The Supreme Court and Its Judicial Critics

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By PHILIP B. KURLAND*

In August, 1958, the Conference of Chief Justices, by a vote of 36 to 8, admonished the Supreme Court of the United States to "exercise one of the greatest of all judicial powers — the power of judicial restraint..."1 Thereupon, fame or infamy, depending on your point of view, descended suddenly upon a body of jurists whose previous existence and actions had been about as well known as was the work of the Manhattan Project during the Second World War. In part the publicity resulted from the fact that the pronouncement of the Conference coincided with the announcement of the special session of the Supreme Court to review the unlawful and seditious actions of the Governor of Arkansas in the Little Rock crisis. It is not irrelevant, therefore, to point out at the outset that there is not one iota of criticism in the Conference's Resolution or Report2 which is directed to the School Segregation Cases.3 In fact the Conference's documents were rather restrained complaints about the Supreme Court's "activism" which the Chief Justices believed to call for self-correction.

At a time when Congress was plagued with bills to restrict the jurisdiction of the Supreme Court in matters relating to the States — one of which failed of passage by a single vote — the Conference of Chief Justices' Report began with the following statement:

...when we turn to the specific field of the effect of judicial decisions on federal-state relationships, we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the law made in pursuance thereof under the authority of the United States. By necessity and by almost common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos...

The demand for judicial restraint by the Conference was not novel4 nor were theirs the only judicial voices to make the same plaint. Only a few months before the Report, a similar cri de coeur, if in more subtle, sophisticated,

† Speech delivered before the Utah Bar Association in Salt Lake City on May 15, 1959.
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1 Conference of Chief Justices, Resolution on Federal-State Relationships as Affected by Judicial Decisions (August 23, 1958) (hereinafter cited as "Resolution").
4 For an excellent historical treatment, see McGowan, The Supreme Court in the American Constitutional System—The Problem in Historical Perspective, 33 Notre Dame Law 527 (1958).
and elegant tones, issued from the throat of Judge Learned Hand as he delivered the Oliver Wendell Holmes' Lectures at Harvard. Parenthetically it should be noted that Judge Hand expressed serious doubts about the Segregation Cases, as did Professor Wechsler in his more recent Holmes Lecture. Mr. Justice Jackson's 1955 Godkin Lectures recognized that the Court continued to exercise its powers in the very same way that had brought forth Mr. Justice Stone's demands for judicial restraint on the part of the Nine Old Men, a generation before. And much of what is to be found in the Report of the Conference of Chief Justices is documented by Mr. Justice Roberts' Holmes' Lectures of 1951. Indeed, the charges leveled by the Chief Justices were well grounded in opinions by Justices of the Court themselves.

Despite its lack of novelty, however, criticism of the judicial critics was widespread. It took many forms. At least one thin-skinned member of the Supreme Court treated the action of the Conference as a personal attack, a crime in the nature of lèse-majesté. Officers of the executive branch of the Government behaved in the same way. So-called "liberals"—so well described by William S. White in his Harper article entitled "The Washington Phonies"—were aghast at the effrontery of any challenge to the work of the liberal clique of the Court. The more reasoned criticism, such as that of Dean Griswold and Professor Freund, took issue with the Chief Justices' Report on the merits. Their view was that the Chief Justices had criticized the Court for the wrong reasons. Each delivered a bill of particulars in support of his own indictment.

Much doubt was also expressed about the propriety of the Conference speaking in a corporative capacity. It was not the first time it had done so. And its previous effort secured Supreme Court recognition. But perhaps the most telling attack on the Report can be summarized in a variety of ways. The language of equity would refer to clean hands; laymen might talk about people in glass houses; ministers would speak of casting the first stone; and, in the vernacular of children, it would be: "You're one, too!" But this is less of a defense of the Supreme Court against the demands of the Conference than it is a plea of confession and avoidance. And in the forum of public opinion, the wrongs of the Supreme Court cannot be deemed expiated by the equal or grosser errors on the part of the courts over which the Chief Justices of the States preside.

9 Id. at 54-55.
10 Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 34 (1959). "For me, the question posed by state enforced segregation is not one of discrimination at all. Its human and its constitutional dimension lies entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges equally on any groups or races that may be involved."
The fact of the matter is that if there is any reason to challenge the action of the Chief Justices, it is on the ground that it gave aid and comfort to the enemy: to those doing battle against the Constitutional "concept of ordered liberty." It was the warm greetings of brotherhood from the Southern demagogues and the paeans of praise from the American witch-hunting fraternity that did the harm.

I submit, however, that we are in a most unfortunate situation if silence is to be enjoined upon those who would criticize the Court lest their words be misused by those who are threatening to undermine our institutions. For we have it on the highest authority that criticism of the Supreme Court's work is essential to the Court's function; that it should not be dispensed with either because it would offend those whom we like or please those whom we dislike. Thus, Mr. Chief Justice Stone, echoing the views of Justices Brewer and Holmes among others, expressed himself in this language:

I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their actions and fearless comment upon it.

And Justices Frankfurter and Harlan have recently expressed similar sentiments. The only appropriate limitation on the critics of the Court is that the criticism should be responsible. Judge Learned Hand phrased it this way:

While it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. . . . Let them

15 "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of the justices should be the subject of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."


16 Of Holmes it was aptly said that "his humility was too deep to make him regard even the highest tribunal as a Grand Lama. Like all human institutions, the Supreme Court, he believed, must earn reverence through the test of truth." Frankfurter, Mr. Justice Holmes and the Supreme Court 93-94 (1938).

17 Quoted in Schwartz, The Supreme Court at v (1957).

18 "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. 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 martinet upon the bench as there have also been pompous wielders of authority who have used their paraphernalia of power in support of what they call their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."

Quoted in 3 Wisdom 24 (January, 1959).

19 "The Supreme Court, no less than the top echelons of the other two great branches of the Federal Government, should never be immune from criticism. . . . Dispassioned criticism of the Court's decisions is something to be welcomed, and if in order to preserve that healthy state of affairs the Court must also suffer unjust attacks it is a price that must be paid."


be severely brought to book, when they go wrong, but by those who will take the trouble to understand them.

The problem, however, is this. The Court’s responsible critics can only address themselves to each other or to an audience which does not understand the role and function of the Supreme Court of the United States. The result is that however valid or justifiable the criticism, it tends to fall on ears that are deaf to the bases of the criticisms and hear only the condemnation of the Court. In short, the problem is that the Supreme Court is probably the least understood of all our important American institutions and responsible criticism cannot be brought home to the appropriate audiences. And there are many causes for this lack of understanding, some of which I should like to speak to here, for implicit in the causes are to be found the bases for cure.

1. The Bar. Because my audience today is what is is, I list the deficiencies of the Bar first among the factors contributing to the lack of understanding of the Supreme Court. It would seem to me obvious that the Bar is the natural intermediary between the people and the Court, interpreting the Court to the people and the people to the Court. The fact is that few members of the Bar are any more familiar with the work of the Supreme Court than are other semi-educated people in the community. Possibly many can name all nine justices, but usually it goes little beyond that. The Supreme Court’s business does not involve bread and butter matters for most of us. A few specialists will read the decisions of the Court which are published in the loose-leaf services which they read so religiously. But on the whole lawyers are more dedicated to reading the comic strips than the Supreme Court reports. And yet lawyers are relatively influential people in their communities. Their views on Supreme Court matters would be welcomed, if they represented a study of greater depth than that which is available in the newspapers. “The layman may think that the law is clear and simple, and well known to those who have had legal training. The lawyer knows that the law in hard cases is wrought out of contemplation and understanding, and is only obtained after intellectual work of the most difficult and searching kind.” And it is his obligation to communicate that understanding.

Mr. Justice Harlan recently said to the New York County Lawyers’ Association:

It would be a fine thing, in my opinion, were a bar association like yours to establish a special committee of qualified lawyers whose duty it would be to follow regularly the decisions of the Supreme Court, and to issue to the press from time to time brief, simply written, and objective accounts of those decisions likely to make “headline” news. Such authoritative accounts would do a great deal towards preventing irresponsible abuse of the Court’s decisions on the part of those who are displeased with them or have special axes to grind.

I would concur in these views, but I think that there is a more fundamental duty to be performed. Either before or at least concurrently with its under-

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22 Griswold, op. cit. supra note 12 at 108.
23 Harlan, op. cit. supra note 19 at 206.
taking by committee to keep the public informed about the Court's business, I think it incumbent on the Bar to undertake to educate itself on the subject — and not by committee. A committee of readers is not the answer to this problem, any more than a committee is normally the answer to any real problem.

Every time I hear a suggestion that a committee be established I am reminded of two Churchillian comments. "I should deprecate setting up a special committee," he once wrote. "We are overrun by them like the Australians were by the rabbits." He commented again on the ineffectiveness of committees as they work on "those broad, happy uplands where everything is settled for the greatest good of the greatest number by the common sense of the most after the consultation of all." He concluded that important business could not be conducted by "a copious flow of polite conversation." In this vein, I should like to suggest that the problem of which I have spoken requires individual effort — a do it yourself program.

2. The Press. The second major barrier to the understanding of the Court is the daily and weekly American press. With the single exception of the work of Anthony Lewis of The New York Times, the most appropriate adjective I can propose for the press coverage of the Supreme Court is "abominable." Were I not fairly sure that the cause is ineptitude, I should suspect malevolence.

Let me say quickly that I am not scoring the press for being critical of the Court. Criticism, as I have already noted, is essential to the Court's proper function. But it must be informed criticism. And this the press has not made available. For the most part, the press has treated Supreme Court opinions as if they were government news releases. Most Supreme Court cases are not deemed newsworthy in the pages now so crowded with stories of rapes and auto accidents and ribbon-cutting ceremonies and comic strips and cooking recipes. And those cases which do receive attention in the press are treated in the same manner as political issues involving Congress or the Executive. The complexes of fact and law which distinguish one case from another, which call forth different emphases and different solutions are ignored. The headlines shout COMMUNIST FREED BY SUPREME COURT; the news stories have no more content than the headlines; and editorial comment tends to be based on the inadequate news stories.

Perhaps it is naive of me to believe that there is a difference between a news story and an editorial. And my naivete extends to the belief that the primary element of a news story is accuracy. But I would remind the American press of Professor Hocking's justification for its existence: "The press must be free because its freedom is a condition of its veracity." Freedom of the press is not an end in itself. It is a fundamental liberty because it is a means of keeping the people informed of the truth. I would go so far as to suggest that its obligation is to tell the people the whole truth and nothing but the truth; that it must justify its freedom by its responsibility. And I will not be put off by the suggestion that the task of accurate and reasonably complete reporting of the business

24 Quoted in Wheare, Government by Committee 1 (1955).
25 Id., at 252.
26 Hocking, Freedom of the Press 194 (1947).
of the Court is not possible. The New York Times does it and The Times of London demonstrates that the New York paper is not unique in its capacity to report on judicial business. Without it the Supreme Court is not likely to be understood as it should be understood if our free institutions are to function properly.

3. Congress. A third impediment to the understanding of the Court in its actual or ideal role is Congress. In its official capacity, Congress speaks with but a single voice: through the legislation which it enacts. But unofficially it speaks through as many voices as there are Senators and Congressmen. So far as the Court is concerned, Congress has frequently been irresponsible in its utilization of its single voice and its many voices.

Let me speak first to the problem of the Court and the many voiced Congress. One of the primary duties of the Court is to interpret and apply the language which Congress has utilized in framing its laws. The statutes, as we know, are often the result of compromise on the part of the interested legislators and ignorance on the part of most of those who have merely followed their party leader's orders. The problem of statutory construction is ordinarily difficult enough whenever the meaning is sufficiently beclouded to result in litigation. And a case finds its way to the Supreme Court only in the more important and frequently in the most delicate matters. 27

No sooner has the Court performed the difficult task of interpreting the meaning of Congressional language, however, than one or more of Congress' several voices will be heard to damn the Court for having misconstrued the statute. These are often isolated voices, but the press finds them newsworthy and it magnifies them. The fact is, of course, that if the dissatisfaction with the judicial construction were widespread in Congress, it could, speaking through its single voice amend the statute to conform with its desires. Seldom has this occurred in comparison with the number of times that the brass has been sounded. 28 Congressmen prefer condemning the Court in public orations to taking constructive effort to remedy what they consider to be the Court's errors. The Congressional furor which followed the decision in Pennsylvania

27 The difficulty of the task is attested by no less a figure in the American judiciary than Judge Learned Hand:

"What then are the qualities, mental and moral, which best serve a judge to discharge this perilous but inescapable duty? First he must be aware of the difficulty and the hazard. He must hesitate long before imputing more to the 'enactment' than he finds in the words, remembering that the 'policy' of any law may inhere as much in its limits as in its extent. He must hesitate long before cutting down their literal effect, remembering that the authors presumably said no more than they wanted. He must have the historical capacity to reconstruct the whole setting which evoked the law; the contentions which it resolved; the objects which it sought; the events which led up to it. But all this is only the beginning, for he must possess the far more exceptional power of divination which can peer into the purpose beyond its expression, and bring to fruition that which lay only in flower. Of the moral qualities necessary to this, before and beyond all he must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgments; he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment." Hand, The Spirit of Liberty 209, 217-218 (2d Dilliard ed., 1953); cf. Frankfurter, Some Reflections on the Reading of Statutes (1947).

v. Nelson," for example, has still not abated. But so far as revision of the Smith Act is concerned, there has been none. In the interim the Court has been the subject of violent abuse by Congressmen whose actions are not calculated to help the Court perform its function. Similarly, Congressional phillipics about the School Segregation Cases have filled volumes of the Congressional Record. But, for these orators, words speak louder than actions.

It is not only the multiple-voiced Congress that has created inappropriate problems for the Court. One of the burdens which Congress has wilfully or ignorantly imposed on the Court from time to time is the delegation to it of legislative functions. Such confusion of function is not calculated to help the Court to assume its proper role in American government. It has been justified by two scholars whom I greatly respect. Mr. Justice Frankfurter has said: "[G]overnment sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding." And in a more concrete situation, Professor Meltzer has said of the failure of Congress to allocate power between the states and the nation in the field of labor regulation: "It may be that, despite the defects of the judicial process, the issues of federalism in labor relations must be left to the Court because they are too complex for legislative determination or compromise." I cannot agree, however, that issues "too complex for legislative determination or compromise" are properly dumped on the Court for resolution. I submit that Congress cannot at one and the same time say to the Court: "You decide these questions of policy which are too difficult, or politically too hot, for us to handle" and then say that the Court should stay out of the legislative area. By imposing this political function of legislation on the Court, it does a disservice to the Court and to the country.

4. The Court. Perhaps the most delinquent of all, however, in creating confusion about its role is the Court itself. This is a theme worthy of a book, which I hope some day to write, but here I want to touch on just three points. Underlying them all is the fact that the Court suffers from a form of institutional schizophrenia.

First, there is a basic conflict of philosophy within the Court. Some justices believe that their function is to utilize the power at hand for the accomplishment of those ends of "social justice" which they conceive to be appropriate. This is not a novel theory of judicial power. Most of you are probably conversant with it as it was exercised by Mr. Justice McReynolds and company in

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21 Frankfurter, op. cit., supra note 27 at 7.
22 He went on to say:
"Certainly the lack of federalist sophistication in the Taft-Hartley Congress and the subsequent legislative paralysis support such a judgment. But a decade of litigation and debate have at least identified the principal issues at stake. The issues are ripe for Congressional determination. Specific Congressional solutions may turn out to be 'unwise' or inept. But they would at least be wise to the extent that they would reflect a healthy tradition under which political decisions are made and changed by avowedly political agencies." Meltzer, The Supreme Court, Congress and State Jurisdiction Over Labor Relations, 8 U. of Chi. Law School Record (Supp.) 95, 125 (December, 1958).
earlier years of this century. It is hard to distinguish between the judicial and legislative functions on the basis of this activist philosophy. The current activist theme has been described by Professor Schlesinger in this way: "The Court cannot escape politics: therefore, let it use its political power for wholesome social purposes. Conservative majorities in past Courts have always legislated in the interests of the business community; why should a liberal majority tie its hands by a policy of self-denial . . . ?" The activists will tell you that absolute detachment is impossible of achievement therefore it ought not to be strived for.

The second face of the Supreme Court says that the Court's function is not the promulgation of its own notions but rather, in statutory cases, it is the "proliferation of the purpose of Congress," in Constitutional matters, it is to sustain the powers of the responsible branches of government except where the exercise of such powers patently infringes on Constitutionally guaranteed rights or privileges. This view was expressed by Mr. Justice Jackson this way: "My philosophy has been and continues to be that such an institution, functioning by such methods, cannot and should not try to seize the initiative in shaping the policy of the law, either by constitutional interpretation or by statutory construction. While the line to be drawn between interpretation and legislation is difficult and numerous dissents turn upon it, there is a limit beyond which the Court incurs the just charge of trying to supersede the law-making branches." And in response to the notion that judges are not capable of detachment, this group says:

For judges, it is not merely a desirable capacity "to emancipate their purposes" from their private desires; it is their duty. It is a cynical belief in too many quarters, though I believe this cult of cynicism is receding, that it is at best a self-delusion for judges to profess to pursue disinterestedness. It is asked with sophomoric brightness, does a man cease to be himself when he becomes a Justice? Does he change his character by putting on a gown? No, he does not change his character. He brings his whole experience, his training, his outlook, his social, intellectual and moral environment with him when he takes a seat on the supreme bench. But a judge worth his salt is in the grip of his functions. The intellectual habits of self-discipline which govern his mind are as much a part of him as the influences of the interests he may have represented at the bar, often much more so.

Certainly one will understand the role of the Court differently according to whether its function is defined in activist terms or in terms of judicial restraint and majorities of the Court continue to wobble between the two.

There is a second manner in which the Court prevents an appropriate understanding of its function. Since it speaks with several voices in its official capacity and speaks not at all in its unofficial capacity, at least as to the business before it, the only way to secure an idea of the reasons and factors which caused the Court to reach a given judgment is by reading its opinions. But recently we have had too many opinions which obfuscate rather than enlighten. "The

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34 Jackson, op. cit. supra note 8 at 79-80.
Court’s product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree.” 36 Holmes told us long ago that “general propositions do not decide concrete cases.” 37 Some members of the Court apparently believe otherwise. Not only are “general propositions” used to resolve the case before the Court, they are used as proclamations of doctrine irrelevant to the case before it but perhaps applicable to other cases which might arise in the future. Once again we have the confusion of the judicial and legislative functions inherent in the activist philosophy. Professor Freund says, in his characteristically kindly way, that this “represents a tendency toward over-broadness that is not an augury of enduring work and that misses the opportunity to use the litigation process for the refinement and adaptation of principle to meet the variety of concrete issues as they are presented in a lawsuit.” 38 For a prime example of the manner in which the Court may confound rather than reveal the bases for its decision, while at the same time issuing edicts on all sorts of matters not before the Court, I refer you to the opinion of the Chief Justice, speaking for four members of the Court, in Sweezy v. New Hampshire, 39 one of the cases singled out by the Conference of Chief Justices for condemnation.

A third difficulty created by the Court in explaining its appropriate function is revealed by the conflict between those Justices who think its job is to consider only those cases involving federal questions of major importance to the country and those of its members who regard themselves as sitting as a court of errors and appeals. Certainly one of the burdens from which the Court suffers is the amount of work which it must handle each year. It must pass upon two thousand applications to be heard and from one hundred to one hundred and fifty cases on the merits. Any time it devotes to matters which are of importance only to the immediate litigants means less time available to deal with those issues which are of great importance to the Country. And yet, Term after Term, the Court must turn to analysis of questions relating solely to the weight of the evidence or similarly isolated matters because four members of the Court have voted to bring such cases before the entire tribunal for consideration.

It is because of these three internal conflicts that I think the Court prevents a general understanding of its proper function.

Having imposed on you to this extent, I seek your indulgence for a few more minutes to explain why I concur in the view of the Chief Justices that the Court should abandon its activist role. I have three reasons.

First, I think judicial activism should be rejected because it replaces a representative legislature with a group which is neither representative nor re-

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38 Freund, op. cit. supra note 13.
Judicial activism is undemocratic. To the extent that a check on democracy is necessary, its function should be confined to those areas in which it is essential. To return once again to the language of Judge Hand: “Each one of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies. . . . For myself it would be irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”

Second, judicial activism should be rejected because it undermines the public faith in the objectivity and detachment of the Court, without which the Court will be reduced to an impotent body, unable to perform those important, indeed vital functions which properly fall within its scope. As long ago as de Tocqueville, it was recognized that the Court’s “power is enormous, but it is the power of public opinion. [It is] all powerful so long as the people respect the law; but [it] would be impotent against popular neglect or contempt for the law.” At this time when the Court is being called upon so frequently for the protection of minority and individual rights against the claims of the state and society, its power to command popular support is reduced to a minimum. Unable to sustain its authority through the approval of its judgments, its basic claim to support must rest on the understanding of the people “that the Supreme Court, whatever its defects, is still the most detached, dispassionate, and trustworthy custodian that our system [can offer] for the translation of abstract into concrete constitutional commands.”

Finally, I suggest that judicial activism should be rejected because the exercise of such naked power invites a reply in kind from those on whose domain the Court is poaching. And in a pitched battle between Congress and the Court, Congress is endowed with the stronger weapons: the jurisdiction and membership of the Court are at its mercy. Shorn of its shield of judicial objectivity, in a day when its opinions are not likely to be popular, it has no adequate defense against such potential legislative attack, the reality of which is all too patent in the Bills which have been introduced in Congress.

Professor Freund has aptly said that: “To understand the United States Supreme Court is a theme that forces lawyers to become philosophers.” While this may be an onerous burden to place upon us, I can only say that it is one which we must all assume. And, in the course of doing so, perhaps we can examine the work of the Court’s critics with more detachment and less emotion than has been afforded the efforts of the Conference of Chief Justices. We may still find many things in their Report and Resolution with which we will disagree. But disagreement on the merits is a lot more useful than the purely visceral response which they have heretofore called forth.

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41 “Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence.” Frankfurter, J., concurring in Dennis v. United States, 341 U.S. 494, 525 (1951).
42 Hand, op. cit. supra note 5 at 73.
43 1 de Tocqueville, DEMOCRACY IN AMERICA 151 (Bradley ed., 1945); cf. The Federalist, No. 78.
44 Jackson, op. cit. supra note 8 at 23.
45 Freund, ON UNDERSTANDING THE SUPREME COURT 7 (1949).