



Harvard Law Record

America's Oldest Law School Newspaper

VOL. 27, NO. 5

CAMBRIDGE, MASS., THURSDAY, OCTOBER 23, 1958

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TEN CENTS

Students Hear Auto Executive

A. M. Sonnabend, new director and chairman of the Acquisitions Committee of Studebaker-Packard, told the Bull & Bear Club last week that Studebaker-Packard will be revitalized by diversification and recapitalization.

Studebaker-Packard, which expects to have a tax loss "carry forward" of approximately \$134 million by the end of this year, will acquire a number of wholly owned subsidiaries, Mr. Sonnabend said. Profits from these subsidiaries will be virtually non-taxable for the first five years after acquisition, since the profits will be offset by the writing off of Studebaker-Packard's accumulated losses.

Recapitalization of Studebaker-Packard has already been carried out, Mr. Sonnabend stated. Twenty banks and insurance companies which had held unsecured claims against the company totalling \$54 million, were persuaded to exchange their claims for \$16 million in bonds secured by Studebaker-Packard real estate, plus preferred stock convertible into five and one half million shares of common stock at \$3 a share.

Studebaker-Packard will acquire subsidiaries through the "Botany Plan," a financial device developed by Mr. Sonnabend. The parent company guarantees the new subsidiary's former owners 75% of the subsidiary's pre-tax earnings for five years, then 75% of its post-tax earnings thereafter until the purchase price has been paid. As part of the deal, management of the subsidiary remains in the hands of the subsidiary's pre-sale officers.

Mr. Sonnabend indicated that Studebaker-Packard will not limit its acquisitions to any one segment of the economy. He listed good management, growth potential, and pre-tax earnings of a million dollars or more

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Renowned Desk



Dean Pound poses in the desk he has surrendered to the Harvard Law School receptionist in Langdell Hall.

Entering the main lobby of Langdell Hall for the first time, one could easily get the impression that he had stumbled upon the nerve center in which all of the law school's administrative officials work, and from which emanate the thousands of catalogs, application blanks, registration forms, and welcoming letters that the law school annually dispatches to all parts of the world. Twenty-five years ago the impression would not have been inaccurate. The massive circular desk which now accommodates a receptionist with a relatively limited job to do, was, a quarter of a century ago, Supreme Headquarters, Administrative Powers de l'Ecole. The aliusion to a burgeoning military control center is not inapt.

Dean Emeritus Roscoe Pound, who will celebrate his 88th birthday on Monday, presently occupies an average size desk, as Professor's furnishings go, which was presented to him by the faculty of the Law School in 1936, and is a replica of Judge Story's desk. Entering his office on the second floor of Langdell, one sees immediately that it is by no means too large to accommodate the many projects which the Emeritus Dean has going simultaneously. The situation was worse in the late twenties.

During the roaring decade Harvard

Law School was not blessed with the long list of Vice and Assistant Deans and Secretaries which it has today. Everything centered in the Dean's office, and decisions at every level of importance were taken there. Dean Pound, being the personal center of this administration, was consequently occupied simultaneously in upwards of a dozen projects. His desk showed it. There were four chairs around it, each facing a major job, with minor tasks interspersed, and as issues came up during the day, the Dean would work his way around and back again. The arrangement embodied less than optimum convenience.

In 1926, Dean Pound began attempts at designing a more convenient desk for himself, but several otherwise brilliant schemes fell

(See DESK on page eight)

Soviet Diplomat Addresses Forum Tomorrow Evening

Mikhail "Mike" Menshikov, Russian Ambassador to the United States and perhaps the friendliest Soviet diplomat ever to be stationed in this country, will address the Harvard Law School Forum tomorrow evening at 8:30 p.m. at the Rindge Tech Auditorium in Cambridge.

Ambassador Menshikov visited the United States in an official capacity in 1943 when he was a member of the Soviet delegation to the UNRRA meeting in Atlantic City. He subsequently held several supervisory posts for that agency and in 1945 headed a delegation to Poland to supervise UNRRA activities.

Williston Contest Begins Tomorrow

The semi-final round of the Williston Competition will take place this month, Martin Louis, 3L of Trenton, N. J., Chairman of the Competition, has announced. Three problems will be issued tomorrow to the nine competing teams. Each problem will receive the attention of three teams.

The teams will have one week to work on their problems, which will arise in the jurisdictions of Massachusetts, New York, and the Southern District of New York. The results will be judged by attorneys from the appropriate jurisdictions.

Problems in drafting statutes, contracts, wills, and trust instruments are used in the qualifying round of the Competition. Problems in the semi-final round will involve deciding upon and pursuing a course of action embodied in the drafting of a legal memorandum and some other document.

A plaque has been placed in the Langdell reading room, with the names of the Williston Competition winners. The names begin with 1956-57, the first year of completion of the Competition in its present form and under its new name in honor of Professor Williston.

The qualifying round of the Williston Competition will take place next semester. It is open to all second-year students except members of the Law Review, Board of Student Advisers, and Ames quarter finalists.

In 1946, when Stalin ruled Russia, Menshikov was appointed Deputy Minister of Foreign Trade; in 1952 he became Minister, replacing Anastas Mikoyan.

Menshikov's first ambassadorial position was in India, where he served from 1953 to 1957. Prior to his arrival, India had had few commercial relations with the Soviet Union. Within several months, however, Mr. Menshikov successfully negotiated a five year trade agreement, which was soon followed by an agreement permitting the Soviets to construct a large steel plant in central India.

In 1957, Mr. Menshikov was transferred to the Russian embassy in Nepal. Last December he was named to his present position of Ambassador to the United States.

Ambassador Menshikov was born and educated in Moscow. He possesses a degree in economics from the Plekhanov Institute, where he specialized in international trade. Before entering the diplomatic service, he headed several Russian trade delegations, including one to England.

Unlike many of his predecessors, Mr. Menshikov's ambassadorship to this country has been characterized by a great effort to make himself familiar to, and liked by, the American public. Known as "Mike" by his own request, the congenial Ambassador has become a familiar figure in Washington social life, has been

(See MENSHIKOV on page seven)

Federal-State Relationships As Affected by Judicial Decisions

Jones:

The following are remarks made by Charles Alvin Jones, Chief Justice of the Supreme Court of Pennsylvania, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.

Mr. Chairman and Members of the Conference of State Chief Justices:

For this intrusion upon your time to speak in opposition to the pending resolution, I shall neither apologize nor palliate. The matter is of such transcendent importance, constituting, as it does, an unwarranted attack on the constitutional structure of our Federal Union of such shocking portent in the circumstances as to warrant the fullest and freest discussion before definite action with respect thereto is taken by this body.

My only embarrassment in speaking, as I shall on this occasion, stems from the pleasant social relations I have heretofore enjoyed with the members of the Committee, as well as others of the Conference, which relationships I trust may continue to endure unimpaired. But, however that may be, a stern duty confronts me which requires me to do all that I can within my limited capacity to help bring about, if possible, the defeat of the resolution now before us.

The Committee report, which the resolution approves, concludes that the over-all tendency of decisions of the Supreme Court in more recent years has been to press the extension of federal power; that, to an extent, the Supreme Court has assumed the function of policy-making; that, too often, the Supreme Court has tended to adopt the role of policy-maker without proper judicial restraint,

Last August, the Committee on Federal-State Relationships as Affected by Judicial Decisions, composed of the Chief Justices of 10 State Supreme Courts, submitted a report to the Conference of Chief Justices at Pasadena, Cal. This unprecedented report contained a comprehensive, carefully-worded criticism of recent decisions of the Supreme Court of the United States. A Resolution approving the Report was passed by the State Chief Justices by a vote of 36 to 8. Votes against the Resolution came from California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Hawaii. No votes were recorded from Arkansas, Connecticut, Indiana, Nevada, and North Dakota.

Here published, for the first time, are the complete texts of the Committee Report and the Resolution together with the complete texts of the speeches of the 4 Chief Justices who spoke in opposition to the Report and Resolution at the Convention in Pasadena. The full texts of the Committee Report and of the Resolution are published in full on pages 3-6. Beginning on this page is the text of the speech delivered by Chief Justice Charles Alvin Jones of Pennsylvania on August 23, 1958, opposing the Resolution and moving to table it. The dissenting speeches of Chief Justices Weintraub of New Jersey, Gibson of California, and Condon of Rhode Island, follow.

particularly in respect of the extent and extension of federal power and the supervision of State action by the Supreme Court by virtue of the Fourteenth Amendment; and that the result of all this is that a study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of the long-time American boast that we have a government of laws and not of men.

These strictures on the Supreme Court are entirely uncalled for and certainly are not justified on the basis of the decisions, which the report cites for criticism, such as *Pennsylvania v. Nelson*, 350 U.S. 497, designated by the report as an example of "the wide sweep now given to the doctrine of pre-emption"; or *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232; *Konigsberg v. State Bar of California*, 353 U.S. 252; *Watkins v. U.S.*, 354 U.S. 178, and *Sweezy v. New Hampshire*, 354 U.S. 234. Each of the latter decisions afforded appropriate judicial protection to the rights of the indi-

vidual involved against hostile State action violative of the Fourteenth Amendment. Regardless of one's point of view, none of those cases can, in my opinion, be logically cited as an extension of federal power or a contraction of State's rights. Each was merely a judicial application of a long-ordained federal power to a new set of circumstances.

Judging from the public prints and the agitation in Congress ever since *Pennsylvania v. Nelson* was handed down by the Supreme Court of the United States on April 2, 1956, it has been evident that the doctrine of federal pre-emption, as applied in that case, was being made the special *bête noir* of the bitter critics of the present day work of our Supreme Court. As it happened to fall to my lot to write the majority opinion in the *Nelson* case for the Supreme Court of Pennsylvania, whose judgment, incidentally, was affirmed and not reversed, I beg your indulgence while I endeavor to demonstrate that the ruling in the *Nelson* case was in

no sense "a wide sweep of the doctrine of pre-emption" or any extension whatsoever of federal power. It was but the enforcement of a power inherent in our Federal Government ever since the adoption of the Constitution in 1787, namely, the right to protect itself most efficiently and effectively against all enemies, foreign or domestic.

The curt observation with which the Committee report dismisses and implicitly condemns the *Nelson* decision derives from a monograph by a law professor whose services, as the report indicates, were specifically enlisted by the Committee for the purposes of its work. While the monographer, himself, devoted 14 of his total 28 pages of writing to treatment of the *Nelson* case, the Committee report disposes of that decision, as the primarily designated object of its criticism, in one brief paragraph with the palpable and irrelevant non-sequitur that the fact that the Supreme Court's decision was an affirmation of the State court "empha-



Charles Alvin Jones

sizes rather than detracts from the wide sweep now given to the doctrine of pre-emption."

And, while we are considering State complaints of Supreme Court decisions, fairness compels it to be recognized that in the *Nelson* case the Supreme Court of the United States did not ascribe to the Federal Government any greater power than what Pennsylvania's highest court had considered conceded to be the Federal Government's. But, before getting into the established constitutional principle, which the Pennsylvania Supreme Court deemed to be decisive of *Nelson's* appeal, let me make the following plain beyond misunderstanding.

The ruling in the *Nelson* case will not impede or interfere with the de-

(See DISSENTS on page two)

Conference Chairman Explains Resolution

John R. Dethmers, Chief Justice of the Supreme Court of Michigan, was Chairman of the Conference of Chief Justices at Pasadena, Cal. He was a member of the Committee on Federal-State Relationships as Affected by Judicial Decisions, and favored passage of the Resolution.

The following is part of an address delivered by Chief Justice Dethmers on August 25, 1958, at the Annual Dinner in Honor of the Judiciary Section of Judicial Administration of the American Bar Association, at Los Angeles, Cal. It summarizes the background of the Resolution and some of the reasons for its passage.

Of transcendent importance to the nation, overshadowing all others in the concern of the Conference, is the matter of federal-state relationships as affected by judicial decisions. Increasingly, in recent years, members of the Conference had been expressing themselves in terms sharply critical of what they viewed as a trend in this area. Accordingly, at the sessions of the Conference in Dallas, two years ago, the formal program was in large part devoted to the subject of the division of powers between the federal and state governments. In New York, last year, several members urged adoption of resolutions strongly condemnatory of that asserted trend. The majority, shunning hasty or precipitate action, determined on the appointment of a committee to devote the ensuing year to a study of the subject and to report to the 1958 session with recommendations for achieving sound and appropriate relationships. The committee, upon appointment, engaged the assistance of a number of law professors for research in several areas of the general subject. Each of them prepared an excellent monograph based on study and research on specific constitutional questions and United States Supreme Court decisions relating thereto. These afforded much assistance to busy committee



John R. Dethmers

members. On such a foundation, the committee drafted a scholarly and comprehensive report. It was presented to the full Conference last Wednesday morning, as were personal reports by two of the professors; the Conference divided into four sections Wednesday afternoon for piecemeal consideration and discussion of the report, and at the concluding session, last Saturday, the Conference, by an overwhelming majority, adopted a resolution approving the report and making certain observations, expressions of belief, and recommendations in the premises. This did not come about in haste or in a spirit of rancor, but upon calm reflection, careful consideration and in a spirit of humility and love for American freedoms and our free institutions, with a view to calling attention, respectfully, to matters of grave concern to the Conference and to the country.

Time will not permit, nor is this the occasion for detailing the treatment in the report of specific phases of the subject and the decisions of the United States Supreme Court relating thereto. Copies of the report are

available and we would commend it to the careful and appraising examination of each of you. In general, it expresses the concern of its framers and adopting members of the Conference over the constant expansion of the powers of the national government and consequent contraction of the powers of state and local governments, which result from Supreme Court interpretations of constitutional and statutory provisions. Note is taken of what is viewed as an assumption by the Court of the legislative function and the role of policy maker in this area of federal-state relationships.

Maintenance of the historic division of powers between national and state governments, and retention of the highest possible degree of local self government compatible with national security and well-being, are deemed of the utmost importance by members of the Conference, as they were by the founding fathers, only as they serve as effective instrumentalities for the preservation of the liberties of the people and the perpetuation of our free institutions. No other, or sectional, interest was sought to be subserved by the report.

It is the feeling of the members of the Conference that, as judicial officers, entrusted by the people with positions of high responsibility and trust, they would be remiss in their duties, indeed, if they were to cover in a corner and neglect to speak out in temperate tone, to alert the public to trends and developments of tremendous moment to the people. Particularly is this true in view of the peculiar training, experience and contact with events that especially equip Justices of the State Appellate Courts to discern such trends and to appreciate their significance. Where can it be said that greater obligation rests than on them to call public attention to a gradual sapping of state and local powers and rights, portending peril to the rights of the people. Inasmuch as the people must make

the final judgments on these matters, existence of the problems and the involvements must be proclaimed. It is intended that the report shall serve that office.

Abraham Lincoln once said that resistance to decisions of the Supreme Court "meant an attack on our whole system of republican government, a blow that would place all our rights and liberties at the mercy of passion, anarchy and violence." The Conference has moved in full recognition of the utter importance of upholding public confidence in the Courts and the judicial process, and the high duty of lawyers and Judges to upbuild it. Constitutional guarantees of freedoms and liberties avail but little except as the Courts breathe the breath of life into them and make them effective and meaningful. This they can only do, successfully, as they are supported by the public. As American Bar President Charles S. Rhyne has said so pointedly: "Our free institutions and system of government are no stronger than the public opinion supporting them." Accordingly, you will find the Conference report, despite certain newspaper headlines to the contrary, completely temperate and restrained, couched in terms of fullest respect for the United States Supreme Court as an institution of government charged with responsibility for giving life to human liberties, and also respect for the intelligence and integrity of the members of that Court.

At the same time, in a government by the people, views on vital national issues not only may, but must be voiced if that system is to be maintained. It will be recalled that Abraham Lincoln, also, in discussing the Dred Scott decision, said "We know the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this. We offer no resistance to it." We do not forget that Mr. Justice David J. Brewer of the United States Supreme Court, speaking in 1898, said "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism." The Conference report, so far from attacking the Court, expresses only its concern with cer-

tain of the decisions. It contains no applause for suggestions on the political front that the Court be stripped, by Congressional action, of any of its traditional powers. The power of the Court to uphold and preserve human liberty and the rights of the people must not be crippled, curbed or destroyed. The Conference report would have none of this. It concludes, therefore, in most respectful and temperate terms, and with extreme restraint, to urge upon the Court, that, particularly in the field of determining federal and state powers and relationships, it exercise that greatest of all judicial powers, the power of judicial self-restraint, by constant recognition and giving effect to the vital difference between what, on the one hand, the Constitution prescribes or permits and that which, on the other, may, from time to time, to the majority of the Court, seem desirable or undesirable, and by adhering firmly to its tremendous, strictly judicial powers and eschewing so far as possible the exercise of essentially legislative powers, contenting itself with use of the policymaking role, where at all necessary, with only the utmost care and moderation. Such is the general tenor of the report, offered in a spirit of good will and cooperation in the public interest. If, perchance, it should come to the attention of the esteemed members of the Court, it is our fervent wish and hope that it will be received and considered in like fashion.

Mention has been made of the dread responsibility of members of bench and bar for enhancing the prestige of Courts and the judicial process in public esteem and the consequent duty to criticize court decisions, if at all, with only the greatest restraint. That responsibility and that restraint must be deemed to apply not only to the critic but as well to the formulator of court opinions and the making of court decisions. We, lawyers and judges, share, as advocates, as critics and as final arbiters of right and law, one common responsibility to the people in that regard. If, in public appraisal, we do not make our system work, as an instrument for good and for human freedom, it must fail.

DISSENTS

(Continued from page one)

tection, prosecution or conviction of a single communist or other subversive who advocates the overthrow of our government by force and violence, and no one can authentically assert to the contrary. What the *Nelson* decision did was to recognize in the Federal Government the unrestricted right to control its defense against internal subversion, unhampered by meddlesome or officious interference from any subordinate sovereignties or political subdivisions. At the same time, the *Nelson* decision does not deny to the States the right to condemn sedition against themselves. But, of course, it is fanciful to contemplate sedition against a State which is not at once sedition against the Federal Government, whose constitutionally imposed duty it is to guarantee the maintenance of a republican form of government in each of the several states.

Any information as to possible offenders against the Federal Sedition Act which a State obtains can, and should be, promptly transmitted to the Federal Bureau of Investigation. And, if sedition cases should, perchance, become numerous, Congress can constitutionally confer concurrent jurisdiction on State courts to try such cases in relief of Federal court administration. But — and this is basically essential — informations against alleged seditious offenders must be made under the Federal statute and the prosecution of indictments therefor conducted at the direction and under the supervision of the Department of Justice.

In *Nelson's* appeal to our Court, he contended that the Pennsylvania Sedition Act of 1939, under which he had been convicted of conspiracy with others to overthrow the government of the United States by force and violence, had been superseded by the Smith Act of 1940. We accredited the contention on the authority of the Supreme Court's decision some thirteen years earlier in *Hines v. Davidowitz*, 312 U.S. 52. In that case, the Supreme Court had held that the Pennsylvania Alien Registration Act of 1939 had been superseded by the Alien Registration provisions of Title III of the same Smith Act of 1940. The *Nelson* case cannot rationally be distinguished on constitutional principle from *Hines v. Davidowitz*; and

no one, so far as I am aware, ever objected to the decision in the *Hines* case. The difference between the two cases which the monograph advances is a factual immateriality which does not point a legal distinction.

Four of the five members of the Pennsylvania Supreme Court who sat for the argument of the *Nelson* appeal accordingly held that the Smith Act of 1940 superseded the Pennsylvania Sedition Act of 1939. That the opinion for the court was fully concurred in by all the members of the majority was not left to inference. Chief Justice Stern, joined by Justice Allen M. Stearne and Justice Chidsey, filed the following succinct and cogent joinder: "We concur in the foregoing opinion (for the Court) in its entirety. Sedition against the United States is not a local offense. It is a crime against the Nation. As such, it should be prosecuted and punished in the Federal courts where this defendant has been prosecuted and convicted and is now under sentence. It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government, and we are of the opinion that this is required in order to harmonize the respective constitutional powers of the Nation and the several states."

Responsible Pennsylvania newspapers of wide circulation understood and approved the Supreme Court's affirmation of the State Court's *Nelson* decision. A Washington correspondent of the Philadelphia Inquirer in a special article of April 15, 1956, wrote, "In the *Steve Nelson* case, the Court ruled the protection of the Nation against sedition is a Federal, not a State, responsibility, and that, therefore, the State anti-sedition laws are unconstitutional [i.e. superseded]. This decision does not mean that the States can't help the Federal Government guard against subversion. It does mean that the responsibility for investigation belongs to the Federal Bureau of Investigation and the responsibility for prosecution belongs to the Department of Justice."

The Pittsburgh Post-Gazette of April 3, 1956, editorialized that "the Federal Government, having entered the field of sedition control, has pre-emptory interest in that field and is the agency to prosecute therein. This view is endorsed by the U. S. high court, which says further that 'a state sedition statute is superseded regardless of whether it purports to

supplement the Federal law.' Common sense as well as law argues thus. The control of sedition is tricky business; it calls for timing, tact, and central direction. The intrusion of state governments in this field could impede the work of Federal agents, confuse the issues, and even discredit laws against sedition."

The *New York Times* in an editorial of April 16, 1956, entitled "Three Decisions", said: "In the second of this series of decisions, the *Nelson* case, the Court spelled out its view that the area of national security belongs primarily to the Federal Government rather than to the states. * * * The decision, which seems to us to be a simple matter of common sense, puts the responsibility for internal security where it belongs, and in fact the only place where it can be effectively exercised, with the Federal Government."

Thus far, I have endeavored to prove to those of you who would vote for the pending resolution, in the belief that the Supreme Court was guilty of an unconstitutional extension of federal power in its decision in the *Nelson* case, would do so on a fallacious assumption and give aid and comfort to those who are striving in Congress and out of it to curtail the powers of the Supreme Court to interpret, expound and apply the Constitution.

On August 8th last, the *New York Times* said editorially, "The consistently liberal decisions of the United States Supreme Court in the general area of civil liberties have produced a reaction in Congress which may have been inevitable but can and should be thwarted. The reaction has taken the form of several bills designed in one way or another to override or to turn back the rulings at which they are aimed. The worst of these bills to have passed the House is the one that would wreck the historic doctrine of Federal pre-emption by providing that no Federal law could supersede a state law on the same subject unless Congress specifically so stated or unless the two were absolutely irreconcilable." And then, speaking with special reference to H.R. 3, the editorial continued, "This

bill grew out of the decision in the *Nelson* case in 1956, in which the Supreme Court agreed with the Supreme Court of Pennsylvania in invalidating a state statute aimed at sedition against the Federal Government, on the sensible grounds that Congress had already pre-empted the field by the Smith Act of 1940."

Whence, then, comes the impetus behind the movement to obviate by Congressional action the effect of the ruling in the *Nelson* case? Is it possible that that decision is the whipping boy (to employ a somewhat mixed metaphor) of those who would flay the doctrine of federal pre-emption to extinction? Let us stop beating around the bush about this thing. Let us come out in the open and acknowledge the decision which is the real basis for the current widespread criticism of the Supreme Court. Only in that way can we deal fairly and above board with the recent Civil Liberties decisions of the Supreme Court which share the report's criticism. The preponderant backing of the attack on the decision in the *Nelson* case is made up of those who would undo the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483. That statement finds confirmation, as lately as night before last, in the vote in the Senate on the motion to re-commit H.R. 3, which was admittedly introduced in an effort to nullify the doctrine of federal pre-emption as applied in the *Nelson* case.

It is true that nowhere in the report is the public school segregation decision mentioned. According to reliable newspaper account of the introduction of the resolution and the report whereon it is based, "It was explained that Committee members felt that to inject this into the study would stir sectional feelings and defeat the over-all purpose of the study." I readily and wholeheartedly concede the good faith of the Committee's desire and intent in such regard, but the fact remains that no matter how meticulously reference to the school segregation case is avoided, it must be recognized that the principal cause of the present-day criticism of the Supreme Court is that decision. And, thus, the Committee report, quite unintentionally but nonetheless actually, exploits a hostility to the Supreme Court bred of a decision (involved in current litigation) which

the report does not, and could not properly, discuss.

Of course, the segregation issue has no proper place in determining whether the decision in *Pennsylvania v. Nelson* constituted an extension of federal power by the Supreme Court in its application of the doctrine of pre-emption, or whether the Civil Liberties cases above referred to worked a deprivation of States' rights because of the Supreme Court's interpretation of the protection afforded the individual by the Fourteenth Amendment against hostile State action. The segregation issue is here, nevertheless, inextricably imbedded in the background of the resolution you are asked to adopt. You might as well face that fact.

If prosecution for sedition against the Federal Government were permitted to State courts acting under State statutes (and that is what the pending resolution envisions), confusion amounting to chaos in the hunt for and prosecution of alleged subversives would result to the detriment and peril of the internal security of our citizenry. In such a deplorable situation, I would hold with Judge Learned Hand that "Risk for risk for myself, I would rather take my chance that some traitors will escape detection than spread abroad a spirit of general suspicion and distrust which accepts rumor and gossip in the place of undisputed and unimpeached inquiry."

Coming, then, to the matter of procedure to be pursued with respect to the pending resolution, it is my opinion that the best thing to do would be to dispose of it without reference to its substance. Consequently, I shall move that the resolution be tabled. If that motion should fail and a vote is taken on the resolution, I desire that I be recorded as having voted against it. Indeed, it seems no more than appropriate that, in a matter of such grave importance, a roll call vote should be had.

I now move that the resolution be tabled.

Weintraub:

The following are remarks made by Joseph Weintraub, Chief Justice of the Supreme Court of New Jersey on August 23, 1958, at the Conference (See DISSENTS on page seven)

Reprints

Reprints of the Report and Resolution (pages 3-6 of this issue) and of the dissenting speeches of Chief Justices Jones, Weintraub, Gibson, and Condon, along with the explanatory remarks of Chief Justice Dethmers, are available in a special six page form at the following schedule of prices:

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CAMBRIDGE, MASS., THURSDAY, OCTOBER 23, 1958

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Report of the Committee On Federal-State Relationships As Affected by Judicial Decisions

This Report was submitted to and approved by the Conference of Chief Justices at Pasadena, Cal., on August 23, 1958. The complete text of the Report is published in this special four-page supplement.

Foreword

Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Cramton;
3. "Congress, the States and Commerce" by Professor Alison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and
5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research ma-

terial would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

Background and Perspective

We think it desirable at the outset of this report to set out some points

which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United States have a major impact upon federal-state relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by Acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting federal-state relationships are the rulings and actions of federal administrative bodies. These include the independent agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board. Many important administrative powers are exercised by the several departments of the Executive Branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Consti-

The Resolution

RESOLVED:

1. That this Conference approves the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions submitted at this meeting.

2. That in the field of federal-state relationships the division of powers between those granted to the national government and those reserved to the state governments should be tested solely by the provisions of the Constitution of the United States and the Amendments thereto.

3. That this Conference believes that our system of federalism, under which control of matters primarily of national concern is committed to our national government and control of matters primarily of local concern is reserved to the several states, is sound and should be more diligently preserved.

4. That this Conference, while recognizing that the application of constitutional rules to changed conditions must be sufficiently flexible as to make such rules adaptable to altered conditions, believes that a fundamental purpose of having a written constitution is to promote the certainty and stability of the provisions of law set forth in such a constitution.

5. That this Conference hereby respectfully urges that the Supreme Court of the United States, in exercising the great powers confided to it for the determination of questions as to the allocation and extent of national and state powers, respectively, and as to the validity under the federal Constitution of the exercise of powers reserved to the states, exercise one of the greatest of all judicial powers — the power of judicial self-restraint — by recognizing and giving effect to the difference between that which, on the one hand, the Constitution may prescribe or permit, and that which, on the other, a majority of the Supreme Court, as from time to time constituted, may deem desirable or undesirable, to the end that our system of federalism may continue to function with and through the preservation of local self-government.

6. That this Conference firmly believes that the subject with which the Committee on Federal-State Relationships as Affected by Judicial Decisions has been concerned is one of continuing importance, and that there should be a committee appointed to deal with the subject in the ensuing year.

tution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. (See Judge Learned Hand's most interesting Holmes Lectures on *The Bill of Rights* delivered at the Harvard Law School this year and published by the Harvard University Press.)

Third, there is obviously great interaction between federal legislation and administrative action on the one hand, and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply Acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied

that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in expressing our concern and, at times, our criticisms in making the comments and observations which follow.

Problems of Federalism

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and state governments.

The guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by de Tocqueville. Under his summary of the federal Constitution he says:

The first question which awaited the Americans was to divide the sovereignty that each of the different states which composed the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, repre-



DOUGLAS BRENNAN BLACK CLARK WARREN HARLAN FRANKFURTER WHITTAKER BURTON

The Supreme Court as it was composed last August at the time of the Conference of Chief Justices in Pasadena, Cal. Since then Justice Burton has been replaced by Justice Potter Stewart.

sented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation.

In the period when the Constitution was in the course of adoption the *Federalist* (No. 45) discussed the division of sovereignty between the Union and the States and said:

The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State.

Those thoughts expressed in the *Federalist* of course are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and state governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original states and the governments of those states after the Revolution. Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the states. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must rely upon representative government.

But it is this spirit of self-government, of local self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt, on the division of powers between the national and state governments — delivered in his addresses at the University of Nebraska and published under the title *The Doctrine of the Separation Powers and Its Present Day Significance* are persuasive. He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British government with this sentence: "As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several states indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other — in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means towards an end; and that the horizontal distribution or allocation of powers between national and state governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

Two Major Developments in the Federal System

The outstanding development in federal-state relations since the adop-

tion of the national Constitution has been the expansion of the power of the national government and the consequent contraction of the powers of the state governments. To a large extent this is wholly unavoidable and indeed is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in *Texas v. White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is discounted as a serious overstatement, it remains a dramatic reminder of the great influence which Supreme Court decisions have had and can have. As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on *Stare Decisis*, 49 *Columbia Law Review* 735.

Sources of National Power

Most of the powers of the national government were set forth in the original constitution; some have been added since. In the days of Chief Justice Marshall the supremacy clause of the federal Constitution and a broad construction of the powers granted to the national government were fully developed, and as a part of this development the extent of national control over interstate commerce became very firmly established. The trends established in those days have never ceased to operate and in comparatively recent years have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint the increase in federal revenues resulting from the Sixteenth Amendment (the Income Tax Amendment) has been of great importance. National control over state action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-state relationships.

The General Welfare Clause

One provision of the federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general welfare clause. In *United States v. Butler*, 297 U. S. 1, the original Agricultural Adjustment Act was held invalid. An

argument was advanced in that case that the general welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare. The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See *Steward Machine Co. v. Davis*, 301 U. S. 548, and *Helvering v. Davis*, 301 U. S. 690. In those cases the Social Security Act was upheld and the general welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

Grants-in-Aid

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report. Perhaps we should also observe that since the decision of *Massachusetts v. Mellon*, 262 U. S. 447, there seems to be no effective way in which either a state or an individual can challenge the validity of a federal grant-in-aid.

Doctrine of Pre-emption

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause. More recently the doctrine has been applied in other fields, notably in the case of *Commonwealth of Pennsylvania v. Nelson*, in which the Smith Act and other federal statutes dealing with Communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania anti-subversive statute which sought to impose a penalty for conspiracy to overthrow the government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

Labor Relations Cases

In connection with commerce clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created (depending upon how one looks at the matter) by the Supreme Court's decision in *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U. S. 383, which overturned a state statute aimed at preventing strikes and lockouts in public utilities. This decision left the states powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] state."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a state court was upheld. In *International Association of Machinists v. Gonzales*, a union member was held entitled to maintain a suit against his union for damages for wrongful expulsion. In *International Union, United Auto, etc. Workers v. Russell*, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that at the present time there is unfortunately a kind of no-man's land in which serious uncertainty exists. This un-

certainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of *Textile Union v. Lincoln Mills*, 353 U. S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor Management Relations Act of 1947. Paragraph (a) of that Section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Paragraph (b) of the same Section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and to include within that body of federal law specific performance of promises to arbitrate grievances under collective bargaining agreements.

What a state court is to do if confronted with a case similar to the *Lincoln Mills* case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains, where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a state court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by state law, or is it limited to those which would be available under federal law if the suit were in a federal court? It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the federal law and committed solely to the jurisdiction of the federal courts, so that the state courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that Section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between state and federal governments. As he points out much of this confusion is due to the fact that Congress has not made clear what functions the states may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which state action is clearly permissible. That is where actual violence is involved in a labor dispute.

State Law in Diversity Cases

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the states or the effect of state laws. The celebrated case of *Eric R. R. v. Tompkins*, 304 U. S. 64, overruled *Swift v. Tyson* and established substantive state law, decisional as well as statutory, as controlling in diversity cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

In Personam Jurisdiction Over Non-Residents

Also, in cases involving the *in personam* jurisdiction of state courts over non-residents, the Supreme Court has tended to relax rather than tighten restrictions under the due process clause upon state action in this field. *International Shoe Co.*

Harvard Law Record

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Published weekly on Thursday for twelve weeks of each term by The Harvard Law School Record Corporation, 23 Everett St., Cambridge, 38, Massachusetts. Subscription price: \$2.00 per term, \$4.00 per year (24 issues) mailed; student subscription \$1.50 per term mailed, \$1.00 per term distributed at the Law School. Individual copies 10c each at the Law School, 20c each mailed. Business and editorial offices, 23 Everett St., Cambridge 38, Massachusetts. Telephone University 8-7600, extensions 418 and 419.

Entered as second-class matter November 19, 1946, at the post office in Lexington, Massachusetts, under the Act of March 3, 1879.

v. Washington, 326 U. S. 310, is probably the most significant case in this development. In sustaining the jurisdiction of a Washington court to render a judgment *in personam* against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there." Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including *McGee v. International Life Insurance Co.*, 355 U. S. 220, until halted by *Hanson v. Denckla*, 357 U. S. decided June 23, 1958.

Taxation

In the field of taxation the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street.

In recent years cases involving state taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a state has sought to tax a contractor doing business with the national government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years towards the validity of state taxation than it formerly took.

Other Fourteenth Amendment Cases

In many other fields, however, the Fourteenth Amendment has been invoked to cut down state action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State anti-subversive acts have been practically eliminated by *Pennsylvania v. Nelson* in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

The Sweezy Case — State Legislative Investigations

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy v. New Hampshire*, 354 U. S. 234. In that case, the State of New Hampshire had enacted a subversive activity statute which imposed various disabilities on subversive persons and subversive organizations. In 1953 the legislature adopted a reso-

lution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins v. United States*, 354 U.S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity." Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part:

The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it can not be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the Attorney General's investigation. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state and hence that the liberties of the individual should prevail. Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the state's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cranton says:

The most puzzling aspect of the *Sweezy* case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power.

Public Employment Cases

There are many cases involving public employment and the question of disqualification therefor by reason of Communist party membership or other questions of loyalty. *Slochow v. Board of Higher Education*, 350 U.S. 551, is a well known example of cases of this type. Two more recent cases, *Lerner v. Casey*, and *Beilan v. Board of Public Education*, both in 357 U.S. and de-

cided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness. Lerner was a subway conductor in New York and Beilan was a public school instructor. In each case the decision was by a 5 to 4 majority.

Admission to the Bar

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant — in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned.

Konigsberg v. State Bar of California, 353 U.S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the state highest court for decision and was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the state highest court of "whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in *Dennis v. United States*, 341 U.S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U.S. 269) would not support such an inference either. On the matter of advocating the overthrow of the national or state government by force or violence, the Court held (as it had in the companion case of *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, decided contemporaneously) that past membership in the Communist party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the Bar Committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his

views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but (at 353 U.S. 270) said that "prior decisions by this Court indicated that his objections to answering the questions (which we shall refer to below) were not frivolous."

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions." In a footnote appended to this statement it is said (353 U.S. 259):

Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application.

Mr. Justice Harlan's dissent took issue with these views — convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and the committee of the State Bar investigating his application. (353 U.S. 284-309.) Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party. The Bar Committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party. We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion, that the Committee was concerned with its duty under the statute "to certify as to this applicant's good moral character" (p. 295), and that the Committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee (p. 301), and that the Committee, in passing on his good moral character, sought to test his veracity (p. 303).

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto*, a basis for excluding an applicant from the bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to *Konigsberg*, we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the Committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to

be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point (pp. 270-271) it says that the Committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another (p. 273) it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U.S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to society and the bar itself that lawyers be unintimidated — free to think, speak and act as members of an Independent Bar." The majority thus makes two stated concessions — each, of course, subject to limitations — one, that it is important to leave the states free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a state is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar. The power left to the states to regulate admission to their bars under *Konigsberg* hardly seems adequate to achieve what the majority chose to describe as a "worthy objective" — "a bar composed of lawyers of good character."

We shall close our discussion of *Konigsberg* by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-state relations — the right of States to establish and administer standards for admission to their bars — into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment (p. 312), he says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgement. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The *Lerner* and *Beilan* cases above referred to seem to indicate some recession from the intimations, though not from the decisions, in the *Konigsberg* and *Slochow* cases. In *Beilan* the school teacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

State Administration of Criminal Law

When we turn to the impact of decisions of the Supreme Court upon the state administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several States. There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not

only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect. Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no more striking example of this can readily be found than in *Moore v. Michigan*, 355 U.S. 155.

In the *Moore* case the defendant had been charged in 1937 with the crime of first degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education (only the 7th grade) and as being of rather low mentality. He confessed the crime to law enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire "to get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed. About 12 years later the defendant sought a new trial principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned. The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court. The Supreme Court of the United States reversed. The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the state to prove its case against him (saying the evidence was largely circumstantial), by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law — solitary confinement for life at hard labor. The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the state might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is *Lambert v. California*, 355 U.S., decided December 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles. Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined. The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the con-

venience of the police, that the defendant had no opportunity to comply with it after learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of state and federal statutes which imposed criminal penalties for non-feasance and stated that he felt confident that "the present deviation will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas corpus matters because what is probably the most far reaching decision of recent years on state criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas corpus case. That is the case of *Griffin v. Illinois*, 351 U. S. 12, which arose under the Illinois Post Conviction Procedure Act. The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a state permits an appeal by those able to pay for the cost of the record or its equivalent, then the state must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings. Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in *Griffin v. Illinois* are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that in order to give full effect to the doctrine of *Griffin v. Illinois*, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The *Griffin* case was very recently given retroactive effect by the Supreme Court in a per curiam opinion in *Eskridge v. Washington State Board of Prison Terms and Paroles*, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge. A statute provided for so furnishing a transcript if "in his [the trial judge's] opinion justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial. The defendant then sought a writ of mandate from the Supreme Court of the state, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed. In 1956 he instituted habeas corpus proceedings

which, on June 16, 1958, resulted in a reversal of the Washington Court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in *Griffin*, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself. Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in *Griffin* that it should not be retroactive. He did not participate in the *Eskridge* case.

Just where *Griffin v. Illinois* may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the non-meritorious appeals eliminated. One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions. Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the state.

Whether this latter approach which we may call "screening" would be practical or not is, to say the least, very dubious. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U. S. C. A. contains a sentence reading as follows: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." This section or a precursor thereof was involved in *Miller v. United States*, 317 U. S. 192, *Johnson v. United States*, 352 U. S. 565, and *Farley v. United States*, 354 U. S. 521, 523. In the *Miller* case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that in order that such a review might be made by the Court of Appeals it was necessary that it have before it either the transcript of the record or an adequate substitute thereof, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought. Similar holdings were made by per curiam opinions in the *Johnson* and *Farley* cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in *Johnson*, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The *Eskridge* case, above cited, decided on June 16, 1958, rejected the screening process under the state statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed — not simply a review of the screening process, as under the federal statute above cited. The effect of the *Eskridge* case thus seems rather clearly to be that unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence imposed. In most, if not all, states, such a classification would doubtless require legislative action.

In the *Griffin* case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for

appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some state appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect. How far *Eskridge* may lead and whether it will be extended beyond its facts remain to be seen.

Conclusions

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much of this stems from the doctrine of a strong, central government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the states which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government — the foundation of our democracy — they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last 25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policymaker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently — one might, indeed, say customarily — exercised policymaking powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to

which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policymaker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed — namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government — the Supreme Court — should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 *Columbia Law Review* 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every

member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and Judicial decisions, bear repeating:

If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment.

(Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is adhering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Respectfully submitted:

Frederick W. Brune, Chief Judge of Maryland, Chairman

Albert Conway, Chief Judge of New York

John R. Dethmers, Chief Justice of Michigan

William H. Duckworth, Chief Justice of Georgia

John E. Hickman, Chief Justice of Texas

John E. Martin, Chief Justice of Wisconsin

Martin A. Nelson, Associate Justice of Minnesota

William C. Perry, Chief Justice of Oregon

Taylor H. Stukes, Chief Justice of South Carolina

Raymond S. Wilkins, Chief Justice of Massachusetts

DISSENTS

(Continued from page two)



Joseph Weintraub

of Chief Justices in Pasadena, Cal.

Mr. Chairman and members of the Conference. I am confident that every member of this Conference has carefully considered this important resolution and has reached, as I have, a firm view with respect to it. I sense that the resolution will attract a spanking majority. I doubt that extended debate will add very much. I speak simply because, in the light of the importance of the matter, I should state the reasons why I cannot join in the resolution. May I say to members of the Committee who prepared the Report that my difference of view certainly does not suggest any personal criticism. I am just one lawyer differing with another.

I place no institution, office or public official beyond full and frank public criticism. Nor do I question the right of any member of this Conference, at least in his capacity of private citizen, to express his disagreement with the work of the Supreme Court. But I do question the wisdom, and indeed the propriety, of a joint pronouncement by this Conference of Chief Justices, assembled as it is in an official or quasi-official capacity. I doubt that it is within the proper function of this Conference to issue what in essence is a blast, devoid of any specific recommendation as to any specific matter. Most importantly, in my judgment, the criticism and characterizations in the Report are unwarranted.

As I read the Report it laments the readjustment of power and authority between the national government and the states and then belabors the Supreme Court for its role in the process.

I agree that John Marshall would be astounded by the present scene. This, I believe, is most fortunate, because if the present scene were such as to appear at all familiar to him, our nation would be a third or fourth rate power, if indeed it would exist at all. The Report itself acknowledges the inexorable sweep of scientific and economic events which have dictated the readjustment of responsibility and power, events which have led the states themselves to look to federal authority for the solution of problems beyond their abilities.

I am sure that if the federal government would abandon its many programs of local assistance and release to the states the sources of revenue gathered for those purposes, my little state — small in acreage but large in population, industry, and tax remittance to Washington — would profit greatly. Yet I would not urge so provincial a view, because the welfare of the several states and territories is single and indivisible. For the same reason, in all matters involving the relationship between the nation and state, the rights of a single

state must yield to federal needs. And for the same reason, in international matters it is today unthinkable that any state may possess the power to pursue a course of action or inaction which may embarrass or jeopardize the well-being of the entire nation.

Such is the background against which the Supreme Court must resolve the issues before it. Its horizon is different from ours. We may lament the course of history and even weep in its wake, but let us not suppose that we can by resolution stay the current of events.

The Report assails decisions of the Supreme Court in two areas: interpretation of acts of Congress and interpretation of Constitution, especially the Fourteenth Amendment.

The Report cites a number of decisions as to many of which it is adversely critical.

I assume it is not intended to obtain a vote in this Conference upon each of those decisions. I should be surprised if some 50 Justices could, upon careful consideration, be unanimous as to any of those decisions and I would be amazed if unanimity were achieved as to the basket-full. And although each of us might venture a curbstone view with respect to the cases cited, I doubt that we would assume responsibility for a public pronouncement without consideration of the record, briefs and arguments presented in each case. We would want the benefit of the same material with which the Supreme Court was favored in those matters.

Hence we can only deal with the generalized conclusions and criticisms which appear in the closing portion of the Report.

With respect to the interpretation of acts of Congress, the Supreme Court is contending with a well-known phenomenon — legislative ambiguity. I think it enough to say that if the Court has incorrectly divined the legislative intent, correction is within the easy reach of the authors of the ambiguity.

As to its work in the interpretation of the Constitution, we may of course readily disagree. But our disagreement should be tempered by our understanding of the inherent difficulties of the constitutional interpretive process. It would hardly be a justifiable criticism to say the Supreme Court engages in a process of evaluation and judgment. The Constitution does not offer a literal, definitive answer to the awesome problems which confront the Court. One may read the commerce clause, the due process clause, the equal protection clause, a thousand times and still not detect the slightest clue to the proper decision. The answer must be found elsewhere. The Constitutional framework, as we all know, is a mere skeleton expression of governmental power and individual rights. The actual contours of those powers and rights must be determined in the context of changing conditions, by a process which is more than a mere mechanical application of a constitutional phrase to a set of facts.

We may of course disagree with the nine gentlemen at Washington. Lawyers have always disagreed with each other and always will. But while we may register disagreement, we cannot justly impute to members of the Supreme Court anything less than conscientious devotion to duty as they see it.

And hence I disapprove strongly of what to me is the essence of the Report — the charge that the Justices of the Supreme Court have violated the duty of judicial self-restraint in constitutional areas, the suggestion that their behavior has been such as to raise considerable doubt that we remain a government of laws and not of men. I have no doubt whatever that the Justices are men of conscience and honor, that they respect the rule of law, that none would set himself above the law or seek to arrogate power or responsibility which he believes is not his.

It is one thing for a judge to say that he disagrees with another; it is something else to impute to that other a violation of the basic standards of judicial behavior. I find no bill of particulars within the Report which in my view supports the charge and I know of no facts that would sustain it.

I think it unfortunate that the prestige of the Conference of Chief

Justices should be placed behind so serious an indictment. I think it unfortunate that there should emanate from this Conference a document which will surely be misunderstood and so readily lends itself to misuse by anyone who tilts with the federal government. Any man or group of men who choose to place themselves above constituted authority or to flout basic rights as the Supreme Court authoritatively finds them to be, will surely claim comfort and support in the sweeping reflection upon the Supreme Court in the Report.

Gibson:

The following are remarks made by Phil S. Gibson, Chief Justice of the Supreme Court of California, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.

This resolution is intended as criticism of recent decisions of the United States Supreme Court. With the exception of those cases discussed in the report which relate to the pre-emption question, the decisions deal for the most part with the protection of the fundamental rights of individuals guaranteed by our Constitution. It is, of course, the duty of the Supreme Court to protect the constitutional rights of the individual against the power of government, whether it be the power of national, state or local governments, and the court has my enthusiastic support in the performance of this duty.

The cases dealing with the problem of whether a federal statute has preempted the field present difficult questions where the statutes are unclear. We have the same problems in the state courts in determining whether a local ordinance has invaded a field occupied by a state statute. If a court is mistaken in its interpretation of the legislative intent in any of these cases, the error can easily be corrected by legislative action unless a constitutional question is presented. It does not seem to me that any of the decisions of the Supreme Court holding that a federal statute has preempted the field may properly be characterized as lacking in judicial restraint even if we disagree with the result. Moreover, in my opinion *Commonwealth v. Nelson* was correctly decided.

Some of the decisions discussed in the report are criticized upon the



Phil S. Gibson

ground that the Supreme Court has erroneously construed the record. One of those decisions, *Konigsberg v. State Bar of California*, involves a matter now pending in our court and, of course, it would not be proper for me to discuss the merits of that case. I might mention, however, that the Supreme Court of the United States did not have the benefit of an interpretation of the record by an opinion of our court which has the power to make an independent determination of questions of fact in all matters dealing with admissions to practice. I think it is improper for the members of this Conference to criticize the court for its interpretation of a record unless, as Chief Justice Weintraub has pointed out, they have read the record. And even if we assume that the Supreme Court of the United States has made a mistake in its interpretation of a record, how many justices gathered here today can say that the court they represent has not made a similar mistake. I think we would

make a much greater mistake in adopting this resolution and I hope it will be defeated.

Condon:

The following are remarks made by Francis B. Condon, Chief Justice of the Supreme Court of Rhode Island, on August 23, 1958, at the Conference of Chief Justices in Pasadena, Cal.

I profoundly regret that this body did not adopt the motion by Chief Justice Jones. I intended to make that motion myself.

The first time I saw this report was on the first day of this Conference. I assume that practically all of the members saw this report for the first time that day. That report covers a great deal. It ought to receive, it seems to me, the same mature deliberation which the members of this



Francis B. Condon

Court in the discharge of their judicial duties give to the briefs presented in the most ordinary case that comes before the Court. We have not had that opportunity.

I have not read the report since it was read by Mr. Chief Justice Brune, but I must confess, gentlemen, that I would like more time to consider it. What are we doing? Forty-eight Chief Justices are sitting here in a brief conference and undertaking to disapprove of and condemn the actions of nine Justices of the highest court in this Republic. What right have we to condemn them? What right have we to disapprove of the manner in which they have discharged their duties? Indeed, Mr. Chairman, I question whether this Conference has the right under our Articles of Organization to adopt such a report. This is a consultative organization. It is not an organization to sit in judgment upon the conduct of any state officers of any of our several states, nor indeed is it an organization to sit in judgment upon the highest court in the land. And so, Mr. Chairman, I have asked for these few moments here this morning in order that I might explain my vote.

I do not intend to support this resolution. I do not intend to support it because, as our Chairman of Group Three said: "Everything in the report is incorporated in the resolution by reference." So, when you vote to pass this resolution, you vote to approve every single paragraph in that report, and I, for one, do not care to be recorded in that manner. Therefore, I subscribe to the suggestion made by Mr. Chief Justice Jones of Pennsylvania that when the vote is taken on this resolution, it shall be by ayes and nays so that each of us shall have an opportunity to record his stand, and it will be a matter of public record.

MENSHIKOV

(Continued from page one)

featured in several national magazines, and is a frequent subject of television news programs. He speaks fluent English.

Professor Mark De Wolfe Howe will moderate the program. After the conclusion of the formal address, questions from the audience will be entertained.

Kennedy Speaks

Senator John F. Kennedy (D) of Massachusetts will deliver a major campaign address at Sanders Theater on Monday at 5 p.m., it has been announced by Charles Edson, 2L of University City, Mo., president of the Law School Democratic Club, and Frederick Leventhal, president of the Harvard Young Democratic Club. The meeting will be open to the public.

SONNABEND

(Continued from page one)

as the criteria by which prospective subsidiaries will be selected.

Studebaker-Packard will continue to manufacture automobiles at least until 1959, Mr. Sonnabend declared. But, he added, if the company's small sized "Lark" is not successful, Studebaker-Packard will "probably" not retool for another automotive venture after 1959. The "Lark" will compete with American Motors' Rambler models for a share of the small car market.

Mr. Sonnabend is also president of Hotel Corporation of America, president of Botany Mills, and a director of a number of other large corporations.

— Cover

Alumni Notes

LL.B. '38 — Nathan Moger has been appointed Auditor and Master by the Justices of the Superior Court of Massachusetts, to hear cases and to report his findings to the Court. Mr. Moger is former Assistant Corporation Counsel of the City of Boston, and former counsel for the Transit Commission of the City of Boston.

LL.B. '42 — Frederic O. Floberg and LL.B. '42 — Charles L. Michod have opened offices for the practice of law at Suite 1023, The Field Building, 135 South La Salle Street, Chicago 3, Ill.

LL.B. '49 — Billy S. Sparks is now a member of the firm of Langworthy, Matz and Linde at 300 Union National Bank Building, Kansas City 6, Missouri.

LL.B. '52 — Theodore C. Geisert has opened an office for the general practice of law at 105 Avenue A East, Kingman, Kansas.

LL.B. '52 — Daniel A. Austin, Jr., of Hartford, Conn., has received a Meritorious Service Certificate and a cash award of \$150.00 from the Federal Trade Commission. The selection was made by a three-man committee on the basis of recommendations from supervisors of FTC's 725 employees in Washington, D.C., and eight other major cities.

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Abba Eban Deplores Spread of 'Nasserism'

Speaking to a near-capacity crowd in Sanders Theater for the Law School Forum's opening session of the year last Friday evening, Ambassador Abba Eban from Israel characterized present Arab-Israeli relations as "a useless hostility, which deprives the Middle East of its vast opportunity and rightful role in the world." Ambassador Eban declared that the central disappointment of Israel's first decade of restoration has been her lack of reconciliation with her neighbors, and that this circumstance has prevented the entire area from using its unsurpassed resources to build a new and illustrious civilization.

The Ambassador opened his remarks with a review of Israel's first decade, which, while just closed, he pictured as yet forcibly alive and ever living. He outlined as the nation's achievements her reclamation of the land, her democracy in the midst of despotism, her open gate through which one million of her kinsmen have poured, her security amid tension, her cultural accomplishments, and perhaps most important, her network of friendship, which, he said, was history's final verdict for her integration in the world community. This decade, he explained, had permitted the people of Israel, after 2,000 years, to become the agents, rather than the victims, of their history.

Yet, in spite of all this, and the newly won independence of the Arab states, hostility continues to dominate the life of the area, of which the Arab-Israel conflict is only one aspect. The intra-Arab disputes are just now coming to the fore, Mr. Eban asserted. In trying to evaluate these movements, he warned, we must beware of journalistic simplifications and instead demand a clear and objective analysis. The important thing in the Middle East is not "coming to terms with the Arabs," as is often stated, for "some indecencies are not negotiable." The real issue is whether in the name of cultural unity there is some inherent right in "Nasserism" to bring together separate states by force.

Mr. Eban expressed inability to understand why the "pro-Soviet nationalism of Nasser" should be labeled "Arab nationalism," and the "pro-Western nationalism of Bourguiba" should not be so labeled. But no Arab nationalism will engulf the nation of Israel, he declared, for "The Near East is not now, never has been, and never will be, an exclusively Arab domain."

Mr. Eban, on several occasions, asserted that President Nasser of the United Arab Republic was working hand in hand with the Soviets.

"Presently there is a brooding tranquility in the Middle East, but the basic tensions remain," he emphasized, one of which is the constant tension in the Arab world between centralization and unity on the one hand, and decentralization and diversity on the other. Of these two aspects, the Ambassador stressed, the Middle East will achieve a new greatness not through a "rising as one



Abba Eban

people," but rather through its "historical diversity." In dealing with the situation, he noted, we must take into account several new developments of great importance. These include a "faith and confidence of the freedom loving people of the area, restored by the recent United States intervention, a similarly renewed spirit of resistance in the countries threatened by 'Nasserism,' and a new recognition by the free world of what a strong Israel can mean for the stability of the free world and the prolongation of the present tranquility of the area."

Today's theme must be the consolidation of this tranquility, and toward that end Ambassador Eban recommended that the free world guarantee the status quo against forcible change, offer a chance of peaceable consolidation, aid Arab or non-Arab governments resisting hegemony, and attempt to divert the mind of the area from political bickering to the theme of economic and social development. In this last regard, he said, recent history had shown that "political and institutional liberation was not enough."

Following the Ambassador's prepared remarks, the moderator, Professor Richard R. Baxter, invited questions from the floor. In response to one, regarding Israel's possible assent to President Nasser's Bandung proposal for an exchange of boundary guarantees in return for Israel's secession of one-third of its territory, Mr. Eban observed that while Israel had its imperfections, one of them was not that it was too large, and that this arrangement would be out of the question.

— Skornia

DESK

(Continued from page one)

through because of technical difficulties. An architect by the name of Coolidge, of the firm of Shipley, Rutan & Coolidge, contracted to take on the job of designing the unfinished Langdell Hall, and became acquainted with the Dean's problem of designing a desk suitable for his many tasks. The resulting cooperation produced the administrative masterpiece which has resided in the main lobby of Langdell Hall ever since.

Upon close inspection, it will be noticed that the inside of the desk is divided into three levels, and its entire circumference is utilized by an entering door which drops into place as part of the main structure. To complete the efficiency of the desk, Dean Pound added a fast moving swivel chair in its center, and two lower shelves of books and reference works. Upon necessity, a phone appeared from another corner. With these arrangements, it was possible to have the desk top free at all times for the many jobs which were simultaneously in process. By scooting swiftly from one part to another, the Dean could almost instantaneously furnish callers and assistants with up-to-the-minute reports and requests on projects ranging from Admissions to Alumni relations. Everything which affected the school, its prospective, present, and past students, and much that concerned every legal problem of the day crossed the desk in these busy years. This is not to mention either, the steady outpouring of books, articles, and commentaries of a scholarly nature which flowed

from the Dean's mind, and his desk, during the period.

One might say that the desk retired with the Dean. In its advancing years, the desk has been called upon to do a reduced job. Not so the Dean. "Let me show you how hard they make you work when you're supposed to have retired," he comments, as he shows one around his book lined office.

On one side of his desk are the anticipated stacks of books and papers, with just enough room between for a writing pad, on which the Dean is composing a chapter for a book on the family court to be published by the National Probation and Parole Association. In one of the stacks of papers is a sheaf belonging to the Illinois Bar Association, for which he is doing some research on its project to amend the judicial article of the Illinois constitution and reform the Illinois state court system. Beneath that is a letter from the Brooklyn Law School, inviting him to speak there in November.

While being duly awed by this display, one notices a visitor from Madrid entering the office to deliver a personal letter from the Instituto Internacional Para la Unificación del Derecho Publico Comparado inviting the Dean to address that organization's meeting on October 27, the occasion of Dean Pound's eighty-eighth birthday. The visitor assures the Dean that his coming "would be a very memorable happening for Spain and for all European peoples." (Dean Pound has declined the invitation, with regret).

But the busy future schedule only lives up to the recent past. On the other side of the desk, a second chair dutifully placed in front, are evidences of his work during the past

Law Wives

On Wednesday, October 29, Miss Betty McCabe will speak to the Law Wives on "Behind the Scenes in Television." Miss McCabe has been assistant director of *Omnibus* and also worked on such programs as *Kraft T.V. Theater* and *Texaco Star Theater*. This meeting will be held in the North Dining Room of Harkness Commons at 8 p.m.

year. Last December he gave two addresses before the Oklahoma Bar Association. In the early spring, Dean Pound delivered the first Shulman Lecture at the Yale Law School, the annual Gleason Lecture in Watertown, "Tort or Liability?", and an address before the Chicago Bar Association, "Toward an Adequate Administration of Justice." In April he gave the Law Day address, "Law and Laws," at Ohio State University Law School, and on May 1, the Law Day address here. In June he traveled to the South to give the address, "Toward Improving the Administration of Justice in North Carolina" before that state's bar association, and contributed a summation of the year's activity in administrative law to the *Virginia Law Weekly's* column, "Dicta."

The walls of his office show the rewards of a long life dedicated to learning. The many citations and awards disclose that Harvard Law School's elder statesman holds such varied honors as an award from the Republic of China's Ministry of Justice and an initiation as one of New England's few Kentucky Colonels.

— Skornia



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