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# Attacks on the Supreme Court

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*The intense contemporary criticism of the United States Supreme Court is analyzed in the following article with an attempt to determine its justification.*

# ATTACKS ON THE SUPREME COURT*

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ACCORDING TO AN old dictum, it makes a difference whose ox is being gored. In the past few years the Supreme Court has gored some oxen (plus, now and then, a sacred cow), and the proof of the proverb lies in the sustained attack which has been mounted. The common judgment is that contemporary criticism of the Court has few parallels for scope and intensity in American history.

Disparagement of court decisions is not a new phenomenon, of course. Criticism of the high Court has flashed like summer lightning through the nation's history, and one ordinarily need go no further than his favorite historical character to find some juicy tidbit of invective. Indeed, a case might be made against the present expressions of pique solely on the grounds of their pedestrian tenor.

Senator William E. Jenner has characterized the Court's work as lacking "solid foundation in either legal principles or common sense." Professor Edward S. Corwin has suggested that the justices "bone up a little on the history of the Constitution before trying to remake it." Journalistic pundits have alternatively explained their disagreement with the Court's opinions by claiming that the justices are sadly deficient in scholarship, or haven't had sufficient lower court experience to function properly on the high bench.

The unique status of the Court makes it a scapegoat for any group in our society. Unlike politicians, the Supreme Court cannot be all things to all people. The nature of the institution impels judgment and decision — the deliberate choice between competing claims and theories. And what pleases the Civil Liberties Union is apt to wrap a fog of gloomy debate around the next American Legion convention.

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A focal point of modern tensions, the Court is vulnerable to attack from all sides. In the important policy questions which the Court must decide substantial group interest can be identified with both sides – the losing as well as the winning side. The Constitution is very often invoked to protect the rights claimed by the minority or the unpopular side of public issues. It is, thus, inevitable that the Court will decide against some powerful and vocal groups. Just a glance at some of the recent decisions which feed the contemporary controversies is sufficient to show the type of problem with which the Court is confronted, and the variety of social groups which it has antagonized.

### *Cases Reviewed*

Segregationists and state rights groups are still smarting from the 1954 opinion of the Supreme Court in *Brown v. Board of Education*[1] which held the racial segregation of students in public schools to be a violation of the equal protection clause of the fourteenth amendment. Some of the attacks were of the emotional sort, including the perennial question, "Would you like your sister to marry a Negro?" Others reached for the cloak of constitutional respectability with claims that the fourteenth amendment had never been properly ratified, that the Court failed to follow its own prior decisions by rejecting the "separate but equal" doctrine, and that the Court had used "sociological" rather than legal criteria to determine the meaning of "equal protection of the laws."

Perhaps the most publicized decision of the past term of the Court was the case of *Jencks v. United States*.[2] Both law enforcement officers and other citizens, preoccupied with security against subversion, protested the high Court's ruling that in a federal criminal trial, after a prosecution witness has testified, the defendant is entitled to inspect the witness' prior statements which were made to government agents and are in the government files and which touch the events and activities on which he has testified. The purpose of this inspection is to give the defendant the benefit of information which might show that the witness has told inconsistent stories. It would seem only fair the accused be enabled to impeach the reliability of an inconsistent government witness. Certainly, the defendant could not readily do so if the prior statements on the same subject matter are locked in the prosecution files. It is particularly worthy of note that the probity of the rule was demonstrated in the *Jencks* case itself where one of the witnesses, Harvey F. Matusow, subsequently recanted his testimony under oath. It should be noted too that the extent to which the government files had to be exposed was limited to statements touching the subject matter on which testimony had already been given. The Federal Bureau of Investigation may like to protect its files, but a limited use of them is often proper if a person charged with crime is to be able to get information necessary for his defense. Some lower federal courts had already required such a practice. A few months after the *Jencks* case Congress passed an act which left the decision substantially intact as a federal procedural rule.

Some legislators and other citizens with a deep-seated conviction that the Court and the nation are soft on communism were irate over the Court's holding in *Watkins v.*

[1] 347 U.S. 483 (1954).
[2] 353 U.S. 657 (1957).

*United States*[3] which limited the investigative powers of Congressional committees. The decision reversed a conviction for contempt of Congress based on the defendant's refusal to answer some of the questions posed by the House of Representatives' Committee on Un-American Activities. The Court traced the history of legislative investigations from the English Parliament through to recent congressional hearings and found a new tendency in the investigations which "involved a broad-scale intrusion into the lives and affairs of private citizens."[4] The constitutional infirmity in the conviction of Watkins, the Court found, was rooted in the vagueness and the sweeping character of the House resolution creating the Committee; this made it impossible for the witness to know the extent of the Committee's authority to command his cooperation in answering the questions propounded. The Court reasoned that Congress has no power to expose for the sake of exposure:

> The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for legislative purpose. . . . An essential premise in this situation is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them. . . . Those instructions are embodied in the authorizing resolution.[5]

The Court after investigating the resolution creating the Committee on Un-American Activities found: "No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make."[6] The Court concluded:

> Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.[7]

The Court also stated that Congress in its investigations must not encroach unreasonably upon the individual's privacy or upon his liberty of speech, press, religion or assembly.

Groups preoccupied with security against the menace of communist subversion were once more disturbed at the Supreme Court's reversal of the conviction of fourteen West Coast communists for conspiracy to violate the Smith Act. The decision in *Yates v. United States*[8] defined the statutory term "organize" to include only initial organization. As a result parts of several indictments were declared invalid as covering acts beyond the three-year statute of limitations. By this holding the Court rejected the government's interpretation of the Smith Act and applied the familiar rule of law that criminal statutes are to be construed strictly. The Court also made a distinction between teaching the violent overthrow of the government as an abstract doctrine in the academic sense and advocacy that incites to illegal action. This distinction was applied to the Smith Act which was interpreted to allow academic discussion of communism while prohibiting incitement to overthrow the government. The distinction is not only a valid one but essential if the truth of a philosophical or theological position is not to be decided by legislative fiat. The government which is competent to declare Marxism false is able to say the same of Thomism. This does not, however, pre-

[3] 354 U.S. 178 (1957).
[4] Watkins v. United States, 354 U.S. 178, 195 (1957).
[5] *Id.* at 200-01.
[6] *Id.* at 204.
[7] *Id.* at 215.
[8] 354 U.S. 298 (1957).

vent the government from prohibiting speech that incites illegal action, as the Court had earlier held in *Dennis v. United States*.[9] This important distinction was forgotten by alarmist critics excited to discover that fourteen communists were not yet jailed.

Some of the groups which are concerned with civil liberties found cause for dissatisfaction in the Court's handling of obscenity in *Roth v. United States*.[10] Occasional blasts from the other side of the fence came from those who agreed with the Court's opinion that "obscenity is not within the area of constitutionally protected speech or press,"[11] but who disagree with the standard approved by the Court for defining obscenity. The standard applied by the lower court was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[12] While it is true that this might not be an ethician's definition of obscenity, ethicians do not make up the juries that have to rule on the charges. Some of the groups devoted to civil rights were also disturbed at *Kingsley Books, Inc. v. Brown*[13] which allowed an injunction against the sale of obscene books. Here the objection was that prior restraint on the press violated freedom of press guaranteed by the first amendment. Justice Frankfurter's opinion attempted to meet the objections against prior restraint with this argument:

> Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him. . . .[14]

Veterans' organizations—as well as those who in general distrust foreign justice—were incensed at the action of the Court in denying relief to an American soldier whom the United States Army proposed to deliver to the Japanese government to be tried for the killing of a Japanese woman in Japan.[15] The issue was complicated by the 1951 Security Treaty and an Administrative Agreement with Japan. Under this Agreement a joint committee of the two countries met but was unable to decide which nation should prosecute the soldier, Girard. The Secretary of Defense and the Secretary of State determined that the United States would waive jurisdiction. It was the waiver of jurisdiction which brought forth the cries. In the Court's opinion the United States could waive jurisdiction under an article of the Agreement which provided:

> The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.[16]

The Court expressed its belief that "the wisdom of the arrangement is exclusively for the determination of the Executive and Legislative Branches."[17] Here it is ironic that the Court is criticized for not interfering with the action of Congress and the Executive, whereas the usual complaint is that the Court is guilty of usurpation of the powers of the coordinate branches.

[9] 341 U.S. 494 (1951).
[10] 354 U.S. 476 (1957).
[11] Roth v. United States, 354 U.S. 476, 485 (1957).
[12] *Id.* at 489.
[13] 354 U.S. 436 (1957).
[14] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 442 (1957).
[15] Wilson v. Girard, 354 U.S. 524 (1957).
[16] *Id.* at 529.
[17] *Id.* at 530.

A section of the business and industrial community was dismayed at the Court's finding in *United States v. E. I. du Pont de Nemours and Company*[18] that Section 7 of the Clayton Anti-Trust Act prohibited the lessening of competition through the holding of stock in a customer corporation (i.e., prohibited "vertical" stock acquisition). Section 7 of the Act makes it unlawful

> to acquire . . . the whole or any part of the stock or other share capital of another corporation . . . where the effect of such acquisition may be . . . to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[19]

The Act was adopted in 1914 and the earlier applications of the section had been made to prevent the lessening of competition through holding of stock in a competing corporation (i.e., to prohibit "horizontal" stock acquisitions). The Federal Trade Commission had not applied the section to vertical stock acquisitions, and it is safe to say that the section was generally thought not to apply to such acquisitions. The Court further held in the *du Pont* case that the question of whether competition was lessened could be made at the time the government filed the suit and did not have to be made at the time of original acquisition. The Court said the statute was applicable "whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce."[20] It is hard to deny that the *du Pont* case expands the meaning of the Clayton Act, but it must not be overlooked that the case was brought at the instance of the Executive Branch of the government and that the Congress can readily modify the Act if it believes that the Court has erred.

Taking a broad view of the decisions here noted, one is struck by the kind of problem with which the Court is saddled. These cases called for judgments on core issues of our society: procedural rights of the individual faced with the massed power of the state; limits of free expression in a pluralistic society; irreducible minimums of minority interests; permissible affiliations of economic blocs; propriety of method in combatting subversion. These involuted questions underlie the facts of the cases. They call for specification and resolution, not in the sweet-sounding phrases of the speculative, but in the harsh irrevocable words of decision.

At any given time the diverse principles and overlapping assumptions which constitute a functioning government are in a precarious and shifting balance; this state of affairs is more, not less, true in a democracy. The task of the Supreme Court is nothing less than the articulation of this amorphous public philosophy and the application of it to the controversies which are properly brought before the bar.

Much of the present criticism can be traced, then, to an ignorance of what the judicial act entails, or to an unwillingness to accept the system of government which provides for a Supreme Court with power of review.

The popular notion of law demands a code of well-defined and finished rules under which all imaginable problems fit with snug exactness. Thus men who in their daily lives suffer agonies of indecision over which suit to buy expect that a Justice can interpret the Clayton Act "correctly." Those who conscientiously grapple with

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[18] 353 U.S. 586 (1957).

[19] United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957).

[20] *Id.* at 592.

large but individual problems of moral conduct are chagrined when the Court cannot produce some slide-rule to determine the meaning of "obscene" for 170,000,000 of us.

The fact that lower courts are reversed in their decisions is a scandal of a sort. "Don't lower court judges know law, too? How, indeed, can there be disagreement over what the law is?" The supposition behind the objection is obviously that courts are invading the province of Congress, contrary to all the principles of government which are summarized in the textbooks: "the legislator makes the law, the executive enforces it, and the judiciary determines violations." Do we have a government of law or of men, runs the complaint.

This view — which, incidentally, is not necessarily restricted to those outside the legal fraternity — assigns to the judge merely the elementary task of applying law to facts and transcribing the results. Whatever validity such a philosophy has for the routine class of lawsuits, it fails miserably as an explanation of the operation of a Supreme Court. For the Supreme Court also has as a primary function the interpreting of a written Constitution, with the gloss that such interpretation is authoritative.

Constitutions are not the same type of animals as other laws. They are not designed to detail the solutions of every problem that can arise. Instead, they set down norms and guideposts within which particular decisions must be reached. All of this is elementary.

Yet even when the Court is not exercising itself on a specific constitutional issue, it is normally concerned with problems that in their scope and complexity inevitably require a system of values and a list of priorities. Legal questions are in their essence manifestations of value clashes within our society itself. Only infrequently do legislators resolve these clashes comprehensively. The legislative process requires that the different interests be reconciled and that a law regulating an area of human conduct be expressed in terms which reflect a consensus required for its enactment. But the Court cannot stop when it has found the law's area of common agreement; it must judge the issue which has been presented to it. And the mere fact that the issue has reached the Supreme Court is some evidence that the statute gives only equivocal answers.

A failure to realize what the Court is called upon to do leads to frustration and annoyance. The innocent observer can only explain judicial disagreement, as Holmes put it, "as if it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement inevitably would come."

Depending on whether one agrees or disagrees with the decision, the Court is, in this simple view, either a society of godlike creatures, or a club of nodding mortals.

Yet even those who have a sophisticated understanding of the vital elements of judicial decision sometimes close their eyes to the structure of our American legal system. The Court is not merely a sounding board for debate on the burning questions of the day; it is a terminal point. The prevailing doctrine under which we live encompasses an independent and supreme judiciary which guards the sacred fires of the Constitution, and regulates and resolves the justiciable tensions. The alternatives to this system (and this fact bears periodic repetition) are anarchy or tyranny.

The Supreme Court is a consequence of the need for an impartial and a detached evaluation of governmental activity in the

perspective of the Constitution. If the nation acts in haste, it has a Court to prevent an extended repentance. But, additionally, the Court serves the real need of bringing issues to a conclusion. However it may gall us at the time, "the buck stops here."

A distinguishing mark of our legal system is the precedence of process over power. The Court may make a decision, but its enforcement lies basically in a willingness of the people to give that respect which is due the system itself. This respect does not hinge on agreement with any individual mandate of the Court, but on the knowledge that problems must be resolved *by law*.

The carping which overlooks the nature of the judicial process, or which balks at the meaning of the system, is dangerous precisely because it tends to destroy and not to improve law. No one would seriously preach the heresy that the Court is above criticism. The current problem is quite to the contrary. Many of those who have attacked the Court in past months have actually forestalled effective criticism. As one lawyer put it, "I wish some of these people would shut up so that I could take issue with some of the Court's opinions. But I don't want people thinking that I'm in agreement with the rash charges that have been made."

The charge that the Court is playing a creative role, rather than a mechanical one, is noteworthy only for its naïveté. Those who think that disagreements can be eliminated by requiring the justices to have a given amount of lower court experience are only deceiving themselves. They cannot see what Justice Frankfurter means when he writes: "One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero." And why is this true? Because, he tells us,

> the Court's preoccupation today is with the application of rather fundamental aspirations and what Judge Learned Hand calls 'moods,' embodied in provisions like the due process clauses, which are deliberately designed to supply only general norms of decision. The judicial process in applying them involves a judgment on the processes of government. The Court sits in judgment, that is, on the views of the direct representatives of the people in meeting the needs of society, on the views of Presidents and Governors, and by their construction of the will of the legislatures the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.

Similarly naïve is the mock horror with which other critics of the Court contemplate the immense power which the justices wield. Among the crass remedies which some disgruntled critics would apply is a periodic reconfirmation of the justices by the Senate. Thinking the bath water foul, they are momentarily not concerned that the baby will be dumped out as well. At bottom their complaint is not that there is a Supreme Court but that the present Court does not reflect their views.

To be effective, the critic of the Court must appreciate the complex processes of human judgment; he must also concede the imperative need for finality in resolving vexatious problems.

There is no guarantee that the values which the judges apply are the proper ones. Every decision, then, should come under the closest scrutiny. Nor is there harm when decisions are taken to another (for example, the Congressional) arena. But criticism must have direction, or it will be worse than futile. It will be simply destructive.