

LECTURE

Preserving the System: The Role of Judges*

By ANTHONY LEWIS**

Nine years ago the *Hastings Law Journal* devoted an issue to the decisions of Justice Tobriner.¹ Not just the work but the man shines through those pages. One sees a judge who was contemporary in his awareness of change as the norm in our society, old-fashioned in his rectitude and strength of character. Those who knew the justice well wrote of his sense of history, his concern for human values, his philosophical perspective, his wisdom.²

To speak in Justice Tobriner's memory at this time is a challenge. For the values he represented are under attack. The very process to which he was so devoted, the judicial process, is nowadays called into question. To say that is to say that there is a threat to one of the foundations of American freedom, or so I believe. It is important for all of us to try to understand what is happening. For that we need Justice Tobriner's philosophical perspective, his sense of history.

Let me begin by quoting another judge about the feeling of being embattled:

[T]hese days no one can complain if any institution, system, or belief is called on to justify its continuance in life. Of course we [judges] are not excepted and have not escaped. Doubts are expressed that go to our very being. . . . I get letters, not always anonymous, intimating that we are corrupt. Well . . . I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought

* This lecture was delivered as the Fourth Annual Mathew O. Tobriner Memorial Lecture at the University of California, Hastings College of the Law, on October 20, 1986. The Tobriner Memorial Lecture commemorates the life work and social vision of Mathew O. Tobriner, former justice of the California Supreme Court.

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1. 29 HASTINGS L.J. 1 (1977).

2. See, e.g., Grodin, *Justice Tobriner: Portrait of the Judge As An Artist*, 29 HASTINGS L.J. 7 (1977).

but that of solving a problem according to the rules by which one is bound, to know that many see sinister motives³

That was said to the Harvard Law School Association of New York on February 15, 1913, by Mr. Justice Holmes. Attacks on judges are not new. I did leave out one phrase of Holmes' that would probably have identified his words as from another age. "[W]e are told," he said, "that we are representatives of a class—a tool of the money power."⁴ That is not the complaint today. It is, rather, that judges, or some of them, are too ready to challenge power. The critics do not speak in exactly those terms, but I think that is what they mean.

As I hardly need to say here,⁵ state as well as federal judges are under attack. But I am more familiar with the federal scene. There the attack on judges is coming from the highest levels of government. The President of the United States lately told a political audience: "The proliferation of drugs has been a part of a crime epidemic that can be traced to, among other things, liberal judges who are unwilling to get tough with the criminal element in this society. We don't need a bunch of sociology majors on the bench."⁶ The Attorney General of the United States has lectured judges on the correct mode of constitutional interpretation.⁷ One of his principal assistants recently excoriated a Justice of the United States Supreme Court, describing his judicial philosophy as a, and perhaps the, chief present danger to our liberty.⁸

Whatever pains Justice Holmes and his colleagues had to bear, such comments from the top of the executive branch were not among them. William Howard Taft—a Republican conservative who revered the Supreme Court and later became Chief Justice—was President when Holmes made that speech in 1913. His Attorney General was George W. Wickersham, another respecter of judges. Some things *have* changed

3. O. W. HOLMES, *Law and the Court*, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 169 (Howe ed. 1962).

4. *Id.*

5. At the time of this talk, six of the seven California Supreme Court justices were up for "reconfirmation." There was a vigorous and controversial campaign led by California Governor George Deukmejian to deny the confirmation of justices appointed by former Governor Edmund G. Brown, Jr.—particularly aimed at Chief Justice Rose E. Bird. *See, e.g., Friend, Rose Bird's Being Run Out of Office*, AM. LAW., Sept. 1986, at 35. In the event, California voters denied confirmation to all three of the targeted justices: Chief Justice Bird, Justice Joseph Grodin, and Justice Cruz Reynoso.

6. N.Y. Times, Oct. 9, 1986, at 14, col. 1.

7. Meese, Address to the Meeting of the American Bar Association (July 9, 1985) (text available from the A.B.A., Chicago) [hereinafter Meese Address]. *See also* L.A. Daily J., July 10, 1985, at 1, col. 2.

8. Reynolds, Speech to the University of Missouri School of Law (Sept. 12, 1986) (text available from the Department of Justice). *See also* N.Y. Times, Sept. 13, 1986, at 1, col. 6.

since 1913, and one of them is the definition of conservative in American politics. Many of those who call themselves conservatives today look at judges and see, in Holmes' phrase, sinister motives.

Attorney General Meese seemed to call into question the good faith of every Supreme Court Justice for the previous sixty years when he spoke to the American Bar Association in July, 1985.⁹ He attacked the long-established view that some of the guarantees of freedom in the Bill of Rights, the first ten amendments to the Constitution, which originally protected those rights only against their abridgment by the federal government, now apply also to the states. That is, state like federal officials are forbidden to suppress freedom of speech,¹⁰ to carry out unreasonable searches,¹¹ to impose cruel and unusual punishments,¹² and so on.

What the Supreme Court has held is that essential protections of freedom in the Bill of Rights are embraced in the "due process of law" guaranteed by the Fourteenth Amendment against deprivation by the states.¹³ I spoke of that view as established because as long ago as 1925 the Court held that freedom of speech was protected against repressive state action.¹⁴ In 1931 it applied the Press Clause of the First Amendment to keep Minnesota from suppressing a newspaper.¹⁵ In the *Gideon*¹⁶ case in 1963 it said the states were bound by the Sixth Amendment's right to counsel guarantee and must provide lawyers for poor defendants in criminal trials.

The history is so familiar that I apologize for running through it even briefly. But Mr. Meese's 1985 speech showed again the wisdom of Justice Holmes' remark that "we need education in the obvious."¹⁷ The Attorney General was criticizing recent Supreme Court decisions on the question of religious establishment.¹⁸ The cases all dealt with state and

9. See Meese Address, *supra* note 7.

10. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925).

11. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

12. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (assuming, without expressly stating, that the Fourteenth Amendment incorporates eighth amendment protections).

13. See *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) ("the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."); *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) ("it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.").

14. *Gitlow v. New York*, 268 U.S. 652 (1925).

15. *Near v. Minnesota*, 283 U.S. 697 (1931).

16. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

17. O. W. HOLMES, *supra* note 3, at 169.

18. Meese Address, *supra* note 7, at 11.

local practices. But, Mr. Meese said, the First Amendment's provision against an establishment of religion "was designed to prohibit Congress from establishing a national church."¹⁹ Indeed, he said, the whole Bill of Rights had nothing to do with state action. The constitutional theory by which its provisions were applied to the states through the Fourteenth Amendment was "intellectually shaky."²⁰ And then he said: "[N]owhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow"²¹

Now of course it is proper for an Attorney General or anyone else to criticize Supreme Court decisions. The Justices themselves have divided often and sharply about whether and how to apply particular provisions of the Bill of Rights to the states.²² But Mr. Meese seemed to be doing something more: shaking fundamental assumptions about the constitutional rules under which we live. For all of us operate on the understanding that there are limits to what state and local authorities may do: limits set by the Constitution of the United States and enforced by judges. In fact, most of the Supreme Court cases that test the extent of our rights come from state proceedings, whether they concern religion, or capital punishment, or free speech, or whatever.

If Mr. Meese was serious, there would be nothing to decide in any of those cases, for there would be no guarantees in the Federal Constitution to help us. The State of California, for example, could make the Unification Church its official religion, and require public employees—teachers, members of the legislature, police officers—to belong to that church, all without offending the Constitution of the United States. Minnesota could put newspapers out of business if they published stories linking officials to criminal ventures. New York could make all defendants in criminal cases take the stand and testify against themselves.

That is what "the principle of federalism" requires, in the Attorney General's view. Or so we must assume, since he said the contrary view—that the Constitution *does* protect us against such state repression—had dealt a "politically violent and constitutionally suspect"²³ blow to federalism, to the proper relationship between the state and federal governments.

Mr. Meese's talk of federalism drew a rare direct response from a member of the Supreme Court. Justice John Paul Stevens said Mr.

19. *Id.* at 14.

20. *Id.* at 13.

21. *Id.* at 14.

22. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 315-18 (3d ed. 1986).

23. Meese Address, *supra* note 7, at 14.

Meese had overlooked "the profound importance of the Civil War and the post-war amendments on the structure of our government, and particularly upon the relationship between the federal government and the separate states."²⁴ The point is that those amendments, most of all the Fourteenth, were expressly intended to change the state-federal relationship, to make this a more unified country, and to give the federal government—including the courts—more authority in what had been areas of exclusive state jurisdiction. Justice Stevens, in short, was recalling the pregnant fact that our bloodiest war and its aftermath profoundly and permanently changed political relationships in the United States. The Justice added drily that Mr. Meese had also failed to mention "the fact that no Justice who has sat on the Supreme Court during the past sixty years has questioned the proposition" that the Fourteenth Amendment applies the guarantees of the First Amendment to state action.²⁵

If Mr. Meese was serious, I said a moment ago. There is reason to wonder. For when the consequences of undoing federal constitutional protection against state repression were pointed out, a spokesman said the Attorney General thought "some" of the Bill of Rights *should* apply to the states.²⁶ What, then, was Mr. Meese doing in that speech? Was he just casually advancing a radical doctrine without understanding what it would actually do? Or did he candidly tell us what he wishes would happen to American freedom, and then execute a politic withdrawal?

Since then Mr. Meese has dropped that idea from his speeches. But he has not given up another point of his Bar Association talk, which he has made the theme of a continued campaign. That theme is that judges, in expounding the Constitution, should adopt what he called "a Jurisprudence of Original Intention."²⁷

By that the Attorney General meant that courts—and he addressed his message especially to the Supreme Court—should follow the intent of those who wrote the provision of the Constitution at issue in any present case. "Those who framed the Constitution," he said, "chose their words carefully The language they chose meant something. It is incumbent upon the [Supreme] Court to determine what that meaning

24. Stevens, Address to the Federal Bar Association (Oct. 23, 1985), at 9 (text available from the United States Supreme Court Press Office).

25. *Id.* Among the Justices accepting the application of first amendment guarantees to the states through the Fourteenth Amendment has been one praised by Attorney General Meese: Justice (now Chief Justice) Rehnquist. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-55 (1976).

26. See Taylor, *Meese and His Candor*, N.Y. Times, Aug. 3, 1985, at 7, col. 3.

27. Meese Address, *supra* note 7, at 15.

was.”²⁸

Let me interrupt myself here for a moment of what may be light relief. Some years ago the Supreme Court was hearing argument in a case involving the Twenty-first Amendment to the Constitution.²⁹ That was the Amendment that repealed Prohibition but at the same time gave the states power to control the transportation or importation of alcoholic beverages within their borders. In this case, the State of New York was trying to control sales of duty-free liquor to departing international airline passengers. As the lawyers argued over what the Framers of the Amendment had meant about state power, an amazed look came over the face of Justice Hugo L. Black.³⁰ He had just realized that he was a Senator when Congress proposed the Twenty-first Amendment. He was a Framers! It was a wonderful moment for a man who wrote with such passion of what Jefferson meant by “an establishment of religion” and Madison by “no law . . . abridging the freedom of speech.”³¹ But not even the presence of a Framers on the Court left the issue of the Framers’ intentions free of doubt. The Supreme Court held that New York could not control those duty-free liquor sales³²—Justice Black dissenting.³³

Of course there is a serious point in that story. The “intent” of the Framers is seldom easy to discover, least of all in a form useful to the judges who must decide concrete contemporary disputes. Ninety-six Senators who vote on a proposed constitutional amendment—that is how many there were in Hugo Black’s Senatorial days—may have ninety-six different ideas of what they intend. Even the most particularized legislation often contains deliberately ambiguous language, so that enough members with conflicting ideas will vote for it. They leave it to the judges to decide what they meant. If that is true of a tax bill, how much more inevitably is it so of a constitutional provision.

The Framers of our Constitution are known to have had individual beliefs, strongly-held and conflicting, on the nature of government and society. Their genius, and it surely was that, lay in part in their diversity. They created this country by managing to submerge their differences. But not even Madison’s notes on their debates can possibly assure us of their collective intent in the spare language they used. More important, they did not have *any* measurable intention on many of the issues that

28. *Id.* at 16.

29. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

30. Justice Black’s reaction was observed, and described to the author, by Professor Vincent Blasi of the Columbia Law School.

31. U.S. CONST. amend. I.

32. *Hostetter*, 377 U.S. at 334.

33. *Id.* (Black, J., dissenting).

come before judges today, because they could not have imagined today's circumstances.

The usual thing said in this regard is that men of the eighteenth century could not have imagined airplanes or telephones or other technological changes. Thus the judges who in this century had to decide whether wiretapping was a search and seizure condemned by the Fourth Amendment³⁴ could not solve the problem by looking up what the Framers thought of wiretapping. But technological change is not the real issue, for a reason well stated by a judge who is often cited as an exemplary conservative, Judge Robert Bork of the United States Court of Appeals for the District of Columbia. What matters is the *values* underlying the clauses of the Constitution, he said. He put it that the judge's job is "to discern how the framers' values, defined in the context of the world they knew, apply to the world we know."³⁵ In those terms the wiretapping question is answerable. A central value of the Fourth Amendment is personal privacy. Its framers did not foresee electronic surveillance, but their value should be applied today when the state uses electronic means to invade personal privacy.

But that more sophisticated way of looking at original intention, Judge Bork's way, is still not enough to solve many modern problems of constitutional interpretation. Think about the Supreme Court decision that was probably this century's most striking example of a change in interpretation: *Brown v. Board of Education*.³⁶ Attorney General Meese says the Court was right in 1954 to change its mind and hold racial segregation in public schools unconstitutional.³⁷ Moreover, he says, the *Brown* decision was consistent with his demand that courts obey the original intention of constitutional provisions.³⁸ How can that be? It is because, he says, in the case of *Plessy v. Ferguson*³⁹ in 1896 the Court, holding that segregated railroad cars met the Fourteenth Amendment's demand for the equal protection of the laws, had "disregarded the clear intent of the Framers of the civil war amendments to eliminate the legal degradation of blacks."⁴⁰ So *Brown* restored the original principle of the Fourteenth Amendment. But at the time the Amendment was adopted, in 1868, schools *were* segregated—in the District of Columbia among

34. See *Olmstead v. United States*, 277 U.S. 438 (1928).

35. *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (Bork, J., concurring).

36. 347 U.S. 483 (1954).

37. Meese, Address to the District of Columbia Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985) (text available from the Department of Justice).

38. *Id.* at 6.

39. 163 U.S. 537 (1896).

40. Meese, *supra* note 37, at 6.

other places, both South and North. The gallery of the Senate that proposed the Amendment was segregated. It took some straining for the Court to find, in the *Brown* opinion, that evidence of the Framers' intent on segregated schools was "inconclusive."⁴¹ No Justice of whom I am aware believed or believes that the Meese canon, reliance solely on history, could have brought the Court to its decision in *Brown v. Board of Education*.

What produced the great change of constitutional interpretation in 1954 was change in circumstances; in the reality of race in the human condition; in our perception of race. In 1896, when it allowed segregation, the Supreme Court said that separation of human beings on account of their race was a stamp of inferiority only if the segregated race chose "to put that construction upon it."⁴² The Court cited no history, no precedent, to support that proposition; the Justices simply asserted it, I suppose, as a received sociological truth of the day. But after Hitler, after the marking of Jews with yellow stars had been followed by the Holocaust, it would have been very hard for the Supreme Court to say that racial segregation was invidious only if those marked out put that construction upon it. Segregation was an assertion of racial inferiority. The world knew it, and judges could not hide from that contemporary knowledge in construing the old words of the Constitution.

The *Brown* case illustrates what a very conservative Justice of the Supreme Court, Joseph McKenna, said in 1910 about construing the Constitution. "Time works changes," he said, and "brings into existence new conditions and purposes. . . . In the application of a Constitution, therefore, our contemplation cannot be only of what has been but of what may be."⁴³

Supreme Court Justices have said a good deal over the years about how to construe the Constitution, and their words do not offer much comfort to the Meese canon. Chief Justice Hughes said in an opinion of the Court:

If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the condition and outlook of their time, would have placed upon them, the statement carries its own refutation.⁴⁴

But the most eloquent, as always, was Justice Holmes:

41. *Brown*, 347 U.S. at 489.

42. *Plessy*, 163 U.S. at 551.

43. *Weems v. United States*, 217 U.S. 349, 373 (1910).

44. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁴⁵

In the controversy stirred by Attorney General Meese's campaign for "a jurisprudence of original intention," time has not won him many supporters. Even a leading conservative intellectual, Dinesh D'Souza, managing editor of the Heritage Foundation's *Policy Review*, has rejected the Meese canon.⁴⁶ He proposes an even simpler approach for judges: just look at the text of the Constitution itself.

"The vast majority of clauses should give no anguish at all to judges interested in what the Constitution actually says," Mr. D'Souza wrote. "It is only a handful of clauses, such as 'due process,' 'unreasonable search and seizure,' 'equal protection' and the like that are subjective and open to judicial discretion."⁴⁷ What an easy life judges would have if their job were as Mr. D'Souza imagines it to be. But alas, most of the constitutional cases they must decide turn on what he calls subjective clauses, and not only the clauses he mentions. Consider one of the most familiar parts of the original Constitution, the Commerce Clause: "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁴⁸ Now there is a nice simple declarative sentence for you. But from the very beginning of our history as a nation it was seen—as it had to be seen—in a more complicated way. The clause is framed in affirmative terms: a grant of power to Congress. But what about the negative? Suppose individual states began imposing barriers on their borders, putting tariffs on interstate commerce or giving monopolies to this company and that company to carry goods on rivers and highways?⁴⁹ In Mr. D'Souza's view, I suppose, judges could not read the Constitution to keep the states from doing such things, because the literal text of the Commerce Clause did not prohibit state interruptions of commerce. If John Marshall and his colleagues had read the Constitution that way, we would not have a national economy today; Holmes doubted that we would have a nation.⁵⁰

45. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

46. D'Souza, *Meese Misreads Constitution*, Boston Globe, Sept. 14, 1986, at A17, col. 3.

47. *Id.*

48. U.S. CONST. art. I, § 8, cl. 3.

49. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

50. O. W. HOLMES, *supra* note 3, at 172.

The United States survived and prospered because Marshall did *not* follow the canon of textual literalism in interpreting the Constitution.

Or consider the well-trod ground of the First Amendment. "Congress," it says, "shall make no law . . . abridging the freedom of speech."⁵¹ Another straightforward command. Justice Black always said it should be taken just that way: literally. "No law means no law."⁵² But when Justice Black did not like a particular utterance or its circumstances, he found ways to avoid his own simplicity. Shocking words were not really "speech."⁵³ Speech near courthouses,⁵⁴ or by children in school,⁵⁵ was different. And so on.

For most other judges, and for the rest of us who grapple with the First Amendment, those few words pose excruciating intellectual and philosophical problems—and looking for the Framers' intentions throws very little light on them. After the First Amendment's adoption, the common law of libel continued to be applied. But then, in 1962, an Alabama jury gave record libel damages to a white politician who sued over an advertisement in the *New York Times*—a message advertisement against segregation—that did not name him but that he said inferentially reflected on him.⁵⁶ The judgment threatened to let loose an avalanche of libel suits that would keep the national press out of the South at a crucial time in the struggle over segregation. No libel judgment had ever before been set aside as a violation of the First Amendment. Should that history have been conclusive? Or was the Supreme Court right to decide that this libel action threatened to suppress a right at the core of the First Amendment,⁵⁷ the citizens' right to speak freely, in Madison's phrase, about "public characters and measures?"⁵⁸ I think we would be in a different country, a far less free country, if the Supreme Court had woodenly followed precedent and found that libel judgment unaffected by the First Amendment.

51. U.S. CONST. amend. I.

52. *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting).

53. *Cohen v. California*, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting, in which Black, J., joins) (shocking words on jacket not "speech").

54. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 559, 578 (1965) (Black, J., dissenting) (court-house picketing not protected because the First Amendment prohibits governmental restrictions on speech and assembly only "where people have a right to be for such purposes" (emphasis in original)).

55. *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 515 (1969) (Black, J., dissenting) (symbolic speech by students not "speech").

56. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 S.2d 25 (1962), *rev'd*, 376 U.S. 254 (1964).

57. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

58. *See id.* at 274 (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 553-54 (1876)).

If the doctrine of original intent has as little support as I suggest, you may wonder why I have dwelt on it—why I have taken so much of your time discussing Attorney General Meese's campaign on that theme. After all, there is always room for debate about how judges should approach the duty of enforcing the Constitution. It is a curiosity that judges should have such a role in a democracy, that they should be able to say no to elected politicians. To reflect on that feature of our system is never wrong, and certainly not for an Attorney General to do so.

But this is more than reflection. It is a campaign, and I think it has worrying overtones. It rings of an effort to intimidate judges into taking a narrower view of their function. Just incidentally, that view would be more congenial to the current National Administration's legal agenda: preventive detention, for example, capital punishment, and elimination of the rule excluding illegally seized matter from evidence in criminal trials.⁵⁹

And it is not just a campaign of lofty abstractions. This Administration is going to appoint more federal judges than any of its predecessors,⁶⁰ and the Justice Department is scrutinizing prospective appointees with fanatical care to see that they will carry out the desired ideological agenda.⁶¹ A Republican conservative has lately told us that he was excluded from consideration for a judgeship because, among other things, he belonged to that establishment organization, the Lawyers' Committee for Civil Rights Under Law.⁶² And then there was the recent speech by Mr. Meese's Assistant Attorney General for Civil Rights, William Bradford Reynolds. It was no subtle intimidation; it was an aggressive attack, by name, on the senior member of the Supreme Court, Justice Brennan. The Justice's views, Mr. Reynolds said, constitute a major threat—"perhaps the major threat to individual liberty" under our Constitution.⁶³ To prove that point, he invented quotations and attributed them to Justice Brennan: for example, the statement that the Constitution is essentially a "dead letter"—which of course the Justice had not said.⁶⁴

It is no great secret why Justice Brennan should be a target. He has played a crucial part on the Court in enforcing congressional statutes and voluntary local arrangements to bring blacks into the mainstream of

59. *Interview with Attorney General Meese*, A.B.A. J., July 1985, at 44-46.

60. Browning, *Reagan Molds the Federal Court in His Own Image*, A.B.A. J., Aug. 1985, at 60.

61. See Lacovara, *The Wrong Way to Pick Judges*, N.Y. Times, Oct. 3, 1986, at A31, col. 1.

62. *Id.*

63. Reynolds, *supra* note 8, at 4.

64. *Id.*

our economic life after generations of discrimination.⁶⁵ And Mr. Reynolds has bitterly opposed that effort. More broadly, for thirty years Justice Brennan has been a leading judicial voice in protecting freedom of speech and press, assuring that the votes we cast are counted equally and resisting the power of the state—the power of the federal government—to control our lives in the name of national security.⁶⁶ Power is the issue. The government wants more, and wants to exercise it without constraints. Justice Brennan is an obstacle to that aim. That is why he was made a target. And that is why it matters.

All Presidents object to limitations on their power. Ronald Reagan is no different from Lyndon Johnson in that regard. Attorneys General argue again and again in lawsuits that this act of Congress or that judicial decision infringes on the prerogatives of the President. But I know of no time when the momentum of those arguments was so strong, when the courts were so deferential to them, when a President exercised such enormous power without realistic constraints.

When the courts were so deferential: I emphasize that point. It is a reason for the deepest concern. We live in an age when Presidents have an enormous military and intelligence apparatus, none of which existed when I was growing up. There was no huge standing army then, no Central Intelligence Agency, no vast National Security Agency listening in on conversations all over the world with its eavesdropping devices. And no nuclear weapons. It is a different world today. And from the nature of that world has come the development in our country of a national security state, with some of the constitutional presumptions of our past turned upside down. That is a strong statement. Let me test it with a little recent history.

In 1952 we were in a painful war in Korea. The United Steelworkers Union called a strike that threatened to cripple the war effort. President Truman headed off the strike by seizing the nation's steel mills and operating them under nominal control of the government. The companies sued, challenging the President's power to take their property.⁶⁷ In the trial court the Justice Department lawyer, Holmes Baldrige, argued

65. See *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring and dissenting).

66. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Brennan, J., concurring) (disallowing government's prior restraint on publication of the *Pentagon Papers*); *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964); *Baker v. Carr*, 369 U.S. 196 (1962) (holding that the political question doctrine does not preclude judicial review of a gerrymandering allegation).

67. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) [hereinafter the *Steel Seizure Case*].

that the President could act as he had, without a statute authorizing seizure, because he had inherent power to act for the national safety. The trial judge questioned Mr. Baldrige, and these exchanges occurred:

The Court: So you contend the Executive has unlimited power in the time of an emergency?

Mr. Baldrige: He has the power to take such action as is necessary to meet the emergency.

. . .

[T]he distinction that the Constitution itself makes between the powers of the Executive and the powers of the legislative branch . . . are significant

In so far as the Executive is concerned, all executive power is vested in the President. In so far as legislative powers are concerned, the Congress has only those powers that are specifically delegated to it

The Court: So, when the sovereign people adopted the Constitution, it . . . limited the powers of the Congress and limited the powers of the judiciary, but it did not limit the powers of the Executive.

Is that what you say?

Mr. Baldrige: That is the way we read Article II⁶⁸

The Supreme Court rejected the government's argument in the *Steel Seizure Case*.⁶⁹ It held that the President could not act—not even in a wartime emergency—in the absence of authority given by legislation or inferable from the action or acquiescence of Congress.⁷⁰ The steel mills were returned to the companies.

The *Steel Seizure Case* was a landmark decision in the field of separation of powers: a reaffirmation of the Framers' belief that our freedom could best be maintained by distributing power among three branches of government and preventing concentration of power in any one of them. The lesson of the *Steel Seizure Case* was applied in 1971, when President Nixon asked the courts to stop publication of the *Pentagon Papers* in the *New York Times*.⁷¹ The Supreme Court said "no" to the President, in part because of first amendment considerations, and in part because Congress had passed no law authorizing injunctions against publications that a President said were a threat to national security.⁷²

68. A. WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW SUIT: YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER; THE STEEL SEIZURE DECISION* 62-64 (1958).

69. 343 U.S. at 585.

70. *Id.* See also *id.* at 635-38 (Jackson, J., concurring).

71. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

72. *Id.* at 744-46 (Marshall, J., concurring).

But all that sounds long ago and far away as I describe it. For one looks in vain through more recent decisions of the Supreme Court for any indication that a President must have some authority in law before he can take action against Americans for what he asserts are reasons of national security.

In 1980 the Supreme Court considered the case of a former C.I.A. official, Frank Snepp, who was deeply disturbed about the way he thought we had abandoned our allies in Vietnam—even leaving the names of our Vietnamese intelligence sources in files, so they would surely face retribution.⁷³ Mr. Snepp published a book about the last days in Vietnam⁷⁴ without first showing the manuscript to the agency, as he had promised to do. The former Director of Central Intelligence, William Colby, had complained to Congress that there was no remedy when former employees of the C.I.A. published material without first clearing it; he asked Congress for legislation, but none was passed.⁷⁵ The Supreme Court stepped into the breach by simply making up law to punish Mr. Snepp. It imposed on him what it called a constructive trust, namely the seizure of all he had earned or would earn from the book—about \$175,000 so far, more than the maximum fine for many heinous federal crimes. And it enjoined him, for the rest of his life, from speaking or writing anything related to intelligence, even fiction, without first getting clearance from the C.I.A.: the first time in American history that the Supreme Court had put a prior restraint on speech about governmental matters. The Court did all that without letting Mr. Snepp's lawyers brief or argue the case. It did so although the government conceded for purposes of the case that his book contained no classified material. And it did so, I repeat, although Congress had been asked to create a remedy in such situations and had *not* enacted legislation.

The uninhibited lawmaking by the Court in the *Snepp* case encouraged President Reagan to try an even bolder step on his own. In 1983 he issued a National Security Decision Directive requiring more than 120,000 government officials with access to highly classified information to sign contracts that would require them to clear any writings on the general subject of their work with censors—for the rest of their lives, whether in or out of government service.⁷⁶ Once again there was no basis in any statute for such a program. And it is easy to understand why the

73. *Snepp v. United States*, 444 U.S. 507 (1980).

74. F. SNEPP, *DECENT INTERVAL* (1977).

75. See *Petition for Certiorari*, at 26-27, in *Knopf v. Colby*, No. 74-1164, *cert. denied*, 421 U.S. 992, *reh'g denied*, 422 U.S. 1049 (1975).

76. National Security Decision Directive, Mar. 11, 1983 (text on file at the *Hastings Constitutional Law Quarterly* offices).

Administration attempted to act without going to Congress for legislation. Legislating takes time. Congress rarely does exactly what the President wants. In this case it was a certainty, I think, that Congress would not impose so drastic and permanent a censorship system on men and women who came to work for the government, however briefly. But that is the very reason—the reason in the mind of those who wrote the Constitution—why Presidents should not be able to act on their own. The constitutional theory is that debate and reflection produce better policies than those imposed by fiat. Congress in fact rebelled against President Reagan's National Security Decision Directive, forcing him to suspend it—for a time, in any event.⁷⁷ But there has been no change in the Supreme Court's evident willingness to accept as law whatever the President does under the banner of national security.

In 1981, the Court held that the government could revoke the passport of a citizen whose travel abroad assertedly injured national security,⁷⁸ although earlier Supreme Court decisions had limited executive power to deny passports for political reasons,⁷⁹ and Congress had not responded to presidential requests for corrective legislation.⁸⁰ In 1984, the Court sustained a Treasury regulation that prevented most Americans from traveling to Cuba,⁸¹ although again the legislative authority for such a step was dubious.

In those cases the Supreme Court emphasized the great power of the President in matters of defense and foreign affairs, and its own reluctance to touch those areas. The opinion in the passport case said that "matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."⁸² In other words, the President is presumed to have plenary power. But that is to forget the fear of power that moved the Framers: the presumption *against* concentrated power that was reaffirmed in the *Steel Seizure Case*.

77. *Senate Bars Lifetime Censorship*, Washington Post, Oct. 21, 1983, at 1, col. 1.

Despite the suspension of the directive, more than 290,000 present and former federal employees signed a form promising to submit material for clearance before publication for the rest of their lives. In 1985, under that continuing program, 14,144 books, articles, and speeches were submitted to censors for clearance. See Engelberg, *Security Rule Died but Lived On*, N.Y. Times, Oct. 23, 1986, at 12, col. 4.

78. *Haig v. Agee*, 453 U.S. 280 (1981).

79. See, e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958).

80. See *Haig v. Agee*, 453 U.S. at 317 n.7 (Brennan, J., dissenting).

81. *Regan v. Wald*, 468 U.S. 222 (1984).

82. *Haig v. Agee*, 453 U.S. at 292. See also Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Powers and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349 (1986).

Unbridled presidential power is not a matter of marginal or esoteric concern. We know from recent history—repeated history—that Presidents can slide this country into self-destructive wars. Earlier this year, when President Reagan was having trouble persuading Congress to vote for military aid to the Contras in Nicaragua, an editorial writer for the *Wall Street Journal* wrote that the President should not be detained by defeat in Congress: he should just “unilaterally order a transfer of funds to the Contras.”⁸³ So much for the Constitution and the separation of powers. That is modern-day conservatism. I remember when it was a conservative axiom to oppose concentrated power in this country. Conservatives cheered the *Steel Seizure Case*,⁸⁴ in which Justice Jackson wrote of the idea of elastic presidential power in time of claimed emergency: “The Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country.”⁸⁵

Attorney General Meese praises the separation of powers, but his is a one-way version of the doctrine: it strikes down the slightest gesture by Congress that strays from its customary bounds, but it rejects all challenge to new exercises of power by the President.

Thus the Attorney General praised the Supreme Court’s decision on the Gramm-Rudman-Hollings budget law.⁸⁶ The Court held the act unconstitutional because it called on the Comptroller General to perform some of the calculations in the scheme of automatic spending cuts.⁸⁷ That was an “executive” function, the Court said, but the Comptroller was a “legislative” creature because he could be removed at Congress’ initiative. But the Comptroller can be removed only by a joint resolution, signed by the President or passed by a two-thirds vote of both houses over his veto.⁸⁸ And besides, no one has ever tried to remove a Comptroller General in the sixty-five years the office has existed. So the objection was not only trivial but theoretical. Of Congress we demand empty punctilio. On Presidents we set no limits when they assert the needs of national security. Not in fourteen years has the Supreme Court found a presidential action invalid for want of legislative authority.⁸⁹

83. Crovitz, *Plenty of Precedents for Bypassing Congress on Contra Aid*, Wall St. J., Mar. 25, 1986, at 30, col. 3.

84. 343 U.S. 579 (1952).

85. *Id.* at 643-44 (Jackson, J., concurring) (emphasis in original).

86. *Bowsher v. Synar*, 106 S. Ct. 3181 (1986).

87. *Id.* at 3192.

88. *Id.* at 3198 & n.7. See also *id.* at 3210 (White, J., dissenting).

89. See Edgar & Schmidt, *supra* note 82, at 365 n.45.

There is a further irony in those recent cases. Conservatives, including the Attorney General, say they are against "judicial activism" and for "restraint." But there could hardly be a more "activist" performance than what the Supreme Court did in the Gramm-Rudman case: it reached out to find a tiny theoretical flaw in order to strike down an important statute.

In the period when Earl Warren was Chief Justice, the Supreme Court often employed a much more restrained approach when dealing with sensitive legislation. It insisted on finding clear authority in legislation for rules that touched on significant civil liberties concerns.⁹⁰ For example, an industrial employee who had lost his security clearance after charges by unnamed informers challenged the procedure as unconstitutional. The Supreme Court, without reaching the constitutional issue, held that neither Congress nor the President had clearly authorized a security program denying an opportunity for confrontation of accusers.⁹¹ In effect the Court remitted the issue to Congress, saying: "If you really want to do this, you will have to say so without equivocation." It was a form of deference to the legislative branch not much in evidence in the Supreme Court these days.

The most worrying of all the contemporary cases is going through the courts right now, and I must say a word about it before I conclude. This country has never had a general law making it a crime to disclose classified information. In fact, as you know, classified material is leaked every day in the bureaucratic wars of Washington. Our laws make it a crime to disclose secrets only of particularly dangerous kinds: nuclear secrets, for example.⁹² And there are espionage acts against transmission of defense information to foreign powers.⁹³ That is all—or so we thought.

Now a Navy employee, Samuel Loring Morison, has been convicted under the Espionage Act:⁹⁴ not because he slipped information to a Soviet agent, like so many other Defense Department employees we have heard about in the last year.⁹⁵ Rather, because he gave a magazine clas-

90. See P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 178-80 (1961).

91. *Greene v. McElroy*, 360 U.S. 474 (1959).

92. See, e.g., 42 U.S.C. § 2274 (1983).

93. See, e.g., 18 U.S.C. §§ 793-794 (1983).

94. See *Damming a Leak: Photo Filcher Found Guilty*, *TIME*, Oct. 28, 1985, at 45; see also *United States v. Morison*, 604 F. Supp. 655 (D. Md.), *appeal dismissed*, 774 F.2d 1156 (4th Cir. 1985) (denying summary judgment on first amendment grounds); 622 F. Supp. 1990 (D Md. 1985) (suppressing evidence of Morison's patriotism).

95. See, e.g., Wise, *The Spy Who Got Away*, *N.Y. Times*, Nov. 2, 1986, § 6 (Magazine), at 18 (discussing Edwin Lee Howard); Kittle, *Spies in the U.S.—A Growing Infestation*, *U.S. NEWS & WORLD REP.*, June 10, 1985, at 42 (discussing John Walker, Jr.); *150-year Prison*

sified material for publication. He did so because he thought the American public did not appreciate the growing Soviet aircraft naval threat, and he thought this item—a satellite photograph of a Soviet aircraft carrier under construction—would alert the public.⁹⁶ The Espionage Act has been on the books since 1917, and no one has ever before been convicted under it for supplying material to a publication. Moreover, Congress has repeatedly rejected presidential requests for laws making it a crime to publish classified information.⁹⁷

Attorney General Meese, in his Bar Association speech, said it would be his policy “to resurrect the original meaning of constitutional provisions *and statutes*. . . . Any other standard suffers the defect of pouring new meaning into old words”⁹⁸ There could hardly be a better description of what he and his colleagues have persuaded a trial judge to do in the *Morison* case: to pour new meaning into the old words of the Espionage Act. And again the reason is plain. As long as judges are pliant, it is easier to go to them for repressive new powers than to Congress, which has so often denied the very powers sought. Yes, there is an inconsistency in the Attorney General’s speeches and his actions, but that is not unusual. His interest is not in theory but in power.

Ten years ago, in this room, I had the privilege of speaking about the two-hundredth anniversary of the Declaration of Independence.⁹⁹ I said then that it was really the Constitution that had made us a nation and kept us free all this time. My faith in the Constitution is the same as we approach its bicentennial. Its system of divided powers remains the best way—the way proved by our American experience—to avoid tyranny.

But the system depends to a very large degree on judicial enforcement. Asking the holders of power to set their own boundaries on its use is not a very practical form of limitation, as other peoples have learned. Indeed, other countries in growing numbers are adopting, or at least talking about, the uniquely American idea of judicially enforceable bills of rights. Canada has a new bill of rights, being actively expounded by its courts. France, which might have been thought the last country to let judges into political matters, has a constitutional court. Discussion of a

Term Sought For Convicted Spy, N.Y. Times, Aug. 26, 1986, at A10, col. 6 (discussing Jerry A. Whitworth).

96. *Morison*, 604 F. Supp. at 658.

97. See Edgar & Schmidt, *supra* note 82, at 373 n.72; see also Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg case*, 26 STAN. L. REV. 311, 313 n.15 (1974).

98. Meese Address, *supra* note 7, at 17-18 (emphasis added).

99. Lewis, *A Constitutional Faith*, 3 HASTINGS CONST. L.Q. 679 (1976).

possible bill of rights is one pale glimmer in the dark night of South Africa.

I see no reason for us to fall back in *our* commitment to constitutionalism; to act as if those niceties had to be sacrificed in a dangerous world. And I see no reason, especially, for us to say that our judges should take a narrower view of their function— should be more timid in speaking truth to power. The opposite is true, for reasons stated more than twenty years ago by a brilliant federal judge, Charles E. Wyzanski, Jr.:

There has been a prodigious increase in both executive and legislative powers. Today the President has a dominant role in the initiation of both domestic and foreign policy. The power of the military establishment, now so clearly intertwined with scientific, technological and production processes, is unprecedented. . . . Congress . . . is master of the whole economic life of the nation, including finance, transport, trade, business, labor, agriculture and social security. It is against these developments that we should consider the power of the Supreme Court. . . . How small, relatively speaking, is that power. . . . To reduce [it] would be greatly to increase the possibilities of executive, legislative or military tyranny.¹⁰⁰

Twenty years later the tendency toward concentrated power has not lessened. Presidents have gathered more power unto themselves, and they have acquired the habit of asserting it unilaterally. Congress has become more compliant with the wishes of the Executive. Yet we are told, in strident voices, that judges must be more deferential: that democracy requires them to get out of the way.

In abstract logic it may be undemocratic for judges to say no to political power. But the life of our Constitution has not been logic: it has been experience. And our experience is that we depend on judges for our freedom: on their courage and wisdom, on our understanding that there are no easy answers to their hard problems.

For all those reasons I think it is a fitting time, an urgent time, to honor the memory of Mathew Tobriner.

100. Wyzanski, *Introduction* to L. HAND, BILL OF RIGHTS at xii-xiii (paper ed. 1964).

