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The Supreme Court in the American Constitutional System

COURT-CURBING PROPOSALS IN CONGRESS

*Shelden D. Elliott**

NOW, THEREFORE, BE IT RESOLVED, That, reserving our right to criticize decisions of any court in any case and without approving or disapproving any decisions of the Supreme Court of the United States, the American Bar Association opposes the enactment of Senate Bill 2646, which would limit the appellate jurisdiction of the Supreme Court of the United States.¹

Thus, on the afternoon of February 25, 1958, the House of Delegates of the American Bar Association, in Atlanta, Georgia, after some preliminary skirmishing and compromise as to the wording and the prefatory "whereas" clauses, spoke its collective mind. Although its spokesmanship on this occasion was that of counsel for the defense, and its weapon the shield of opposition rather than the sword of affirmative proposal, the Association was in essence asserting a position consistent with that previously taken in 1950 when its House of Delegates, by a vote of 92 to 35:

RESOLVED, That the American Bar Association approves the submission to the Congress of the United States of an Amendment to Article III, Section 2, of the Constitution of the United States of America, establishing in the Supreme Court of the United States appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact.²

This shift from offense to defense was not of the Association's own choosing. What had happened in the meantime has become

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¹ House of Delegates: Midyear Meeting, Atlanta, February 24-25, *Proceedings* 44 A.B.A.J. 338, 387 (1958).

² House of Delegates: September 18-22, *Proceedings*, 36 A.B.A.J. 948, 957 (1950). U.S. CONST. art. III, § 2, cl. 2, after enumerating the cases to which the federal judicial power extends, and those in which the Supreme Court has original jurisdiction, provides: "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

too well known to require more than initial mention, as is the historical fact that it has happened before and the predictive guess that it will probably happen again in future decades, namely, discontent in Congress with Supreme Court decisions with which a number of Senators and members of the House of Representatives, and, perhaps, some of their respective constituents, have felt constrained to disagree. Perhaps "discontent" is too generously mild a designation. Certainly the vocal outcries have ranged from virulent exasperation in some quarters to unhappy doubt in others — from the bitter "I hate you — I hate you — I hate you" extremists to the reproachful "I-wish-you-hadn't-done-it" moderates.

I do not propose to analyze or diagnose the causes of the current rash of anti-Court proposals that has broken out on Capitol Hill. The causative irritants are all-too-recent and all-too-obvious. Rather, I propose to take a close and, I hope, objective look at the rash itself, and compare it with prior outbreaks to which the legislative body of our national government has on past occasions proved susceptible. But perhaps I'd better work my way out of the medical metaphor and back to my assigned role of legislative reporter.

Senate Bill 2646,³ the Jenner bill, which the Association's resolution opposes, is a type of selective scattergun proposal. It has been variously damned and occasionally praised in the public press and forum, and its provisions are by now too familiar to require verbatim restatement. Briefly summarized, they would deny the Supreme Court jurisdiction to review any case involving the validity of (1) the practices or jurisdiction of congressional committees, (2) the national government's enforcement of federal employee security regulations, (3) state control of intra-state subversive activities, (4) school board regulation of subversive activities of teachers, and (5) state action or regulation pertaining to admission to practice law in the state.

If clarification of the approach as well as the objects and purposes of the Jenner bill is needed, there is no better source than the words of Senator Jenner himself in his testimony before the subcommittee of the Senate Judiciary Committee at the hearing on August 7, 1957. After discussing the possibility of curbing the Supreme Court's power by constitutional amendment, he observed that, for more immediate protection of certain "con-

³ S. 2646, 85th Cong., 1st Sess. (1957). See Appendix A *infra*.

stitutional rights," constitutional amendment is not necessary. In the Senator's own words:

The right of appeal to the Supreme Court is not a constitutional right. No man has a constitutional right to more than one trial. Due process does not require the judgment of more than one court. Any appeal procedure is a matter of grace, not of right. Congress has conveyed [sic] upon [the] Supreme Court the appellate power which it has, and Congress can curtail or limit that power, under article III, paragraph 3, section 2 of the Constitution.

My bill proposes to limit the appellate power of the Supreme Court in five respects. These limitations are set forth in the bill in five subparagraphs . . .⁴

The Senator from Indiana then proceeded to summarize briefly, by reference to recent Supreme Court decisions, the object and purpose of each of the five subparagraphs. On completing his summary of the bill, the Senator added:

Mr. Chairman, it may be there are other areas in which the appellate jurisdiction of the Supreme Court should be restricted or with respect to which such jurisdiction should be withdrawn. I hope the committee will consider this matter carefully and if in the judgment of the committee there should be additions to this bill, I hope the committee will make them.⁵

In the face of mounting opposition to his proposal, including the American Bar Association resolution and the statement of the United States Attorney General that the bill was motivated by "a spirit of retaliation," Senator Jenner was under increasing stress to defend his measure and his motives. Thus, on March 5, 1958, his reported denial was: "I introduced the bill not out of a spirit of retaliation but out of deep concern for the preservation of the Constitution."⁶ To his defense also, before the Senate Judiciary Committee on March 24, came Senator Butler of Maryland with proposed amendments, tempering the first four subparagraphs of the Jenner proposal, but leaving the fifth, with respect to admissions to the bar, intact.⁷ The Butler approach, to overcome the effect of specific Supreme Court decisions by equally specific legislative enactments, is in line with the action of Congress in 1957 when it changed the result of the *Jencks*⁸ decision by revising the procedure with respect to

⁴ *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 22 (1957).

⁵ *Id.* at 24.

⁶ N. Y. Times, March 6, 1958, p. 55, col. 2.

⁷ N.Y. Times, March 25, 1958, p. 19, col. 2. For the text of the Butler Amendment, see Appendix A *infra*.

⁸ *Jencks v. United States*, 353 U.S. 657 (1957).

defense inspection of confidential documents in criminal cases,⁹ but the Butler amendment, as will be noted later, it itself fraught with confusing complications.

So much for the Jenner bill's status as of the end of March 1958. What happens to it hereafter will have to be reported by supplemental comment, but one experienced Washington observer, as of March 15, flatly gave it no chance of passage.¹⁰ However, that it cannot be written off as an isolated and quixotic effort is apparent from the host of other measures poured into House and Senate hoppers in the 85th Congress.

It might be of more than purely academic interest to note the general categories into which these other proposals fall, and then to discuss a few historical parallels.

I have already typified the Jenner proposal as the "selective scattergun" approach. Perhaps a "five-gun" salvo would be a more appropriate analogy, but in any event it, together with its identical counterpart in the House of Representatives,¹¹ would be in this category of broadside attack. So also would a house resolution introduced in February 1958, and entitled "a bill to establish rules of interpretation of the effect of Acts of Congress on State laws; to limit the appellate jurisdiction of the Supreme Court in certain cases; and to provide that confessions and other evidence shall be admissible in the United States courts."¹² The latter measure, under a subheading on "separation of powers," contains the following provisions, the interpretation and application of which would furnish an interesting challenge:

The courts of the United States and the courts of the several States of the United States shall not be bound by any decision of the Supreme Court of the United States which conflicts with the legal principle of adhering to prior decisions and which is based upon considerations other than legal.¹³

Another group of proposals, perhaps more appropriately designated as the "single-shot" variety, would directly or indirectly curb the jurisdiction of the federal courts, including the appellate authority of the Supreme Court, in a particular area rather than in a cluster of areas. Thus, Senate Bill 3386, introduced by Senator Butler on March 3, 1958, would deprive the federal courts of jurisdiction to interfere with state action denying admission to

⁹ 71 STAT. 595, 18 U.S.C.A. § 3500 (Supp. 1957).

¹⁰ Anthony Lewis in the N.Y. Times, March 16, 1958, p. E9, cols. 1, 2.

¹¹ H.R. 9207, 85th Cong., 1st Sess. (1957) (Mrs. St. George of N.Y.).

¹² H.R. 10775, 85th Cong., 2d Sess. (1958) (Mr. Colmer of Miss.).

¹³ *Id.* at § 2(c). See also H.R. 463, 85th Cong., 1st Sess. (1957) (Mr. Smith of Miss.), embodying these "separation of powers" provisions in a separate bill.

practice law because of subversive activities or for refusing to answer questions pertaining to such activities.¹⁴ A house resolution presented at the opening of the January 1957 session would preclude federal court jurisdiction over any action involving the validity of a state provision relating to public schools "on the ground of its being repugnant to the Constitution, treaties, or laws of the United States for any reason other than substantial inequality of physical facilities and other tangible factors."¹⁵ As an example of the indirect approach, there is a house joint resolution proposing a constitutional amendment to empower Congress "by statute passed by two-thirds of each House of Congress, to limit the authority of courts of the United States to determine that statutes of the United States or of any State are repugnant to the Constitution of the United States."¹⁶

As distinguished from the direct or indirect proposals to curb the powers of federal courts, there are numerous measures which, like the proffered Butler amendments to the Jenner bill, seek to overcome the effect of Supreme Court decisions by assertion or reassertion of congressional authority and legislative intent. Here, of course, the legislative body is operating more nearly within its own traditional domain. For example, a bill introduced in the first session by Senator Bridges, on behalf of himself and others, would add to the "Treason, Sedition and Subversive Activities" chapter of the United States Code¹⁷ a declaration that neither existing subversive and communist control statutes nor other similar future acts shall prevent state enforcement of state criminal statutes in the field of sedition or subversion.¹⁸ In the House, the much more extensive Walter bill¹⁹ proposing numerous amendments to the Internal Security Act includes a provision comparable to that in the measure offered by Senator Bridges.

In the area of federal limitation on state authority, two other "interpretative restriction" types of approach are proposed. One would provide that no act of Congress shall be construed to exclude state laws on the same subject matter in the absence of express provision to that effect, or unless there is "a direct

14 S. 3386, 85th Cong., 2d Sess. (1958).

15 H.R. 1228, 85th Cong., 1st Sess. (1957) (Mr. Rivers of S.C.). The words "substantial" and "tangible" would provide challenging, if not dismaying, areas for judicial latitudinarianism.

16 H.R.J. RES. 476, 85th Cong., 2d Sess. (1958) (Mr. Rogers of Tex.).

17 18 U.S.C. §§ 2381-90 (1952).

18 S. 654, 85th Cong., 1st Sess. (1957) (Mr. Bridges of N.H.).

19 H.R. 9937, 85th Cong., 2d Sess. (1958) (Mr. Walter of Pa.).

and positive conflict" between the federal and state laws.²⁰ The other would amend the Constitution to reserve to the States exclusive jurisdiction over, and prevent federal "interference with or limitation upon the power of any State to regulate health, morals, education, marriage, and good order in the State."²¹

Thus far, I have surveyed the types of pending proposals that aim directly at curbing the appellate jurisdiction of the Supreme Court, as well as, in some instances, the authority of other federal courts. I have also noted the category of measures that are designed, by way of congressional exposition or amendment of legislation in particular areas, to overcome the impact of specific Supreme Court decisions.

Not to be overlooked, however, are a number of joint resolutions and bills that would change either the terms of office or the qualifications and methods of selection of Supreme Court justices. I grant that they are not, *stricto sensu*, proposals to "curb" the Court, but I suspect that the Damoclean sword effect, or even a retaliatory implication, motivates at least some of them. As I shall indicate later, they are strongly reminiscent of that era, two decades ago, when dissatisfaction with Supreme Court decisions aligned the Court's opponents and defenders behind barrage and counter-barrage of proposals to alter or solidify its organizational membership.

Review and analysis of various measures representative of the current crop show that they divide about evenly between those that would limit the terms of office either of Supreme Court judges alone or of federal court judges generally, and those that would impose required qualifications of prior judicial service as a condition of eligibility. I note as a matter of possible passing interest that all but one of the proposals here mentioned were introduced by representatives of the Southern States — something from which a sanguinary historian might hypothesize a coincidental shadow of the era of the Confederacy and a distant echo of Fort Sumter.

One pair of duplicate measures in the Senate and House would limit Supreme Court justices to four-year terms and would require Senate ratification of incumbents within six months following the adoption of the proposed constitutional amendment.²²

²⁰ H.R. 3, 85th Cong., 1st Sess. (1957) (Mr. Smith of Va.).

²¹ H.R.J. RES. 175, 85th Cong., 1st Sess. (1957) (Mr. Whitten of Miss.).

²² S.J. RES. 114, 85th Cong., 1st Sess. (1957) (Mr. Eastland of Miss.) and H.R.J. RES. 403, 85th Cong., 1st Sess. (1957) (Mr. Abernethy of Miss.).

Three identical joint resolutions in the House would prescribe ten-year terms for all federal judges, with the tenure of each present judge to terminate "December 31, 1962, or ten years after the date of his taking the oath of office, whichever date is the later."²³ A more ambitious proposal would change both the method of selection and the terms of office of Supreme Court judges by directing Congress to divide the country into nine judicial election districts, from each of which a judge would be elected by the voters for an eight-year term, the judges so elected to select one of their number to serve as Chief Justice.²⁴

It is tempting to speculate what the course of American history would have been had the Framers of the Constitution reversed the tenure and methods of selection of the federal judiciary and the Congress, respectively, with the judges elected for limited terms and the legislators appointed for life. Would there have been a *Marbury v. Madison*,²⁵ a *McCulloch v. Maryland*,²⁶ a *Gibbons v. Ogden*,²⁷ or a *Brown v. Board of Education*,²⁸ or would the thrust of judicial determinism have been undeviatingly anti-federalist? Or, as seems more likely, would the Court have become a purely interpretative body, innocuously deferential to legislative omnipotence? But what the past might have been, as well as what the future could be in the remote contingency that our Supreme Court judges should become elected, is not properly within the scope of my present concern.

To return to the other group of pending proposals, those which would impose certain qualifications on eligibility for appointment, it is transparently obvious that they are drawn with reference to certain incumbents of the present Supreme Court. The basic approach, with some variations, is to require a period of prior judicial service, either in the highest court of a state or in a federal court, and the minimum such period among the several bills considered is five years.²⁹ One would impose a

²³ H.R.J. RES. 388, 85th Cong., 1st Sess. (1957) (Mr. Smith of Wis.); H.R.J. RES. 407, 85th Cong., 1st Sess. (1957) (Mr. Whitten of Miss.); H.R.J. RES. 415, 85th Cong., 1st Sess. (1957) (Mr. Herlong of Fla.).

²⁴ H.R.J. RES. 536, 85th Cong., 2d Sess. (1958) (Mr. Long of La.). The proposal omits any provision for transition from the present appointive to the elective method as far as incumbent judges are concerned — a lacuna that could provide interesting complications.

²⁵ 5 U.S. (1 Cranch) 137 (1803).

²⁶ 17 U.S. (4 Wheat.) 316 (1819).

²⁷ 22 U.S. (9 Wheat.) 1 (1824).

²⁸ 347 U.S. 483 (1954).

²⁹ S. 283, 85th Cong., 1st Sess. (1957) (Mr. Smathers of Fla.) and S. 1184, 85th Cong., 1st Sess. (1957) (Mr. Talmadge of Ga.). A similar requirement is included among the other provisions of H.R.J. RES. 536, *supra* note 24.

requirement that at least one-half of those appointed have not less than six years;³⁰ another would require that at least one of each two successive nominees have had at least ten years of judicial service;³¹ and a third would require one out of two appointed to the Supreme Court to have had ten years, and each appointee to the office of circuit judge to have had five years or more of judicial service.³² Other measures would provide negative as well as affirmative qualifications, as, for example, that no person shall be confirmed as a "justice of the United States" [sic] unless he is a natural-born citizen, has attained the age of 35, has been a resident for 14 years, has graduated from an approved law school or been admitted to practice law, has practiced for at least ten years, or has had a total of not less than five years of judicial service.³³ Another would prohibit appointing to a federal judgeship anyone who has, within the preceding five years, held any one of certain specified executive or administrative positions in the United States government, or served as Senator or Representative in Congress, or as "Governor, Lieutenant Governor, or head of any executive department of any State or Territory."³⁴ Among the more novel ideas, mention should be made of one "proposing an amendment to the Constitution of the United States to provide that, subject to the consent of the Senate, judges of the Supreme Court shall be appointed by a vote of the judges of the courts of highest and last resort in civil cases in the several States."³⁵ And, in quite a different vein, there is the recently reported move by Senator Eastland, vigorously opposed by the Attorney General, to require newly-appointed federal judges to swear that they "will not participate knowingly in any decision to alter the Constitution."³⁶

This completes my initial survey of proposals in the 85th Congress and I should like now to venture a brief backward look at a comparable era when the Supreme Court was the subject of intensive congressional concern. In this respect, the period 1935 - 1937 offers the most obvious parallel, although perhaps "parallel" is not quite *le mot juste*. The then attack on

30 S. 171, 85th Cong., 1st Sess. (1957) (Mr. Long of La.).

31 S. Res. 96, 85th Cong., 1st Sess. (1957) (Mr. Stennis of Miss.).

32 H.R. 462, 85th Cong., 1st Sess. (1957) (Mr. Smith of Miss.).

33 H.R. 322, 85th Cong., 1st Sess. (1957) (Mr. Lanham of Ga.).

34 H.R. 512, 85th Cong., 1st Sess. (1957) (Mr. Abernethy of Miss.).

35 H.R.J. Res. 438, 85th Cong., 1st Sess. (1957) (Mr. Fisher of Tex.).

36 N.Y. Times, April 2, 1958, p. 20, col. 3.

the Supreme Court, stimulated by the Court's seemingly intransigent invalidations of federal statutes sponsored by the Roosevelt administration to alleviate the depression, lacked some of the overtones of the current battle — but there was no lack of wrath and indignation. Epicenter of the stormy controversy was the message of the President to Congress on February 5, 1937, and the draft bill that accompanied it, proposing that when a federal judge, on reaching the age of 70 after ten years of judicial service, failed to resign or retire within six months thereafter, "the President, for each such judge who has not so resigned or retired, shall appoint one additional judge to the court to which the former is commissioned," with the limitation that the Supreme Court should not be increased thereunder to more than 15 members.³⁷

The history of the American Bar Association's vigorous campaign to bring about the defeat of the President's plan is amply documented in the pages of the American Bar Association Journal for 1937. Highlights are illuminated by the titles of some of the numerous articles that appeared, and their sequence from inception to climax to denouement as follows: "The Supreme Court Issue"³⁸ — "The President's Proposal to Add Six New Members to the Supreme Court"³⁹ — "Members of the American Bar Association Decide Its Policies as to the Federal Courts"⁴⁰ — "The Most Important Question Since the Civil War"⁴¹ — "Association's Views on the Supreme Court Issue Presented to the Senate Committee"⁴² — "Members and Non-Members of American Bar Association Take Same Stand on Court Issues"⁴³ — "Public Opinion Defeated the Court Bill."⁴⁴

In the excitement engendered by the main battle, a number of other proposals pertaining to the Supreme Court, its composition and powers, were relegated to relative obscurity. The records show, however, that from May 7, 1935, to August 20, 1937, no

³⁷ 81 CONG. REC. 877, 880 (1937). The bill was formally introduced as S. 1392, 75th Cong., 1st Sess. (1937), first known as the Ashurst-Maverick bill, and later, in the substitute form in which it was ultimately defeated, as the Logan-Hatch-Ashurst bill.

³⁸ Stinchfield, 23 A.B.A.J. 233 (1937).

³⁹ Olney, *id.* at 237.

⁴⁰ Ransom, *id.* at 271.

⁴¹ Burlingham, *id.* at 278.

⁴² *Id.* at 315.

⁴³ Ransom, *id.* at 338.

⁴⁴ Smith, *id.* at 575.

less than 33 proposed constitutional amendments were introduced, each of which would, in one way or another, have affected the Supreme Court's membership or its powers to declare laws unconstitutional.⁴⁵ Sixteen of the measures, or nearly half, were introduced in the first three months of 1937. Among the 33 proposals, those having an imminent bearing on the Supreme Court's authority ranged from outright prohibition of the Court's power to declare laws unconstitutional⁴⁶ to affirmative protection of its composition and membership.⁴⁷ The spectrum in between included proposals to require the Court to render advisory opinions on the constitutionality of acts of Congress,⁴⁸ measures that would make laws held unconstitutional by the Supreme Court valid if re-enacted by Congress,⁴⁹ or if either re-enacted by Congress or approved by the electorate,⁵⁰ and proposals to require a two-thirds vote of the Court in order to declare a law unconstitutional.⁵¹

Most of these, it will be noted, were designed to accomplish by various means the same ends as the President's proposal, namely, to overcome, or prevent the recurrence of, Supreme Court decisions holding unconstitutional the statutes implementing the administration's recovery program. On the other hand, aligned squarely against the President's court-enlargement plan were a significant number of proposed constitutional amendments to forbid any increase in the Supreme Court's membership and to fix the number at nine.⁵² None of these prevailed to the point of passage, or even near-passage. Yet the after-echoes of the 1937 battle persisted, albeit with diminishing sound and

⁴⁵ See, *Proposed Amendments to the Constitution of the United States*, S. Doc. No. 65, 85th Cong., 1st Sess. *passim* (1957).

⁴⁶ H.R.J. RES. 296, 74th Cong., 1st Sess. (1935) (Mr. Hill of Wash.).

⁴⁷ See note 52 *infra*.

⁴⁸ H.R.J. RES. 317, 74th Cong., 1st Sess. (1935) (Mr. Tolan of Calif.); H.R.J. RES. 374, 74th Cong., 1st Sess. (1935) (Mr. Hobbs of Ala.); H.R.J. RES. 132, 75th Cong., 1st Sess. (1937) (Mr. Tolan of Calif.).

⁴⁹ S.J. RES. 80, 75th Cong., 1st Sess. (1937) (Mr. Bone of Wash.); H.R.J. RES. 80, 75th Cong., 1st Sess. (1937) (Mr. O'Malley of Wash.); S.J. RES. 118, 75th Cong., 1st Sess. (1937) (Mr. Bilbo of Miss.).

⁵⁰ H.R.J. RES. 565, 74th Cong., 2d Sess. (1936) (Mr. Sioncheck of Wash.); H.R.J. RES. 190, 85th Cong., 1st Sess. (1957) (Mr. Coffee of Wash.).

⁵¹ S.J. RES. 98, 75th Cong., 1st Sess. (1937) (Mr. O'Mahoney of Wyo.); H.R.J. RES. 276, 75th Cong., 1st Sess. (1937) (Mr. Fish of N.Y.); H.R.J. RES. 286, 75th Cong., 1st Sess. (1937) (Mr. Fish of N.Y.); H.R.J. RES. 333, 75th Cong., 1st Sess. (1937) (Mr. Fish of N.Y.).

⁵² See, for example, H.R.J. RES. 277, 75th Cong., 1st Sess. (1937) (Mr. Culkin of N.Y.); H.R.J. RES. 302, 75th Cong., 1st Sess. (1937) (Mr. Daly of Pa.); H.R.J. RES. 312, 75th Cong., 1st Sess. (1937) (Mr. Dondero of Mich.); H.R.J. RES. 373, 75th Cong., 1st Sess. (1937) (Mr. Gray of Ind.); H.R.J. RES. 383, 75th Cong., 1st Sess. (1937) (Mr. Gearhart of Calif.).

fury. Regularly, in the opening days of each succeeding Congress through 1955, Representative Dondero of Michigan reintroduced his proposed constitutional amendment to preserve at nine the number of members of the Supreme Court.⁵³

The Supreme Court's emergence unscathed from the denunciations and congressional threats of 1937 gives reasonable assurance of its potential perdurability in today's battle and in the skirmishes that may be ahead in future legislative generations. Particular provocations occasioned by individual decisions there will always be, just as there have been in the annals of the past, beginning at least as early as *Cohens v. Virginia*⁵⁴ in 1821, which alarmed Senator Johnson of Kentucky into proposing that in cases where a state was a party or desired to become one because its constitution or laws were in question, the Senate and not the Supreme Court should have appellate jurisdiction.⁵⁵ Thereafter, at intervals between 1821 and 1882, the 19th century witnessed upsurges of congressional animosity and threats to curb the Supreme Court's powers, particularly with respect to passing on the validity of state laws, but none proved to be more than a transitory and ineffective flare-up.⁵⁶

And so it has been down through the 20th century to date — judicial decision, legislative reaction, and then, quiescence — with sometimes the Court as a whole and sometimes an individual justice as the target of congressional sniping. An illustrative instance of the latter occurred on June 17, 1953, when Mr. Justice Douglas, motivated by a last-minute point of statutory construction that had apparently been overlooked by court and counsel throughout the intensive trial and appeal of what was certainly a fully-argued *cause célèbre*, granted a stay of execution to Julius and Ethel Rosenberg,⁵⁷ only to be overruled by his colleagues two days later.⁵⁸ The action of Mr. Justice Douglas brought prompt reaction in the form of a resolution offered by Representative Wheeler of Georgia to impeach the Justice for

⁵³ H.R.J. RES. 75, 76th Cong., 1st Sess. (1939); H.R.J. RES. 13, 77th Cong., 1st Sess. (1941); H.R.J. RES. 45, 78th Cong., 1st Sess. (1943); H.R.J. RES. 37, 79th Cong., 1st Sess. (1945); H.R.J. RES. 7, 80th Cong., 1st Sess. (1947); H.R.J. RES. 12, 81st Cong., 1st Sess. (1949); H.R.J. RES. 18, 82d Cong., 1st Sess. (1951); H.R.J. RES. 27, 83rd Cong., 1st Sess. (1953); H.R.J. RES. 34, 84th Cong., 1st Sess. (1955).

⁵⁴ 19 U.S. (6 Wheat.) 264 (1821).

⁵⁵ See 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 117 (1924).

⁵⁶ Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 4 (1913).

⁵⁷ *Rosenberg v. United States*, 346 U.S. 273, 313 (1953).

⁵⁸ *Id.* at 273.

"high crimes and misdemeanors in office."⁵⁹ This was followed by somewhat more temperate proposals in the House and Senate to limit the power of individual justices to grant stays of execution in criminal cases, proposals which were likewise destined to fall by the wayside.⁶⁰

It is therefore with a well-filled arsenal of precedents that we return to the current Congress and its cluster of Court-curbing measures. The dangers inherent in the Jenner bill, to eliminate the Supreme Court's reviewing authority in certain areas, are so apparent that little need be added to what was written nearly a quarter of a century ago by Charles Warren when he stated:

Changes . . . restricting the appellate jurisdiction of the Court . . . would result in leaving final decision of vastly important National questions in the State or inferior Federal Courts, and would effect a disastrous lack of uniformity in the construction of the Constitution, so that fundamental rights might vary in different parts of the country.⁶¹

Opposition to the Jenner bill on this and other grounds was voiced by a number of law school teachers and deans in letters written to Senator Hennings of Missouri and incorporated in the record of the subcommittee hearings held in February and March of 1958.⁶² Among them, one of the co-participants in this Symposium, Dean Rostow, pointed out in detail some of the particular weaknesses in the measure, including the following:

First, S. 2646 appears to be studded with ambiguities, a few of which it might be well to advert to:

Does the bill foreclose review of all cases at any stage of which there was 'drawn into question the validity of' one or more of the matters described in subparagraphs (1) through (5)? Or does the bill merely limit the issues which can be raised in the Supreme Court?

What, furthermore, does 'validity' mean? Does it relate only to constitutionality, or does it also comprehend conformity with applicable statutes or regulations as well?

Testing the statutory language against concrete situations only deepens its mystery: For example, under subparagraph (1), would the Supreme Court be entitled to review a ruling

⁵⁹ H.R. RES. 290, 83rd Cong., 1st Sess. (1953). For Mr. Wheeler's explanatory statement, see 99 CONG. REC. 6699 (1953), and for the response of Representative Reams of Ohio on the following day, see *id.* at 6832.

⁶⁰ H.R. 5859, 83rd Cong., 1st Sess. (1953) (Mr. Curtis of Mass.); S. 2373, 83rd Cong., 1st Sess. (1953) (Mr. McCarran of Nev.). The McCarran proposal, although reported favorably from Committee, failed to come to a vote in the Senate. See 100 CONG. REC. 7209, 7379, 8572, 14089, 14945 (1954).

⁶¹ 1 WARREN, *op. cit. supra* note 54, at 27-28.

⁶² *Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Laws of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 2, at 391 (1958).

on evidence, or an allegedly prejudicial statement by the prosecutor, or a challenge to the composition of the jury, in a trial for contempt of Congress? Would such an issue be deemed to have 'drawn into question the validity of * * * any action or proceeding against a witness charged with contempt of Congress'?

The sweeping language of subparagraphs (3) and (4) also presents major problems of interpretation. Who determines, and by what standard, whether a statute or regulation is one 'concerning subversive activities * * *'? Consider, for example, *Atkins v. School Board* (246 F.2d 325, cert. denied, 78 Sup. Ct. 83), in which the Court of Appeals for the Fourth Circuit recently sustained the invalidation of the Virginia Pupil Placement Act of 1956. The State statute in question recited, in part, that 'the mixing of white and colored children in any elementary or secondary public school * * * constitutes a clear and present danger * * *.' Would S. 2646, had it been on the books, have foreclosed the Commonwealth of Virginia from seeking Supreme Court review of the adverse decisions of the lower Federal courts?⁶³

Professor Edwin D. Dickinson, formerly of the University of Pennsylvania law faculty, and former dean of the University of California School of Law at Berkeley, summarized the dangers in the Jenner bill's five subdivisions, beginning with the first clause relating to the proposed denial of Supreme Court review of the functions and jurisdiction of congressional subcommittees:

. . . Judicial review of the functioning of legislative committees has been exceedingly cautious in this country and will, I anticipate, continue to be so; but the possibility has long since become an important feature of the scheme of checks and balances. It would seem utterly improvident to eliminate even the possibility as proposed in the bill's clause (1). Do we wish seriously to cast our Congress in the role of a supreme soviet? Or our Executive, as proposed in clause (2), in the role of a sort of presidium in terms authorized to substitute the purge for orderly procedures? Of clause (3) I can only say that it appears to have been formulated in an amazing disregard of essential national supremacy in matters of national security. As to clause (4), I would anticipate that most of the bodies to which it is improvidently addressed would continue notwithstanding to administer in accord with our best educational traditions, but lapses would be invited and there would be those to take advantage of the invitation. The phrase 'subversive activities in its teaching body' can be made to mean anything from treason to mere policies or opinions with which an administering body may disagree. The results could easily be devastating. The whole bill, clauses (1) to (5) inclusive,

⁶³ *Id.* at 397.

appears to be aimed at an emasculation of the Bill of Rights in everything that pertains to 'security' or 'subversive activities.' Are we in such dire straits in matters of security that our whole tradition of due process under a government of laws must be abandoned? I think not. On the contrary, I suggest that the tradition is source of our greatest strength.⁶⁴

As I noted earlier, the proposed amendments by Senator Butler to the Jenner bill are studded with difficult and confusing problems. These are pointed out by Senator Hennings in an extensive memorandum filed with the Senate subcommittee on April 7, 1958, in which he criticized both the Jenner approach and the Butler approach as a "kill the umpire" philosophy and urged against the attempted undoing of particular unpopular decisions of the Court by hasty and ill-considered measures. Referring to the Butler amendment, he states:

In my opinion, each of the disparate provisions of this amendment should be introduced as a separate bill and considered on its own merits. This is the orderly and sound method of dealing with legislation. Legislation should not be considered by bringing several unrelated provisions into an amalgamation and by rushing it through. Such action usually will bring about only undesirable results.

The lack of relationship between the proposed five provisions is easily seen if each provision is studied individually.⁶⁵

It is only necessary to refer to one or two provisions of the amendment to illustrate its uniqueness. For example, Section 5 (a) of Senator Butler's proposal would add a statement of congressional "finding" that is certainly novel in its phraseology as a proposed formal legislative enactment. It states:

... The Congress finds that the distinction made by the Supreme Court of the United States in *Yates* against United States, *Schneiderman* against United States, and so forth, between advocacy of the forcible overthrow of the Government as an incitement to action and advocacy of such overthrow as mere abstract doctrine is, as Mr. Justice Harlan characterized it, 'subtle and difficult to grasp'; that the construction put upon section 2385 of title 18 of the United States Code by the Supreme Court is one never intended by the Congress; that such construction is impracticable of application, and infuses into this criminal statute a degree of uncertainty and unclarity which

⁶⁴ *Id.* at 418. For the views of Dean Erwin N. Griswold of Harvard Law School, see "Dean Griswold Opposes Enactment of 'Jenner Bill,'" *Harvard Law Record*, March 6, 1958, p. 3, col. 4.

⁶⁵ Memorandum Setting Forth Objections to Senator Butler's Proposed Amendments to S. 2646, the So-Called Jenner Bill to Limit the Supreme Court's Jurisdiction, April 7, 1958. (Mimeographed), p. 1.

is highly undesirable; and that legislative action to clarify and make certain the intent of this criminal statute is therefore required.⁶⁶

Subdivision (d) of the same section adds a definition of the word "organize" that attempts, but hardly accomplishes, clarification of what Congress would intend by its adoption:

As used in this section, the term 'organize' with respect to any society, group, or assembly of persons, includes encouraging recruitment or the recruiting of new or additional members, and the forming, regrouping, or expansion of new or existing units, clubs, classes, or sections of such society, group, or assembly of persons.⁶⁷

As for other proposals in the current Congress suggesting changes in the tenure of Supreme Court justices, and the recommended abandonment of appointment for life in favor of relatively short terms, surely the history of Jacksonian democracy and its impact on the state judicial systems has taught us that judicial independence and ability are apt thereby to be sacrificed on the altar of popular whim and political control. The unbroken tradition of a federal judiciary appointed for life or during good behavior has proved sufficiently strong to withstand any suggestions of change during its long and sometimes stormy history, and the dangers of any change today could scarcely be considered more than ephemeral.

Nor do I think it likely that the proposals to require five, six, or ten years of prior judicial service would necessarily change the calibre of appointees to the Supreme Court. After all, the Senate has the power to confirm or reject, and there is no present restriction on its authority other than the deterrent of respect for the President's nominating choice, considerations of senatorial courtesy, and the requirement of a majority vote to approve a nominated candidate for appointment. Once the approval has been given, should not the Senate at least be somewhat morally bound thereby, reserving its right of course to criticize in individual instances of judicial decisions not in accord with legislative views?

I do not doubt there will be in the future, as there is today and has been in the past, criticism in Congress, and often bitter criticism. This is no more than the price we pay, and expect to pay, for a representative form of government, as foreseen long ago by Alexander Hamilton, when he commented that

⁶⁶ See *infra* Appendix A.

⁶⁷ *Ibid.*

legislators, as representatives of the people, "seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter."⁶⁸ But today's choler gives way to tomorrow's sober second thought, and the very legislative process itself is designed to place checkreins on overhasty action.

The Supreme Court today, therefore, will have to bear with its customary dignity the slings and arrows of occasionally outraged members of the legislative branch. After all, as an eminent historian of the Court has observed:

No institution of government can be devised which will be satisfactory at all times to all people. But it may truly be said that, in spite of necessary human imperfections, the Court today fulfills its function in our National system better than any instrumentality which has ever been advocated as a substitute.⁶⁹

⁶⁸ THE FEDERALIST No. 71 (Hamilton), quoted in HAND, THE BILL OF RIGHTS 11 (1958).

⁶⁹ 1 WARREN, *op. cit. supra* note 54, at 29.

APPENDIX A

IN THE SENATE OF THE UNITED STATES

JULY 26 (legislative day, JULY 8), 1957

MR. JENNER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To limit the appellate jurisdiction of the Supreme Court in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 81 of title 28 of the United States Code is amended by adding at the end thereof the following new section:

“§ 1258. Limitation on appellate jurisdiction of the Supreme Court.

“Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall have no jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case where there is drawn into question the validity of —

“(1) any function or practice of, or the jurisdiction of, any committee or subcommittee of the United States Congress, or any action or proceeding against a witness charged with contempt of Congress;

“(2) any action, function, or practice of, or the jurisdiction of, any officer or agency of the executive branch of the Federal Government in the administration of any program established pursuant to an Act of Congress or otherwise for the elimination from service as employees in the executive branch of individuals whose retention may impair the security of the United States Government;

“(3) any statute or executive regulation of any State the general purpose of which is to control subversive activities within such State;

“(4) any rule, bylaw, or regulation adopted by a school board, board of education, board of trustees, or similar body, concerning subversive activities in its teaching body; and

“(5) any law, rule, or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State.”

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"1258. Limitation on the appellate jurisdiction of the Supreme Court."

BILL AS IT WOULD APPEAR WITH SENATOR BUTLER'S AMENDMENTS INCORPORATED

A BILL

To limit the appellate jurisdiction of the Supreme Court in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 81 of title 28 of the United States Code is amended by adding at the end thereof the following new section:

"§ 1258. Limitation on appellate jurisdiction of the Supreme Court.

"Notwithstanding the provisions of sections 1253, 1254, and 1257 of this chapter, the Supreme Court shall have no jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case where there is drawn into question the validity of —

"any law, rule, or regulation of any State, or of any board of bar examiners, or similar body, or of any action or proceeding taken pursuant to any such law, rule, or regulation pertaining to the admission of persons to the practice of law within such State."

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"1258. Limitation on the appellate jurisdiction of the Supreme Court."

Sec. 2. Section 102 of the Revised Statutes, approved June 22, 1938 (52 Stat. 942; 2 U.S. C. 192), is amended by changing the period at the end thereof to a colon and adding the following proviso: "Provided, That for the purposes of this section any question shall be deemed pertinent unless timely objection is made thereto on the ground that such question lacks pertinency, or when such objection is made, if such question is ruled pertinent by the body conducting the hearing; and on any question of pertinency, the ruling of the presiding officer shall stand as the ruling of the body unless reversed on appeal."

Sec. 3. The Act of August 26, 1950 (64 Stat. 476; 5 U.S. C. 22-1, 22-3) is hereby amended by striking out, in section 1

thereof, the words "Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics," and inserting in lieu thereof "the head of any department or agency of the Government"; and by striking out all of section 3 thereof.

Sec. 4. (a) Chapter 1 of title 1, United States Code, is amended by adding at the end thereof the following new section:

"§ 7. Effect of Acts of Congress on State laws.

"No Act of Congress in any field shall operate to the exclusion of any State law on the same subject matter unless such Act contains an express provision to that effect. No Act of Congress shall invalidate a provision of State law which would be valid in the absence of such Act unless there is such direct and positive conflict between an express provision of such Act and such provision of the State law that the two cannot be reconciled or consistently stand together."

(b) The sectional analysis of such chapter is amended by adding at the end thereof the following new item:

"7. Effect of Acts of Congress on State laws."

Sec. 5 (a) The Congress finds that the distinction made by the Supreme Court of the United States in *Yates* against United States, *Schneiderman* against United States, and so forth, between advocacy of the forcible overthrow of the Government as an incitement to action and advocacy of such overthrow as mere abstract doctrine is, as Mr. Justice Harlan characterized it, 'subtle and difficult to grasp'; that the construction put upon section 2385 of title 18 of the United States Code by the Supreme Court is one never intended by the Congress; that such construction is impractical of application, and infuses into this criminal statute a degree of uncertainty and unclarity which is highly undesirable; and that legislative action to clarify and make certain the intent of this criminal statute is therefore required.

(b) The first paragraph of section 2385 of title 18 of the United States Code is amended so as to read:

"Without regard to the immediate probable effect of such action, whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the Government of the United States or

the government of any State, Territory, District or possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or”.

(c) Section 2385 of title 18 of the United States Code is amended by inserting therein, immediately after the first paragraph thereof, the following new paragraph:

“Whoever, with intent to cause the overthrow or destruction of any such government, in any way or by any means advocates, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying any such government by force or violence; or”.

(d) Section 2385 of title 18 of the United States Code is amended by adding at the end thereof the following new paragraph:

“As used in this section, the term ‘organize’ with respect to any society, group, or assembly of persons, includes encouraging recruitment or the recruiting of new or additional members, and the forming, regrouping, or expansion of new or existing units, clubs, classes, or sections of such society, group, or assembly of persons.”

Amend the title so as to read: “A bill to limit the appellate jurisdiction of the Supreme Court in certain cases, and for other purposes.”