Portland Journal 2/23/50

Portland to Hear Negro Attorney

George W. Crockett Jr., Negro attorney from Detroit, Mich., will speak in Eugene Sunday and in Portland Monday under auspices of the Civil Rights Congress of Oregon.

The meeting in Eugene will be in hall A of the Hampton building at 8 p. m., and the one in Portland will be in Norse hall at a like hour.

Crockett, a graduate of the University of Michigan, was a defense attorney in the trial of 11 Communist party leaders in New York last year.

High Cost Of Litigation In U. S. Courts Deplored By Committee

Federal Judge Eugene Rice made public Saturday the first report of a committee of five on improvement of administration of justice and reappointed the committee for a year.

The committee's report praised the pretrial conferences which are carried on under the rules of the federal courts, lauded the federal jury system and deplored the cost of litigation which it termed appalling. It also recommended that the judges of the federal court here wear their robes to enhance the solemnity of the court. It requested that the judges make themselves available so far as possible, to explain to laymen and members of the legal profession the rules their court and what they described as the compleities of litigation in them.

The report of the committee has been praised, Judge Rice said, by members of the Court of Appeals of the Tenth Circuit, who recommended appointment of the committee and others like it, and by Arthur Vanderbilt, chief justice of New Jersey and formerly president of the American Bar Association. The report has been sent to the judges of the Tenth Circuit court of Appeals and to the Chief Justice of the United States.

The committee was appointed in accordance with awakened interest of the federal courts in the opinions of laymen and constructive suggestions of laymen for the administration of justice. It includes Robin Hood, chairman, and Paul Bruner, of Muskogee; Hicks Epton, Wewoka; Leon Daube, Ardmore, and Dutch Pendleton, Durant real estate and insurance man.

"The cost of litigation to the interested parties," the committee wrote in critcism of the juducial system," is often appalling. It is not a healthy condition in a democratic country which compels a poor man to abandon efforts to obtain redress or gain justice merely by reason of the cost of taking his case to court. The bench and the bar should therefore be eager to eliminate avoidable costs.

"The committee has neither the time nor the competency to make a detailed study of the costs of litigation and it does not pretend to an arrival at any important conclusions on methods of economy. But it does have two suggestions for further consideration by the courts.

"First, commendation should be expressed for the practice in this district of holding court close as possible to the homes of the litigants and witnesses. Careful study may reveal that further progress is possible in this direction, particularly to appeal cases.

"Second, the committee is impressed by the enormous cost of printing records for appeal—a cost which seems to us could be obviated by transfer of the original records from the district to the appellate court.

"These two suggestions, whether practicable or not, merely scratch the surface of a field for serious study by the bar and the judiciary. A democracy cannot afford to permit justice to become too expensive for litigants."

(Under certain prescribed conditions, to meet the problem noted, records for an appeal are not required to be printed. Generally, as the committee states, they must be printed.)

The committee approved efforts of the federal court to obtain jurors of a high type.

"It is fundamental to our democratic system of government," it wrote," that a man shall be tried by his peers. Yet we fear that the obstacles in the paths of court officials sometimes prevent the selection of juries whose members are peers of the men they try.

"This committee notes with satisfaction the effort made by the federal court to obtain high type jurors, but the effort must be an increasing one—one in which the prospective jurors and the general public must play their respective parts.

"Jury service is a civic duty from which men should not be excused except in rare instances, but methods of reducing the time, cost and inconvenience to jurors should be thoroughly explored. Expediting the business of the court—such as the pretrial (conference)—is one approach. Attention to the individual needs of jurors while attending court is another."

(Names in the jury box of the fedeal court here have been selected on recommendation of men with outstanding reputations in their communities throughout Eastern Oklahoma).

The system of pretrial conferences which exists in the federal courts but not in the state courts here particularly impressed the committee. Indeed, it has impressed some members of the legal profession who, it is reported, are interested in adoption of the conferences in state courts.

"In the expeditious handling of litigation nothing has so impressed the members of this committee as the pretrial procedure in use in the Oklahoma federal courts," the committee report.

(Such conferences are informal discussions by litigants with the judges of the issues in cases filed in federal courts. The conferences usually lead to agreements among attorneys and the litigants which cut away large parts of trials or produce settlements of lawsuits with consequent savings of time and money).

"Of no small importance in this connertion," the committee stated, "is the fact that shorter periods in the jury box will materially faciliate the procurement of the highest type of juror.

"The only danger in the pretrial procedure would appear to be the posibility of suspicion of 'star chamber' proceedings in the minds of litigants. However, adequate precaution against this danger rests in making it clear to the public that litigants themselves, as well as their attorneys, may attend pretrials. While pretrials are usually held in chambers, the committee sees no serious objection to pretrials being held in the open courtroom as a concession to the need for good public relations, if such a course seems appropriate to the bench and the bar."

(Many dozens of pretrial conferences have been held in open court here before onlookers).

The committee recommended the wearing of judicial robes by the federal judges in this district—the Eastern District of Oklahoma, and Judge Rice donned a robe for the first time while on the bench here Friday.

The question as to whether the robe should be worn is the subject of a part of the committee report, which reasons:

"Wearing of the robes by high justices is a custom dating back to antiquity. It emphasizes the solemnity of the proceedings. Worn by a justice who adds credit to the dignity of the robe, it is undoubtedly an aid to the orderly proceedings of the court.

"Nevertheless, this committee is not prepared to recommend use of the robe in all sessions of the court in this district.

"The robe would be completely out of harmony with court facilities in several towns of the district. Without a place to enrobe, or without a courtroom possessing dignified appointments, the robe would not only be meaningless; it would be incongruous. Moreover, in at least some parts of the Eastern District, we are not far removed from the rough and tumble of pioneer days, and the wearing of a judicial robe might lower rather than gain respect by being regarded as an abnormal and pretentious frill.

"The members of the committee respectfully offer their opinion that the wearing of the robe in the judge's home courtroom in Muskogee would be well received by the bar and the general public. There (here) proper facilities exist for entrance and exist of the judge, and the robe would be in keeping with the appointments of the courtroom.

"The robe might also be worn on special occasions elsewhere in the district as, for illustration, on days when citizenship is conferred in special ceremonies. In the course of time, use of the robe should become general throughout the district, but it should be introduced in gradual stages."

The committee recommended dignified quarters for the court at several cities.

"Because of its direct bearing upon the dignity and effectiveness of the federal court," the committee stated, "especial attention is called to the absence of appropriate federal court buildings at Hugo, Durant, Poteau and Pauls Valley. This deficiency should be of interest to Oklahoma's senators and representatives in Congress."

McAllister

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF JUDGE McALLISTER
GRAND RAPIDS 1, MICH.

October 6, 1949

File
NOTED
OCT 10 1949
F.M.V.

Dear Chief Justice Vinson:

When Judge Hicks asked me to come up to the Conference and meet the judges, I had no idea of staying for more than a few minutes, and was completely overcome by your generous and magnificent invitation to your luncheon and to accompany you to the White House for the call upon the President.

I can't express the depth of my appreciation, dear Chief, for your kindness in honoring me as your guest, and also giving me the chance to be again with the great judges of our country. I can only say thanks, thanks again, to a dear friend whom I have always admired and whom I always think of with the deepest affection.

Yours

Thomas F. McAllister

Honorable Fred M. Vinson
Chief Justice of the United States
Supreme Court Building
Washington, D. C.

Dear Chief Justice Vinson

Came by to bring
the best wishes of
the circuit that claims
you — and to say
Merry Christmas —
Again in Washington
for the Emergency
Court of Appeals — and
you know what that is
better than I do —

Most sincerely yours

Thomas F. McAllister

File

McAllister

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF JUDGE McALLISTER
GRAND RAPIDS 1, MICH.

May 11, 1950

Honorable Fred M. Vinson
Chief Justice of the United States
Supreme Court Building
Washington, D. C.

Dear Chief Justice Vinson:

We have a bad situation in our circuit at Cleveland. Judge Wilkin, who retired as district judge last August, had been ill for nearly a year before that time. There are three judgeships in the Northern District of Ohio. Two judges have been doing practically all of the work there for the last year and a half. On the basis of three judges in that district, the number of civil cases filed per judge during the fiscal year 1949 was 50% higher than the national average, according to the Administrative Office.

In other words, the caseload in civil cases for each of the two judges in this district during the fiscal year of 1949 was 75% higher than in any other district in America. The fact that the criminal cases filed per judge were less than half the national average did not, in the opinion of the Administrative Office, appreciably lighten the burden, because criminal cases generally take much less time than civil cases.

The increase in litigation has been so great in the Cleveland district that, as you remember, the September 1949 Judicial Conference in Washington recommended the appointment of an additional judge at Cleveland. At the present time, therefore, two district judges are doing the work which requires the services of at least four district judges, and the cases are continually piling up. I understand that the two senators from Ohio are in favor of the appointment of an additional judge in that locality. What is needed in Cleveland is the appointment of two good judges as soon as such appointments can be made.

However, when some of our district and circuit judges went to Washington last month to testify before the House Committee in support of the creation of another judgeship, the radio announcers pointedly emphasized that "maybe" the situation would not be so bad if the judgeship that had been vacant for nearly a year would be filled.

Honorable Fred M. Vinson
Chief Justice of the United States
Washington, D. C.

The criticism among the lawyers has become very severe during recent weeks. Four months ago, Chief Judge Hicks wrote the Attorney General that the delay in filling the present vacancy resulted in a denial of justice for the citizens in that district.

Last November, I called on the Attorney General and told him of the situation, and also wrote him a letter on December 30, 1949, copy of which I enclose. Apparently he has done everything possible, and nobody seems to know what is holding up the appointment.

I believe that none of us on the Court of Appeals in the Sixth Circuit personally knows any of those that have been mentioned for the position. We all realize that the political aspect of these matters must often be given consideration. But this particular situation really demands the appointment of a well qualified man. Cleveland has one of the finest bars in the country, and the lawyers and the public have become highly sensitive to this situation and have their eyes upon this appointment.

In any event, the continued vacancy for all of these months, with the tremendous increase in litigation in that locality---while everyone is asking for the creation of an additional judgeship---is causing a great deal of popular gossip to the effect that politicians are dominating the courts, and so on. I felt that the foregoing might be of interest to you.

With my admiration and high regard, I am

Most sincerely yours,

Thomas F. McAllister

December 30, 1949

Honorable J. Howard McGrath
Attorney General of the United States
Department of Justice
Washington, D. C.

Dear General McGrath:

Although I know that you have in mind the important matter of appointments to fill judicial vacancies as among the vital considerations in the administration of justice, I wish to call again to your attention the most pressing need for the appointment of a district judge in Northern Ohio as soon as it can properly be made.

At the risk of being repetitious in bringing the matter again before you, I am prompted to do so not only because of the incessant inquiries from the bar and the overcrowded court calendar, but also because of the report which we have just received from the Administrative Office of the Courts, dated December 1, 1949, and concerned with the Northern District of Ohio. This report shows that during the past year, there have been many more cases commenced in the Eastern Division of the Northern District of Ohio than in any other district in the United States.

On the basis of three judges in that district, the number of civil cases filed per judge during the fiscal year 1949 was 50% higher than the national average. Although Judge Wilkin has been retired for approximately six months, he was unable to do very much in the way of judicial duties for six months prior to his retirement, which left two judges in the district for this tremendous increase of cases.

In other words, the caseload in civil cases for the two judges in this district during the fiscal year of 1949 was 75% higher than in any other district in America. The fact that the criminal cases filed per judge were less than half the national average did not, in the opinion of the Administrative Office, appreciably lighten the burden because the criminal cases generally take much less time than the civil cases.

The increase in litigation has been so great in the Cleveland district that the September 1949 Judicial Conference recommended the appointment of an additional judge at Cleveland. At the present time, therefore, two district judges are doing the work which requires the services of at least four district judges, and the cases are continually piling up. I understand that the two senators from Ohio are in favor of the appointment of an additional judge in that locality.

Honorable J. Howard McGrath
Attorney General of the United States
Washington, D. C.

From the Sixth Circuit Court of Appeals, we are contributing the services of two circuit judges who were formerly district judges, but, of course, we have a heavy docket on the Sixth Circuit and these judges are contributing their services to the district court in Cleveland in addition to their regular work on the Sixth Circuit, which is a heavy burden upon them--- and even with this work, it is so limited in time that the ultimate accomplishment amounts to very little in the way of disposition of the great number of cases.

What is needed in Cleveland is the appointment of two good judges as soon as such appointments can be made. While I know that you are aware of this situation generally, I felt it proper to call it to your attention again, especially in view of the recent report from the Administrative Office, for I know that in the midst of the performance of your heavy and onerous duties, you could not possibly be aware of these many details which seem to me to emphasize the necessity of special consideration in this district.

It was a great pleasure to see you in Washington during my service on the United States Court of Appeals for the District of Columbia. I wrote Judge Mahoney in Providence that I had seen you and mentioned the very complimentary and kind things you said about him. In a letter that I received just before Christmas, he told me of his deep appreciation of your friendship.

Hoping to see you again in the near future, and with kindest regards, I am

Most sincerely yours

McCollach –

JUDGE CLAUDE McCOLLOCH'S CHAMBERS
UNITED STATES COURTHOUSE
PORTLAND 5, OREGON

Tucson, Arizona

February 28, 1950

Honorable Fred M. Vinson
The Chief Justice
Supreme Court of the United States
Washington 13, D. C.

Dear Mr. Chief Justice:

Your gracious letter of February 20th arrived in Portland while I was enroute here to keep an assignment. I have just received it.

As I have endeavored to say before, I trust your leadership of the Federal Judiciary implicitly, and if you think it would dignify these people unduly, to take note of their activities - that is all right with me.

I am inclined to think this agitation will carry a good ways. The enclosed clipping, which I have just received from a Portland, Oregon newspaper, may be of interest. Judge Eicher's death was murder, and Judge Medina barely escaped impairment of his health. Judge Harris in San Francisco has not been having an easy time.

Respectfully and sincerely yours,

Enc.

McCulloch

February 20, 1950

Honorable Claude McColloch,
United States District Judge,
United States District Court,
Portland 5, Oregon.

Dear Judge:

I have your letter of February 7th with which you enclosed material circulated by the Bar Committee in Los Angeles.

I will be glad to call this matter to the attention of the Judicial Conference if you desire it. Personally, I don't think that it should be dignified to this extent. As you know, there are cases which will probably reach us in which the method of trial will be involved. It strikes me they are making an effort to arouse the bar, but it might be that the greater circulation of their report may bring a reaction contrary to their views.

I will await your further reflection on this matter.

With kind regards,

Sincerely,
(Signed) Fred M. Vinson

FMV:McH

JUDGE CLAUDE McCOLLOCH'S CHAMBERS
UNITED STATES COURTHOUSE
PORTLAND 5, OREGON

February 7, 1950

HONORABLE FRED M. VINSON,
Chief Justice,
United States Supreme Court,
Washington, D.C.

Dear Mr. Chief Justice:

I heard yesterday through Mr. Chandler that the Judicial Conference will meet soon. This leads me to call to your attention, respectfully, that a movement is going on among radical lawyers to challenge the established, orderly method of conducting trials.

I think it is going to be necessary for the Judges to take some action to protect themselves. Mr. Justice Clark had directed the Department of Justice to investigate the subject about the time he was appointed to the bench.

Would it not be in order for the Judicial Conference to sponsor a committee to begin study of the subject, so that appropriate counter measures, if they are needed, will be ready?

Respectfully submitted,

Claude McColloch

Bar Committee To Defend Lawyers' Right of Advocacy

Room 902, 650 S. Grand Ave.
Los Angeles 14

28

Room 221, 68 Post St.
San Francisco 4

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IRVIN GOODMAN
NELS PETERSON

Dear Fellow Member of the Bar:

Because we believe that a free, courageous and independent Bar is essential to our democracy, we have become alarmed by the developing pattern of attack upon members of our profession, endangering the independence of the entire Bar. Lawyers, generally representing individuals connected with minority or unpopular causes, have been subjected to attack by legislation, legislative committees and by the courts themselves.

An examination of these attacks, as described in the enclosed memorandum "In Behalf of Freedom of Advocacy," indicates that they are directed primarily against vigorous defense of the unorthodox rather than against actual misconduct by the attorneys involved.

Accordingly we call upon lawyers mindful of the historic function of a free Bar to unite with us in a common program for the protection of the lawyer's right of advocacy.

If after reading the enclosed memorandum you agree with the views therein expressed, we ask you to join with us in this common program for the protection of the lawyer's right of advocacy. Funds are, of course, needed to pay for printing of material and circularization of the entire Bar of California, and if you can help, your aid will be appreciated.

A meeting of all lawyers participating will be called soon. If you share our views, please be good enough to return the enclosed card.

Very truly yours,

JOSEPH W. AIDLIN
Los Angeles

GEORGE OLSHAUSEN
San Francisco

For the Committee

In behalf of the

FREEDOM *of* ADVOCACY

A REPORT *to the* BAR

BAR COMMITTEE TO DEFEND LAWYERS' RIGHT OF ADVOCACY
Room 902, 650 S. Grand, Los Angeles 14 • Room 221, 68 Post Street, San Francisco 4

Introduction

Lawyers, like members of most professions, rarely stop to evaluate their functions and the traditions of their profession. We are normally more concerned with the mechanical necessities of earning a livelihood and fulfilling day to day responsibilities to our clients.

From time to time, however, forces over which we as individuals have no control thrust upon us the necessity for a serious consideration of what we as individuals and as members of the legal profession stand for, what our profession has been, is now, and must be, and where we as individuals fit into this pattern.

We believe that now is one of those times when lawyers must examine the history of the Bar to determine whether the very traditions we treasure are being endangered. For the past several years there have been a number of attacks upon lawyers which we assert present a serious threat to the entire Bar. The attacks have come from administrative officers, from legislative bodies, and the members thereof, and from the courts both in the form of caustic criticism and of actual contempt proceedings.

It is our primary purpose to deal with the three current assaults, namely, the widely publicized declarations by former Attorney General, now Mr. Justice, Tom C. Clark to the effect that trial lawyers who dare defend unpopular causes should be sent to a legal "woodshed"[1]; the strong public censure recently administered to three prominent trial lawyers in California by the United States Court of Appeals for the Ninth Circuit in an Anti-Trust prosecution of the International Fishermen's Union[2]; the conviction of five trial lawyers and their sentences to terms from one to six months for contempt of court in the recently completed Smith Act prosecutions in New York.[3]

PATTERN OF ATTACK

That we discuss in detail these recent attacks upon members of our profession is not intended to obscure the fact that there have been many others and that the pattern of attack had been previously set. For instance, only two years ago a case arose in Detroit involving the shooting to death of a Negro youth by a police officer.

The case turned upon the credibility of two opposing sets of witnesses. Speaking of one group of eleven witnesses, the judge, in acquitting the police officer, said:

> *"One group, which had been herded into the office of Ernest Goodman, the brains of Maurice Sugar's law office in the Barlum Tower, by some of the pink members of the N.A.A.C.P. insisted dramatically that from two to seven police officers beat the driver with pistols and fists . . ."*[3a]

Thus the alleged political complexion of attorney and clients was injected into a case involving the killing of a member of a minority group.

Many members of the California Bar will recall that, when John T. McTernan of Los Angeles appeared before Senator Tenney's Un-American Activities Committee in February 1948 as counsel for witnesses subpoenaed before that Committee, McTernan himself was called as a witness. After McTernan protested this interference with his duties as counsel and asserted constitutional objections to the questions of the Committee, Tenney made written demand on the State Bar for McTernan's disbarment. Because McTernans' constitutional objections were similar to those offered by his clients when they were called as witnesses, Tenney accused him of fomenting a conspiracy to commit a contempt of the Legislature. Maurice Braverman of the Maryland Bar was subjected to similar treatment while representing clients before the Congressional Un-American Activities Committee.[3b]

The technique of calling an attorney to testify as to his own political affiliations during proceedings in which he is actively representing a client, and then charging him with some crime is exemplified by the recent perjury prosecution of John Caughlan, a member of the Bar of the State of Washington, prominent in representing minority groups. That Mr. Caughlan was acquitted by the jury did not spare him the trouble and indignity of being forced to go through such a trial.

A similar pattern was followed recently in Los Angeles when attorney Ben Margolis was called from the counsel table by the Government to testify against the client he was representing and was questioned closely concerning several matters clearly privileged and confidential between attorney and client, and concerning his own political affiliations. Margolis, who, in the pending case, was defending the right of his client not to testify concerning her own political affiliations, was held in contempt and ordered committed because he refused to testify as to his own. Confronted with a shocked and quickly aroused Los Angeles Bar on the next day, the government withdrew the question thus permitting the court to vacate the contempt order.

We feel that these attacks on members of the profession constitute a pattern of assault upon the right of advocacy based upon the alleged political beliefs of the attorneys or their clients. This pattern can best be understood in the light of a careful examination of the history of the traditions of the American Bar in the never-ceasing battle for freedom and human rights.

---

[1] *The Boundless Responsibility of Lawyers,* 32 A.B.A. Journal, 453, 457.
[2] *United States vs. Local 36, International Fishermen's Union,* C.A. 9, No. 1638, Sept. 28, 1949.
[3] *U. S. vs. Dennis et al.* No. C 128-87, S.D.N.Y.
[3a] *People vs. Louis Melasi, Recorder's Court, City of Detroit, Opinion by Judge Arthur E. Gordon,* Dec. 20, 1938.
[3b] *Hearings, Communist Espionage in U.S.,* 80th Congress, Second Session, p. 1310, 1948; *New Yorker Magazine,* November 13, 1948, p. 124; *Liebling, A. J. Minx and Red Herring;* see also *Hearings, Communist Espionage in U.S., Interim Report,* p. 12, August 28, 1948.

THE HISTORICAL ROLE OF THE LAWYER IN THE FIGHT FOR FREEDOM

Every battle for freedom has resulted in an expansion of human rights. The recoil from witch hunting led to religious tolerance. A Colonial rebellion ended in national independence. The triumph of Jacksonian democracy gave men political equality and nearly a century later the agitation of the Suffragettes extended this privilege to women as well. In 1835, Garrison was mobbed for being an Abolitionist; thirty years later the Thirteenth Amendment removed slavery from the land. A century ago the Labor Union was denounced as the devil's work, but now it is a common and legally sanctioned social instrument. Eighty years ago the agitation of the National Labor Union for the eight-hour day was decried as outrageous; it is at present an accepted fact and already replaced by the demand for the thirty-hour week.[4]

Each of these gains was achieved only after long and bitter struggle. Men and women fought for them step by step, year after year, at great personal sacrifice. And always in the center of these struggles were the lawyers, working both in the forum of opinion where these principles were being hammered out and in the courtroom where they were sooner or later always tried out.

Much has been written about the role of the courts in the preservation of human liberties. It is indeed a great role. Much less has been said about the part played by the lawyer. Great decisions profoundly affecting the public welfare are the results of neither divine inspiration nor random subjective speculation by courts. Before such decisions are finally rendered, lawyers have first labored long in the preparation of arguments and briefs, in the marshalling of apposite historic material, and in the evaluation of the underlying basic and conflicting major premises which give rise to the critical issue. Such labor is creative work in highest measure. It cannot be carried on under fear.

FOR SUCH WORK, AN ATMOSPHERE OF COMPLETE FREEDOM IS REQUIRED BY THE LAWYER, JUST AS BY THE WRITER, THE RESEARCH SCIENTIST, THE THEOLOGIAN.

History proves that the truth in transcendent issues lies almost too often with the lone and embattled dissenters and with the harried minorities. Overawe the lawyer by public censure, deter him from action by inducing fear of contempt, and his willingness to defend the cause and the right of those minorities in their search for truth may well be ended. This is the tragic social consequence of the present thrust at the lawyer's freedom.

The lawyer's duties in this respect are clearly defined not only by statue but by canons of professional conduct as well. Our statute provides that it is the duty of an attorney:

> *"Never to reject for any consideration personal to himself, the cause of the defenseless or the oppressed." (Bus. & Prof. Code, Sec. 6068 (h))*

Canon 15 of the Canons of Professional Ethics of the American Bar Association provides:

> *"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability' to the end that nothing can be taken or be withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."*

These mandates are reinforced and given content by the rich history of the defense by the bar of the cause of unpopular and persecuted minorities:

> *"The record of the services rendered to the cause of civil liberties by American lawyers is a very long and honorable one. It stretches all the way from James Otis defending two Boston merchants against a tyrannical Writ of Assistance in 1761, down to Wendell Willkie defending the Communist William Schneiderman in the Supreme Court in 1943."*[5]

When Charles Evans Hughes, Henry L. Stimson, Morgan J. O'Brien, Louis Marshall, Joseph M. Proskauer and Ogden L. Mills defended the right of five Socialist assemblymen to sit in the New York Assembly in 1920 and struck out at the "Lusk Committee" (the New York prototype of the Tenney Committee), it was not because they shared the Socialists beliefs but because they knew that American freedom depended on the right of all men to be free to believe and to advocate whatever they chose. When, in 1939, the Committee of the Bill of Rights for the American Bar Association argued to the Supreme Court in *Hague* vs. *CIO*[6], in support of the rights of freedom of speech, assembly, affiliation and association of alleged radical organizations which had been forbidden to exercise those rights in Jersey City, it was not because the Committee was in sympathy with the objectives or beliefs of those organizations, but because its members knew that the preservation of their own rights depended upon a system of law which preserved the rights of others.

SENATE BILL 298

Members of the Bar of the State of California have recently concluded a successful resistance to a frontal attack on their historic function. In June of 1949 an aroused Bar supported by public opinion defeated the so-called "Senate Bill 298" sponsored by Senator Jack Tenney. This bill would have set up a test oath for lawyers.

It was designed, by intimidation, to induce lawyers to decline representation of minority persons or groups because of fear of being called disloyal. The Bar of California secured the defeat of this bill because of its conviction that although an attorney might agree or disagree with the programs of dissident and minority groups, the attorney has a right, and a duty, to give them counsel on the same conditions as others. The Bar Committee against Test Oath Bill for Lawyers also aptly pointed out:

> *"No member of the Bar can afford to sit idly by today when the civil rights of members of the profession are under attack, resting upon the false assumption that one's own orthodoxy today will protect him tomorrow."*

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[4] Madison, Charles A, *Critics and Crusaders,* p. 2.
[5] Cushman, R. E. *Civil Liberty and Public Opinion,* Cornell University Press, 1945, p. 105.
[6] 307 U. S. 496

THE FORMULATION OF THE ATTACK

The content of today's attack on the freedom of the Bar was formulated by former Attorney General Tom C. Clark. In a speech made before the Chicago Bar Association on June 21, 1946, on "The Boundless Responsibility of Lawyers" he said:[7]

> *"I do not think there is anyone any more subject to censure in our profession than the revolutionary who enters our ranks, takes the solemn oath of our calling and then uses every device in the legal category to further the interests of those who would destroy our government by force, if necessary."*
>
> *"I do not believe in purges because they bespeak the dark and hideous deeds of Communism and Fascism, but I do believe that our bar associations, with a strong hand, should take those too brilliant brothers of ours to the legal woodshed for a definite and well deserved admonition."*

"The Boundless Responsibility of Lawyers" was more accurately and eloquently stated in 1936 by T. P. Wittschen, then President of the State Bar of California in his response to a demand that lawyers who represent communists should be disbarred:[8]

> *"No attorney can be disciplined because he appears and defends or continues to appear and defend a person or persons accused of crime regardless of the nature of the offense. It is one of the constitutional rights guaranteed every person on trial for his liberty to be represented and defended by counsel of his own selection. The right to such defense and the right of the attorney to be protected in fearlessly representing his client is a fundamental right. If we take that right away from one accused of one class of crime, in a short time it may be taken away from every defendant in every case. It is still the law that until conviction a defendant is presumed to be innocent. Instances all over the country prove that in some cases courts and juries are influenced by popular clamor, which sometimes results in a denial of justice, and in order to perform the duty required of an attorney he may have to espouse an unpopular cause in a hostile community. For the time being he may sometimes be the only shield between the defendant and the mob. His independence in that regard should not be restricted. On the contrary, it should be strengthened. And while he is performing his duty in accordance with the law of the land he is entitled to the full protection of the court and of peace officers and other officers of the court who are themselves sworn to uphold the law."*

Nevertheless, shortly before his elevation to the Supreme Court the then Attorney General indicated that his ideas about the form which that punishment in the "woodshed" should take were beginning to crystallize. Writing in the October 30, 1949 issue of LOOK magazine he said:

> *"I also believe that lawyers who are not provably card-carrying Communists, but who act like Communists and carry out Communist missions and offenses against the dignity of our courts, should be scrutinized by grievance committees of the bar and the courts."*

Thus, that which began with a disavowal of purges ends by a call for purges.

The LOOK article means that a political test is to be imposed upon practicing members of the profession. For actually when thus used, words like "offenses against the dignity and order of our courts" are but emotionally surcharged synonyms for "vehement and forceful debate" on legal issues with respect to which the trial lawyer is often in disagreement with both the government and the courts.

This political test leads to the naked and revealing formulation that this test is to be applied against lawyers "who *act like Communists*"! Thus the vice of any political test is exposed. For as Mr. Justice Jackson truly said, coercive elimination of dissent achieves only the unanimity of the graveyard.[9]

Such a political test portends the possibility of disbarment for any attorney who disagrees with persons like Senator Tenney and Mr. Rankin. The fantastic bounds to which the name-calling of these gentlemen can proceed is exemplified by the attack on Senator Taft as a Communist for his support of a housing bill; by the attack on Herbert Lehman in New York as a Communist candidate in his recent successful campaign for the Senate; and by the Act recently introduced by Rankin in Congress making it a crime to be a member of the Anti-Defamation League!

We reject any political test as a qualification for membership in the Bar. The acceptance of such a test can lead only to the requirement of total conformity.

THE ATTACK

Unwarranted attacks upon lawyers founded upon political considerations have also recently come from the courts. In the case of *United States vs. Local 36 of the International Fishermen's Union, supra,* a challenge to the jury panels was made by counsel for the defendants, former Attorney General of California, and former Judge, Robert W. Kenny, and his co-counsel, on the ground that the method of jury selection was discriminatory, resulting in the under-representation of persons in the lower economic categories—principally workers—in contravention of the applicable rules laid down by the United States Supreme Court in *Thiel vs. U. S.,*[10] and in *Ballard vs. U. S.,*[11] and other cases.

Although the trial judge, Federal Judge Pierson Hall, denied the challenge, he indicated his full approval of the manner in which counsel had handled it. He said:

> *"I seriously want to thank counsel on both sides for the magnificent efforts they have made and for the very great aid which you will have given me in this matter."*[12]

The Court of Appeals conceded that counsel had proved that selection of the jury panels was marked by violations of the principles laid down by the United States Supreme Court for the selection of jury panels—violations which the appellate court termed "surprising, after the years which have elapsed since some of these [principles] were announced."

One might assume that lawyers who had thus established a serious departure from requirements for the administration of the jury system would at least merit freedom from adverse comment by the court. Not so these attorneys who had defended the constitutional rights of a trade union. The challenge was treated as having advanced the thesis of "class war." Counsel were condemned for having presented their motion with "earnestness" and "tremendous force" on the grounds that such a presentation constituted "an impertinent obstruction of justice." This the court called "tactics" which "in our opinion deserves censure. We now pass it."

This stricture so clearly unwarranted, and now made a permanent part of the record, is a serious interference with the right of trial lawyers fearlessly and vigorously to present fundamental constitutional issues for determination.

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[7] 32 A.B.A.J. 457
[8] 11 State B.J. No. 2, p. 27, 31.
[9] *Board of Education vs. Barnette,* 319 U.S. 624, 641.
[10] 328 U.S. 217
[11] 329 U.S. 187
[12] Typewritten Transcript, 1159

NEW YORK CONTEMPT

Against this background we come to the most drastic application of a judicial sanction to trial lawyers in recent history, and this in a political case, *U. S. vs. Dennis et al.* (Supra.)

Immediately upon the close of that trial in New York City on October 14, 1949, presiding Federal Judge Medina sentenced five licensed attorneys and one defendant appearing pro se, to jail for from one to six months for contempt. These judgments were pronounced without according to these men any hearing on the charges and without affording them any opportunity for defense whatever.

The record, together with Judge Medina's certificate of contempt, shows bitter debate between court and counsel during this lengthy trial. The acrimony came from both the bench and the bar.

A great deal of the difficulty arose from a rule announced by the Judge on April 4, 1949, near the beginning of the trial, while the prosecution's first witness was on the stand, that thereafter when objections were made no grounds of objection might be stated or ascertained, without leave of court[13]. The effect of the refusal to permit the statement of grounds of objection is revealed in the following excerpt:

"MR. McGOHEY: *Objection.*

THE COURT: *Sustained.*

MR. GLADSTEIN: *May I know why, your Honor?*

THE COURT: *I don't want to hear any argument at this time, Mr. Gladstein.*

MR. GLADSTEIN: *No. I asked a question. May I know why?*

THE COURT: *What is the question?*

MR. GLADSTEIN: *May I know why your Honor is sustaining that objection?*

THE COURT: *No, I think I have sufficiently explained myself."*[14]

Conversely, the court refused to require any statement of the theory upon which it received prosecution evidence whose admissibility was broadly challenged by the defense. To illustrate:

During the cross-examination of a defendant on July 5, Judge Medina overruled an objection of Mr. Sacher, and the following occurred:

"MR. SACHER: I would really like to know on what theory now, your Honor, any of this is being admitted.

"THE COURT: If you cogitate enough some day you will realize."[15]

The effect of this ruling upon counsel for the defendants is further clarified by the following two excerpts from the very "Contempt Certificate" upon which Judge Medina founded his sentence:

"On May 25, 1949, in the course of the direct examination of the witness John Gates, which was being conducted by Mr. Sacher, an article written by the witness in 1938 was offered in evidence. Objection was made by the United States Attorney, which objection was sustained by the Court. Thereupon the following occurred (Tr. 6460-6462):

MR. GLADSTEIN: *Your Honor, may I ask that the Government be required to state the grounds for its objection to a document that this man wrote twelve years ago before he ever knew there would be an indictment and when he expressed his political views on the very issues involved in this case? May I know what the legal ground is by which a man is prevented from showing his intentions, his state of mind—*

THE COURT: *You remember my instruction about these arguments?*

MR. GLADSTEIN: *I desire to ask the court to require the Government to explode this mystery whereby with the mere words "I object" they can shut off the right of a man to show . . .*

THE COURT: *You may think that this matter of argument is helpful. It is certainly not helpful to me. Now you have requested, and you could have requested without those comments and that argument that the Government be required to state the grounds of its objection. That application is denied.*

MR. GLADSTEIN: *Your Honor, we have been sitting here for months—*

THE COURT: *Now please don't start this argument over again.*

MR. GLADSTEIN: *May I—*

THE COURT: *I have no desire to hear it. If you have some motion, make it. If you have some objection, state it and I will rule on it.*

MR. GLADSTEIN: *Well, I do object to a ruling which prevents a man from summoning to his defense the deeds and acts of his life committed long before there was any question about it—*

THE COURT: *I do not really think, Mr. Gladstein, you have any right to proceed with that form of argumentative matter when I have forbidden it. Now, you have already got a very substantial record of disobedience here. You may have an additional record now if you choose to go on.*

MR. GLADSTEIN: *I have no desire to disobey the Court's admonitions.*

THE COURT: *But you have.*

MR. GLADSTEIN: *I do have a desire, your Honor, to bring before the jury the opening pages of the book—*

THE COURT: *Well, I think, Mr. Gladstein, this sort of argument is the very sort of thing that you are not entitled to bring before the jury and I forbid it.*

Now as I said before, if you choose to pile up the record of these things against yourself, you may go on.

MR. GLADSTEIN: *I take exception to the Court's remarks.*

THE COURT: *Otherwise you will sit down.*

MR. GLADSTEIN: *I take exception to the Court's remarks.*

THE COURT: *Very well."*[16]

"On August 1, 1949, the witness Yolanda Hall, called by the defense, was asked a question on cross-examination and then the following transpired (Tr. 11,031):

"MR. ISSERMAN: *I object to that as argumentative. It is not based on the facts in evidence as testified by this witness.*

THE COURT: *Mr. Isserman, do you remember my admonition, that when counsel objects, counsel is merely to state "I object"? You have violated it several times this morning. Did you forget?*

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[13] Transcript 2340-2341
[14] Transcript 10,415
[15] Transcript 9011
[16] Contempt Certificate, xxiv

MR. ISSERMAN: *I am reminded of it now. It is a habit that goes back over 25 years. It is hard to give up that habit, which your Honor has undoubtedly engaged in himself.*

THE COURT: *Every time you do that your action is contemptuous and direct, I think, wilful and deliberate disobedience of my command.*

MR. ISSERMAN: *I object to your Honor's characterization of my conduct.*

THE COURT: *I have heard counsel for the defense here again and again give various excuses, say they have forgotten or it was inadvertent, and I have warned them again and again. I now say that such conduct must be and I find it to be wilfully and deliberately done and contemptuous.*

MR. ISSERMAN: *I object to your Honor's finding.*

THE COURT: *Very well."*[17]

An example of the acrimony which came from the bench is found in Judge Medina's conduct towards defense counsel George W. Crockett, Jr. Although Judge Medina attacked all the defense attorneys, his comments addressed to Mr. Crockett have a special character:

"Well, how any sane person can think otherwise is difficult for me to see."[18]

"Well, that is the most ridiculous thing I have ever heard, Mr. Crockett. I wish you wouldn't do that. There is just no sense in that at all."[19]

"Well, I am afraid that you understand things in a different sense from what they were said."[20]

"Well, that sounds crazy. You always seem to do that."[21]

The contempt with which the court addressed Mr. Crockett, the only Negro attorney in the case, is apparent from some of the following remarks:

"You want to talk some more, Mr. Crockett?"[22]

"Oh, my, Mr. Crockett. You have something to add."[23]

"Get down to business, Mr. Crockett."[24]

"Why don't you get down to work, Mr. Crockett, instead of all this fooling around, repetition."[25]

"I wonder if it is possible for me to impress upon you . . . now, I beg of you to try to absorb that thought."[26]

WHAT IS CONTEMPT

In such an atmosphere it would indeed be surprising if there were not heated exchanges between Court and counsel. But sharp and vehement comment or argument by counsel does not necessarily constitute contempt. Thus:

1. The fact that an attorney may speak in a loud, combative and contentious tone of voice does not constitute a contempt.[27]

2. The fact that an attorney happens to be persistent or vehement or both in the presentation of his points does not constitute a contempt.[28]

3. The fact that an attorney for a party to an action pending before the court, while a witness is being examined, persists in addressing the court, even though admonished not to do so, constitutes no contempt of the court.[29]

4. Every interruption of the proceedings of the court is not a contempt, nor unlawful, nor necessarily improper. Many interruptions are lawful and proper. Every time an attorney in the performance of his duty objects to a question asked of a witness, or objects to any other proceeding in the action, he may be said to interrupt the proceeding, but unless the language used is actually offensive he is guilty of no contempt.[30]

5. The behavior of attorneys may not be judged in vacuo, separated from the tenor set by the court.

> "The relations between court and counsel may and often do during the course of a trial becomes strained; mutual conditions of irritation may be created in the heat of debate, leading to tones and demeanor which in other situations would clearly manifest contempt but which, under the conditions often existing in a hotly contested criminal case, such as indicated by the record here, should lead to no such conclusion."[30a]

Nevertheless, the excessive utilization of the autocratic power of summary contempt has recurred again and again in English and American history—and generally as an integral part of the waves of reaction which roll in upon us after war. Thus, Thomas Erskine, greatest of all trial lawyers in England in the period following the French Revolution, was punished for contempt—and indeed lost the office of attorney general to the Prince of Wales—for vigorously defending Thomas Paine, author of THE RIGHTS OF MAN. The Prince, however, subsequently made amends by making Erskine his Chancellor.[31]

Most of Erskine's brushes with trial judges occurred during the numerous political trials of his day in which he participated. One such instance is recalled by our Mr. Justice Traynor in a recent opinion:

> *"At length, Erskine said, 'I stand here as an advocate for a brother citizen, and I desire that the word "only" be recorded'; whereupon, Buller, J. said, 'Sit down. Remember your duty or I shall be obliged to proceed in another manner.' . . . To which Erskine retorted, 'Your Lordship may proceed in what other manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter my conduct.' The judge took no notice of this reply. Lord Campbell speaks of the conduct of Erskine as 'a noble stand for the independence of the Bar.'"*[32]

No one, least of all an attorney, may perform acts which actually obstruct the administration of justice by the courts nor use obscenity in addressing them. However in testing whether the conduct is of the proscribed character, the United States Supreme Court has said:

> *"Judges should be foremost in their vigilance to protect the freedom of others to rebuke and castigate the bench and in their refusal to be influenced by unfair or misinformed censure. Otherwise, freedom may rest upon the precarious base of judicial sensitiveness or caprice. And a chain reaction may be set up, resulting in countless restrictions and limitations upon liberty."*[33]
>
> *"It is not enough that the judge's sensibilities are affected or that in some way he is brought into obloquy. After all it is to be remembered that it is the judges who apply the law of contempt, and the offender is their critic."*[34]

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[17] ibid xxxi
[18] Transcript 2825
[19] ibid 3323
[20] ibid 10,014
[21] ibid 10,038
[22] ibid 1575
[23] ibid 7275
[24] ibid 12,133
[25] ibid 12,262
[26] ibid 12,321-22
[27] *Platnauer vs. Superior Court,* 32 Cal. App. 463, 470.
[28] *Gallagher vs. Municipal Court,* 31 Cal. (2d) 784; *Curran vs. Superior Court,* 72 Cal. App. 258; *Platnauer vs. Superior Court,* supra.
[29] *in re Shortridge,* 5 Cal. App. 371.
[30] Vide fn. 28 & 29.
[30a] *Curran vs. Superior Court,* supra, at 258
[31] *Encyclopaedia Britannica,* 11th ed. vol. 9, p. 756.
[32] *Gallagher vs. Municipal Court,* supra, at p. 796.
[33] *Bridges vs. California,* 314 U.S. 252.
[34] *Pennekamp vs. Florida,* 328 U.S. 331, at 372.

PERSISTENCE AND VEHEMENCE

Contested private law suits are rarely, if ever, tea parties. And great constitutional issues, affecting beneficially or adversely the lives of millions, are not less contentiously controversial when they become the subject matter of embattled judicial debate. The "hydraulic" pressures of such constitutional issues have a profound effect upon the lawyers deeply concerned with their solution, and that effect remains indelibly imprinted upon the person of the lawyer—whether he is in or out of the courtroom.

Fully conscious of this, the California Supreme Court has recently said:

> *"A lawyer, when engaged in the trial of a case, is not only vested with the right, but under his oath as an officer of the court, is charged with the duty of safeguarding the interest of his client in the trial of an issue involving such interests. For this purpose, in a trial, it is his sworn duty, when the cause requires it, to offer testimony in behalf of his client in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses.* If in discharging this duty he happens to be persistent or vehement or both in the preparation of his points, he is still, and nevertheless, within his legitimate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal questions under argument, and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it." *(Emphasis supplied.)*[35]

J. F. Oswald in his classic study of the same subject, has said:

> *"An advocate is at liberty when addressing the court in regular course, to combat and contest strongly any adverse views of the judge or judges expressed on the case during its argument, to object to and protest any course which the judge may take and which the advocate thinks irregular or detrimental to the interest of his client, and to caution juries against any interference by the judge with their functions or with the advocate when addressing them, or against any strong view adverse to his client expressed by the presiding judge upon the facts in the case before the verdict of the jury thereon. An advocate ought to be allowed freedom and latitude both in speech and in conduct of his client's case."*[36]

NO HEARING ALLOWED

Even Judge Medina recognized that the conduct of counsel in and of itself did not so overstep the bounds of propriety as to constitute the basis for anything more serious than a mere reprimand.

What emerges most significantly from reading the court's certificate of contempt is this—the major premise underlying the sentences is the declaration made upon the face of the contempt certificate by the Judge:

> *"Before the trial had progressed very far, however, I was reluctantly forced to the conclusion that the acts and statements to which I am about to refer were the result of an agreement between these defendants, deliberately entered into in a cold and calculating manner to do and say these things . . ."*

The heart of the charge then is the claim that the lawyers had entered into "an agreement" to do the acts Judge Medina condemns. Were it not for this so-called agreement between counsel entered into for the alleged purposes of making it impossible to go on with the trial, provoking a mistrial, and impairing the Judge's health so that the trial could not continue, Judge Medina himself says he would "have overlooked or at most merely reprimanded counsel for conduct which appeared to be the result of the heat of controversy or of that zeal in the defense of a client or in one's own defense which might understandably have caused one to overstep the bounds of strict propriety." It is then the Judge's own conclusion that the lawyers had entered into an improper agreement, which provoked their imprisonment.

But the Judge did not permit the attorneys to be heard by way of defense; they were given no opportunity to establish either before that Judge, or some other judge, that there had not in fact been any such agreement at all. No matter what else may be said for or against these harsh sentences, predicating them, as here, upon a conclusion that there was such an agreement is unconscionable.

The Supreme Court of the United States has recently defined the contempt power:

> *"It is true that courts have long exercised a power summarily to punish certain conduct committed in open court, without notice, testimony or hearing. Ex Parte Terry, 128 U. S. 289 was such a case."*[37]

> *"That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in Cooke vs. U. S., 267 U. S. 517, a contempt case arising in a Federal District Court . . . Furthermore, the court explained the Terry rule as reaching only such conduct as created 'AN OPEN THREAT TO THE ORDERLY PROCEDURE OF THE COURT and such a flagrant defiance of the public' that, if not instantly suppressed and punished, demoralization of the court's authority will follow.' Id. at p. 536 of 267 U. S." (Emphasis supplied)*[38]

We must contrast to these authoritative words the fact that in the instant case the trial was at an end and no need existed for hasty or summary action, yet the Judge acted summarily without notice of hearing, and without any opportunity for the attorneys to answer the specifications or defend themselves. Not only does this seem harsh and unfair but it is contrary to law.

The power here asserted by Judge Medina to file these charges of contempt, based in part on alleged attempts to injure his person, and then to pass upon them without affording hearing, is inconsistent with ordinary concepts of fair play.

> *"Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity."*[39]

> *"It is when the court that punishes summarily is also an insulted human being that objection is most vigorous . . . If judges should universally conform to a canon of good taste lately declared, and call in brother judges to sit wherever their immunity to natural resentments may be suspect, objection though it might be slightly baffled, would not be suppressed."*[40]

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[35] *Platnauer vs. Superior Court,* supra, at 44.
[36] Oswald, James Francis, Q.C., *Contempt of Court,* pp. 56, 57.
[37] *in re Oliver,* 333 U.S. 257, 274.
[38] Ibid. at 275.
[39] *Bridges vs. California,* supra, at 289.
[40] Nelles & King, *Contempt by Publication,* 28 Col. L. R. 401.

CONCLUSION

This, then, is the pattern of the attack being levelled today against the right of lawyers freely to practice their profession according to the dictates of their conscience.

There are lawyers who, even in the face of these facts, will remain complacently undisturbed because of their feeling that such attacks cannot possibly affect them. We can only hope that this minority will not awaken too late to the realization that one's own rights are best protected through the preservation of the rights of others.

We believe that the great majority of the bar will, however, realize that the lawyer's most precious heritage is his untrammelled right to think as he pleases and to represent whom he will. We believe that the great majority of the bar abhors the imposition of any political test upon the right of lawyers to practice their profession freely and can recognize, for what they are, infringements of lawyers' rights, based upon their own views or those of their clients, even when made from the bench. We believe that the respect which the bar holds for the bench depends upon a reciprocal respect by the bench of the dignity and rights of the bar.

We feel deeply that the proper administration of our system of justice can be maintained only if the actions of the bench—as of the bar—are continually subjected to critical examination and evaluation. The United States Supreme Court has pointed out that respect for the judiciary is not won by immunity from criticism.

> *"The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions. And an enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt more than it would enhance respect."*[41]

We have placed this memorandum before you because of our deep concern with the pattern of repressive action against colleagues at the bar. We ask only that you evaluate objectively the facts we have presented and that if you conclude, as we have, that the rights and privileges of fellow-lawyers are being threatened, you take such action as will help to restore to all members of the bar that full freedom of advocacy which is the lawyer's most treasured right.

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[41] *Bridges vs. California,* supra, at 270.

BAR COMMITTEE TO DEFEND
LAWYERS' RIGHT OF ADVOCACY

68 POST STREET

SAN FRANCISCO 4, CALIF.

Room 221

28

To the Bar Committee to Defend Lawyers' Right of Advocacy:

1. I hereby agree to become a member of the Bar Committee to Defend Lawyers' Right of Advocacy. (Yes.....) (No.....)
2. I hereby contribute $.....to the Bar Committee to Defend Lawyers' Right of Advocacy.
3. I hereby subscribe to the general principles enunciated in the memorandum entitled, "In Behalf of Freedom of Advocacy." (Yes.....) (No.....)

Name.....

Address.....

D. Chas R. Garry - Atty 68 Post St S.F.

Mc Duffie

Judge's Chambers

United States District Court

Southern District of Alabama

JOHN McDUFFIE
JUDGE

MOBILE 10, ALA.
November 8, 1946

Personal

The Honorable
The Chief Justice
Of the United States Supreme Court
Washington, D. C.

Dear Fred:

No one knows the record better than you, which is that the White House usually follows the Lower House of Congress. You have the highest position on the face of the earth, in my humble judgment, and I have too much faith and confidence in your good sense to believe that you are going to let anybody persuade you to become a candidate for the Presidency.

Doubtless many overtures have been made, and knowing you as I do, I believe you, like myself, get more of a thrill in the political game than we can ever have in the judicial department of the government.

I am convinced now, more than ever before, that you will make an outstanding record as a great Chief Justice, because you have done well everything you have undertaken, and I would regret exceedingly to see you give up the great opportunities which lie before you in order to become a candidate for the Presidency.

A Democrat or "New Dealer", whatsoever you may call it, in my opinion cannot be elected President in 1948, if we, as Al Smith says, "look at the record". All of this is a repetition of what happened when the Wilson administration went out. I am bold enough or presumptuous enough to write you as I have because of my affection for you in the first place, and secondly because I think you are going to render a great service where you are.

I thoroughly enjoyed seeing you and especially enjoyed seeing Mrs. Vinson. I am looking forward to the day when I can see that fine boy. Mrs. Vinson

is prettier than she was eleven years ago, and how you did out-marry yourself!

With affectionate regards, I am

Your friend,

John

Magruder

United States Circuit Court of Appeals

1634 P. O. & U. S. Courthouse

BOSTON, MASSACHUSETTS

CHAMBERS OF
CALVERT MAGRUDER
CIRCUIT JUDGE

Write Magruder file

RECEIVED
DEC 2 9 15 AM '48
CHAMBERS OF THE
CHIEF JUSTICE

November 30, 1948

Dear Fred:

After I saw you yesterday I had a talk with the Attorney General which got around to a discussion of Judge Lindley and the Seventh Circuit. The A.G. said that Senator Lucas had been favorable to Lindley's appointment last summer, but that Lindley's refusal to take the gamble did not sit well with the Senator, who now was not inclined to favor Lindley. The A.G. said that personally he did not feel that way and that he well understood Lindley's hesitancy. I thought that if you were disposed to help Lindley out, you might show Senator Lucas the letter you received from Judge Major, and you might express to him your view that Judge Lindley's disinclination to accept a recess appointment should not be held against him.

I understand there are now two vacancies on the Seventh Circuit. Judge Lindley certainly deserves appointment to one of these vacancies.

When I saw you, I forgot to ask if you would be needing a law clerk for next year. My present law clerk thinks he would like to have a year with the Supreme Court, and if you are looking for a man I would be happy to give a favorable recommendation to my present law clerk.

Sincerely yours,

Calvert Magruder

CM:GP

The Honorable
Fred M. Vinson
Chief Justice of the United States
Washington 13, D. C.

Magruder

December 20, 1950

Dear Calvert:

I have your note of the 13th. I will keep this matter under my hat.

It is a very sensitive situation, but, thinking it over, I cannot keep from concluding that he would be a very unhappy man if the committee were to hold hearings that would involve him regardless of its findings.

With kind regards and the Season's Greetings, I am

Sincerely,

(Signed) Fred M. Vinson

Honorable Calvert Magruder,
Chief Judge,
United States Court of Appeals
for the First Circuit,
Boston, Massachusetts.

8 Sowell St
Cambridge Mass
13 Dec/50

Dear Fred,

Judge Mahoney called me again last Monday. It seems he did not send the reply to Senator Green which I summarized in my previous letter. He said he had been thinking it over and had decided that he had better retire. I said I errored would give him my certificate of disability if he wanted it. I delivered my certificate to him today, and I think he will send in his letter to the President in a few days. Please keep this under your hat until he actually does so.

Yrs.
Calvert Magruder

Chief Justice Vinson.

Major

August 26, 1949

Dear Earl:

I have your letter of the 23rd, and note the contents.

I do not know what will finally eventuate, but I have heard several friendly references to the appointment of Judge Lindley, and hope that it takes place.

I am glad you are going to be in St. Louis at the ABA meeting. I will be particularly pleased to see you.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

Honorable J. Earl Major,
Chief Judge,
United States Circuit Court of Appeals
for the Seventh Circuit,
1212 Lake Shore Drive,
Chicago 10, Illinois.

FMV:McH

United States Circuit Court of Appeals
For the Seventh Circuit
1212 Lake Shore Drive
Chicago 10

Chambers of
Judge J. Earl Major

Home Address
Hillsboro, Illinois

August 23, 1949

Honorable Fred M. Vinson
Chief Justice, United States Supreme Court
Washington 13, D.C.

Dear Mr. Chief Justice:

Knowing your close association with the President, I am again calling to your attention a matter which is very close to my heart, as well as every member of our court, and that concerns Judge Walter C. Lindley, who I understand is under consideration for appointment to our court. It was a terrific disappointment to the Bar as well as to many others when he was not appointed to the last vacancy, and we are all hoping for better results this time. No judge in this country, in my opinion, so merits a promotion and no person can be appointed who will so favorably affect the stature of our court as Judge Lindley. I need not bother you further as to his qualifications.

Of course, I know that politics must be taken into consideration, but a good appointment is good politics and his appointment would be exceptionally good politics, even if the matter must be viewed in that light. I know you are vitally interested in the welfare of our court, and we will all be eternally grateful to you if you will put this matter up to the President.

I expect to be in St. Louis at the meeting of the American Bar Association, and I am glad to note that you are on the program. I hope to see you at that time.

I regret to bother you in this fashion but the matter about which I write is of such vital importance that I believe you will understand.

With kind personal regards, I am

Sincerely,

J. E. Major

JEM:bm

Miller

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF THE COURT
CINCINNATI 2, OHIO
Louisville 2, Ky.

Wednesday, Sept. 2nd

Dear Mr. Chief Justice:

I was sorry not to see you in Boston last week. Wallace Downey phoned me on Thursday noon that you were at the Statler, just as I was leaving for Cambridge, and I did not get back to Boston until too late to go calling before the dinner that evening. Roy Shelbourne had planned to make the trip with a few of us from Louisville, but changed his mind about a week before we left. We both enjoyed having lunch with Shay Minton in Louisville a short time ago and talked about you and the problems of the Courts. Best regards.

Sincerely, Shack.

February 1, 1949

Honorable Sherman Minton,
Judge,
United States Court of Appeals
for the Seventh Circuit,
1212 Lake Shore Drive,
Chicago 10, Illinois.

Dear Shay:

I have your letter of the 26th, and regret that I did not get to see you.

Prior to the Inauguration, I had a talk with our friend about this very matter, and was under the impression that it would be done. Since then, I understand that there may be a change in the plans. You know what can come up in matters of this kind. However, since I have not checked the Congressional Record to date, nor do I have any other information, I am not certain that any change in the original plan has been made.

Everything I have heard about your friend is that he is a very fine person and a "work hoss". I believe I should tell you that I heard indirectly of your interest in this matter prior to the time I had my talk with our friend, and your views carried a great deal of weight with me.

Glad to hear from you. With every good wish to you and yours, I am

Your friend,

[Signed] Fred M. Vinson

FMV:McH

United States Circuit Court of Appeals
For the Seventh Circuit
1212 Lake Shore Drive
Chicago 10

Chambers of
Judge Sherman Minton

January 24, 1949

My dear Fred:

When I was down for the Inaugural, I called at the Court to see you but I got there a little too late and you had gone to lunch. I was so tied up I could not get back. Sorry I did not get to see you.

We are much concerned here at the Court about filling the vacancy occasioned by the resignation of Judge Sparks of Indiana. It looks like Illinois has the inside track and will get this appointment. Since Sparks was the only Republican on this Court, the President indicated that he wanted to appoint a Republican to succeed him, and that Judge Lindley, the District Judge at Danville, Illinois, was the man he had in mind. This would be the finest thing that could happen to our Court at this juncture, because Lindley, since I have been out here and for a long time before I came, has spent about one-third of his time here helping this Court.

Since the President has this in mind and since we are so desperately in need of a full bench, I am sure that the President would expedite this appointment if you would indicate our great necessity therefor. If you can say a word to urge the President along, I am sure this vacancy will be promptly taken care of - and we shall be very grateful to you for your assistance.

Please remember me to Mrs. Vinson and with warmest personal regards, I am

Sincerely yours,

SHERMAN MINTON

The Honorable Fred M. Vinson
Chief Justice of the United States
Washington 13, D. C.

Murrah

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

ALFRED P. MURRAH
JUDGE

Oklahoma City, Oklahoma
October 7, 1949

Dear Chief Justice:

It occurred to me that the enclosed newspaper article on Judge Rice's Lay Committee report might be of interest to the Conference.

Respectfully,

Alfred Murrah

Honorable Fred M. Vinson
Chief Justice of the Supreme Court
Washington, D. C.

Dear

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS

January 2, 1953

The Honorable Fred M. Vinson
Chief Justice of the United States
Washington, D. C.

Dear Mr. Chief Justice:

At the conference of the chief justices of the States at San Francisco in September there was a long discussion of Federal-State relations in the matter of habeas corpus for the release of State prisoners. It seemed to be the practically unanimous opinion of the chief justices that the present condition of the law was unsatisfactory in two respects:

(1) After the prisoner has been through the entire State system and his conviction has been affirmed by the highest court of the State sitting in banc, and even after certiorari has been refused by the Supreme Court of the United States, he may apply for habeas corpus before a single Federal judge in the lowest Federal court, proceed thence to the Court of Appeals, and at the end again apply for certiorari to the Supreme Court of the United States. This course of procedure, which now seems likely to become the regular pattern rather than the exception in most serious criminal cases, may practically double the time required to reach a final decision. Perhaps the greatest reproach to American justice, at least that which is most resented by the general public, has been delay in the disposition of criminal cases. The people simply cannot understand why it should take so long to execute a murderer, where capital punishment prevails, or to lodge a robber in prison under a certain and final sentence. I am ashamed to say that in this Commonwealth it may well take two years to secure final State determination of the guilt (or innocence) of an accused murderer. Under the prevailing system of habeas corpus in Federal courts this time may well be extended to three or four years. Respect for the administration of justice is necessarily seriously undermined.

(2) The proceedings in the Federal courts are not concerned with the guilt or innocence of the accused. On the contrary the accused in effect puts on trial before a single district judge all the State officers who had anything to do with his apprehension and prosecution from the police officers who arrested him to and including the highest court of the State which affirmed his conviction. Reckless allegations are made without a shred of truth. This is an unseemly proceeding. The public cannot understand the reasons for it.

At the conference of the chief justices it was voted to appoint a committee to investigate the situation and to report at the next conference. I was unfortunate enough to be named chairman of that committee. Hence this letter.

Strictly from the State viewpoint it would seem that a statute simply barring habeas corpus in lower Federal courts for the release of State prisoners would solve the problem. Inasmuch as under Darr v. Burford, 339 U. S. 200, the State prisoner must ordinarily apply for certiorari anyway before he can go to the Federal district judge, it would seem that such a statute would impose no great additional burden upon the Supreme Court. It would, however, give to the denial of certiorari the effect of barring habeas corpus in lower Federal courts. I am aware of the difficulties involved in giving any effect to such denial. But after all, where both personal liberty and constitutional rights are involved, is it going too far to assume that if a case has any substantial merit the Supreme Court will not deny certiorari?

The foregoing is intended only as a general suggestion. Any such statute might have to contain exceptions and qualifications. Perhaps some other approach would be better. It seems to me that we have a problem of Federal and State accommodation which might be solved in some manner by cooperative effort. Would it seem to you useful to have a committee of the conference of Federal judges, which I understand will meet in March, confer with our committee, or with a subcommittee of our committee?

Please let me make it more than plain that none of us wishes to deprive anybody of constitutional rights or to hamper the Supreme Court in any respect, even if we could. Nor is there, at least in this jurisdiction, any complaint of the lower Federal courts, which have always acted with due caution and restraint, and with whom our relations have been pleasant in every way. There is simply a belief, widely shared by State judges in all parts of the country, that a situation exists that is harmful to the administration of the criminal law, and that a responsibility rests upon the judges to try to discover a reasonable and adequate remedy.

Respectfully yours,

Stanley E Reed

Chief Justice

SEQ:HC

Qua

January 23, 1953

Honorable Stanley E. Qua,
Chief Justice,
Supreme Judicial Court,
Boston, Massachusetts.

Dear Mr. Chief Justice:

I desire to apologize for my delay in answering your letter of January 2, 1953, expressing the viewpoint of the chief justices of state courts relative to the matter of habeas corpus for the release of state prisoners.

I note that the Conference of Chief Justices of the States has appointed a committee to investigate and report on the problem to the next Conference, and I am pleased to know that you head this committee as chairman.

In respect to the appointment of a committee from the Judicial Conference of the United States to meet with your committee, I have a feeling that better results might flow if you proceed with your study of the problem and expressing the viewpoint of the state justices.

We have had a committee of the Conference and have taken Conference action in this field, with members of the Conference appearing before Congressional Committees prior to the enaction of the recent legislation. It is a matter in which I am deeply interested, and I assure you that I am in full accord with your considered study of this highly important issue. I agree that "a responsibility rests upon the judges to try to discover a reasonable and adequate remedy."

With kind regards,

Sincerely,
(Signed) Fred M. Vinson

FMV:McH

Ful 2ma

SUPREME JUDICIAL COURT
BOSTON, MASSACHUSETTS

January 26, 1953

The Honorable Fred M. Vinson
Chief Justice of the United States
Washington, D. C.

My dear Mr. Chief Justice:

Permit me to thank you for your letter of January 23d expressing your views in the matter about which I wrote you.

The Chief Justices of the States are not committed to any particular line of action but they are very desirous that some solution be found for a situation which seems to grow more serious as time goes on and as the possibilities for delay become more widely known among those members of the bar who deal primarily with criminal cases.

Yours respectfully,

Stanley E. Qua

SEQ:HC

Chief Justice

Quinn

February 5, 1952

Honorable Robert E. Quinn,
Chief Judge,
United States Court of Military Appeals,
Washington 25, D. C.

Dear Judge Quinn:

I will present your letter of January 29th, relative to the possibility of including the United States Court of Military Appeals' decision in the Federal Reporter Series, to the next meeting of the Judicial Conference of the United States.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

UNITED STATES COURT OF MILITARY APPEALS
WASHINGTON 25, D. C.

January 29, 1952

ROBERT E. QUINN
CHIEF JUDGE

GEORGE W. LATIMER
PAUL W. BROSMAN
JUDGES

RECEIVED
JAN 30 10 13 AM '52
CHAMBERS OF THE
CHIEF JUSTICE

The Chief Justice of the United States
The Supreme Court

Dear Mr. Chief Justice:

I was very glad to have the opportunity to talk with you informally concerning the operation of the recently created United States Court of Military Appeals. Your interest in its function is much appreciated, and I know that you too hope that the Court will come to be the landmark in the field of military justice Congress intended when it passed the new Uniform Code of Military Justice.

In the course of our conversation, you mentioned the desirability of confirming by letter my thoughts concerning the possibility of including the Court's decisions in the Federal Reporter Series. As you know, all of the members of our Court feel very strongly that it would be of benefit both to the several armed services and to the American Bar at large to have our opinions given the wide circulation such a plan would provide. This is especially true today in view of the fact that a large and increasing segment of the American people has come to be directly concerned with the course and conduct of military law administration. Publication in the Federal Reporter would also, of course, save the Government a very substantial amount of money.

I hope that you will be able to bring this matter to the attention of the Judicial Conference and am grateful for your helpful advice. I earnestly hope too that its members will receive the suggestion favorably.

Sincerely yours,

Robt E. Quinn

ROBERT E. QUINN

Will present your Jan 29 letter to the next meeting of Jud Conf. Put it on agenda & copy of letter mailed to members —

ALBERT L. REEVES
DISTRICT JUDGE

Reeves

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
KANSAS CITY 6

July 15, 1949

My dear Mr. Chief Justice:

Before leaving Washington it was my desire to have a brief visit with you. I had planned to call at your chambers, but, in the rush at the conclusion of the case, I was very eager to get back to my own bench and left at once. I recalled with pleasure my brief visits with you, and these encouraged me to look forward to another meeting with you.

Thanking you for your kindness and courtesy to me, and with every good wish, I am,

Sincerely yours,

Albert L. Reeves.

Honorable Fred M. Vinson
Chief Justice
Supreme Court of the United States
Washington 13, D. C.

B. K. ROBERTS
CHIEF JUSTICE
SUPREME COURT

STATE OF FLORIDA
TALLAHASSEE

6 May 1953

The Chief Justice
The Supreme Court
Washington 13, D. C.

My dear Mr. Chief Justice:

I am enclosing a copy of an opinion of the Supreme Court of Florida filed May 5, 1953, in the case of Henderson v. State ex rel. Lee, in the thought that you might be interested in reading the last two pages of such opinion.

It was authored for the court by The Honorable John E. Mathews, a justice of this court.

Respectfully,

B. K. Roberts

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1953

EN BANC.

JACK B. HENDERSON, as Sheriff of Dade County, Florida,

Appellant,

-vs-

THE STATE OF FLORIDA, ex rel. D. Q. LEE,

Appellee.

and

JACK B. HENDERSON, As Sheriff of Dade County, Florida,

Appellant,

-vs-

STATE OF FLORIDA, ex rel W. O. FRAZIER,

Appellee.

CASE NO. 23,752

CASE NO. 23,752

Opinion filed May 5, 1953

Appeals from the Circuit Court for Dade County, Grady L. Crawford, Judge.

Richard W. Ervin, Attorney General, John A. Madigan, Jr., and William A. O'Bryan, Assistant Attorneys General, for Appellee.

Lucille Snowden, Richard H. M. Swann and Wendell C. Heaton, for Appellees.

MATHEWS, J.:

These two cases involve a labor dispute between the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1267, of Dade County, Florida, and the Miami Transit Company. Frazier was President of the union and Lee was a member of the union and an employee of the Miami Transit Company. The appellees were arrested and held in custody under warrants charging and accusing them with a violation of Chapter 453 F. S., being Chapter 23911, Laws of Florida, 1947, which is commonly known as the Florida Public Utility Arbitration Law.

Petition for writs of habeas corpus were brought by the appellees in the Circuit Court of Dade County, Florida, attacking the constitutionality of the Florida Public Utility Arbitration Law. After a hearing before the Circuit Judge, an order was entered denying motions to quash the writs of habeas corpus and discharging the appellees. This appeal is from that order.

There is no dispute about the facts. Elections were held by the union in 1941 and 1943 under the United States Department of Labor Conciliation and Mediation Service to determine the representative status of the union for employees of the bus company involved in this cause. Since the enactment by Congress in 1947 of the so-called Taft-Hartley Act as an amendment of the Labor Management Relations Act, the union in question has complied with all of the provisions of that law and has negotiated under its terms. A collective bargaining agreement between the union and the bus company was entered into with reference to wages and working conditions of the employees, which expired on October 1, 1951. More than sixty days prior to that date and in compliance with the Labor Management Relations Act, the union submitted written proposals to the bus company for specified changes they wished to negotiate for in a new contract and offered to meet, and requested a conference with the company officials for the purpose of bargaining on such proposals. Proper notice was given to the Federal Conciliation and Mediation Service of the United States Department of Labor of the failure of the parties to reach an agreement, and at the time of the habeas corpus proceedings, negotiations were continuing under the direction of a representative of the Federal Conciliation and Mediation Service.

The Public Utility Arbitration Law contains the following provisions:

> "453.05 Work interruption; prohibited - The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of such dispute. From and after the filing of a petition with the governor as provided for in Sec. 453.04

hereof, and until and unless the governor shall determine that the failure to settle the dispute with respect to which such petition relates would not cause severe hardship to be inflicted on a substantial number of persons, there shall be no interruption of work and no strikes or slowdowns by the employees, and there shall be no lockout or other work stoppage by the employer, until such time as all procedure provided for by this chapter has been exhausted or during the effeftive period of any order issued by a board of arbitration pursuant to the provisions of this chapter.

"453.12 Penalty for violation by an individual - Any violation of this chapter by any member of a group of employees acting in concert, or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor, punishable upon conviction by a fine of not more than one thousand dollars or by imprisonment in the county jail for not more than twelve months, or both."

It appears from the record that after the dispute arose the bus company, acting under Chapter 453 F. S., petitioned the Governor of Florida to call into effect the arbitration and conciliation provisions of the Florida law. The appellees refused to recognize this procedure and eventually called a strike.

Only one question is presented by this appeal, and that is: "Has Congress, by the enactment of the National Labor Relations Act of 1935, as amended by the Labor Management Relations Act of 1947, so completely preempted the regulation of peaceful strikes for higher wages in industries affecting interstate commerce, including public utilities, as to render invalid Chapter 453, Florida Statutes, as being in direct conflict with federal legislation?"

The Circuit Judge answered the above question in the affirmative by its order denying the motion to quash and discharging the appellees.

This case is controlled entirely by the majority opinion of the Supreme Court of the United States in the case of Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board, 340 US 383, 71 S Ct 359, 95 L ed 354. This case will hereafter be referred to as the "Wisconsin case".

The above case, decided by the Supreme Court of the United States, involved the validity of the Wisconsin statutes of 1947, Sections 111.50, et seq. The net result of the majority opinion in that case was that the Wisconsin Statute, which prohibits strikes against public utilities and provides for compulsory arbitration of labor disputes after an impassee in collective bargaining has been reached, is invalid, because it is in conflict with the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947.

For the purposes of this opinion, the Wisconsin Act is the same as the Florida Act. Any deviation in details between the two acts are of no importance in this case.

Among other things the majority opinion of the Supreme Court of the United States in the Wisconsin case specifically held:

> "We have recently examined the extent to which Congress has regulated peaceful strikes for higher wages in industries affecting commerce. * * * We also listed the qualifications and regulations which Congress itself has imposed upon its guarantee of the right to strike. * * * Upon review of these federal legislative provisions, we held, 339 US at 457:
>
> "'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. Plankington Packing Co. v. Wisconsin Board, 338 US 953 (1950); La Crosse

Telephone Corp. v. Wisconsin Board, 336 US 18 (1949); Bethlehem Steel Co. v. New York Labor Board, 330 US 767 (1947); Hill v. Florida, 325 US 538 (1945).'

"* * * Congress * * * saw fit to regulate labor relations to the full extent of its consitutional power under the Commerce Clause, National Labor Relations Board v. Fainblatt, 306 US 601, 607, 83 L ed 1014, 1019, 59 S Ct 668 (1939). Ever since the question was fully argued and decided in Consolidated Edison Co. v. National Labor Relations Board, 305 US 197, 83 L ed 126, 59 S Ct 206 (1938), it has been clear that federal labor legislation, encompassing as it does all industries 'affecting commerce,' applies to a privately owned public utility whose business and activities are carried on wholly within a single state.* * *

"* * * In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. International Union, United Auto Workers v. O'Brien, supra (339 US at 457, 94 L ed 982, 70 S Ct 781). And where, as here, the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.

"* * * Such state legislation must yield as conflicting with the exercise of federally protected labor rights.

"* * * This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation.

"Fifth. It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act, has forbidden the exercise of rights protected by Sec. 7 of the Federal Act. In addition, it is not difficult to visualize situations in which application of the Wisconsin Act would work at cross-purposes with other policies of the National Act. * * * That act requires that collective bargaining continue until an 'impasse' is reached, Wis Stat 1949, Sec. 111.52, whereas the Federal Act requires that both employer and employees continue to bargain collectively, even though a strike may actually be in progress.* * *

"The National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Art 6 of the Constitution. Having found that the Wisconsin Public Utility Anti-Strike Law conflicts with that federal legislation, the judgments enforcing the Wisconsin Act cannot stand."

The Federal Act has preempted the field and under that act, labor unions have the right within the limits prescribed thereby of peaceful strikes for higher wages, or for better working conditions. Where state legislation denies a right guaranteed by Congress, such state legislation is in conflict with Federal law. The state law in question substitutes compulsory arbitration for the right to strike.

In his brief the Attorney General correctly states: "The provisions of these two laws [Wisconsin and Florida] * * * are so similar in substantial intent and purpose as to render unimportant any deviation between them."

After discussing the minority and majority opinions of the Supreme Court of the United States in the Wisconson case, the Attorney General made the following statement, or suggestion:

"Therefore, by this appeal, Appellant is frankly and honestly petitioning this Supreme Court of Florida to give deep consideration to the basic issue here involved before determining to accept and follow the ruling of the Supreme Court of the United States in the Wisconsin case. In other words, Appellant respectfully suggests that the Supreme Court of the United States, by its decision in the Wisconsin case, may have grievously erred, and is asking the Supreme Court of Florida to refuse to follow that precedent." (Emphasis supplied.)

The effect of this suggestion is to ask us to dissent from the majority opinion instead of following the same and being bound thereby. The suggestion is repugnant to the duty imposed upon us by Article 6 of the Constitution of the United States, and our oath of office.

If the Supreme Court of the United States has "grievously erred" in its interpretation and construction of the Federal Statute, it is not within the jurisdiction or province of this Court to dissent from that opinion or pit our judgment against their judgment. Those who practice before that Court, may in a proper case, reargue the matter, but the Justices of this Court are not authorized to do so.

Disputes between labor unions, capital and management are not new. There was a time in the history of their relationships when the right of peaceful striking for the purpose of increasing wages or improving labor conditions was questioned. Capital alone can make very little, if any, contribution to the welfare of the Nation without the employment of labor. Each is essential to the other. The necessity of labor in the progress, development, economy and greatness of the Nation is now fully recognized and from this recognition, legislation has been enacted by State Legislatures and by the Congress, primarily in furtherance of the public interest, but also for the protection of those whose labor is so vital to the Nation. Management, capital and labor are subject to valid regulatory legislation.

Anyone whose rights are established by such legislation may rely upon the law. In this case a labor union or members thereof seek the aid of the courts to protect rights guaranteed to them by law.

The question of the agreement of this Court with the majority opinion in the Wisconsin case is not involved in this opinion. Article 6 of the Constitution of the United States, among other things, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

When a law, enacted by Congress, is construed and interpreted by the Supreme Court of the United States, that interpretaioon and construction becomes a part of the supreme law of the land, and an opinion by that tribunal upon the questions at issue is absolutely binding upon this Court, whatever may be the personal predilections of the Justices.

It is not the duty of the Federal Courts alone, but of all State Courts, to respect and be bound by the decisions of the Supreme Court of the United States. No good purpose can be served by inferior Federal Courts or Supreme Courts of the various states, or of any other courts, dissenting from the opinions of the Supreme Court of the United States in respect to Federal questions.

Unbridled, unauthorized, or irresponsible criticism of the highest Court of the Nation, and the opinions of such Court by State Supreme Courts, or other inferior courts, has a tendency to destroy the confidence of the people in the Court. Courts exist primarily for the protection of the people, our institutions and form of government. The Court may restrain other departments from President to Constable (the case of Executive Seizure of the steel mills being an outstanding example) from usurpation of power. Neither men, nor organizations, under our form of government, are immune from the res-

training power of the courts.

Orderly government requires respect for and confidence in constituted authority. Unauthorized criticism of, disrespect for and dissents from the opinions of the highest court in the land by inferior courts will eventually destroy all confidence in that Court, resulting in contempt for the Nation's highest tribunal by whose opinions "the Judges in every State shall be bound."

Our form of government requires finality. There must be some tribunal from whose decisions there is no appeal. The Supreme Court of the United States is that tribunal. Should confidence in that tribunal be so undermined, or destroyed, that its opinions were not respected or binding upon anyone, government itself, as we know it today, would cease to exist and in its place we would have turmoil, confusion, anarchy or a dictatorship.

Every officer, whether in the executive, the legislative, or the judicial branch of our government, is required to take an oath that he will "support, protect and defend the Constitution and laws of the United States * * *"; and in accordance with Article 6 of the Constitution of the United States, "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." So it is, that until the law is modified or changed by Congress, or the opinion with reference thereto is modified, changed or receded from by the Supreme Court of the United States, this Court and every other court, is bound to give full effect to the law as construed in the opinion, for it is the supreme law of the Land.

Affirmed.

ROBERTS, C.J., TERRELL, THOMAS, SEBRING, HOBSON, and DREW, JJ., CONCUR.

Roberts

May 14, 1953

Dear Mr. Chief Justice:

I want to thank you for your letter of the 6th, enclosing a copy of an opinion of your court, filed May 5, 1953, in the cases of Henderson v. The State of Florida, ex rel. Lee, and Henderson v. The State of Florida, ex rel. Frazier.

I read the opinion with interest. The position of the Attorney General and the court's response were very interesting.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

Honorable B. K. Roberts,
Chief Justice,
Supreme Court,
State of Florida,
Tallahassee, Florida.

B. K. ROBERTS
CHIEF JUSTICE
SUPREME COURT

STATE OF FLORIDA
TALLAHASSEE

16 June 1953

The Chief Justice
The Supreme Court
Washington 13, D. C.

CONFIDENTIAL, except as to Associate Justices.

My dear Mr. Chief Justice:

It was with distress that I read in the newspaper this morning that Mr. Justice Clark had been "invited" to appear before a subcommittee of the Judiciary Committee of the U. S. House of Representatives to testify concerning certain unspecified matters which took place during his term of office as Attorney General of the United States.

In times like these, any man may pardonably think in personal terms and reach a decision on that basis; yet so great is the principle involved here that I am hopeful that Mr. Justice Clark will review the matter in its public as well as private aspects. The implications here are to me so grave and so historic in nature that I am taking the liberty, as a member of another court, of expressing to you my unsolicited views.

I am greatly disturbed at the growing trend toward the establishment of a police state in this country--built around congressional committees rather than a dictator as in other countries. These committees have, in my opinion, completely ignored the constitutional limitations upon the exercise of their investigative powers and have arrogated unto themselves unbridled discretion in a campaign of character assassination which would do justice to the Nazi propaganda chief.

The Kefauver-O'Conor Committee became so brazen that it attempted to make the head of a sovereign state subservient to its process. The Governor returned their subpoena with a broad denunciation of the attempted exercise of power. A copy of his letter and brief is enclosed.

The activities of these congressional committees have already shaken the confidence of the people in the executive branch of the government; and I fear that this "invitation" is but the opening wedge for a similar assault on the judicial branch of the government. I believe it to be more than an attempt to dragoon Mr. Justice Clark; I believe it is an attempt to establish a precedent whereby all other members of the judiciary, including judges of state courts, may be made subservient to the whims of such committees.

I have no inclination to make obeisance before such committees and defend my judicial acts. And if that time should ever come, I fear that our free and independent judiciary, which has always stood as a bulwark against tyranny and oppression, will have lost its usefulness.

Modern dictatorships have all been built on the ruins of an independent judiciary. Hitler said in 1942: "Judges who do not recognize the needs of the hour will be removed from office." In 1948 Andrei Vishinsky said: "Law is an instrument of politics. There are libraries full of books trying to prove the contrary, but it is known to be a legal fiction." Dr. Kurt Schusnigg, who stood helplessly by to see his people lose their liberties, said: "When the independence of courts disappears because judges have been accustomed to taking political orders; when dogmatic politics defines law as that which is useful to the nation; when judges are purged because of politics; when the total corruption of the judiciary is completed--then and only then is modern totalitarianism able to paralyze the minds of the people. As long as an independent judiciary exists intact, there can be no totalitarianism."

Once we said, in declaring our independence, that the King "has made judges dependent upon his will." Shall we say tomorrow that Congress "has made judges dependent upon their will?" I see a deadly parallel in the making.

It is, therefore, my fervent hope that Mr. Justice Clark will decline the invitation and will resist any other effort of the subcommittee to bring him before them. In my opinion, he has an opportunity--if not a duty--to protect and preserve the independence of the judicial branch of our government against this first encroachment. I pray that he will do so.

Yours respectfully,

B. K. Roberts

Letter of Honorable Fuller Warren
Governor of Florida

Returning Subpoena to the United States Senate Special Committee on Organized Crime in Interstate Commerce

and Asserting the Independent Sovereignty of the State of Florida.

Governor Fuller Warren

On June 22, 1951, the Chairman of the United States Senate Special Committee on Organized Crime in Interstate Commerce issued a subpoena commanding Fuller Warren, the Governor of Florida, to appear in Washington, D. C., on July 9, 1951.

Governor Warren, having previously answered all questions propounded by the committee in a telegraphic communication, returned the subpoena, asserting the sovereignty of the State of Florida.

The Governor's letter of transmittal with his memorandum legal opinion follow.

STATE OF FLORIDA
EXECUTIVE DEPARTMENT
TALLAHASSEE

FULLER WARREN
GOVERNOR

July 2, 1951

HONORABLE HERBERT R. O'CONOR,
United States Senator,
Chairman, Special Committee on Organized Crime in Interstate Commerce
Washington, D. C.

SIR:

I have been served with a subpoena issued by you as Chairman of the Senate Committee under Senate Resolution 202 commanding me to be and appear in Washington, D. C., on July 9, A. D. 1951, to testify before your committee. I have accepted service of this subpoena but return the same herewith to you because, in my opinion, neither you nor the Senate Committee has the power to compel me to obey its commands.

The fact that the subpoena is addressed to me individually rather than as Governor of Florida in no way alters my decision in the matter. In fact, there is no distinction if measured by the result to be accomplished. A subpoena which seeks to compel my appearance before your committee in Washington as an individual, nonetheless seeks to compel the appearance of the Governor of the State, who is vested with specific duties and responsibilities to the people under the Constitution.

Since I learned of your action in issuing the subpoena, I have given careful and serious consideration to the position I should take in response thereto. Realizing that there was no direct precedent to guide me and conscious of the transcendent importance of the constitutional precedent that would be established by my decision and action in response to the subpoena, I have devoted several days of study to the constitutional questions involved and have attempted to arrive at my decision with no other thought than to perform my duty and direct my actions in strict and full accord with the letter and spirit of the Constitution of Florida and of the United States.

Under the Constitution of Florida the Governor is the supreme executive officer of the state. It would not be possible to detail the multitude of duties imposed on him, but among them is that of commander in chief of the state militia when not called into the service of the nation. He directs all executive business of the state; he is the directing head of all executive departments of the state government and may require information from them as to the status of their departments at any time; he is required to see that the laws of the state are faithfully executed; he may call the legislature into extraordinary session when the circumstances require; he is required to communicate to each regular session of the legislature the condition of the state and recommend the passage of such measures as he may deem expedient; he may suspend all officers not subject to impeachment; he is answerable to the people for failure to perform his duties only by way of impeachment.

The performance of these duties and the discharge of these responsibilities require that I be available at all times to perform such duties as may devolve upon me

and free to take such action in the discharge of my responsibilities as my judgment dictates. To admit the power of your committee to summon me from the State of Florida at such time as it elects and for such period of time as it decides is proper is to admit that the committee has the power to remove me from this state, deprive me of freedom of action in the performance of my duties and restrain me from the discharge of my responsibilities as chief executive of a sovereign state and establish a precedent for such action on the part of congressional committees in the future. Such an encroachment might well mark the beginning of the end of the dual system of sovereignty, federal and state, under which this nation was established; and, when the sovereign power of the state is fully usurped by the federal government, there would be an end to our representative form of government; there would be no need for United States Senators and Representatives to represent the people of a puppet state; and once-sovereign states would be reduced to helpless dependencies of the Federal government.

Moreover, if I, as the chief executive of this state, am amenable to your process, there would appear to be no reason why the members of any state's judicial system could not be held accountable to your committee, or some other congressional committee, for their judicial decisions; and it would also appear that members of any state legislature could likewise be brought by subpoena before a congressional committee to explain their deliberations on pending or past legislation.

Confronted, therefore, with the ultimate consequences of the full exercise of the power you seek to invoke and being unable to reconcile such consequences with the

vested sovereignty of Florida and the Constitution of this state, which as Governor I am sworn to protect and defend, I have no alternative but to deny that you possess the power you seek to exercise.

As heretofore indicated, I am fully conscious of the system of dual sovereignty which is the unique feature and the fundamental basis of our federal union, and I have given full and careful consideration to the provisions of the Constitution of the United States that may be applicable to the action of your committee in seeking to compel my appearance before it. The Constitution of the United States, which as Governor of the State of Florida I am also sworn to protect and defend, guarantees to each state a republican form of government, which is that form of government which provides that the people shall be governed by officials of their own choice, and by three separate and distinct branches.

The Constitution of the United States further provides that the powers not delegated to the United States by such Constitution nor prohibited by it to the states are reserved to the states, respectively, or to the people. I have a firm and fixed opinion that your action seeking to compel my attendance upon your committee usurps powers reserved to the states and is an affront to the dignity, the sovereignty and the independence of the people of this state.

In addition to the constitutional questions involved, I am further impelled to my decision by consideration of matters of public policy. Under our system of dual sovereignty of the state and of the United States, it appears to me unseemly for the officials of one sovereignty to exercise any power in such way as to hinder and interfere with the exercise of the sovereign powers of the

other. Such exercise of power would destroy the balance of equal sovereignty, prevent cooperation in attainment of common objectives, and undermine the spirit of unity which has and should pervade the Federal Union.

Previously I received notice through the press that I was invited to appear before your committee in Miami to testify concerning six questions. Although these questions were not directed to me through any channel or in a manner befitting the office I hold, I replied to them by direct telegram to you; but in order that they may be made a part of the official records of your committee, I now re-state the subjects on which you desired information from me and furnish you the same answers I previously furnished you by telegram.

Your Subject #1. Any knowledge of large contributions made to his 1948 campaign for Governor and whether any of these sums were to his knowledge received from gambling interests or gangster syndicates.

My Answer. I have no knowledge that any contributions to my campaign for Governor were received from gambling interests or gangster syndicates, and I know of no one who has any such knowledge.

Your Subject #2. Whether commitments were made to those making these substantial contributions regarding tolerance of gambling operations.

My Answer. No commitments were made by me to anyone about anything, and specifically no commitments were made regarding tolerance of gambling operations.

Your Subject #3. Whether steps were taken after the election to carry out any such commitments.

My Answer. No such commitments were made, therefore, no steps were made to carry them out.

Your Subject #4. Whether arrangements were made after the election to permit and control activities of the bookie race wire service coming into Florida.

My Answer. No arrangements were made at any time to permit and control activities of the bookie race wire service coming into Florida.

Your Subject #5. Whether the Governor had any information regarding the relationship between the operation of rackets with an interstate aspect and the conduct of Florida law enforcement officials subject to the Governor's constitutional powers.

My Answer. I have no "information regarding the relationship between the operation of rackets with an interstate aspect and the conduct of Florida law enforcement officers subject to the Governor's constitutional powers."

Your Subject #6. What knowledge the Governor may have as to the penetration of Chicago, New York and other out-of-state gangsters into legitimate businesses in Florida.

My Answer. I have no knowledge of the penetration of any out-of-state gangsters, or local gangsters, into any legitimate businesses in Florida.

The above answers I deem sufficient; and a memorandum of law is attached to support my views, herein-

above expressed, respecting the recognition which your committee should accord to the sovereignty of my state.

Because of these considerations, and with due deference to you and your committee and its lofty purpose, as claimed by the committee, your subpoena is returned herewith and you are respectfully advised that I will not be present in Washington on July 9, A. D. 1951, or on any other date during my term as Governor of the State of Florida to testify before you or your committee. I think state sovereignty as conceived by the founders of our government is something more than a fading memory to rest in the nation's archives. It has a vital place in our scheme of government, and I took an oath to defend it.

Respectfully,

Fuller Warren

Governor of Florida

STATE OF FLORIDA
EXECUTIVE DEPARTMENT
TALLAHASSEE

FULLER WARREN
GOVERNOR

STATEMENT OF FACT AND QUESTIONS OF LAW

A committee of the Senate of the United States issued subpoena to Fuller Warren, Governor of the State of Florida, commanding him to appear and testify before such committee in Washington, D. C., on July 9, A. D. 1951.

Two questions of law are thus presented:

(1) Has a congressional committee the power to compel the Governor of a sovereign state to appear before it to testify?

(2) Even if the congressional committee has the power to compel the Governor of a sovereign state to appear before it to testify, should such committee, as a matter of public policy, exercise such power?

AUTHORITIES AND CONCLUSIONS

1. Constitutional Provisions.

Several provisions of the Constitution of the State of Florida and of the Constitution of the United States appear to be applicable to the questions involved.

CONSTITUTION OF THE STATE OF FLORIDA

Article IV

Section 1. Governor, Chief Executive.—The Supreme Executive power of the State shall be vested in a Chief Magistrate, who shall be styled the Governor of Florida.

Section 4. Commander-in-chief of Militia.—The Governor shall be commander-in-chief of the military forces of the State, except when they shall be called into service of the United States.

Section 5. Duties of Governor.—The Governor shall transact all Executive business with the officers of the Government, civil and military, and may require information in writing from the administrative officers of the Executive Department upon any subject relating to the duties of their respective offices.

Section 6. Execution of Laws.—The Governor shall take care that the laws be faithfully executed.

Section 8. Convening Legislature in Extra Session.—The Governor may, on extraordinary occasions, convene the Legislature by proclamation, and shall in his proclamation state the purpose for which it is to be convened, and the Legislature when organized shall transact no legislative business other than that for which it is especially convened, or such other legislative business as the Governor may call to its attention while in session, except by a two-thirds vote of each House.

Section 9. Governor's Message to Legislature.—The Governor shall communicate by message to the Legislature at each regular session information concerning the condition of the State, and recommend such measures as he may deem expedient.

Section 15. Removal or Suspension of Officers.—All officers that shall have been appointed or elected, and that are not liable to impeachment, may be suspended from office by the Governor for malfeasance, or misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetency, and the cause of suspension shall be communicated to the officer suspended and to the Senate at its next session. And the Governor, by and with the consent of the Senate, may remove any officer, not liable to impeachment, for any cause above named. Every suspension shall continue until the adjournment of the next session of the Senate, unless the officer suspended shall, upon the recommendation of the Governor, be removed; but the Governor may reinstate the officer so suspended upon satisfactory evidence that the charge or charges against him are untrue. If the Senate shall refuse to remove, or fail to take action before its adjournment, the officer suspended shall resume the duties of the office. The Governor shall have power to fill by appointment any office, the incumbent of which has been suspended. * * * *

Constitution of the United States

Article IV, Section 4: The United States shall guarantee to every state in this Union, a Republican Form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature can not be convened) against domestic violence.

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

2. The fact that the subpoena is directed to Fuller Warren as an individual and not as Governor of Florida has no legal significance.

The fact that the subpoena is directed to Fuller Warren as an individual, and not to him in his capacity as Governor of the State of Florida, has no significance in the determination of these questions.

Fuller Warren is the individual who occupies the office of Governor of the State of Florida. If he is compelled to appear in Washington, D. C. before the committee, the Governor of the State of Florida is the individual who appears. Fuller Warren cannot, as an individual, respond to the subpoena and appear before the committee in Washington and as Governor of the State of Florida, remain free and unrestrained to perform the duties and functions of the office of Governor of the State of Florida.

It is significant that in the case of Thompson vs. German Valley R. R. Company, 22 N. J. Eq. 111, a subpoena had been served on the Governor of New Jersey commanding him, by his individual name, to appear and testify. Despite the fact that the Governor was subpoenaed as an individual rather than in his official capacity the court decided the case on the basis of the effect that the subpoena would have upon the discharge by the Governor of his official duties.

If Fuller Warren, the individual, is compelled to absent himself from the State of Florida in response to the subpoena, the Governor of the State of Florida *is not available* in the State *to*

perform the duties which may devolve upon him, nor is the Governor of the State of Florida *free to discharge his responsibilities* to the State and to its people.

The legal effect of compelling Fuller Warren as an individual and compelling Fuller Warren as Governor of the State of Florida to appear before the committee in Washington, D. C. is identical.

3. The Committee Had the Power to Issue the Subpoena.

There seems to be no doubt that the committee has the power to issue a subpoena to Governor Warren. Congressional committees, when acting within the scope of their authority to investigate in those fields in which Congress may legislate, may subpoena such witnesses as the committee decides would be helpful in the matters under consideration and this power of a committee is comparable to the power of the courts to subpoena a witness.

This power seems to extend to officers of the United States and of the states.

In

Aaron Burr's Trial

Robertson's Reports I, 121, 127, 136, 181, 255 motion was made to the court for subpoena directed to Thomas Jefferson individually, and as President of the United States, to be and appear before the court and bring a certain letter in his possession. In ruling upon the motion Chief Justice John Marshall said:

> "In point of fact, it cannot be doubted that the people of England have the same interest in the service of the executive government—that is, of the cabinet council—that the American people have in the service of the Executive of the United States, and that their duties are as arduous and as unremitting; yet it has never been alleged that a subpoena might not be directed to them. It cannot be denied that to issue a subpoena to a person filling the exalted station of the Chief Magistrate is a duty which could be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case. If then, as

is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it."

In other cases we find that subpoenas have been issued by courts to Governors of States, the courts adopting the theory that the court has the power to issue the subpoena but that the Governor is the sole judge of what response he will make to it and that there is a difference in the power of the court to compel the attendance of a citizen and the power of the court to compel the attendance of the Chief Executive of a sovereign State.

See

Thompson v. The German Valley Railroad Co.
22 N. J. Eq. 111

and

In Re: Hartranft's Appeal
85 Pa. 433
27 Am. Rep. 667

4. The Governor of a State is the Sole Judge of What Response he will Make to a Subpoena.
5. A Congressional Committee has no Power to Compel the Governor of a State to Appear Before it.
6. Even if the Committee Possesses the Power to Compel the Governor of a State to Appear Before it, the exercise of Such Power Would be Contrary to Public Policy.

It seems to be well settled that the Chief Executive of a sovereign State is the sole judge of what response he will make to a subpoena and that neither the courts nor the legislative branch of the Government have any authority to review the decision of the Chief Executive as to his duties in response to the subpoena.

In Aaron Burr's Trial, supra, President Jefferson refused to appear before the Court in response to a subpoena, stating as his grounds for refusal:

"To comply with such calls would leave the nation without an *executive branch,* whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the *Constitution requires to be always in function. It could not,* then, intend that it should be *withdrawn from its station by any coordinate authority.*" (Emphasis supplied.)

Chief Justice Marshall recognized the validity of the reasoning of President Jefferson and no attempt was made to compel any further response by the President, the learned Chief Justice saying:

"In no case of this kind would the court be required to proceed against the president as against an ordinary individual. The objections to such a course are so strong and obvious that all must acknowledge them. * * * * In this case, however, the president has assigned no reason whatever for withholding the paper called for. *The propriety of withholding it must be decided by himself,* not by another for him. *Of the weight of the reasons for and against producing it he himself is the judge.*" (Emphasis supplied)

In Hartranft's Appeal, supra, the governor refused to obey the subpoena and gave as his reason, among others, that he thought his duties required him not to appear or produce the paper required or to submit his official acts, as Governor, to the scrutiny of any court.

In recognizing that the Governor was the sole judge of what his duty was in response to the subpoena, the Court said:

"The same reasoning which brings us to the conclusion that the governor is the absolute judge of what official communications to himself or his department may or may not be revealed, in like manner, leads us to conclude that he must be the sole judge, not only of what his official duties are, but also of the time when they should be attended to. The governor, disavowing any disrespect to the court or its process, has answered that, in consequence of his constant communication with the State forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. *This brings* us face to face with the question, whether the

executive, *or the courts* for him, *are to determine the character of his official duties and the order in which they may be performed.* For instance, is obedience to a subpoena one of his duties, and if so, shall he discharge that duty in preference to that which rests upon him as commander-in-chief? The answer to this question is easy; *for if the courts can, in any one instance* or at any one time, *control or direct the executive* in the performance of his duties, *they may do so in every instance and at all times.* We need not waste time in the attempt to prove that this proposition is not allowable; that *the governor cannot thus be placed under the guardianship and tutelage of the courts. To the people,* under the methods prescribed by law, not to the courts, *is he answerable* for his doings or misdoings. It is his duty, from time to time, 'to give to the general assembly information of the state of the Commonwealth,' but it is not his duty to render such an account to the grand jury of Allegheny or any other county. Whilst, therefore, the motives of the Court of Quarter Sessions in granting the process before us, are not to be lightly impugned, yet we have no doubt it *exceeded its jurisdiction in attempting to interfere with the executive prerogative.*" (Emphasis supplied)

In the Thompson case, supra, the Governor refused to respond to a subpoena and in ruling upon the question of whether or not the Court could compel his attendance upon it, the Court said:

"Such order ought not to be made against the executive of the State, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. *It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty.*" (Emphasis supplied)

A Comprehensive annotation on this subject is to be found in

9 A.L.R. 1099, et seq.

wherein the above and other cases are fully discussed and which recognizes the principle that the Chief Executive of a State of

the United States is the sole and final judge of what response, if any, he will make to process of another department of the government.

The above authorities are in full accord with the letter and spirit of the supreme law of the land.

It is a fundamental principle of our system of government, based as it is upon the dual sovereignty of the states and of the United States, that neither possesses a power that can prevent the full free exercise of the sovereign powers of the other.

This principle is ably expressed in the Article on "Constitutional Law"

11 Am. Jur. 870

wherein it is said:

> "Among the matters which are implied in the Federal Constitution, although not expressed therein, is that the National Government may not, in the exercise of its powers, prevent a state from discharging its ordinary functions of government. This corresponds to the prohibition that no state can interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it. In other words, the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. Therefore, whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear."

The Supreme Court of the United States gave full effect to this principle in the case of

South Carolina vs. United States

————U. S.————

50 L.Ed. 261

wherein the Court said:

> "In other words, *the two governments*—national and state—*are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers.* This proposition, so far as the nation is concerned, was affirmed at an early day in the great case of M'Culloch v. Maryland,

4 Wheat. 316, 4 L.Ed. 579, in which it was held that the state had no power to pass a law imposing a tax upon the operations of a national bank. The case is familiar and needs not to be quoted from. No answer has ever been made to the argument of Mr. Chief Justice Marshall, and the propositions there laid down have become fundamental in our constitutional jurisprudence."

* * * * * *

In Texas v. White, 7 Wall, 700, 725, 19 L. Ed. 227, 237, Mr. Chief Justice Chase, speaking for the Court, declared:
" 'Not only, therefore, can *there be no loss of separate and independent autonomy to the states, through their union under the Constitution,* but it may be not unreasonably said that *the preservation of the states,* and the maintenance of their governments, *are as much within* the design and *care of the Constitution as the* preservation of the Union and the *maintenance of the national government. The Constitution,* in all its provisions, *looks to an indestructible Union, composed of indestructible states.*' " (Emphasis supplied)

In the case of

Marbury vs. Madison
1 Cranch 137
2 L. Ed. 60

the Supreme Court of the United States said:

"By the Constitution of the United States, *the President is invested with* certain *important political powers,* in the exercise of which he is to use his own discretion, *and is accountable only to his country* in his political character *and to his own conscience.*" (Emphasis supplied)

The conclusion is inescapable that under our dual system of government, the State of Florida, as one of the forty-eight sovereign states of the union, is supreme in its sphere of action and the Federal Government is supreme in its sphere of action.

The Governor of the State is accountable only to the sovereign people of the State of Florida. Even the highest State Court cannot control his discretion or compel him to respond to a subpoena to give evidence of things which he may know as Governor, or which pertain to his duties as Governor. No committee of the Congress of the United States, nor the Congress itself, has the power to compel the Governor of a sovereign state to

answer a subpoena and go to Washington, D. C. to testify concerning matters within his knowledge as Governor.

To recognize the power of a congressional committee to compel the Governor of a sovereign State to leave his State and appear before such committee in the nation's capital, is to recognize the power of such committee at any moment it may elect, to determine whether or not the Governor shall perform the duties of his office.

To recognize such power in a congressional committee is to admit that the Congress of the United States could compel the attendance of a Governor of a sovereign State upon it for such period of time as to paralyze the administration of the affairs of such State and to admit that by the exercise of such power, the Congress could concurrently paralyze the administration of the affairs of all the states of the American Union. The recognition of such power is to destroy the basis of our federal or republican system of government and to utterly destroy the concept of a government of checks and balances which is inherent in our Federal Constitution, the decisions of our courts and the traditions of our people.

The recognition of such power in Congress is to admit that the power lies in one department of the Federal Government to utterly destroy the entire concept of dual sovereignty which is the unique feature and the fundamental basis of this indestructible Union of indestructible States.

The Constitution of the United States preserves the rights of the sovereign states to the same degree and to the same extent that it establishes the sovereign powers of the United States.

Based on these authorities and principles, it conclusively appears that the Governor of Florida cannot be compelled to appear before the congressional committee which has issued its subpoena commanding him to appear before it.

Respectfully submitted,

Fuller Warren

Member of the Bar of the Supreme Court of the United States and of the Supreme Court of the State of Florida

Roberts

June 23, 1953

Honorable B. K. Roberts,
Chief Justice,
Supreme Court,
Tallahassee, Florida.

Dear Mr. Chief Justice:

I want to express appreciation for your writing me under date of June 16th enclosing a brochure relative to the subpoena power. I thank you very much for it.

With kind regards,

Sincerely,

FMV:McH

Russell -

March 5, 1951

Dear Judge Russell:

I have your letter of February 26th, and am glad to know that you are back on the job. All of us were unhappy at the illness which incapacitated you and prevented your attendance at the conferences.

We had a very good conference of each committee on which you were to have represented the Fifth Circuit. While the library funds matter is of real interest to your Circuit, the Committee on Venue and Jurisdiction considered some very important phases of the subject matter entrusted to it. I feel certain that you will have further opportunity to give the benefit of your experience and judgment to its considerations.

I hope that by this time you have fully recovered. I look forward with pleasure to being with you in the future.

With kind regards,

Sincerely,

(Signed) Fred M. Vinson

Honorable Robert L. Russell,
United States Circuit Judge,
United States Court of Appeals
for the Fifth Circuit,
New Orleans 12, Louisiana.

FMV:McH

ROBERT L. RUSSELL
UNITED STATES CIRCUIT JUDGE
NEW ORLEANS 12, LA.

February 26, 1951

Dear Mr. Chief Justice:

I was disappointed and chagrined that an acute illness which necessitated hospitalization prevented my meeting with the Committees of the Judicial Conference which I had already arrived in Washington to attend on February 12th to 15th. I espeically regret that I did not get to see you and the other members of the Committees at that time. I shall pleasantly anticipate, however, some similar opportunity in the future.

With high esteem, I am

Sincerely yours,

Robert L. Russell

Honorable Fred M. Vinson,
Chief Justice of the United States,
Supreme Court Building
Washington, D. C.