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The New Federal Immunity Act and the Judicial Function

*O. John Rogge**

The federal compulsory testimony act of 1954¹ provides in paragraphs (a) and (b) for a grant of immunity to a witness before one of the Houses of Congress or a congressional committee upon the approval of a federal district court. The portions of the act pertinent to this Article read as follows:

(a) . . . Such an order [requiring a witness to testify or produce records] may be issued by a United States district court judge upon application by a duly authorized representative of the Congress or of the committee concerned. . . .

(b) Neither House nor any committee thereof nor any joint committee of the two Houses of Congress shall grant immunity to any witness without first having notified the Attorney General of the United States of such action and thereafter having secured the approval of the United States district court for the district wherein such inquiry is being held.

Last year in *Ullmann v. United States*² the United States Supreme Court, in sustaining paragraph (c) of the act, relating to a witness before a federal court or grand jury, expressly left open the question of the constitutionality of paragraphs (a) and (b). The Court stated: "We are concerned here only with § (c) and therefore need not pass on this question [function of the federal district court] with respect to §§ (a) and (b) of the Act."³ It is the purpose of this Article to show that paragraphs (a) and (b) seek to impose on federal courts a nonjudicial function contrary to

* Member, New York Bar; formerly United States Assistant Attorney General in charge of the Criminal Division of the Department of Justice, 1939-1940.

¹ 18 U.S.C. § 3486 (Supp. III, 1956).

² 350 U.S. 422 (1956), *affirming* 221 F.2d 760 (2d Cir. 1955), *affirming* 128 F. Supp. 617 (S.D.N.Y.).

³ 350 U.S. at 431-32.

Recently Federal District Judge David A. Pine in the District of Columbia entered the first orders under paragraphs (a) and (b). He approved proposed grants of immunity by the Senate Internal Security Subcommittee to four witnesses: Harold Glasser, a former Treasury Department economist; Wilfred M. Oka, a columnist for The Honolulu Record; Robert McElrath, a

our constitutional requirements for the separation of governmental powers and in violation of the Federal Constitution.⁴

I

THE DOCTRINE OF SEPARATION OF POWERS

The constitutional system devised by the founding fathers is premised on the concept of the separation of governmental powers and functions into three equal and independent arms of the government. It is this circumstance *inter alia* which has helped to prevent the concentration of governmental power in the hands of the few. Thus an appropriate preface to discussion of the constitutionality of paragraphs (a) and (b) of the immunity act is a brief outline of the historical development of this doctrine and how it achieved such prominence in the constitutional plan.

The doctrine of separation of powers had at least some of its origins in the reign of Henry II, almost eight centuries ago. As early as 1166 Henry II assembled the archbishops, bishops, abbots, earls and barons of all England and legislated: the result was the Assize of Clarendon.⁵ Here he separated legislative from executive functions. A decade later he organized the eyre system on a continuing basis,⁶ and in 1178 he reorganized it into a permanent court of professional judges.⁷ Some six centuries later the framers of our Constitution provided:⁸

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The founding fathers were acutely aware of the danger of vesting too much power in fallible human beings. Accordingly they constructed our Federal Constitution along the lines of their understanding of Montesquieu's classic triple division of governmental functions into legislative, executive, and judicial branches and of their own ideas and those of Montesquieu, John Locke and James Harrington concerning checks and bal-

broadcaster; and Myer C. Symonds, a lawyer. *N.Y. Times*, April 11, 1957, § 1, p. 27, col. 4.

⁴ See U.S. CONST. art. III, § 2. The district judge in *Ullmann* was apparently inclined to a similar view. Although sustaining the validity of paragraph (c), as did the higher courts, he did so in language which intimated a real doubt as to the validity of (a) and (b): "The language in these sections of the act purports to vest discretion in the court and specifically requires its approval of any grant of immunity." 128 F. Supp. 617, 624 (S.D.N.Y. 1950). (Emphasis added.)

⁵ See note 6 *infra*.

⁶ 2 ENGLISH HISTORICAL DOCUMENTS 479-81 (Douglas & Greenaway ed. 1953).

⁷ This early court consisted of two clerks and three laymen of the King's private household. These five were to hear and decide all complaints and to present before the King any case which they were unable to bring to a decision. *Id.* at 482.

⁸ U.S. CONST. art. III, § 1.

ances between the different agencies which exercise governmental power. Montesquieu based his three-fold division on Locke, who in his *Second Treatise on Civil Government*, licensed for printing in 1689, the year after James II was forced to flee from England, had a chapter entitled, "Of the Legislative, Executive and Federative Power of the Commonwealth."⁹ In this chapter he commented that "it may be too great temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them."¹⁰ Even earlier James Harrington in his *The Commonwealth of Oceana*, published in 1656, also made a three-fold division of governmental powers. Just as Locke's *Second Treatise* came out after the flight of James II so Harrington's book came out after the execution of James II's father, Charles I. Harrington put the query: "But seeing they that make the laws in commonwealths are but men, the main question seems to be, how a commonwealth comes to be an empire of laws, and not of men?"¹¹ He in effect answered by saying separation of powers.

But it was Montesquieu who, in his *L'Esprit des Lois*, published in 1748, arrived at the three-fold division of legislative, executive, and judicial.¹² According to Montesquieu the three branches were to function in the interest of liberty by balancing and checking each other: "[I]t is necessary from the very nature of things that power should be a check to power."¹³ The French philosopher had an influence over the founding fathers greater than any other political philosopher of his age. Of him James Madison wrote: "The oracle who is always consulted and cited on this subject is Montesquieu."¹⁴ The framers agreed that the concentration of governmental powers spelled tyranny.¹⁵ Washington in his Farewell Address

⁹ The "federative" part was that relating to foreign affairs.

¹⁰ LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* 72 (Gough ed. 1946).

¹¹ HARRINGTON, *THE COMMONWEALTH OF OCEANA* 27, 29, 44 (Morley ed. 1887).

¹² Montesquieu had dealt with the subject in an earlier piece, *THE GRANDEUR AND THE FALL OF THE ROMANS* (1734), an anticipation in title of Gibbon's work.

¹³ MONTESQUIEU, *L'ESPRIT DES LOIS*, bk. II, c. 4 (1748).

¹⁴ *THE FEDERALIST* No. 47, at 300 (Lodge ed. 1907).

¹⁵ By way of contrast it is notable that the communist regime early asserted that the Soviet Union repudiated the idea of the separation of powers. A. Y. Vyshinsky, in commenting on the Soviet constitution of 1936, declared: "We do not have the separation of powers but the distribution of functions. . . . This has nothing in common with the Montesquieu doctrine." As quoted in 1 GSOVSKI, *SOVIET CIVIL LAW* 74 (1948).

There have been times in this country when our system of checks and balances has seemed too cumbersome and unworkable to many. Easily recalled is the New Deal's impatience with the Supreme Court for holding unconstitutional, legislation approved by both Congress and the Executive; the resulting court packing plan; and, happily, the defeat of this proposal. Twentieth century experience with totalitarian governments should give us a greater appreciation of Lord Acton's dictum: "Power tends to corrupt, and absolute power tends to corrupt absolutely." *ESSAYS ON FREEDOM AND POWER* 364 (Boston, 1948). For such an appreciation see VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* (1953).

cautioned: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism";¹⁶ and Madison wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."¹⁷

As our system has developed from this foundation all three branches, legislative, executive, and judicial, have a hand in the treatment to be accorded deviants from the law, but their respective roles are different. The Congress passes the laws which define offenses and prescribe the penalties; the executive branch investigates offenses and prosecutes offenders; the courts interpret the laws, pass upon their constitutionality, determine whether accused persons are innocent or guilty, and if guilty impose the appropriate penalties. On the basis of this division if there are to be immunity acts, the power to grant immunity should rest with the investigative agencies of the executive branch of government.¹⁸ The primary business of Congress is to legislate, not to investigate offenses. For this purpose there is no need of any power to grant immunity.¹⁹ In order to legislate Congress has always been able to get enough information without any such power and will continue to be able to do so. Thus Attorney General Herbert Brownell, Jr., in his tug of war with Senator Pat McCarran of Nevada over the Attorney General's request to participate in a grant of immunity to a congressional witness,²⁰ had much the better of the argument—if there is to be an immunity act, the power to grant immunity should rest with the executive branch of the government.

For a recent illustration of the doctrine in operation see President Truman's remarks when, after he was out of office, he refused to honor a subpoena of the House Committee on Un-American Activities. *New York Times*, Nov. 13, 1953, § 1, p. 14, col. 4.

¹⁶ 13 *THE WRITINGS OF GEORGE WASHINGTON* 306 (Ford ed. 1892).

¹⁷ See note 14 *supra*. John Adams, in a letter of November 1775 to Richard Henry Lee, commented: "It is by balancing each of these three powers against the other two, that the efforts in human nature towards tyranny can alone be checked and restrained, and any degree of freedom preserved in the Constitution." 4 *THE WORKS OF JOHN ADAMS* 185, 186 (Chas. F. Adams ed. 1851). Jefferson, in his *Notes on the State of Virginia*, observed: "The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one." 3 *THE WRITINGS OF THOMAS JEFFERSON* 223 (Ford ed. 1894).

¹⁸ A possible exception is the power of the House of Representatives to grant immunity in the exercise of its power of impeachment. See U.S. CONST. art. I, § 2, cl. 5.

¹⁹ *Accord*, H.R. REP. No. 2606, 83d Cong., 2d Sess. 12 (1954) (minority report). On the power of Congress to investigate, Chief Justice Warren in *Quinn v. United States*, 349 U.S. 155, 161 (1955) wrote: "Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

²⁰ See S. REP. No. 153, 83d Cong., 1st Sess. 15 (1953).

II

THE NATURE OF JUDGING

In any event the determination of the desirability of a grant of immunity is not a judicial function. A consideration of the nature of the business of judging will demonstrate this.

The business of judging involves the resolution of disputes about legal rights between adverse claimants. For the judicial function to come into operation there must first be a real, substantial, and concrete controversy about valuable legal rights. This controversy must be between actual antagonists, each of whom presents his side to the court. Only if there are adverse litigants will the various aspects of disputed questions be fully presented, and only under such circumstances can the courts do their work well. Furthermore, this controversy must admit of an immediate and definitive determination of the legal rights of the parties by a decree of a conclusive character. The Constitution accordingly provides that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;"²¹ and to various additional kinds of "cases" and "controversies."²²

Because of the nature of the judicial function and the necessity of an adversary proceeding for its exercise, the federal courts, and courts generally, have refused to give advisory opinions. The Supreme Court has presented us with a consistent line of authorities to this effect. The earliest ones were *Hayburn's Case*²³ and the unreported decision in *United States v. Yale Todd*,²⁴ both of which arose under a veterans' pension act of 1792.²⁵ This act gave circuit courts of the United States the duty of examining into the claims to pensions as invalids of members of our armed forces during the Revolutionary War and certifying their opinion to the secretary of war. The different circuit courts were of the opinion that the duties assigned by this act were not of a judicial nature. The circuit court for the district of New York stated:²⁶

²¹ U.S. CONST. art. III, § 2.

²² The word "controversies," according to Justice Field in *In re Pacific Ry. Comm'n*, 32 Fed. 241 (C.C.N.D. Cal. 1887), "if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *Id.* at 255. The Supreme Court has quoted this language with approval in later cases. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937); *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911).

²³ 2 U.S. (2 Dall.) 355 (1792).

²⁴ Unreported, 1794. Chief Justice Taney in a note to *United States v. Ferreira*, 54 U.S. (13 How.) 43, 56 n.(a) (1851), inserted at the direction of the court, gave the substance of the decision.

²⁵ 1 STAT. 243 (1792).

²⁶ *Hayburn's Case*, 2 U.S. (2 Dall.) 355, 356 n.(a) (1792).

That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and it is the duty of each to abstain from, and to oppose, encroachments on either. That neither the legislative nor the executive branches, can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

But this court did, in an effort to cooperate, give its members the option of acting as commissioners, but not as judges, in carrying out the provisions of the act. The circuit court for the district of Pennsylvania, however, respectfully refused to act at all. Accordingly the Attorney General made a motion *ex officio* in the Supreme Court for a writ of mandamus to compel the circuit court for the district of Pennsylvania to act in the case of one Hayburn. The court denied the motion. The Attorney General then changed his ground and stated that he was in court on behalf of Hayburn. This caused the court to take the motion under advisement until the next term. In the meantime Congress repealed the act of 1792²⁷ but put in a saving clause for the determination of the validity of action taken by those judges who accommodately acted as commissioners.²⁸ It was under this saving clause that the court subsequently decided the *Yale Todd* case in favor of the United States on the ground that the act of 1792, in violation of the Constitution, sought to impose non-judicial functions on federal circuit courts. As later interpreted by Chief Justice Taney in *United States v. Ferreira*,²⁹ the earlier decision determined:³⁰

1. That the power proposed to be conferred on the circuit courts of the United States by the act of 1792 was not judicial power within the meaning of the constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

²⁷ 1 STAT. 324 (1793). As a consequence of the repeal, no decision on the merits was ever rendered. See *Hayburn's Case*, 2 U.S. (2 Dall.) 356 (1792).

²⁸ In the interim between the repealing act and the *Yale Todd* case President Washington had Secretary of State Thomas Jefferson write to Chief Justice Jay and his associates on hand whether their advice would be available to the executive branch on various important legal questions. After consulting with their brethren they answered in the negative, "especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments." 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488-89 (Johnston ed. 1891). The reference is to U.S. CONST. art. II, § 2, which provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relative to the Duties of their respective Offices."

²⁹ 54 U.S. (13 How.) 43 (1851).

³⁰ *Id.* at 58. *Yale Todd* thus becomes the first case in which the Court declared an act of Congress to be unconstitutional, antedating *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), by almost a decade. Some legal writers have been unable to accept what must have seemed to them like a downgrading of the great case of *Marbury v. Madison*. See, e.g., 1 THAYER, CASES ON CONSTITUTIONAL LAW 105 (1895); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 81-82 (rev. ed. 1937); DODD, CASES AND MATERIALS ON CONSTITUTIONAL LAW 13-14 (5th ed. 1954).

2. That as the act of Congress intended to confer the power on the courts of a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

In the more recent case of *Muskrat v. United States*³¹ the plaintiffs sought to have determined the validity of certain legislation which undertook to increase the number of persons entitled to share in the final distribution of the lands and funds of the Cherokee Indians by permitting the enrollment of children alive on a designated date. Although the United States was the defendant, the proceedings were not really adversary in character. The Supreme Court ordered the suits dismissed saying:³²

That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.

. . . .

If such actions as are here attempted, to determine the validity of legislation, are sustained, the result will be that this court, instead of keeping within the limits of judicial power, and deciding cases or controversies between opposing parties, as the Constitution intended it should, will be required to give opinions in the nature of advice concerning legislative action, a function never conferred upon it by the Constitution, and against the exercise of which this court has steadily set its face from the beginning.

A few states in their constitutions have provided for advisory opinions.³³ However, such provisions have been largely limited to constitutional questions. Moreover, they have not been adopted generally. Those who have studied advisory opinions have been divided in their estimates of them. In Mr. Justice Frankfurter's estimate, "however much provision may be made on paper for adequate arguments (and experience justifies little reliance) advisory opinions move in an unreal atmosphere. . . . They are ghosts that slay."³⁴

The necessity of adversary proceedings in order to obtain the best results from the judicial process has compelled courts to refuse to decide

³¹ 219 U.S. 346 (1911); *accord*, *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *Coffin v. Breeze Corps., Inc.*, 323 U.S. 316 (1945); *Alabama v. Arizona*, 291 U.S. 286 (1934); *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Great Northern Ry. Co. v. Lumber and Sawmill Workers*, 232 F.2d 628 (9th Cir. 1956); *United States v. Carrollo*, 30 F. Supp. 3 (W.D. Mo. 1939).

³² 219 U.S. at 361-62.

³³ See, e.g., MASS. CONST. c. 3, art. 2; N.H. CONST. [art.] 74; R.I. CONST. art. 10, § 3, amend. 12, § 2.

³⁴ Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006-08 (1924). For an opposing view see Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970 (1924).

friendly or collusive suits. In *United States v. Johnson*³⁵ a tenant sued his landlord at the landlord's instigation in order to test the validity of certain provisions of the Emergency Price Control Act of 1942. The Court dismissed, saying:³⁶

Such a suit is collusive because it is not in any real sense adversary. It does not assume the "honest and actual antagonistic assertion of rights" to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this court.

Neither will the courts pass on abstract, hypothetical, contingent or remote questions.³⁷ In a recent case³⁸ the Supreme Court ordered the dismissal of a complaint seeking to enjoin the district director of the Immigration and Naturalization Service from construing the Immigration and Nationality Act of 1952 so as to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. The Court declared that the "determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."³⁹

Of course courts will not consider academic or moot problems. In *St. Pierre v. United States*⁴⁰ the Supreme Court dismissed a writ of certiorari to review a contempt sentence of imprisonment which had been served, ruling: "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it."⁴¹

Indeed the courts in this country were so sparing and self-disciplined in their exercise of the judicial function that remedial legislation providing for declaratory judgments became necessary. Professor Edson R. Sunderland in the first American article on declaratory judgments commented: "We have canonized the ancient tradition of a cause of action, in all its original crudeness, and have made it the condition and the measure of judi-

³⁵ 319 U.S. 302 (1943); *accord*, *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300, 301 (1892); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850).

³⁶ 319 U.S. at 305.

³⁷ *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945).

³⁸ *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222 (1954).

³⁹ *Id.* at 224; *accord*, *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1941); *Electric Bond & Share Co. v. SEC*, 303 U.S. 149 (1938).

⁴⁰ 319 U.S. 41 (1943).

⁴¹ *Id.* at 42; *accord*, *United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920); *Campbell Soup Co. v. Martin*, 202 F.2d 398 (3d Cir. 1953); *Harris v. Texas & Pac. Ry.*, 196 F.2d 88 (7th Cir. 1952).

cial action."⁴² The federal act was passed in 1934⁴³ and held constitutional.⁴⁴

Some critics of judicial self-restraint were more caustic in their comments than Professor Sunderland. For instance, Professor Robert J. Harris suggested that "'cases and controversies,' 'adverse parties,' 'substantial interests,' and 'real questions,' are no more than trees behind which judges hide when they wish either to throw stones at Congress or the President or to escape from those who are urging them to do so."⁴⁵ But the course of judicial self-restraint is basically sound, and it has increased the confidence of the people in the courts and added to the effectiveness of the judicial process. The business of judging involves the peaceful resolution of concrete controversies between actual litigants who insist on a determination of the issues involved between them. If the courts undertake to accomplish more than this they may be bargaining for trouble. While there have been cases which support the argument that the Supreme Court has avoided issues,⁴⁶ by and large the Court has not refrained from deciding controversial questions. In the recent past the Court has ruled upon such difficult problems as those relating to segregation,⁴⁷ to claims of the fifth amendment's privilege against self-incrimination,⁴⁸ to a contention that a state sedition law was invalid,⁴⁹ and to the assertion that the Government's security program was illegal in its application to employees in nonsensitive positions.⁵⁰ Professor Harris overstated his case.

With the growth of administrative regulation the courts have distin-

⁴² Sunderland, *A Modern Evolution in Remedial Rights—The Declaratory Judgment*, 16 MICH. L. REV. 69, 89 (1917).

⁴³ 28 U.S.C. § 400 (1952).

⁴⁴ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); see BORCHARD, *DECLARATORY JUDGMENTS* (2d ed. 1941).

⁴⁵ HARRIS, *THE JUDICIAL POWER OF THE UNITED STATES* 23 (1940). For a sympathetic treatment see Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 627 (1955); Comment, *Immunitization of Congressional Witnesses Under the Compulsory Testimony Act: Constitutionality of the Function of the District Courts*, 22 U. CHI. L. REV. 657 (1955).

⁴⁶ See, e.g., *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949), *cert. denied*, 339 U.S. 934 (1950); *Barsky v. United States*, 167 F.2d 241 (D.C. Cir.), *cert. denied*, 334 U.S. 843 (1948); *United States v. Josephson*, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 858 (1948).

⁴⁷ See, e.g., *Holmes v. Atlanta*, 350 U.S. 879, *vacating judgment in* 223 F.2d 93 (5th Cir. 1955); *Baltimore v. Dawson*, 350 U.S. 877 (1955); *Brown v. Board of Educ.*, 349 U.S. 294 (1955); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Henderson v. United States*, 339 U.S. 816 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950).

⁴⁸ See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956); *Emspak v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955); *Singleton v. United States*, 343 U.S. 944 (1952); *Brunner v. United States*, 343 U.S. 918 (1952).

⁴⁹ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *affirming* 377 Pa. 58, 104 A.2d 133 (1954), *reversing* 172 Pa. Super. 125, 92 A.2d 431 (1952).

⁵⁰ *Cole v. Young*, 351 U.S. 536 (1956).

guished not only between judicial, legislative, and executive functions but also between judicial and administrative processes. In line with this distinction the federal courts have determined that rate making,⁵¹ the approval of increases in the capital stock of public utilities,⁵² the granting or renewal of a radio broadcasting station license,⁵³ the granting of a patent as well as a trademark registration,⁵⁴ the issuance, renewal, denial or revocation of a liquor license,⁵⁵ and the approval of an annexation to a municipality⁵⁶ all involved legislative or administrative functions, not a judicial one.

One decision, *Federal Radio Comm'n v. General Elec. Co.*,⁵⁷ arose under the Radio Act of 1927,⁵⁸ which gave an appeal from the Federal Radio Commission to the United States Court of Appeals of the District of Columbia and then provided that the court "shall hear, review and determine the appeal upon said record and evidence, and may alter or revise the decision appealed from and enter such judgment as it may deem just."⁵⁹ The court of appeals reversed an order of the Commission cutting down the hours of service of a broadcasting station. Conceding the power of Congress to vest the courts of the District of Columbia with non-judicial functions,⁶⁰ the Supreme Court denied review on the ground "that the powers confided to the commission respecting the granting and renewal of station

⁵¹ *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581 (1945); *Keller v. Potomac Elec. Power Co.*, 261 U.S. 428 (1923); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). *But see* *Canada Southern Ry. v. International Bridge Co.*, 8 Fed. 190 (N.D.N.Y. 1881).

⁵² *In re MacFarland*, 30 App. D.C. 365 (1908), *appeal dismissed sub nom.* *Washington Gas Light Co. v. MacFarland*, 215 U.S. 614 (1909), on motion of counsel for appellants.

⁵³ *Federal Radio Comm'n v. General Elec. Co.*, 281 U.S. 464 (1930).

⁵⁴ See, e.g., *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693 (1927); *Baldwin Co. v. R. S. Howard Co.*, 256 U.S. 35 (1921); *E. C. Atkins & Co. v. Moore*, 212 U.S. 285 (1909); *Frash v. Moore*, 211 U.S. 1 (1908); *United States v. Duell*, 172 U.S. 576 (1899); *Butterworth v. United States*, 112 U.S. 50 (1884).

⁵⁵ *Application of L. B. & W.* 4217, 238 F.2d 163 (9th Cir. 1956); *Bogges v. Berry Corp.*, 233 F.2d 389 (9th Cir. 1956); *Bordenelli v. United States*, 233 F.2d 120 (9th Cir. 1956). In the last cited case the court of appeals held that the Territorial Legislature of Alaska in burdening the district court of Alaska and its judges with the responsibility in the first instance of granting, refusing or revoking a liquor license violated the letter of Alaska's Organic Act and the clear intent of Congress, saying: "The discretion exercised in granting or revoking a license to sell intoxicating liquor is not a function of the judiciary but an exercise of ultimate police power. The province of a court or judge is not to exercise such power in the first instance, but to hear and determine in a case or controversy between adverse parties constitutional or legal questions as to the grant or refusal of such a privilege to a designated person." *Id.* at 125.

⁵⁶ *In re Annexation to City of Anchorage*, 146 F. Supp. 98 (D. Alaska 1956).

⁵⁷ 281 U.S. 464 (1930).

⁵⁸ 44 STAT. 1162 (1928).

⁵⁹ *Id.* at 1169.

⁶⁰ 281 U.S. at 468; see HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 213 (1953).

licenses are purely administrative and that the provision for appeals to the court of appeals does no more than make that court a superior and revising agency in the same field."⁶¹ Congress promptly revised the act to provide that "review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious."⁶² After this change the Supreme Court, in a case involving the Commission's termination of two license requests, granted review of an administrative decision.⁶³ In an opinion by Chief Justice Hughes the Court explained the proper but limited scope of judicial review over administrative action.⁶⁴

Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. . . . And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action.

Further experience with administrative action enabled the Court in *United States v. Morton Salt Co.*⁶⁵ to describe with greater definiteness the nature of such action and to point out that it involved investigative and prosecutive elements not appropriate to the judicial function.⁶⁶

⁶¹ 281 U.S. at 467.

⁶² 46 STAT. 845 (1930).

⁶³ *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

⁶⁴ *Id.* at 276-77.

⁶⁵ 338 U.S. 632 (1950).

⁶⁶ *Id.* at 640-41. In *Garner v. Teamsters, Chauffeurs and Helpers Union*, 346 U.S. 485 (1953), the Court, having in mind that in the countries on the mainland of Western Europe there is a distinction between administrative law and private law and a separate system of law courts for each, commented: "At other times, rights will be characterized by the body of law from which they are derived; but such distinction between public and private law is less sharp and significant in this country, where one system of law courts applies both, than in the Continental practice which administers public law through a system of courts, separate from that which deals with private law questions. Perhaps in this country the most usual differentiation is between the legal rights or duties enforced through the administrative process and those left to enforcement on private initiative in the law courts." *Id.* at 495-96.

In a recent state case, *State v. Boone Circuit Court*, 138 N.E.2d 4 (Ind. 1956), the court stated that "a review or appeal to the courts from an administrative order or decision is limited to a consideration of whether or not the order was made in conformity with proper legal procedure, is based upon substantial evidence, and does not violate any constitutional, statutory, or legal principle." *Id.* at 8.

To protect against mistaken or arbitrary orders, judicial review is provided. Its function is dispassionate and disinterested adjudication, unmixed with any concern as to the success of either prosecution or defense. Courts are not expected to start wheels moving or to follow up judgments. Courts neither have, nor need, sleuths to dig up evidence, staffs to analyze reports, or personnel to prepare prosecutions for contempts. Indeed, while some situations force the judge to pass on contempt issues which he himself raises, it is to be regretted whenever a court in any sense must become prosecutor. Those occasions should not be needlessly multiplied by denying investigative and prosecutive powers to other lawful agencies.

As the work of administrative bodies grew, the self-restraint of courts again came in for criticism. This time the critics asserted that the courts were abdicating their responsibilities to administrative agencies.⁶⁷ Although the courts may at times have been oversold on expertise, and even overawed by it, one wonders whether the objections of such critics could not better be met by adopting the recommendation of the Hoover Commission for the creation of "a court of special jurisdiction, to be known as the Administrative Court of the United States,"⁶⁸ to which would be transferred the judicial functions of administrative agencies.

State cases have held unconstitutional as conferring nonjudicial functions statutes which empowered courts to approve the issuance of liquor licenses;⁶⁹ to issue licenses permitting betting and bookmaking;⁷⁰ to try *de novo* the issuance by a commission of licenses to construct dams;⁷¹ to approve sales made under deeds of trust;⁷² to revoke licenses granted for the sale of nonintoxicating beer;⁷³ to supervise the sale of forfeited and delinquent lands;⁷⁴ to approve the annexation of specified areas to municipal corporations,⁷⁵ their severance from them,⁷⁶ or the alteration of the territory of school districts;⁷⁷ to fix the salaries of other state officers;⁷⁸ to

⁶⁷ See, e.g., Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

⁶⁸ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 85-86 (1955). The Hoover Commission further stated that the proposed Administrative Court "would serve as an intermediate stage in the evolution of administrative adjudication and the transfer of judicial activities from the agencies to courts of general jurisdiction." *Id.* at 87.

⁶⁹ *Cromwell v. Jackson*, 188 Md. 8, 52 A.2d 79 (1947).

⁷⁰ *Close v. Southern Md. Agriculture Ass'n*, 134 Md. 629, 108 Atl. 209 (1919).

⁷¹ *Hodges v. Public Serv. Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931).

⁷² *Staud v. Sill*, 114 W. Va. 208, 171 S.E. 428 (1933).

⁷³ *State v. Huber*, 129 W. Va. 198, 40 S.E.2d 11 (1946).

⁷⁴ *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943).

⁷⁵ *In re City of Phoenix*, 52 Ariz. 65, 79 P.2d 347 (1938); *State v. Town of Riverdale*, 57 N.W.2d 63 (Iowa 1953); *Ruland v. City of Augusta*, 120 Kan. 42, 242 Pac. 456 (1926).

⁷⁶ *Brenke v. Borough of Belle Plaine*, 105 Minn. 84, 117 N.W. 157 (1908); *Winkler v. City of Hastings*, 85 Neb. 212, 122 N.W. 858 (1909).

⁷⁷ *North v. Board of Educ.*, 313 Ill. 422, 145 N.E. 158 (1924).

⁷⁸ *Potter County Comm'rs Salary Case*, 350 Pa. 141, 38 A.2d 75 (1944); *State v. County Court*, 78 S.E.2d 569 (W. Va. 1953).

supplement such salaries;⁷⁹ to appoint any other than court officials;⁸⁰ to appoint an administrator for an insolvent municipal corporation with authority to control its fiscal affairs;⁸¹ to approve the enactments of county boards of supervisors;⁸² to determine whether drainage districts should be organized and what lands should be included in them;⁸³ to determine whether proposed drainage ditches would be conducive to the public health, convenience or welfare, and whether their proposed routes were practicable;⁸⁴ to approve the organization of conservation districts⁸⁵ and electric light, heat and power districts;⁸⁶ to fix reasonable rates for common carriers,⁸⁷ for title insurance,⁸⁸ and for ginning cotton;⁸⁹ to confirm the apportionment of the expenses of a county among its municipalities;⁹⁰ to determine the amounts of property assessments for taxes;⁹¹ to approve the accounts of certain officials;⁹² to approve the location and layout of street railways;⁹³ and undoubtedly many others.

One recent case involved a statutory provision making justices of the peace members of township boards.⁹⁴ The court struck it down. Another⁹⁵ dealt with an act which required one who contemplated filing an action for divorce, separate maintenance, or annulment of marriage to file preliminarily with the clerk of the court a written statement announcing an intention to file the complaint. The clerk was to take this statement to the judge, and the judge was authorized to invite the prospective parties and their counsel to confer with him in chambers. Attendance was to be voluntary.

⁷⁹ Henderson County v. Wallace, 173 Tenn. 184, 116 S.W.2d 1003 (1938).

⁸⁰ State v. Barker, 116 Iowa 96, 89 N.W. 204 (1902); Prince George's County Comm'rs v. Mitchell, 97 Md. 330, 55 Atl. 673 (1903); Beasley v. Ridout, 94 Md. 641, 52 Atl. 61 (1902); Application of O'Sullivan, 117 Mont. 295, 158 P.2d 306 (1945).

⁸¹ City of Enterprise v. State, 156 Ore. 623, 69 P.2d 953 (1937).

⁸² Gandy v. Elizabeth City County, 179 Va. 340, 19 S.E.2d 97 (1942).

⁸³ Funkhouser v. Randolph, 287 Ill. 94, 122 N.E. 144 (1919).

⁸⁴ Tyson v. Washington County, 78 Neb. 211, 110 N.W. 634 (1907).

⁸⁵ *In re* Verdigris Conservancy Dist., 131 Kan. 214, 289 Pac. 966 (1930).

⁸⁶ Searle v. Yensen, 118 Neb. 835, 226 N.W. 464 (1929).

⁸⁷ State v. Johnson, 61 Kan. 803, 60 Pac. 1068 (1900).

⁸⁸ Daniel v. Tyrrell & Garth Inv. Co., 127 Tex. 213, 93 S.W.2d 372 (1936).

⁸⁹ Oklahoma Cotton Ginners' Ass'n v. State, 174 Okla. 243, 51 P.2d 327 (1935).

⁹⁰ Boston v. City of Chelsea, 212 Mass. 127, 98 N.E. 620 (1912).

⁹¹ Silven v. Board of Comm'rs of Osage County, 76 Kan. 687, 92 Pac. 604 (1907).

⁹² Robey v. Commissioners of Prince George's County, 92 Md. 150, 48 Atl. 48 (1900).

⁹³ Appeal of Norwalk Street Ry., 69 Conn. 576, 37 Atl. 1080 (1897), a leading state case.

In it the court reasoned: "One controlling consideration in deciding whether a particular act oversteps the limits of judicial power is the necessary inconsistency of such acts with the independence of the judicial department, and the preservation of its sphere of action distinct from that of the legislative and executive departments." *Id.* at 594, 37 Atl. at 1086.

⁹⁴ Dearborn Township v. Dail, 334 Mich. 673, 55 N.W.2d 201 (1952).

⁹⁵ People *ex rel.* Christiansen v. Connell, 2 Ill. 2d 332, 118 N.E.2d 262 (1954).

The court invalidated the act on the ground that the function to be performed by the judge "cannot fairly be described as judicial."⁹⁶

Courts have demonstrated the disciplined self-restraint which is characteristic of the judicial process at its best by other restrictions which they have applied to themselves. They have refused, for instance, to pass upon questions which they have deemed to be political.⁹⁷ A precise description of such questions is difficult. They have arisen in disputes which the courts for one reason or another have felt they could not effectively or adequately resolve. Courts have thus refused to decide which government was to be recognized as representing a foreign state,⁹⁸ the policy which was to govern recognition,⁹⁹ or the policy toward aliens and foreign policy generally;¹⁰⁰ whether a foreign state was in a position to perform its treaty obligations;¹⁰¹ which governments were the established ones in our 48 states¹⁰² and whether these governments were republican in form;¹⁰³ the way in which our states geographically distributed their electoral strength among their political subdivisions;¹⁰⁴ how many members in the House of Representatives our various states were to have;¹⁰⁵ the way in which our states divided themselves into congressional districts;¹⁰⁶ the terms on which a new political party was to go on the ballot;¹⁰⁷ whether a certified amendment

⁹⁶ *People ex rel. Christiansen v. Connell*, 2 Ill. 2d 332, 349, 118 N.E.2d 262, 270 (1954).

⁹⁷ See POST, *THE SUPREME COURT AND POLITICAL QUESTIONS* (1936); Dixon, *The Doctrine of Separation of Powers and Federal Immunity Statutes*, 23 GEO. WASH. L. REV. 501, 627 (1955); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

⁹⁸ *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938).

⁹⁹ *United States v. Pink*, 315 U.S. 203 (1942); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Kennett v. Chambers*, 55 U.S. (14 How.) 38 (1852).

¹⁰⁰ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Japanese Immigrant Case*, 189 U.S. 86 (1903); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796); *In re Cooper*, 143 U.S. 472, 503 (1892); *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955).

¹⁰¹ *Clark v. Allen*, 331 U.S. 503 (1947).

¹⁰² *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹⁰³ *Cockran v. Louisiana State Board of Educ.*, 281 U.S. 370 (1930); *Ohio ex rel. Bryant v. Metropolitan Park Dist.*, 281 U.S. 74 (1930); *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Marshall v. Dye*, 231 U.S. 250 (1913); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

¹⁰⁴ *South v. Peters*, 339 U.S. 276 (1950); *Cook v. Fortson*, 329 U.S. 675 (1946).

¹⁰⁵ *Dennis v. United States*, 171 F.2d 986 (D.C. Cir. 1948), *aff'd on other grounds*, 339 U.S. 162 (1950); *Saunders v. Wilkins*, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

¹⁰⁶ *Colegrove v. Green*, 328 U.S. 549 (1946).

¹⁰⁷ *White v. Howard*, 347 U.S. 910 (1954); *Illinois ex rel. Sankstone v. Jarecki*, 346 U.S. 861 (1953); *MacDougall v. Green*, 335 U.S. 281 (1948).

to the Federal Constitution was properly adopted;¹⁰⁸ whether a legislative act was passed in the form in which it was authenticated;¹⁰⁹ the duration of a state of war;¹¹⁰ the extent to which the power to prosecute violations of the laws of war were to be exercised before peace was declared;¹¹¹ and the control and dominion over the three-mile marginal ocean belt adjoining our shores.¹¹²

The judicial self-restraint which courts practice probably has made it easier for them than for the other branches of government to stay within the bounds of their prescribed functions. In three recent cases the federal courts refused to interfere with the activities of Senator McCarthy and the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations.¹¹³

Federal District Judge Irving R. Kaufman reasoned:¹¹⁴

Were a court empowered to limit in advance the subject matter of Congressional investigations, violence would be done to the principle of separation of powers upon which our entire political system is based. Justice Brandeis warned of the danger of encroachment by one department of the government upon another, when he spoke of the dangers of "[U]surpation, proceeding by gradual encroachment rather than by violent acts; subtle and often long-concealed concentration of distinct functions, which are beneficial when separately administered and dangerous only when combined in the same persons. . . . The makers of our Constitution had in mind like dangers to our political liberty when they provided so carefully for the separation of governmental powers."

In yet another recent case¹¹⁵ a three-judge district court in the District of Columbia refused to enjoin the members of the Senate Internal Security Subcommittee and the public printer from disseminating 75,000 copies of a handbook on the communist party, which described the plaintiff as a communist front. Judge Edgerton pointed out "that nothing authorizes anyone

¹⁰⁸ *Coleman v. Miller*, 307 U.S. 433 (1939); *Leser v. Garnett*, 258 U.S. 130 (1922).

¹⁰⁹ *Harwood v. Wentworth*, 162 U.S. 547 (1896); *Field v. Clark*, 143 U.S. 649 (1892); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

¹¹⁰ *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Commercial Trust Co. v. Miller*, 262 U.S. 51 (1923).

¹¹¹ *In re Yamashita*, 327 U.S. 1 (1946).

¹¹² *United States v. California*, 332 U.S. 19 (1947). In *Alabama v. Texas*, 347 U.S. 272 (1954), the Court, in sustaining the validity of the Submerged Lands Act, 67 STAT. 29 (1953), 43 U.S.C. §§ 1301-15 (Supp. III, 1956), ruled that the power of Congress over the public land was unlimited. Justice Jackson in his *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 54-55 (1955), published posthumously, took pains to list various of the questions of a political nature which the Court passed by.

¹¹³ *Mins v. McCarthy*, 209 F.2d 307 (D.C. Cir. 1953); *Fischler v. McCarthy*, 117 F. Supp. 643 (S.D.N.Y. 1954); *Hutner v. McCarthy*, Civil No. 89-364, S.D.N.Y., Dec. 8, 1953.

¹¹⁴ *Fischler v. McCarthy*, 117 F. Supp. 643, 648 (S.D.N.Y. 1954). (Editor's omission.)

¹¹⁵ *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729 (D.D.C. 1956).

to prevent Congress from publishing any statement" and "that a judgment for the plaintiff would invade the constitutional separation of powers."¹¹⁶

Not only have courts confined themselves to disputed issues within their competence to resolve; they have also prevented grand juries, which are arms of the courts, from making charges against named persons unless those charges could be controverted. A recent example is *Application of United Electrical, Radio & Machine Workers*.¹¹⁷ There the court ordered a "presentment" expunged from the court records because those whom it named did not have "the right to defend themselves and to have their day in a Court of Justice—their absolute right had the Grand Jury returned an indictment."¹¹⁸ To allow the document to stand would "defeat that fundamental fairness which must mark all judicial proceedings."¹¹⁹ A state court said of such a document: "A presentment is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for a denial."¹²⁰

Because of the desire that the judiciary have the confidence and respect of the people in the highest degree many judges, although not legally required to do so, have declined offers of political nominations and appointments to other offices. Chief Justice Warren removed himself from political life. Chief Justice Stone refused the chairmanship of the Atomic Energy Commission and membership on the United States Ballot Commission.¹²¹ Cardozo, while chief judge of the New York Court of Appeals, refused an appointment to the Permanent Court of Arbitration at The Hague.¹²² He

¹¹⁶ *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729 (D.D.C. 1956). See also *Hearst v. Black*, 87 F.2d 68 (D.C. Cir. 1936), where the courts denied aid to William Randolph Hearst, who sought to enjoin the members of the Senate Committee headed by Senator, later Justice, Hugo L. Black from publishing telegrams alleged to have been obtained in violation of his constitutional rights. In *Dayton v. Hunter*, 176 F.2d 108 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949), and *Dalton v. McGranery*, 201 F.2d 711 (D.C. Cir. 1953), the courts refused to interfere with the regulations of the Bureau of Prisons relating to the communications of inmates of federal penitentiaries with the outside world and their application to a particular prisoner. In the latter case the plaintiff, a prisoner, also requested the removal from the files of prison officials certain letters which he claimed were false and malicious. The court refused this request on the ground that "the courts have no inherent power of disposition over internal documentary data of the executive branch of the Government." *Id.* at 713.

¹¹⁷ 111 F. Supp. 858 (S.D.N.Y. 1953).

¹¹⁸ *Id.* at 861.

¹¹⁹ *Id.* at 869.

¹²⁰ *People v. McCabe*, 148 Misc. 330, 333, 266 N.Y.S. 363, 367 (Sup. Ct. 1933). State cases expunging such documents and other authorities condemning them are collected in *Application of United Electrical, Radio and Machine Workers*, 111 F. Supp. 858, 866, 867 n.26, 868 n.35 (S.D.N.Y. 1953). See also *Ex parte Burns*, 261 Ala. 217, 73 So. 2d 912 (1954); *In re Report of Grand Jury*, 260 P.2d 521 (Utah 1953).

¹²¹ VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 117 (1953).

¹²² *Ibid.*

wrote Secretary of State Charles Evans Hughes: "After many inward struggles I have come to the conclusion that a Judge of the Court of Appeals best serves the people of the State by refusing to assume an obligation that in indeterminate, if improbable, contingencies might take precedence of the obligations attached to his judicial office."¹²³ Federal Judge Thomas F. Murphy, after consulting with his judicial brethren, turned down President Truman's proposal that he conduct an investigation of corruption in the executive branch.¹²⁴

Just as the courts will not give advisory opinions, or entertain amicable or collusive suits, or rule on abstract, hypothetical, remote, contingent, academic or moot questions, or exercise legislative, administrative or executive functions, or consider problems which they regard as political, so also the courts will not exercise general investigative powers. The case of *Webster Eisenlohr, Inc. v. Kalodner*¹²⁵ furnishes a good illustration. A preferred stockholder brought a class action to have the court adjudge that the preferred stockholders had the exclusive voting power in the corporation. During the course of the litigation the corporation sent its annual report to stockholders and thereafter wrote to its preferred stockholders offering to purchase their interests. The plaintiff and other preferred stockholders whom he represented availed themselves of this offer. Judge Kalodner was advised of this development and felt that the letter and the annual report were misleading. Accordingly he appointed a special master to investigate the acts and assets of the corporation. The court of appeals disagreed with his action, saying:¹²⁶

The fundamental proposition which probably no one would dispute is that a court's power is judicial only, not administrative nor investigative. . . .

We do not think this view imposes unduly restrictive limitations upon courts. . . . No doubt a great deal goes on in the world which ought not to go on. If courts had general investigatory powers, they might discover some of these things and possibly right them. Whether they would do as well in this respect as officers or bodies expressly set up for that purpose may be doubted, but until the concept of judicial power is widened to something quite different from what it now is courts will better serve their public function in limiting themselves to the controversies presented by parties in litigation.

¹²³ See *id.* at 117-18 n.63.

¹²⁴ *Id.* at 119.

¹²⁵ 145 F.2d 316 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945); *accord*, *Bestel v. Bestel*, 153 Ore. 100, 53 P.2d 525 (1936).

¹²⁶ 145 F.2d at 318-20. In *United States v. Morton Salt Co.*, 338 U.S. 632, 641-42 (1950), Justice Jackson, writing for the Court, stated: "Federal judicial power itself extends only to adjudication of cases and controversies and it is natural that its investigative powers should be jealously confined to these ends."

Judges are judges and not mediators, arbitrators, administrators or investigators.¹²⁷

III

THE NEW FEDERAL IMMUNITY ACT

The new federal immunity act, at least in paragraphs (a) and (b), imposes upon federal district courts duties which properly belong to the investigative agencies of the executive branch of government. In determining whether to offer a grant of immunity the questions to be answered are investigative and policy ones: Is it expedient to make the offer? Is it timely to do so? Which suspect in the commission of the offense under investigation is the most appropriate one to whom to make the offer? Was he a minor participant? Will he talk? Will what he has to tell help to make out a case against the major participants? The expression of one's view on the correctness of the answers given to such questions does not even rise to the status of an advisory opinion. Such a task is investigative, not judicial, in nature.

Moreover, a court proceeding under paragraphs (a) and (b) will not be adversary in character in so far as the witness to whom it is proposed to grant immunity is concerned. To begin with, it is not clear under the act whether the witness has any standing in court at all. Even if he does his position cannot by its very nature be adversary. Let us suppose that a congressional committee and the Attorney General are in disagreement as to a proposed grant of immunity. Committee counsel argues to the court that the testimony of the proposed grantee is necessary for the legislative purposes of Congress. A representative of the Attorney General counters that the proposed grantee is one who ought to be prosecuted. Committee counsel responds that the proposed grantee was but a minor participant in the offence which the department of justice is investigating. What will the proposed grantee be able to argue—that he was a major participant! The approval of a proposed grant of immunity is in no way a part of the judicial function. If there is to be an immunity act the granting of immunity should rest with investigative agencies.

The approach suggested here is by no means novel. Mr. John M. Kernochan, author of the American Bar Association's Model State Witness Immunity Act,¹²⁸ wrote in support of a similar position:¹²⁹

¹²⁷ In *Kauble v. Haynes*, 64 F. Supp. 153 (N.D. Cal. 1946), a conscientious objector in a civilian public service camp sought release on habeas corpus on the ground that he was suffering from excessive nervousness and depression. The court in denying relief, commented: "Administrative powers, with which courts should not interfere, involve carrying laws into effect—their practical application to current affairs by way of management and oversight, including investigation, regulation and control in accordance with and in execution of the principles prescribed by the law-makers." *Id.* at 153.

¹²⁸ 2 AMERICAN BAR ASSOCIATION COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND LAW ENFORCEMENT 161 (1953).

¹²⁹ *Id.* at 168-69.

[T]he agency best qualified to make the determination [of whether or not to grant immunity] will be one thoroughly and currently conversant with both the general and the detailed situations regarding enforcement of the criminal laws. To make a wise decision, that agency should be informed with respect to the particular witness involved, his offense, and his importance to the proceeding. It should be equipped to weigh this proceeding against others pending or planned, not merely locally but on a wider basis. These considerations seem to point clearly to the enforcement authorities as the proper agency to exercise the principal control over grants of immunity. Such a solution conforms to the essential nature of immunity legislation as an instrument in aid of law enforcement.

Furthermore, if the federal courts assume the burdens sought to be imposed upon them by paragraphs (a) and (b) and pass upon the investigative and policy questions involved in proposed grants of immunity, they will take a step away from our accusatorial method in dealing with deviants and in the direction of the inquisitorial technique; federal judges will undertake a duty which will remind one of the role of the French *juge d'instruction*.¹³⁰

Congress to date has passed at least fifty acts containing immunity provisions¹³¹ but, with the exception of the present act, none of these provisions require court approval of a proposed grant of immunity. The earliest act which related to a witness before a federal court or grand jury simply provided that "no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be given in evidence, or in any manner used against such party or witness."¹³² It was this act which was involved in the well known case of *Counselman v. Hitchcock*.¹³³ There the Supreme Court held that despite the immunity act the defendant was still entitled to claim his right of silence under the fifth amendment because the immunity granted was not broad enough—it did not include immunity from prosecution. Subsequently Congress repealed the act¹³⁴ on the ground that this decision made it "a shield to the criminal and an obstruction to justice."¹³⁵ After that the department

¹³⁰ See Comment, *Immunization of Congressional Witnesses Under the Compulsory Testimony Act: Constitutionality of the Function of the District Courts*, 22 U. CHI. L. REV. 657 (1955). On the role of the *juge d'instruction* see Esmein, *Histoire de la Procédure Criminelle en France*, translated in 5 CONTINENTAL LEGAL HISTORY SERIES 505-08 (1913); Coudert, *French Criminal Procedure*, 19 YALE L.J. 326 (1910); Ploscowe, *The Investigating Magistrate (Juge d'Instruction) in European Criminal Procedure*, 33 MICH. L. REV. 1010 (1935).

¹³¹ These acts are collected in Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 375, 378 n.184, 383 n.222-23 (1956-57).

¹³² 15 STAT. 37 (1868).

¹³³ 142 U.S. 547 (1892).

¹³⁴ 36 STAT. 352 (1910).

¹³⁵ H.R. REP. NO. 266, 61st Cong., 2d Sess. 2 (1910).

of justice was without a general immunity act of its own.¹³⁶ A promise by a federal district attorney of immunity in return for testimony, except in certain very narrow areas, was unenforceable.¹³⁷ As Mr. Justice Frankfurter stated in his dissenting opinion in *Monia v. United States*:¹³⁸ "Indeed, so sensitive has Congress been against immunizing crime that it has not entrusted prosecutors generally with the power to relieve witnesses from prosecution in exchange for incriminating evidence against others."

Until the new federal act the role of a federal court with respect to a witness who claimed a right of silence was purely a judicial one. In the case of a witness before a court or a grand jury the court determined whether the claim was a valid one. If the court decided that it was, that ended the matter. If the court decided that it was not, it ordered the witness to answer. If the witness still refused, the court then ruled upon the question of contempt. In the case of a witness before an administrative body the court, whenever a statute provided for it, gave its aid to enforce the subpoena of such a body, for administrative agencies did not have the power to enforce their own subpoenas. In no case did the court pass upon the advisability of a grant of immunity. In the case of a witness before an administrative body the court also did not pass upon the question whether a subpoena *ought* to issue. Moreover, any proceedings that took place in court were truly adversary in character. In the leading case on the judicial enforcement of subpoenas issued by administrative bodies, *Interstate Commerce Comm'n v. Brimson*,¹³⁹ Justice Harlan, writing for the Court, said: "Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued?"¹⁴⁰

¹³⁶ Various specialized agencies such as the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board had immunity acts, but not the Justice Department. See note 131 *supra*.

¹³⁷ See *Whiskey Cases*, 99 U.S. 594 (1878); *United States v. Shotwell Mfg. Co.*, 225 F.2d 394 (7th Cir. 1955), *Government's petition for cert. granted in part*, 352 U.S. 997, *cross-petition for cert. denied*, 352 U.S. 998 (1957); *Krug v. United States*, 203 F.2d 525 (8th Cir. 1953).

¹³⁸ 317 U.S. 424, 434 (1943).

¹³⁹ 154 U.S. 447 (1894).

¹⁴⁰ *Id.* at 487. Of course judicial proceedings can retain their adversary character even though they in fact involve no contest in a particular case, a point that was overlooked in *Davis, Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1122, 1123-5 (1955). A criminal case may end with a guilty plea, and often does. A civil suit may go by default. All that is necessary is that there be provision and an opportunity for the presentation of opposing views should the parties concerned deem it in their best interests to follow such a course. As the Supreme Court, speaking through Justice Brandeis, observed in *Tutun v. United States*, 270 U.S. 568, 577 (1926), in holding naturalization proceedings to be cases or controversies within the meaning of art. III, § 2: "The United States is always a possible adverse party."

But the new federal act in paragraph (b) requires the "approval" of a federal district court to a proposed grant of immunity to a congressional witness, while in paragraph (c) such a court's "order" is required in case of a proposed grant of immunity to a witness before it or a federal grand jury. In the *Ullmann* case the Supreme Court¹⁴¹ and District Judge Weinfeld¹⁴² equated the procedure in paragraph (c) with that involved in the *Brimson* case. One can suggest that if the provision of this paragraph requiring the district attorney to "make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence" means no more than the Court said it did, then it becomes wholly unnecessary. It requires courts to do no more or other than they have always done without it. Courts would have continued to do precisely this. Such a strained construction reduces the quoted portion of paragraph (c) to an embellishment which served no other purpose than that of deceiving Congress. Nevertheless that is what the Court ruled. However, this downgrading of paragraph (c) will not help the supporters of paragraphs (a) and (b) for paragraph (b) specifically requires court "approval" of a proposed grant of immunity, and this is exactly what Congress intended. The House Report on this measure states:¹⁴³

In all cases where the bill authorizes a grant of immunity after privilege has been claimed, there are at least two other independent but interested parties who must concur in the grant of immunity in order to meet the requirements of the bill.

Congressman Keating, a member of the Judiciary Committee of the House, and the measure's leading sponsor, in debate said:¹⁴⁴

[I]t does not leave the final determination as to the granting of immunity in either the hands of the investigating committee or the Attorney General, but rather the court . . . the court will have the final word in the matter.

The Congress did not consider whether requiring a federal district court's "approval" of a proposed grant of immunity was constitutional. Only one member, Representative, now Senator, Javits of New York, appeared to be concerned with the court's role. He remarked that he did not believe the court would "inquire into the advisability or lack of it in giving an immunity bath."¹⁴⁵ Congressman Walter, another member of the House

¹⁴¹ 350 U.S. at 434.

¹⁴² 128 F. Supp. at 626 n.22.

¹⁴³ H.R. REP. No. 2606, 83d Cong., 2d Sess. 8 (1954).

¹⁴⁴ 100 CONG. REC. 13323 (1954). See also *id.* at 13324-325, 13997-998; Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 163, 171-74 (1956).

¹⁴⁵ 100 CONG. REC. 13325 (1954). Congressman Javits was not a member of the House Judiciary Committee. He was one of the fifty-five who voted against the immunity act. *Id.* at 13333.

Judiciary Committee, responded: "After all, when it comes to the question of the wisdom, I just think that is a question of materiality."¹⁴⁶ Then this interchange took place:¹⁴⁷

Mr. Javits: "The Congress will have decided that [materiality] and the court will just rely upon the decision made by the committee or the House?"

Mr. Walter: "I do not think so. I think this goes much further than that."

There the matter rested.

Nor can supporters of paragraphs (a) and (b) find any help in the *ex parte* issuance of search warrants or the like issuance of warrants to wiretap. Insofar as search warrants are concerned, they are issued, not in order to procure evidence, but to obtain property which another person or the state claims is wrongfully held or used. The practice of issuing search warrants arose in England in the seventeenth century. They were used to search for stolen property. Lord Coke in his *Fourth Institute* stated that in the absence of an indictment justices of the peace had no power to issue a warrant "to search for a felon, or for stolen goods, for they being created by act of parliament have no such authority granted unto them by any act of parliament."¹⁴⁸ But not long thereafter Matthew Hale expressed a contrary opinion:¹⁴⁹

In case of a complaint and oath of goods stolen, and that he suspects the goods are in such a house, and shews the cause of his suspicion, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, and to attach the goods and the party in whose custody they are found, and bring them before him or some justice of peace to give an account how he came by them, and farther to abide such order as to law shall appertain.

In the course of time the Crown took to the use of these warrants in a general form to search for writings alleged to be seditious and for their authors, printers and publishers. But in 1765 in the great case of *Entinck v. Carrington*¹⁵⁰ Lord Camden, speaking for an unanimous court, held general search warrants to be illegal. To permit them, he reasoned, "would destroy all the comforts of society."¹⁵¹

The fourth amendment provides that "no Warrants shall issue, but

¹⁴⁶ 100 CONG. REC. 13325 (1954).

¹⁴⁷ *Ibid.*

¹⁴⁸ COKE, *FOURTH INSTITUTE* 176-77.

¹⁴⁹ PLEAS OF THE CROWN 113.

¹⁵⁰ 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765).

¹⁵¹ *Id.* at 291, 95 Eng. Rep. at 817-18. According to the report of the case in 19 How. St. Tr. 1029, 1066, Lord Camden stated that to sanction the practice of issuing general search warrants "would be *subversive* of all the comforts of society." (Emphasis added.)

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In a leading case, *Gouled v. United States*,¹⁵² the Court ruled that search warrants¹⁵³

may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken.

This still represents the law. Search warrants are limited to such items as stolen or embezzled goods, contraband, or articles used or to be used in the commission of a crime.¹⁵⁴ Now it may well be, and often is the case, that material obtained as a result of a lawful search and seizure is used as evidence, but a search warrant may not be issued solely for this purpose.

Moreover, although search warrants are issued *ex parte*, just as temporary restraining orders, writs of attachment, and various other writs are sometimes so issued under different particular circumstances, there is involved here a real controversy. The person from whom the property is taken on a search warrant may come into court and assert his rights. The proceedings are genuinely and fully adversary in character.

Warrants to wiretap have had but a brief history. Although an important state, New York, in its 1938 constitution and a subsequent statute provided for their issuance,¹⁵⁵ there is no federal provision to this effect;¹⁵⁶ any

¹⁵² 255 U.S. 298 (1921); *accord*, *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

¹⁵³ 255 U.S. at 309.

¹⁵⁴ FED. R. CRIM. P. 41(b) provides: "A warrant may be issued under this rule to search for and seize any property (1) Stolen or embezzled in violation of the laws of the United States; or (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or (3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18 U.S.C., § 957." Section 957 relates to the possession of property or papers in aid of a foreign government. For a recent case see *Honig v. United States*, 208 F.2d 916 (8th Cir. 1953).

¹⁵⁵ N.Y. CONST. art. I, § 12. N.Y. CODE CRIM. PROC. § 813-a. This section authorizes any judge of the supreme court, a county court, or the court of general sessions of New York County to issue an *ex parte* order for the interception of telephone or telegraph communications upon the oath or affirmation of any district attorney, the attorney general, or a police officer above the rank of sergeant that "there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular telephone line or means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof." The judge "may examine on oath the applicant and any other witness he may produce for the purpose of satisfying himself of the existence of reasonable grounds for the granting of such application." These constitutional and statutory provisions were held not to violate § 605 of the Federal Communications Act of 1934, 48 STAT. 1064, 1103, 47 U.S.C.

such provision which sought to impose on federal courts the duty to approve their issuance would be unconstitutional for the same reason that it is submitted paragraphs (a) and (b) are unconstitutional, namely, the imposition on federal courts of a nonjudicial function.

Mr. Justice Jackson in his posthumous book described the judicial function, and indicated his doubts as to the validity of legislation of the type which paragraphs (a) and (b) contain:¹⁵⁷

But perhaps the most significant and least comprehended limitation upon the judicial power is that this power extends only to cases and controversies. . . .

The result of the limitation is that the Court's only power is to decide lawsuits between adversary litigants with real interests at stake, and its only method of proceeding is by the conventional judicial, as distinguished from legislative or administrative, process. . . . Recent trends to empower judges to grant or deny wiretapping rights to a prosecutor or to approve a waiver of prosecution in order to force a witness to give self-incriminating testimony raise interesting and dubious questions. A federal court can perform but one function—that of deciding litigations—and can proceed in no manner except by the judicial process.

CONCLUSION

The determination of cases and controversies which the Constitution assigns to the federal courts is enough of a work load for them. In order to do this job effectively they should not add duties to the business of judging which do not properly belong to it. Even if the federal courts restrict themselves to their assigned task they will at times come in for criticism by those who feel aggrieved by their decisions. In the past year the Supreme Court has encountered a volume of harsh attacks because of its necessary rulings

§ 605 (1952). *People v. Feld*, 305 N.Y. 322, 113 N.E.2d 440 (1953); *People v. Stemmer*, 298 N.Y. 728, 83 N.E.2d 141 (1948), *aff'd without opinion by an evenly divided court*, 336 U.S. 963 (1949); *Matter of Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946). In an excellent recent case, *Matter of Interception of Tel. Communications*, 207 Misc. 69, 136 N.Y.S.2d 612 (Sup. Ct. 1955), a judge who had signed orders permitting wiretapping with "much misgiving," *id.* at 70, 136 N.Y.S.2d at 613, refused to enter the order there requested.

Massachusetts has a statute which prohibits wiretapping "except when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district." MASS. ANN. LAWS, c. 272, § 99 (1920). A conviction under this section for unauthorized wiretapping was upheld. *Commonwealth v. Publicover*, 327 Mass. 303, 98 N.E.2d 633 (1951).

¹⁵⁶ In May 1953 Attorney General Brownell announced that he had submitted to Congress a bill to legalize the use of evidence obtained by wiretapping in federal criminal cases involving national security and asserted that legislation such as he proposed was "vital for the adequate safeguarding of our country and its way of life." N.Y. Times, May 9, 1953, § 1, p. 9, col. 6. Some members of Congress introduced such bills, but they failed of passage. See, e.g., H.R. 8649, 83d Cong., 2d Sess. (1954); H.R. 4513, 84th Cong., 1st Sess. (1955).

¹⁵⁷ JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 11-12 (1955).

in sensitive areas—for example, the segregation cases;¹⁵⁸ *Pennsylvania v. Nelson*,¹⁵⁹ in which it invalidated Pennsylvania's sedition law and cast doubt on such laws of other states; *Slochower v. Board of Higher Education*,¹⁶⁰ in which it held unconstitutional section 903 of the New York City Charter because it made a claim of the fifth amendment's privilege against self-incrimination an automatic basis for the dismissal of a city employee; and *Cole v. Young*,¹⁶¹ in which it ruled that the government's security program, set up in President Eisenhower's Executive Order 10450, could not legally be applied to an employee in a nonsensitive position. There were loud protests against the Court's decisions in these cases, not only out of Congress but also in it.¹⁶²

Especially should the federal courts challenge the imposition on them of a function that would involve them in the business of investigating offenses rather than judging deviants, a function which, when in the hands of the judiciary, involves the importation of a feature of the inquisitional system. Paragraphs (a) and (b) of the new federal act, in seeking to burden federal courts with a nonjudicial function of an essentially inquisitional nature, squarely violate the Constitution of the United States.

¹⁵⁸ See note 47 *supra*.

¹⁵⁹ 350 U.S. 497 (1956).

¹⁶⁰ 350 U.S. 551 (1956).

¹⁶¹ 351 U.S. 536 (1956).

¹⁶² For a sample of the attacks in Congress in 1956 on the Court see 102 CONG. REC. 5710-13 (daily ed. April 16, 1956). Representative Noah M. Mason of Illinois demanded to know: "Mr. Speaker, where is the usurpation of States rights by the United States Supreme Court going to end?" *Id.* at 5711. Congressman James C. Davis of Georgia chimed in "that the Supreme Court is driving this country closer to a complete judicial dictatorship." *Ibid.* Representative L. Mendel Rivers of Georgia asserted: "Mr. Speaker, something has got to be done to stop that Supreme Court. They are a greater threat to this Union than the entire confines of Soviet Russia. If some way is not found to stop them, God help us." *Id.* at 5713. Representative Francis E. Walter of Pennsylvania inserted in the Congressional Record an article by David Lawrence which charged that the Court's decision in *Cole v. Young*, 351 U.S. 536 (1956), "has stricken down the most effective weapon against subversive activity available to the government." 102 CONG. REC. A4721 (daily ed. June 13, 1956).

The Court's necessary decisions resulted in the introduction in Congress of some seventy bills affecting federal courts, which were referred to the Senate and House Judiciary committees. See N.Y. Times, May 14, 1956, § 1, p. 25, col. 1. Three of these bills sought to reverse the result in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). S. 3617, 84th Cong., 2d Sess. (1956); H.R. 3, 84th Cong., 1st Sess. (1955); H.R. 11341, 84th Cong., 2d Sess. (1956). The Department of Justice approved the enactment of S. 3617 and H.R. 11341. S. REP. NO. 2117, 84th Cong., 2d Sess. 2-3 (1956); H.R. REP. NO. 2576, 84th Cong., 2d Sess. 4-5 (1956). H.R. 3, which was the bill of Congressman Howard W. Smith of Virginia, the principal draftsman of the Smith Act, was amended into the form of H.R. 11341 and reported favorably by the House Judiciary Committee. H.R. REP. NO. 2576, *supra*. The Senate Judiciary Committee took similar action on S. 3617. S. REP. NO. 2117, *supra*. However, the Congress did not get to the passage of any one of them.