



Mr. Borgeson

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TEN CENTS

Panel Probes Wiretapping

The difficulties of the issues involved in legalizing wiretapping were emphasized dramatically by a panel of experts before the Student Bar Association in the James Barr Ames Courtroom last week. Mr. Alfred J. Scotti, Rackets Chief for the New York District Attorney's office, emphasized the need of law enforcement agencies for this weapon to combat organized crime, and pointed out in detail the elaborate safeguards established in New York to prevent abuse. Mr. Osmond K. Fraenkel, veteran civil liberties defender, took the view that such legalized "eavesdropping" presents inherent dangers to the right of privacy of individuals, and should be prohibited as antagonistic to the provisions of the Bill of Rights.

Mr. Samuel Dash, moderator of the panel, emphasized that wiretapping was a century old problem, first dealt with by statute in California in 1861, and made of most vital concern by today's electronic advancements. Mr. Dash drew upon his extensive experience in conducting a two year study for the Pennsylvania Bar Association on the use and control of devices affecting individual privacy, to provide the audience with a complete background of the issues involved and the present state of the law. The results of the study, to be published this spring, indicate that, although most states prohibit private wiretapping, exception is made for law enforcement agencies, and few statutes cover other means of electronic eavesdropping, such as listening to or recording private conversations with a hidden dictaphone.

Mr. Scotti's basic premise was that under the elaborate safeguards of the New York law (which permits the tapping of wires by law enforcement officers after the obtaining of a court order), "the only person who has cause to be alarmed by legalized wiretapping is a criminal — and no one else!" He pointed out from personal experience, supported by investigations of State and Congressional com-

Vincent Celeste Here Tomorrow

The Harvard Law School Republican Club will hold the second in a series of three "Meet the Candidates" luncheons tomorrow at 1:00 p.m. in the Mallory Smith Room of Harkness Commons.

Speaking at this week's meeting will be Mr. Vincent J. Celeste, Republican candidate for the U. S. Senate from Massachusetts. Mr. Celeste, a young Boston attorney, is a graduate of the U. S. Merchant Marine Academy and Suffolk Law School. He served as secretary to Massachusetts' Governor Christian Herter from 1953 to 1957. In his only previous campaign for public office, Mr. Celeste was the G.O.P. candidate for U. S. Congress from the 11th district (Cambridge) in 1950. Celeste is opposed in November by U. S. Senator John F. Kennedy.

At last week's luncheon, the Club heard Christian A. Herter, Jr., Republican candidate for Attorney General of Massachusetts. Next week's luncheon will feature Elliott F. Stone, G.O.P. Congressional candidate in this district.

Tea

Mrs. Erwin N. Griswold will hold a tea for all women connected with the Law School on Tuesday afternoon in the Harkness Commons Meeting Room from 4:30 p.m. to 6:30 p.m. Guests will be welcomed personally by Mrs. Griswold and Mrs. Andrew J. Casner, Jr., president of the Law Wives.



Donald F. Turner

Review Features Turner Article

An article by Professor Donald F. Turner will be featured in the first *Harvard Law Review* of the current academic year. Professor Turner discusses "The Validity of Tying Arrangements Under the Anti-Trust Laws," using as a basis of development the case of *Northern Pacific Railway v. United States*, decided by the Supreme Court at its last term.

The *Review's* lead article will be "Courts Martial and the Bill of Rights: The Original Practice," written by Frederick Bernays Wiener, LL. B. '30, *m.c.l.* This is a reply to an article which appeared last year in Volume 71, No. 2 of the *Review*.

Mr. Wiener is a prominent Washington, D. C., appellate attorney. He has argued several cases before the Supreme Court, including *Reid v. Covert* at the Court's last term.

An extensive analysis and discussion of the major cases decided by (See *REVIEW* on page four)

mittees, that not a single instance has been discovered where an innocent person has been harmed by wiretapping under New York safeguards.

Mr. Scotti further emphasized that wiretapping is "an indispensable weapon against organized crime." He estimated that, of the prosecutions prepared during his 12 years as Rackets Chief, some 90% could have been sustained only through the use of wiretapping, and concluded that "depriving law enforcement agencies of this vital tool would cripple them, at small increase of security."

Mr. Fraenkel asserted that the legalized use of wiretapping was a violation of the basic human right of privacy. He pointed out that, despite the elaborate safeguards of the New York law, illegally obtained evidence was still admissible in court, and he emphasized that "when such evidence

(See *WIRETAPPING* on page four)

Loss Heads North

Professor Louis Loss has accepted an invitation from the Alaska Legislative Council to consult with them on the needs of the new state for "blue sky" legislation. He is leaving for Kodiak, Alaska, today.

Soviet Jurist Enters Infirmary

Sergei A. Golunsky, Professor of Law at Moscow University, entered Stillman Infirmary immediately after he attended Professor Harold J. Berman's class in Comparison of Soviet and American law last Thursday afternoon.

The Soviet jurist had been scheduled to address the class, but cut his remarks to ten minutes because of his ill health. He appeared to be in physical distress. Later it was learned that he was having difficulty breathing. He left the Infirmary and Harvard Friday morning.

Professor Golunsky was at Harvard for two days. He represented the Academy of Sciences of the U.S.S.R. to the International Council of Scientific Unions, which has just met in Washington to plan a future Geophysical Year.

He is a former member of the International Court of Justice, held the post of Chief Prosecutor for the Soviet Union at the Tokyo War Crimes Trials, and served on the Soviet delegation at the founding of the United Nations in San Francisco in 1945.

Supreme Court Overworked; Quality of Opinions Suffers



Erwin N. Griswold

Last Thursday evening Dean Erwin N. Griswold delivered the Morrison Lecture before the State Bar of California at Coronado, California. The following are excerpts from that address:

Over the past three or four years, there has been great controversy about the Supreme Court. This has not been unprecedented, for the Court is inevitably and inherently subject to controversy. . . . This is especially true when the issues which the Court must decide have deep emotional overtones.

Much of the criticism of the Supreme Court in recent years can be traced directly or indirectly to the segregation decisions of 1954 and 1955. . . . There is in all probability nothing that has happened within the past ten years which has so played into the hands of the communists as the reaction to the Supreme Court's decision in the School cases.

Governor Faubus will no doubt have a place in our national chronicles. As my colleague, Professor Paul A. Freund, has pointed out, though, he "is not likely to be identified in history with Abraham Lincoln." Freund, "Storm over the Supreme Court," 21 *Modern L. Rev.* 345, 357 (1958).

Not all of the criticism of the Supreme Court has arisen out of the School cases. There have been some other decisions, chiefly in the field of Civil Liberties, which have evoked considerable opposition.

Quite a bit of the criticism in this area, it seems to me, has been based on plain misunderstanding. For example, a year ago there was great excitement about the *Jencks* case, in which the Court held that when a witness testifies who has previously given a statement to the F.B.I., that statement must be made available to counsel for the defendant. Really, this seems rather elementary. How could we have a decent system of

(See *OVERWORK* on page three)

ABA Committee Drafts Ethics Code for Agencies

A new code of ethics to govern the conduct of federal administrative agencies is now being drafted by a special committee of the American Bar Association, under the chairmanship of David W. Peck, LL. B. '25, of New York.

The purpose of the code is to prevent the recurrence of any such "imprudent" conduct as stigmatized the recent Adams-Goldfine affair and marked the scandals concerning former FCC commissioner, Richard A. Mack, and Miami television channel 10.

The committee, which began work this week, will attempt to distinguish the judicial from the executive and legislative duties of the federal agencies, and limit the permissible personal contacts in this area.

The express objective of the committee is to formulate "minimum uniform provisions forbidding ex parte communications with any agency as to any pending quasi-judicial proceedings."

(See *ETHICS* on page four)

First Fall Forum Features Israel's Ambassador Eban



Abba Eban

Abba Eban, ambassador to the United States from Israel, will discuss the "Significance of the United Arab Republic" at the opening Harvard Law School Forum of the year tomorrow evening in Sanders Theater. The program will begin at 8:30 p.m.

Ambassador Eban's speech will be followed by a panel discussion and a period when questions from the floor will be answered. Assistant Professor Richard R. Baxter will moderate the program.

Ambassador Eban's record of government service in the Middle East extends back to 1940 when he was Liaison Officer of the Allied Headquarters to the Jewish population of Jerusalem. He served with the Jewish Agency in 1946, and the next year became a Liaison Officer with the United Nations Special Commission on Palestine. Ambassador Eban came to the United Nations in 1948, representing the Provisional Government of Israel. He was made a permanent United Nations representative with Minister's rank in 1949.

Mr. Eban has served as ambassador to the United States since 1950. He was educated at the University of Cambridge in England and holds an M.A. from that institution. He also possesses honorary degrees from New York University, Boston University, the University of Maryland, and several others.

Professor Baxter, who will moderate the program, is a consultant with the General Counsel's Office in the Defense Department. He is also working with Professor Louis Sohn on a draft codification of the Law of the Responsibility of Nations for the United Nations.

Omar Loufti, permanent representative to the United Nations from the United Arab Republic, has been invited to share the platform with Mr. Eban. On Tuesday, Mr. Loufti was reported ill and it was uncertain whether he would be able to participate in the Forum.

Tickets for this forum cost 95c and may be purchased at the door or at the Forum office at 23 Everett Street.

Seminars Show Big Enrollment

An unusually large number of students, 419 in number, are enrolled in seminars offered in the Law School this term, according to Miss Margaret Quinn, Registrar.

Registration figures available for seminars given throughout the year show that the most popular of the year-long seminars is Constitutional Litigation conducted by Paul A. Freund, Carl M. Loeb University Professor. It lists 31 students. Next in popularity among the year-long seminars is Professor Ernest J. Brown's Taxation: Corporate Reorganizations and Distributions with 29 students enrolled.

Others being presented on a year's basis are: International Tax Research, Professor Stanley S. Surrey, 19 students; Juvenile Delinquency, Professor Sheldon Gleuck, 19 students; Labor Law, Professor Archibald Cox, 19 students; Income Tax Policy and Legislation, Mr. O. S. Oldman, Lecturer on International Tax Law, with Jack Heller, Teaching Fellow at Kendall House, 19 students; Atomic Energy Problems, Roger Fisher, Lecturer on Law, 16 students; Defense Policy and Administration, Dr. Henry A. Kissinger with Professor W. Barton Leach and members of the Defense Studies Staff, 15 students; State and Local Taxation, Jesse Nelson Young, Visiting Professor, 15 students; Constitutional Prob-

(See *SEMINARS* on page four)

Book Review

ANTITRUST AND AMERICAN
BUSINESS ABROAD

By Kingman Brewster, Jr.
McGraw Hill Company, Inc. 1958. 509 pp.

FOREIGN COMMERCE AND ANTITRUST
LAWS

By Wilbur Lindsay Fugate
Little, Brown and Company, 1958. 384 pp.

by
SIGMUND TIMBERG

These two volumes, one by a Harvard law professor and one by an Antitrust Division attorney, are valuable and needed contributions to a field of the law — the application of the antitrust laws to the foreign trade and investments of the United States — that has been characterized by pockets of swirling controversy and large unresolved areas of doubt and uncertainty.

Professor Brewster's book is an analytical survey of the field, in all of its legal, economic and political ramifications. Mr. Fugate's volume follows the more normal format of a legal treatise, but the unconventional nature of the subject produces some unconventional features in the text.

Thus, a quarter of the Fugate volume and a goodly portion of the Brewster one is devoted, not to problems of substantive antitrust law, but to the jurisdictional limitations of United States courts in antitrust cases. This has been an area of hard-hitting (and at times emotionally-charged) controversy, as is well illustrated by the pending antitrust proceeding against the international oil cartel, the row of several years ago when the Department of Justice went after the records of the United States-Canadian pulp and paper producers and the recently settled *United Fruit* case. The controversy itself is inevitable, considering the importance of some of the commodities involved to the economic development and political and military security of both producing and consuming countries, the inextricably interlinked nature of the domestic and foreign activities of the enterprises involved, and the relative indifference, support, and antagonism of the different governments to the business practices engaged in by their respective nationals.

Case Framework

The emotionalism surrounding the controversy is, however, largely the product of lack of perspective. Here both volumes make a notable contribution. Both volumes eschew the angry slogans of "judicial aggression" by American courts and the tired clichés of "extraterritorial application" of the law that have befogged the real issues, and instead set forth the jurisdictional and international law issues in the concrete framework of the cases (including some in the trademark and deceptive practice field) that have successively eroded the unrealistic logic of the *American Banana* case of 1909. Fugate and Brewster both end up by endorsing the so-called "objective territorial" principle of jurisdiction, the idea that our courts may validly exercise jurisdiction over business conduct initiated abroad that has a substantial impact on United States trade and commerce.

Once the problem of jurisdiction over international business restrictions is resolved, there arises a somewhat less discussed but even more difficult battleground of controversy: — In what circumstances should the federal courts feel impelled to exercise this jurisdiction? What are the norms of business behavior and the measures of judicial relief that should be prescribed by the courts, after they have taken jurisdiction over an international cartel situation? The only clear guidance to be gleaned from the current cases is that they still support the rule of the *American Banana* case that no antitrust defendant can be held liable for acts he was required to do by a foreign government, assuming that he has not been in collusion with that government. They also support the rule of international comity (respected by both the United States and the British courts in the widely mooted and generally misunderstood *Nylon Spinners* situation) that no court will order a defendant to do something forbidden by a foreign sovereign. Beyond this common ground, however, a continuing debate has raged.

"Conflict of Laws" Approach

Brewster, after a careful analysis, recommends what may be described as a "conflict of laws" approach — that both government prosecutors and the courts should temper the uncompromising demands of the Sherman Act by taking into account (1) the relative significance of the domestic and foreign contacts to the antitrust violation in question, (2) the relative seriousness of effects within the United States as compared with those abroad, (3) the specific purpose to harm or affect American consumers or business opportunities for Americans, (4) the nationality or allegiance of the parties involved and the fairness of applying our law to them, (5) the degree of conflict with foreign laws and policies, and (6) the extent to which such conflict can be avoided without serious impairment of American or foreign national interests. The case for this recommendation is



Sigmund Timberg

Member of the District of Columbia and New York bars, specializing in antitrust and international law problems.

buttressed by a thoughtful chapter by Professor Trautman analyzing the precedents concerning the coverage of other federal regulatory statutes. Nevertheless, this reviewer doubts the feasibility of such an approach, both because of the assumption (well expressed by Judge Rifkind in the *National Lead* case) that it would be tantamount to administrative or judicial revision of the Sherman Act and of the judicial and administrative incapacity for such an exhaustive exercise in comparative law and comparative economics. However, in the one area where an American judge has discretion, that of decreeing the remedies consequent upon an antitrust violation, these factors, particularly the last three, have had some play.

Fugate, although his book is primarily limited to the delineation of existing case law, has some thoughtful pages analyzing the recent proposal of a United Nations committee for an international convention in this field, pointing out what he considers its inadequacies, and making five tentative suggestions for international co-operation as a prelude to a broader (and, to the reviewer, ultimately necessary) program of international agreement.

The treatment of the substantive antitrust law in both books constitutes another departure from legal treatise norms. Almost all of the litigated cases in this field have involved business arrangements that were caught up in the over-all complex of agreements among competitors to divide world markets, the illegality of which is not disputed. Consequently, there are no clear-cut judicial answers as to the circumstances under which such necessary adjuncts of foreign trade as distributorships, joint sales agencies not operating within the Webb-Pomerene exception, patent and know-how licensing arrangements and joint business ventures with competitors, become legally vulnerable. This judicial vacuum both authors attempt to fill by discussing the classic antitrust cases (e.g., the *Addyston Steel* case of 1898 and the *Trenton Potteries* case of 1926) which formulate the basic antitrust approach to similar situations in domestic commerce, and the sanctions and remedies applied both in the litigated cases and in the cases terminated by consent decrees. Also brought into play is the Justice Department's thinking about substantive antitrust violation as reflected in its consent judgments.

Useful Tool

In this last connection, it has become quite usual for antitrust counselors to box their legal compass by Antitrust Division beacon lights, as contrasted with recourse to the much more infrequent (and sometimes dimmer) pronouncements of the courts. While Mr. Fugate does not purport to reflect the official policy of the Justice Department, this consideration makes his volume a useful tool for the practitioner who has to reckon with a law the practical coercive effect of which is so largely a matter of administrative interpretation.

Professor Brewster has well merited the confidence of the Merrill Foundation for the Advancement of Financial Knowledge in financing, and the Association of the Bar of the City of New York in sponsoring and aiding his exhaustive project. His volume is far more than the counselor's guide it sets itself as its primary goal, and a fair and meticulous dissection of the ramifications of the relevant legal precedents. It will be useful to the formulators and administrators of foreign economic policy and to the reflective businessman, because it gives full length treatment not only to the United States policies of military security, foreign aid and free trade to which federal antitrust policy should be accommodated, but also to the economic and political problems of international investment, the industrial development of underdeveloped areas and raw materials exploitation upon which world prosperity and peace depend.

The Brewster study is also to be commended for the attention it devotes to the administration of the antitrust laws. Superficially it may be a bit boring to embark on a detailed

appraisal of the many different federal agencies that promote (or have reservations concerning) antitrust enforcement, as a prelude to determining where the responsibility for deciding and administering antitrust waivers and exemptions should lie. However, it is a necessary exercise, for most critics of our antitrust laws are prone to forget that ours is a government of men as well as of laws.

Provocative Suggestion

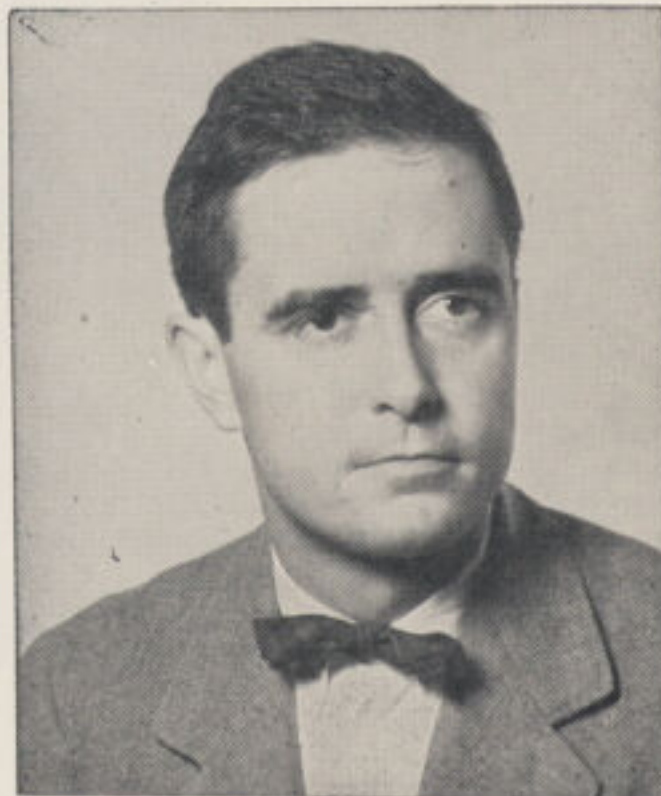
The upshot of this exercise is Brewster's recommendation that Congress pass legislation authorizing the President, after consideration by the National Security Council and report to the appropriate Senate Committee or Committees in executive session, to grant waivers or exemptions from the antitrust laws in the interests of national security. This is a provocative suggestion for several reasons. First, limiting the substantive scope of this exemption to national security carries with it the implicit judgment that foreign aid or investment considerations do not warrant any Congressional superseding of our antitrust policy, even if they suggest tempering the rigors of its judicial and administrative application. In the overall view, free trade and the contribution to free trade made by antitrust remains the paramount foreign economic policy of the United States.

Second, the administrative virtue of the proposal is that it associates in the responsibility for making national security decisions the two federal organs most directly concerned, dissociates the Attorney General from the disagreeable function of relaxing the antitrust laws that he is sworn to enforce, and yet insures some antitrust review on the part of people with a responsibility in the field. The corresponding difficulty with this all too logical procedure is its complexity and that, with the elimination of the Attorney General and the substitution of other high level mechanisms, there is also eliminated the agency best suited for grappling with the immediate circumstances of the individual antitrust case. Perhaps this is why the Attorney General's Committee to Study the Antitrust Laws decided on the Attorney General as the appropriate instrument for relaxing the antitrust laws in critical national security situations, trusting him to continue the informal procedures for consultation with the National Security Council that have prevailed in the past.

Webb-Pomerene Act

Brewster's innate restraint and capacity for suspended judgment is illustrated by the fact that he makes only one other suggestion for change in the law, the repeal of the Webb-Pomerene antitrust exemption for export associations. In common with others, this reviewer also considers the Webb-Pomerene Act an obsolete device that does not meet the acute problems currently confronting United States exporters or the basic realities of antitrust enforcement.

Another contribution of the Brewster volume is his chapter on the effect of the antitrust laws on United States foreign invest-



Kingman Brewster, Jr.

ment, in which he reaches the general conclusion that antitrust prohibitions have not been a conclusive deterrent to specific foreign deals, but that the uncertainty of the law has had a dampening effect on the initiative of United States foreign traders, particularly with respect to proposed acquisitions, joint ventures and technological licensing arrangements. Yet, paradoxically, in this area where greater certainty is presumably desirable, Brewster's restatement of the applicable law confirms the existing uncertainty. He recommends that restraints attached to licenses, acquisitions, or joint ventures with competitors not be considered *per se* illegal, but that their legality depend on the seriousness of their probable economic effects and their apparent purpose. The reviewer agrees with Brewster that this is the existing law; uncertainty seems to be part of the price we must continue to pay for the sort of free economic system most of us desire.

Book Has Depth

It implies no criticism of a book which blazes paths in so many different and difficult directions, and of an author who tries to write elegantly and vividly while cramming his

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Sub Judice

Man's right of privacy has been once again affirmed! And nudism has scored another smashing victory!

Photographic evidence of indecent exposure obtained by crafty Michigan State Police at a nudist camp was condemned as the product of illegal search by the Supreme Court of Michigan in a decision handed down on September 9. In *People v. Hildabridge* (reported in 27 *Law Week* 2131) the Court reversed convictions based upon such evidence.

The case involved a Michigan State detective who accompanied a city policeman on what he termed a "business" trip to a nearby nudist camp, where he discovered three nudists.

The detective later returned accompanied by several other police officers, a photographer, and warrants for the arrest of the nudists he had encountered on his first visit. More sunshine enthusiasts were discovered and mass arrests were made.

Several nudists were convicted of indecent exposure on the basis of the evidence, photographic and otherwise, obtained on the second visit.

But the Supreme Court of Michigan, in an indignant opinion by Justice Voelker, reversed the decision. The Court arched its judicial brows in doubt when informed that the policeman whom the state detective accompanied on his first visit was there on "business," but said it didn't make any difference, anyhow.

The evidence garnered on the first visit was the product of illegal search, and the warrants for arrest based on this evidence were invalid. The search and arrests and photography on the second visit were not only illegal, the Court declared, but were "indeed the one big indecency we find in the whole case."

The officers apparently overdid it a little, too, when they swore out warrants that one of their own number was the aggrieved victim of an indecent exposure. The Court, after reviewing the facts and hearing his story, proved singularly unsympathetic.

The opinion suggested that the three nudists could have been arrested on the first trip by the State detective for a misdemeanor committed in his presence, if one was committed. There was no call to return for reinforcements and warrants for arrest. Lack of warrants, did not deter the police on their second visit, the opinion added.

Chief Justice Dethmers and Justices Carr and Kelly dissented.

subject as full of imaginative insight as possible, that the Brewster volume is likely at times to be heavy slogging for the uninitiated. For those readers who have to learn to walk on the strictly legal surface of this area before they can fly in its turbulent economic, political and administrative outer space and prefer to get a clear picture of the historical linear continuity of the relevant legal decisions, the Fugate volume will therefore prove a useful adjunct.

In short, while the price tag on these two volumes is a heavy one, they both belong in the library of those who have to deal with antitrust problems in the export and import trade of the United States and in overseas investment and distribution. This judgment is based not only on the intrinsic analytic merit of the books, but on the very practical consideration that this is a field for which neither the law library nor conventional economic periodicals furnish adequate preparation.

OVERWORK

(Continued from page one)

criminal trials on any other basis? Yet this decision was attacked on the ground that it opened "the F.B.I. files to the communists, to say nothing of assorted crooks, grafters, narcotics peddlers, etc." *Nine Men against America* (1957) 18. Actually, it did not do that at all, as can be seen by anyone who will take the trouble to read it. There was an extravagant dissenting opinion in the case, which gave rise to some misunderstanding. And the then Attorney General went before both Houses of Congress and said that the government was confronted with a "grave emergency," and sought a statute which Congress passed. Whether there was such an emergency in fact seems rather doubtful, even though some lower courts may have misapplied the decision. The witness in the *Jencks* case was Harvey Matusow. Suppose your client was being convicted on Harvey Matusow's testimony, and you knew that he had made a previous statement to the F.B.I. Wouldn't you want to see that statement? Wouldn't you regard it as highly unfair and improper if you were not allowed to see the statement? Is there any lawyer who can seriously say that the Supreme Court did anything in the *Jencks* case except its plain duty? Lawyers, especially trial lawyers, should be commending the Court for this decision.

Another case which has caused concern, especially here in California, is the *Konigsberg* case, in which your own Supreme Court was reversed on



Earl Warren
Chief Justice
U. S. Supreme Court

a matter of admission to the bar. That decision troubles me, too. Nevertheless, as my colleague Professor Archibald Cox pointed out in a speech he gave in Los Angeles at the time of the American Bar Association Convention there last August, this decision should not be read too broadly. One of the first things that a law student learns in Law School is that an opinion must be taken in the light of the facts before the Court, and that its significance depends on the actual decision on those facts, and on nothing more. As Professor Cox observed in his speech, the *Konigsberg* case shows that the Supreme Court "is concerned that a man should not be denied admission to the bar because of radical political or economic views," and that he should not be put to a special burden of proof because of such views. There is a clear distinction, which I am sure the Court would recognize, between radical political and economic views, on the one hand, and true subversion, on the other. The ranks of honored lawyers, throughout the centuries, in this country and elsewhere, have included people who challenged the status quo, as a matter of principle or on behalf of a client. Moreover, as Professor Cox likewise pointed out, the Court is concerned here, as in other fields of the law, "lest what appear to be findings of fact should mask the application of a rule of law" which is inconsistent with proper freedom in seeking admission to the bar.

As I have indicated, I do not think that the *Konigsberg* opinions are very

satisfactory. Yet I have considerable confidence that experience will show that the conclusion reached is not only one that we can live with but is one that we will come to accept. The subsequent action of the Court in a case from Oregon — *In re Patterson*, 356 U. S. 947 (1958) — seems to confirm this view.

Nelson Case

Finally, I would like to make reference to another decision as to which it seems to me that there has been great misunderstanding, based very largely on purely emotional grounds. This is the decision in *Pennsylvania v. Nelson*, 350 U. S. 497 (1956), where the Court held that the adoption by Congress of the Smith Act had superseded state statutes in the field of subversion. Actually, there is really nothing novel or startling in this decision. The same general conclusion has been reached before in literally hundreds of cases. Reference is rarely made to the point actually decided in the *Nelson* case, which was that the Commonwealth of Pennsylvania could not maintain a prosecution for subversion against the Federal government, after Congress had provided for such prosecutions in the Smith Act. Why should a State prosecute for a conspiracy against the United States, especially when Congress has made provision for prosecution in such cases by Federal authorities and in the Federal Courts? Such conspiracies have interstate ramifications, and are almost surely in more experienced and better informed hands when they are handled by Federal authorities. Moreover, in the *Nelson* case, the Supreme Court affirmed a decision of the Pennsylvania Supreme Court. This was no novel doctrine.

There have been moves in Congress to abolish the whole doctrine that state laws are superseded when Congress has passed a valid statute in the area. This is really throwing out the baby with the bath. The passage of such a statute would upset the federal-state balance in many areas, and would go far to Balkanize the United States. More than two years have passed since the *Nelson* case was decided, and there is no evidence that I know of that it has done any harm of any sort. If State officers have information of subversion against the United States, there is no reason to think that it will not get full attention from the F.B.I. and other agencies of the Federal Government. Why should it be the responsibility of the States to prosecute for offenses against the United States anyway?

Literate Critics

However, it should surely be recognized that not all criticisms of the Supreme Court in recent years can be dismissed on the ground that they are based primarily on emotional grounds or on misunderstanding. There are a number of persons of eminence and understanding who may be called, in the words of Professor Philip B. Kurland of the University of Chicago Law School, the "Literate Critics" of the Supreme Court.

First and foremost among these, of course, is Judge Learned Hand. . . . [Judge Learned Hands says] that the Supreme Court should not undertake to act as a third house of the legislature, and there can be no disagreement with that. And insofar as he says that our legislative bodies themselves have a great responsibility in the field of civil liberties which they should exercise more regularly and carefully, one may likewise agree. But a legislative body is not a good place for the protection of individual rights — strange as that observation may seem. There is ordinarily no concrete specific case before the legislative body. It legislates in general terms, on a broad issue, and rightly enough, with the general public interest primarily in view. However, in the courts, there is an individual claiming protection, and presenting the concrete facts of an actual case. Moreover, the action against which the individual is seeking protection may be that of an executive or administrative officer who is seeking to apply the

law in a way that the legislature could hardly have foreseen. Even with the greatest of responsibility on the part of the legislature, there is ample scope for the proper functioning of the courts in this field. But the courts should here, as everywhere else, be restrained and careful. For his emphasis on this important point, we can be grateful to Judge Hand.

[A] document to which careful and respectful attention must be given is the Declaration signed by the Chief Justices of the Supreme Courts of thirty-six of the States at their annual Conference held in Los Angeles last August. . . . My best judgment is that this statement will live in history as a symptom of the times and not because of its own power as a persuasive discussion of constitutional law.

Caution Abandoned

Having paid my respects to a number of those who have recently engaged in criticisms of the Supreme Court, it is only appropriate that I, too, should now throw caution to the winds, and join their ranks.

The Supreme Court in our system has unique responsibilities. Its duties are truly awesome. . . . The Court, and each of its members, have far too much to do, and have to work far too hard and too fast, especially in view of the great complexity and importance of the issues that come before it. . . . To an extent to which I think the bar is largely unaware, the Supreme Court is now oppressed by mere volume and complexity of its business.

So I would first propose that the organized bar establish committees to review the volume of the Court's work, and, in cooperation with the Court, to devise ways and means to reduce this, so that the Court may have ample time to consider and weigh the tremendous questions which come before it.

One area where something could be done, for example, is with respect to ordinary tax cases. It is now some twenty years ago since . . . Roger Traynor proposed that there should be a special court of appeal in tax cases. And I came along with a similar proposal a few years later. These suggestions were strongly disapproved by practicing lawyers. Yet the fact remains that the Supreme Court in a federal nation of 185,000,000 persons ought not to have to spend its time deciding ordinary tax cases. Indeed, I will even go so far as to say that the Supreme Court, hard pressed for time as it is, does not do a very good job in the intricate and specialized field of federal taxation. For instance, I may mention one of its most recent decisions in the field — *Flora v. United States*, 357 U. S. 63 (1958) — where the Court held that a taxpayer who had paid only part of a tax claimed to be due from him could not maintain a suit to get it back. This leads to the bizarre result that a taxpayer who pays everything he has is wholly without remedy if he cannot pay the whole tax assessed. This result was reached in the teeth of the language of the statute, and on the basis of a statement of practice which is demonstrably wrong. I venture the thought that this was a result which would not have been reached if the Court had had more time for the consideration of the case. But, as things are, tax cases inevitably have a low priority among all the cases the Supreme Court has to decide. It would be in the interest of all concerned to find a way to relieve the Court from having to decide these cases, and many other — non-constitutional — cases in the general area of administrative law.

Too Broad Grounds

As I have reviewed the decisions of the Court in recent years, there are not many of the results reached, it seems to me, which are really objectionable on what might be called sound professional grounds. But in an unfortunate number of the cases, in my view, the opinions proceed on too broad grounds, and it is these grounds, rather than the actual points decided, which have caused some of the trouble. This is an area where perhaps the Chief Justice can have an especial influence.

Take, for example, the *Watkins* case — *Watkins v. United States*, 354 U. S. 178 (1957) — where the Court

(See OVERWORK on page four)

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Law School Professors Sojourn on Continent

Congressmen aren't the only people who take official junkets to Europe during their vacation time. A number of Harvard Law School professors visited the Continent on various types of official business last summer. A non-comprehensive and incomplete survey shows that:

Professors Louis Loss and Arthur T. von Mehren attended the 5th International Congress, sponsored by parative Law at Brussels during the week of August 4. A Congress is held approximately every 4 years. About 40 countries were represented.

Professors Loss and von Mehren later attended the "International Lawyers Convention" in Israel, accompanied by Associate Dean David F. Cavers, Professor David Herwitz, Norman Abrams, Secretary of the Harvard-Brandeis Project, and Salo Engel, Consultant on the Project.

At this Convention, Professor Cavers delivered an address on "Legal Education in the Atomic Age." He also spoke at a luncheon sponsored by the Harvard Club of Israel.

Professors Loss and von Mehren also lectured in Luxembourg at the

former Visiting Professor at the Law School and Professor of the London School of Economics, also lectured. Professor von Mehren and Visiting Professor Ronald H. Graveson, Dean of the Faculty of Law at King's College, University of London, are members of the Faculty Board.

The premises of the International Faculty of Comparative Law at Luxembourg were utilized September 1 and 3 when the Harvard-Brandeis Cooperative Research for Israel's Legal Development, in cooperation with the Israeli Ministry of Justice, sponsored a round table discussion of the problems arising under the Draft Companies Bill for Israel. Three sessions were held. Professor Loss was chairman of sessions 1 and 3. Professor Herwitz was chairman of session 2. Professors Herwitz and Gower and Israeli Deputy Attorney-General Yadin served as Reporters for the three sessions.

Professor Loss, along with Professors Charles M. Haar and Samuel E. Thorne, attended a meeting of the Society of Public Teachers of Law at Cambridge University in England, September 18-20. Professor Gower was the Honorary Secretary at this meeting. Professors Haar and Thorne are on leaves of absence from the Law School for the present academic year.

Professors Clark Byse and Abram Chayes participated in the Salzburg Seminar in American Studies held in Salzburg, Austria, in June-July, 1958.

Professor Milton Katz, Director of International Legal Studies, and Professors Kingman Brewster, Jr., and Arthur T. von Mehren were members of a United States delegation to a Conference on "Socialist Legality," during the week of September 10 in Warsaw, Poland. The Conference was sponsored by the International Association of Legal Science. Professor Katz was chairman of the United States delegation.

After the Conference on "Socialist Legality," Professor von Mehren remained in Warsaw for the annual meeting of the International Committee of Comparative Law, the directing organ of the International Association of Juridical Sciences.

Dean Erwin N. Griswold visited South Africa during July and August as an observer of the celebrated Treason Trial held there.

— Binder

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OVERWORK

(Continued from page three)

reversed a conviction for contempt of Congress and talked in rather broad terms about the powers of Congress in this field. Or the *Sweezy* case — *Sweezy v. New Hampshire*, 354 U. S. 234 (1957) — which was decided at the same time. The latter case has been the subject of an intemperate attack by the Attorney General of New Hampshire, though he was losing counsel in the case and might better have been more restrained. The former case has occasioned a good deal of complaint in Congress. Looking as a lawyer at the facts of these cases, and what was decided, I cannot believe that they are truly objectionable. But both opinions contain broad statements, which might better, I think, have been carefully guarded and trimmed away. Most of the reaction comes from the breadth of some of the statements in the opinions, which were not really necessary to the decisions themselves.

Another case to which I would refer is *Hoag v. New Jersey*, 356 U. S. 464, decided last May. Here the majority of the Court held that a person

Bull & Bear

Mr. A. M. Sonnabend, president of Hotel Corporation of America and a member of the board of directors of Studebaker-Packard Corporation, will address the Bull and Bear Club on "Recapitalization and Reorganization of Industry" tomorrow in the Harkness Commons Meeting Room at 1:40 p.m.

could be tried and convicted in New Jersey of robbery after he had been acquitted of robbing three other persons on the same occasion. Note that this was an appeal from a State court, and that New Jersey had held that such a second trial was consistent with its law. The only question was whether this violated the Fourteenth Amendment's prohibition against an action contrary to "due process of law." In this case, the Chief Justice filed a dissenting opinion. He felt that "the conviction of this petitioner has been obtained by use of a procedure inconsistent with the due process requirements of the Fourteenth Amendment." But he never tells us why. To me there is more of yearning than of law in this opinion. Perhaps it is his long experience as Governor which leads the Chief Justice to approach problems in some cases in terms of generalities and without sharp focus.

Interstate Commerce

Finally, there is one important area where I have long found myself in sharp disagreement with a majority of the Court. In the field of interstate commerce, Congress has refused to pass a workmen's compensation act, but has instead left in force the Employers' Liability Act, which bases liability on negligence and fault. Yet, over a series of years, the Court has, by one extreme decision after another, largely transformed this statute into a workmen's compensation act, with unlimited liability. Justices Black and Douglas have been the leaders in this movement. Closely related to this has been the substantial elimination of any effective judicial restraint in civil jury trials, so that state courts are repeatedly required to allow juries to find verdicts on an amount of evidence which can hardly be called a scintilla. I am sorry that the Chief Justice has followed along in these cases. Indeed, these cases ought not to be before the Supreme Court at all. That the Court has brought them there through certiorari only enhances my criticism in this field. Speaking in purely professional terms, without any reflection on motive, this is one area where the Court has, to me, yielded unduly to its "activists," and thus caused itself unfortunate harm.

My hope would be, then, that the Court would endeavor, as a matter of its wisdom and judgment, to exercise great care to decide constitutional questions only when absolutely necessary, and then only in carefully guarded and narrowly written opinions designed to decide only the precise questions then before the Court, and inescapably required to be decided. If it be said that this is the Frankfurter line, I would say that it is none the worse for that. Moreover, I am sure that he would be the first to agree that he did not originate this approach, but that he got it from, among others, James Bradley Thayer, a great professor in the Harvard Law School two generations ago, who should be remembered more widely than he is.

REVIEW

(Continued from page one)

the Supreme Court during its 1957 term is contained in the *Review's* annual note on the Supreme Court.

Professor Ernest J. Brown has written a forward to this note en-



Ernest J. Brown

titled "Process of Law." It is an analysis of the recent Supreme Court practice of disposing of cases per curiam without written opinions.

The first issue of the *Review* will be published on November 10.

SEMINARS

(Continued from page one)

lems of International Relations and Non-Military Defense, Professor Charles Fairman, 9 students; and Comparative Contracts, Professor Arthur T. von Mehren, 8 students (all graduates).

In addition to the twelve year-long seminars, eleven seminars are given complete in the fall semester. Of these the most popular is Planning and Counseling for the Closed Corporation. It is given in two sections. The section under Professor David Herwitz has 31 students and the section working with Professor Abram Chayes has 30 students.

Other seminars listed are: Legal Education, Visiting Professor Elliott E. Cheatham, 21 students; Land Use Planning, Assistant Professor William A. Doebele, Jr., 21 students; Medico-Legal Problems, W. J. Curran, Lecturer on Legal Medicine, 20 students; Evidence Problems, Professor John T. McNaughton, 19 students; Secured Commercial Transactions, Peter F. Coogan, Lecturer on Law, 15 students; Public Utilities, Professor Donald T. Trautman, 12 students; Commercial Law Seminar, Professors Robert Braucher and Arthur E. Sutherland, 11 students; Comparative Legal Research, Professor von Mehren, 8 students; Legal Problems of International Administration, Professor Louis B. Sohn, 8 students; International Tax Research, Professor Surrey and Mr. Oldman, 3 students; and United Nations Law, Professor Sohn, one student.

Fall seminars on Administrative Law and Family Law were originally scheduled but have since been cancelled. But the year-long seminars in Income Tax Policy and Legislation and Comparative Contracts have been added since the original scheduling.

The increased emphasis on the seminar as a device to enable students to concentrate on a single narrow topic and to develop their understanding of it from a greater number of different approaches than might be possible under the normal classroom conditions has been characterized by Visiting Professor Elliott E. Cheatham, director of the Legal Education Seminar, as an element which adds "depth and richness" to the curriculum. "Seminars," says Professor Cheatham, "communicate a sense of perspective and movement to the whole curriculum and are a part of a changing intellectual climate" in American law schools.

WIRETAPPING

(Continued from page one)

is admissible despite safeguards, the most elaborate safeguards are meaningless."

Mr. Fraenkel referred to the success of Federal law enforcement agencies as proof that such methods are not essential. The opportunities of manipulation of wiretap evidence, and of abuse of the right by unscrupulous law enforcement officers are, he concluded, cogent arguments against the legalization of wiretapping and other electronic eavesdropping.

At the conclusion of the program, Mr. Dash played a recording which illustrated the ease with which tape recordings may be edited and the impossibility of detection. Additionally, he emphasized areas of current agreement, such as the support of most law enforcement agencies for the outlawing of private electronic eavesdropping. Questions from the floor emphasized concern about such methods when utilized as evidence, and attempted to pin down specific instances of abuse of wiretapping by law enforcement officers.

— Silver

ETHICS

(Continued from page one)

handle all judicial duties, limiting the agencies to the role of prosecutor.

Serving on the committee with Mr. Peck are Clarence A. Davis, LL. B. '16, Hans Klagsbrunn, sp. '32-'33, Ashley Sellers, Trowbridge von Bauer, all of Washington, D. C., and Harold L. Russell of Atlanta, Ga.

An earlier committee under the chairmanship of Albert E. Stephan, LL. B. '29 had previously drawn up a draft code of ethics for administrative agencies, which the present committee will utilize.

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