The Supreme Court and the Spirit of 1957

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APPRAISAL of outstanding decisions of the Supreme Court of the United States handed down during the term ended in the summer of 1957 has been published rather frequently in the daily press and other mass communications media. Hasty and intemperate criticism has been the rule rather than the exception. Journalists have found the Court to be an ideal whipping boy. Alleged faults of governmental operation can be readily attributed to the Court. The Court as a whole and its individual members can be vilified with impunity. It is unlikely that the Court or the Justices will take any retaliatory action. They will not defend themselves. In this state of affairs it would seem to be the duty of lawyers generally and teachers of law, in particular, to endeavor to counteract the unwarranted abuse to which the Court has been made subject. The following pages represent such an attempt.

Although the Justices do not rush out to lead a counterattack on their critics, the opinions accompanying the decisions furnish, in most cases, the most persuasive arguments for the conclusions reached by the Court. These opinions are not, however, made available to the readers of most newspapers. Even if they were, it is doubtful that they would be comprehended by most newspaper readers. The opinion of an appellate court is not an isolated phenomenon. It is an example of a long tradition in England and the United States. Some knowledge of that tradition is necessary for the comprehension of the single example. Even the bright young men who come to our law schools require months of study before they understand the cases presented to them in the form of appellate court opinions.

Not all the recent decisions which have evoked most criticism and misunderstanding involve questions of constitutional law. Interpretation of statutes and other documents and procedural matters bulk large. Distinction here is of great practical significance, as will be shown.

The first case1 reported for the term under consideration (usually referred to as October Term, 1956) involved convictions for conspiracy to violate the Smith Act.2 The charge was that the defendants had conspired to advocate the overthrow of the Government of the United States by force and violence. The conviction in the District Court for the Western District of Pennsylvania was affirmed by a divided court in the Third Circuit.3 The Supreme Court granted the petition for writ of certiorari in the preceding term.4 The case was scheduled

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3. 223 F.2d 449 (3d Cir. 1955).
for argument on October 10, 1956. Argument on the merits, however, was not heard. About two weeks before the time set for argument on the merits the Government moved to remand the case to the trial court. Instead of hearing arguments on the merits the Court heard arguments on the motion. The gist of the Government's argument was that one of the seven witnesses for the prosecution had demonstrated his unreliability in other proceedings by testifying falsely. There appears to be no doubt about the falsehoods. Nevertheless the Government took the position that what this witness had testified to at the trial was true. The issue of his truthfulness at the trial should, the Government insisted, be determined by the trial court after a hearing. Mr. Justice Frankfurter believed that the Government's motion should be granted without argument. The Court, however, decided to order a new trial. Mr. Justice Harlan, with whom Mr. Frankfurter and Mr. Justice Burton joined, dissented. Mr. Chief Justice Warren in delivering the opinion of the Court stated that the decision passed only on the integrity of a criminal trial in the federal courts and did not determine the guilt or innocence of the defendants. It is perhaps significant that the Chief Justice saw fit to state such an obvious fact at the outset of his opinion. To say that the Court reversed the conviction of certain Communist conspirators is accurate enough but surely it is a misleading statement, very misleading to most readers, if left unqualified. Innocent or guilty the defendants may be, what the court had to decide was how to dispose of the Government's motion. One member of the Court thought it should be granted after argument. But the majority thought that since the witness had been proved to be unreliable in other proceedings according to material cited by the Government it was not for the trial court judge to determine the reliability of his testimony at the trial. Rather it was for the jury, and the jury was, of course, no longer in existence. Consequently, a new trial had to be ordered. Such is the conclusion of the Court. It should be noted that the new trial was ordered not because the defendants were held to have been denied due process of law or any other constitutional right but because in the words of the Chief Justice, the interests of justice call for that result. It may well be objected that the phrase "the interests of justice" has a strong affinity for the phrase "due process of law." But in a preceding paragraph of the opinion the Chief Justice states:

This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

5. 77 Sup. Ct. 14 (1956).
6. 77 Sup. Ct. 1, at 8.
7. 77 Sup. Ct. 8 (1956).
8. 77 Sup. Ct. 1, at 8.
9. Ibid.
To be doubly sure the *McNabb* case\(^1\) and two other cases\(^2\) involving the principle of supervisory jurisdiction are cited. It would appear safe, therefore, to categorize the principal case as one involving the supervisory function of the Court rather than one laying down a constitutional limitation on the courts. The practical difference between the two categories is that a constitutional limitation can be removed only by a constitutional amendment or overruling of the precedent while the functions and duties of the courts may be prescribed by legislation under the necessary and proper clause of Article I, section 8, the Constitution. If the people of the United States do not approve of the rule that a new trial must be had in a federal criminal prosecution where the Government questions the credibility of its own witness, they may, through their representatives in Congress have a different rule prescribed by law. The same observations will be made with respect to a number of other cases to be discussed later.

A conviction in another federal criminal case was reversed\(^3\) because of failure to disclose the identity of an informer against a self-confessed dope peddler. The Court stated that it believed no fixed rule with respect to disclosure is justifiable. The particular circumstances of each case must be taken into consideration in order to determine a proper balance of the public interest in protecting the flow of information as against the right of the accused to prepare his defense. The charge in the case was that the accused knowingly transported heroin, "knowing the same to be transported into the United States contrary to law." The undercover employee of the Government, it was testified, had taken a material part in bringing about the possession of certain drugs by the accused and had been present with the accused at the occurrence of the alleged crime. Since the informer might have been a material witness as to whether the accused knowingly transported the drugs as charged and in view of other specified circumstances of the case, the Court held that there was reversible error. The correctness of this determination is vigorously denied by Mr. Justice Clark in dissent.\(^4\) Many lawyers and students of criminal law may deplore the disposition of the case, but would it not be absurd to contend that the Court is "soft on dope peddlers" or other undesirable members of society because of this and other decisions in which it has insisted on what it considers adequate safeguards against persons accused of crime in federal courts?

Thus far the cases have been noted in chronological order. It will be observed that they do not appear to have the marks of "great cases." It was not until rather late in the term, that is, May 6, 1957, that the Court began handing

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4. Mr. Justice Clark's dissent, *id.* at 630.
down the decisions that aroused the wrath and disgust of certain newspaper writers and others. Of course there were several important decisions, involving constitutional rights, interpretation of labor statutes, grants of public land, and other matter before that date, but it was the publication of the decision in *Konigsberg v. State Bar of California* that gave the first clear indication of what might be considered a new temper in the Court with respect to personal freedom under the Constitution.

Raphael Konigsberg, after graduation from law school, in 1953, satisfactorily passed the California bar examination. He was, however, refused certification because the State Committee of Bar Examiners, after several hearings, was not satisfied that he was of good moral character and that he did not advocate overthrow of the Government of the United States or California by unconstitutional means. The State Supreme Court, without opinion, and with three of its seven justices dissenting, denied his petition for review. The Supreme Court held that California’s refusal to admit Konigsberg was a denial of due process and of equal protection of the laws guaranteed by the Fourteenth Amendment. Konigsberg was not denied admission to the Bar simply because he refused to answer questions. The opinion of the Court states clearly what was believed by the majority of the Justices to be the issue in the case: "Does the evidence in the record support any reasonable doubts about Konigsberg’s good character or his loyalty to the governments of State and Nations?" Konigsberg’s failure to respond to questions was, however, contended to be evidence from which some inference of doubtful character and loyalty could be drawn. The Court discussed generally the good moral character aspects of the case and then took up three kinds of objections concerning moral character: (1) testimony of an ex-Communist, (2) criticism by Konigsberg of certain public officials and their policies, and (3) his refusal to answer questions. After alluding to the vagueness of the expression "good moral character" the Court assumed for the purposes of the case the broad definition contended for by counsel of the State of California, that is, one stressing "elements of honesty, fairness and respect for the rights of others and for the law of the state and nation." With that assumption of the meaning of good moral character the Court went on to inquire whether on the whole record a reasonable man could fairly find that there were substantial doubts about Konigsberg’s "honesty, fairness and respect for the rights of others and for the laws of the state and nation."  

Forty-two persons who had known Konigsberg at different times during the
twenty-year period prior to his application for admission to the Bar attested to his excellent character. The Court quoted some of the laudatory statements concerning Konigsberg's character made by a Catholic monsignor, a Jewish rabbi, a lawyer, and a member of the faculty at the University of Southern California Law School. The Court stated that "not a single person has testified that Kongisberg's moral character was bad or questionable in any way." The testimony of the ex-Communist was to the effect that the applicant had attended various meetings held under Communist auspices in 1941, when the Communist Party was a recognized political party in California. The Court indicates that attendance at and participation in such meetings even as a member of the Party was not evidence of lack of good moral character. No doubt many Americans may well believe that adherence to the Communist Party even if such adherence was a matter of the past is rather conclusive evidence of moral depravity and therefore a lack of good moral character. But it must be remembered that the Court is assuming as the definition of good moral character the language quoted above, the definition suggested by counsel for the State of California and not the definition or definitions that might be proposed by moral philosophers or just plain citizens. With that notion of good moral character, for purposes of admission to the California Bar, it is surely not too much to say that the Court was clearly correct in its position that participation in Communist discussion groups and even membership in the Party back in 1941 are not indicative of lack of such good moral character.

The Court had even less trouble in disposing of the contention that criticism of certain public officials, even of the Supreme Court itself, supplies lack of good moral character. Perhaps it is worth noting that the published writing of Konigsberg certainly seems to be in the vein of what most of us would expect Communist propagandists to spew forth, and yet the Court took the opportunity of stating:

Courts are not, and should not be, immune to such criticism. Government censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining "moral character," than if it should be attempted directly.

The third matter for special consideration with respect to lack of good moral character was Konigsberg's refusal to answer questions put to him by various members of the Committee of Bar Examiners concerning his political affiliations and beliefs. Konigsberg's position in this matter was that he had a constitutionally protected right to refuse to answer such questions. The Court refused to pass on the validity of this position except to state that the claim was not frivolous.

19. Id. at 729.
20. Id. at 731.
21. Id. at 732.
As for the argument that Konigsberg might reasonably be supposed to advocate the overthrow by force or violence of the governments of State and Nation, not only was an express denial of such advocacy or belief in such doctrine emphatically made by the applicant but also his writings and the entire course of his life were at war with such notions.

Dissent by Frankfurter, J. on procedural grounds, and by Harlan, J., whom Clark, J. joined, on the merits as well as procedural grounds, contain, as might be expected, very strong arguments against the conclusions of the majority. These three Justices may quite fairly be characterized as opponents of judicial "activism" in questions of individual constitutional rights, but in the companion case of Schware v. Board of Bar Examiners of State of New Mexico, decided on the same day as the Konigsberg case, even these dissenters concurred in the decision of the court, reversing and remanding with directions the judgment of the Supreme Court of New Mexico, which denied the applicant's right to take the state bar examination. Mr. Justice Whittaker took no part in the consideration or decision of either case. In the Schware case good moral character was again in issue. Schware had admittedly been a Communist in the past, had used aliases, and had been arrested for alleged offenses for which he was neither tried nor, of course, convicted. Like Konigsberg he made a forceful showing of good moral character by means of evidence as to his course of life for a number of years immediately prior to the time of his application to take the bar examination. Frankfurter, J., writing for the same group that dissented in the Konigsberg case, in a concurring opinion, stated:

Refusal to allow a man to qualify himself for the [legal] profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause. Such is the case here.

The Justice went on to point out that the controlling element in the case seemed to him to be the undue weight that the State Court gave to the early Communist affiliations of the applicant.

In neither of these historic cases was the Court faced with the problem of the avowed Communist. In neither did it give any clear indication of its attitude toward claims of freedom of speech, that is, specifically the freedom of silence, but it did strike out boldly for individual rights even though it must have expected bitter attacks from the apostles of conformism. To this writer it appears that cases of the applicants for admission to the bar were eminently apt for enunciation of the doctrine of the Court relating to discrimination in the administration of licensing requirements. I believe that most lawyers and, indeed, most citizens who

22. 77 Sup Ct. 752 (1957).
23. Id. at 761.
concern themselves with the matter would agree that the legal profession should not be closed to persons who hold and express unorthodox ideas or to persons who demonstrate moral courage in the face of massive pressures to conform to the ways and the notions that happen to be popular at the time. It would seem that the members of the Court keenly appreciate the need for independence of character within the ranks of the legal profession. Considerations of this sort probably encouraged the Court to take the strong stand that it did in these cases. This attitude of the Court in 1957 should be contrasted with its attitude, say in 1948, and immediately succeeding years when the Court repeatedly denied certiorari in cases involving claims of violation of First Amendment freedoms.24

But it is not so much the differences in issues and decisions that is of interest. It is rather the different spirit of the times as reflected in the Court's attitudes. No one can seriously doubt that the temper, the climate of opinion, the spirit, call it what you will, has shifted more than imperceptibly since that time, and the Court is, of course, not insensitive to such changes. The point has been emphasized again and again, perhaps ad nauseam, ever since Peter Finley Dunne had his Mr. Dooley make the observation concerning the Supreme Court and election returns. This vague thing, however, the spirit of the times, climate of opinion, vaguely demonstrated, is more than a matter of election returns. Election returns, too, of course, are affected by it and give indications of its existence and what it is. There are many active signs of it. But apathy, inertia, lack of active signs are also significant. In short, even though the year 1957 has presented to the people of the United States and the world the exhibition of many stirring events, the people of the United States just don't seem to get as excited as they used to. We have been subjected to so many shocks in recent years that we are learning to live with them and not get stirred up over them.

The Court is well aware of its self-inflicted wounds of the past, Dred Scott,25 the income tax decision of 1895,26 and the like, when it failed to take into account the spirit of the time. Such decisions have been very exceptional. Controversial decisions, however, have been legion. Examples of the recent past are the Steel Seizure case,27 the Segregation cases,28 the Dennis case.29 All of these, it seems to the writer, were decided in a way that was satisfactory to the vast majority of the American people, although they were severely criticized by many at the time, and, indeed, they are still being inveighed against. A court of law, it is said, and rightly so as a general proposition, should not be swayed by changes in popular sentiment. The Supreme Court, however, as most lawyers appreciate, is

a great deal more than a mere court of law in the ordinary sense when it has for
consideration and decision questions of constitutional or public law involving
the rights of persons as against governmental infringement or the distribution of
powers in our complex system of government under the Constitution. The
present Court is continuing to perform the historic role of the Court in this
regard. In the days of James Bryce it was common to speak of the Court as the
living voice of the Constitution and in the days of James W. Beck as a continuing
constitutional convention. The Court itself has never professedly claimed such
an exalted status, but it will be remembered that Charles Evans Hughes proclaimed
that the Constitution is what the judges say it is. These famous cliches are
reminders of the facts of history concerning the exercise of the power of judicial
review of the acts of other governmental agencies, legislative or executive,
national or local. Again and again this peculiarly American institution has been
attacked vocally and otherwise. One of the latest manifestations is proposed
legislation introduced by Senator Jenner which would cut down the jurisdiction
of the Court.30 In the light of our historical experience it would seem that such
attacks are doomed to failure.

Another bombshell was exploded by the Court on June 3, 1957, when it
handed down the decision in Jencks v. United States.31 This was the case involving
F.B.I. files. Jencks was prosecuted for filing a false affidavit with the National
Labor Relations Board. The affidavit was to the effect that he was not on
April 28, 1950, a member of the Communist Party or affiliated with such party.
His conviction in a United States District Court was affirmed by the Court of
Appeals for the Fifth Circuit. The Supreme Court reversed the conviction. The
evidence of the government that Jencks was a member of the Communist Party
on the crucial date was entirely circumstantial,32 that is, the defendant's conduct
and his alleged conversations with Harvey F. Matusow, a Communist Party
member paid by the F.B.I. to make oral or written reports of Communist Party
activities. On cross examination at the trial Matusow testified that he had made
both oral and written reports to the F.B.I. concerning his conversations with
Jencks.33 The defendant moved for orders directing an inspection of reports of
Matusow and another F.B.I. undercover agent who had testified about the
defendant's activities at various Communist meetings. The trial judge denied
the motions without stating reasons. The Government opposed the "motions at
the trial upon the sole ground that a preliminary foundation was not laid of
inconsistency between the contents of the reports and the testimony of the
witnesses."34 "The Court of Appeals rested its affirmance primarily upon that

32. Id. at 1009.
33. Id. at 1012.
34. Ibid.
Mr. Justice Brennan, writing for the majority of the Supreme Court stated:

We hold that the petitioner [Jencks] was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that these reports were of the events and activities related in their testimony.

And again:

We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written, and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witnesses and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

As in the dope-peddler case previously discussed the Court tersely states that justice demands the result reached. Again Mr. Justice Clark dissents. This time, however, we have not a self-confessed dope-peddler but an individual whom the Government is attempting to prove was a Communist on a specified date. That the accused was a Communist is attested by two undercover agents of the Government. The accused seeks to impeach the accuracy of the Government's witness by means of the reports made by them or concerning them at the time of the alleged occurrences. The Court says justice demands that the accused should have the opportunity to inspect the reports. Again the question arises as what is the "justice" the Court is referring to? Some immutable principle or principles supposed to be embraced by the due process of law provisions of the Fifth Amendment? Rather, it is the justice as administered in Federal courts governing and authorizing the rules of procedure in such courts. This is in effect the interpretation of justice as understood by Congress, for it proceeded to enact legislation designed to limit the application of the Jencks decision. Here Congress apparently expressed the conviction that the Court may have gone too far in extending protection to an accused as far as F.B.I. files are concerned. Congress is supposed to be closer and more responsive to the sentiments of the people than the Court. In any event, it seems to be acting entirely within its constitutional province when it chooses to modify or repeal, if you will, a rule of

35. Ibid.
36. Ibid.
37. Id. at 1013.
38. See note 12 supra.
Federal procedure as developed by the Court, unless the rule is one based on the provisions of the Constitution. Assuming, as everyone appears to do that the Jencks case, does not involve a principle of constitutional law, Congress acted promptly to limit its application, but the complaints against the Court continue to reverberate because of the decision. It seems clearly unjust to cite the case as an instance of softness toward Communism and Communists. As has been shown, the fact of Communist affiliations contrary to the affidavit was the very fact in issue at the trial, and it was the evidence for such affiliation that was sought to be discredited. The burden of proving the affiliation was, of course, on the Government. The defendant was found guilty only because of the testimony of these witnesses, who might have been shown to be perjurers themselves. With respect to the Court's holding I have no hesitancy in saying that as a matter of justice, as that term is understood by lawyers trained in the Anglo-American tradition, as a matter of having a fair trial when accused of a particularly heinous crime, I believe the Court was right and that very many other lawyers, perhaps a majority, would agree.

On June 17, 1957, the Court handed down a decision which is of great interest to students of constitutional law even though it is not strictly speaking a constitutional law decision, namely, *Yates v. United States.* It is of great interest because it contains an important gloss on the famous *Dennis* case previously mentioned. Popular interest was aroused, or at least valiant efforts to stir up popular interest were made, because the Court upset the conviction under the Smith Act of certain Communists. Alas, the Court is again showing favoritism to Communists, so the cry goes. The defendants were convicted in a United States District Court "upon a single count indictment charging them with conspiracy (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the interest of causing the overthrow of the Government by force and violence as speedily as circumstances would permit." The Supreme Court remanded the case to the District Court with instructions to enter judgments of acquittal as to certain of the defendants, and to grant a new trial as to the rest.

The opinion of the Court by Harlan, J. discusses a number of points, two of which are of chief importance. The first concerns the meaning of the term "organize" as used in the penal statute under which ten defendants were convicted. The meaning of "organize" contended for by the defendants must

40. 77 Sup. Ct. 1064 (1957).
41. See note 29 supra.
42. 77 Sup. Ct. 1064, 1067.
43. Id. at 1069.
prevail upon traditional Anglo-American principles "stated by Chief Justice Marshall more than a century ago" and quoted by Harlan, J.:

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.44

The meaning contended for by the defendants and adopted by the Court was that "organize" in the statute means to "form," to "establish," and does not have the broad meaning contended for by the Government which would include continuing activity to promote the increase or fortunes of the thing organized. It is submitted that the Court's reading of organize in a penal statute is in accord with common understanding of that term. The meaning of the term having been determined, the statute of limitations had run on any organizing activities. Inasmuch, as the charge of conspiracy to organize and the charge of conspiracy to advocate violent overthrow of the Government were submitted to the jury together in one count, it was impossible to tell which ground the jury selected. In such a situation, where the verdict is not supportable on one ground, even though supportable on another, the verdict must be set aside.46 This is a familiar principle, of course. The Court cites Stromberg v. People of State of California,46 and other well known cases. But the Court went on to the second point of interest, its gloss on the Dennis case, for it found that the instructions to the jury were defective in that such instructions did not clearly bring out the necessary element of incitement to action as contrasted with mere advocacy of overthrow of the Government by force and violence. Here the Court interprets its decision in the Dennis case. The element of incitement was in that case by reason of Medina, J.'s instructions at the trial, the Court says in effect. There is the clear implication that the omission of this element of incitement to action would have required a holding of unconstitutionality, as violating the guarantees of the First Amendment. Congress cannot under the First Amendment restrict freedom to discuss and advocate political change if there is no incitement to riot, sabotage, or other violent or unlawful acts. The Court now says what many have said Dennis must mean. Now it's official, as it were, but again such solicitude for the right of free speech and other related rights on the part of the Court is offensive to some of our vocal fellow citizens in that it is, for them, an indication of weakness or even favoritism in the face of the Communist terror. It seems to this writer, however, and, I hope, to many other lawyers that the Court is sincerely attempting to apply well-settled principles of criminal law and long-cherished freedoms supposedly guaranteed by the Constitution from possible oppressive action on the part of law enforcing authorities. The Court's own commentary on the famous Dennis case is worthy of and will doubtlessly receive

44. Ibid., quoting from United States v. Wilberger, 5 Wheat. 76, 95-96 (1820).
45. Id. at 1073.
extended discussion, in many other places but here I shall make only one further observation in this respect, namely, that the Court's elucidation concerning the necessity for having the element of incitement to action in Smith Act cases is a prime example of what I call the spirit of 1957 as contrasted with the spirit of some prior years, when alarm was evinced in all parts of the country, it would seem, about various menaces to our society at home and abroad. In this year of the sputnik, among other strange things, we seem more calm.

On the same day as the Smith Act cases there also came down the decision of Service v. Dulles, Mr. Justice Harlan again delivering the opinion of the Court. Mr. Justice Clark did not participate in the consideration or disposition of the case. The decision has been frequently alluded to as another one of those cases in which the Supreme Court has impeded efforts to rid our governmental departments of disloyal employees. John S. Service was discharged on December 14, 1951, by the then Secretary of State, Dean Acheson, from his employment as a Foreign Service Officer. The question in the case before the Court was the validity of the discharge. The Court expressly stated that it was not concerned with the merits of the Secretary's action in terminating Service's employment. The questions to which the Court addressed itself were as follows:

(1) Were the departmental Regulations here involved applicable to discharges effected under the McCarran Rider? and (2) Were those Regulations violated in this instance?

The McCarran Rider referred to by the Court is a statutory provision empowering the Secretary of State, in his absolute discretion, to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he deems such termination necessary or advisable in the interests of the United States. The Court points out that the Regulations of the Department concerning loyalty and security procedures not only purported to cover discharges under the McCarran Rider but also the practice of the Department indicated that it so construed its own Regulations. Furthermore, it is pointed out, Congress was duly notified concerning the departmental practice and regulations made under the McCarran Rider, which Congress repeatedly re-enacted prior to Service's discharge. In short, the Court had cogent reasons for its holding that the Regulations were applicable. That being so, it went on to hold that the Regulations were violated. There was a dispute as to which set of Regulations was applicable to Service's discharges. But the Court concluded that neither set had been properly observed. The later set of Regulations, which the Government contended was applicable, required the decision to discharge to be reached after

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47. 77 Sup. Ct. 1152 (1957).
48. Id. at 1157.
49. Ibid.
50. 60 STAT. 458, cited by the Court, 77 Sup. Ct. 1152, 1156.
consideration of the complete file, arguments, briefs, and testimony presented.\textsuperscript{51} The Government's brief virtually conceded that no such procedure was applied. Perhaps it should be noted that hearing after hearing had been held with respect to Service and he was repeatedly cleared. The case is patently one concerning proper procedure to be followed with respect to the discharge of governmental employees. However infamous Service may or may not be, departmental procedures established in pursuance of statutory or executive authority are available to him and must be observed. No contrary view was expressed by any member of the Court. Are they all madly and flagrantly disregarding a plain mandate of Congress, as some have contended? Again, I submit that anyone who takes the trouble to read the cogently reasoned opinion of the Court must confess that the Court had valid reasons for its decision, whether one agrees with the result or not.

Another famous case came down on June 17, 1957, namely, \textit{Watkins v. United States.}\textsuperscript{52} This was a case involving the right to silence. The defendant was convicted of "contempt of Congress" because of his refusal to answer certain questions put to him at a hearing of a Subcommittee of the Committee on Un-American Activities of the House of Representatives. He testified that for about five years (1942-1947) he cooperated with the Communist Party and participated in Communist activities to such a degree that some persons might honestly believe that he was a member of the party, but he denied that he was or had ever been a member. In the Government's brief in the case it is stated that he "told the Committee that he was entirely willing to identify for the Committee, and answer any questions it might have concerning, 'those persons whom I knew to be members of the Communist Party,' provided that to [his] best knowledge and belief, they still were members of the Party."\textsuperscript{53} He apparently made similar statements before the Sub-Committee. With respect to certain persons whose names appeared on a list which was read by counsel and who were known to the witness, the witness refused to tell whether he knew them to have been members of the Communist Party. He explained that he refused to answer because he believed questions designed to elicit such information were beyond the scope of the Committee's activities. The Court quoted\textsuperscript{54} from his statement as reported in the Committee Hearings\textsuperscript{55} as follows:

\begin{quote}
I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which the committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom
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\item \textsuperscript{51} 77 Sup. Ct. 1152, 1164.
\item \textsuperscript{52} 77 Cm. Ct. 1173 (1957).
\item \textsuperscript{53} \textit{Id.} at 1177.
\item \textsuperscript{54} \textit{Id.} at 1178.
\item \textsuperscript{55} Hearings before the House of Representatives Committee on Un-American Activities on Investigation of Communist Activities in the Chicago Area, Part 3 83d Cong., 2d Sess. at 4275.
\end{itemize}
I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.

I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the Committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates.

As a result of this refusal the witness was prosecuted and convicted. The Court of Appeals for the District of Columbia reversed the conviction, but upon rehearing, the full bench affirmed the conviction with judges of the original majority in dissent. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the District Court with instructions to dismiss the indictment. The Chief Justice in an elaborate opinion in which he reviewed the history of legislative investigations in England and the United States with particular attention to the history of the House Committee on Un-American Activities, asserted that Watkins was not accorded a fair opportunity to determine whether he was within his rights in refusing to answer and that his conviction was necessarily invalid under the Due Process Clause of the Fifth Amendment. In reaching this conclusion the terms of the statute under which Watkins was prosecuted were quoted and discussed. The offense is specified in the statute as a refusal "to answer any question pertinent to the question under inquiry." Again the familiar vice of vagueness was required to be avoided as in all other crimes. The Chief Justice discussed the various possibilities as to "the question under inquiry," the whole vast field of Un-American activities or subversive activities in general and, or including, purported investigation of Communist infiltration in labor. It was, however, the position of the Government that the immediate subject of inquiry concerned Communist infiltration in labor. This attempt to avoid the vice of vagueness, however, failed since most of the witnesses before the Subcommittee had no connection with labor and the questions which Watkins refused to answer concerned persons almost a quarter of whom were not connected with labor. Furthermore the Chairman announced that the Subcommittee was investigating "subversion and subversive propaganda." The Chief Justice remarked with respect to that "question under inquiry:" "This is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so."

56. 77 Sup. Ct. 1173, 1193.
57. 2 U.S.C. §192.
58. 77 Sup. Ct. 1173, 1190.
59. Id. at 1193.
60. Ibid.
Mr. Justice Frankfurter wrote a concurring opinion in which he stated that he agreed with the Court’s holding and joined in its opinion, but he deemed it important to state what he understood the Court’s holding to be. Mr. Justice Clark dissented; Mr. Justice Burton and Mr. Justice Whittaker took no part in the consideration or decision of the case.

It seems clear that it is quite erroneous to say that the Court in the *Watkins* case held that congressional investigation committees may not inquire about Communist or other subversive activities. The *Watkins* case, it must be emphasized, involved a criminal charge for failure to answer questions that were not clearly pertinent to the scope of the inquiry, which was vague and indefinite. It also seems clear that where Congress makes clear the scope of the inquiry or where the committee itself does so and the relevance of the questions to that inquiry is also clear, then and only then would a refusal to answer raise the question of congressional power. The opinion of the Court does discuss congressional power and states, what few lawyers would deny, that the power of inquiry is not unlimited. Those portions of the opinion are, of course, indicative of the thinking of the majority of the Court and may be regarded as a warning to Congress to mend its ways. Mr. Justice Clark objects at considerable length to this aspect of the Court’s opinion. That the majority of the Court agreed to indicate their views concerning individual rights of privacy in congressional investigations is another noteworthy manifestation of the spirit of 1957 as compared with the spirit of a few years ago.

The last of the cases reported as decided on June 17, 1957, *Sweezy v. State of New Hampshire*,61 raised the question of substantive rights as contrasted with the procedural due process question decided in the *Watkins* case. Unfortunately, however, there is no opinion of the Court. The Chief Justice announced the judgment of the Court, which reversed the judgment of the Supreme Court of New Hampshire, which upheld the conviction of contempt for failure to answer certain questions of the State Attorney General, acting pursuant to legislative authority to investigate subversive activities. Justices Black, Douglas, and Brennan joined in the opinion of the Chief Justice. Justices Frankfurter and Harlan concurred in the result. Justices Clark and Burton dissented. Justice Whittaker did not participate.

The New Hampshire legislature in 1951, in what may be characterized as the spirit of 1951, adopted a comprehensive scheme of regulation of subversive activities. In 1953 its legislature adopted a Joint Resolution which was construed, under state law, to constitute the Attorney General as a one-man legislative committee. The position taken by the Chief Justice in his opinion, in which he was

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61. 77 Sup. Ct. 1203 (1957).
joined by three other Justices, is that there was a "lack of any indications that the legislature wanted the information the Attorney General attempted to elicit" and that such lack "must be treated as the absence of authority" and that accordingly "the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."62 The language just quoted does not appear felicitous, but preceding language in the opinion is forthright in asserting:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment.

We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression, areas in which government should be extremely reticent to tread.63

The Chief Justice and the three Justices who joined in his opinion saw fit, it would seem, to express disapproval of requiring witnesses to answer concerning beliefs, the contents of academic lectures, and political activities of a non-Communist nature, but preferred to ground their decision on lack of clear legislative authority for the questions. Mr. Justice Frankfurter and Mr. Justice Harlan, however, thought that the authority of the Attorney General was a matter of state law but that requiring answers to questions concerning the witness's academic lectures and writings and his activities in connection with the Progressive Party was a violation of First Amendment freedoms embraced by the Due Process Clause of the Fourteenth Amendment. This case did not involve a Communist, but the witness was admittedly a Marxist, who had expressed political and economic views that are generally condemned in this country. Neither the Court nor any of its members has expressed approval of such views. There is furthermore no serious reason to believe that any of the Justices share such views. Yet some critics of the Court might lead people to believe that such is the case. The reversal of the conviction would appear to be in accord with traditional constitutional doctrine. What makes the case remarkable are, first, the seemingly strange grounds chosen by the Chief Justice in his opinion, and, secondly, the eloquent statements in both the opinion of the Chief Justice and in that of Mr. Justice Frankfurter concerning the worth of permitting the expression of unorthodox ideas in matters affecting politics, economics and affairs of human society in general.

A passage from Frankfurter's opinion deserves special notice not because it asserts novel doctrine but rather sums up succinctly some traditional

62. Id. at 1214.
63. Id. at 1217.
doctrine that is very familiar to students of constitutional law but is perhaps not as well known to others as it should be. He writes:

While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. See Hurtado v. People of California, 110 U. S. 516, 528-529, 4 S. Ct. 111, 117, 292, 28 L. Ed. 232; McCulloch v. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579.64

The opinion in the last case cited, as famous a decision as any that were handed down, one of Marshall's great decisions, and the opinion in the Hurtado case, decided in 1884, both have, at the pages cited by the Justice, language expressing similar views. It is hardly a new idea. The great clauses of the Constitution have been adapted from time to time by the Court to the needs of the present age. With respect to the needs of 1957, it is submitted, the Court has, even in the cases reviewed herein, which have been selected on the basis of clamor against them, continued the great tradition of American constitutional law and the Anglo-American legal tradition as well.

It is the hope of the writer that those who have not for one reason or another had occasion to read the cases discussed herein in the reports, will find these brief sketches of value in determining just what the Court was about, what it actually had for consideration and decision. If so, I am sure they will agree at the very least that what the Court did in the October 1956 term in the cases involving Communists and other unpopular types of persons in court, the results were not so unreasonably outrageous as readers might have been led to believe.

64. Id. at 1220.