California Law Review

VOL. 47 DECEMBER, 1959 No. 5

Unenumerated Rights

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THE NINTH AMENDMENT

Justice Robert H. Jackson in his posthumously published *The Supreme Court in the American System of Government* commented: " But the Ninth Amendment rights which are not to be disturbed by the Federal Government are still a mystery to me."[1] In the same year a member of the Texas bar, Bennett B. Patterson, produced a book entitled *The Forgotten Ninth Amendment*.[2]

The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Little use has been made of it.

However, it is possible to ascertain what its framers meant by it. In doing so we shall also discover why it has fallen into disuse. We shall learn why lawyers who represented clients with unenumerated rights came to rely on the due process clauses of the fifth and fourteenth amendments rather than on the provisions of the ninth amendment.

The Constitution originally did not have a bill of rights because the delegates to the Federal Convention which proposed it did not feel that one was necessary. They had assembled in order to meet the need for strengthening the national government. They did not regard individual rights in danger, certainly not from that source. Besides, they thought that the States would protect individual rights. The first recognition of such rights by the Convention was an emendation in the handwriting of John Rutledge of South Carolina to the report of the Committee of Detail. This called for a jury trial in criminal cases in the State where the offense was committed,[3] and became article III, section 2, clause 3. In the closing weeks provisions were added against bills of attainder, ex post facto laws, and religious tests for federal office holders, and for the protection of the writ

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[1] At 74–75 (1955).

[2] (1955). This volume contains a convenient reprint of those parts of the *Annals* of the first Congress which relate to the first ten amendments. *Id.* at 100–217.

[3] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 144 (1911). A report written by James Wilson of Pennsylvania and edited by Rutledge contained a similar provision. *Id.* at 173.

of habeas corpus. These are to be found in article I, sections 9 and 10, and article VI, clause 3. But that was all.

However, the absence of a bill of rights became the strongest objection to the ratification of the Constitution. Its supporters countered with the argument that since the federal government was one of enumerated powers a bill of rights was unnecessary; indeed, it might even be dangerous, for it would furnish some ground for a contention that such an enumeration was exhaustive. The earliest and leading protagonist of this double-barreled position was James Wilson of Pennsylvania. In October 1787, less than a month after the Federal Convention had adjourned, he stated to a gathering in Philadelphia:

> [I]t would have been superfluous and absurd, to have stipulated with a federal body of our own creation, that we should enjoy those privileges, of which we are not divested either by the intention or the act that has brought that body into existence.[4]

The next month in the Pennsylvania convention on the ratification of the Constitution he contended:

> But in a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but in my humble judgment, highly imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete. On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and by that means the constitution becomes incomplete. But of the two, it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous nor important as an omission in the enumeration of the rights of the people.[5]

The following year Alexander Hamilton of New York in *The Federalist No. 84*, put Wilson's argument in its best-known form, although the last instalment of this number did not come from the press until after New York, the eleventh State, had ratified the Constitution. Thus this number had little actual effect on the political course of events. Hamilton reasoned:

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[4] PAMPHLETS ON THE CONSTITUTION 156 (Ford ed. 1888).

[5] 2 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 436–37 (2d ed. 1881). One will note that Wilson speaks of a bill of rights as an enumeration of reserved powers. In Ashwander v. TVA, 297 U.S. 288, 330–31 (1936), Chief Justice Hughes in the Court's opinion stated conversely: "And the Ninth Amendment . . . in insuring the maintenance of the rights retained by the people does not withdraw the rights which are expressly granted to the Federal Government." Madison was more careful and did not so interchangeably use the words "rights" and "powers."

> I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?[6]

Nevertheless, various of the States in their conventions on the adoption of the Constitution suggested provisions for a federal bill of rights as well as other amendments to the Constitution. However, in doing so they now had to guard against the danger that lay in the possible contention that an enumeration of the rights of the individual was exhaustive. Madison's State, Virginia, the tenth one to ratify the Constitution, accordingly suggested as one of its proposed amendments:

> 17th. That those clauses which declare that Congress shall not exercise certain powers, be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they be construed as either making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.[7]

These proposed amendments accompanied Virginia's recommended provisions for a federal bill of rights. This body of suggestions was for the consideration of the first Congress to assemble under the new Constitution.

Hamilton's State, New York, in ratifying declared:

> [T]hose clauses in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.[8]

North Carolina, although it neither ratified nor rejected the Constitution in 1788, convened a convention in that year which adopted a set of suggestions patterned after those of Virginia.[9]

Madison, under the impact of his correspondence with his friend Jefferson and the general demands for a bill of rights, changed his position and became the principal draftsman of the first ten amendments. After studying the proposals of the various States he prepared his own set of amendments, which he laid before the first Congress on June 8, 1789. In order to meet the danger in the contention that an enumeration of individual rights was exhaustive, he proposed:

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[6] At 559 (Nat'l Home Library ed. 1937).

[7] 3 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 661 (2d ed. 1881).

[8] 1 *id.* at 327.

[9] Virginia's seventeenth proposed amendment became North Carolina's eighteenth. 4 *id.* at 246. North Carolina and Rhode Island ratified the Constitution in 1790. Rhode Island in doing so made a declaration similar to that of New York. 1 *id.* at 334.

> The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.[10]

The House sent Madison's proposals to a special committee of which he was a member. The special committee revised this proposal to read: "The enumeration in this constitution of certain rights shall not be construed to deny or disparage others retained by the people."[11] With the change of "this" to "the" and the addition of a comma, this became the ninth amendment.

Suppose a conflict were to arise between an unenumerated right and the exercise of a power under article I, section 8, clause 18 empowering the Congress: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Which would prevail? Although the debates in the House of the first Congress did not pair off an unenumerated right against an implied power, a study of these debates will permit one safely to say that the implied power would prevail. In 1789 the framers of the first ten amendments were concerned that there be no weakening of the newly established federal government.

Madison, before he offered the House his proposals, took note of the demands for a bill of rights and, in the course of doing so, commented:

> And if there are amendments desired of such a nature as will not injure the constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished.[12]

Then he referred to the "two States" which had not yet ratified the Constitution and continued:

> I have no doubt, if we proceed to take those steps which would be prudent and requisite at this juncture, that in a short time we should see that disposition prevailing in those States which have not come in, that we have seen prevailing in those States which have embraced the constitution.
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> But I will candidly acknowledge, that, over and above all these considerations, I do conceive that the constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more

[10] 1 ANNALS OF CONG. 452 (June 8, 1789) (Gales Comp. 1834—"History of Debates in Congress"). (Hereafter, citation to volumes 1 and 2 of *Annals* will be to this edition.)

[11] *Id.* at 783 (Aug. 17, 1789).

[12] *Id.* at 449 (June 8, 1789).

secure manner than is now done, while no one advantage arising from the exercise of that power shall be damaged or endangered by it. We have in this way something to gain, and, if we proceed with caution, nothing to lose. And in this case it is necessary to proceed with caution; for while we feel all these inducements to go into a revisal of the constitution, we must feel for the constitution itself, and make that revisal a moderate one. I should be unwilling to see a door opened for a reconsideration of the whole structure of the Government—for a re-consideration of the principles and the substance of the powers given; because I doubt, if such a door were opened, we should be very likely to stop at that point which would be safe to the Government itself. But I do wish to see a door opened to consider, so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents; such as would be likely to meet with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures.[13]

With specific reference to his proposal which became the ninth amendment, he explained:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see . . . .[14]

During the course of his presentation he commented:

In our Government it is, perhaps, less necessary to guard against the abuse in the executive department than any other; because it is not the stronger branch of the system, but the weaker: It therefore must be levelled against the legislative, for it is the most powerful, and most likely to be abused, because it is under the least control. Hence, so far as a declaration of rights can tend to prevent the exercise of undue power, it cannot be doubted but such declaration is proper. But I confess that I do conceive, that in a Government modified like this of the United States, the great danger lies rather in the abuse of the community than in the legislative body.[15]

Madison concluded his explanation of his amendments with the observation:

[I]f we can make the constitution better in the opinion of those who are opposed to it, without weakening its frame, or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations as shall produce that effect.[16]

[13] *Id.* at 449-50.
[14] *Id.* at 456.
[15] *Id.* at 454.
[16] *Id.* at 459.

One may thus summarize Madison's thinking to the extent that it has a bearing on a conflict between an unenumerated right and an implied power. The federal government was one of delegated and limited powers. Hence a bill of rights was not really necessary. Nevertheless, he was agreeable to having a declaration of individual rights in order to make doubly sure that in various areas the federal government was not to act at all, and in certain other areas was to act only in a particular manner. For example, in the areas of speech, press and religion, the federal government was not to act at all. Or, to take a case in the other field, although the federal government was to collect its taxes, it was not to do so by means of general warrants.

But in the matter of amendments Madison had one important proviso, and he emphasized it: any revisions of the Constitution were not to weaken the federal government. Nor is there any indication in Madison's thinking that he regarded properly implied congressional powers as of a lesser standing than express powers. On the contrary, his position on the tenth amendment indicates that he equated the two. This amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." An effort was twice made, once by Thomas Tucker[17] of South Carolina and again by Elbridge Gerry[18] of Massachusetts, to insert the word "expressly" before the word "delegated." This was the way it had been in the Articles of Confederation.[19] Madison opposed Tucker's proposal "because it was impossible to confine a Government to the exercise of express powers; there must necessarily be powers by implication, unless the Constitution descended to recount every minutiae."[20] Madison's view prevailed. So far as Madison was concerned, implied powers were necessary and they were as good as express powers.

Madison in his comments, neither then nor later, juxtaposed implied powers against unenumerated rights. On the contrary, he indicated that he thought a line could be drawn between them.

Edmund Randolph of Virginia was thus substantially correct when,

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[17] *Id.* at 790 (Aug. 18, 1789).

[18] *Id.* at 797 (Aug. 21, 1789).

[19] Article II of the Articles of Confederation, 1777, provided: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

[20] 1 ANNALS OF CONG. 790 (Aug. 18, 1789). It was in the preceding year that Madison had made the same point: "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too, not only to the existing state of things, but to all possible changes which futurity may produce, for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same. THE FEDERALIST No. 44, at 281–82 (Lodge ed. 1888).

in his opposition to the ninth amendment, he characterized it as an opiate. In the Virginia Legislature he objected to this amendment on the ground that "there was no criterion by which it could be determined whether any other particular right [than those specified in the other amendments] was retained or not."[21] In a letter of December 6, 1789, to George Washington he wrote that this amendment "is exceptionable to me, in giving a handle to say, that Congress have endeavored to administer an opiate, by an alteration which is merely plausible."[22] Madison in a letter of December 5, 1789, to Washington answered Randolph's position in the Virginia Legislature with the observation that if a line could not be drawn between implied powers and unenumerated rights then the declaration in the ninth amendment would be a futile one: "If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing."[23]

The most than can thus be said is that the framers of the ninth amendment intended it as a declaration, should the need for it arise, that the people had other rights than those enumerated in the first eight amendments; and the federal Judiciary and the State legislatures could so use it if they had to do so in order to pass judgment on the validity of an act of Congress. The ninth amendment was not so used. Even Madison did not so use it.

IMPLIED POWERS

One can further suggest that the ninth amendment's declaration of the existence of unenumerated rights could also be used as an added weight in the balance to support a restrictive interpretation of the necessary and proper clause. It was not so used either. Again Madison himself, although he was soon to become concerned about the growing power of the federal government and the claims of additional powers for it by the rising Federalists, did not so use the ninth amendment.

Originally Madison had expressed himself in favor of a broad interpretation of the necessary and proper clause. Early in 1788 he had written in *The Federalist No. 44*: "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."[24] The following year he carried this approach forward in his drafts of the ninth and tenth amendments.

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21 See 5 THE WRITINGS OF JAMES MADISON 431 (Hunt ed. 1904).

22 4 SPARKS, CORRESPONDENCE OF THE AMERICAN REVOLUTION 298 (1853).

23 5 THE WRITINGS OF JAMES MADISON 432 (Hunt ed. 1904).

24 At 282 (Lodge ed. 1888).

But within 3 years thereafter he was to change his emphasis and be on his way to a stricter construction of the Constitution with reference to implied powers. The change began in 1791. It came in the controversy over the national bank bill. Hamilton, in December 1790, had presented to Congress his plan for the establishment of a national bank. The Senate, in January 1791, passed the bank bill without a roll call.[25] In the House Madison argued against its constitutionality on the ground, among others, that no power to charter a bank could be found in the necessary and proper clause: "If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."[26] The House nevertheless passed the bill.[27]

Washington, doubtful of the constitutionality of the measure, asked his cabinet officers for opinions on the point. Jefferson and Hamilton were of course of different views. Jefferson was in favor of a narrow interpretation of the necessary and proper clause; Hamilton, a broad one. Jefferson argued: "[T]he Constitution restrained them to the *necessary* means, that is to say, to those means without which the grant of the power would be nugatory."[28]

Late the same year Hamilton submitted to the House his famous *Report on Manufactures*.[29] In it he contended that Congress had express authority to provide for the general welfare. The objects to which money could be devoted were not narrower than the general welfare itself, and Congress could say what those objects were. The next month Madison wrote to Henry Lee, referring to the Constitution: "If not only the *means*, but the *objects* are unlimited, the parchment had better be thrown into fire at once."[30]

Six years later in his opposition to the Sedition Act of 1798[31] Madison again stated his views on the proper interpretation of the necessary and proper clause. It was in his *Report* on the Virginia Resolutions of 1798.[31a] He was in the process of answering the contention that under the express power of Congress to "suppress Insurrections"[32] one could "imply the power to *prevent* insurrections, by punishing whatever may lead or tend to

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[25] 2 ANNALS OF CONG. 1791 (Jan. 20, 1791).

[26] *Id.* at 1949 (Feb. 2, 1791).

[27] *Id.* at 2012 (Feb. 8, 1791).

[28] 6 THE WORKS OF THOMAS JEFFERSON 201 (Ford ed. 1904). Washington signed the bill, although he held it almost to the last hour allowed him. For Hamilton's opinion see 3 THE WORKS OF ALEXANDER HAMILTON 445 (Lodge ed. 1904).

[29] 4 *id.* at 70.

[30] Letter, Jan. 1, 1792, in 6 THE WRITINGS OF JAMES MADISON 81n. (Hunt ed. 1906).

[31] Ch. 74, 1 Stat. 596.

[31a] 6 THE WRITINGS OF JAMES MADISON 347 (Hunt ed. 1906).

[32] U.S. CONST. art. I, § 8, cl. 15.

them." His answer was that if libels tended to insurrections then the thing to do was to pass and execute laws for the suppression of insurrections, but not for the punishment of libels. He quoted the necessary and proper clause and argued:

> It is not a grant of new powers to Congress, but merely a declaration, for the removal of all uncertainty, that means of carrying into execution those otherwise granted are included in the grant. . . . It may be added, and cannot too often be repeated, that it is a construction absolutely necessary to maintain their consistency with the peculiar character of the Government, as possessed of particular and definite powers only, not of the general and indefinite powers vested in ordinary Governments; for if the power to *suppress insurrections* includes the power to *punish libels,* or if the power to *punish* includes a power to *prevent,* by all the means that may have that *tendency,* such is the relation and influence among the most remote subjects of legislation, that a power over a very few would carry with it a power over all. And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers.[33]

Madison in his *Report*[34] and Jefferson in his opinion on the constitutionality of the national bank bill[35] quoted the tenth amendment. They did not rely on the ninth.

A little over two decades later came the Supreme Court's guiding decision in *McCulloch v. Maryland.*[36] In language reminiscent of that of Madison in *The Federalist No. 44,* Chief Justice John Marshall speaking for the Court gave the classic statement on the interpretation of the necessary and proper clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[37]

Madison was critical of the Court's opinion. In a letter of September 2, 1819, to Judge Spencer Roane of Virginia he referred to "their latitudinary mode of expounding the Constitution," and commented:

> But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. . . .

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[33] 6 THE WRITINGS OF JAMES MADISON 383–84 (Hunt ed. 1906); 4 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 568 (2d ed. 1881) (emphasis in original).

[34] 6 THE WRITINGS OF JAMES MADISON 347 (Hunt ed. 1906); 4 ELLIOTT, *op. cit. supra* note 33, at 547.

[35] 6 THE WORKS OF THOMAS JEFFERSON 198 (Ford ed. 1904).

[36] 17 U.S. (4 Wheat.) 316 (1819).

[37] *Id.* at 421. In that case the Court held that Congress had power to incorporate a bank and that a Maryland statute which taxed a branch of that bank was unconstitutional.

> ... There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with wch. [*sic*] it was meant to be reconcilable.[38]

Toward the end of his life Madison suggested a moderate construction of the Constitution with respect to implied powers. In a letter of January 6, 1831, to Reynolds Chapman, after commenting that in interpreting the Constitution, "where a language technically appropriate may be deficient, the wonder wd. be far greater if different rules of exposition were not applied to the text by different commentators," he continued:

> Thus it is found that in the case of the Legislative department particularly, where a division & definition of the powers according to their specific objects is most difficult, the Instrument is read by some as if it were a Constitution for a single Govt. with powers co-extensive with the general welfare, and by others interpreted as if it were an ordinary statute, and with the strictness almost of a penal one.
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> Between these adverse constructions an intermediate course must be the true one, and it is hoped that it will finally if not otherwise settled be prescribed by an amendment of the Constitution.[39]

Yet not even here, nor in his letter to Judge Roane, did Madison cite the ninth amendment.

The Supreme Court carried forward its approach in *McCulloch v. Maryland*[40] in the *Legal Tender Cases*.[41] There it reasoned that an implied power did not have to be directly traceable to a particular express power: "Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined.... Congress has often exercised, without question, powers that are not expressly given or ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of government."[42]

Recent decisions of the Court have further held that the federal government in its conduct of this country's foreigu affairs has certain inherent

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[38] Letter from James Madison to Judge Spencer Roane, Sept. 2, 1819, in 8 THE WRITINGS OF JAMES MADISON 447–52 (Hunt ed. 1908).

[39] 9 *id.* at 434 (Hunt. ed. 1910).

[40] 17 U.S. (4 Wheat.) 316 (1819).

[41] 79 U.S. (12 Wall.) 457 (1874).

[42] *Id.* at 535. Recently in Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954), the Court applied the principal case to invalidate an act of New York which forbade national banks to use the words "saving" or "savings" in their business or advertising. On implied powers see Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137 (1919).

powers.[43] In one recent case, *Perez v. Brownell*,[44] the Court sustained the validity of an act of Congress which deprived a native-born American citizen of his nationality for voting in a political election in a foreign state, despite the first sentence of the first section of the fourteenth amendment, which expressly provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Court, speaking through Justice Frankfurter, ruled: "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."[45]

A combination of various circumstances contributed to the lack of vitality of the ninth amendment. To begin with, it was never more than a declaration that the people had unenumerated rights. Even its framers forgot about it. For another thing, the first ten amendments were applicable only to the federal government and not to State governments, and the Supreme Court so held. The leading case is *Barron v. Baltimore*,[46] involving a claim by an individual that city officials had taken his property for a public use without just compensation in violation of the fifth amendment. The Court, speaking through Chief Justice Marshall, ruled, referring to the first ten amendments: "These amendments contain no expression indicating an intention to apply them to the state goverments. This court cannot so apply them."[47] In the third place, early constitutional questions involved

[43] Perez v. Brownell, 356 U.S. 44 (1958); Savorgnan v. United States, 338 U.S. 491 (1950); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Mackenzie v. Hare, 239 U.S. 299 (1915).

[44] 356 U.S. 44 (1958).

[45] *Id.* at 57. In United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–18 (1936), the Court gave a greater latitude to federal powers in the foreign field than in the domestic area: "The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . . The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality."

[46] 32 U.S. (7 Pet.) 242 (1833).

[47] *Id.* at 250. This case was followed later at the same term in Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833), involving a claim by an individual of a denial of a right to a jury trial in violation of the seventh amendment. The Court held: "[I]t is now settled that those amendments do not extend to the states . . . ." *Id.* at 551–52. *Accord,* Knapp v. Schweitzer, 357 U.S. 371 (1958); Ohio *ex rel.* Lloyd v. Dollison, 194 U.S. 445 (1904); Bolln v. Nebraska, 176 U.S. 83 (1900); Brown v. New Jersey, 175 U.S. 172 (1899); Thorington v. Montgomery, 147 U.S. 490 (1893); McElvaine v. Brush, 142 U.S. 155 (1891); Eilenbecker v. Plymouth County, 134 U.S. 31 (1890); Spies v. Illinois, 123 U.S. 131 (1887); Edwards v. Elliott, 88 U.S. (21 Wall.) 532 (1874); Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1868); Pervear v. Massachu-

either individual rights under the first eight amendments or disputes primarily between the federal government and one of the States or State officials. For instance, Madison and Jefferson and their supporters rested their opposition to the Sedition Act of 1798 on the first and tenth amendments. Under these amendments they contended that the federal government had no power over advocacy unless connected with criminal conduct other than advocacy.[48] Fourthly, the unenumerated rights which come to mind today, such as the right of privacy, to engage in political activity, of freedom of movement across national boundaries, to knowledge, to confrontation in other than criminal cases, a jury trial in contempt cases, the use of the mails, and to engage in peaceful picketing, did not receive their development until after, and in most instances much after, the adoption of the first ten amendments; and in the interim two other clauses of the Constitution have been applied to safeguard to the individual those rights which in the apt phrasing of Justice Cardozo in the Court's opinion in *Palko v. Connecticut*[49] "have been found to be implicit in the concept of ordered liberty:" the due process clause of the fifth amendment as against federal action, and of the fourteenth amendment as against State action, principally the latter clause.

Recent advocates on behalf of unenumerated rights have occasionally relied on the ninth amendment, usually in connection with the tenth,[50] but such efforts have not been successful. Sometimes such advocates have relied on yet other constitutional provisions than the due process clauses. For example, in *Olmstead v. United States*,[51] a prohibition case, counsel objected to the use in evidence of wiretapped conversations on the grounds of a violation of the fourth amendment's prohibition against unreasonable searches and seizures, and the fifth amendment's guarantee of the privilege against self-incrimination. Or again, in *United Public Workers v. Mitchell*,[52] involving a challenge to the constitutionality of a portion of section 9(a) of the Hatch Act,[53] counsel rested the right to engage in political activity on the first, ninth and tenth amendments as well as the due

setts, 72 U.S. (5 Wall.) 475 (1866); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847). See also Miller v. Texas, 153 U.S. 535, 538 (1894); *In re* Sawyer, 124 U.S. 200, 219 (1888); United States v. Cruikshank, 92 U.S. 542 (1875); The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869).

[48] For a fuller discussion of this point see Rogge, *"Congress Shall Make No Law . . . "*, 56 MICH. L. REV. 331, 344–65, 367–74, 579 (1958).

[49] 302 U.S. 319, 325 (1937).

[50] See, *e.g.*, Roth v. United States, 354 U.S. 476 (1957); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); Ashwander v. TVA, 297 U.S. 288 (1936).

[51] 277 U.S. 438 (1928).

[52] 330 U.S. 75 (1947).

[53] 53 Stat. 1148 (1939), as amended, 5 U.S.C. § 118i(a) (1958).

process clause of the fifth amendment. More and more, however, counsel who urged the recognition of unenumerated rights relied on the due process clauses of the fifth and fourteenth amendments.

In the *Olmstead* and *United Public Workers* cases the individual lost. On the other hand, the response of the Court has been such to claims under the due process clauses that in two passport cases at the last term, those involving Rockwell Kent,[54] an artist, and Dr. Walter Briehl,[55] a Los Angeles psychiatrist, the Government conceded that under the due process clause of the fifth amendment individuals had a constitutional right to travel.[56] A consideration of some unenumerated rights will help to fill in the picture.

PRIVACY

During the current century we developed a general right to privacy, a right to be let alone. The starting point for this development was an article by Justice Brandeis, before he reached the bench, and Samuel D. Warren, in the December 1890 issue of the *Harvard Law Review*.[57] Later Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*,[58] described the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men."[59] Not quite 15 years after the Brandeis and Warren article the Supreme Court of Georgia recognized a right of privacy.[60] Since then twenty-three more States and the District of Columbia recognized such a right judicially and three others provided for it to a modified extent by statute.[61] Only four States denied it, and one of these, New York, was one of the three which provided for it in modified form by legislation.[62] It did so almost immediately after the decision denying the right.

But during the current century we also developed a practice which invaded one's right of privacy—wiretapping. In recent years many public officials have taken the position that wiretapping is necessary in certain

[54] Kent v. Dulles, 357 U.S. 116 (1958), *reversing* 248 F.2d 600 (D.C. Cir. 1957).

[55] Kent v. Dulles, 357 U.S. 116 (1958), *reversing* 248 F.2d 561 (D.C. Cir. 1957).

[56] Brief for Respondent, p. 26.

[57] Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[58] 277 U.S. 438 (1928).

[59] *Id.* at 478.

[60] Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905).

[61] To the cases collected in Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538 (D. Conn. 1953), add Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W.2d 762 (1957); Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956); Roach v. Harper, 105 S.E.2d 564 (W. Va. 1958); *cf.* Gouldman-Taber Pontiac, Inc. v. Zerbst, 213 Ga. 682, 683, 100 S.E.2d 881, 882 (1957); *see* Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948).

[62] To the cases collected in Hazlitt v. Fawcett Publications, Inc., *supra* note 61, add Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

cases in order to protect this country's national security. For instance, in May 1953 Attorney General Herbert Brownell, Jr., 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."[63] Before and since that time various members of Congress introduced many such bills, but so far they have failed of passage.[64]

The reason for legislation is that it may fairly be contended that Congress sought to outlaw wiretapping in section 605 of the Federal Communications Act of 1934: "[A]nd no person not being authorized by the sendor shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ."[65] However, this measure is only part of wiretapping's brief but interesting history.

In 1924 Chief Justice Stone as Attorney General forbade wiretapping by the FBI as "unethical tactics." But in 1928 in *Olmstead v. United States*[66] the Supreme Court in a five to four split allowed the use of wiretap evidence. Chief Justice Taft wrote the majority opinion. The four dissenters were Justices Holmes, Brandeis, Butler and Stone. It was in this case that Justice Holmes in his dissent characterized wiretapping as dirty business: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an iguoble part. . . . If the existing code does not permit district attorneys to

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[63] N.Y. Times, May 9, 1953, p. 9, col. 6.

[64] See, *e.g.*, S. 2418 (Senator Norris Cotton of New Hampshire), H.R. 104 (Celler), H.R. 8340 (Congressman Edgar W. Hiestand of California), 84th Cong., 1st Sess. (1957); S. 4181 (Senators Joseph C. O'Mahoney of Wyoming, Price Daniel of Texas, James O. Eastland of Mississippi, Herman Welker of Idaho, and John M. Butler of Maryland) (narcotic offenses), 84th Cong., 2d Sess. (1956); H.R. 762 (Congressman E. L. Forrester of Georgia), H.R. 867 (Congressman Edwin E. Willis of Louisiana), H.R. 4513 (Celler), H.R. 4728 (Congressman Lawrence Curtis of Massachusetts), H.R. 5096 (Congressman Kenneth B. Keating of New York), 84th Cong., 1st Sess. (1955); H.R. 7107 (Congressman Kit Clardy of Michigan, H.R. 8649 (Keating), 83d Cong., 2d Sess. (1954); S. 832 (Senator Alexander Wiley of Wisconsin), H.R. 408 (Congressman Emanuel Celler of New York), H.R. 477 (Keating), H.R. 3552 (Congressman Francis E. Walter of Pennsylvania), H.R. 5149 (Congressman Chauncey W. Reed of Illinois), 83d Cong., 1st Sess. (1953).

In Benanti v. United States, 355 U.S. 96, 106 n.18 (1957), Mr. Chief Justice Warren noted in the Court's opinion: "In passing, it should be pointed out that several Attorneys General of the United States have urged Congress to grant exceptions to § 605 to federal agents under limited circumstances. See, *e.g.*, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 762, 867, 4513, 4728, 5096, 84th Cong., 1st Sess. 28; Rogers, The Case for Wire Tapping, 63 YALE L.J. 792 (1954)."

[65] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[66] 277 U.S. 438 (1928).

have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed."[67]

Three years later Attorney General Mitchell announced that the Department of Justice would approve wiretapping when requested by the director of the bureau concerned. Despite the enactment of section 605, the Department of Justice continued to countenance wiretapping in criminal cases of "extreme importance," although not "in minor cases, nor on Members of Congress, or officials, or any citizen except where charge of a grave crime had been lodged against him."[68]

Two States under certain circumstances sanctioned wiretapping. Massachusetts by statute permitted it "when authorized by written permission of the attorney general of the commonwealth, or of the district attorney for the district."[69] New York after an intense and prolonged debate in its constitutional convention of 1938 adopted a provision authorizing *ex parte* warrants to wiretap.[70] A few years later a statute implemented this provision.[71]

But the United States Supreme Court in three cases between 1937–39 broadly enforced the prohibition in section 605. It refused to permit the use in a federal court of evidence so obtained,[72] as well as leads from such

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[67] *Id.* at 470.

[68] See Statement of Attorney General Jackson, March 13, 1940, 86 CONG. REC. App. 1471–72 (1940).

[69] MASS. ANN. LAWS ch. 272, § 99 (1956).

[70] N.Y. CONST. art. I, § 12, para. 2 (in part): "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

[71] N.Y. CODE CRIM. PROC. § 813-a. This section authorized 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 communiation 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 or satisfying himself of the existence of reasonable grounds for the granting of such application." This statute was adopted in 1942.

The New York constitutional and statutory provisions providing for warrants to wiretap were held not to violate § 605 of the Federal Communications Act. 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), Justice Samuel H. Hofstadter, 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.

[72] Nardone v. United States, 302 U.S. 379 (1937).

evidence,[73] and extended its rulings to wiretaps of intrastate communications.[74] The next year Attorney General Jackson announced a return to the Stone policy of 1924. He concluded that wiretapping could not be done unless Congress saw fit to modify the existing statutes. However, a year later he changed his mind about the proper interpretation of section 605. In March 1941 in a letter to the House Judiciary Committe urging the adoption of pending wiretap legislation he stated: "The only offense under the present law is to intercept any communication and divulge or publish the same. Any person, with no risk of penalty, may tap telephone wires . . . and act upon what he hears or make any use of it that does not involve divulging or publication."[75] In the following years wiretapping grew apace. Public officials, national, State and municipal, as well as private persons engaged in it, so much so that one writer concluded:

> For, despite the statutes and judicial decisions which purport to regulate wire tapping, today this practice flourishes as a wide-open operation at the federal, state, municipal, and private levels.
>
> A wealth of collected information discloses that the conversations of public officials in every sort of government agency, bureau, and political subdivision have been tapped. Reports are legion that private citizens have had their conversations recorded. All kinds of business organization and social, professional, and political groups have been listed as victims. There are charges that wire tapping may be an essential part of the Federal Bureau of Investigation's population-wide 'loyalty' probe. And recently complaints have been made that telephones of United Nations delegates and employees are under surveillance, as well as the telephones of foreign embassies, legations, and missions in the United States.
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> . . . .
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> In short, although wire tapping is a crime in almost every state, and although there is a federal law prohibiting the interception and divulging of the contents of telephone communications, wire tapping is carried on virtually unimpeded in the United States today.[76]

Moreover, during the time of Chief Justice Fred M. Vinson the judiciary weakened somewhat in its stand against the use of wiretap evidence in court proceedings. In *Schwartz v. Texas*[77] the Supreme Court sustained the use of such evidence in a State court proceeding even though the State, Texas, had a statutory provision which rendered inadmissible in criminal trials evidence obtained in violation of the constitution or laws of the State

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[73] Nardone v. United States, 308 U.S. 338 (1939).

[74] Weiss v. United States, 308 U.S. 321 (1939).

[75] *Hearings on H.R. 2266 and H.R. 3099 Before Subcommittee No. 1 of the House Committee on the Judiciary,* 77th Cong., 1st Sess. 18 (1941).

[76] Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal,* 52 COLUM. L. REV. 165, 167–68 (1952). See also Donnelly, *Comments and Caveats on the Wire Tapping Controversy,* 63 YALE L.J. 799 (1954).

[77] 344 U.S. 199 (1952).

or the Constitution of the United States. Only Mr. Justice Douglas dissented:

> It is true that the prior decisions of the Court point to affirmance. But those decisions reflect constructions of the Constitution which I think are erroneous. They impinge severely on the liberty of the individual and give the police the right to intrude into the privacy of any life. The practices they sanction have today acquired a momentum that is so ominous I cannot remain silent and bow to the precedents that sanction them.[78]

Three years later the United States Court of Military Appeals in three cases held that section 605 did not bar the use of wiretap evidence in courts-martial where it was obtained under these circumstances: (1) By interception of messages initiated and received on facilities operated by the Army independently of commercial telephone systems; (2) by interception of telephone messages initiated and received in foreign countries; and (3) by listening on an extension telephone, with an informer's consent, to a conversation which the informer initiated with an accused person.[79] The next year in *Sugden v. United States*[80] the Supreme Court held that the Government could tap radio communications broadcast over a licensed farm radio station by unlicensed operators.

Of course, private individuals who violated section 605 were indicted, convicted and sentenced.[81] A similar thing happened to individuals in State prosecutions in Massachusetts and New York.[82] The individual in New York was John G. (Steve) Broady, a lawyer. After his conviction Broady was disbarred. This is but another of the instances, as in the case of capital punishment, where society permits itself conduct which it denies to the individual.

Although the *Sugden* case was decided during the time of Mr. Chief Justice Earl Warren, the stand of the Court against the use of wiretap evidence has again become strong. Recently, in *Benanti v. United States*,[83]

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[78] *Id.* at 205.

[79] United States v. Noce, 5 U.S.C.M.A. 715, 19 C.M.R. 11 (1955); United States v. De-Leon, 5 U.S.C.M.A. 747, 19 C.M.R. 43 (1955); United States v. Gopaulsingh, 5 U.S.C.M.A. 772, 19 C.M.R. 68 (1955). *But cf.* United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952), where the court reversed conviction for the double reason that the prosecution did not show in open court that none of the wirestaps led to any of the evidence there involved, and that the defense was unduly prevented from learning whether the information which originally led to the tracking of her movements was itself the result of a wiretap.

[80] 351 U.S. 916 (1956), *affirming per curiam*, 226 F.2d 281 (9th Cir. 1955).

[81] Massicot v. United States, 254 F.2d 58 (5th Cir.), *cert. denied*, 358 U.S. 816 (1958); United States v. Gris, 247 F.2d 860 (2d Cir. 1957), *affirming* 146 F. Supp. 293 (S.D.N.Y. 1956).

[82] Commonwealth v. Publicover, 327 Mass. 303, 98 N.E.2d 633 (1951); People v. Broady, 5 N.Y.2d 500, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959), *affirming* 6 App. Div. 2d 674, 174 N.Y.S.2d 218 (1st Dep't 1958), *appeal dismissed, cert. denied*, 80 S. Ct. 57 (1959).

[83] 355 U.S. 96 (1957). New York courts have divided on the effect of this decision on State proceedings. Justice Hofstadter, in In the Matter of Interception of Tel. Communications, 9 Misc. 2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958), ruled that under it no State wiretap order could lawfully be issued. *But cf.* People v. Dinan, 6 N.Y.2d 715, 158 N.E.2d 501, 185 N.Y.S.2d

the Court, speaking through Mr. Chief Justice Warren, held that wiretap evidence, even though procured by New York officials in accordance with that State's constitutional and statutory provisions and without participation by federal authorities, was nevertheless inadmissible in a federal criminal prosecution because of section 605.

But suppose Congress were now to make a law that in any instance where the Attorney General approved it, wiretapping was permissible in investigations relating to our national security. On what constitutional grounds would counsel for the individual attack it? In view of the eloquent dissenting opinions in *Olmstead v. United States*,[84] his first ground would be the fourth amendment. He would quote, as Brandeis did, Chief Justice Marshall's language to the effect that it is a constitution, the Constitution, which the Court is expounding and that the Court is to construe it in such a way as to make it as nearly immortal as human institutions can ever be, and that under such an approach wiretapping violates the fourth amendment's prohibition against unreasonable searches. His second ground would be the due process clause of the fifth amendment. If he relied on the ninth amendment at all, it would only be at best as an added last ground.

POLITICAL ACTIVITY

One of the oldest of the unenumerated rights is that to engage in political activity. At the time of the framing and adoption of the first ten amendments political parties were still in the process of forming. There were federalists and anti-federalists. There were republicans and anti-republicans. But there were as yet no political parties. Indeed, Washington frowned upon their growth. He regarded them as both factional and sectional. When he was conferring with Madison in May 1792 about his wish to retire at the end of his first term and about the manner of his announcement to do so, he complained about the "spirit of party" that was growing in the Government and was dividing the Secretaries of State and the Treasury (Jefferson and Hamilton). Madison responded that the new spirit of party was an argument for Washington's remaining.[85]

Washington asked Madison to prepare for him a draft of a farewell

806, *cert. denied*, 80 S. Ct. 71 (1959), *affirming* 7 App. Div. 2d 119, 181 N.Y.S.2d 122 (2d Dep't), *reversing* 15 Misc. 2d 211, 172 N.Y.S.2d 496 (Westchester County Ct. 1958) (wiretap evidence admissible); People v. Grant, 14 Misc. 2d 182, 179 N.Y.S.2d 384 (N.Y. County Ct. Gen. Sess. 1958). The Pennsylvania Supreme Court likewise ruled that wiretap evidence was admissible in a State criminal proceeding. Commonwealth v. Voci, 393 Pa. 404, 143 A.2d 652 (1958), *cert. denied*, 358 U.S. 885 (1958); Commonwealth v. Chaitt, 380 Pa. 532, 112 A.2d 379 (1955).

In Burack v. State Liquor Authority, 160 F. Supp. 161 (E.D.N.Y. 1958), the court held that a New York liquor retailer was entitled to have the State Liquor Authority enjoined from using wiretap evidence in a proceeding to revoke or suspend the plaintiff's license.

[84] 277 U.S. 438 (1928).

[85] See 6 THE WRITINGS OF JAMES MADISON 108 (Hunt ed. 1906).

address. Madison did so, but in his draft he did not condemn political parties. However, when Washington and Hamilton finished with Madison's draft 4 years later it did contain such a condemnation. Washington in his Farewell Address, published in September 1796, warned "in the most solemn manner against the baneful effects of the Spirit of Party."[86]

Madison could not have condemned political parties, for he favored their development. Indeed, he may be said to have been the first to have given a name as such to a political party in this country. In an article entitled *A Candid State of Parties,* published in September 1792, he said, referring to the party of Jefferson and himself: "The republican party, as it may be termed . . . ."[87] Before that the name, as Irving Brant pointed out, "was simply the expression of a state of mind."[88]

Thus political parties and the right to engage in political activity, although not contemporaneous with the framing and adoption of the federal Bill of Rights, go back almost that far. And in a recent case, *Sweezy v. New Hampshire,*[89] involving a contempt conviction of a socialist who lectured at the University of New Hampshire and who refused to answer the inquiries of the Attorney General of New Hampshire about his lecture and about the activities of his wife and others in the formation of the Progressive Party in that State, Mr. Justice Frankfurter in a concurring opinion in which Mr. Justice Harlan joined, recognized not only a right to engage in political activity but also a right of political privacy:

> But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.[90]

But section 9(a) of the Hatch Act, as amended, now provides in its second sentence: "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns." Is such a provision constitutional? The Court in *United Public Workers v. Mitchell*[91] held that it was, saying:

> [W]hen objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry

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86 See 35 THE WRITINGS OF GEORGE WASHINGTON 226 (Fitzpatrick ed. 1940).

87 6 THE WRITINGS OF JAMES MADISON 119 (Hunt ed. 1906).

88 BRANT, JAMES MADISON FATHER OF THE CONSTITUTION 348 (1950).

89 354 U.S. 234 (1957), *reversing* 100 N.H. 103, 121 A.2d 783 (1956).

90 *Id.* at 265. The Court upset the conviction.

91 330 U.S. 75 (1947).

> must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments must fail.[92]

This language was quoted with approval in the recent *Roth* case.[93] The Court, although it did not distinguish between express and implied powers, was dealing with an implied power. Specifically the Court ruled: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with efficiency of the public service."[94] In the case of a conflict between an implied power and an unenumerated right, the power will prevail. Madison would have assumed as much, for he felt that the best check to power was a rival power.

FREEDOM OF MOVEMENT

The unenumerated right which the Government conceded was that to travel. King John of England more than seven centuries earlier made a comparable concession in clause forty-two of the Magna Carta: "It shall be lawful in future, unless in time of war, for anyone to leave Our Kingdom and to return, safe and secure by land and water, saving his fealty to Us, for any short period, for the common benefit of the realm, except prisoners and outlaws according to the law of the land, and people of a country at war with Us." Our Government gave its concession in its brief in the *Kent* and *Briehl* cases:

> On that point, there is no controversy between the parties. For, while this Court has not yet decided whether the Constitution protects the travel of citizens across the boundaries of the nation as it protects their travel across state boundaries, we do not challenge, but readily accept, the existence of a general 'natural' or 'constitutional' right to depart from or enter the country as an aspect of the 'liberty' subject to the protections of the Constitution. We fully accede to the definitive ruling of *Shachtman v. Dulles*, 225 F.2d 938, 941 (C.A.D.C.)—confirmed in substance in the opinions below—that there is a 'right to travel' and that restraints on that right must conform to the Fifth Amendment . . . .[95]

The Court, although not reaching any constitutional issue, accordingly commented through Mr. Justice Douglas: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process

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[92] *Id.* at 96.

[93] Roth v. United States, 354 U.S. 476, 493 (1957).

[94] United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947).

[95] Brief for Respondent, p. 26, Kent v. Dulles, 357 U.S. 116 (1958), *reversing* 248 F.2d 561, 600 (D.C. Cir. 1957).

of law of the Fifth Amendment."[96] The decision was by a five to four vote.

In view of the insistence in this country, almost from colonial times, on the freedom to cross State lines as one of the privileges of citizenship, it could be contended that egress and ingress across national boundaries was an implied constitutional privilege of federal citizens. For instance, article IV, the privileges and immunities provision, of the Articles of Confederation, 1777, declared: "the people of each State shall have free ingress and regress to and from any other State . . . ." Or again, when the people of Missouri in their constitution of 1820 instructed their general assembly to pass laws which would "prevent free negroes and mulattoes from coming to, and settling in this state, under any pretext whatsoever,"[97] the anti-slavery people protested on the ground that this clause violated article IV, section 2 of the Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." They argued that in some States free Negroes were citizens and thus had the privilege to cross State lines. Their opponents contended that Negroes were not citizens within the meaning of the Constitution. The House, on the motion of Henry Clay of Kentucky, referred the problem to a committee of 23—the number of States in the Union at that time.[98] On the report of this committee the House and the Senate resolved that Missouri was to be admitted "upon the fundamental condition, that the fourth clause of the twenty-sixth section of the third article of the constitution . . . shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States."[99]

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[96] Kent v. Dulles, 357 U.S. 116, 125 (1958) (see notes 54, 55 *supra*). In its concluding paragraph the Court added: "To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect." *Id.* at 130. The actual holding was that Congress had not authorized the Secretary of State to deny a passport to one because of a refusal to swear whether one was or ever had been a Communist.

The Court ruled against the State Department at the last term in a third passport case, that involving Weldon Bruce Dayton, a cosmic-ray physicist. Dayton v. Dulles, 357 U.S. 144 (1958), *reversing* 254 F.2d 71 (D.C. Cir. 1957).

In Scachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955), Circuit Judge Charles Fahy in the court's opinion characterized the freedom to go from place to place as "a natural right." Chief Judge Henry W. Edgerton in a concurring opinion stated: "Freedom to leave a country or a hemisphere is as much a part of liberty as freedom to leave a State." *Id.* at 944. The Government in its brief in the *Kent* and *Briehl* cases adopted both concepts. Mr. Justice Douglas for the Court regarded freedom of movement as a constitutional rather than a natural right.

[97] Mo. Const. art. III, § 26 (1820).

[98] Annals of Cong., 16th Cong., 2d Sess. 1219–20 (1821).

[99] Resolution Providing for the Admission of the State of Missouri into the Union, 3 Stat. 645 (1821). This measure further provided that when the Missouri Legislature made a declaration of assent to this fundamental condition and furnished a copy to the President, he should

Or yet again, in *Crandall v. Nevada*,[100] which arose before the adoption of the fourteenth amendment, the Court invalidated a State "capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire" on the ground that freedom to cross State lines was to be inferred "from the Constitution itself, and from the decisions of this court in exposition of that instrument."[101] Although Chief Justice Stone in his dissenting opinion in *Colgate v. Harvey*,[102] citing a statement in *Helson & Randolph v. Kentucky*,[103] stated that the *Crandall* case to the extent that it relied on privileges and immunities rather than on the commerce clause had been overruled, it is submitted that Mr. Justice Douglas in his concurring opinion in *Edwards v. California*[104] is right in his insistence that the *Crandall* case should continue to rest "on the broader ground of rights of *national* citizenship."[105]

Mr. Justice Douglas in the Court's opinion in the *Kent* and *Briehl* cases cited *Crandall v. Nevada*,[106] *Williams v. Fears*,[107] and *Edwards v. Cali-*

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by proclamation declare the new State to be admitted. The Missouri Legislature at a special session in June 1821 made the required declaration and on August 10, 1821, President Monroe proclaimed Missouri a State. Presidential Proclamation Respecting Admission of the State of Missouri, 3 Stat., app. II (1821).

[100] 73 U.S. (6 Wall.) 35 (1868).

[101] *Id.* at 49. In Truax v. Raich, 239 U.S. 33, 39 (1915), Justice, later Chief Justice, Hughes speaking for the Court said with reference to an alien duly admitted into the United States: "He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any State in the Union."

[102] 296 U.S. 404, 444 (1935).

[103] 279 U.S. 245, 251 (1929).

[104] 314 U.S. 160 (1941).

[105] *Id.* at 180. In that case the Court under the commerce clause invalidated a State statute which made it a misdemeanor knowingly to bring or assist in bringing a nonresident "indigent person" into the State. The Court on various occasions has commented on the freedom to cross State lines, usually as a privilege of national citizenship. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873), the Court through Justice Miller in listing the privileges and immunities of citizens of this country said: "One of these is well described in the case of *Crandall v. Nevada.* It is said to be the right of the citizen of this great country, protected by implied guaranties of its Constitution, 'to come to the seat of government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.'" In Williams v. Fears, 179 U.S. 270, 274 (1900), the Court through Chief Justice Fuller stated: "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution." In Twining v. New Jersey, 211 U.S. 78, 97 (1908), the Court through Justice Moody in enumerating the rights and privileges of national citizenship began: "Thus among the rights and privileges of national citizenship recognized by this Court are the right to pass freely fom State to State, Crandall v. Nevada . . . ."

[106] 73 U.S. (6 Wall.) 35 (1868).

[107] 179 U.S. 270 (1900).

fornia[108] as support for the proposition: "Freedom of movement is basic in our scheme of values."[109] However, he did not specifically describe freedom as one of the privileges of American citizens.

Furthermore, if one were to rest one's argument in support of the freedom of movement on the ground that such freedom was a privilege of national citizenship, one's argument would benefit only those who are citizens. It would not help those who have a resident status here but who are not citizens. In view of this and in view of the Government's concession in the *Kent* and *Briehl* cases and the Court's statement in those cases that the fifth amendment's due process clause protected an individual's freedom of movement, one will base one's support of this right on that clause.

Infringements on the right of freedom of movement have arisen in various ways. For one thing, the State Department has refused to validate or to issue passports for travel to certain countries. For instance, in 1956 the State Department announced that it would refuse to validate United States passports for American newsmen to travel to Communist China. Three newsmen nevertheless went. One of these was William D. Worthy of the *Baltimore Afro-American*. He had his passport revoked. In 1957 the State Department refused to validate Mrs. Franklin D. Roosevelt's passport for travel to Communist China. She wanted to make a news-gathering journey there and hoped to interview some of the members of the Communist regime.[110] Or again the following year the State Department took similar action with reference to Waldo Frank,[111] an author, who had been invited to lecture at the University of Peiping on the works of Walt Whitman. The State Department also refused a passport to Mr. Worthy.[112]

In the second place, the State Department has denied passports to those Americans whom it regarded as members, or followers, or supporters of the international Communist movement. This list is a long one. In addition to Rockwell Kent, Dr. Walter Briehl and Weldon Bruce Dayton, it includes: Paul Robeson, the singer; Martin D. Kamen of St. Louis, an atomic scientist; Leonard B. Boudin, a New York lawyer; Dr. Otto Nathan, Albert Einstein's executor; engineer Henry Willcox and his wife; screen writer Carl N. Foreman; and playwrights Edward Chodorov and Donald Ogden Stewart. It includes many others that we do not know about. In the third place, the State Department has often denied passports on the basis of confidential information.

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[108] 314 U.S. 160 (1941).

[109] 357 U.S. 116, 126 (1957).

[110] N.Y. Times, June 26, 1957, p. 1, col. 3.

[111] N.Y. Times, Nov. 13, 1958, p. 7, cols. 3–5.

[112] N.Y. Times, Dec. 30, 1958, p. 23, col. 5. However, in 1959 the State Department did grant passports valid for travel to Communist China to W. Averell Harriman, former governor of New York, and Vincent Sheean, a free-lance foreign correspondent.

A few of those to whom the State Department denied passports went to court, and in 1958 the Supreme Court in the *Kent* and *Briehl*,[113] and *Dayton*[114] cases held that the Secretary of State in denying passports to the petitioners acted without authority. However, in the instances of Messrs. Worthy and Frank the courts have so far sustained the State Department.[115] On September 30, 1959, both asked the Supreme Court to review their cases.[116] Representative Charles O. Porter also asked the State Department for a passport for travel to Communist China, was turned down and went to court. He felt that it was "the duty and prerogative of a Congressman to see the world about which he legislates."[117] Federal District Judge McGuire granted the Government's motion for a summary judgment. Congressman Porter then applied for Supreme Court review. In all three cases the Court denied it.[117a]

Furthermore, and despite the Supreme Court's opinions in the *Kent* and *Briehl* and *Dayton* cases, the President and the Secretary of State urgently requested legislation to authorize the latter to do what he sought to do in those and other cases. Just 3 weeks after the Court's decisions in those cases President Eisenhower sent a message to Congress in which he said: "It is essential that the Government today have power to deny passports where their possession would seriously impair the conduct of the foreign relations of the United States or would be inimical to the security of the United States. . . . The Secretary of State will submit to the Congress a proposed draft of legislation to carry out these recommendations. I wish to emphasize the urgency of the legislation I have recommended . . . ."[118] The next day Secretary of State John Foster Dulles sent to Congress the adminis-

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[113] Kent v. Dulles, 357 U.S. 116 (1958) (see notes 54, 55 *supra*).

[114] Dayton v. Dulles, 357 U.S. 144 (1958). Others who went to court successfully were Dr. Nathan, Mr. Boudin and former judge William Clark. In Dulles v. Nathan, 225 F.2d 29 (D.C. Cir. 1955), the court ordered Dr. Nathan's complaint dismissed, but only because the Government advised it that he had gotten his passport. Previously District Judge Henry A. Schweinhaut had denied the Government's motion to dismiss Dr. Nathan's complaint. Nathan v. Dulles, 129 F. Supp. 951 (D.D.C. 1955). Judge Schweinhaut had made a similar ruling with reference to a similar complaint of Judge Clark. Clark v. Dulles, 129 F. Supp. 950 (D.D.C. 1955). In Boudin v. Dulles, 136 F. Supp. 218 (D.D.C. 1955), District Judge Luther W. Youngdahl ruled that in a passport hearing all the evidence upon which the passport office relied for its decision "must appear on record so that the applicant may have the opportunity to meet it and the court to review it." *Id.* at 222. However, the Court of Appeals for the District of Columbia Circuit did not find it necessary to reach this question. Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956).

[115] Worthy v. Herter, 270 F.2d 905 (D.C. Cir. 1959); Frank v. Herter, 269 F.2d 245 (D.C. Cir. 1959).

[116] 28 U.S.L. WEEK 3093 (U.S. Sept. 30, 1959) (Nos. 444, 445).

[117] N.Y. Times, Sept. 29, 1959, p. 25, col. 1.

[117a] Porter v. Herter, 80 S. Ct. 260 (1959); Frank v. Herter, 80 S. Ct. 256 (1959); Worthy v. Herter, 80 S. Ct. 255 (1959).

[118] 104 CONG. REC. 13046, 13062 (1958).

tration's proposed bill. The same day Senator Theodore F. Green of Rhode Island introduced it in the Senate[119] and Representative, now Senator, Kenneth B. Keating of New York in the House.[120] This bill contained many restrictive provisions. It proposed the denial of a passport wherever to grant it would be inimical to the security of the United States. An applicant had to state whether at any time within the past 10 years he had been a supporter of the international Communist movement. The bill sought to create a Passport Hearing Board, consisting of three officers of the State Department, which could consider oral or documentary evidence without making such evidence part of the open record. Both before and after the introduction of the administration's bill various members of Congress introduced many similar bills.[121] Some of these were even more restrictive of an individual's right to freedom of movement than was the administration's bill. None of these measures passed, but another Congress is in session.

Such a measure will impair at least three unenumerated rights: freedom of movement, knowledge, and confrontation with the witnesses against one. As for the right to freedom of movement, counsel's reliance will be on the due process clause of the fifth amendment. He will probably not even cite the ninth amendment.

KNOWLEDGE

One of the newest of the unenumerated rights is that to knowledge. Our attention was focused on this right not only by the restrictive policy of the State Department in the issuance of passports and the granting of visas,[122]

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[119] S. 4110, 85th Cong., 2d Sess. (1958).

[120] H.R. 13318, 85th Cong., 2d Sess. (1958).

[121] See, *e.g.*, S. 3344 (Senators Thomas C. Hennings, Jr., of Missouri, Clinton P. Anderson of New Mexico, John A. Carroll of Colorado, Dennis Chavez of New Mexico, Joseph S. Clark of Pennsylvania, Ralph E. Flanders of Vermont, Hubert H. Humphrey of Minnesota, Irving M. Ives of New York, Jacoh K. Javits of New York, William Langer of North Dakota, Warren G. Magnuson of Washington, Wayne Morse of Oregon, James E. Murray of Montana, Richard L. Neuberger of Oregon, William E. Proxmire of Wisconsin, and Stuart Symington of Missouri), S. 4030 (Eastland), S. 4065 (Senator Everett M. Dirksen of Illinois), H.R. 9937 (Walter), H.R. 12983 (Congressman Patrick J. Hillings of California), H.R. 12989 (Walter), H.R. 13005 (Congressman Harold R. Collier of Illinois), H.R. 13699 (Congressman John M. Vorys of Ohio), H.R. 13700 (Congressman Armistead I. Selden, Jr., of Alabama), H.R. 13760 (Selden), H.R. 13761 (Vorys), H.R. 13769 (Curtis of Massachusetts), H.R. 13788 (Congressman Wayne L. Hays of Ohio), 85th Cong., 2d Sess. (1958).

[122] The State Department denied visas to a number of well-known foreigners who wanted to visit us, for examples, Nobel Prize-winning physicist Professor P. A. M. Dirac, Cambridge University, England, and the Dean of Canterbury, Dr. Hewlett Johnson. There were many more visa rebuffs that did not become public knowledge. According to a report from the Federation of American Scientists, visa difficulties blocked or seriously delayed 100 foreign scientists invited to the United States by Harvard, Princeton, Stanford and other leading universities, medical institutions and, in several instances, prominent business concerns; and led seven international scientific organizations to prefer meeting abroad. N.Y. Times, Dec. 5, 1955, p. 14, cols. 3–4. Addressing himself to this situation, Professor Kirtley F. Mather, internationally known Harvard geologist, in his retiring speech as president of the American Association for the Advance-

but also by the studies on official secrecy of the Special Subcommittee on Government Information. This subcommittee is under the chairmanship of Representative John E. Moss of California. It prepared a report in which it concluded:

> Slowly, almost imperceptibly, a paper curtain has decended over the Federal Government. Behind this curtain lies an attitude novel to democratic government—an attitude which says that we, the officials, not you, the people, will determine how much you are to be told about your own Government.
> The paper curtain, now many layers thick, is not the fault of any one administration or any one party. It has developed over a 30-year period. And it began with the very 'bigness' of Federal Government that is accepted today by the leadership of both political parties . . . .
> Unfortunately, there has existed and still does exist in high governmental and military circles a strange psychosis that the Government's business is not the people's business. . . . This psychosis persists to the point where some Government officials decide what is good for the public to know.[123]

The subcommittee noted as one of "the most ominous developments" an effort to extend government control over non-security information which was not eligible for classification.[124] It further found that the informational policies and practices of the Defense Department were "the most restrictive —and at the same time the most confused—of any major branch of the Federal Government. . . . The Defense Department and its component branches are classifying documents at such a rate that the Pentagon may some day become no more than a huge storage bin protected by triple-combination safes and a few security guards."[125]

During the course of the hearings which the subcommittee conducted, Trevor Gardner, former Assistant Secretary of the Air Force for Research and Development, related an incident which epitomized what has happened. He told of the case of a scientist of international reputation who had his clearance withdrawn, but who had such inventive ability that he kept com-

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ment of Science, charged that the Internal Security Act of 1950 and the Immigration and Nationality Act of 1952 had "dropped a 'redtape curtain' around the United States." This, he said, "in many evil ways resembles the Iron Curtain around the Soviet Union." N.Y. Times, Dec. 29, 1952, p. 8, col. 3. George F. Kennan, former Ambassador to Russia, touched on the same point in a 1953 convocation at the University of Notre Dame: "The remote pasts of foreign artists and scholars are anxiously scanned before they are permitted to enter our land, and this is done in proceedings so inflexible in concept and offensive in execution that their very existence often constitutes a discouragement to cultural interchange. The personal movements and affairs of great scholars and artists are thus passed upon and controlled by people who have no inkling of understanding for the creative work these same scholars and artists perform. In this way, we begin to draw about ourselves a cultural curtain similar in some respects to the iron curtain of our adversaries."

123 House Comm. on Government Operations, *Availability of Information from Federal Departments and Agencies,* H.R. REP. No. 2947, 84th Cong., 2d Sess. 81–82, 89 (1956).

124 *Id.* at 83.

125 *Id.* at 88–89.

ing up with secret and top secret ideas. The Air Force solved the problem by giving him an unclassified contract. However, as soon as he produced interesting results, they classified the results and he no longer had access to them.[126]

The problem of official secrecy reached such proportions that two leading newspapermen published books on it in 1956: Kent Cooper, *The Right to Know;* and James Russell Wiggins, *Freedom or Secrecy?* Cooper was formerly executive director of *The Associated Press,* and Wiggins was executive editor of the *Washington Post* and *Times-Herald.* Cooper had written his book some years earlier. In a newly written foreword he said:

> Practically all of this book was written five years ago. At that time and earlier a trend in the withholding of news was discernible. I decided to defer publication for a few years to see if within that time the government of this free country would reverse the trend.
> It has not done so. Instead, in its treatment of news it is in some respect slowly pressing toward the totalitarian pattern. It is doing so, in my opinion, with no intention of contravening a canon of liberty and without realizing that it was the antithesis of this practice that helped to make this nation great.[127]

Wiggins had earlier criticized the "ominous" secrecy prevalent in the Defense Department and the National Security Council.[128] Under one of Secretary Wilson's directives, advising defense project contractors to release no information that might be of "possible value to a potential enemy," the military can encourage management to suppress the release even of certain unclassified economic information.

The National Bar Association devoted the January 1959 issue of its *Journal* to the subject, *Executive Privilege: Public's Right to Know and Public Interest,* with an introduction by Congressman Moss and articles by Mr. Wiggins and Senator Thomas C. Hennings, Jr., of Missouri, among others. Senator Hennings' article was also inserted in the *Congressional Record,* on the request of Senator Lyndon B. Johnson of Texas, the Senate leader.[129] Yet more recently Senator Clinton P. Anderson of New Mexico, chairman of the Joint Committee on Atomic Energy had an article in *The New York Times* Magazine entitled *'Top Secret'—But Should It Be?*[130]

In opposition to the trend toward official secrecy has come some ameliatory legislation, beginning on a State level. In 1955 Ohio enacted a law which requires all meetings of local government boards, commissions and

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[126] *Id.* at 40–41.
[127] *Id.* at xii.
[128] See N.Y. Times, Nov. 8, 1955, p. 25, col. 1.
[129] 105 CONG. REC. 13416 (daily ed. July 30, 1959).
[130] N.Y. Times, May 3, 1959, § 6 (Magazine), p. 14.

agencies to be open to the public.[131] Some of Ohio's local governing bodies had found the federal government's practice of official secrecy too tempting to resist. In 1957 California, Connecticut, Illinois and Pennsylvania adopted similar legislation.[132] California enacted a total of 66 separate statutes providing for open meetings of various governing bodies. Such laws came to be known as right-to-know laws.[133] Then the following year, as a result of the labors of Congressman Moss and his subcommittee, the federal government itself adopted a so-called anti-secrecy law.[134] This act was in the form of a one-sentence addition to 5 U.S.C. section 22, which was formerly Revised Statutes section 161, and which in turn derived from a number of acts, including a series of four enacted in 1789.[135] The four acts of 1789 simply gave the Secretaries of State, War, and the Treasury custody of the records of their departments. Section 22, among other things, simply authorized the heads of departments "to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of" records. The one-sentence addition provides: "This section does not authorize withholding information from the public or limiting the availability of records to the public." With reference to the passage of this measure Congressman Moss wrote:

> Each of the ten Cabinet departments opposed this amendment. The reasons ranged from the attitude that the law had been on the books for 168 years and therefore should not be changed, to the contention that the amendment was unclear.
>
> Passage of the amendment is merely a first, timid step toward eradicating unnecessary Government secrecy. The new legislation merely eliminates one glaring violation of the right to know.[136]

As Congressman Moss indicated, despite this legislation most of the current restrictions on an individual's right to knowledge remain. Moreover, the Government and various of its officials are seeking yet additional such restrictions. The administration is seeking them with reference to the issuance of passports. As another illustration, the Government's Commission on Government Security made a report in 1957 in which it recommended that Congress make it a crime for one wilfully and without proper authorization to publish information classified as "top secret" or "secret" if one knew or had reason to believe that such information was so classified.[137]

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131 OHIO REV. CODE ANN. § 121.22 (Page Supp. 1958).

132 Cal. Stat. 1957, chs. 2170–2235; Conn. Pub. Acts 1957, No. 468, at 688; ILL. REV. STAT. ch. 102, §§ 41–44 (Smith-Hurd Supp. 1958); PA. STAT. ANN. tit. 65, §§ 251–54 (Supp. 1958).

133 See, *e.g.*, N.Y. Times, Sept. 1, 1957, p. 30, col. 1.

134 72 Stat. 547, 5 U.S.C. § 22 (1958).

135 Act of July 27, 1789, ch. 4, § 4, 1 Stat. 29; Act of Aug. 7, 1789, ch. 7, § 4, 1 Stat. 50; Act. of Sept. 2, 1789, ch. 12, 1 Stat. 65; Act of Sept. 15, 1789, cb. 14, § 7, 1 Stat. 69.

136 N.Y. Times, Aug. 17, 1958, p. 66, col. 1.

137 REPORT OF THE COMMISSION ON GOVERNMENT SECURITY 737 (1957). See Krock, *The Guarding of Essential Secrets of Defense*, N.Y. Times, July 2, 1957, p. 26, col. 5; Reston, *Security vs. Freedom*, N.Y. Times, June 25, 1957, p. 17, cols. 1–3.

Suppose this Commission's proposed legislation were to pass and suppose that the Atomic Energy Commission in conformity with an appropriate executive order were to classify information about hydrogen bomb tests and the fallout of radioactive strontium-90 as secret. Or suppose that newspapers were to send reporters to Communist China in violation of passport restrictions.[138] The newspapers' position in both instances would be that in this country the people decide issues and that they are not in a position intelligently to do so unless they first have the facts. If the Government were to proceed punitively against such newspapers, what would the constitutional defense of counsel representing them be? In the case of violations of passport restrictions, since such restrictions also involve an impairment of the right of freedom of movement, counsel will rely on the due process clause of the fifth amendment. To the extent that the right to knowledge is involved, since this right has not yet been recognized under the due process clauses, counsel will rely on the first and ninth amendments as well as the due process clause of the fifth amendment.

In the other suppositious case, about classified information, involving as it does the right to knowledge, counsel will again urge the first, fifth and ninth amendments. Counsel will argue that freedom of the press, guaranteed by the first amendment, includes not only the publication but also the gathering of news, and that the freedom of speech guarantee of this amendment includes the right to knowledge in order that one may speak intelligently. Senator Hennings in his article wrote: "The Supreme Court has yet to recognize explicitly the 'right to know' as a constitutional right, but the Court has given strong indication that it deems such a right to exist, both as a natural right protected by the Ninth Amendment and as a constitutional right protected by the First Amendment."[139]

In Halpern v. United States, 258 F.2d 36 (2d Cir. 1958), *reversing* 151 F. Supp. 183 (S.D. N.Y. 1957), arising under the Invention Secrecy Act of 1951, 35 U.S.C. § 181–88 (1958), the court, at 44, held: "We conclude that the district court has jurisdiction to entertain the action during the pendency of the secrecy order; and we further conclude that a trial *in camera* in which the privilege relating to state secrets may not be availed of by the United States is permissible, if, in the judgment of the district court, such a trial can be carried out without substantial risk that secret information will be publicly divulged." *But cf.* New York Post Corp. v. Leibowitz, 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957), where the court ruled that a newspaper was entitled to a transcript of a trial judge's charge to the jury in a criminal case which had been concluded.

[138] Not only Mr. Worthy but also Edmund Stevens and Phillip Harrington of *Look* went to Communist China in violation of passport restrictions. Thereafter the State Department announced that it would revoke their passports and refer their cases to the Treasury Department for possible action under the Trading With the Enemy Act. See N.Y. Times, Jan. 21, 1957, p. 8, col. 1; *id.*, Feb. 7, 1957, p. 13, cols. 1–3.

[139] Hennings, *The Executive Privilege and the People's Right to Know,* 19 FED. B.J. 1, 6 (1959), 105 CONG. REC. 13416 (daily ed. July 30, 1959).

CONFRONTATION

Our State Department's restrictions on the issuance of passports impair a third unenumerated right, that to be confronted with the witnesses against one. Of course, this right is secured in criminal cases by various constitutional and statutory provisions. In federal criminal cases it is protected by the sixth amendment's provision that "the accused shall enjoy the right . . . to be confronted with the witnesses against him." Forty-three States have similar constitutional provisions. Four more have statutory provisions to this effect. Some have both. Only one of the 48 States, Idaho, apparently has no provision for confrontation.[140]

However, these provisions relate to criminal proceedings. In other types of proceedings the right to confrontation has not established itself. On the contrary, there have been increasing instances in which an individual's rights and status have been determined on the basis of the statements of secret informers. Included among them are the State Department's determinations with reference to the denial or issuance of passports. The State Department still claims that it can make such determinations without confrontation, and the courts have not yet finally ruled against it. The federal district judges have divided on the question. Federal Judge Luther W. Youngdahl in *Boudin v. Dulles*[141] ruled for confrontation. But Federal Judge Joseph C. McGarraghy in *Dayton v. Dulles*[142] reached a contrary conclusion and sustained a passport denial which was based in part on confidential information. The Court of Appeals for the District of Columbia Circuit did not find it necessary at this point to reach the question.[143] When the *Dayton* case came before Judge McGarraghy a second time, he again ruled against confrontation.[144] This time the court of appeals did reach the issue and ruled similarly: "[T]he problem is whether disclosure would adversely affect our internal security or the conduct of our foreign affairs. The cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area. If he need not disclose the information he has, the only other course is for the courts to accept his assertion that disclosure would be detrimental in fields of highest importance entrusted to his exclusive care. We think we

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140 The various constitutional and statutory provisions are collected in 5 WIGMORE, EVIDENCE § 1397 n.1 (3d ed. 1940).

141 136 F. Supp. 218 (D.C. Cir. 1955).

142 See Dayton v. Dulles, 237 F.2d 43 (D.C. Cir. 1956) (no district court opinion).

143 *Ibid.*; Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956).

144 Dayton v. Dulles, 146 F. Supp. 876 (D.D.C. 1956).

must follow that course."[145] But this time the Supreme Court did not find it necessary to reach the question.[146]

Yet other types of proceedings in which an individual's rights and status have been determined without confrontation have been: loyalty and security investigations and hearings of federal, often State, and even a multitude of employees of private employers who have had defense or research contracts with the federal government, and of members and former members of our armed forces; determinations involving aliens; and selective service hearings to determine whether an individual was a conscientious objector. In one recent instance the Military Sea Transportation Service, a Navy branch, ordered a marine engineer and two seamen off an American President Lines ship for security reasons. All three seamen had Coast Guard clearance. The Navy branch took this step without notice or charges. According to this governmental agency, to disclose the reasons would "endanger the security of the United States."[147] The Government has also denied cash benefits due more than 250 former Korean War prisoners because of secret Army charges of collaboration.[148] Various cases arising in

[145] 254 F.2d 71, 76–77 (D.C. Cir. 1957), *affirming* 146 F. Supp. 876 (D.D.C. 1956). But in a criminal case the Government either produces relevant confidential information or the defendant goes free. United States. v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952); United States v. Beekman, 155 F.2d 580 (2d Cir. 1946); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944). In the *Coplon* case Chief Judge Learned Hand said for the court: "[T]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense." 185 F.2d at 638.

In Roviaro v. United States, 353 U.S. 53 (1957), the Court held that the Government had to disclose the identity of a confidential informant even though such person was not called as a witness by the Government. The confidential informant had been present with the defendant at the time of the alleged commission of the offense. The Court reasoned: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication. Three recent cases in the Courts of Appeals have involved the identical problem raised here—the Government's right to withhold the identity of an informer who helped to set up the commission of the crime and who was present at its occurrence. *Portomene* v. *United States,* 221 F.2d 582; *United States* v. *Conforti,* 200 F.2d 365; *Sorrentino* v. *United States,* 163 F.2d 627. In each case it was stated that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense." 353 U.S. at 60–62. For a recent State case where the court ruled a search and seizure to be illegal because of the prosecution's refusal to reveal the identity of informers whose information furnished the basis for a search without a warrant, see Priestly v. Superior Court, 50 Cal. 2d 812, 330 P.2d 39 (1958).

[146] Dayton v. Dulles, 357 U.S. 144 (1958).

[147] See N.Y. Times, Jan. 20, 1958, p. 44, cols. 6–7.

[148] See N.Y. Times, Dec. 19, 1955, p. 9, col. 1.

such types of proceedings have reached the Supreme Court, but so far the Court has not spoken out against the practice of using secret informers. On the contrary, the Court has sustained it. The Court did so in the first two such cases to come before it, *Bailey v. Richardson,*[149] and *Washington v. McGrath,*[150] but by an evenly divided Court. These cases arose out of federal loyalty investigations and hearings. In a third such case, that involving Dr. John P. Peters[151] of Yale University, the Court ducked the issue. In *United States v. Nugent*[152] the Court sustained the practice of using secret informers in Selective Service hearings, and in *Jay v. Boyd*[153] in suspension of deportation proceedings.

Three cases at the last term involved the issue of confrontation: *Vitarelli v. Seaton*;[154] *Greene v. McElroy*;[155] and *Taylor v. McElroy.*[156] All

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[149] 341 U.S. 918 (1951), *affirming* 182 F.2d 46 (D.C. Cir. 1950).

[150] 341 U.S. 923 (1951), *affirming* 182 F.2d 375 (D.C. Cir. 1950).

[151] Peters v. Hobby, 349 U.S. 331 (1955).

[152] 346 U.S. 1 (1953). The principal case was followed in Leifer v. United States, 260 F.2d 648 (6th Cir. 1958), *cert. denied,* 358 U.S. 946 (1959); Blalock v. United States, 247 F.2d 615 (4th Cir. 1957).

[153] 351 U.S. 345 (1956).

[154] 359 U.S. 535 (1959), *reversing* 253 F.2d 338 (D.C. Cir. 1958).

[155] 360 U.S. 474 (1959), *reversing* 254 F.2d 944 (D.C. Cir. 1958). In this case the Court of Appeals for the District of Columbia Circuit stated that the right to knowledge was not involved: "We are not dealing here with the vexed questions of the right of Congress, or the press, or the public, to be informed of defense operations generally, or to inspect particular documents. On this subject, see Mitchell, Government Secrecy in Theory and Practice: 'Rules and Regulations' as an Autonomous Screen, 58 Colum. L. Rev. 199 (1958); Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. Bar J. 103, 223, 319 (1949); Bishop, The Executive's Right of Privacy: An Unresolved Constitutional Question, 66 Yale L.J. 477 (1957); 40 Ops. Att'y Genl. 45 (1941). See also Hand, The Bill of Rights 17–18 (1958)." 254 F.2d at 949, n.9.

The American Civil Liberties Union in its brief before the Supreme Court, while claiming for the petitioner the right to cross-examine all persons who gave adverse information, nevertheless suggested as a minimum requirement, which would be dispositive of that case, confrontation at least as to the casual informant: "[T]he Industrial Personnel Security Program is in no way jeopardized when the Government is required to separate the professional or 'undercover' agent from the casual informant having no legitimate reason for secrecy, affording confrontation and cross-examination of the latter. See, Davis, *The Requirement of a Trial-Type Hearings,* 70 HARV. L. REV. 193, at pp. 212–214, 233–243 (1956); Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service,* 58 YALE L.J. 1211, at pp. 1234–1235 (1949)." Brief for American Civil Liberties Union as Amicus Curiae, p. 14, Greene v. McElroy, *supra.*

[156] 360 U.S. 709 (1959). In this case the Court granted certiorari in advance of the judgment of the Court of Appeals for the District of Columbia Circuit. For other employee cases where the Federal District Court in the District of Columbia denied confrontation, see Coleman v. Brucker, 156 F. Supp. 126 (D.D.C. 1957), *rev'd and remanded,* 257 F.2d 661 (D.C. Cir. 1958); Dressler v. Wilson, 155 F. Supp. 373 (D.D.C. 1957). Both district court decisions were by Judge Alexander Holtzoff. In Dressler v. Wilson, *supra,* Judge Holtzoff declared: "To be sure, he was not confronted with the witnesses against him, but as the Court has just stated, there is no constitutional requirement of confrontation with witnesses outside of the criminal courts." *Id.* at 376. In Coleman v. Brucker, *supra,* he asserted: "In other words, procedural due process, in

three cases arose out of security hearings of employees. Vitarelli was a federal employee, and Greene and Taylor were employees of private contractors with the Defense Department. In all three cases the lower courts ruled against confrontation. In all three cases the Supreme Court reversed; but once again, in two of the cases, it did not reach the issue, and in the third it said that it did not. In the *Vitarelli* case the Court rested its decision on the ground that the Secretary of the Interior had not followed his own regulations; and in the *Taylor* case, on mootness. (The Defense Department had notified all interested parties that the petitioner had been granted clearance.) In the *Greene* case the Court held the procedures of the Defense Department to be unauthorized, but Mr. Chief Justice Warren in the Court's opinion further stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory action were under scrutiny.[157]

During the course of the argument of this case Mr. Chief Justice Warren said to counsel:

> If my neighbor accuses me of anything else but this [that is, of being a bad security risk] that they are going to put me in jail or deprive me of my livelihood, I have a right to confront him. Why is this different?[158]

The language in Mr. Chief Justice Warren's opinion led Mr. Justice Clark to feel that the Court had held that the due process clause of the fifth amendment required confrontation and an opportunity for cross-examination in security hearings: "While the Court disclaims deciding this

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the opinion of this Court, obviously is inapplicable to removals of employees from the Government service." *Id.* at 128. In that case he not only ruled against confrontation but also held that letters of notification which simply advised employees that their continued employment "would not be clearly consistent with the interests of national security" constituted findings under the applicable regulation. It was on the latter point that he was reversed.

[157] Greene v. McElroy, 360 U.S. 474, 496–97 (1959).

[158] N.Y. Times, April 3, 1959, p. 26, col. 2.

constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security."[159]

The right of confrontation, as Mr. Chief Justice Warren indicated in the Court's opinion in the *Greene* case, should exist in any proceeding which involves a determination as to one's future status.[160] We have no less a protagonist for this position than President Eisenhower himself. In an address to the B'nai B'rith Anti-Defamation League in Washington, D.C., in which he described Wild Bill Hickock's code in Abilene, Kansas, he said:

> I was raised in a little town of which most of you have never heard. But in the West it is a famous place. It is called Abilene, Kansas. We had as our Marshal for a long time a man named Wild Bill Hickock. If you don't know anything about him, read your Westerns more. Now that town had a code, and I was raised as a boy to prize that code.
>
> It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry. If you met him face to face and took the same risks he did, you could get away with almost anything, as long as the bullet was in the front.
>
> And today, although none of you has the great fortune, I think, of being from Abilene, Kansas, you live after all by that same code, in your ideals and in the respect you give to certain qualities. In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose.[161]

And his advice was not entirely lost. Justices Frankfurter and Douglas in *Jay v. Boyd*[162] both quoted from this speech—in dissenting opinions. Mr. Justice Frankfurter said: "President Eisenhower has explained what is fundamental in any American code. A code devised by the Attorney General for determining human rights cannot be less than Wild Bill Hickock's code in Abilene, Kansas...."[163] Mr. Justice Douglas added: "The statement that President Eisenhower made in 1953 on the American code of fair play is more than interesting Americana. As my Brother FRANKFURTER says, it is Americana that is highly relevant to our present problem."[164]

So far there has been but one strong decision in favor of confrontation

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159 Greene v. McElroy, 360 U.S. 474, 524 (1959) (dissent).

160 For what the writer predicts will become the leading article on the subject, see McKay, *Confrontation*, 1959 WASH. U.L.Q. 122.

161 Speech by President Eisenhower, November 23, 1953, on receiving America's Democratic Legacy Award at dinner on the occasion of the fortieth anniversary of the Anti-Defamation League. U.S. President Press Release, Nov. 23, 1953.

162 351 U.S. 345 (1956).

163 *Id.* at 372.

164 *Id.* at 374.

in cases arising out of loyalty-security programs, that of *Parker v. Lester*.[165] In that case the Court of Appeals for the Ninth Circuit invalidated the Coast Guard's security procedure because it failed to provide for confrontation. Judge Walter L. Pope of Montana in the court's opinion wrote: "But surely it is better that these agencies suffer some handicap than that the citizens of a freedom loving country shall be denied that which has always been considered their birthright. Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of such talebearing. . . . The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness to the merchant seaman involved cannot justify an abandonment here of the ancient standards of due process. . . . [T]he time has not come when we have to abandon a system of liberty for one modeled on that of the Communists . . . ."[166]

With reference to the right of confrontation in other than criminal cases, there is no doubt as to the constitutional ground on which counsel contending for the right will rest their cases: it will be on the due process clauses. It has been on the due process clause of the fifth amendment that such cases have already been considered. It was on this clause that the court rested its decision in *Parker v. Lester*.[167] It was on this ground, to take another instance, that Mr. Justice Douglas rested his concurring opinion in the *Peters* case,[168] saying: "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life . . . . If the sources of information need protection, they should be kept secret. But once they are used to destroy a man's reputation and deprive him of his 'liberty,' they must be put to the test of due process of law."[169] To the extent that the right to con-

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[165] 227 F.2d 708 (9th Cir. 1955), *reversing* 112 F. Supp. 433 (N.D. Cal. 1953).

[166] 227 F.2d at 720–21. Subsequently the courts ruled that the seamen were entitled to their sailing papers before rather than after a hearing which measured up to due process. Lester v. Parker, 235 F.2d 787 (9th Cir. 1956), *affirming* 141 F. Supp. 519 (N.D. Cal.). Thereafter the court of appeals denied a petition for rehearing. 237 F.2d 698 (9th Cir. 1956). But the United States Court of Claims held that a shipmaster to whom the Coast Guard refused to issue a certificate of loyalty while it had the procedure which the court condemned in Parker v. Lester, 227 F.2d 708 (9th Cir. 1955), did not have the basis for a claim against the United States which was within the class of cases cognizable in that court. Dupree v. United States, 141 F. Supp. 773 (Ct. Cl. 1956). Then the Court of Appeals for the Third Circuit, affirming the court below, ruled that the shipmaster could not make out a claim under the Federal Tort Claims Act either. Dupree v. United States, 264 F.2d 140 (3d Cir. 1959), and 247 F.2d 819 (3d Cir. 1957), *affirming* 146 F. Supp. 148 (E.D. Pa. 1956).

[167] 227 F.2d 708 (9th Cir. 1955). See also Brown and Fassett, *Security Test for Maritime Workers: Due Process under the Port Security Program*, 62 YALE L.J. 1163 (1953).

[168] Peters v. Hobby, 349 U.S. 331 (1955).

[169] *Id.* at 351–52.

frontation in other than criminal cases will be recognized without specific constitutional or statutory provisions, it will be under due process clauses. It will not be under the ninth amendment.

JURY TRIAL IN CONTEMPT CASES

Another right which, like confrontation, some have urged be extended beyond its traditional bounds, at least in cases of a punitive nature, is that to a jury trial. A recent controversy and several recent cases produced an insistence that the right to a jury trial be extended to criminal contempt of court cases, particularly if an individual's liberty was involved. The recent controversy involved the power to be given to federal judges to punish alleged contempts, and arose during the deliberations on the Civil Rights Act of 1957.[170] After long and, at times, heated debates in Congress, the compromise which became law contained this third proviso:

> *Provided further, however,* That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of $300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.[171]

Very recently under this section a federal district judge in Alabama ordered a State circuit judge to appear before him to show cause why he should not be held in criminal contempt for refusing the federal Civil Rights Commission access to voter registration records.[172] The federal judge later cleared the State judge: he found that the latter had in fact aided the federal Commission, although feigning to defy it.[173]

The recent cases involved the power of federal judges to impose criminal contempt of court sentences on Gus Hall, Robert Thompson, Gilbert Green and Henry Winston, four of the defendants in the *Dennis* case,[174] the first Foley Square Smith Act conspiracy prosecution of leaders of the American Communist party. After the Supreme Court's affirmance of the judgments of conviction in that case, these four defendants, together with four of the defendants in the *Flynn* case,[175] the second Foley Square Smith Act conspiracy indictment, staged a mass flight. Hall was former Ohio chairman and acting national chairman of the American Communist party; Thompson, New York State chairman; Green, Illinois chairman; and Winston, national organization secretary. All four, who had already been convicted

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[170] 71 Stat. 634 (1957), codified in scattered sections of 5, 28 and 42 U.S.C. (1958).

[171] 71 Stat. 638 (1957), 42 U.S.C. § 1995 (1958).

[172] See N.Y. Times, Jan. 16, 1959, p. 1, col. 2.

[173] See N.Y. Times, Jan. 27, 1959, p. 1, col. 5.

[174] Dennis v. United States, 341 U.S. 494 (1951), *affirming* 183 F.2d 201 (2d Cir. 1950).

[175] United States v. Flynn, 216 F.2d 354 (2d Cir. 1954), *cert. denied,* 348 U.S. 909 (1955).

and sentenced on their conspiracy indictment, also drew sentences for criminal contempt of court for willful disobedience of a surrender order. Green, Winston and Hall each drew three years, and Thompson four. All sentences were affirmed on appeal.[176] The Supreme Court granted certiorari in the case of Green and Winston but denied it in those of Hall and Thompson. However, the Supreme Court, as did the Court of Appeals for the Second Circuit, affirmed the contempt sentences. Four members of the Court dissented, Mr. Chief Justice Warren and Justices Black, Douglas and Brennan. Mr. Justice Black wrote a vigorous dissent in which Mr. Chief Justice Warren and Mr. Justice Douglas joined. He argued:

> The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law. In my judgment the time has come for a fundamental and searching reconsideration of the validity of this power which has aptly been characterized by a State Supreme Court as, 'perhaps, nearest akin to despotic power of any power existing under our form of government. . . .' I would hold that the defendants here were entitled to be tried by a jury after indictment by a grand jury and in full accordance with all the procedural safeguards required by the Constitution for 'all criminal proceedings.'[177]

The right to a jury trial in criminal contempt of court cases, like confrontation, cannot depend for its recognition on the ninth amendment. Rather it will have to rely either on new statutory or constitutional provisions, or on new constructions of existing constitutional requirements for jury trials in criminal cases, for example, that part of the federal constitution's sixth amendment which states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

USE OF THE MAILS

The Post Office Department long contended that the use of the mails was a privilege which Congress could regulate at will. This contention is obsolete, so much so, that Mr. Justice Harlan in his dissenting opinion in the recent case of *Roth v. United States*[178] characterized it as a "hoary dogma."[179] Today the use of the mails is a right, and an important one. As

[176] Green v. United States, 356 U.S. 165 (1958), *affirming* 241 F.2d 631 (2d Cir. 1957), *affirming* 140 F. Supp. 117 (S.D.N.Y. 1956); United States v. Thompson, 214 F.2d 545 (2d Cir. 1954), *affirming* 117 F. Supp. 685 (S.D.N.Y. 1953), *cert. denied,* 348 U.S. 841 (1954); United States v. Hall, 198 F.2d 726 (2d Cir. 1952), *affirming in part* 101 F. Supp. 666 (S.D.N.Y. 1951); *cert. denied,* 345 U.S. 905 (1953). Thompson subsequently moved to vacate his conviction or correct his sentence. It was denied. Thompson v. United States, 261 F.2d 809, (2d Cir. 1958), *cert. denied,* 359 U.S. 967 (1959).

[177] Green v. United States, 356 U.S. 165, 193–95 (1958).

[178] 354 U.S. 476 (1957).

[179] *Id.* at 504 n.5. He said: "The hoary dogma of *Ex parte Jackson,* 96 U.S. 727, and *Public Clearing House* v. *Coyne,* 194 U.S. 497, that the use of the mails is a privilege on which

Justice Holmes expressively put it in *Milwaukee Publishing Co. v. Burleson*:[180] "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."[181] He said this in a dissenting opinion, but today it represents the law.[182]

Today the mails are so much a part of our daily lives that an order barring one from the use of them, as the Court remarked in *Reilly v. Pinkus*,[183] "could wholly destroy a business." Or as the Court of Appeals for the District of Columbia Circuit observed in *Pike v. Walker*:[184]

> Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.[185]

Today if the Government were to act in an arbitrary, or unfair, or exclusionary way with reference to one's use of the mails, one would have a constitutional objection. However, one would rest one's objection either on the first amendment or on the due process clause of the fifth, or both; but not on the ninth amendment. For instance, in the *Pike* case the court further said: "It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution . . . ."[186]

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the Government may impose such conditions as it chooses, has long since evaporated. See Brandeis, J., dissenting, in *Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430–433; Holmes, J., dissenting, in *Leach v. Carlisle*, 258 U.S. 138, 140; *Cates v. Haderline*, 342 U.S. 804, reversing 189 F.2d 369; *Door v. Donaldson*, 90 U.S. App. D.C. 188, 195 F.2d 764."

[180] 255 U.S. 407 (1921).

[181] *Id.* at 437.

[182] The dissenting opinions of Justices Holmes and Brandeis in that case have been cited with approval in subsequent Supreme Court decisions. See, *e.g.*, Speiser v. Randall, 357 U.S. 513, 518 (1958); Reilly v. Pinkus, 338 U.S. 269, 277 (1949); Hannegan v. Esquire, 327 U.S. 146, 156 (1946).

[183] 338 U.S. 269, 277 (1949). In Stanard v. Olesen, 74 S. Ct. 768, 771 (Douglas, Circuit Justice, 1954), involving an application to Mr. Justice Douglas, he said: "Impounding one's mail is plainly a 'sanction', for it may as effectively close down an establishment as the sheriff himself."

[184] 121 F.2d 37 (D.C. Cir.), *cert. denied*, 314 U.S. 625 (1941).

[185] *Id.* at 39.

[186] *Ibid.* In Walker v. Popenoe, 149 F.2d 511, 513 (D.C. Cir. 1945), Associate Justice Thurman W. Arnold, in a concurring opinion in which the court joined, added: "To deprive a publisher of the use of the mails is like preventing a seller of goods from using the principal highway which connects him with his market. In making the determination whether any publication is obscene the Postmaster General necessarily passes on a question involving the fundamental liberty of a citizen. This is a judicial and not an executive function. It must be exercised according to the ideas of due process, implicit in the Fifth Amendment." *Cf.* Rudder v. United States, 226 F.2d 51, 53 (D.C. Cir. 1955), where the court held that the Government as landlord

PEACEFUL PICKETING

Peaceful picketing did not begin to receive its fair share of judicial protection until the present century, after the passage of the Norris-LaGuardia Act[187] and similar legislation, and the Supreme Court's decision in *Senn v. Tile Layers Protective Union*.[188] In that case the Court held that a Wisconsin statute for the protection of peaceful picketing did not violate either the equal protection or the due process clause of the fourteenth amendment. The decision was five to four, with Justice Brandeis writing the Court's opinion.[189]

Then in *Thornhill v. Alabama*[190] the Court in an opinion by Justice Murphy identified peaceful picketing with freedom of speech and stated broadly: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[191] Soon thereafter the Court held in *American Federation of Labor v. Swing*[192] that an injunction against peaceful organizational picketing, based on Illinois' common law policy against picketing, was unconstitutional, saying: "The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."[193]

However, the Court soon backed away somewhat from the *Thornhill* and *Swing* opinions. As the Court explained recently through Mr. Justice Frankfurter in *International Brotherhood of Teamsters v. Vogt, Inc.*:[194]

> Soon, however, the Court came to realize that the broad pronouncements, but not the specific holding, of *Thornhill* had to yield 'to the impact of facts unforeseen,' or at least not sufficiently appreciated. . . . Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regnlation.[195]

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nevertheless had to comply with the requirements of due process: "The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law."

[187] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–15 (1958).

[188] 301 U.S. 468 (1937).

[189] Previously, in Truax v. Corrigan, 257 U.S. 312 (1921), a five to four decision with the Court's opinion by Chief Justice Taft, the Court had ruled that a comparable Arizona statute fell afoul of the equal protection clause of the fourteenth amendment.

[190] 310 U.S. 88 (1940).

[191] *Id.* at 102.

[192] 312 U.S. 321 (1941).

[193] *Id.* at 326.

[194] 354 U.S. 284 (1957).

[195] *Id.* at 289.

In that case the Court sustained a Wisconsin statute applicable against even peaceful organizational picketing, a statute comparable to the common law policy of Illinois which the Court invalidated in the *Swing* case. The result led Mr. Justice Douglas, with the concurrence of Mr. Chief Justice Warren and Mr. Justice Black, to complain in dissent: "The Court has now come full circle . . . . [F]or practical purposes, the situation now is as it was when *Senn v. Tile Layers Union* . . . was decided. State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."[196] Nevertheless, they should take some comfort from the fact that at the last two terms the Court set aside State court injunctions against picketing in three cases.[197]

Relief in this field against governmental action will depend on the first amendment or the due process clause of the fourteenth or both. Once again it will not rest on the ninth amendment.

CONSTRUING A CONSTITUTION

The ninth amendment thus ends up with a small role. Nor will the fact that we have before us a constitutional provision augment that role appreciably.

It may help a little, for in construing a constitution one is engaged in an effort to make the document as timeless as possible. As Chief Justice Marshall emphasized in *McCulloch v. Maryland*:[198] "[W]e must never forget that it is a *constitution* we are expounding. . . . a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[199] Or as he added in the Court's opinion in *Cohens v. Virginia*:[200] "[A] constitution is framed for ages to come, and is designed to approach immortality, as nearly as human institutions can approach it."[201] Or as the Court elaborated in *Weems v. United States*:[202]

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They

196 *Id.* at 295, 297.

197 Hotel Employees Union v. Sax Enterprises, Inc., 358 U.S. 270 (1959); Chauffeurs Union v. Newell, 356 U.S. 341 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957).

198 17 U.S. (4 Wheat.) 316 (1819).

199 *Id.* at 407, 415.

200 19 U.S. (6 Wheat.) 264 (1821).

201 *Id.* at 387.

202 217 U.S. 349 (1910).

> are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[203]

But even if one takes this approach, and even if one accepts the fact that the Court as final arbiter has a molding as well as a judicial function,[204] one should not carry this approach as far as Mr. Justice Black does. He would hold, for instance, that the privileges and immunities and due process clauses of the fourteenth amendment make the first eight amendments applicable to the States.[205] Or again, he would construe the sixth amendment's provision for a jury trial to be applicable to criminal contempt of court cases.[206] One should stop somewhat short of his position or one will no longer be engaged in construing the Constitution by applying it to new situations; one will be engaged in amending it.

If one takes the approach of a broad but not amendatory construction of the Constitution, this estimate of Professor Leslie W. Dunbar will prove to be substantially correct as to the role of the ninth amendment: "Neither the Court's progress in filling the privileges and immunities clauses of the Constitution with content, nor its efforts to keep manageable and contained all the matter read into 'due process' gives encouragement to the idea that the ninth amendment provides another fertile garden for cultivation."[207] One will occasionally cite the ninth amendment in the case of an unenumerated right not yet established under the due process clauses, such as that to knowledge; but even here one will rely on the due process clauses as well. Moreover, one will usually rely on these clauses for the protection of established unenumerated rights without a further reference to the ninth amendment; and these clauses, by virtue of their historic roots and historical role, will in most instances satisfactorily meet the demands on them.

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[203] *Id.* at 373.

[204] For recent books on the political role of the Court see HAND, THE BILL OF RIGHTS (1958); MASON, THE SUPREME COURT FROM TAFT TO WARREN (1958).

[205] See, *e.g.*, his dissenting opinion in Adamson v. California, 332 U.S. 46, 68–123 (1947).

[206] See, *e.g.*, his dissenting opinion in Green v. United States, 356 U.S. 165, 193–219 (1958).

[207] Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 640 (1956).