
Pritchett, C. Herman: Congress versus the Supreme Court

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BOOK REVIEW

Congress versus the Supreme Court. By C. HERMAN PRITCHETT. Minneapolis: University of Minnesota Press, 1961. Pp. viii+168. \$3.75.

The Supreme Court has weathered onslaughts by Presidents Jefferson, Jackson, Lincoln, and the two Roosevelts. It has experienced changes in the number of its justices by Congresses desiring to change or preserve the status quo. Its appellate jurisdiction has been diminished. Prior to the Civil War the liberals violently criticized the Court as a bulwark of slavery. In the last decade of the 19th century the radicals assailed the Court's protection of vested interests and corporate privilege. Under the second Roosevelt liberal groups united in their efforts to force the Court to approve legislation designed to cope with economic problems of the greatest magnitude. Much has been written of the manner in which the Court faced its detractors, losing stature on occasion, but gaining increasing prestige, respect, and solid footing over the years.

In this book Professor Pritchett discusses the above, but his basic concerns are with the attempts and the effects of the attempts of basically conservative groups to secure passage of legislation designed to limit the Court's powers in national security matters because of decisions rendered in that field from 1955 to 1958. From the Constitutional Revolution of 1937 to 1954 the Court was relatively free of criticism. The *Brown v. Board of Education*¹ decision subjected the High Court to a barrage of criticism basically from Southern sources. The *Pennsylvania v. Nelson*² decision, holding that Congress had preempted the field of sedition, offended many who believed the opinion was an unwarranted assault on federalism. Several rulings unfavorable to the states under Taft-Hartley added fuel to the fire as did the Court's expanding role under due process in state criminal prosecutions. Pritchett explains how these forces in 1958 and 1959 united with those who believed that the Supreme Court unduly favored the rights of individuals at the expense of national security.

Detailed analysis is given to the "legislative investigation issue" as exemplified in *Watkins v. United States*³ wherein the Court set forth certain standards for Congressional investigating committees. In *Barenblatt v. United States*⁴ much of the effect of *Watkins* was eliminated. *Sweezy v. New Hampshire*⁵ limited the scope of investigations authorized by state legislatures, while *Uphaus v. Wyman*⁶ made *Sweezy* largely ineffective. *Uphaus* also eliminated much of the sweeping effect of preemption in the field of sedition.

Dennis v. United States,⁷ upholding the constitutionality of the Smith Act's criminal conspiracy organization and advocacy features, lost much of its vitality when *Yates v. United States*⁸ defined the meaning of organization and set forth the proof necessary. Pritchett's book was published before the Court's

¹ 347 U.S. 483 (1954).

² 350 U.S. 497 (1956).

³ 354 U.S. 178 (1957).

⁴ 360 U.S. 109 (1959).

⁵ 354 U.S. 234 (1957).

⁶ 360 U.S. 72 (1959).

⁷ 341 U.S. 494 (1951).

⁸ 354 U.S. 298 (1957).

decisions in *Scales v. United States*⁹ and *Communist Party of the United States v. Subversive Activities Control Board*¹⁰ which gave the government new and potent weapons in its fight against communism.

The broad dictum that the right to travel is a freedom protected by the fifth amendment, set forth in *Kent v. Dulles*,¹¹ may, in Pritchett's view, have been limited the Supreme Court's refusing to review lower court holdings that the government could limit travel in certain countries at its discretion.¹²

The "loyalty-security issue" in the case of employees brought forth its most significant case in *Greene v. McElroy*¹³ when the Court, with a more favorable attitude toward personal rights, intimated the unconstitutionality of an industrial security program denying confrontation and information as to source of charges in a security hearing. This case was deprived of much of its effect by *Cafeteria & Restaurant Workers Union Local 473, AFL-CIO v. McElroy*¹⁴ which held that an employee of a private contractor could be removed from her job in a United States Naval Gun Factory for security reasons without a hearing or confrontation.

The "right to silence," affirmed in the first *Konigsberg* case¹⁵ and in *Slochower v. Board of Higher Education of New York City*,¹⁶ was curtailed in *Lerner v. Casey*¹⁷ and *Beilan v. Board of Public Education*.¹⁸ The book was published before the holdings in the second *Konigsberg* case¹⁹ and *Cohen v. Hurley*²⁰ were announced. In those cases the "right to silence" was further curtailed.

After the Court's earlier pronouncements of its libertarian views, numerous proposals were made to restrict its authority particularly by limiting its jurisdiction in preemption and certain appellate fields. These legislative programs ended in virtually complete failure. Pritchett reasons that failure resulted because of a prevailing view that influence should be exerted on the Court only in the appointing power when vacancies occur, because the character and motives of some of the proponents of restrictive legislation were of dubious quality, because charges made against the Court were at times without substance, and because the Court had begun a change in position. The confirmation of Justices Whittaker and Stewart made the Court more conservative.

Pritchett emphasizes that the shift in the Court's attitude toward national security as weighed against personal rights differed from the Court's position in 1937 when it abandoned its bastions in the face of retaliatory legislation.

⁹ 367 U.S. 203 (1961).

¹⁰ 367 U.S. 1 (1961).

¹¹ 357 U.S. 116 (1958).

¹² *Porter v. Herter*, 278 F.2d 280 (D.C. Cir. 1960) *cert. denied*, 361 U.S. 918 (1959).

¹³ 360 U.S. 474 (1959).

¹⁴ 367 U.S. 886 (1961).

¹⁵ *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

¹⁶ 350 U.S. 551 (1956).

¹⁷ 357 U.S. 468 (1958).

¹⁸ 357 U.S. 399 (1958).

¹⁹ *Konigsberg v. State Bar of California*, 360 U.S. 36 (1961).

²⁰ 366 U.S. 117 (1961).

Here in 1958 and subsequently the probability of retaliatory legislation had largely passed when the justices handed down modified opinions based for the most part on a contrary philosophy.

The book presents a well documented explanation of the forces that pushed the Court curbing proposals, the cases that furnished the ammunition, and the reasons for failure. In 1958 and subsequently there was no Constitutional Revolution as there was in 1937. Rather a differently oriented court in a different generation accomplished evolution toward an approach less libertarian than the High Court which handed down decisions in the field of national security from 1955 to 1958. We are presented with a contemporary viewpoint taking us right through a major shift in position. Only to a limited degree was the shift due to outside pressures.

The author's weakness lies in his preference for the philosophy that prevailed in the Court from 1955 to 1958. He presents, upholds, and affirms viewpoints grounded in that philosophy. This makes the work less objective than it otherwise might be. He has little appreciation for the court curbing efforts of such highly respected and intellectual groups as the American Bar Association and the Conference of State Supreme Court Justices, both of which organizations sided with those who criticized the decisions which seemed to favor the rights of individuals. For instance, he says: "The Bar Association's pronouncements fell far short of the intellectual standards one would expect from such an organization." Justice Douglas' words are appropriate at this point: "For the federal constitution is not a code, but a rule of action—a statement of philosophy and point of view, a summation of general principles. . . . Democracy, like religion, is full of sects and schisms."²¹ Criticism of the Court, even when expressed in terms of limiting its jurisdiction and powers, is a healthy part of the democratic process.

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²¹ Douglas, *In Defense of Dissent*, in *THE SUPREME COURT: VIEWS FROM THE INSIDE* 51 (Westin 1961).

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