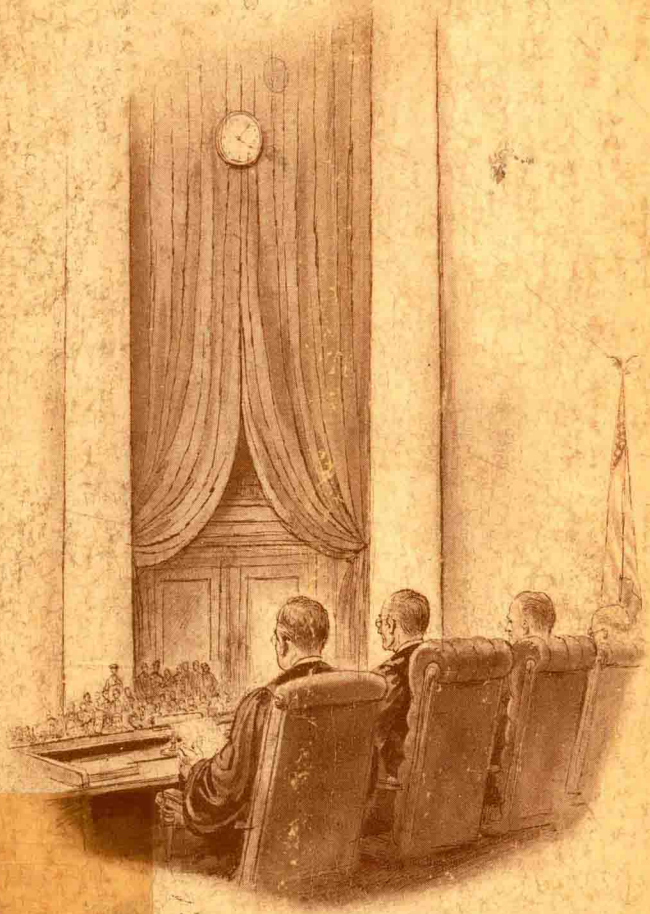
THE SUPREME COURT: Views from Inside



Edited by ALAN F. WESTIN

Fourteen out-of-court commentaries by the justices offering unique insights into the Supreme Court and leading constitutional issues of our day

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Preface

My greatest debt in assembling this collection is to the Justices of the Supreme Court who made copies of their printed or typescript addresses available to me: Chief Justice Earl Warren and Associate Justices Hugo Black, William O. Douglas, Felix Frankfurter, Tom C. Clark, John M. Harlan, William J. Brennan Jr., Charles E. Whittaker and Potter Stewart. While limitations of space made it impossible to include a speech by each of the present Justices and topical coverage sometimes required the choice of one speech and relegation of parallel speeches to the Bibliography, my understanding of the scope and tenor of judicial commentary was widened considerably by having read all of the speeches.

For assistance in collecting speeches of previous members of the Court, I am especially indebted to Mr. Justice Frankfurter and Mr. Justice Harlan, and to their respective secretaries, Elsie Douglas and Ethel McCall. Helen Lally of the Library of the Supreme Court and Morris Cohen, Associate Librarian of Columbia University Law School were most cooperative in the face of trying call-slips and queries. My wife, Bea, and Eleanor and Robert Miller aided me, to the straining of vocal chords, in the reading of manuscript and proofs.

Introduction: On the View from Inside

John W. Davis, one of the masters of courtroom argument, once suggested in a lecture on the art of oral advocacy that this was a subject to be presented by judges, not by practicing lawyers. "Who would listen to a fisherman's weary discourse on fly casting," he asked rhetorically, "if the fish himself could be induced to give his views on the most effective method of approach?" A few years later, quoting Mr. Davis' remark, Justice Robert H. Jackson delivered a delightful and revealing lecture on "Advocacy Before the United States Supreme Court," billing the speech as "some meditations by one of the fish." Mr. Davis' quest for the inner perspective parallels the purpose of this short volume on the Supreme Court; Justice Jackson's willingness to speak about things other than lower-court reform and legal ethics signifies the tradition among Supreme Court members which makes this collection possible.

Our normal panorama of the Supreme Court comes from the formal opinions written by the Justices. A majestic "Affirmed" or "Reversed"—without further explanation—has never been the mode of judicial communiqué in this country. Since the Court's first decision in 1791, over 280,000 pages of majority, concurring, and dissenting opinions have undertaken to communicate what the Court did in the cases it decided, what it would not do, and why. Today, three bulky official volumes are required to print the opinions for a single year.

The general observer who reads these opinions carefully finds in them a wealth of data about judicial review in the American political system. He finds the lines of agreement and division

within the Court; the great debates of constitutional theory reverberating in the nation at large; the degree of rapport or tension between the Court and its governmental fellows—Congress, the President, and the States; the tenderness or hostility of the federal judiciary at a given moment toward the claims of groups such as organized labor, business, Negroes, or Catholics; and the particular economic, sectional, and social issues of each decade, from National Banks and Fugitive Slaves to Taft-Hartley injunctions, Passport Procedures, and School Segregation.

Even though the opinions open important vistas to us, they are not exactly picture-windows opening onto the Supreme Court-yard. The opinions present only a result, and because the Supreme Court does not deliberate in public, how that result was reached remains cloudy. For many rational and irrational reasons, American practice has determined that the bones of Justice—even Constitutional Justice—are best shaken and thrown in a darkened temple. Thus we see "before" and "after" at the Supreme Court but not "during." We can scrutinize what goes before the Court—the trial record, with its documentary etching of an unfolding dispute brought to law; the opinions of lower courts; the briefs and oral arguments of the parties and their friends; and the leading questions of the Justices while the case is being argued. When the Justices rise and file out through the red velour drapes behind the Bench, however, the curtain literally falls across the Court's proceedings.

No outsider knows whether or what the Justices read in making up their minds. The intra-Court debates are held behind the locked doors of the Conference Room and no transcript is made. The successive votes of each Justice on the cases which swing back and forth within the Court are not revealed, so changes of position can not be noted and analyzed as we are able to analyze those of Congressmen. Only years later, when biographies of deceased Justices may be written, do we learn the significant changes in wording and concept within the majority and dissenting opinions as they progressed through various drafts and were circulated among the "brethren." No systematic briefings or helpful leaks to the press issue from the law clerks, as they do from executive or legislative aides, and memoranda from the clerk to his Justice remain confidential. Finally, the Justices do not submit to press

conferences, either to explain their opinions under questioning or to respond to the general queries of a press corps.

All of these key elements in the judicial process take place in private. Only when they have been completed do the curtains part again and the Justices come back to view. When the result in each case is announced by a spokesman for the majority, he lets slip what he chooses about the internal feuds or passions stirred by "No. 521" or "No. 16," to be matched, perhaps, by a statement in reply from one of the dissenters.

Following the Supreme Court, then, is like trying to assemble a picture puzzle for which several important pieces have been playfully withheld by the manufacturer. As a result, students of judicial review subject the formal opinions to a textual examination comparable to the dissection of Biblical passages, Platonic dialogues, and Marxist treatises. When the opinions have been milked dry, the searchers move on to expert commentary, judicial biographies, political histories, the tidbits of Washington columnists (almost invariably wrong or warped), the expansive recollections of former law clerks, or observations by law professors fresh from a convivial hour with Mr. Justice X. Some political scientists, frustrated at the secrecy of the Conference, turn to a kind of scholarly astrology to pierce the curtain: game theory—"assuming each Justice decides cases so as to win the deciding vote position for himself . . ."; or scalagram analysis—"isolating the factors which decide the case in a given area, translating these into mathematical terms, we can predict that if a case exactly like this ever comes up again . . ." and a host of other alchemist's techniques.

The surprising thing is that, apart from the quotation of passages from a few of the better-known addresses of the Justices, there has never been a systematic examination of what the Justices say in public about themselves and their agency of government. Especially surprising is the fact that a collection of contemporary commentary has never been assembled as a teaching guide about judicial review. It is the thesis of this volume that the self-image of the Justices and their comments about the work of the Court provide a useful supplementary tool for students. Like any tool, its proper use depends upon a correct understanding of its purposes, special qualities, and limitations.

First, it should be appreciated at once that the Justices speak

out *primarily* to advance the prestige of the Supreme Court and defend it against critics. No Justice has taken the rostrum to urge elimination of judicial review of legislation. No Justice has supported popular election for members of the Court, or periods of limited rather than life tenure. No Justice has urged the institution of devices short of constitutional amendment to override judicial rulings holding legislative acts unconstitutional, such as national referenda or a two-thirds re-passage of an act by Congress. No Justice in recent decades has called for an increase in the Court's number of members, or for a compulsory retirement age to prevent the creep of senility on the bench. No Justice has supported Congressional limitations on the Court's appellate jurisdiction—not in the 1820's as to review of state court decisions or public land cases, nor in the 1890's as to municipal bond or railroad cases, nor in the 1950's as to segregation, loyalty-security, or passport matters.

Each of these positions which none of the Justices has endorsed has had eloquent champions among our leading political figures, from Thomas Jefferson and Theodore Roosevelt to Senator Robert LaFollette, Franklin Roosevelt, and the platoon of influential Senators and Congressmen pressing for "court-curbs" in 1958. Had the men who served as Justices since 1790 not gone on the Court, but performed as Senators, Governors, Attorneys-General, Professors or Presidents, it is possible that quite a few of them would have associated themselves publicly with one or another of the reform proposals. And, Justices who have retired from the Court *have* advocated changes in the Court's numbers or jurisdiction. But, as members of the Court, the Justices speak entirely on the defensive on what might be called "institutional questions"—those touching the nature of the judicial Establishment. This could be predicted, of course. Men elevated to the post of Master Architects of a society should not be expected to endorse the idea of "do-it-yourself" blueprints.

Thus one major purpose and function of speeches by the Justices has been to defend the Court from serious onslaughts, as openly as the canons of propriety in each era would permit. Minor defenses are also part of the pattern. The first Justice John Marshall Harlan went to great pains in an 1896 address[1] to advise the Bar and the public that there were no such things as

[1] "The Supreme Court and Its Work," 30 *American Law Review* 900 (1896).

committees within the Court to which cases were parceled out, even for determination of whether they would be heard, but that every Justice considered and passed upon every case presented to the Court. Sixty years later, his grandson, the present Justice John M. Harlan, was making the same explanation to members of the contemporary bar who had indicated a similar misconception.[2] Justice William J. Brennan, Jr., in the speech reprinted in this collection,[3] defends the Court's use of "social science data" in reaching its decisions, partly in answer to Southern critics of the desegregation rulings. Justice Felix Frankfurter's noted address, "The Supreme Court in the Mirror of the Justices" [4] demolishes the argument advanced by some influential journalists and Congressmen in the late 1940's that all Justices should have judicial experience before they are appointed.

Second, while the speeches of the Justices are defensive of the Establishment, they air clearly the fundamental differences within the Court as to basic judicial philosophy and specific topics of constitutional law. Justice Hugo Black's address in 1960, "The Bill of Rights" [5] (reprinted here), carries onto the speaker's rostrum his disagreement with the so-called "Frankfurter-Harlan" approach to civil-liberty issues. Justice Robert H. Jackson closed his life in the midst of writing a set of three lectures[6] (two of which appear here), in which he gave his mature speculations about the entire range of questions concerning judicial review in a democratic system; his strictures against the "cult of libertarian activists" in the Court left little to the imagination as to whom or what he meant. Thus the public statements of the Justices carry on the dialogue from the Conference Room and the opinions, and sometimes the freedom from fact-situations, precedents, and the parties of a specific case lead a Justice to express in revealing fashion the assumptions which underlie and shape his position.

Third, the Justices, by tradition, leak out informative bits of fact in their speeches and memoirs. Justice Felix Frankfurter, for

[2] "Some Aspects of Handling a Case in the United States Supreme Court," speech at the Annual Dinner of the New York State Bar Association, New York City, January 26, 1957.

[3] "Law and the Social Sciences," 24 *Vital Speeches* 143 (1957).

[4] 105 *University of Pennsylvania Law Review* 781 (1957).

[5] 35 *New York University Law Review* 865 (1960).

[6] *The Supreme Court in the American System of Government.* Cambridge, Mass., Harvard Univ., 1955.

example, disclosed in 1955, at a memorial lecture,[7] a private memorandum given to Frankfurter by the late Justice Owen D. Roberts; this showed that Roberts had *not* made the so-called "switch in time which saved nine" in the minimum-wage cases of 1936-1937. In his memoir, *All In One Lifetime*,[8] former Justice James F. Byrnes describes the intra-Court consideration of several leading cases decided during his year on the Court in 1941, including an account of how an opinion which began as a dissent became the majority statement.

In addition to the factual disclosures, the Justices have used the broad opportunities of speeches and essays to reflect on the dilemmas of judging. Justice Frankfurter has questioned whether the members of the judiciary have really said much of note about their own area. Speaking to the American Philosophical Society in 1954,[9] Justice Frankfurter speculated:

> Those who know tell me that the most illuminating light on painting has been furnished by painters, and that the deepest revelations on the writing of poetry have come from poets. It is not so with the business of judging. The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition, or because they are inhibited from practicing it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavor.

If Justice Frankfurter means that no judge has yet produced a masterpiece of introspective analysis as to wise judging in constitutional cases, he is certainly correct. But if the standard is a portrayal of how particular Justices and their ideological confreres approach their task, what they consider relevant to decision, and how they strike the four or five major balances of competing values which every sensitive Justice consciously makes—if these are the goals of discussion, then more than a few notable contributions can be cited. After his always graceful warnings about the proprieties which imprison Justices giving public addresses, Justice Brennan has

[7] "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311 (1955).

[8] New York, N. Y., Harpers, 1958.

[9] "Some Observations on the Nature of the Judicial Process of Supreme Court Litigation," 98 *Proceedings of the American Philosophical Society* 233 (1954).

discussed judicial review and the difference between a state court judge's role and that of a Supreme Court Justice in a revealing fashion. Justice Frankfurter himself, in at least a dozen luminous essays on judicial behavior, has provided an abundance of superb commentary. Many of the speeches of Justices William O. Douglas and Robert H. Jackson, to mention only two others, fall into this category. All of these have the special quality of revealing "the view from inside." They show the collegial tug of war, the sense of being riveted to the seat of decision when events collide and perspective is not available, the awareness that in a nation worshiping pragmatism from its elected leaders, the Supreme Court serves as Political Theorist to a people.

Finally, the out-of-court statements of the Justices take on a special significance as we begin the 1960's. Before the 1940's, much of the national debate over the Court was in the form of proposals from the liberal community to cut the power of the Court and limit the discretion of the Justices. Since the early 1950's, the liberal community has aligned itself staunchly with the Court because of its civil-liberty, civil-rights, and business-regulation opinions. The business community, once the Court's unswerving and basic ally, has become neutralist, at best, toward its former partner-in-conservatism. Southerners, law-enforcement officers, and the internal-security zealots have declared war on the Court since the flow of rulings rejecting their positions, especially in the 1954-1959 period. In this unique setting of group alignments, the Justices, balanced between New- Fair-Deal appointees and the essentially "New Republican" designees of President Eisenhower, have had to re-define the role of the Court in relation to popular, majority-will measures. Where once the issues were property matters, they are now primarily liberty and equality issues. Thus, while much of the traditional apologetic for judicial review retains its meaning, the defense and the explanations must be recast to explain the new situation, to carry along the new liberal allies, and to pacify the older, estranged groups if possible. Therefore, what the Justices have said in the late 1950's and in 1960 is particularly significant, since this indicates how far the Justices felt it necessary to enunciate and defend their new institutional position between 1956 and 1960.

The desirability of sampling this present mood of the Justices, in a short volume for the college student and the general reader, has

dictated the exclusion of two types of judicial commentary which otherwise would have been included: speeches by Justices before 1948, and the Justices' biographical estimates of former colleagues and predecessors. What this anthology offers, therefore, is a *contemporary* view from inside.

In Part One, "Justice at Work," five Justices discuss aspects of what might be called the "institutional filter of decision" in the Supreme Court: the Justices' image of the place of the Court in the American scheme of government; their understanding of their roles as individuals within the Court itself; the formal rules by which judicial business is conducted; and the informal practices or judicial folkways which affect the way in which the rules are applied. For those who need reminding, the selections indicate that debate over roles and rules starts at the Court's own conference table.

Part Two, "Court, Congress and the States," contains a discussion by three Justices of the Court's relations with Congress: Justices Douglas and Frankfurter probe the problems of statesmanship and craftsmanship involved in construing Congressional statutes; Justice Roberts submits a sturdy brief in behalf of a constitutional amendment to protect the Court from external and internal dangers; his discussion of the need to forestall hostile Congressional legislation cutting the Court's appellate jurisdiction came only a few years before the "court-curb" debates of 1957-59. The last selection in this Part, by Justice Brennan, was a speech defending the Court's duty to umpire the federal system, and it may not have been wholly accidental that the address coincided with condemnations of the Court's trend of decision in federal-state relations cases by the Chief Justices of the state supreme courts and the state Attorneys-General.

Part Three, "Precedent, Segregation, and 'The Law,'" opens with a sharp attack upon the Court for its 1954 decision holding segregated public schools to be unconstitutional. The author, former Justice James F. Byrnes, had he still been a member of the Court, would very likely have written almost the same words in a dissenting opinion. No present member of the Court has spoken publicly in defense of the de-segregation rulings. However, Justice Douglas' essay on *stare decisis* and Justice Brennan's defense of utilization of social science findings by "the law" indicate the con-

trary attitudes to that of former Justice Byrnes which underlay the de-segregation doctrines.

Part Four, "Liberty and Judicial Review," is a debate between two eloquent spokesmen for alternative judicial positions on court review in civil liberty cases. The late Justice Jackson surrounded his discussion with a full-dress consideration of the Court's role in all of the central problems of judicial review, while Mr. Justice Black limited his essay largely to the civil liberty field. Set alongside each other, though, the two arguments air thoroughly the basic issues involved in this controversy.

Now, the time for comments from outside is over. Let the views from inside begin.