



1956

Book Reviews

J. D. Hyman

Lloyd M. Wells

Follow this and additional works at: <https://scholar.smu.edu/smulr>

Recommended Citation

J. D. Hyman, et al., *Book Reviews*, 10 Sw L.J. 94 (1956)
<https://scholar.smu.edu/smulr/vol10/iss1/7>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BOOK REVIEWS

NATIONAL SECURITY AND INDIVIDUAL FREEDOM. By John Lord O'Brian. Cambridge, Mass.: Harvard University Press, 1955. Pp. 96. \$2.00.

The thesis of this slim volume, containing the 1955 Godkin Lectures at Harvard University, is embodied in two propositions. The first is that developments on the loyalty-security front have led, step by step, to "a coherent pattern of a legal system in startling contrast with the distinctive features of the tradition of fair play as well as of Anglo-American Constitutionalism." The second is that there is now an urgent need for American leaders to "awaken to their obligation to protect the freedom of the human spirit."

The new pattern is described as "something like a new system of preventive law applicable to the field of ideas and essentially different from traditional American procedures." Its documentation follows a line of analysis which has become very familiar. Punishment merely because of membership in a group invokes the doctrine of guilt by association. The change in standard under the Truman Loyalty Order, from reasonable grounds for belief of disloyalty, to reasonable doubt as to loyalty, shifted to the accused employee the burden of establishing loyalty and integrity beyond a reasonable doubt. The Internal Security Act of 1950 contains explicit preventive detention provisions, with only limited hearing safeguards which are seriously impaired by authorization to the Attorney General to withhold information on grounds of national security. The 1953 modification of the Executive Loyalty Program standard to "clearly consistent with the national security" means in practice that doubtful cases have been decided in favor of the government, the accused being handicapped by denial of access to derogatory information accessible to the security boards.

Mr. O'Brian contends that the most serious questions are presented by the procedures under which these operating standards are applied. Constitutional safeguards have been withdrawn by the absence of a Supreme Court ruling, thus far, that in the case of

federal employment due process requirements must be met. This deficiency is enhanced by the non-judicial character of the tribunals and the lack of standards for qualification of their members. The adverse determination in effect adjudges the person accused to be unworthy of trust and unfit for employment. Reliance on secret information, lack of opportunity for cross-examination, and reliance on paid informants are cited as further procedural developments which impair the presumption of innocence and negate the possibility of a fair trial.

All of these developments have acquired greater significance as the security program has been extended into private employment where work is done on government contracts, into the admissions policies of the Immigration Service, and into the employment of seamen. Sweeping as these developments are, Mr. O'Brien believes that the logic of the development does not allow for any stopping point. That logic is stated to be the necessity for applying punitive measures against unorthodox political ideas lest the communication of those ideas become the direct cause of wrongful acts; hence, the spread of ideas thought to be subversive must be prevented. It is that kind of logic which supports the post office in refusing to deliver Soviet writings to American scholars and could well be invoked to justify scrutiny of educational curriculums in colleges doing classified research under military contracts.

This factual review can hardly be challenged. And the conclusion Mr. O'Brien draws seems inescapable: that something fundamental is happening to American ideals when millions of Americans are subject to serious employment and reputation deprivation, not for concretely wrongful acts, but because of a speculative conclusion as to their possible future conduct, the determination being made under procedures that would not for a moment be tolerated in any American court in a civil action for a fifty dollar claim.

A responsible challenge to this part of Mr. O'Brien's argument might have two phases. One would be a denial that there is any policy of restraining the spread of thoughts as such, unless it be the thought that forcible overthrow of the Government of the United States is a desirable objective to be achieved as quickly as

possible. With this denial might go the assertion that our security requires such inquiry into thought patterns as may be taking place in order to screen out of sensitive employment persons who might create danger of sabotage or espionage, evils which we have reason and right to protect ourselves against. The problem here is reminiscent of the old one involved in determining whether legislation that closes certain occupations to individuals because of their past, non-criminal conduct or associations is punishment, or is merely the establishment of standards of trustworthiness for those engaging in occupations that properly are thought to involve high standards of trustworthiness. The second phase of the challenge, closely related to the first, might be that the questioned procedures are necessary for this particular kind of inquiry.

Mr. O'Brian deals only briefly with the first phase, arguing that the kind of inquiry being made is not responsive to the real danger. He points to the absence of sabotage in the United States in World Wars I and II, and to the fact that present policies did not uncover any instances of espionage or sabotage and would not have thwarted the treachery of the Fuchs and Rosenbergs. Despite the brevity of the discussion, Mr. O'Brian's opinion on this phase of the problem carries weight. Not only has he been for many years one of the great, constructive leaders of the American Bar, he has also had important governmental service, including the general counselship of the War Production Board in World War II, and, more pertinently, direction of the War Emergency Division of the Department of Justice in World War I, the division which supervised the internment of enemy aliens and trials for subversive activities. It may be hoped that Mr. O'Brian will be able to develop this point more fully.

Finding no adequate basis for the argument that our present security inquiries into ideas and attitudes are necessary to protect against sabotage, espionage, and similar tangible dangers, Mr. O'Brian draws the conclusion that the only reason for them can be a desire to control the spread of thoughts considered dangerous. Let us grant that one may reasonably challenge Mr. O'Brian's judgment about the inutility of these inquiries. Let us grant, in short, the good faith of some at least of those who defend the pres-

ent system of inquiry in areas of Government employment.¹ Nevertheless it must be recognized as lending itself to effective exploitation by those who, deliberately or unconsciously, seek to prevent the spread of thoughts that they regard as undesirable or dangerous. It does not matter that the investigators do not intend to seek the suppression or check the spread of nonconformist thought; the preventive inquiries being made inevitably have that effect. And the logic that produces this effect is clear. One who believes in socialization of basic industry may seem more likely to be sympathetic to Marxist doctrine than one who believes in a wholly unrestricted system of private enterprise. And even belief in public operation of utilities may seem to put one a little closer to Marxism than the belief that public utilities should be wholly private. One who opposes all kinds of racial discrimination may be suspected of being more likely to be discontented with American practices than one who believes in segregation, and hence more likely to be sympathetic to Soviet propaganda about equality. Or, if the fallacy is too patent here, in view of the substantial body of evidence concerning Soviet discrimination on grounds of race and national origin, then it may be reasoned that such a person is more likely to work with Communist-dominated organizations, which often attack discrimination, and is thus more likely to get involved in espionage or sabotage. A like course of argument is available with respect to one who displays an unusual amount of interest in civil liberties problems generally. In short, any sharing of ideas espoused by the Communists provides the basis for an inference, however, unreliable, that there is a possibility of cooperation in activity, innocent in itself, which may result in dangerous exposure to those recruiting saboteurs or spies. That this kind of logic has taken hold is clear enough. Dorothy Bailey was asked about her views on the segregation of blood by the Red Cross.² And the recently published study of security cases makes

¹ Mr. O'Brien excludes from his discussion the activity of legislative investigating committees. Much of that activity, it seems clear, is aimed at displacing from private employment, particularly in the fields of the press and entertainment, persons who might be considered likely to attempt to disseminate communistic ideas. See, for example, *New York Times*, January 18, 1956, p. 14, quoting the Annual Report of the House Committee on Un-American Activities for the year 1955. This is, of course, quite plainly the kind of attempt to prevent the dissemination of dangerous thoughts which Mr. O'Brien finds in the Federal security program.

² Bailey v. Richardson, 182 F.2d 46, 73 (D.C. Cir. 1950).

common knowledge, what has long been known to lawyers defending government employees, that this kind of reasoning permeates the program.³

Hence, Mr. O'Brian's point seems equally effective whether the pursuit of nonconformist ideas and those critical of prevailing policy is deliberate, or merely incidental to the search for evidence of potential susceptibility to Communist wiles. The scope as well as the procedures of the program becomes menacing; for there can be little doubt that knowledge of the existence of such an inquiry at the threshold of government employment, federal or state, of large areas of private employment, and of military service, will tend to discourage critical thinking about American policy, foreign or domestic. It would be a happy circumstance if everyone were brave enough to take a stand on controversial issues without regard to the problems that might be involved in seeking a career or earning a living, but it can hardly be doubted that the nation needs the benefit of the independent thinking even of the citizens who have only average courage or less.

But even if one were reluctant to accept Mr. O'Brian's conclusion on this point, as stated, or as qualified here, his book is most valuable for its forceful reminder of the high price we are paying just in terms of the abandonment of traditional procedural safeguards in the operation of the security programs, and for its call for a sober re-evaluation of their necessity. The answer to the problem, he states, "is not necessarily the abolition of security programs, but a drastic revision by men soundly educated in the history of freedom and in the history of constitutionalism." There has been a tendency to decry as dangerous to our security any criticism of the procedures as well as the substance of the security programs. Thus Mr. J. Edgar Hoover was recently reported as assailing Communists and their sympathizers for attempting to discredit the use of informer witnesses.⁴ One may accept the necessity for reliance on informers without closing his eyes to the real danger that, especially when they begin to make careers of that work, there are special problems of credibility arising

³ CASE STUDIES IN PERSONAL SECURITY, Adam Yarmolinsky, ed., Bureau of National Affairs, 1955; reviewed by Charles P. Curtis, *THE SATURDAY REVIEW*, August 20, 1955, p. 7.

⁴ *New York Times*, October 4, 1955, p. 24, col. 1.

from financial or emotional involvement. This example may suggest that even those unwilling to go all the way with Mr. O'Brian may recognize that a full awareness of the price we are paying requires a careful review of the costs and benefits of the program free of the implication in Mr. Hoover's speech that any criticism is, at the best, unpatriotic aid to the foe.

What Mr. O'Brian calls for is leadership that will remind the American people of the value and importance to them of the procedural safeguards that they are abandoning, thus leading the people to insist upon a clear showing of the need, if in fact the need does exist.

In this connection, Mr. O'Brian's book is significantly different from many critical appraisals of the security program. He searches for the factors in American life which have produced apathy toward the erosion of personal freedom and also for those factors which justify hope for a revival of concern. The apathy, he suggests, comes from a reaction close to panic produced by the delayed general awareness of the real nature of Soviet conspiratorial activity. This shocked awareness came at a time when the American sense of values was obscured by the startling emergence of wholly new ideas about the nature of the physical world, when the search for security in an industrialized society had encouraged acquiescence in the idea of the supremacy of the state, when the weight of mass opinion was tending to smother the individual, and when recollections of the depression reinforced fears of atomic annihilation in creating a blind groping for security. These factors made it easier, Mr. O'Brian believes, for the American people's shocked reaction to the disclosure of Soviet activities to submerge their devotion to the ideals of fair procedure in matters affecting substantial personal interests.

On the positive side, Mr. O'Brian finds both long-range and immediate factors pointing toward the possibility of checking the trend toward the acceptance of procedures incompatible with basic American ideals. One is the abundant evidence that there is no ground for fear that Soviet ideas will gain any substantial acceptance in the United States. Another is the fact that our constitutional guarantees have for the most part originated in the rulings of judges which afforded protection against governmental

action sought to be justified on just those reasons of state being urged today. The primary religious basis of the liberties protected by the Bill of Rights seems to Mr. O'Brien an important reason for hope that the sense of the importance of those rights can be reawakened. Further, without regard to the exact constitutional status of the current procedures, he feels that their disregard of essential and historic traditions of fairplay will again be felt. Finally, the unique development of voluntary community cooperation in the United States reveals stabilizing social forces that are capable of being effectively rallied in the interest of fairness to fellow citizens. With this material to build upon, Mr. O'Brien concludes that the only thing needed to re-awaken the deeply-rooted American conviction about the importance of fair procedure is some clear speaking leadership.

There are signs that the leadership is making itself felt. Under Chief Justice Warren, the Supreme Court seems to be taking pains to read clear lessons in the vital importance of fair procedures when sanctions are involved in the area of personal freedoms.

Mr. O'Brien's home state of New York is attempting to work out a balance between the competing interests. Its security risk program⁵ utilizes standards similar to those of the Federal program, but, as Mr. O'Brien recommends, only in agencies or positions determined by the Civil Service Commission, subject to court review, to be "security" agencies or positions. Centralized review of the determinations of risk by the numerous appointing and employing bodies is lodged in the Civil Service Commission. Indiscriminate reliance on lists of suspected organizations is discouraged by authorizing reliance upon organizational affiliation when the organization has been found to be subversive in the sense that it advocates or approves overthrow of the government by force, violence or other unlawful means. Such organizations are to be listed only after notice and hearing, and listings of the United States Attorney General or the New York State Regents under the Feinberg Law may be borrowed only if the determinations were made after notice and a chance to be heard.

⁵ New York Law 1951, c. 233, as amended; MCKINNEY'S UNCONSOLIDATED LAWS, Ch. 14, Disqualification from Employment for Subversive Conduct, Secs. 1101-1108.

A long stride forward will be taken if the newly appointed national commission to re-study the security program approaches its task with the deep awareness of the history of freedom and the history of constitutionalism which animates this book. If it does, there is no reason to doubt that a program can be fashioned which will meet the essential needs of our security without further impairment of our tradition of freedom.

J. D. Hyman.*

NINE MEN. By Fred Rodell. New York: Random House, 1955. Pp. xii, 338. \$5.00.

Professor Fred Rodell's book bears the subtitle *A Political History of the Supreme Court of the United States from 1790 to 1955*. It is hardly the ambitious undertaking which the subtitle might suggest. Apparently this history is intended for "popular" consumption. The Yale Law School professor expresses his intention to delineate the Court's place in our scheme of government in words which "any halfway literate non-lawyer can understand."

Unfortunately the book fails to rise far above Rodell's minimum requirement of readability. Superficial characterizations of men and events predominate as the author shifts easily from a breezy, irreverent, debunking style to the oversimplified argumentation of a political polemic. The limitations which he has set for himself militate against penetrating analysis.

Professor Rodell's frame of reference is set forth in Chapter 1. He is at war with the stork theory of constitutional decisions and with the "undemocratic canard" that "ours is a government of laws, not of men." The judges are pictured as "powerful, irresponsible, and human." The power which they wield is a political power, a power to determine or to refuse to determine the most vital questions of public policy — a power, in short, to govern.

The author's concern with establishing these points leads him into gross overstatement. That Supreme Court justices "make

*Dean of the University of Buffalo School of Law.

law" and play a highly significant role in shaping public policy has long been recognized by persons with any degree of political sophistication. That the judges of the Supreme Court are "at once the most powerful and most irresponsible of all the men in the world who govern other men" (not excluding the "bosses of the Kremlin") is quite another proposition. Rodell's position here can be understood only as a reaction to those theories which portray Supreme Court justices as political eunuchs. One extreme has begotten the other.

There are additional factors which help to determine the course of Professor Rodell's history. He tends, so he tells us, "to admire liberals or lookers-after-the-other-fellow" more than he admires conservatives. His heroes are liberal favorites Holmes and Brandeis, Murphy and Rutledge, and those two "ex-poor boys" on the present court, Black and Douglas; the villains range from Van Devanter, McReynolds, Sutherland and Butler, who took a stand, to Frankfurter, Vinson and others who sometimes tried to avoid taking one. But Rodell is consistent. He does not urge that those decisions of which he approves are based on "sound law" while those of which he disapproves are drawn from "mere sociological theory." He believes quite frankly in a "living legal liberalism" and has as little use for the "nice-Nelly-notion" of judicial self-restraint.

The central theme of *Nine Men* has been developed in somewhat different form by various other scholars: Throughout most of its history the Court has been far more concerned with property rights than with human rights. Its decisions have all too often reflected obsolete beliefs and a social slant which was out of date by the time those decisions were made. The Court may follow the elections returns as Mr. Dooley suggested, but it does so, Rodell insists, only after an interval of 20 or 30 years. Cases in point are not difficult to find and many of the old favorites are discussed along with the biting dissents indicating what the law might have been and what not infrequently it was to become.

The author's appraisal of the present court and of its prospects for the future constitute the most provocative section of the book. He is disappointed in Frankfurter, contemptuous of

Burton, Minton, Clark, and Reed but hopeful that Warren will align himself with Douglas and Black, carrying Harlan along with him. In such an eventuality, Rodell feels, Clark is sure to "trot along" and "the American dream of freedom may be reborn."

Lloyd M. Wells *

*Assistant Professor of Government, Southern Methodist University.