1955.

The first year activities in the Ames Competition next year will be guided by David W. Robinson, 2L of Raleigh, N. C., as chairman of the First Year Administrative Committee, and Hubert T. Weinsienk, 2L of Denver, Colo., as First Year Facts Chairman. Mr. Robinson is a 1953 graduate of Davidson College, while Mr. Weinsienk received his A.B. from the University of Colorado in the same year.

MITCHELL

(Continued from page one)

posed amendments would extend the minimum wage law to about 2,500,000 workers employed by some 3,000 enterprises not now covered.

The largest single group to come under the Act would be workers employed in retail trade. Nearly 2,000,000 employees in chain store organizations and large single unit department stores are in a position to be affected by the proposed amendments.

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High Court Allows Conviction Based upon Blood Sampling

The United States Supreme Court has decided that a conviction in a state court based upon a sample of blood taken from an unconscious man does not deprive him of due process of law, when the blood has been extracted by a physician. In *Breithaupt v. Abram*, CCH SUP. CT. REP. 567 (Feb. 25, 1957), the Court affirmed a denial of habeas corpus by the New Mexico Supreme Court. Chief Justice Earl Warren and Associate Justices Hugo L. Black and William O. Douglas dissented.

A truck driven by the petitioner collided with an automobile on the highways of New Mexico. Three passengers in the car were killed, and the petitioner rendered unconscious. He was taken to a hospital where a physician, at the request of a state highway patrolman, withdrew a sample of blood by means of a hypodermic needle. The sample was then delivered to the patrolman, and subsequent laboratory analysis showed that the blood contained enough alcohol to produce intoxication. The petitioner was convicted and sentenced for involuntary manslaughter, partly on the basis of the laboratory report. He later sought habeas corpus, which was denied by New Mexico's highest court.

Before the United States Supreme Court on writ of certiorari, the pe-

itioner argued that his conviction, based on the blood sample, violated the due process clause of the Fourteenth Amendment. He contended that it was an unreasonable search and seizure, proscribed by the Fourth Amendment. He further stated that it "shocked the conscience," in the same manner as did the involuntary use of a stomach pump, which caused the Court to overturn a state conviction in *Rochin v. California*, 342 U.S. 165 (1952).

In an opinion written by Associate Justice Tom C. Clark, the majority of the Court rejected both contentions. Since *Weeks v. United States*, 232 U.S. 383 (1914), evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal prosecutions. But Justice Clark cited *Wolf v. Colorado*, 338 U.S. 25 (1949) as holding that the Fourteenth Amendment did not extend the exclusionary rule of the Fourth Amendment over state criminal proceedings.

The petitioner's second argument was based on the *Rochin* case and was equally unsuccessful. Justice Clark wrote, "Basically, the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate."

The opinion of the majority concluded, "As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road."

Minority View

In the dissenting opinion, joined by Justice Black, Justice Douglas attacked the distinction which the majority had drawn between this case and *Rochin*. "The conception of due process is not limited to a prohibition of the use of force and violence against an accused," he wrote. "The sanctity of the person is equally violated and his body assaulted where the prisoner is incapable of offering resistance as it would be if force were used to overcome his resistance. . . . Nor would I draw a line between involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids of his body, when the evidence is used to convict him."

Chief Justice Warren agreed with the other dissenters. "I cannot see," he said, "that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest. . . . I cannot accept an analysis that would make physical resistance by a prisoner a prerequisite to the existence of his constitutional rights."

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