

**The Rule of Law  
in the United States:  
A Survey**

AMERICAN BAR ASSOCIATION  
COMMITTEE TO CO-OPERATE WITH  
THE INTERNATIONAL COMMISSION OF JURISTS  
(Section of International and Comparative Law)

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# THE RULE OF LAW IN THE UNITED STATES: A SURVEY

## Introduction

In the ten years since the International Commission of Jurists was organized in 1952 it has become so well known in so many centers of legal culture throughout the free world – the high courts, university law faculties, practitioners, associations and institutes – that repetition of its origin, purpose and history is unnecessary here. It has fostered the creation of national sections and co-operating groups in many countries. In the United States the unit is the “Committee to Co-operate with the International Commission of Jurists,” formed by the Section of International and Comparative Law of the American Bar Association.

This “Survey of the Rule of Law in the United States” was undertaken by this Committee in response to a “Survey Questionnaire” prepared by the Commission in February 1960. We understand that similar studies have been prepared by corresponding groups in other countries.

The members of this American Committee have enlisted the active, co-operating assistance of a wide number of judges, legal scholars and practitioners, to draw upon their experience with the law in action to prepare the materials which have been here fused into the answers that follow the separately stated questions framed by the Commission. A list of those Committee members and their collaborators who have thus participated in the preparation – by original written material or the critique offered by them to successive drafts – appears following this Introduction.

An earlier study (1958) by this same Committee and bearing the slightly shorter title of “The Rule of Law in the United States,” was in the form of a running text, of half the length of the present “Survey” and was conceived upon somewhat different bases of approach. More than 20,000 copies of that document were printed and distributed by the Commission. This 1962 Survey goes into much greater detail in the “Executive” and particularly in the “Criminal Process and the Rule of Law” sections. The two documents, however, are complementary each to the other.

It will be observed that nowhere in the present statement is any definition attempted or over-all summary given of the basic concept and meaning of the “Rule of Law” phrase. It is left for the reader – assumed to be the foreign, non-American lawyer-student – to form his own concept of what that term means in this country.

The Questionnaire as framed offers no place for discussion and exposition of any basic philosophy of law in the United States, nor does this statement venture consciously into this field. Some readers, however, will perhaps find in these pages a reflection, but certainly not one planned by the participants in its preparation, of the impact upon American judges, lawyers and legislators since 1910 of Dean Roscoe Pound's beliefs that the law should be shaped to give effect to *de facto* individual and social "interests," articulately expressed.

It must be emphasized that the statement is not a compendium or cross-section of what the participants think our law should be; on the contrary, it is an attempt to state within the framework posed by the Questionnaire what the law is today. At the risk of misleading over-simplification, passing mention may also be made of an under-current in American judicial court opinions of "natural law." Some jurists such as Judge Learned Hand have rejected natural law. Mr. Justice Felix Frankfurter on the other hand, in a considered formal opinion, has referred to the long and well founded "meaning and justification" of natural law.<sup>1</sup> We do no more here than mention the recurrence of sharply divergent views.

Two other phenomena of the American legal scene should be alluded to. One is the problem of conflicting and at times overlapping jurisdiction inherent in any federation system of government. We have a national (known as the "federal") government functioning under the federal Constitution and we have fifty "sovereign" states whose existence and general powers are equally definitely recognized and prescribed by that same Constitution. Each of the states has its own constitution and tripartite division of powers between the executive (a "governor"), its legislature and its courts. At several places in this study – particularly in the "Criminal Process" section – mention is made of differences in some respects between the "federal" law as it has evolved in the judicial interpretation and application of the federal Constitution to matters of federal jurisdiction, and the laws of the states as applied by their courts (with variations between the several states) to matters of state jurisdiction that are not governed by the federal Constitution. This 1789 document and the subsequent Amendments to it give to the national government specified powers which are in most, but not all, respects exclusive. To these the federal courts have accorded apparent extensions of jurisdiction deemed by implication reasonably necessary to implement those powers expressly conferred upon the national government.

Among these express powers are: imposition of certain forms of taxes, regulation of commerce between the states and with foreign countries, naturalization, bankruptcies, coinage of money, the post

office, declaration and conduct of war, and the national military forces. Some powers are expressly forbidden to the states: e.g., the conduct of foreign relations, coinage of money and *ex post facto* laws. Then there are a considerable number of rights of the personal order which the Constitution guarantees to all citizens. These are "those wise restrictions which make men free"; many of these are treated in the pages which follow. In the area of criminal offenses proscribed by the Congress are violations of the powers of the federal government such as counterfeiting; transportation of narcotics or stolen property in inter-state or foreign commerce; smuggling into the country from abroad; evasion of federal taxes; the use of the mails or other media of inter-state and foreign communication to perpetrate frauds in property sales; offenses by the military forces; espionage, treason and other offenses against the national security.

All powers other than those expressly or by implication conferred on the federal government or expressly forbidden to the states lie within the scope of state jurisdiction. The great body of criminal sanctions lies with the states: murder and the lesser degrees of violence against the person; the common crimes against property rights such as burglary, theft and misappropriation; evasion of local tax imposts; bigamy and offenses against minors. These are the broad lines. In a few instances the same act may be a violation of both a federal and of a state law.

The other functional characteristic of the American legal scene to which preliminary attention should be called here is the scope of the power of judicial review that stems from the supremacy of written constitutions in a structure of powers balanced, but divided horizontally in our federal system, between the national and the state governments.

Wholly within the scope of challenged federal action – executive, legislative (an act of the federal Congress) or judicial (a case presented for decision in the first instance or on appeal from a lower federal court) – one litigant may invoke the judicial power of review to decide whether such action thus brought into question is a violation of some right prescribed or an abuse of power limited by the federal Constitution. The court will determine whether the executive act was forbidden or required by the Constitution; or, if the act in question is derived from some purported power created by an Act of Congress, whether the statute is "unconstitutional"; or whether the decision of the lower federal court is or is not within the scope of federal powers under that Constitution (or is otherwise in accordance with established law).

When a case comes before a federal court in which the issue is squarely presented of whether the challenged action of a state organ – its executive, its legislature by a statute or its courts by a decision – is in conflict with the overriding powers of the federal government

<sup>1</sup> *Adamson v. California*, 332 U.S. 46, 65 (1947); Swisher, *The Supreme Court in Modern Role*, 146 (1958).

under the federal Constitution, the court will determine that issue. If the sole issue presented by the exercise of purported state authority arises from application of a state statute, the federal court will determine whether that statute is unconstitutional as an invasion of federal government powers or its guarantee of rights. If the state action in question is an act of the executive or a decision of a state court which is not based on a state statute, the federal court will likewise make its judgment on the conflict question.

Thus the federal court may render a judgment that the state or federal statute is wholly invalid as in conflict with the Constitution. In the state courts the same scope of review exists with respect to the supremacy of the state constitutions, within the scope of state powers. Determination of unconstitutionality of a state statute, under the federal or the state constitution, is reached only if no other grounds exist for the judgment invoked by one of the litigants. This judicial power of review is far broader than that of ordinary review of an appellate tribunal in a governmental structure which lacks the federal system of dual sovereignties or in a structure such as Great Britain in which Parliament in its legislative capacity is supreme and there is no overriding written constitution. Chief Justice Marshall grounded the Supreme Court's epochal decision of 1803 in *Marbury v. Madison* upon the thesis that "It is emphatically the province and duty of the judicial department to say what the law is."<sup>2</sup>

American lawyers who may thumb through these pages will look in vain for any attempted resolution of the recurrent problem of the relative primacy of rights under the guarantees of the federal Constitution: the shift since 1937 from marked protection of property rights by application of the "due process" clause to the "preferred" position of personal liberties – the latter as asserted with fervor by many jurists and denied, as a constitutional doctrine, by others. It does seem probable that the Supreme Court has committed itself to a difference in interpretation of due process between these broad categories of rights,<sup>3</sup> but we may observe, with respect, that its differentiating reasoning lacks persuasive certainty and that in any event a necessarily brief discussion can only be confusing to the foreign lawyer. Near the end of his fifty years on the bench, Judge Learned Hand confessed he found it impossible to predict what position the Supreme Court would take upon issues in this area.<sup>4</sup>

A word of brief explanation is in order concerning the titles of the four parts of the Questionnaire and Answers as "Committee I," "II," etc. This term is merely a carry-over from the division of the discussion groups at the New Delhi Congress of 1959 into the four

divisions of the Legislative, the Executive, the Criminal Process, the Judiciary and the Bar – each in relation to the Rule of Law.

To the text are appended footnotes, selectively documented, as references to reported decisions and other authorities supporting some of the principal statements of law and quotations in the text. The interested reader may wish also to consult the bibliography of recommended text writers, again selective and limited in number, which appears at page 165.

ERNEST ANGELL, New York, New York, Chairman  
PHILIP W. AMRAM, Washington, D.C.  
EDWARD C. FREUTEL, Jr., Los Angeles, California  
DAVID M. GOODER, Chicago, Illinois  
JOHN RAEBURN GREEN, St. Louis, Missouri  
STEPHEN H. HART, Denver, Colorado  
GEORGE N. LINDSAY, Jr., New York, New York  
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GANSON PURCELL, Washington, D.C.  
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OLIVER SCHROEDER, Jr., Cleveland, Ohio  
CICERO C. SESSIONS, New Orleans, Louisiana  
WILLIAM B. SPANN, Jr., Atlanta, Georgia

#### Committee

<sup>2</sup> 1 Cranch (2 U.S.) 137, 177.

<sup>3</sup> Swisher, *op. cit.*, 42-47.

<sup>4</sup> Hand, *The Bill of Rights*, 44-46 (1958).

# CONTRIBUTORS OF MATERIAL

City	Name
<i>Boston, Massachusetts</i>	FREDERICK T. DOYLE LAURENCE M. LOMBARD HON. JOHN V. SPALDING
<i>Boulder, Colorado</i>	DAVID N. BRICHTSON PROFESSOR AUSTIN W. SCOTT, JR.
<i>Cambridge, Massachusetts</i>	PROFESSOR LIVINGSTON HALL PROFESSOR LOUIS JAFFE
<i>Chicago, Illinois</i>	DAVID M. GOODER PROFESSOR NATHANIEL L. NATHANSON
<i>Cincinnati, Ohio</i>	ROBERT TAFT, JR.
<i>Cleveland, Ohio</i>	FRANK A. BERNDT LAWRENCE R. SCHNEIDER PROFESSOR OLIVER SCHROEDER, JR.
<i>Concord, New Hampshire</i>	ROBERT P. BASS, JR.
<i>Denver, Colorado</i>	STEPHEN H. HART ROBERT A. KRANTZ JOHN A. MOORE WILLIAM E. MURANE HOWARD S. REILLY
<i>Los Angeles, California</i>	PROFESSOR NORMAN ABRAMS HAROLD A. BLACK HOMER D. CROTTY HON. JOHN J. FORD EDWARD C. FREUTEL, JR. L. F. E. GOLDIE PROFESSOR ARVO VAN ALSTYNE
<i>Minneapolis, Minnesota</i>	HON. LEE LOEVINGER MICHAEL OLSON RAYMOND A. SCALLEN
<i>Nashville, Tennessee</i>	PROFESSOR PAUL H. SANDERS
<i>New Haven, Connecticut</i>	JERRY PHILIPS

## *New York, New York*

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HALIBURTON FALES, II  
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JOHN N. HAZARD  
PETER S. HELLER  
RICHARD P. KRAMER  
GEORGE N. LINDSAY, JR.  
ERIC K. PETSCHKE  
PROFESSOR MONRAD G. PAULSEN  
DAVID SIMON  
JOHN C. SOMERS  
HARRIS B. STEINBERG  
ROBERT B. VON MEHREN  
NATHANIEL T. WINTHROP

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JOHN RAEBURN GREEN  
PROFESSOR FRANK W. MILLER  
MORRIS A. SHENKER  
HON. JOHN J. WOLFF

## *San Francisco, California*

ALVIN J. ROCKWELL

## *Seattle, Washington*

HERBERT S. LITTLE

## *Washington, D.C.*

PHILIP WERNER AMRAM  
JAMES V. BENNETT  
GANSON PURCELL  
HON. GEORGE THOMAS WASHINGTON

## COMMITTEE I

### THE LEGISLATIVE AND THE RULE OF LAW

1. (a) *Are there provisions in the Constitution or other laws which place limits on the powers of the Legislature? \**

Yes. The most basic limitation is the concept of the separation of legislative, executive and judicial powers. The Constitution expressly grants these respective powers to the Congress, the President and the courts – separately – by Art. I, sec. 1; Art. II, sec. 1; and Art. III, sec. 1 in turn. The federal Constitution, Art. I, sec. 8, enumerates the only general powers conferred upon the Congress; while Art. IV, sec. 3, describes its specific powers to admit new states and to dispose of and regulate the territory and property of the United States, and Art. V describes its role as to proposal of amendments of the Constitution. Also Amendments XIII (slavery), XIV and XV (civil rights), and XIX (suffrage) provide Congress with powers to enforce their provisions. Space limits forbid discussion of all limitations, but the answers to Question 4 under this general heading do elaborate upon some of the more important ones.

While the courts have repeatedly held that this enumeration of federal powers is by way of limitation, and while Amendment X provides that “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,” these limiting doctrines have their counterbalances. Art. I, sec. 8, cl. 18 makes the enumerated powers of Congress plenary, and Art. VI, cl. 2 provides for the supremacy of the Constitution and laws of the United States and of the treaties made under its authority. Action by Congress in an authorized area precludes state action in the same field.

Again, however, there are specific limitations found in Art. I, secs. 8 and 9 that taxes shall be uniform, prohibiting suspension of the writ of habeas corpus, bills of attainder and *ex post facto* laws, taxes on exports, and the creation of titles of nobility. There are many guarantees of individual rights spelled out in the Bill of Rights (the first ten Amendments) as further limitations, in Amendment XIII (as to slavery), XIV (public debt), XV and XIX (voting). Moreover, the power of the President to veto Congressional acts (Art. I, sec. 7) and “to make treaties,” with concurrence of the

\* The headings, typeset in italics like the above and all others which follow, are the questions framed by the Commission’s “Survey Questionnaire” of February 1960, identified on page 7, *ante*, which constitute the last portion of the text, at page 165.

Senate (Art. II, sec. 2), are partial limitations on the powers of the legislature. The federal Constitution also contains specific limitations on the powers of state legislatures, found in Art. I, sec. 10; Art. IV, secs. 1 and 2; and Amendments XII, XIV, XV and XIX. Among these are prohibitions against states entering into treaties, conducting foreign affairs, coining money, imposing duties on exports or imports, impairing the obligation of contracts; and requiring that the same “privileges and immunities” be given to citizens of other states, and that “full faith and credit” accrue to acts and judgments of other states.

The Supreme Court of the United States has held that some of the guarantees of the Bill of Rights are encompassed within the concept of “due process”, as expressed in Amendment XIV, and are applicable to state action. It is on the basis of this concept, applied to matters of substance as well as procedure, that both federal and state courts exercise their power to protect citizens against arbitrary or capricious legislative action.

Understanding of “due process” and of its gradual extension from the federal to the state field requires an apparent digression from the immediate theme. Determination of what is, or is not, due process is without doubt the most difficult problem in American constitutional law, primarily because the criteria are not capable of exact, objective and agreed definitions, and because the frames of reference do change, in part, from time to time. There is an immense body of decisional law and of legal writing on the subject.

Originally – and until quite modern, fairly recent times – due process meant modes of procedure known to the common law, particularly although not exclusively in matters of criminal law. A generally accepted concept is, first with respect to procedure: that which is reasonable, essential to a fair and enlightened system of justice, “an ultimate decency in a civilized society,” something that is consistent with the protections of a free society. Confession forced by torture or a long period of confinement *incommunicado*; knowing use by the prosecution of perjured testimony; racial discrimination in the selection of jurors: these examples are easy of solution.

But what of the prosecutor who comments adversely to the jury on the failure of the accused to take the witness stand and testify on his own behalf, or of the use of incriminating evidence seized by the police in a search of premises conducted without a warrant?

In the late nineteenth century this concept was extended, judicially, to protection of “property” rights from legislative invasion. At this stage two approaches in judicial thinking became evident. The first was the presumption of the validity of the legislative act; the second – often in conflict with the first – was the respect and

weight to be accorded to "freedom of contract," an assumed individual choice, in hours of contractual labor or wages or surrounding conditions of health.

The problem is how the conflict can be resolved by a judge who professes to lay aside his personal predispositions toward the correct solution of ultimate social and political policy for the state. The commands of due process are therefore loose, because within the meaning of a "right" as a claim or assertion which will be recognized and enforced by a court, due process means something within the consensus of public policy of which the judges of the court of final disposition will take cognizance. This recognition admits awareness of moral and ethical standards – something beyond logic and legal precedent – but not a translation of those standards into legal concepts. A generation ago it was unreasonable for a legislature to prescribe minimum hours of night work in bakeshops; today this has become reasonable – by a shift from *laissez-faire* consensus to the structure of the service state.

It is impossible within the limited scope of an essay such as this to do more than indicate the immense difficulty of attaching permanent relative weights to the several ingredients of the final balancing choice when these weight-values change from decade to decade in a society which within a generation has passed through a peaceful but major revolution in the accepted function of the state.

The first group of rights specified in the federal Bill of Rights is, in express terms, one of commands and prohibitions applicable only to the relations between the citizen and the federal government. However, the extension of the concept of due process as noted generally above has tended strongly in recent years to carry with it recognition by the Supreme Court of the majority of these particular rights as embraced within due process and therefore equally applicable to the field of state government action. Amendment XIV of 1868 expressly forbids any state to "deprive any person of life, liberty or property without due process of law." This phrase is identical with the prohibition of Amendment V of 1791 upon the federal Congress. (See further discussion and illustrations under 4(a)(v) and "Committee III" answers, *infra*.)

State constitutions vary widely in their particular provisions, but universally distribute the legislative, executive and judicial functions among the three organic branches, vest a veto power in the state governor, impose on the legislatures similar procedural limitations and contain a set of legislative prohibitions analogous to the federal Bill of Rights. Many contain additional restrictions as to special and local legislation, generally or with respect to particularly enumerated subjects. In contrast to the federal Constitution, a number of state constitutions require each bill and act to relate to a

single subject, which must be specified in the title of the legislation. Furthermore, there are in state constitutions a number of examples of limitation upon legislative action, by direct determination of legislative policy, as by requiring the revenue from specified types of taxes to be devoted to prescribed purposes, limitations of taxes on property or income, vesting local municipal areas with "home rule" legislative powers, and providing initiative and referendum powers in the voters at large wherewith to block or to over-ride legislative acts. Procedural rules stated in constitutions, statutes and legislative resolutions are in the aggregate further measures of limitations upon legislative power.

- (b) *In the event of the enactment of legislation which is outside the limits of the Legislature's powers, is there any judicial machinery for setting aside such legislation as invalid?*

Yes. It has long been established that both federal and state courts have the power, when their jurisdiction has been properly invoked and except insofar as the court determines the issue to be "political" or otherwise non-justiciable, to review relevant legislation and to declare it invalid to the extent that it impairs the rights or diminishes the duties of the parties before the court. Furthermore, many state courts will entertain suits to determine validity at the instance of citizens or taxpayers. In some instances, upon showing of proper interest in the petitioner and threat of irreparable harm, these courts may grant injunctive relief against the enforcement of unconstitutional legislation or issue one of the "extraordinary" common law writs. This "judicial machinery" is discussed generally in "The Rule of Law in the United States," International Commission of Jurists' publication, 1958, pp. 47-48.

- (c) *If there is no such judicial machinery, is there any other machinery or recognized practice which fulfils this purpose?*

No answer required, in view of 1(b).

2. (a) *It is provided by the Constitution or other law that a special procedure must be followed before legislating on certain matters?*

Yes. The federal Constitution, Art. I, sec. 7, requires revenue measures to originate in the House of Representatives; but this does not preclude radical changes in the bill by the Senate. Art. V prescribes the procedure required to effect amendments to the Constitution itself.

State constitutions vary widely; but most of them have similar provisions. Many have additional restrictions such as requirements

of local or general referenda as to particular subjects (e.g., local option as to Sunday movies, prohibition and the like, or change of location of the state capital). In quite a few state constitutions one finds provisions requiring local publication of notice of intention to seek enactment of a local or private measure.

- (b) *In the event of the enactment of legislation without the requirements of this procedure being fulfilled, is there any judicial machinery for setting aside such legislation as invalid?*

Yes. See 1(b), subject to the "enrolled bill" theory, which exist in some jurisdictions and by which some courts justify a refusal to go back on an enrolled bill to determine whether it has been enacted in accordance with constitutional requirements as to legislative procedure.

3. *Please indicate whether the Constitution or other laws contain provisions which ensure the following:*

- (a) *universal adult suffrage (please indicate disabilities)*

The federal Constitution does not confer the right to vote upon citizens of the states, except for the provision that electors of members of the House of Representatives and of the Senate shall have the qualifications requisite for electors of the most numerous branch of the state legislatures. The right to vote is thus left to be defined by the individual states. The power of the state to define the voting class, however, bears a duty to carry out that function, and it is therefore only in a limited sense true that the right to vote is a matter for each state to determine for itself.

The federal Constitution prohibits denial or abridgment of the right to vote by the United States or by any state on account of race, color or sex; and by the so-called "equal protection" clause prohibits arbitrary discrimination by the states in their application of rights or privileges guaranteed by law. This in effect prohibits arbitrary disqualification by the state of any group otherwise eligible to vote. (Cf. further discussion under 4(a), *infra*.)

Aside from the constitutional restrictions, each state is free to determine for itself the eligibility of its citizens to vote. The qualifications for voting do vary from state to state; but there are certain requirements which are found in most states. All require, either by statute or state constitution, that the voter shall be a citizen of the state. Another usual requirement is that the voters shall have been residents of the state, county, and voting district for a specified period prior to election and that they shall register in advance of

the voting date. In many states, idiots, lunatics and criminals are not qualified to vote. A few states require payment of a poll tax before voting, and many prescribe literacy tests for prospective voters.<sup>1</sup> Neither the tax nor the tests are everywhere applied without discrimination.

The federal Constitution does contain qualifications of minimum age for the holders of elective federal offices and of native birth for the Presidency. Universal adult suffrage does not, under the Constitution, extend to residents of the District of Columbia, a small area in which lies Washington, the national capital.

- (b) *that a candidate from any or no political party is free to present himself for election*

It is generally true among the states that a candidate from "any or no political party" is free to present himself for election. There has not been discovered any requirement of party affiliation, but in some states there exist qualifications by required loyalty affidavits from candidates in support of the federal and state constitutions and of a "republican" form of government.<sup>2</sup> There are often requirements of some specific number of signatures on the nominating petition. Filing fees, expenses of campaigning, the prestige of the two national political parties and local state definitions of a "party" make party affiliation and endorsement a practical though not a legal necessity.

- (c) *that voting is secret*

Secrecy in voting is not mentioned in the federal Constitution. However, the secret ballot has been so established by legislation, court decision, or state constitution in every state as to have become virtually a sacred institution. Many state courts have held that a constitutional provision that voting shall be by ballot implies a requirement of secrecy. Secrecy is usually protected by stringent legislation in the various states. For example, statutes have been enacted that the voter may not be required to exhibit his ballot; also that election officers are prohibited from revealing how a voter has marked his ballot.<sup>3</sup> Details of secrecy in voting, as by written ballot marked in a voting booth or by mechanical voting machines, are regulated by state statutes.

4. (a) *Please indicate whether and if so to what extent the Constitution or other laws limit the powers of the legislature in respect of*  
(i) *discrimination between citizens*

<sup>1</sup> See cases cited in 46 Virginia Law Rev. 950, n. 30.

<sup>2</sup> Such a requirement is not barred by the federal Constitution: *Gerende v. Election Board*, 341 U.S. 56 (1951).

<sup>3</sup> *Ex parte Owens*, 148 Ala. 402 (1906); *Jones v. Glidewell*, 53 Ark. 161 (1890).

The disjunctive form of the question – the limitations imposed on the legislature by “the Constitution or other laws” – calls for a preliminary clarifying answer. In the United States there are no “laws,” as we understand and use that term, other than those enacted by the legislature.<sup>4</sup> These it may adopt and change as it sees fit from time to time, subject always to the constitutional limitations as construed and applied by the independent judiciary which itself, like the legislature, is created by the same constitutions, federal and state.

Realistically viewed, the judiciary “makes law” in its enunciation of new “doctrine” in the course of the development of “law” as an evolving, not a static, body of rules. Such judicial law-making, however, is not the equivalent of “laws” as legislation, which is the exclusive province of the legislature.

Rules and regulations promulgated by the executive branch, whether viewed as inherent in its power to enforce the law as a whole or in exercise of power delegated by the legislature, may always be amended by the legislature, provided the change does not derogate upon a constitutional power of the executive. Thus in a limited sense the executive, like the judiciary, “makes law.” Confusion is inevitably caused by interchangeable use of “law,” “laws,” and “legislation,” and, thus engendered, lies at the root of vigorous and recurrent criticism of the federal Supreme Court for having, it is alleged, usurped the “law-making” function of the legislatures. That conflict of views is almost bound to exist in any system which recognizes the power of “judicial review” of legislation and of executive rule-making; the criticism is more pointed and more superficially appealing in an organic federal structure of division of powers between the national government and the component local units around which sectional pride and jealousy gravitate. This criticism of the Court, be it noted, is a minority view not recognized by the federal government nor effectively prevailing.

Our primary conclusion therefore is that only the constitutions limit the powers of the legislative in respect of the rights specified in subdivisions (i) to (v) of Question 4.

As to the first of these, discrimination between citizens, the federal Constitution restricts the powers of the states by a first provision that the “citizens of each state shall be entitled to all privileges and immunities of citizens in the several states”; this clause forbids any state (through its legislative, executive or judicial branches) from discriminating against citizens of other states in favor of its own.

<sup>4</sup> Our written constitutions, federal and state, are of course laws enacted by the people in sovereign capacity, are superior to enactments of the legislatures, but are not commonly referred to as “laws” in the plural sense.

The phrase “privileges and immunities” is confined to those rights which “are fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this union.” By way of example, not as an exhaustive enumeration, these fundamental rights include: protection by government, enjoyment of life and liberty, the right of acquire and possess property, the right of a citizen of one state to pass through or reside in another state, to maintain actions in the courts of the state, the right to seek happiness subject to such restraints as the government may justly prescribe for the general good. But this provision of the Constitution does not mean that the citizens of the several states are permitted to participate in all rights which belong exclusively to the citizens of any particular state merely upon the ground that they are enjoyed by those citizens. For example, individuals who have been “admitted” to practice law or medicine in State A, or business units authorized to write insurance or carry on banking in A, are not thereby entitled to exercise these callings in the other states; they must qualify so to do by meeting the local requirements of States B, C, D, etc.

Discrimination by the state is also restricted by the “equal protection” clause of the Constitution:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Unlike the “privileges and immunities” clause above, which does not extend to controversies between a state and its own citizens, the equal protection clause pertains to discriminatory practices against any person or group within the state. Furthermore, this clause does not relate solely to a particular class of rights; it requires “that equal protection and security should be given to all under like circumstances in the enjoyment of personal and civil rights.”<sup>5</sup>

The legislatures of the states do, nevertheless, have a rather wide discretion in fixing standards and categories for the precise application of the laws which they enact. Classification will not render a state police statute unconstitutional so long as it has a reasonable basis. Legislation may weigh more heavily upon one group than another, but it is valid if it is designed, not to impose unequal or unnecessary restrictions, but to promote the general good with as little individual inconvenience as possible.

The above-mentioned safeguards against discrimination apply only to the states as the Constitution has no specific restrictions relating to discrimination by the federal government except insofar

<sup>5</sup> *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

as Amendment I prohibits discrimination among religions. However, there are indications from judicial opinions that the "Due Process" clause of the Fifth Amendment, which relates to federal action, impliedly prohibits discrimination by the federal Congress.<sup>6</sup>

(ii) *freedom of religious belief and observance*

The Constitution contains an express limitation upon the powers of the federal government to regulate this freedom by its command in Amendment I that

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

This provision is now considered to be applicable to the states also as it "was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."<sup>7</sup> Thus religious freedom is guaranteed by this amendment in two ways: it precludes legislative compulsion of the acceptance of any form of worship; it also safeguards the free exercise of one's chosen religion or the absence of any religious belief or practice. The "free exercise of religion" embraces two concepts – freedom to believe and freedom to act. The first is absolute under the First Amendment, but the second, obviously, cannot be. Thus, religious belief cannot be pleaded as justification for a criminal act not inherently an expression of religious freedom or belief.

There can be no hard and fast line between the valid exercise of the state's police power and invalid exercise of state power which encroaches upon religious freedom. This determination must be made by the courts in the individual cases, depending upon which result will promote the greater public good. For example, a municipal ordinance which made it unlawful for anyone distributing literature to ring a doorbell or otherwise summon dwellers of a residence to the door to receive such literature was held unconstitutional when applied to distributors of leaflets advertising religious meetings.<sup>8</sup> But the Supreme Court sustained the application of a state child labor law in the case of a nine-year-old girl who was

permitted by her legal guardian to engage in preaching work after hours.<sup>9</sup> Legislation prohibiting polygamy has been upheld against objection that the practice expresses a religious belief.

(iii) *freedom of speech, assembly and association*

These rights are protected against governmental action by the First Amendment that

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .

These federal rights are also protected from state abridgment by the Fourteenth Amendment application to the states.<sup>10</sup>

Freedom of expression is recognized as essential to the nature of a free state; there may be no prior restraint of free speech. However, the aegis of the First Amendment does not forbid punishment of after-the-fact publications or speeches which are criminal or treasonable in nature.<sup>11</sup> The state has, through its inherent duty to promote the public good, the power to control or forbid the promulgation of ideas inimical to the morals of the people or to the democratic form of government. Whether the state is validly exercising that power or is improperly encroaching upon freedom of speech is often a difficult question in a particular case. One test laid down by the Supreme Court is the "clear and present danger" rule, that before an utterance can be penalized by government it must have occurred "in such circumstances and are of such a nature as to create a clear and present danger . . . they will bring about the substantive evils that Congress has a right to prevent."<sup>12</sup>

Under this test, legislation whose purpose is to curb the expression of certain ideas must fulfill two requirements. First, it must be directed toward prohibiting a "substantive evil" which is within the state's power to prevent. That is, it must come within the state's police power to safeguard the welfare, morals, etc., of the people. Second, such legislation may not be so general that it will encompass utterances which do not clearly evince a present danger of precipitating those substantive evils.

An example of this test is afforded by a 1949 Supreme Court decision upon the constitutionality of a Chicago ordinance which directed punishment for breach of the peace by speech which "stirs the public to anger, invites dispute (or) brings about a condition of unrest."<sup>13</sup> The defendant was found at trial to have violated the

<sup>6</sup> Cf. *Hurd v. Hodge*, 334 U.S. 24 (1948); *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

<sup>7</sup> *Davis v. Beason*, 133 U.S. 333, 342 (1890).

<sup>8</sup> *Martin v. Struthers*, 319 U.S. 141 (1943).

<sup>9</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>10</sup> *Fiske v. Kansas*, 274 U.S. 380 (1927) (free speech).

<sup>11</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>12</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>13</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1949).

ordinance by a public speech advocating Communism. It is obvious that the state can punish those whose utterances tend to incite crime or to endanger the foundations of organized government or to threaten its overthrow by unlawful means. However, in this case the Court held on appeal that the ordinance was an unconstitutional restriction on free speech. Speech which invites dispute is desirable, since it stimulates progressive thought. Therefore the state has no right to prohibit all such speech. Another important test is the likelihood of arbitrary discrimination.

The right of peaceable assembly, even to oppose the government, stands upon equal protection and subject to the same limitations as does speech. There is, however, a sharp diversity in judicial views as to where the line of such limitations should be drawn.

Libel and obscenity in speech are not within the protection of the Constitution.

#### (iv) retroactive legislation

The federal Constitution contains restrictions on the powers of the federal and state governments to enact retroactive legislation, viz.: "No Bill of Attainder or *ex post facto* law shall be passed." This clause applies to the powers of the federal government. At the time the Constitution was adopted, many persons understood the term *ex post facto* law to mean all retrospective laws, both civil and criminal. But in an early Supreme Court case this was interpreted to mean only penal or criminal statutes.<sup>14</sup> Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution. A "bill of attainder" is a legislative act that inflicts punishment for past action on named individuals or on easily ascertainable members of a group without a judicial trial.<sup>15</sup>

The cognate restriction on state legislative power to enact retroactive laws refers only to penal and criminal legislation, and not to civil laws which affect private rights. Also, it applies only to legislative action and not to erroneous or inconsistent decisions by the courts.<sup>16</sup> Some state constitutions, however, prohibit all retrospective legislation.

#### (v) guaranteed rights under the Constitution

The federal Constitution sets out certain guaranteed rights of the individual in light of the first ten Amendments, which are col-

lectively called the "Bill of Rights." In addition to these rights, 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.

The purpose of these amendments is not merely to indicate what rights are possessed by the individual, but, rather, to impose limitations upon the exercise of governmental power by the federal government in its regulation of the conduct of society. In effect, the Bill of Rights establishes areas of immunity of individual conduct from governmental regulation and interference.

In addition, the states themselves guarantee most of these same rights by the bills of rights in their own constitutions. And, as is true of the federal Constitution, these state constitutional guarantees of basic rights operate as restrictions on the power of the state legislatures to encroach upon these rights.

The extent to which the bills of rights confer immunity from governmental action with respect to guaranteed individual rights cannot be explicitly defined. In form, the problem of defining the extent of constitutional immunity is that of construing the language of the constitutional amendments which confer this immunity. But history reveals that constitutional construction is not simply an exercise of verbal dissection; it has been greatly influenced by historical considerations, and by various social and political theories. One of the most important of these latter influences has been the philosophical theory of natural rights, with its emphasis on the importance of the individual. But this theory has never been completely accepted by the courts, since they have always recognized the power of government to act to eliminate evils arising from the unbridled exercise of "natural rights." The judicial residuum of the constitutional guarantees of freedom is found in a continual process of adjustment between competing ideas of individual freedom and governmental control.

The first eight Amendments of the federal Constitution limit the powers of the federal government, but not the powers of the states. The Constitution does not contain any provisions, comparable to the Bill of Rights, which expressly guarantee that specifically identified rights of the people shall be preserved against encroachment by the states. However, the Constitution does provide one general limitation on the powers of the states<sup>17</sup> (in the Fourteenth Amendment) that they shall not "deprive any person of life, liberty, or property, without due process of law . . ." Although the Supreme Court has stated in several cases that this "due process" clause does

<sup>14</sup> *Calder v. Bull*, 3 Dall. 386, 390 (1798).

<sup>15</sup> *United States v. Lovett*, 328 U.S. 303 (1946).

<sup>16</sup> *Frank v. Mangum*, 237 U.S. 309, 344 (1915).

<sup>17</sup> *Hurtado v. California*, 110 U.S. 516 (1884).

not incorporate the first eight Amendments, nevertheless its more recent decisions indicate a developing trend to include therein those rights enumerated in the first eight Amendments. It is now settled that freedom of speech and of the press, prohibition of religious establishment or interference with its free "exercise" (cf. 4(a) (ii), *supra*), and the right of the people peaceably to assemble and to petition for "redress of grievances," all of which are protected against federal encroachment by the First Amendment, are also protected against arbitrary state legislation by this due process clause.<sup>18</sup> The Court has also held that the right to be free from unreasonable searches and seizures of the home, which is "at the core of the Fourth Amendment," is protected by this same prohibition against state action.<sup>19</sup>

- (b) *To the extent that there are not legal restrictions on the powers of the legislature in respect of the matters referred to in (a) please indicate the extent if any to which legislation on these matters has in fact restricted the rights mentioned or rights which, in your view, are properly regarded as fundamental.*

As indicated above, the expression of fundamental rights in the federal Constitution and the constitutions of the states acts as a restraint on the power of government, including the legislative power. Any legislation by either the federal Congress or by the state legislatures which nevertheless attempts to invade one of these several guaranteed individual rights may be challenged in the courts by the individual whose right is thus impaired by the legislation. Under the principle of judicial review, if this impairment is thus found, the legislation will be held unconstitutional on that ground and thus become void and a nullity. This amounts to a substantial safeguard, since the judiciary is recognized as independent of the power of the legislature both by the Constitution and by tradition, and the legislature may not make reprisals against the judiciary for thus declaring void certain of its enactment which exceed its delegated powers, or which infringe on the rights of an individual guaranteed under the constitutions.

5. (a) *In respect of rights guaranteed by the Constitution or otherwise, please indicate whether indirect means of circumventing these rights are practiced.*

Generally, the rights guaranteed by the constitutions are diligently protected by the judiciary branches of the federal and

state governments. Moreover, the courts, inweighing the constitutionality of legislation and other governmental action, have sensitively regarded the ultimate effect of such governmental action, and not merely the form. Consequently, indirect attempts at circumventing constitutional rights have usually not been successful.

However, racial discrimination against the Negro has engendered many attempts to eliminate fundamental rights of this minority group, through legislation which on its face would satisfy constitutional requirements but through features of administrative discretion can be distorted to achieve the unspoken purpose. One example of such legislation which, so far, has been successful in disenfranchising many Negroes' voting rights is the application of the literacy test.

The federal Constitution leaves it to the individual states to prescribe the requirements of eligibility to vote. Eighteen states in various parts of the country have included among their standards for eligibility to vote the requirement of literacy. As enacted, such legislation is a lawful exercise of the state's right; and in many states it is used legitimately to insure that all voters will have sufficient intelligence and education to vote responsibly. Therefore, at an early date the Supreme Court held that literacy tests were constitutionally valid.<sup>20</sup> But in some states it is strongly asserted that these tests are being used to discriminate against certain citizens, often native-born Negroes, sometimes naturalized citizens of alien birth, and to deprive them of the right to vote, in violation of the Fifteenth Amendment to the Constitution. The vagueness of some of these statutes has given registration officials broad power to determine who will be allowed to register for voting privileges. The extent to which this power has been abused is not precisely known, but there are indications that it is substantial and widespread.

In 1946 four Mississippi state officials testified that they had discriminated against Negroes.<sup>21</sup> In Alabama during the time the "Boswell Amendment" was in effect, which required that an applicant for registration "understand and explain" any clause of the Constitution, several Negro Ph.D's failed to pass the test. One of the questions asked was: "How many bubbles are there in a bar of soap?" Further court tests of the literacy statutes are impending.

The foregoing illustrations are not offered with the implication that discriminatory administration is confined to the Southern states or invoked solely against Negro applicants for voting rights. The status of Negro citizens is in course of radical evolution, particularly in Southern states and in urban communities in Northern states

<sup>18</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Near v. Minnesota* 283 U.S. 697 (1931); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

<sup>19</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>20</sup> *Williams v. Mississippi*, 170 U.S. 213 (1898).

<sup>21</sup> *New York Times*, December 4, 1946, p. 64, col. 3.

as well, where there is a high proportion of Negro residents. It is therefore but natural that public attention tends to become focused on the problem directly affecting the Negro in those areas of such population concentration.

- (b) *If the indirect means referred to in (a) are practiced, please indicate briefly the extent to which such means have undermined judicial protection.*

As indicated above, measures such as these are indirect attempts to evade the constitutional guarantees and their judicial protection. The protection afforded by the courts is not "undermined," but it is delayed until an appropriate case can be presented to a reviewing court.

- (c) *In both cases please indicate whether the rights in question are guaranteed by the Constitution or not.*

The rights discussed here are primarily those guaranteed by the constitutions. Other rights, not thus guaranteed, derive from statutes or from common law prescription; rights thus derived are subject to statutory change and repeal – except for the continuing protection against *ex post facto* laws noted above and certain property rights which may have been acquired under the prior state of the law. There are also some rights held "fundamental" which, deriving from the common law in some states – as, for example, the right to a "prompt" trial of a criminal charge – will obtain judicial protection against a legislative measure designed to evade them.

6. *Please answer such of Questions 1 through 5 as are applicable to dependent territories, if any, of your own country.*

As a general proposition, the Constitution does not extend or apply to ceded territory not made a part of the United States by Congressional action. Incorporation into the Union may not be assumed without express declaration or at least an implication so strong as to exclude every other view of the intent of Congress. It is clear then that general laws of the United States do not apply to territories except insofar as those laws control dealings of the United States with such other territories or are expressly applied. As a practical matter, each possession is controlled by laws in the Congressional enactment which brings such territory within the dominion of the United States. Most of those Congressional enactments have a bill of rights covering most of the personal rights specified in the Constitution. Many of the enactments specifically make the Constitution applicable to such territory, and one territory, Puerto Rico, has

a constitution of its own. One set of islands is governed by presidential order. The unincorporated territories are governed by these enactments, and as a general rule not by the Constitution.<sup>22</sup>

Suffrage is controlled by the particular Congressional Act which establishes the control of the United States over the specific territory. These statutes consistently require that the elector be a resident of the territory, a United States citizen, and over the age of twenty-one. Several of these acts also require registration for voting and the ability to read and write some language. There is a general statute, also, which controls the qualifications of voters in territories, sets out the same qualifications with the exception of the literacy test, and further allows persons to vote who have declared on oath before a competent court of record their intention to become United States citizens, and have taken an oath to support the Constitution and government of the United States, provided that they otherwise qualify. This general statute also states the affirmative protection that there shall be no denial of elective franchise to a citizen on account of race, color, or previous condition of servitude. Members of the United States Armed Forces are also excluded from voting in such territories unless they have been permanent residents for a period of six months. However, there is no statute or applicable constitutional guarantee of universal adult suffrage.

There is nothing in the statutes of Congress extending the sovereignty of the United States to the various territories nor in the Constitution nor in the general statute concerning territories which prevents a limitation on the basis of political affiliation.

The conduct of the taking and counting of ballots in a territorial election is controlled by the Congress of the United States. There is no provision in the Constitution or statutes requiring that a ballot in a territory be secret.

With respect to discrimination between citizens, freedom of religion, speech, assembly and association, retroactive legislation and other guaranteed rights in the "territories" (not incorporated in the Union), the decisions on this subject are not completely consistent. It has been held that the Fifth Amendment requirement of due process in matters involving life, liberty, and property does apply as a limitation upon the Congress in dealing with territories. The question to this time has been largely moot as the Congress has extended the operation of the Constitution to most, if not all, of the territories over which it has extended the jurisdiction of the United States.

<sup>22</sup> But when by Congress a territory has been made part of the United States, the guarantees of the Constitution are in full force and effect. *Downes v. Bidwell*, 182 U.S. 244, 271 (1901).

It is commonly understood, and has been so stated by the Supreme Court in cases turning on other points, however, that personal and civil rights of the inhabitants of territories are secured to them by the principles of constitutional liberty which are formulated in the federal Constitution and its Amendments. Therefore, the answers under Questions 4(a) and (b) above are applicable to the extent that the rights there discussed may be found to be fundamental and inalienably personal. It has been held that religious freedom in the territories is so fundamental and inalienable as to be comparable to the right to due process in matters of life, liberty and property.

With respect to any practice of circumventing these rights in the territories, by indirect means, the answers under the Questions 5(a), (b) and (c) are applicable to the extent that the Constitution does apply to the territories, as outlined in the comments immediately preceding.

## COMMITTEE II

### THE EXECUTIVE AND THE RULE OF LAW

For purposes of this discussion, the phrase "executive organ" of the government is used interchangeably with "administrative authority." It includes the dozen principal "departments" of the United States federal government, for example "State," "Defense," "Treasury" and "Interior," as well as the many commissions, boards and agencies also created by act of the legislature. Examples on the federal level of the latter are the Interstate Commerce Commission, Federal Communications Commission, Federal Trade Commission, and the National Labor Relations Board. Although "departments" of the former category are usually referred to as "executive" and the latter as "administrative", the terms "executive" and "administrative" are frequently used interchangeably in American legal terminology and the same principles of administrative law are thought generally to apply to both groups of executive organs. It can be asserted, however, that no congressional delegation of power to a regularly constituted, permanent administrative commission, independent of the executive branch, has ever been held invalid.

Executive organs in the United States perform various functions. They promulgate rules and regulations in the manner of the legislature; and, like the courts, they adjudicate disputes. Further, they exercise rule-making and licensing powers and perform supervisory and investigative functions. Whether particular administrative action constitutes rule-making or the exercise of some other function such as adjudication may not always be clear. Various attempts<sup>1</sup> have been made to define rule-making – for example, as administrative action "addressed to indicated but unnamed and unspecified persons and situations" – but no single definition is entirely satisfactory. Yet the limitations imposed upon the powers of an executive organ may turn on whether its action is more in the nature of legislating or adjudicating. The following discussion will, for the most part, be focused on those administrative actions which are clearly legislative in nature. Where relevant, however, the problem of distinguishing between rule-making and adjudication will be introduced. Further, except where otherwise indicated, an attempt will be made to answer the questions in light of rules generally applicable to both state and federal administrative authorities.

<sup>1</sup> Fuchs, *Procedure in Administrative Rule-Making*, 52 Harv. L. Rev. 259, 265 (1938).

1. (a) *To what extent, if any, has any organ of the Executive [the] power to make rules or regulations having legal effect without express constitutional or legislative authority?*

We assume that "express" as used in this question means the opposite of "implied." The basis for any executive rules or regulations<sup>2</sup> having legal effect must be by constitutional or statutory prescription. In general, an administrative authority cannot make legislative rules unless the power to do so has been expressly delegated. Particularly on the state level such delegations are, in some instances, made by constitutional provision, but in most cases the legislature by statute delegates power directly to the administrative authority or to the executive who may in turn delegate the power. On the federal level, however, the President has been said to have an inherent constitutional power to deal with the international affairs of the nation, a power which is not expressed in "the affirmative grants of the Constitution."<sup>3</sup> In the exercise of this power he may, for example, negotiate international "executive agreements" which have the force of law and are supreme over conflicting state laws – in the preponderant opinion.<sup>4</sup> The broad discretion involved in the exercise of this power may well be unreviewable by the courts, except insofar as it conflicts with "applicable provisions of the Constitution" or with valid legislation enacted thereunder. Such inherent power is not limited to emergencies in the conduct of international affairs. The frequent issue by the President of executive orders and proclamations – as also by other executives, such as state governors and city mayors – presents a special problem of constitutional or statutory authorization and of the extent of implied powers. Limitations of space prevent adequate discussion.

In a limited sense, an administrative authority may possess "implied" power to issue rules. Rules promulgated under a statutory grant of rule-making authority which does not in terms seem to cover rules of the type issued may be upheld where the reviewing court can, by looking to the purpose and framework of the enabling statute, find authority to issue such rules.<sup>5</sup> A rule based on such "implied" authority is subject to judicial review on the same general grounds and to the same extent as an authority to issue rules which are

<sup>2</sup> The terms "rules" and "regulations" are used herein interchangeably.

<sup>3</sup> *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>4</sup> *United States v. Belmont*, 301 U.S. 324 (1937).

<sup>5</sup> See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943):

"Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute [italics added]."

clearly granted. (See *infra* No. 4, page 37, for a general exposition of judicial review.)

The legislative rules described in the previous paragraphs should be distinguished from the so-called interpretative rules. The former are the product of an exercise of legislative power by an administrative authority pursuant to a grant of legislative power by the legislative body; they have the force of law. Even in the absence of any express constitutional or legislative authorization to issue rules, however, administrative authorities issue interpretative rules, i.e., interpretative statements issued as an incident of the administering authority's power to implement and administer the provisions of a statute.<sup>6</sup> Sometimes they rest upon statutory authority to issue them, but more commonly grow out of other tasks assigned to the agency. Such rules are not binding on the courts as law in the same sense as legislation enacted by the legislature or duly authorized legislative rules promulgated by an administrative authority (see *infra* No. 6, page 41), and thus it may be misleading also to call them "rules." Interpretative rules are often issued in the same formal manner as legislative rules, frequently with an appropriate *caveat* indicating that they do not have the force of law.

- (b) *Are such laws [interpretative rules] subject to judicial review, and if so on what grounds?*

In a judicial proceeding in which an interpretative rule comes into issue, a court frequently will substitute its judgment as to the legal propriety of the rule. Under certain circumstances such as tax cases, however, a court may give authoritative weight to such a rule, not on the ground that it is to be treated as legislation but rather because the administrative authority which issued it either has special competence in the field, or the rule is of such long standing, or the statutory provision interpreted by the rule was re-enacted while the rule was in effect. (With regard to judicial review generally, and particularly of "legislative" rules, see *infra* No. 4.)

2. *Assuming that the Legislature has delegated power to make laws to organs of the Executive, give figures, if they are available, showing the quantum of such legislation in comparison with the quantum of legislation passed by the Legislature itself.*

Most administrative authorities have authority by statute to promulgate rules. Accurate figures comparing the legislative output

<sup>6</sup> See Griswold, *A Summary of the Regulations Problem*, 54 Harv. L. Rev. 398 (1941); Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 Ia. L. Rev. 575 (1943).

of the executive branch with the quantum of legislation enacted by the legislature itself are not available, but there is no doubt that administrative legislative output far exceeds that of the legislature itself. On the federal level, for example, there is only one legislature, but estimates of the number of rule-making administrative authorities range as high as 155 (depending on the size of the units counted).<sup>7</sup> As one very rough index of the disparity, it may be noted that the Code of Federal Regulations is considerably larger than the "United States Code" of federal statutory enactment. The quantity of state and local regulation is almost impossible to estimate. It varies from state to state and seems to approach in size the unannotated statutes.

3. (a) *Are there any restrictions in the Constitution on the power of the Legislature to delegate legislative power to any Executive organ? If so, please state the restrictions.*
- (b) *If there are no such restrictions, are there any rules of law or of constitutional practice which restrict the competence of the Legislature in this respect?*

In general, there are no express restrictions in the constitutions, federal or state, on the power of the legislature to delegate legislative power to administrative authorities. Restrictions are imposed by the courts, however, based on the structure of the government and the language of the constitution. The principle of separation of powers of the three branches of government and the vesting by the constitution of all legislative power in the legislature provide the basis for the judicial doctrine that the legislature cannot irrevocably delegate its legislative power to an administrative authority. The impracticability, however, of imposing upon the legislature the task of legislating with respect to masses of detail – as a simple example, the collection of taxes as imposed by the legislature – and the need to make constant use of technical and scientific data in keeping abreast of the shifting needs of an industrialized society, has induced the courts to permit a broadening of the legislative powers of administrative authorities. What was once a rather strict prohibition against the delegation of legislative power has, particularly on the federal level, been modified to permit relatively broad delegations of rule-making power, provided only that the scope of the power is not

<sup>7</sup> See 1 Davis, *Administrative Law Treatise* Sec. 5.03 (1958). A broad power to control the Executive Departments is given by 5 U.S.C. Section 22:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of its records, papers and property appertaining to it."

without limit and that adequate standards to guide the administrative authority are established by the legislature. We know of no instance in which a delegation by the federal Congress to a regularly constituted administrative agency, independent of the executive branch, has been held invalid.

The only two decisions<sup>8</sup> of the Supreme Court invalidating delegations for want of legislative power have not been overruled, but subsequent decisions<sup>9</sup> by the same Court indicate that the doctrine of non-delegable legislative power does not now operate as a direct threat to the power of Congress to delegate rule-making authority. The *Schechter* decision, however, may well continue to exercise a restraining influence on the drafting of statutes and the breadth of powers thereby delegated. If so, it is in this sense a "significant limitation". Furthermore, no peace-time legislation upheld by the Court has been as broad as that which was struck down in *Schechter*. On the other hand, state courts with more frequency strike down delegations by state legislatures.<sup>10</sup>

The delegation issue on the federal level usually focuses on the adequacy of the standards limiting the granted rule-making power. Standards which have been upheld as adequate include many framed in very broad and general terms. Thus, for example, the standard limiting the Federal Communications Commission in the exercise of its extensive rule-making functions is whether the "public convenience, interest, or necessity will be served thereby". Although such a broad standard may in a particular case derive considerable meaning from history and context, it may also result in a delegation to an administrative authority of considerable discretion.<sup>11</sup>

One other, perhaps theoretical, aspect of the non-delegation doctrine should be mentioned. Were Congress to delegate an unusually broad and possibly unconstitutional rule-making authority to an administrative body, the courts might be able to construe the grant narrowly in order to avoid the constitutional issue otherwise presented. The doctrine thus indirectly could result in the invali-

<sup>8</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>9</sup> E.g., *Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 314 (1944).

<sup>10</sup> E.g., *State v. Traffic Telephone Workers' Federation*, 2 N.J. 335, 66 A. 2d 616 (1949); *Bell Telephone Co. of Penn. v. Driscoll*, 343 Pa. 109, 21 A. 2d 912 (1941).

<sup>11</sup> The powers of the Federal Communications Commission over broadcasting include the power to classify radio stations; prescribe the nature of the service to be rendered; establish areas or zones to be served by any station; make special regulations applicable to radio stations engaged in chain broadcasting; regulate the keeping of station records; prescribe the qualifications of station operators; and designate call letters and require their publication. 47 U.S.C. Section 303.

dation of administrative rule-making on *ultra vires* rather than non-delegation grounds.<sup>12</sup>

The legislature, of course, cannot delegate legislative power which it does not have. Constitutional restrictions on the legislature's power to legislate in a particular field or in derogation of guaranteed rights, discussed above under the heading "The Legislative and the Rule of Law", restrict its power to delegate.

4. (a) *When power to enact delegated legislation is conferred by the Legislature, is the power defined with precision in respect to its*  
(i) *extent;*  
(ii) *purpose?*

The power need not necessarily be defined with precision, but it must be exercised by specifying adequate standards to guide the administrative authority: otherwise the act may be held to be an unconstitutional delegation of legislative power. These standards – usually derived from the specific statutory language delegating authority or from the entire statute – set out the legislatively-defined policies which are to guide the administrative authority in its rule-making function. Within the broad limits permitted by the non-delegation doctrine, these policies may be defined by the legislature with varying degrees of precision depending on a variety of factors – including the confidence the legislature has in the particular administrative authority, the extent to which the subject matter lends itself to a precise statement of objectives, and whether the legislature has at the time of delegation clearly formulated its policies. The courts recognize that wisdom is to be found in the various organs of government as well as in the legislature, and is to be drawn upon by those organs in the exercise of their judgment.

Two examples illustrate the range of possible variations in the precision and specificity with which such standards may be stated. Under the Renegotiation Act of 1942, Congress delegated to an administrative authority the power to recover "excessive" profits from government contractors without attempting in the statute to define what constitutes "excessive". Two years later Congress incorporated into the authorizing statute a detailed statement of factors to be considered in determining excessive profits – factors which had been evolved by the administrator operating under the original delegation.<sup>13</sup> In perhaps a more extreme example, Congress, without incorporating into the authorizing statute any standards, delegated to the Federal Home Loan Bank Board broad powers to provide by

regulation for the liquidation of savings and loan associations. The Supreme Court upheld this delegation, deriving the necessary standards from the well-defined practices of the banking industry.<sup>14</sup>

Protection against abuse of the delegated power can be and should be provided by adequate procedural safeguards, the legislative right to review, modify or repeal the delegation, and by judicial review.

- (b) *If delegated legislation exceeds the extent or purpose of the enabling law is this a ground for setting it aside? If so, state by whom such legislation can be set aside.*

Delegated legislation which falls outside the scope of authority granted by the enabling statute may be set aside. The administrative authority itself may do so upon complaint of an aggrieved party in accordance with procedures provided by its own rules or by statute. If the administrative authority determines that the rule promulgated was within the scope of its authority, the aggrieved party may obtain judicial review of this determination, generally, however, only after exhausting his administrative remedies. To qualify as a party aggrieved, the person complaining must be injured in some legal interest or must fall within a class granted by statute the right to obtain judicial review.<sup>15</sup> Prior to an attempt by the administrator to enforce the rule, there may be a question whether a person upon whom the rule has already had some prejudicial impact can obtain review.<sup>16</sup> The trend of judicial decisions would seem to indicate that review will often be obtainable even prior to attempted enforcement.

Judicial review of an administrative regulation may take the form of direct review in an appellate court<sup>17</sup> based upon specific or general statutory provisions; or it may be had collaterally in a court of original jurisdiction – for example, in an action brought to enforce a regulation; in an injunction suit to enjoin its enforcement; in a declaratory judgment proceeding; by use of one of the prerogative writs such as certiorari, prohibition, or mandamus; or in a habeas corpus proceeding to obtain release from an arrest for violation. The legislature may by statute make a particular method or methods of review exclusive. If the reviewing court finds that the agency determination was erroneous, i.e., that the rule promulgated was beyond the scope of its delegated powers, the court will, depending on the form of review utilized, issue an order which will invalidate

<sup>12</sup> Compare *Kent v. Dulles*, 357 U.S. 116 (1958).

<sup>13</sup> 50 U.S.C., App. Section 1191 (4) (A).

<sup>14</sup> *Fahey v. Mallonee*, 332 U.S. 245 (1947).

<sup>15</sup> *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

<sup>16</sup> *Associated Industries of New York State v. Ickes*, 134 F. 2d 694 (2d Cir. 1943).

<sup>17</sup> See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). Cf. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954).

the rule or its particular application in the case under review.

Again, it should be noted that in determining whether an administrative regulation is within the scope of the enabling statute, a reviewing court may be influenced by possible constitutional infirmities of the regulation itself. The Supreme Court has in a number of recent cases indicated that, at least in areas affecting liberties of the individual, where an administrative authority promulgates a rule which is constitutionally doubtful and which can be held to be outside the scope of its delegated powers by a restrictive interpretation of the authorizing language, the Court may interpret the legislative grant narrowly and invalidate the rule on *ultra vires* grounds.<sup>18</sup> Thus for example, the Court has stated: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel are involved, we will construe narrowly all delegated powers that curtail or dilute them."<sup>19</sup>

Finally, it should be mentioned that, as a practical matter, judicial review may not always be a wholly effective means of overturning improper exercise of delegated legislative power. Where the delay incidental to litigation in itself would destroy any advantage to be gained by setting aside the administrative action, or where the individual interest affected is not sufficiently important to justify the expense of litigation, an injured party may prefer to comply with an *ultra vires* requirement rather than seek his judicial remedy.<sup>20</sup>

5. (a) *What is the effect of failure to comply with the procedure required by law for the enactment of delegated legislation?*

Failure to comply with procedures required by law for enactment of administrative rules may be a ground upon which a court may set them aside. Where, for example, the type of hearing required by statute, administrative provision or constitution has not been held, the rule promulgated may be invalidated. However, not every disregard of a procedural requirement will be a ground for invalidation: in general, the violation must be substantial and prejudicial to the party complainning. Existence of a contemporaneous administrative construction entitles those who have relied upon it to invoke its protection.

<sup>18</sup> E.g., *Greene v. McElroy*, 360 U.S. 474 (1959); *Peters v. Hobby*, 349 U.S. 331 (1955). Also compare *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

<sup>19</sup> *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

<sup>20</sup> See, e.g., *McGrew v. Industrial Commission*, 96 Utah 203, 85 P. 2d 608 (1938); *Western Union Telegraph Co. v. Industrial Commission of Minnesota*, 24 F. Supp. 370 (D. Minn. 1938). Consult, Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making*, 27 Wash. U.L.Q. 1 (1941).

(b) *If such legislation is liable<sup>21</sup> to be set aside for failure to comply with a procedural requirement, by whom may this be done?*

Requirements for obtaining an order of a court setting aside an administrative rule for failure to comply with necessary procedures are the same as those applicable to cases where the complaint is that the rule is *ultra vires* the enabling statute. The party complaining must be aggrieved and must first exhaust his administrative remedies; the issue may be raised in any of several contexts the nature of which will determine the type of court which will consider the issue.

Even though procedures required to be followed in promulgating rules are minimal, the technique of rule-making itself ordinarily assures to interested persons the advantage of some advance notice of new administrative policies. Development of new policy in individual adjudicatory proceedings, on the other hand, may result in surprise to affected parties, particularly where the development was not foreshadowed by prior administrative action and involves interpretation of a broad statutory standard. Many administrative authorities are authorized to act both by rule-making and through case-by-case interpretation of applicable statutory standards.

(c) *Please indicate whether there is a code of procedure for the enactment of delegated legislation, or whether the procedure depends on the particular enabling law or on established practice.*

Procedures to be followed in the enactment of delegated legislation may be established by a specific enabling statute; by the administrative authority itself in exercise of its rule-making functions; by the custom and practice of the particular administrative authority; or by a general statute prescribing procedures for the exercise of administrative functions.

(d) *If there is such a code of procedure, or established practice, outline its principal requirements.*

Procedures provided by specific statutes, administrative regulations and practice vary considerably from agency to agency.<sup>22</sup> It has been suggested that factors which may influence the procedures chosen include: the character and number of parties affected; the

<sup>21</sup> The writers interpret the words "is liable to be..." in the question to inquire "If such legislation may be set aside...".

<sup>22</sup> See, e.g., *Pennsylvania R. Co. v. Department of Public Utilities*, 14 N.J. 411, 102 A. 2d 618 (1954).

nature of the problems dealt with: the character of the administrative determination; the type of administrative agencies involved; and the character of enforcement attached to the rule involved. Depending on such factors, there may be no provision for participation by affected parties; or affected parties may participate through consultation, conferences, written presentations or oral hearings. In general, there is no constitutional requirement that rule-making be preceded by an oral hearing and findings, but there have been occasional decisions indicating that in connection with the performance of some administrative functions which at least resemble rule-making, e.g., wage-fixing, some such procedural safeguards may be required. Where a specific statute requires "a hearing" in connection with rule-making, it may be interpreted merely to permit the oral presentation of evidence and argument by interested parties, or to require a trial-type proceeding<sup>23</sup> with testimony under oath, opportunity for cross-examination and refutation, and findings based upon the record. In general, whether a trial-type hearing is required depends on whether elements of adjudication are sufficiently present in the "rule-making" function.

On the federal level and in many states,<sup>24</sup> general statutes provide certain minimal procedural standards which, in the absence of specific statutory or administrative provision, are generally applicable to most administrative authorities.<sup>25</sup> Thus, the federal Administrative Procedure Act (APA) requires that notice of proposed rule-making be published, that interested persons be afforded an opportunity to submit written data and arguments with or without opportunity to present them orally, and that the rules adopted contain a statement of their basis and purpose. Even these minimum requirements of the APA may be dispensed with when the administrative authority for good cause finds that these procedures are "impracticable, unnecessary, or contrary to the public interest." Rules excepted from these requirements are also listed, viz., interpretative rules, general statements of policy and rules of agency organization, procedure or practice. If a particular enabling statute provides that rules are to be made on the record after opportunity for agency hearing, the APA also provides the details of the procedures to be followed.

The most common, generally applicable provisions on the state level include notice and opportunity to submit data and views orally or in writing.<sup>26</sup> A few states have general statutes which impose more stringent procedural requirements including, for ex-

ample, public hearings. Again, under such provisions a trial-type hearing and its incidents may or may not be required. In general, there is no constitutional compulsion to use the one approach or the other, and even the fact that the case-by-case approach results in retroactive application of new policy may not be a sufficient reason to invalidate administrative action. Although the rule-making approach should be followed "as much as possible . . . any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."<sup>27</sup> The choice of which procedure to follow is one which "lies primarily in the informed discretion" of the administrative authority. Factors which may be considered in exercising this discretion include, for example, whether the problem is of a type which can be handled within the confines of a general rule; whether the administrative authority has adequate information and experience to warrant issuance of a rule; and whether the problem was foreseeable before it arose in a particular case.<sup>28</sup>

6. *If the answers to Questions 4 and 5 include the fact that delegated legislation is subject to judicial review, whether by a specialized or by an ordinary court, please answer the following questions:*

- (a) *Is it legally possible to exclude judicial review of delegated legislation?*
- (b) *If it is, indicate whether this is done, and give examples.*

In the absence of special legislation, the scope of review usually applied by a reviewing court in determining the validity of a legislative rule promulgated by an administrative authority is limited primarily to a determination that it is: (a) constitutional – viz., issued pursuant to a valid delegation of legislative power and not in violation of constitutional rights; (b) within the scope of the delegated authority; and (c) issued in accordance with proper procedures.<sup>29</sup> In general, the courts do not attempt, unless a specific statute so provides, to re-evaluate the facts underlying the administrative determination, the soundness of the reasoning by which the rule was arrived at, or to substitute their judgment as to what the rule should be. Judicial review of the validity of administrative rules is thus, in general, initially limited in scope, and his power of the agencies to determine and evaluate the facts is very great in practice.

<sup>27</sup> *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

<sup>28</sup> See generally, Baker, *Policy by Rule or Ad Hoc Approach – Which Should it Be?* 22 L. & Contemp. Prob. 658 (1957).

<sup>29</sup> See *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935).

<sup>23</sup> Consult 1 Davis, *Administrative Law Treatise* Section 7.07.

<sup>24</sup> E.g., Ohio Rev. Code, State Government Section 119.03.

<sup>25</sup> Model State Administrative Procedure Act, Section 2 (3).

<sup>26</sup> E.g., *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 151 A. 2d 775 (1938).

The extent to which even this limited judicial review of administrative regulations can be precluded by legislative enactment is unclear under our law. The issue of preclusion may arise in a number of different statutory contexts. The relevant statute may be silent on the issue of whether review is available; somewhat ambiguously, it may provide that the administrative decisions are to be "final"; or it may expressly provide that agency determinations "shall not be reviewed or redetermined by any court," or "no . . . court shall have jurisdiction" to review "decisions . . . on any question of law or fact . . . under any law" administered by the agency.<sup>30</sup>

Such language of preclusion, although perhaps clearly barring review of adjudicative decisions interpreting and applying regulations to particular facts, may not be as clear in prohibiting judicial consideration of the validity of regulations under which the administrator acts. Some courts at least, under such exclusionary language have determined the validity of the regulations under which action was taken although declining to review further.<sup>31</sup>

Moreover, even with respect to administrative determination to which language of preclusion clearly applies, the courts as a matter of statutory interpretation frequently read language apparently cutting off all review as permitting, at the very least, review of whether the administrative action violates constitutional rights or is clearly outside the statutory jurisdiction of the agency.<sup>32</sup> When a regulation is by its terms to be enforced by imprisonment, fine or recovery of damages, review is constitutionally guaranteed.<sup>33</sup> The minimum amount of review frequently permitted under clear language of preclusion thus may not differ materially from the amount of review ordinarily applied in determining the validity of delegated legislation. As a practical matter therefore, attempts by the legislature generally to limit review of administrative action may not be effective to limit the scope of review of delegated legislation which otherwise obtains. Because of judicial techniques of statutory interpretation and the unlikelihood that the legislature will press the issue, the ultimate question of whether the legislature could, consistent with the constitution, bar any and all judicial review of administrative action has not been and probably will not be posed.

- (c) *What interpretation do the courts place upon powers which are conferred in terms which call merely for a*

*subjective decision by an Executive organ on matters which afford grounds for judicial review? (E.g., the Minister may make such laws as appear to him to be necessary, etc.)*

- (d) *If the courts interpret this to mean they have virtually no power to review the particular delegated legislation, please indicate, with examples:*  
 (i) *whether this form of words continues to be used,*  
 (ii) *whether it exists in law enacted before the judicial decision giving this interpretation.*

The legislature may delegate to an administrative authority rule-making powers in terms which seem to call for a subjective decision on the part of the administrator. It may not, however, delegate a completely unlimited subjective rule-making power since such a delegation would violate the constitutional prohibition against delegations of legislative power. (See *supra*, No. 3.) As suggested above, the constitutional test will be satisfied if an adequate statement of standards accompanies the delegation.

To the extent that the administrator is granted subjective discretion to determine the occasion or type of action which will carry out the legislature's policies as defined by the accompanying standards, his exercise of judgment "as to the existence of facts calling for that action" ordinarily will not be reviewed by the courts.<sup>34</sup> On the other hand, the courts may still review his acts to determine whether he has reasonably exercised his discretionary power within the limitations imposed by the accompanying standards.<sup>35</sup>

7. (a) *Who decides whether a state of emergency exists?*  
 (b) *Is the question whether a public emergency exists open to judicial investigation, whether in an ordinary or special court?*  
 (c) (i) *Has the Executive or any organ of the Executive autonomous power to legislate in a time of public emergency?*  
 (ii) *If so, please indicate whether there are any constitutional or other legal restrictions on this power.*  
 (iii) *Are such laws subject to judicial review?*

Congressional legislation delegating emergency powers to the executive sometimes itself declares the existence of a state of emergency; sometimes other Congressional declarations to this effect are relied upon; finally, some statutes expressly or impliedly delegate to

<sup>30</sup> E.g., Veterans' Benefits Act of 1957, 71 Stat. 92, 38 U.S.C.A. Section 211.

<sup>31</sup> *Barnett v. Hines*, 105 F. 2d 96 (D.C. Cir., 1939); *Slocumb v. Gray*, 179 F. 2d 31 (D.C. Cir., 1949).

<sup>32</sup> See generally, 4 Davis, *Administrative Law Treatise*, ch. 28 (1958); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 769 (1958).

<sup>33</sup> *Crowell v. Benson*, 285 U.S. 22 (1932).

<sup>34</sup> *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940).

<sup>35</sup> See 4 Davis, *Administrative Law Treatise*, Section 28.16.

an executive agency, usually the President himself, the task of determining whether the required emergency exists. Thus, emergency powers have been by statute determined to be exercisable "when in . . . [the President's] judgment the public safety may require it," or "in time of war or when war is imminent," or when the President proclaims that there exists a "state of public peril or disaster or other national emergency."<sup>36</sup>

There have been numerous instances in time of public emergency where a broad power to enact delegated legislation has been delegated by Congress to the executive. An outstanding example of this type of statute was the Emergency Price Control Act of 1942 (enacted during the war) which delegated to an administrative authority the power to fix prices. Section 1(a) of the Act declared that it was "in the interest of national defense and necessary to the effective prosecution of the . . . war." Congress has with some frequency delegated to the executive even more extreme emergency powers. Numerous statutes have delegated to the President the power in times of emergency to seize various types of property and operate businesses for limited periods or during the continuance of a defined emergency. Usually detailed conditions precedent to the exercise of the power are imposed, and uniformly there is provision for the payment of just compensation to the property owner. Such congressional grants of power have been uniformly upheld as being within the legislative power.<sup>37</sup>

Where the Congress itself has by statute or resolution determined that a public emergency exists which justifies extreme legislative measures which in the absence of the emergency might be unconstitutional, the courts often defer to the legislative determination. Similarly, the courts often defer to a legislatively authorized determination by the executive that an emergency exists. The judiciary, however, may invalidate executive action attempted to be justified under a claim of emergency which substantially impairs constitutional rights and is not shown to be clearly justified by the claimed emergency conditions.<sup>38</sup>

The extent of the autonomous power of the executive to legislate in time of public emergency depends on whether one looks at the practices of various Presidents in times of crisis or at the judicial

pronouncements on the subject. Presidents, in time of war or when war has been imminent, in the absence of enabling legislation have taken numerous extreme actions including the seizure of property. Congress almost uniformly has given subsequent support to such executive acts, frequently by express legislative provision.

The question of the constitutionality of such autonomous executive action has rarely been faced by the Supreme Court. It has usually been difficult for injured persons to obtain timely judicial review of such actions. In the most recent leading decision relating to the question, however, *Youngstown Sheet and Tube Co. v. Sawyer*,<sup>39</sup> a majority of the Supreme Court ruled that as Congress, in enacting legislation dealing with labor conflicts, had deliberately refused to grant to the executive a seizure power, the President had no power to seize the nation's steel mills to avert the "national catastrophe" which would be caused by an impending strike of steel workers. Whether future Presidents would feel bound by this decision in the face of a serious public emergency may be questioned, however, particularly in view of the history of autonomous executive action in time of emergency.<sup>40</sup>

8. *Please answer Questions 4-6 with reference to delegated legislation in times of public emergency only.*

In general, in time of public emergency the legislature tends to delegate powers in broader terms,<sup>41</sup> and the courts probably exhibit a more tolerant attitude in interpreting delegated legislation. Congress has the power "to make all Laws which shall be necessary and proper for carrying into execution [its] . . . Powers," and the concept of what is "necessary and proper" under the exigencies of wartime or other national emergency is considerably broadened. Thus, although in theory delegated legislation enacted in time of and related to a public emergency may be set aside either because it is beyond the scope of the enabling law or because required procedures<sup>42</sup> are not followed in the enactment process, the courts are probably less likely to do so during time of emergency. Similarly the courts are probably quicker to uphold statutory language excluding,

<sup>36</sup> See authorities collected in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952) (concurring opinion).

<sup>37</sup> *Ibid.*

<sup>38</sup> See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), particularly Mr. Chief Justice Stone concurring at p. 335; *Ex Parte Milligan*, 4 Wall. 2 (1866). Cf. *Sterling v. Constantin*, 287 U.S. 378 (1932). See also *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). Sec. 11440, Calif. Govt. Code provides, *inter alia*, that an emergency regulation shall be declared invalid "on the ground that the facts recited . . . do not constitute an emergency."

<sup>39</sup> 343 U.S. 579 (1952).

<sup>40</sup> See particularly Rossiter, *The Supreme Court and the Commander in Chief* (1951); Schubert, *The Presidency in the Courts* (1957); Corwin, *The President, Office and Powers* (1948).

<sup>41</sup> The broad standards which limited the rule-making power under the Emergency Price Control Act of 1942 were held adequate to satisfy the non-delegation doctrine in *Yakus v. United States*, 321 U.S. 414 (1944). Although there have been suggestions to the contrary (see, for example, Justice Roberts dissenting at p. 460), it is not clear that the Court relied particularly upon the war emergency to uphold the broad delegation involved.

<sup>42</sup> Compare Calif. Govt. Code Section 11421(b).

limiting, or providing particular methods of review where ordinary judicial review would interfere with necessary emergency measures.

9. *Does the Constitution define the law relating to the existence of a state of emergency and the powers then exercisable by the Executive?*

No. There are few constitutional provisions dealing with the effect of a public emergency on the exercise of governmental powers. Article I, Section 9 of the federal Constitution does provide that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." And the Fifth Amendment indicates that the right to indictment by a grand jury of a person serving in the militia in time of war or public danger may be suspended. In addition, of course, Congress has the power "to declare War" and to "make all laws which shall be necessary and proper for carrying into Execution . . . [its enumerated] Powers, and all other Powers vested by [the] . . . Constitution in the Government of the United States, or in any Department or Officer thereof." And the President, the holder of the "executive Power," is to "take Care that the Laws be faithfully executed," and is designated "Commander in Chief of the Army and Navy." Claims of authority in time of emergency to take action otherwise not permissible usually are related to one or more of these provisions.

In considering the law applicable to executive action in time of public emergency, it should be kept in mind that this is a relatively uncharted area in American law. There are some decisions, but they do not necessarily furnish controlling precedents. Moreover, although in theory, there may be basic constitutional limitations on executive action – for example, on autonomous legislative power – and such action may be theoretically subject to judicial review, in time of real emergency the only effective limitation on the exercise of such powers would seem to be the good judgment of the executive himself and the not inconsiderable power of public opinion.

10. (a) *Are there any legal provisions whereby delegated legislation is open to annulment by an organ of the Legislature?*

Delegated legislation is not open to annulment by an "organ of the Legislature". It is assumed that the word "organ" in this context refers to one of the branches (such as the Senate or House of Representatives of the federal Congress) or committees of the legislative body. Delegated legislation may be annulled or repealed, in whole or in part, by subsequent act of the entire legislative body which authorized such legislation.

- (b) *Are there arrangements for some organ of the Legislature to pay particular attention to the content of delegated legislation, whether with power to act or with advisory or scrutiny powers only? If so, describe such arrangements briefly.*

Ordinarily, there are no arrangements for any organ of the legislature to pay particular attention to the content of delegated legislation, after it has been enacted, whether with power to act or with advisory or scrutiny powers only. However, such arrangements do exist in a limited number of specific instances.

For example, the "Federal Atomic Energy Act" established a bipartisan "Joint Committee on Atomic Energy" composed of nine members of the Senate and the House appointed respectively by the presiding officers of the two Houses. This Committee has power to study continually the activities of the Atomic Energy Commission (a separate federal executive agency) and problems in the development, use and control of atomic energy; to obtain current reports from the Commission, the Department of Defense and other governmental agencies; to review and make recommendations to their respective parent bodies concerning all bills and resolutions offered in Congress in this field; to hold hearings to obtain information; and to employ a staff of experts and consultants. Similar devices are more widespread in state legislation.

Also, Congress has provided in the Atomic Energy Act that the Commission shall submit to Congress twice a year, a report of its activities and make recommendations for additional legislation.

For another example: Under the federal Legislative Reorganization Act of 1946, each standing committee of the House of Representatives of Congress is empowered to "exercise continuous watchfulness" over the execution of the laws by the administrative agencies of the federal government within the jurisdiction of the committee; and to investigate and study "the administration and enforcement by departments and agencies of the Government of provisions of law relating to subjects within the jurisdiction of such committee."

In 1957 the House "Committee on Interstate and Foreign Commerce" appointed its "Special Subcommittee on Legislative Oversight," the general purpose of which is to examine the execution of the laws by the administrative agencies administering laws within the legislative jurisdiction of the parent committee, and to see whether or not the law, as the Congress intended, is or is not being carried out. This Subcommittee thus has the duty of legislative oversight and supervision. This Subcommittee has evolved into the present "Special Subcommittee on Regulatory Agencies," the purpose of which is to keep itself informed as to the current and future agency problems, to maintain continuing liaison with the respective

executive agencies and to make studies and recommendations to the parent committee respecting improvement in agency operations.

In some instances the delegation of legislative power by the legislature may become operative only upon the occurrence of some specified future contingency; in many other cases the delegated power to adopt measures having the force of law becomes operative in due course. The legislature itself must fix the condition or event, but may confide to an administrative agency or executive officer the fact-finding function, to be exercised reasonably and not arbitrarily, of determining whether and when the condition exists or the event has occurred. Thus, Congress provides that the suspension of certain provisions of a tariff act shall take effect upon a named contingency. In such a situation, the executive becomes the mere agent of the law-making department to ascertain and declare the event upon which its expressed will is to take effect.

- (c) *Describe briefly any other institution, independent of the Executive, which has any of the powers referred to in (a) or (b). Indicate whether the existence of such institutions is widespread.*

The only institution, other than the legislature itself, which has any power to annul delegated legislation is the judiciary. The executive has no power of annulment; exercise of the veto by the President or the governor of a state or the mayor of a city is only the power to prevent a bill enacted by the legislative body (federal, state or municipal) from becoming a "law": i.e., a piece of "legislation."

The federal government and all of the states have vested their respective courts with authority to nullify illegal or unconstitutionally delegated legislation. However, the judiciary, federal and state, have exercised this power with great restraint. Only seven Congressional acts of delegation have been declared unconstitutional since the Supreme Court undertook its first review. Delegations by state legislatures are more frequently invalidated by state courts.

In enacting delegated legislation, the legislature cannot abdicate or transfer to others the essential functions with which it is vested under the constitution. For example, the federal judiciary can invalidate an act of Congress delegating its legislative power to private individuals or groups, such as trade or industrial organizations, so as to empower them to enact laws for the welfare of their trade or industry. Likewise, a state judiciary may invalidate a state legislature's delegation to a private individual or organization of its legislative power to issue licenses in a particular calling. The federal Congress cannot transfer or delegate its legislative power to the states, nor state legislatures to Congress.

The judiciary has no power of "scrutiny" independent of its power to find legislation unconstitutional. This power of course extends to delegated legislation such as rules and regulations of an administrative agency. In a very few of the states the high court has the power, in answer to a formal query by a state official, to render an "advisory opinion" on the constitutionality of a bill pending in the legislature, before enactment.

11. *To what extent are the following activities of the Executive subject to review in the courts:*

- (a) *acts interfering with freedom to travel within or outside the country?*

Under the United States Constitution, the executive, federal and state, is without power to interfere with the right and freedom of persons to travel from state to state within the country and any such abridgment is subject to annulment in the courts. The right to travel is a privilege of national citizenship protected from state abridgment. Thus the courts have held a state may not levy a tax on persons leaving or passing through that state nor prohibit the entry of indigent persons.

Although a federally-issued passport is by statute required for travel outside the country, the Supreme Court has, recently, stated that the right of a citizen to travel abroad is a substantive constitutional "liberty" – subject to reasonable regulations in the national interest. Congress has delegated to the discretion of the Secretary of State the issuance of passports and to the President the prescribing of necessary rules and regulations.

Any restrictions so imposed by the federal executive on this freedom to travel outside the country are subject to review by the courts; and, in any event, are severely limited in the absence of legislative authority. Moreover, the Secretary of State, in refusing passports, may not act arbitrarily or fail to follow his own regulations; he is subject to having his rulings overturned in court if he does so. The constitutional right to travel cannot be abridged without due process of law, for example, for reasons related to the political beliefs or associations of applicants; but it may be abridged if the applicant's activities would be illegal or prejudicial to the security and interests of the United States. Thus the State Department has issued new regulations denying passports to members of the Communist party. It is expected that this rule of passport refusal will be soon subjected to challenge as a denial of substantive due process, and court review.

Present passport regulations provide for an informal hearing before an officer of the Passport Division and a formal review

hearing before the Board of Passport Appeals before a final denial of a passport. At such hearings, the applicant has the right to counsel, to a specification of the reasons for the denial and to reasonable notice of hearing; and now, by very recent regulation, the right to cross-examine witnesses against him (confrontation).

The actions of the Secretary may be reviewed in the courts and will be reversed if they exceed the limits of authority granted by Congress, violate the executive regulations and procedure or invade a constitutional right of the applicant.

*(b) compulsory acquisition of privately-owned property?*

The Fifth Amendment of the federal Constitution provides that private property shall not be taken for peaceable, federal government public use without just compensation. All of the states have similar constitutional safeguards. Condemnation by the executive is invalid unless authorized by the legislature. Under both state and federal constitutions no person may be deprived of his property without due process of law or in violation of the equal protection of the law. There must be opportunity to be heard at some stage of the condemnation proceeding on the basic questions of title, ownership and the value of the property taken. This usually occurs before the property is finally taken. The condemnation acts of the executive are generally subject to judicial review in federal or state courts to determine (a) whether a taking has occurred, (b) the adequacy of the compensation awarded, and (c) the legality of the taking, i.e., the existence of an authorized public purpose.

The remedy of injunction is normally available to block executive attempts to take private property in an unauthorized manner, as for example where the threatened taking is not for a "public purpose"; or, as in the Steel Seizure Case,<sup>43</sup> where the acquisition of the property had not been authorized by the Constitution or by statute. Also, in certain circumstances such remedies as certiorari, ejectment, mandamus or prohibition or suit for damages are available.

The Supreme Court, however, has indicated that during a period of extreme national emergency, the jurisdiction of the courts to review expropriations of private property may be limited by Congress.

*(c) deprivation of liberties under license or other form of permission to carry on any lawful calling?*

The executive has no power to set up any licensing system unless authorized by the legislature. Any act of the executive consti-

<sup>43</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), noted under 7, above.

tuting an alleged deprivation of constitutionally protected liberties, by refusing or revoking a license or permit to carry on any lawful calling, is always subject to review in the courts. However, a distinction should be noted between the constitutional right to engage in a lawful occupation for which a "license" may nevertheless be required in order to protect the public from the unskilled or irresponsible practitioner, and an *ad hoc* "permit" to perform a single act subject to executive control, as by way of illustration for the protection of life or the stability of the monetary system. A permit may be lawfully refused, by the established licensing authority, to use dynamite at midnight, in a populous residential district, for the otherwise lawful purpose of blasting rock to make the foundations of a house; or to transfer gold to a foreign country at the whim of a speculator. While denials of such permits may in some degree adversely affect the lawful business of the applicant, review will be narrowly limited to the questions of statutory jurisdiction and due procedure, the courts declining to examine into the merits of the exercise of administrative discretion. Generally, acts of the executive in revocation, suspension or modification or other denial of licenses to engage in a lawful occupation *per se* are subject to judicial review either before the act of deprivation or impairment has taken place or at the time the judiciary reviews the licensor's action.

For example, the federal Administrative Procedure Act provides a right of judicial review to any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute. This right of judicial review includes cases of withdrawal, suspension, revocation or annulment of any license. The effective date of the executive action may be postponed pending judicial review. The extent of the review allowed is indicated below in the answer to question 12.

In this context the United States Supreme Court has repeatedly given expression in a long series of cases to certain basic legal principles. Any law that places the issuance of permits or licenses for the conduct of religious activities or meetings in the arbitrary discretion of an official is unconstitutional. The executive may not prohibit religious meetings in streets or in parks, but can only make reasonable and non-discriminatory regulations to avoid conflicts of time and place. Since the chief purpose of the constitutional guaranty of liberty of speech and press was to prevent pre-publication restraints upon expressions as by censorship and licensing laws, any ordinance or practice giving public officials unlimited discretionary power to grant licenses or permits to speak, or to distribute publications or literature, or to solicit citizens to become members of an organization, is illegal and subject to judicial review. While public authorities may regulate the use of streets and parks, they may not institute a

system of granting licenses or permits to exercise constitutional liberties therein which vests in an administrative official the discretion to grant or withhold such a permit or license, and the standards for such a license or permit must be reasonable, definite and related to proper regulation of public places.

*(d) refusal under licensing control to permit the pursuit of any lawful calling?*

The executive does not as such have the inherent power to regulate and control lawful occupations. It may administer a licensing system to the extent that licensing is established by the constitution or an act of the legislature. This power must be exercised reasonably and not arbitrarily.

Generally, a refusal by the executive to issue a license for a lawful calling is subject to judicial review, by mandamus or other form of court proceeding, to test the legality of such refusal. Upon such a review the refusal may be questioned on the grounds that it was arbitrary, capricious or unfair, or that the executive acted outside of the scope of its authority, or failed to comply with the provisions of the licensing statute. If the executive act of refusal effects a deprivation of the enumerated constitutional rights such as freedoms of religion, press, speech or assembly, the refusal is also subject to court review on this ground.

The question stated presents a knotty problem to which there is no single, simple answer. Initial refusal to issue a license leaves the applicant in prior status; revocation, suspension or refusal to renew may cut off an existing mode of livelihood. The great majority of licenses are issued by state and municipal authorities to a wide variety of occupational applicants and professional practitioners: attorneys, doctors, architects and engineers, insurance and securities brokers; skilled craftsmen such as electricians and plumbers; and automobile drivers. It is only a minority who must obtain federal government licenses, such as radio and television stations, dealers in securities and officers of vessels engaged in interstate and foreign commerce.<sup>44</sup>

The statutory requirements for initial hearing, a determination on the record and court review vary considerably from one state to another and from one type of occupational license to another. If the original issuance depends upon good conduct and the primary question is therefore whether the applicant has been guilty of some alleged past misconduct, a hearing procedure is clearly appropriate to the determination.

<sup>44</sup> The professions and occupations named in the text are but illustrative examples, without attempt for full coverage.

Under ordinary circumstances a hearing is not required as a matter of constitutional due process, but refusal to renew or revocation will more frequently call for hearings than in cases of original license issuance. Sheer volume of licensing matters inevitably exerts an influence on the practicability of a theoretically infinite number of hearings; the total procedural process, equally important to reasonably speedy determination in the public interest, may break down. Under some circumstances a hearing may be required by the federal Constitution.

Circumstances affecting the right to judicial review include (other than the statutory provisions therefor): denial of a hearing or of any procedure required by statute; absence of jurisdiction in the agency attacked; whether there was substantial evidence to support the agency's findings of fact. In brief summary, the "law" remains unsettled as the judicial decisions of lower courts lack uniformity in interpretation of statutory requirements.<sup>45</sup>

The federal Administrative Procedure Act of 1946 requires a hearing on the license application or other customary procedural safeguards when the underlying statute applicable to the particular type of license so provides. This Act expressly exempts enumerated agencies from its scope, and a number of federal statutes enacted since its adoption and creating new agencies have likewise exempted them from the 1946 Act.

Recently the United States Supreme Court, in review of a state executive action, held that a person could not be denied a commission to serve as a notary public by the state executive for refusal of the applicant to declare his belief in God; such a requirement deprives him of his constitutional liberty of belief and religion.

*(e) restraints imposed on freedom of assembly?*

The right of the people peaceably to assemble and to petition the government "for a redress of grievances" is a fundamental constitutional right embodied in federal and state constitutions. Today the right of peaceable assembly is treated as fundamental as those of freedom of religion, free speech, free press and petition. Meetings for peaceable political action cannot be proscribed. Peaceable assembly for lawful discussions cannot be made a crime.

In crowded cities, minimal reasonable and non-discriminatory regulations which require permits for the time and place of meetings

<sup>45</sup> See generally, 2 Davis, *Administrative Law Treatise* (1958), pp. 227-234; Benjamin, *Administrative Adjudication in the State of New York*, pp. 77, 83, 124-129, 326-350 (1942); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Riss & Co. v. United States*, 341 U.S. 907 (1951).

on public streets and in public parks have been judicially approved. But any regulation that leaves the grant or denial of a permit solely to the unfettered discretion of the executive is an unconstitutional prior restraint. All such restrictions are subject to the review of the courts, either by application for injunction prior to the meeting or by review following an accusation that the permit was not sought or not obtained or its restrictions not observed.

So limited is the police power flatly to forbid public assembly that denial is only possible, in a realistic sense, where there is inadequate time for legal hearings before the licensing or policing body. The decisions or refusals of such a body may be anticipated and countered by an application to a court for an order compelling the issuance of a permit or restraining the interference with the prospective meeting.

*(f) restraints imposed by seizure or ban on freedom of literary expression?*

Literary expression is free of such executive restraints, especially prior to publication, except in those rare situations where a statute gives the power to seize or ban a very narrow range of expression. So far as is known today, only those publications which are so open to an incitement to riot or rebellion as to constitute a clear and present danger to the safety of the nation or which in their appeal to the prurient interest are shocking to the public taste of the vast majority of people may be suppressed. Usually such a ban or seizure is permitted only after publication and after due trial or hearing by a court exercising judicial scrutiny of the material.

Any such prohibition or confiscation effected by executive action before a court trial or hearing may be reviewed by the courts, and will be reversed if the court finds the executive act exceeds the limits of statutory authority or standards, or that the statute is unconstitutional, or that the publication or other expression is within the constitutional protection of free speech and free press. Recently the Supreme Court has held that the banning by the executive of handbills, generally because of the lack of a license or because of anonymity, is unconstitutional.

For the public showing of motion pictures several states have statutes requiring a prior license and thus permitting censorship and ban, as for example, for "obscenity," but such restraints are always subject to court review for possible violations of the constitutional rights of free speech and press.

As material that is obscene may not be imported into the United States, it may be libeled by the government attorney in proceedings initiated by Customs officials in the federal court for its forfeiture. The court will review the publication and charge, and

may dismiss the libel or order seizure and forfeiture. Likewise, the action of the Postmaster General in denying or revoking mailing privileges to certain publications is reviewable in the courts. There is a large volume of litigation pending in the federal and state courts over the definition of "obscenity" in motion pictures, printed matter, etc., and over the limits of executive and police action with respect thereto.

*(g) deportation of aliens?*

Generally speaking, an alien who is not a resident of the United States may be excluded by the executive, provided its act of exclusion falls within the authority conferred by an act of Congress. Admission of aliens to the United States is not an inherent right but merely a privilege, available only upon such terms as the United States shall prescribe. The power to exclude aliens is a fundamental sovereign attribute exercised by the government's political departments. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with the legislative power, but is implementing an inherent executive power.<sup>46</sup>

An alien outside of the country, attempting to enter, has initially, if he is excluded, such remedy as is authorized by Congress. The action of the executive in excluding an alien is conclusive as to the facts so determined, in accordance with the general rule as to such procedure. When, however, it is shown that the executive has exceeded his powers, the alien may demand his release upon habeas corpus.<sup>47</sup>

An alien who has entered the country, even illegally, enjoys certain constitutional protection because of his presence here; he becomes a "resident alien," may be deported only after proceedings, including an administrative hearing, which conform to traditional standards of fairness encompassed in due process of law, and only upon grounds prescribed by the Congress. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be reviewed in the courts by a writ of habeas corpus if the alien is actually in custody. In the hearing on the writ, the fairness of the procedure below, its conformity to the grounds of deportation laid down by Congress, and the question of whether there is any evidence to support the charge will be reviewed and the alien's release and entry, or a new executive hearing, may be ordered on these grounds. The resident alien may also obtain judicial review of a deportation

<sup>46</sup> *United States ex rel. Knauff vs. Shaughnessy*, 338 U.S. 537, 543 (1950).

<sup>47</sup> *Gegiw v. Uhl*, 239 U.S. 3 (1915); *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

order by a proceeding for declaratory determination; to initiate this it is not required that he be in custody.

*(h) deprivation of citizenship?*

Nationalization of aliens may be effected only pursuant to an act of the federal Congress. Such acts must be procedurally uniform in their application to all aliens. The grounds upon which a citizen may be deprived of his citizenship are wholly statutory. The grounds upon which a naturalized citizen may be deprived of his citizenship are more clear than in the case of a native-born citizen. Thus the naturalized citizen may forfeit – as prescribed by Congress – for fraud in his application, for engaging in specified unlawful occupations, or continuous residence abroad for a certain term of years. However, only commission of grave acts such as forswearing allegiance or engaging voluntarily in the armed forces of another power can afford a lawful ground for canceling the citizenship of a native-born; this rests upon a constitutional basis whose limits have not been judicially determined.

Executive determination that a citizen has lost his citizenship is sometimes made in connection with refusal of a visa for re-entry, or refusal of the renewal of a passport while the individual is still abroad. Similarly, a board of elections or other agency might deny an individual a specific attribute of citizenship because of belief that he is no longer a citizen. Among other remedies available to the citizen so denied the attributes of his asserted citizenship is a court action for a declaratory judgment against the executive body denying his citizenship. Only the actual determination of such a judicial proceeding finally deprives the individual of his citizenship, although the commission of one of the acts constituting ground for forfeiture, followed by failure to challenge the action of the executive invoking alleged forfeiture, may effectively deprive him of a particular attribute of citizenship.

*(i) any rights guaranteed by the Constitution?*

Acts of the executive resulting in alleged deprivation or abridgement of such rights are subject to review in the courts, state or federal. The constitutional guaranty carries the privilege to invoke judicial finding and protection.

12. *If judicial review is available, explain broadly the grounds upon which such acts may be reviewed on the merits.*

Judicial review is generally available as to all of the “activities” of the executive listed in Question 11 above. Such acts may be

reviewed on the merits, broadly speaking, on the following grounds asserted by a litigant claiming to be aggrieved:

(1) They violate constitutional liberties or rights, substantive or procedural;

(2) They exceed the statutory powers and authority granted by the legislature to the executive;

(3) They are not a reasonable and proper exercise of the “police power,” such as regulation or control clearly in the public interest in safety and health;

(4) They violate the procedures or the rules and regulations adopted by the executive in exercise of delegated legislative powers;

(5) They are arbitrary and capricious.

It is a practical impossibility to state within the limits here afforded the circumstances under which acts within agency “discretion” may be reviewed. A rule of thumb is that where such action is “by law” (meaning, generally, by statute) committed to agency “discretion,” it is not reviewable. Absent such commitment, or express vesting power, discretion may be reviewable, particularly where the complaint of a wrong brings the action within the area of “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” (Administrative Procedure Act, Section 10).

An additional ground for review which is generally available is lack of any substantial evidence supporting the adverse finding and action. What is “substantial” has given rise to a large volume of litigation of which the results, by judicial decisions, are often difficult to encompass within clear patterns of apparent consistency.

In respect, generally, of federal executive activities, the federal Administrative Procedure Act provides that “Any person suffering from legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

“Agency” in that Act means each “authority” (unit) of the United States Government, other than Congress and the courts (i.e., the executive), and agencies exempted (see II(d), *ante*). Reviewable acts include every agency action specifically made reviewable by statute and every final agency action for which there is no other adequate remedy in any court. Pending judicial review, the effective date of agency action may be postponed by the agency, if justice so requires; and any reviewing court may issue all necessary process to postpone the effective date of agency action, to preserve status or rights and to prevent irreparable injury pending conclusion of the review proceedings.

The Act further provides that the reviewing court may decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning and applicability of the terms

of any agency action. It can compel agency action unlawfully withheld or unreasonably delayed; and it can hold unlawful and set aside agency actions, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction or authority, or limitations, or without statutory right; (4) a failure to observe procedure required by law; (5) unsupported by substantial evidence in the formal record of an agency hearing; (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

Absence of any provision in a statute conferring power upon the executive to make decisions does not of itself preclude judicial review. Such silence is not to be construed as a denial of the power of federal courts to grant relief "in the exercise of the general jurisdiction which Congress has conferred upon them . . . . Judicial review may indeed be required by the Constitution . . . . Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted . . . . And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses."<sup>48</sup>

13. (a) *To what extent does the law require that an opportunity to present one's case be given before Executive action is taken in the cases listed in Question 11 above?*

No categorical answer can be given to all of the cases there listed. A closer analysis of each is required.

As to Question 11(a), interference with travel: A person does have an opportunity to present his case before executive action denying freedom to travel outside the country becomes final. After a preliminary refusal to issue a passport has been communicated in writing to the applicant with a statement of the reasons therefor, he may present his case, with or without counsel, to a hearing officer of the Passport Division of the Department of State. He also has the right to appeal an adverse decision to the Board of Passport Appeals. At such hearings, which are private, the applicant has full opportunity again to present his case, with the right to counsel, to specification of the reason for the denial, reasonable notice of hearing, and opportunity to offer his witnesses. As noted above under 11(a), the applicant now has the right to cross-examine witnesses adverse to the application; if the Department determines,

<sup>48</sup> *Estep v. United States*, 327 U.S. 114, 120 (1946).

for reasons of national security, not to reveal their identity, the passport must be granted.

As to Question 11(b), expropriation of private property: The compulsory acquisition by the government of privately owned real property is effected generally through eminent domain or condemnation proceedings initiated in court by the government seeking to acquire the particular property. All persons having an interest in such property must be made parties to the proceeding and given notice by service of process. A hearing is then held at which the property owner may present his contest to the right of the government to condemn the property, to the amount of his damage or compensation, and, in some jurisdictions, to the necessity of the taking.

In some jurisdictions where condemnation may be effected by a resolution of an administrative board, the property owner is not entitled to prior notice thereof or to be heard thereon, but he may obtain, by means of a writ of certiorari or otherwise, a judicial review of the legality of such action.

In any condemnation proceeding there must be a hearing at some stage of the proceeding which will meet the requirements of the process of law. This hearing is usually required, absent a public emergency, before the property is "taken," but the hearing need not precede the act of taking. In no event may such taking become final and irrevocable until compensation has been paid. If the taking becomes final, the owner is entitled to full compensation for the reasonable value of his property taken and property rights impaired. If the expropriation procedure provides no method for orderly determination of value, loss to the owner and actual payment therefor, the taking may be enjoined or voided. If the taking is eventually voided, the owner would be entitled to an award for damages resulting from the act of a tentative taking.

As to Questions 11(c) and (d), licensing control: The question of whether, generally, a person is legally entitled to a hearing or opportunity to present his case before a license to pursue a lawful calling is rejected, cannot be answered categorically. In most instances it appears that the judiciary favors such a hearing because of the individual's inability to earn a livelihood without a job or business.

On the other hand, for example, a license to practice a profession, such as accountancy, medicine or dentistry, is conditioned, usually, upon satisfying certain educational requirements and successfully passing an examination. The failure to meet such requirements gives the executive cause for refusing a license. The unsuccessful applicant is not entitled to a "hearing" before such rejection, except in the sense that his application and the record of his qualifications may be regarded as a hearing. Also, in respect of certain special types

of businesses, such as the sale of liquor, a license is often equated with a privilege and the act of rejection can be effected without a prior hearing.

Thus, the character of the business or calling may be an element in determining the right of an applicant to obtain a license and to present his case before his application is rejected.

Rejection of a license application still leaves open the right to a court review if the rejection was capricious, arbitrary or unreasonable.

As to actions by which licenses are revoked, modified or suspended, the question whether a hearing must be accorded before the executive action was taken, or by subsequent judiciary review, depends upon the type of the calling or business and whether the situation is one justifying prior invocation of the police power in the interest of public peace, health, safety or morals. Here, again, the character of the business or calling has a bearing on the question of the right to a hearing before the executive action is taken. Generally, however, such a revocation, modification or suspension of a license to carry on a lawful calling cannot be finally effected by the executive, within the meaning of due process of law, unless and until there is an administrative or judicial hearing at which the licensee may present his case.

The federal Administrative Procedure Act provides that except in cases of willfulness or those in which public health, interest or safety require otherwise, no withdrawal, suspension, revocation or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, the facts or conduct which may warrant such action have been called to the attention of the licensee in writing and the licensee has been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. As noted elsewhere, this Act also provides for a judicial review of such agency actions. See the discussion under Committee II, 11(d) *ante*.

As to Questions 11(e), (f) and (i), restraints upon freedom of assembly and literary expression, and rights guaranteed by the Constitution, in the constitutional field (which includes restraints on freedom of assembly and of speech and press), one's life, liberty or property cannot be finally and irrevocably taken, if at all, without due process of law being first accorded by notice and hearing. But the executive acting under the police power, may take action which purports to deprive a person of some constitutional right, such as one of those mentioned, without first affording procedural due process. This may be done by charging or decreeing that such person has violated or failed to comply with some law or regulation. Yet so long as such action is reviewable by the courts, with a hearing there on the merits before the deprivation becomes legally final, due

process of law will have been accorded. In such a situation opportunity to present one's case comes after the executive action and in a court hearing.

As to Question 11(g), deportation of aliens: A resident alien can be deported by executive action only after proceedings conforming to traditional due process standards of fairness, where he has full opportunity to present his case. As provided in the Immigration and Nationality Act, such proceedings include reasonable notice of the charges against him, and of the time and place of the proceedings; right to counsel of his choice; opportunity to examine the evidence against him, to present his own evidence and to cross-examine; and a decision based only on reasonable, substantial and probative evidence.

A non-resident alien can be excluded by the executive, acting through the immigration officers and the Attorney General. The alien has an opportunity to present his case. Immigration officers may receive and consider oral and written evidence relating to the limited privilege of an alien to enter the country, of which a full record is kept. From an adverse decision, the excluded alien may appeal to the Attorney General, final action being stayed pending appeal.

While the decision of the Attorney General in excluding or ordering the deportation of aliens is by statute stated to be "final," nevertheless, some judicial review of administrative action in this field is available by writ of habeas corpus or declaratory judgment proceedings. The scope of review extends to every substantive and procedural aspect of the attempted deportation, including abuse of discretion, failure to observe agency rules or policies, etc.

As to Question 11(h), deprivation of citizenship: Before final executive action (and only on statutory grounds), the citizen has an opportunity to present his case to a court by the institution of an action for declaratory judgment. The court has the power to declare a statutory ground unconstitutional and to require that the claimed act of expatriation be proved by clear, convincing and unequivocal evidence.

- (b) *What are the minimum legal requirements which are connoted in the duty, if any, in the cases listed in Question 11 above, to give a fair hearing to the person whose interests are threatened by Executive action?*

Generally speaking, such minimum legal requirements include the following: notice of the time, place and nature of the hearing and the jurisdictional basis therefor; prior notice of the procedural rules applicable thereto; the right to be represented by counsel; to present oral and written evidence and to cross-examine opposing

witnesses; notice, prior to the hearing, of the matters of fact and law asserted by the executive to justify the action taken or threatened.

- (c) *What is the source of the legal obligation, if any, to comply with the duties under (a) and (b)? If the answer is simply that in each case a particular law expressly so requires, it is not necessary to specify each law separately.*

In each case, a particular law expressly so requires as, for example, the federal Administrative Procedure Act and the specific statutes and regulations covering the granting of passports, the deportation of aliens and the deprivation of citizenship. However, the paramount sources of the legal obligation to accord a fair hearing are the federal and state constitutional "due process of law" provisions under which neither the federal nor any state government may deprive a person of life, liberty or property without due process of law. But the Constitution probably does not protect alien exclusion.

"Procedural due process" is a basic, ultimate rule of the law in the United States, applicable to all types of legal proceedings and practically all types of administrative proceedings.

Due process embraces substantive and procedural due process. Administrative law concerns itself primarily with procedural due process. The essential elements of procedural due process are embraced in two general terms – notice and hearing. "Hearing" means, constitutionally, a "fair hearing." In administrative proceedings, due process does not constitutionally require a judicial hearing but only a procedure where the "elements of fair play are accorded." These fundamentals, in general, are notice and opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case before any decision is rendered. The particular procedure to be adopted may vary, depending upon the kind of issues and interests involved; that is to say, an administrative agency may develop its own procedures applicable to the requirements of its particular mission so long, of course, as it observes the basic requirements designed for the protection of the private as well as the public interest.

14. (a) *In the case of duties to give a fair hearing under 13(a) and (b), please indicate whether the following requirements are imposed by law or in practice carried out:*
- (i) *Advance notice is given of the procedural rules which will govern the hearing.*
  - (ii) *The opposing case is known in advance.*
  - (iii) *The hearing is in public.*
  - (iv) *Legal representation is allowed.*

- (v) *Reasons are given which are adequate to convey to the individual why a particular decision has been reached.*

Generally speaking, the foregoing "requirements" are imposed by law or by rules and regulations and are in practice carried out, in the usual course. However, reservation must be made as to (ii) above, advance knowledge of the "opposing case" (of the executive). It is not customary in most agency hearings for the executive to do any more than state the general charges prior to the hearing. The executive action here brought into question is civil in nature; it is in matters of criminal law that the opposing case must be stated with particularity, so that the accused may be thus fully informed. See the discussion under Committee III, Clause V, 3(a) and (b), *infra*.

15. *If the requirements under Questions 13 and 14 are not imposed or carried out before the act of the executive in question, are they so imposed or carried out in proceedings for judicial review?*

Yes; such requirements are imposed and carried out, in the usual course before the executive action becomes final; if not they are carried out in proceedings for judicial review. However, one or two possible minor exceptions might be noted. If the opponent's case is not fully known in advance, before the hearing, at least opportunities to acquire some measure of knowledge in advance of the hearing are generally afforded by agency procedures for taking depositions of non-government witnesses and obtaining admissions. "Discovery" from the government, however, is very limited in civil cases (see 14 *ante*) and inspection of government files almost impossible. Also, courts are not always required, in rendering decisions, to write or file an opinion or memorandum giving the reasons therefor. Decisions may be rendered by courts with or without explanatory opinions or memoranda. In many types of cases, however, a court may be required, after decision, to make specific findings of fact and conclusions of law upon request of the parties.

16. (a) *What other procedures are laid down to afford to persons whose interests are threatened by Executive action the opportunity to make representations*
- (i) *in public;*
  - (ii) *in private?*

Among the other procedures available to persons whose interests are threatened by executive action are the following judicial proceedings:

(a) Use may be made of one of the "extraordinary" legal writs, such as habeas corpus, prohibition, mandamus or certiorari in order to secure recognition of the rights with which the action or decision is claimed to interfere.

(b) An injunction may be sought from a lower or appellate court of general jurisdiction to restrain the threatened act for the enforcement of the administrative decision when rendered.

(c) A declaratory judgment may be sought from a state or federal court of appropriate jurisdiction to have the rights and legal relations of such person declared judicially.

(d) If the administrative body which made the decision seeks to enforce it through action of a court, the person affected may plead, in that action, the illegality or unconstitutionality of such decision and may seek appropriate judicial relief by way of a counterclaim.

(e) Efforts may be made to have the legislation upon which the executive action is based repealed or amended; these efforts must be directed to the legislative body.

We do not know of any formal "private" procedures. The individual claiming to be aggrieved may seek – and often does – an opportunity by private conference to state his grievances and to bring about reconsideration.

*(b) Is it possible for the individual's point of view to be expressed in the Legislature by his elected representative or any other member of the Legislature?*

Yes; all members of the federal and state legislatures commonly receive a vast multitude of communications, written and oral, from persons desiring to have their point of view regarding pending or proposed legislation effectively aired and recognized in the meetings of the legislature. Written communications, as well as newspaper and magazine editorials and articles, are frequently read into the federal Congressional Record or into other types of records of legislature proceedings.

17. *(a) To what extent are the orders of the courts effective to prevent or stop illegal acts by the Executive?*

Courts regularly review acts of executive officers upon claims that their acts are in contravention of a constitution or are unauthorized by statute. Among the remedies available to the courts is the writ of habeas corpus by which the release of prisoners who are illegally detained by executive officers may be effected.<sup>49</sup> A

<sup>49</sup> The courts may, on writ of habeas corpus, question and review the jurisdiction of military courts to try enemy war criminals or persons claimed to be in the Armed Forces.

determination by the federal Supreme Court or the highest court of a state that a particular executive act is unlawful will block that act and will generally be effective to prevent or bar executive officers from further similar acts.

The circumstances under which the courts will act to issue injunctions to prevent proposed and allegedly illegal acts of the President or other executive officers have not been clearly defined. In addition to the usual reluctance of courts to issue injunctions unless it can be shown that the petitioner has no adequate legal remedy or that irreparable damage to the petitioner will necessarily occur from the act, the courts have ordinarily been loath to interfere with a coordinate branch of the government before it has taken any specific affirmative action. The President is not amenable as such to judicial action; this is also true as to some state chief executives. However, it has also been held that a cabinet officer may be restrained from seizing property under the authority of an executive order found not to have been authorized by Congress.

Despite the limited physical power of the courts to enforce their orders, executive officers have generally been willing, as in the Steel Seizure Case, to abide by the courts' decisions. This problem has presented itself most frequently in the Supreme Court's decisions concerning the power of military tribunals over civilians.<sup>50</sup> During the Civil War (1861–1865) the Supreme Court, apparently fearing that any order it might issue would be frustrated by military authorities, refused to take jurisdiction to review the proceedings of a military commission. Since that time the Court has successfully asserted its prerogative to issue writs of habeas corpus with respect to persons tried by military courts and commissions, particularly to review their jurisdiction.

*(b) If an act of the Executive amounts to a legal wrong according to the ordinary law, is it possible to obtain judgment for monetary compensation against*

*(i) the Executive;*

*(ii) the individual wrongdoer?*

*(i) Judgment against the Government.* While the federal government and the states have the power to assert the defense of sovereign immunity to suits brought as the result of legal wrongs caused by executive officers, the federal government by statute has waived its sovereign immunity in specified categories of wrongs and has gener-

<sup>50</sup> For example, in several recent decisions, the Supreme Court has held that civilian dependents with the Armed Forces overseas may not be tried for their offenses by military courts, but only by civil courts with all the "due process" safeguards guaranteed by the Constitution.

ally provided access to the courts for persons having claims against it arising out of the torts of its officials. The federal government and the State of New York have each established special courts for hearing claims of private persons against them.

However, in some states the waiver of sovereign immunity is very narrow. There is a wide variance between individual states in the statutory breach of such immunity; general "tort claims acts" are very few.

Claims which may be brought against the United States include those founded upon (a) the Constitution, (b) any Act of Congress or any regulation of an executive department, or (c) any express or implied contract. Claims may also be brought against the United States in federal courts for money damages for torts caused by the negligent or wrongful act or omission of a federal employee acting within the scope of his office or employment "under circumstances where the United States, if a private person, would be liable to the claimant." (The actionable torts do not include certain intentional torts such as assault, battery, libel, slander, or false imprisonment; in these cases the plaintiff must formally assert recourse for damages against the guilty official personally.) The tort liability of the United States does not extend to situations where the federal employee is performing "a discretionary function or duty," whether or not the discretion involved has been abused.

(ii) *Judgment against the individual.* In situations where statutes do not permit a private claimant to sue the governmental body, the claimant may still assert his claim for money damages directly against the public official committing the wrongful act. Such a claim is usually laid on a general common law theory of tort liability in the appropriate state or federal court. The federal courts also have jurisdiction over personal claims brought against officers of the federal government where it is alleged that the claimant has been deprived by the officers of rights protected by the federal constitution. If the tort was committed by the governmental official in the course of the performance of his official duties, under certain circumstances he may be able to defend against the suit on the ground of privilege. Moreover, the President or a cabinet officer appear to be immune from suit for personal damages in connection with any actions taken in the course of his duties.

(c) *Has the individual any assurance that a judgment against either the Executive or the individual will be satisfied?*

Sums for the satisfaction of money judgments handed down in suits against the United States in courts having statutory jurisdiction are appropriated by Congress on a regular basis and such judgments

are nearly always satisfied; absent such an appropriation, there appears to be no right to levy on the assets of the government to enforce collection. Where personal judgments against individual officers are obtained, Congress may by a special act appropriate the necessary funds to satisfy the judgment; if no such special appropriation is made, the claimant must look to the personal resources of the defendant, and can invoke the enforcement machinery of the court to assist him in the execution of the judgment.

18. (a) *In circumstances in which the interests of individuals are affected or threatened by acts of the Executive is it possible to obtain a statement of the reasons for such action in matters of*  
(i) *adjudication;*  
(ii) *administration?*

Both in matters of adjudication and administration it is generally possible and in fact usual for the person aggrieved to obtain a statement of the reasons for the acts or threatened acts of the executive. This statement may be informal; or it may be formal, such as by way of a decision and opinion or of findings of fact and conclusions of law. See the expanded discussion under 18(b), *infra*.

- (b) *To what extent is the public interest urged by the Executive as a reason for not giving reasons under (a) (i) and (ii)? Give examples.*

Only to a very limited extent is the public interest urged by the executive as a reason for not giving reasons, or complete reasons, for his actions.

Several examples may be given:

(1) The reasons for tentatively disapproving a passport application need be stated only as "specifically as in the judgment of the Department of State security conditions permit."

(2) In the Internal Security Act of 1950, it is provided that the President may detain persons where there is a reasonable ground to believe that such persons will engage in acts of espionage or sabotage, with a right to such persons to review by, and hearing before, an administrative board. On such a review the executive is required to inform the detainee of the grounds for his detention and to furnish him with particulars of the evidence against him, including the identity of informants — but this is "subject to the limitation that the Attorney General may not be required to furnish information the revelation of which would disclose the identity or evidence of Government agents or officers which he believes it

would be dangerous to national safety and security to divulge.”<sup>51</sup> Presumably any reasons given by the Board for its action, also, would not reveal factual evidence which it is believed would be dangerous to national safety and security if divulged.

(3) In the federal Administrative Procedure Act there is a provision that every agency shall publish or make available to public inspection all final opinions or orders in the adjudication of cases, except to the extent that there is involved any function of the United States requiring secrecy in the public interest.

Generally speaking, the executive is required to give reasons for its acts so that the person whose interests are at stake will be in a position to contest the legal or factual basis for that action, either at a hearing held in the administrative process or upon a judicial review. It may be questioned whether executive orders or decisions meet the requirements of constitutional due process if they are predicated upon facts which the executive refuses to divulge in a statement of the reasons for such action.

<sup>51</sup> This portion of the Act has never been invoked by the executive and grave doubts have been expressed that the authorizing provisions for detention would survive a judicial test of constitutionality.

### COMMITTEE III

## THE CRIMINAL PROCESS AND THE RULE OF LAW

#### Clause I

#### 1. (a) *Is the content of the criminal law readily ascertainable?*

The answer to this question must be a general “yes,” subject to clarifying comment and some exceptions. All federal crimes and nearly all state crimes are statutory. Reference may be had to the statutes to ascertain the nature of a crime and the prescribed punishment. In general the statutes are sufficiently clear and precise. As with all laws, there do occur instances wherein the application of a statute to a particular case may be doubtful and judicial construction may become necessary. Occasionally a statute will refer to a crime by its common law name without redefining the crime on the statute itself; these are such crimes, well known to the common law, as robbery, larceny, rape, etc. Any competent lawyer knows the elements of these crimes. Often the statute does redefine the crime and is therefore self-sufficient. There is also the rule that any criminal statute of doubtful meaning must be construed strictly in favor of the defendant and against the government.

Although in at least one instance (treason)<sup>1</sup> the content of our criminal law is defined by constitution, the great bulk of criminal law in the United States is found in common law and in statutes which either supplement or supplant the common law. To the extent that criminal law is defined by a statute, its constitutional validity under the due process safeguards of the federal Constitution turns upon whether the legislative body has stated an ascertainable standard of guilt.<sup>2</sup> For conceptual reasons which are rooted in the entire history of our legal system, this constitutional requirement has never been applied in the same way to the content of common law crimes; the Supreme Court seems never to have construed due process as placing substantive limits on a state court’s interpretation of that state’s common law. This means that although a statute which merely restates the common law may in some instances be held unconstitutionally vague, the content of the common law crime itself is not subject to the same constitutional limitation. As a result, some of the more imprecise crimes in this country are

<sup>1</sup> U.S. Constitution, Art. III, Sec. 3.

<sup>2</sup> E.g., *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

those defined by common law, such as conspiracy and vagrancy. These will be examined in some detail in answer to the question immediately following this one.

It should be noted, however, that even within the interpretation of a state criminal statute as authoritatively given by the state court (and thus binding upon the Supreme Court in review of a conviction presenting a question of federal constitutional right), the Court will reverse a conviction for want of any supporting evidence of guilt of the charge laid under the statute so construed. "It is a violation of due process [under the Fourteenth Amendment] to convict and punish a man without evidence of guilt." Recent decisions, for example, have applied this principle to convictions, reviewed, for "disorderly conduct" and "disturbing the peace."

**Common Law Crimes.** At the time of the settlement of the first American colonies in the early seventeenth century there was already in existence in England a relatively comprehensive body of criminal law. For the most part this law was common law which had been articulated in hundreds of reported and thousands of unreported decisions of English courts in cases arising over the preceding five or six centuries. To a lesser extent it was statutory. Except where this criminal law was regarded as inapplicable to American conditions, it was adopted and applied in this country, and after the Revolution of 1775-1783 it was retained by the original thirteen states. In more than half of the present states it is still in effect.<sup>3</sup>

In these states the content of the common law crimes is ascertained by reference to prior decisional law. Cases which have been decided within the particular jurisdiction provide the primary authority. But where these fail to provide an answer to the immediate question involved in any case, the English common law, as it existed prior to 1607 (the date of the settlement of the first American colony), is of the utmost importance. English decisions after that date and prior to the American Revolution are also regarded as authoritative in tracing the late development of the common law. Where applicable to American conditions, the English statutory modifications have (prior to 1607) also been incorporated into our common law by judicial acceptance.

Insofar as the common law is regarded as an evolving body of law which adapts itself to changing social conditions through case-by-case decision, it is possible under the process of interpretation in new applications for a particular judicial decision to punish the individual for behavior which previously has not been punished. Although such an application of the existing common law crime might be difficult to predict in advance of the behavior in question,

<sup>3</sup> Hall and Glueck, *Criminal Law and Its Enforcement*, 5 (1951).

the particular rule of law invoked by the court, under the traditional theory of the common law, is regarded as having been in existence prior to the decision, if only by analogy to an existing principle or doctrine. The basic rule, however, is that our law rejects conviction by analogy. See the discussion, *infra*, under (d) of this clause.

Despite the absence of a defined constitutional safeguard to prevent this type of unforeseeable result, instances of genuine surprise concerning the extent and application of common law crimes are exceedingly rare in this country. There are several reasons for this. In the first place, the rule of *nulla poena, nullum crimen sine lege*<sup>4</sup> is basic to the Anglo-American legal tradition. This notion implies that no act shall be punished unless it has previously been made punishable by law, and that the actual punishment for an offense must likewise be in accordance with predefined law. Under this doctrine, the defendant could be convicted for a common law offense only if his behavior was proscribed by one of the fairly definite categories of crime which the common law had already articulated. Secondly, the doctrine of *stare decisis*, i.e., rigid adherence to precedent, is particularly strong in criminal cases.<sup>5</sup> It would be shocking to the ingrained sense of *nullum crimen sine lege* for the state to punish one for an act which its highest court had earlier declared might be done with impunity, even though that court now believes the previous ruling to be erroneous. It is generally held that the proper mode of change in such a situation is with the legislature, not the courts. Some commentators would allow the court to depart from a previously announced rule in cases of behavior *malum in se*, on the ground that in such a case the accused was conscious of his wrongdoing and therefore has no legitimate basis for claiming unfair surprise. Even in this area the courts have been quite reluctant to depart from prior cases. There is, moreover, general unanimity that *stare decisis* should be strictly adhered to in all rulings concerning acts merely *malum prohibitum* unless the defendant is benefited by an overruling decision. As long as this belief prevails in practice, as it certainly does now, it is possible to ascertain the content of the criminal law with a fair degree of precision by reference to prior case law.

Perhaps as a result of these factors, "the common law spirit" has been said to have "largely lost its power of independent expression in criminal cases"<sup>6</sup> by the middle of the nineteenth century. However this may be, most states began codification of their criminal law in this period. As a result, in about one-third of the states there are today no common law crimes and although many other

<sup>4</sup> Hall, *Nulla Poena Sine Lege*, 47 Yale Law Journal 165 (1937).

<sup>5</sup> Moschizker, *Stare Decisis In Courts of Last Resort*, 37 Harvard Law Review, 409, 418-419 (1924).

<sup>6</sup> Hall, *The Substantive Law of Crimes*, 50 Harvard Law Review, 616 (1937).

states still retain their common law jurisdiction to punish crimes not covered by statute, this power is rather closely circumscribed. In all of the latter group of states this power exists alongside more or less explicit statutory provisions. If there is a statute dealing with a particular situation and purporting to be an exclusive treatment of the subject matter, the common law power to punish analogous acts or omissions may be excluded. Moreover, in some states which retain common law jurisdiction over criminal offenses, the courts refuse to permit prosecution for any offense which has not long been clearly established by precedent in the common law.<sup>7</sup>

In the few states which do not subscribe to these limitations, the common law jurisdiction over crimes is viewed as an expanding concept under which the results of any act or omission which outrages decency or is injurious to public morals is punishable as a common law misdemeanor. It is in this area that the content of the common criminal law is most vague. At early common law most matters which would support a civil action for trespass could also be made the content of an indictment as constituting a misdemeanor or an action for trespass *contra pacem*, essentially a civil remedy in the King's Court to which fine and imprisonment might be attached. Gradually Parliament enacted statutes defining a great many offenses as indictable trespass. In the latter fifteenth and in the sixteenth century, the Court of the Star Chamber claimed the right to punish as crimes not only these statutory offenses but also crimes which escaped existing classification. When the Star Chamber was abolished, the King's Bench claimed the same power and, as guardian of morals (*custos mores*) of the realm, exercised it by holding that an indictment which alleged an act *contra bonos mores* stated a punishable offense. Although infrequently used, it was widely recognized that there was inherent common law power in the courts to punish "all such acts or attempts as tend to the prejudice of the community."<sup>8</sup>

In some states in this country, it is held, even today, that there is a similar jurisdiction to try and punish as a common law misdemeanor any conduct which is not specifically defined as a criminal offense by statute but which by its nature "scandalously affects the morals or health of the community." The loose common law definition of the misdemeanor has not been refined.

*Statutory Crimes:* In approximately one-third of American jurisdictions, common law crimes have been abolished either by constitutional or statutory direction or by court decision, and even

<sup>7</sup> *Anderson v. Commonwealth*, 5 Rand. 627, 631 (Va. 1826).

<sup>8</sup> Cf. generally, as to developments in England: Plucknett, *A Concise History of the Common Law*, 455-459 (5th Ed., 1956); 3 Stephen, *A History of the Criminal Law*, 359-360 (1883).

in states which retain common law crimes the greater part of the criminal law is defined by statute which either supersedes or codifies the common law. As noted before, all statutes defining criminal offenses are subject to the constitutional limitation requiring that they be sufficiently clear so that the individual can ascertain in advance of his acts or omissions whether or not his conduct is covered by the statute. The Supreme Court has explained that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."<sup>9</sup>

Early in our history, it was held that there are no common law offenses against the United States, and that only acts which Congress has forbidden, with penalties for disobedience of its command, are federal crimes. Consequently all federal criminal law is subject to the constitutional proscription of vague statutory standards of guilt. In the federal courts this requirement is based not only upon the general due process protection afforded by the Fifth Amendment but also upon the Sixth Amendment's specific guarantee that criminal defendants shall enjoy the right "to be informed of the nature and cause of the accusation."

The scope of protection guaranteed to the individual by this clause commences with the language of the statute declaring or fixing a federal criminal offense. Under this provision, it is necessary that a crime "be in some way declared by the legislative power"; it "cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state."<sup>10</sup> A criminal statute which is so vaguely worded that it leaves the standard of guilt to "the variant views of the different courts and juries which may be called upon to enforce it" fails to satisfy the requirement. Thus the Supreme Court ruled that a statute making it unlawful for any person to willfully make "any unjust or unreasonable rate or charge" for handling, or dealing with necessities, was unconstitutional because it was "not adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." The Court observed that the statute did not forbid any specific or definite act, and that it left open "the widest conceivable inquiry, the scope of which no one can foreshadow or conceivably guard against."<sup>11</sup>

Unconstitutional vagueness may also arise from internal inconsistency within a statute. The federal Food, Drug and Cosmetic Act, as originally enacted, provides an illustration of this difficulty.

<sup>9</sup> *Conally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

<sup>10</sup> *United States v. Potter*, 56 Fed. 83, 88 (Cir. Mass. 1892).

<sup>11</sup> *United States v. Cohen Grocery Co.*, *supra*, at p. 69, n. 2.

One section of this Act made it a crime to refuse to permit federal officers to enter a plant or factory for inspection. However, another section of the same statute authorized inspectors to enter such a plant only after "making request and obtaining permission." The Supreme Court refused to try to make sense out of these conflicting provisions. "We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice."<sup>12</sup>

While the principle that a statute may be "void for vagueness" is quite well-established in American constitutional law, the use of the doctrine in practice is tempered by judicial reticence to construe any statute as unconstitutional if it can alternatively be read as constitutional. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised," the Supreme Court has recognized that "it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."<sup>13</sup> In following this principle the Supreme Court has demonstrated a versatile approach in reading criminal statutes narrowly so as to uphold their validity.

In the first place, the Court will not consider the constitutionality of a criminal statute unless it has first decided that the statute purports to make criminal the conduct of the individual defendant before the court. On numerous occasions, the Court has preferred to read the statute narrowly so as to exclude the behavior of the defendant and avoid a serious question as to whether the statute was worded precisely enough to give him fair notice that his acts were criminal. It should be noted that in the process of so construing penal statutes, the Court itself may set limits on the scope of the statutory language in question so that in future cases it may be held to afford a sufficiently ascertainable standard of conduct.

Secondly, statutory language which at first blush appears to be vague and imprecise may be held sufficiently concrete where the words in question have acquired a common law meaning. This technique was used to uphold, as a constitutionally ascertainable standard, the oft-quoted criminal liability imposed by the Sherman Anti-Trust Act for entering into any "contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade..." The Supreme Court recognized that these classes of acts were "broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the

<sup>12</sup> *United States v. Cardiff*, 344 U.S. 174, 176-177 (1892).

<sup>13</sup> *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

subjects of such commerce," if such act had the effect of restraining trade, but held that it was contemplated that "the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."<sup>14</sup> As a result, the Act was construed to make illegal only "unreasonable" contracts, combinations or conspiracies in restraint of trade. The Court's interpretation of what was unreasonable was in turn, however, based upon the "elementary and indisputable conceptions of both the English and American law on the subject prior to the passage of the anti-trust act." While the infusion of the rule of reason into the statute did nothing to clarify its meaning, the adoption of common law standards rendered it constitutionally precise.

A third technique of interpretation utilized by the Court to uphold the validity of a statute against an attack of vagueness is illustrated by a case before the Supreme Court in which a state law-enforcement officer had been indicted for violating a federal law making it a crime for anyone acting "under color of any law" willfully to deprive anyone of rights secured by the Constitution of the United States. The defendant was charged with having beaten to death a man whom he had just arrested and thereby depriving him of life without due process of law. The defendant argued that the statute was unconstitutional insofar as it made due process violations criminal, because the concept of due process was too vague to supply an ascertainable standard of guilt. In order to "avoid grave constitutional questions" four Justices construed the word "willfully" as "connoting a purpose to deprive a person of a specific constitutional right," and held that this requirement "saves the Act from any charge of unconstitutionality on the grounds of vagueness." The following quotation indicates the reasoning of the principal opinion:

The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning... But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is

<sup>14</sup> *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-62 (1910).

in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.<sup>15</sup>

Finally, in determining constitutional definiteness of a statute, the Supreme Court has on occasion considered the nature of the subject matter dealt with by the statute in an attempt to determine whether greater clarity would have been possible. If not, the statute may be upheld. On this basis, the Court has upheld a federal statute making it a crime to coerce a licensee in the broadcasting business to employ persons "in excess of the number of employees needed by such licensee to perform actual services". The Court commented that the Constitution "does not require impossible standards", and found it sufficient that persons of ordinary intelligence would know the number of employees actually needed.<sup>16</sup>

Although the particular guarantees of the Sixth Amendment have not been made applicable to the states under the Fourteenth Amendment, the due process clause itself affords the constitutional basis upon which state criminal statutes may also be held void by the Supreme Court for failure to express an ascertainable standard of guilt. This requirement has often been cited by the Supreme Court. Thus it was held<sup>17</sup> that a state statute which provided that it should be a criminal offense to be a "gangster," and defined "gangster" as "any person not engaged in any lawful occupation, known to be a member of a gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime . . ." was invalid. The Court noted that there was no common law definition of the word "gang" and that there was no other sufficiently precise definition of the word. Similarly, the Court has frequently held unconstitutional state statutes such as those of New York State making it illegal to sell certain types of obscene literature or to show "sacrilegious" motion pictures which have been banned by state authorities. See also the reference to vagueness in conspiracy statutes, under (b) immediately following.

Despite these instances, as well as others, the Court will generally attempt to apply the presumption of constitutionality to state statutes as well as to federal legislation. In reviewing state criminal statutes, however, there is one severe qualification on this approach. This qualification inheres in the fact that the Supreme Court is bound by the highest state court's interpretation and application of its own state criminal laws and must therefore judge the constitutionality of such a statute on this basis. Therefore if the

state court has interpreted its criminal statute in a way which does not clarify its meaning beyond its inherent ambiguity, the Supreme Court cannot construe the statute in a narrower way but must hold it unconstitutional.<sup>18</sup> If the state court has purported to apply the statute in question only to the specific facts of the case before it, however, and if it has not considered the validity or definiteness of the statutory standard "on its face," the Supreme Court will review only the limited question whether the statute was sufficiently precise to give the actual defendant notice that his specific behavior would be punished as a crime. Moreover, the Supreme Court has often refused to hold a state statute unconstitutional for vagueness before giving the state supreme court a second opportunity to determine whether the statute as applied is valid under the particular state constitution. In practice this may enable the state court to place a more restrictive and definitive, and therefore constitutional, construction on the statute in question.

- (b) *If not, or in cases where the law is doubtful, give specific examples, paying particular attention to crimes which are defined in wide or imprecise terms.*

Mention has already been made, in answer to the first question in this part of the Survey, of two instances in which crimes are defined in wide or imprecise terms, i.e., the common law misdemeanor and the anti-trust statutes. Comment may also be directed to four additional examples of vague crimes – the common law and statutory crimes of conspiracy and vagrancy, and the statutory crime of publishing or distributing obscene literature. The crime of bigamy may also be cited inasmuch as it is defined with fair precision but illustrates how the content of the criminal law may nevertheless be confusing to potential innocent violators.

*Conspiracy.* Although conspiracies to do specific acts had been criminal by statute in England since the early fourteenth century, it was not until three centuries later that conspiracy became a common law crime.<sup>19</sup> In 1611, the Star Chamber held that the agreement to do an unlawful act was itself indictable even though the purpose remained unaccomplished. As the emphasis in the offense shifted from the object of the agreement to the agreement *per se*, it was held that the conspiracy to commit any crime was itself a crime. It has been said that during the seventeenth century there was a strong tendency in the courts to punish immoral acts as well as those which violated express law. This may account for the emergence of the general thesis, buttressed by a statement in

<sup>15</sup> *Screws v. United States*, 325 U.S. 91, 103, 107 (1945).

<sup>16</sup> *United States v. Petrillo*, 332 U.S. 1 (1947).

<sup>17</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

<sup>18</sup> See, e.g., *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914).

<sup>19</sup> Sayre, *Criminal Conspiracy*, 35 Harvard Law Review 393, 396-399 (1922).

Hawkins' *Pleas of the Crown*, that the acts contemplated by a conspiracy need not themselves be criminal but need only be "wrongful" in order to make the conspiracy punishable. While it is doubtful whether the contemporary case law supported this comment, the proposition seems to have itself become part of the common law of conspiracy.

Today in the United States, every state has enacted several relatively narrow conspiracy statutes proscribing agreements to do specified acts, such as conspiring to overthrow the government or to defraud the state. In addition, conspiracy sections are often appended to various statutory offenses such as kidnapping, sabotage, and inciting to racial hatred. These provisions may describe involved and complicated statutory offenses but they do not generally present problems of vagueness. These arise, instead, from broad definitions of criminal conspiracy which exist either in statutes, or in the common law, of all but a few states.

Where statutes simply provide that criminal conspiracy is a conspiracy to commit any crime, or to cause a false arrest or indictment, or to defraud by criminal means, the object of the crime of conspiracy is generally clear. At least one-third of the states also provide, however, that the crime may be committed by agreeing to do any acts "injurious to public morals, health, trade and commerce," or to commit acts which "obstruct or prevent justice or the administration of the laws." Moreover, well over half the states still retain common law conspiracy. Since most of these have adopted some general statutory provision as well, the resulting duplication presents additional confusion. Even in states where common law conspiracy has been superseded by statute, the use in statutes of such vague terms as "unlawful act" has caused courts to resort to the common law.

The anomaly of common law conspiracy has often been said to be that although the object of a conspiracy may not itself be criminal, the agreement to accomplish this objective may be a crime. The consequent vagueness of conspiracy definitions is obvious from the broad and accepted generalization that all combinations to accomplish "unlawful" ends are punishable. "Unlawful" in this context has never been precisely defined and although it clearly includes criminal activities, it is also held by commentators and the courts to include acts which, although not criminal, prejudice the public or oppress individuals. Thus, one state has held that conspiracy to conduct a usurious small loan business was criminal even though usury was not a crime in the jurisdiction.<sup>20</sup> Another state has held that a conspiracy to assign wages to out-of-state assignees and thereby avoid the state statute immunizing laborers' wages from

<sup>20</sup> *Commonwealth v. Donoghue* 250 Ky. 343, 63 SW (2d) 3 (1933).

attachment was criminal because it tended to obstruct justice. If this assignment had been made individually, no criminal offense could have been charged.

Some prosecutors eager to secure a conviction of "underworld characters" or others believed to be habitual lawbreakers but against whom evidence sufficient for a conviction of a specific criminal act cannot be marshalled, at times resort to the conspiracy statutes, particularly if these are couched in broad terms. The fact of a conspiracy is easier to prove. The federal government prosecutors have been charged by competent students with being over-zealous in this respect.

However, the appellate courts are alert, on appeals from conviction, to check such possible abuses and there are numerous decisions which either hold the conspiracy statute itself to be unconstitutional for vagueness – hence a denial of due process – or that the statute has been unconstitutionally applied to a situation in which no specific crime has been charged or proved.

In spite of the occasional abuse here noted, there is, generally, a substantial measure of voluntary self-restraint by prosecutors, judges and juries. Nevertheless, in cases such as the two described above, it seems highly doubtful that the defendants could have known in advance that their conduct was criminal, and the potential danger of surprising similar defendants will remain as long as common law conspiracy is retained as a criminal offense in its unrefined present form.

*Vagrancy.* Most crimes in our legal system are defined in terms of particular acts or omissions to act. Thus it is generally provided that any person who commits particular acts is guilty of a certain specified crime, e.g., embezzlement, and upon conviction thereof may be punished. It is always possible to take a somewhat different statutory approach, however. Instead of defining embezzlement in the general manner suggested, the statute could provide that anyone who does such acts *is* an embezzler and that persons in this category may be punished. There are in the United States several crimes which are defined in this manner. Mention has already been made of a state statute, held unconstitutional, which attempted to punish "gangsters" in this manner.<sup>21</sup>

Vagrancy is the principal crime of personal condition in this country, though not the only one. It is today a statutory offense in almost every state. Many statutes, however, incorporate the vague common law definition of the word "vagrant" – an idle person, beggar, or person wandering who is without visible means of support and "unable to give a good account of himself." At least two-

<sup>21</sup> *Lanzetta v. New Jersey*, ante, p. 76, f.n.

thirds of the states contain a general category based upon this common law definition.

On occasion, the vagueness of this and similar definitions and the attendant uncertainty in determining when the condition attaches and when it ceases to exist has been held a denial of due process. The Supreme Court's denouncement of the New Jersey "gangster" statute has already been described. On similar grounds a federal circuit court of appeals held unconstitutional a territorial ordinance punishing "any person who shall habitually loaf, loiter, and/or idle upon any public street or highway, or in any public place." The court cited dictionary definitions of "loaf," "loiter" and "idle," and held that these words had no sinister meaning and did not even imply misconduct or wrongdoing. President Roosevelt referred to these as well as other dangers in vetoing in 1941 a bill which made a vagrant, first, out of "any person leading an idle life . . . and not giving a good account of himself," and secondly, out of "any able-bodied person who lives in idleness upon the wages, earnings, or property of any person having no legal obligation to support him":

While this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. I am not willing to agree that a person without lawful means of support, temporarily or otherwise, should be subject to the risk of arrest and punishment under provisions as indefinite and uncertain in their meaning and application as those employed in this clause.

Turning then to the second quoted category, President Roosevelt remarked:

This definition is so broadly and loosely drawn that in many cases it would make a vagrant of an adult daughter or son of a well-to-do family who, though amply provided for and not guilty of any improper or unlawful conduct, has no occupation and is dependent upon parental support.<sup>22</sup>

Despite the existence of this and numerous other attacks on the inherent uncertainties of punishing vagrancy as a crime, most state courts which have considered the question have upheld loosely phrased statutory definitions.

One facet of the use of the vagrancy statute deserves comment. Discussion of later phases of this survey will show that generally a police officer, and in some states a private person as well, can arrest for a misdemeanor committed in his presence.<sup>23</sup> Since the condition of being a vagrant is itself a misdemeanor, any person

<sup>22</sup> Quoted in Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L. J. 1, 8 (1960).

<sup>23</sup> Cf. discussion under Question 2(a) in Clause III *infra*, p. 93.

having this condition is presumably committing a misdemeanor as long as the condition exists and is therefore subject to arrest at any time. It has often been charged that the accusation of vagrancy provides a convenient "cloak or cover" for arrest for investigation on suspicion of involvement in some other crime. The evidence available suggests, unfortunately, that there is merit in this criticism.

*Obscenity statutes.* A recurring problem in our constitutional law has stemmed from statutes designed to curb or prevent the publication or dissemination of obscene or indecent literature or other mass media. In addition to the problem of vagueness in statutory definitions of such undesirable content, these statutes have frequently run afoul of the additional constitutional guarantee of freedom of speech.

Fifteen years ago, the Supreme Court held that a New York statute which made it a misdemeanor to publish, distribute, or sell any book, magazine, newspaper or other printed material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime," was unconstitutionally vague.<sup>24</sup> In order to avoid the free speech constitutional limitation, the New York state courts had limited the scope of the statute to prohibit only such publications as incite "violent and depraved crimes against the person." The Supreme Court held that, as so interpreted, the statute was so indefinite that an honest distributor of publications could not know when he might be held to have ignored the prohibition. Shortly after this decision the Court also held invalid another New York statute which made it unlawful to show any unlicensed motion picture, and authorized state authorities to refuse to license any "sacrilegious" film.<sup>25</sup> Although the Supreme Court was primarily concerned with the inherent threat to freedom of expression, it also noted that in seeking to apply this definition the state censor "is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts except those provided by the most vocal and powerful orthodoxies." *A fortiori*, any attempt to punish as a crime a refusal to adhere to such a standard would be unconstitutional.

Nevertheless, certain criminal statutes of this type have been upheld. In 1957 the Supreme Court reviewed the federal obscenity statute making it a federal crime to knowingly deposit in the mails any "obscene, lewd, lascivious, or filthy" material, "or other publication of an indecent character."<sup>26</sup> In holding that this language was "sufficiently definite to give men adequate notice of what is

<sup>24</sup> *Winters v. New York*, 333 U.S. 507 (1948).

<sup>25</sup> *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>26</sup> *Roth v. United States*, 354 U.S. 476, 491-492.

prohibited," the Court admitted that "many decisions have recognized that these terms of obscenity statutes are not precise." But, the majority continued:

This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process . . . "The Constitution does not require impossible standards"; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'

The American Law Institute has devised a more taut definition, in recognition of prior vagueness.

*Bigamy.* Although bigamy was not a common law crime, each state in our legal system has made it a crime by statute to enter into a second marriage while a prior marriage is still legally in effect.<sup>27</sup> The statutory standard of guilt is clearly ascertainable, but vagueness in application of the statute arises from the collateral complexities in determining whether or not a prior marriage has been terminated by a valid divorce. Although a divorce granted by a state court with jurisdiction is entitled by the federal Constitution to full faith and credit in all other states, the defendant in a bigamy prosecution who erroneously believes that he (or she) has been divorced from a prior spouse by a court with jurisdiction will not be allowed to raise his good faith mistake as a defense.<sup>28</sup> Actually, few prosecutions are brought for bigamy where an out-of-state divorce has been obtained, and few juries will convict under such circumstances.

In practice, the good faith of the defendant who relies by mistake on a prior divorce decree by a court without jurisdiction, while not a defense to the crime of bigamy itself, is generally taken into account in fixing the punishment sentenced by the court. Moreover, parties in doubt as to the validity of a prior divorce may elect the safe alternative of acquiring a new divorce in the state of their domicile. In practice, however, this may be a serious and costly requirement to impose for failure to understand the law of divorce.

(c) *In the case of crimes mentioned in (b) above, is it possible to effect changes by normal processes of legislation or other flexible means?*

<sup>27</sup> This discussion of bigamy may seem to be only peripheral to the problem stated in the question *ante*, (b): "...crimes which are defined in wide or imprecise terms." There is, to be sure, a lack of precision in defining the "prior marriage still legally in effect": i.e., whether the validity is to be determined under the law of the jurisdiction of the domicile of the defendant or under that of the court granting the divorce to a migrating plaintiff.

<sup>28</sup> See 56 A. L. R. 2d 917, 920 (1957).

As has been seen, the criminal law in the United States is largely statutory. Subject to constitutional restrictions, criminal statutes can be changed as fully as other types of statutes, existing criminal definitions may be amended, new definitions may be enacted, common law crimes may be abrogated, and common law definitions may be codified, all by legislation. However, certain crimes do not lend themselves to precise definition, and as a practical problem of definition it may therefore be difficult to correct existing vagueness. This is particularly true in the case of the obscenity statutes discussed above. By its nature, obscenity is a difficult concept to define and any attempt at more precise definition than that of the federal obscenity statute would probably fail to include certain material which the legislature intends to prohibit from circulation.

Although the other crimes discussed in (b) above, i.e., conspiracy, vagrancy and bigamy, could be modified or eliminated by statute, most changes which would narrow the definitional problems and thereby make the content of the crimes more readily ascertainable would require a definite policy decision to leave potentially undesirable behavior unpunishable. Nevertheless, there seems to be little justification for retaining the sweeping catch-all statutory definitions of vagrancy.<sup>29</sup>

(d) *Can rules of criminal law be extended by analogy?*

The answer is a categorical negative, subject only to the possibility mentioned early in the discussion, *ante*, under 1(a), pages 69-77.

It has been said, justifiably, that analogy as used in the criminal law of certain European countries has never been a part of the Anglo-American legal system. In this sense analogy may be defined as the process of utilizing one code provision to supplement another, or to indicate an underlying principle.<sup>30</sup> Although the crimes which have been discussed above are vaguely defined and consequently leave great latitude for judicial interpretation, they are probably distinguishable from crimes developed by analogy, as so defined. Nevertheless, they and analogy have a common vice in that each tends to the punishment of individuals who have not been adequately forewarned that their behavior is criminal.

In the United States, this danger is to some extent alleviated by the generally accepted principle of strict construction of penal statutes. Chief Justice Marshall explained this doctrine in an early case as follows:

<sup>29</sup> Cf. note, 68 Harv. L. Rev. 1056, 1068 (1955).

<sup>30</sup> Cf. note, 47 Col. L. Rev. 613 (1947).

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

It is said, that notwithstanding this rule, the intention of the Law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. *It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated* [emphasis added]. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.<sup>31</sup>

A vivid illustration of the use of this rule in practice is seen in the Supreme Court's decision in a 1931 case in which the defendant was indicted and convicted in the trial court for transporting a stolen airplane across a state line in violation of the National Motor Vehicle Theft Act. The sole question before the Court was whether an airplane was included in the statutory definition of "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." The Court noted that although this definition was broad enough to include an airplane, the word "vehicle" generally calls to mind a picture of a thing moving on land. Holding that transportation of the airplane was not within this statute, Mr. Justice Holmes concluded: "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."<sup>32</sup>

<sup>31</sup> *United States v. Wiltberger*, 5 Wheat. 76, 95, 96 (1820).

<sup>32</sup> *McBoyle v. United States*, 283 U.S. 25 (1931).

The rule of strict construction affords a practical check upon development of new crimes by attempted analogy to existing statutory offenses, always bearing in mind the American law rejection of any principle of extension by analogy. It is doubtful whether there is any corresponding safeguard in common law crimes. In such cases, the "rule" depends almost entirely on the use of rational analogy since no two cases will have identical facts. Excessive extension of common law rules may be limited to some degree, however, by the recognized principle that in deciding a case by reference to precedent it is desirable to find the rationale by examination of the facts of prior cases, not by reference to generalization of principles in previous opinions.

2. (a) *Are there cases in recent times where criminal offenses have been created with retrospective effect?*

Unless the few cases applying the common law misdemeanor principle to new sets of facts are so regarded, the answer is no.

- (b) *Does the Constitution or the Criminal Code prohibit this?*

Yes. Both Congress and the separate states are forbidden by the Constitution to pass *ex post facto* laws.<sup>33</sup> This prohibition, in general, applies only to statutes defining criminal offenses, or imposing criminal penalties, but it cannot be evaded by giving a civil form to a measure which is essentially criminal.<sup>34</sup> Every law which makes criminal an act which was innocent when done, or which inflicts a greater punishment than the law permitted for the crime when it was committed, is *ex post facto* and prohibited. On the other hand, if it mitigates the penalty in force at the time the crime was committed, or if it merely penalizes the continuance of conduct which was lawfully begun before its passage, the statute is not *ex post facto*.

The prohibition of *ex post facto* laws does not give a criminal defendant a right to be tried in *all* respects by the law in force when the crime charged was committed. The Supreme Court has accordingly upheld the application of post-offense state statutes which removed disabilities of witnesses, which allowed comparison of writings and testimony of handwriting experts as evidence, and which changed the place of trial. In 1915 the Court also upheld a retrospective change of the form of capital punishment from hanging to electrocution.<sup>35</sup>

<sup>33</sup> U.S. Const., Art. I, Secs. 9, 10.

<sup>34</sup> *Calder v. Bull*, 3 Dall. 386, 389 (1798); *Burgess v. Salmon*, 97 U.S. 381 (1878).

<sup>35</sup> *Hopt. v. Utah*, 110 U.S. 574, 589 (1884); *Thomson v. Missouri*, 171 U.S. 380, 386 (1898); *Cook v. United States*, 138 U.S. 157, 183 (1891); *Malloy v. So. Carolina*, 237 U.S. 180 (1915).

The constitutional safeguards apply only to legislative actions and not to inconsistent court decisions.

## Clause II

1. *In what circumstances, if any, is it necessary as a matter of law for an accused person to prove facts or give evidence raising doubts in order to establish his innocence? Give examples, if any.*

In theory, it is never necessary under American criminal law for an accused to prove facts or give evidence raising doubts of this order, since the burden of ultimate persuasion is always on the prosecution. In practice, however, there are a number of situations in which the accused may find it necessary to assume the burden of going forward with such evidence in order to avert conviction.

It is well recognized in American criminal law that the prosecution has two procedural burdens of proof – the burden of introducing some evidence (direct or circumstantial) of the guilt of the accused, and the burden of persuading the fact-finder beyond a reasonable doubt of that guilt. The second burden never shifts to the accused during a criminal proceeding. The expression so often used in criminal cases, that the accused is presumed innocent until he is proved guilty, is generally held to mean no more than that the prosecution has the two burdens mentioned above; but another point of view gives this presumption the weight of independent evidence.<sup>36</sup> Under either view, however, it is clear that the accused derives many legal and practical benefits from its application in our criminal procedure.

Because the prosecution always has the burden of persuasion,<sup>37</sup> the defendant, as a matter of law, need not offer any independent evidence to support a verdict of not guilty. In practice this point is most evident where the criminal case is tried before a jury, since the jury's finding of innocence cannot be set aside by the court on legal grounds regardless of how well the prosecution has met its burden or how inadequately the defendant has met the charge. (The situation is probably different in a case tried before a judge, however, for under these circumstances, the court can, and is more likely to, apply legal standards regarding burden of proof in order to determine whether the accused has raised a reasonable doubt of his innocence.)

In practice, however, the accused usually must take more than

<sup>36</sup> Cf. Goldstein, *The State and the Accused*, 69 Yale L. J. 1149, 1153-55 (1960).

<sup>37</sup> Cf. Thayer, *The Burden of Proof*, 4 Harv. L. R. 45 (1890).

a passive role in order to avoid conviction, unless the evidence offered by the prosecution is sufficient to authorize the trial judge to leave to the jury the determination of guilt after the prosecution has completed the offer of its evidence. In this regard, it is commonly held that at certain points in the trial proceedings, the accused has the burden of going forward with evidence of innocence if he is to avoid the practical risk of conviction, even though the prosecution has the ultimate burden of persuading the fact-finder of guilt. Moreover, despite the traditional dichotomy between the two types of burdens of proof, it has recently been pointed out that if the accused fails to sustain his "production burden," i.e., his burden of presenting evidence of innocence, it is natural that the prosecution's burden of persuasion will gain considerable, if not conclusive, advantages thereby.

The most important area of criminal law in which the accused may have the practical burden of presenting evidence, is that of the so-called "affirmative defense." Defenses which are termed affirmative include alibi, insanity, infancy, intoxication, self-defense, defense of a third party or of property, duress, mistake of fact or law, public authority and exception of defendant from a penal statute. Although most jurisdictions allow these defenses to be raised on a plea of not guilty, an increasing minority have enacted statutes requiring certain defenses to be specially pleaded by the defendant, particularly the defenses of alibi and insanity.<sup>38</sup> In New York State prosecutions, for example, the defendant is required, upon demand of the prosecution served in advance of trial, to give actual notice in writing of intent to rely on an alibi. This affords the prosecution an opportunity to investigate the facts of the intended defense.

Courts apparently differ as to the degree of burden which an accused must carry in order to sustain his affirmative defense. A very few jurisdictions hold that he must meet the same burden that the prosecution must meet in its charge: i.e., proof beyond a reasonable doubt, particularly in the defense of insanity (e.g., in Louisiana and Oregon), where the normal presumption of sanity must be overcome. Others hold that the accused must sustain his defense by "clear and convincing evidence"; or by a "preponderance of the evidence"; and still others hold that all he need do is to raise a reasonable doubt in the mind of the trier of facts (the jury in a jury trial, the judge in a criminal trial without jury).

Criminal law writers have detected a logical inconsistency in the rule that the defense of insanity actually places upon the defendant not only the burden of first producing evidence, but also the burden of persuasion by a preponderance of the evidence. This

<sup>38</sup> Cf. Fletcher, *Pretrial Discovery*, 12 Stanf. L. Rev. 293, 315 (1960).

means that as to some elements of the crime the jury must be convinced beyond a reasonable doubt, but as to others, such as the capacity of the defendant to know right from wrong, the jury might convict although they have doubt whether the defendant was legally sane.

It is questionable how influential the burden-of-proof instructions of the court are with a jury, and of course the relative degree of burden to be sustained by one party in any given situation is closely connected with the extent to which the other party has actually sustained his burden. Moreover, no rule is applicable to all cases. The defendant must always prove his defense in the sense that he must produce at least as much evidence (of relative persuasive weight) in support of it as has been introduced against it. And it may happen that the defense itself will have to be in fact proved to a degree of moral certainty before it will create a reasonable doubt as to any of the conditions of guilt.<sup>39</sup>

A second important situation in which the accused may find the burden of proof shifted heavily against him is in the area of admissions. Admissions "made by the accused to the police before trial are freely and regularly used at the trial, placing defendants under pressure to take the stand and explain the admissions away."<sup>40</sup> Admissions need not be in the form of direct statements by the accused. A substantial number of jurisdictions take the silence of the accused in the face of pre-trial accusation as an adoptive admission, on the theory that the innocent man should and must protest his innocence under such circumstances.<sup>41</sup> In practice, the introduction of, or comment upon, this type of admission places a very real burden on the defendant to offer some explanation.

Closely allied to the theory of admissions is that of spoliation, where the accused destroys or refuses to produce evidence known to be under his control. Again, such action obviously places the accused in a bad position in the eyes of the fact-finder, and the evidence so withheld will be presumed to be unfavorable to him unless he produces a satisfactory explanation.

A third important exception to the usual requirements of burden of proof in criminal cases exists in those areas where it has been provided by statute that certain facts when proved shall be prima facie evidence of the existence of the ultimate fact in question. Such statutes have been held to be constitutional when there is a logical connection between the facts proved and the ultimate fact. For example, some states allow proof of the possession of intoxicating liquor to constitute prima facie evidence of violation of

a law prohibiting its purchase; or the presumption of knowledge of theft in receiving stolen property; or the presumption, from possession, of illegal importation of narcotic drugs.<sup>42</sup>

In some cases such statutes are construed to shift the burden of proof to the defendant; other cases state that they allow only for the establishment of evidence "sufficient to invoke the judgment of the trier of fact, and to support a judgment if one be found". A substantial question exists as to what effect such statutes have on the usual requirements of proof in criminal cases, and whether the same relative burdens would not exist in reality under such circumstances regardless of whether the courts were able to refer to statutory provisions regarding the establishment of prima facie evidence.

The number of court-created presumptions has been reduced in recent years. Few if any courts will now invoke a presumption of murder from the fact of an unexplained killing, although a century ago it was not uncommon on such facts to require the defendant to introduce evidence to raise the issues of accident and provocation.

A fourth area deserving of comment is the well-recognized procedural rule which allows the court, in criminal as well as civil cases, to take judicial notice of facts which are undisputed or which are capable of indisputable proof.<sup>43</sup> The allowance of judicial notice is justified as an economy measure to avoid waste of time and energy in proving already known or readily knowable facts. If a matter is to be judicially noticed, the court will generally direct the jury to find the noticed fact; in a non-jury case, the judge is required to record the fact noticed.

There is a dispute as to whether a fact which a court chooses to notice judicially may be argued by counsel nevertheless, if one side denies the validity of the fact noticed. Today when the tenets of science are no longer taken as necessarily fixed and indisputable, a question may be raised as to the justifiable scope which may be allowed a court in the area of judicial notice. Judicial notice is a

<sup>42</sup> These examples are not, strictly, exceptions to the basic requirement of burden of proof laid upon the prosecution, nor do these situations require the accused, as a matter of law, to offer proof on his own behalf. They do mean, however, that when proof is made of the possession of offending articles, the prosecution is not required to prove, also and by other evidence, the fact of illegal acquisition. A further practical result is that the accused then remains silent, at his peril, of attempted proof of legal purchase and intended use.

<sup>43</sup> See the footnote immediately preceding; the comment there made is equally relevant to the risk assumed by the defendant in failing to combat by evidence offered on his own behalf the probative effect of facts of which the court will "take judicial notice," to include as part of the formal proof facts of common, general knowledge, without the necessity of formal proof. The accused may equally invoke judicial notice of such facts on his own behalf.

<sup>39</sup> Cf. Slovenko, 31 Tulane L. Rev. 173, 175 (1956).

<sup>40</sup> Cf. Goldstein, 69 Yale L. J. 1149, 1186 (1960), cf. p. 86, n. 36.

<sup>41</sup> Wigmore, *Evidence*, vol. 4, Sect. 1072 (3d ed., 1940).

flexible concept which is capable of considerable expansion or contraction, depending upon the attitude of the individual court, but it should be borne in mind that a jury, as ultimate triers of all the facts and circumstances, can avoid the force of judicially-found facts, particularly where a general verdict is returned – merely “guilty” or “not guilty.”

An important corollary of the doctrines of burden of proof and presumption of innocence in criminal cases is the rule that the accused need not take the stand in his own defense. This rule provides a fifth area for examination. The right of an accused not to testify is based upon the constitutional protection against self-incrimination. The privilege against self-incrimination is embodied in the Fifth Amendment of the United States Constitution and each of the states affords similar protection.<sup>44</sup> Furthermore, in most jurisdictions, if the prosecutor should call the accused as a witness, he will find himself limited to the range of impeachment techniques which he can bring to bear against “his” witness.

Writers have seriously questioned whether or not the failure of an accused to take the stand does not in reality shift the burden of proof heavily against the accused, or at least destroy the presumption of innocence which he enjoys. One study, based on data from the administrative offices of the federal courts, has revealed that:

... in 99 per cent ... of all the criminal cases tried in the eighty-six judicial districts at the federal level, defendants who did not take the stand were convicted by juries. I think this is perhaps the result of the organized assault by the congressional committees that has been made on the constitutional privilege against self-incrimination over the past decade. The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence.<sup>45</sup>

This conclusion, however, is not necessarily the only one to be drawn from the facts which are cited. An opposite conclusion might be supported by assuming that the defendants who did not take the stand were in fact guilty of the crimes charged, or appeared to be so on the basis of all the evidence offered by the prosecution and unrefuted by the defense.

Most jurisdictions prohibit comment to the jury by the court or by the prosecution on the failure of a defendant to take the stand, on the theory that the right of comment would constitute a kind of compulsion on the defendant to take the stand, thereby weakening the

<sup>44</sup> In all states by express constitutional provision except Iowa, and there by court application of the state's due process clause: *State v. Height*, 117 Iowa 650 (1902).

<sup>45</sup> Williams, *The Trial of a Criminal Case*, 29 New York State Bar Bulletin 36, 42 (1957).

extent of his constitutional protection against self-incrimination. But such comment does not violate the due process clause of the Fourteenth Amendment to the United States Constitution,<sup>46</sup> and a few states permit the judge or prosecutor to comment to the jury on the failure of an accused to testify in his own behalf.<sup>47</sup>

The adverse inference which is drawn from the failure of the accused to take the stand arises from his failure to come forward with evidence which is within his own power to produce. In this respect the process is akin to that which operates in a situation where there appears to have been spoliation of evidence by the defendant.

In the absence of independent, adverse evidence offered by the prosecution, no inference may be drawn from the failure of the accused to testify, nor may such an inference be used against the accused in the absence of such independent, adverse evidence. Under these circumstances, it is questionable how much effect comment by court or prosecution may ultimately have upon the cause of the accused, although it seems reasonable that the authoritative weight which judicial comment normally carries could go far toward swaying the minds of otherwise undecided jurors.

Finally, consideration should be given to arguments recently advanced to the effect that the burden of proving guilt beyond a reasonable doubt in criminal cases has been considerably relaxed in America in recent years through the development of a judicial attitude against directing a verdict of acquittal on grounds of insufficiency of evidence except under the clearest of circumstances. According to one writer, the traditional and better approach on the part of a court in deciding whether the prosecution has offered sufficient evidence to warrant a jury finding of guilt, has been that it is the trial judge's function to assure that the jury could reasonably find that the evidence of the prosecution negated “every other hypothesis but that of guilt.”<sup>48</sup> An approach which is apparently gaining ground, however, is that which confines the concept of “proof beyond a reasonable doubt” to the role of an admonition only to the jury; as to the judge's ruling on the sufficiency of evidence, no distinction is made between civil and criminal cases: i.e., there need only be sufficient evidence from which reasonable men might conclude that the charge in the indictment or information was proved.<sup>49</sup>

From this it has been argued, perhaps validly, that the weaker test for judicial determination of sufficiency of evidence, combined with general laxity in pre-trial methods of screening prosecution

<sup>46</sup> *Adamson v. California*, 332 U.S. 46, 56 (1942).

<sup>47</sup> Cf. Wigmore, *Evidence*, vol. 8, 412-15 (3 ed., 1940).

<sup>48</sup> *Isabell v. United States*, 227 Fed. 788, 792 (1915).

<sup>49</sup> See, e.g., *United States v. Valenti*, 134 F. 2d 362, 364 (1943).

charges, and with the advantages of discovery and investigation which the state possesses over an individual, has resulted in a gradual but significant eroding of the protections which have been thought to be guaranteed to defendants in the concepts of "proof beyond a reasonable doubt" and the "presumption of innocence" in criminal cases. Whatever merit there may be in arguments for greater scope of discovery on the part of the criminally accused, and for stricter or less prosecution-oriented pre-trial procedures, it should be realized that criticism of the more lax sufficiency-of-evidence test used by some courts in criminal trials is based on a value judgment that a court is better able than a jury to weigh the evidence and determine the existence of a reasonable doubt. Such a value judgment is by no means generally adhered to by many prominent American writers in the field of criminal procedure and evidence.

An illustration of divergence between federal and state law is in the respective function of court and jury in determining the materiality of the alleged falsehood in prosecutions for perjury — materiality being an essential element of the offense. Under the federal practice the judge determines materiality as a matter of law; in New York State (*inter alia*) this is for the jury as a fact. While this difference may appear to be somewhat tangential to the main topic under discussion here, it is nevertheless relevant since the practical burden of persuasion laid upon the defendant may be greater in one jurisdiction than in another, depending on the circumstances in the particular case.

An interesting recognition of the general, heavy burden on the accused at trial is the New York State provision allowing one who is a prospective defendant to go before a grand jury considering the matter (before return of indictment), waive immunity and try by his own volunteered testimony to avert an indictment.

A vast amount of literature has been written in America on the content and significance of the concept of burden of proof "beyond a reasonable doubt," and on the "presumption of innocence" which is accorded defendants in criminal trials. It is generally recognized, however, that these concepts cannot be defined with any real precision, and that oversedulous attempts to do so may often result in more confusion than clarification.<sup>50</sup>

Ultimately these concepts in American criminal procedure must constitute more of a spirit of the law than precise, definable legal standards. Though specific legal formulae and actions in the various areas discussed in this essay, as well as in other specific areas, can undoubtedly affect to a certain extent the balance of proof required of prosecution and defense in criminal cases, the ultimate burden of

<sup>50</sup> See McBaine, *Burden of Proof*, 32 Calif. L. Rev. 242 (1942); 9 Wigmore, *op. cit.*, Sec. 2497.

persuasion resting on the prosecution and the correlative measure of protection accorded the accused will greatly depend upon the extent to which society regards the freedom of the individual as of greater value than the vindication of the rights of the state. The relative importance given to these conflicting values and interests can never be fully judged from an analysis of legal standards and criteria alone, although these criteria may be taken as a rough indication of importance of the values to a society. How much the legal criteria lag behind or run ahead of social values in this area can be determined adequately only by a careful study of current sociological data and material relevant to the subject.

### Clause III

1. *Is the power of arrest, whether in flagrante delicto or not, strictly defined by law?*

Yes, both the common law of arrest and statutes on the subject prescribe strict standards which must be complied with in order to effect a legal arrest. Although the law of arrest is now largely governed by statute, the statutory law generally incorporates common law distinctions between the authority of a law enforcement officer and that of a private person, and further distinctions according to the nature of the crime for which the arrest is made. If our law of arrest is subject to criticism, it is not because of a failure to define the power of arrest strictly but rather because of the technical distinctions embodied in the law of arrest and the variances from jurisdiction to jurisdiction. The police officer or citizen is required to know these distinctions or act at his peril, for civil liability may be imposed for illegal arrest.

2. (a) *In what cases, if any, is arrest without warrant permitted other than on grounds of reasonable suspicion that a crime has been committed? Who has power to arrest without warrant?*

Arrest without a warrant is generally permitted in the United States only where the person making the arrest has reasonable grounds to believe that a serious crime has actually been committed by the person arrested or where there has been a (misdemeanor) breach of the peace.<sup>51</sup>

The Fourth Amendment of the Constitution of the United States

<sup>51</sup> In 1958 the Supreme Court sustained the constitutional validity of an arrest without warrant made solely upon suspicion derived from information conveyed to a public officer by a third person.

provides that the right of the people to be secure in their persons against "unreasonable searches and seizures" shall not be violated, and that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing . . . the persons . . . to be seized." The Supreme Court has always construed this provision to incorporate the requirement of "probable cause" in the test of "unreasonableness" in the case of seizures without a warrant. "Indeed," it has been said, "without such an interpretation the warrant is reduced to a futile anachronism, for no officer is going to bother to make the showing of probable cause required for the issuance of a warrant if he is given the option of making a valid seizure on less evidence simply by avoiding the judicial process altogether."<sup>52</sup> There is some indication that this requirement extends to the states as well as to the federal government, under the due process clause of the Fourteenth Amendment.<sup>53</sup> It should be noted, however, that Supreme Court interpretations of the "unreasonable searches and seizures" clause of the Fourth Amendment have been primarily focused upon the legality of seizures of, and searches for, property (evidence), and the question of the constitutional validity of an arrest has arisen only in connection with the argument that the search, or seizure, of incriminating evidence was reasonable because incident to a lawful arrest. Thus it is not clear that the federal constitutional prohibition of an unreasonable arrest (seizure of the person) extends to the states.<sup>54</sup>

Whether or not the federal constitutional guarantee applies to the states in the area of arrests without warrant, the common law of arrest and the statutes which have supplanted it in various states incorporate the requirement of "probable cause." Under the common law, neither an officer nor a private person could arrest without a warrant for a misdemeanor which was not committed in his presence, and in general neither could arrest without warrant for a misdemeanor committed in his presence unless it involved a breach of the peace. On the other hand, either an officer or a private person could arrest if a felony had actually been committed and there was reasonable ground to believe that the person arrested committed it. Where there was reasonable ground to believe that a felony had been committed, but in fact no felony had been committed, an officer but not a private person could effect the arrest. The common law also may have authorized arrest by either an officer or a private person where a felony had actually been committed and the person arrested had committed the crime. In this last situation it is theoretically possible

<sup>52</sup> Foote, 52 N.W. L. Rev. 16, 38 (1958).

<sup>53</sup> *Wolf v. Colorado*, 338 U.S. 25, 27-28 (dictum) (1949).

<sup>54</sup> The Fourteenth Amendment applies only to state action; the question whether an unauthorized arrest by a private person is state action has not been answered.

to have a legal arrest without probable cause, but the arresting individual would have to proceed at his own risk, for the arrest would be unlawful unless subsequent developments proved that the person arrested had in fact committed a felony.

By statute in many jurisdictions there have been various modifications of the common law, but, with the exception of the instance just noted, none of the statutory changes purport to authorize arrest other than on grounds of probable cause. The Uniform Arrest Act provides for brief "non-arrest" detention.<sup>55</sup>

This question relates exclusively to cases in which an arrest *without a warrant* is permitted other than on grounds of reasonable suspicion that a crime has been committed, but from what has been said above it should be clear that the requirement of "probable cause, supported by oath or affirmation" applies alike to the constitutional validity of an arrest with a warrant. In such a case the warrant must be based upon reasonable suspicion that a crime has been committed and that the person to be arrested has probably committed it.<sup>56</sup>

- (b) *If the approval of a higher authority is needed to effect such an arrest, from whom must such approval be obtained?*

Only an arrest made under the auspices of a warrant requires approval of higher authority: i.e., a magistrate or judge. An arrest without warrant by its intrinsic nature implies that it is made on one's own initiative and without seeking approval of a higher authority; here there must be prompt judicial review of the arrest.

- (c) *In the case of an arrest without warrant on allegedly reasonable suspicion, has any judicial authority, before or after the arrest, power to determine whether the suspicion was in fact reasonable?*

Since arrest without warrant is effected on the individual initiative of the arrester and without an immediate approval of a higher authority, a judicial determination *before* the arrest, of the factual basis supporting the "reasonable suspicion" for arrest is precluded. There may be, however, a judicial determination after the arrest has been made.

Among the means of presenting the question of "reasonable suspicion" for arrest before the courts are: (a) a civil action for

<sup>55</sup> Cf. generally, Moreland, *Modern Criminal Procedure* (1959).

<sup>56</sup> For illustrations and discussion of discrepancies between the law as "written" and as "applied," cf. Foote, 52 N.W. L. Rev. 16, 22, 25, 34, 44 (1958).

damages may be brought;<sup>57</sup> and (b) in some states, where statute so provides, a criminal complaint may be filed against the arrestor.<sup>58</sup> While habeas corpus can, at least in some states, be utilized, before the filing of criminal charges against the arrested person to challenge the "reasonable suspicion" for arrest, in practice the arrested person can seldom, while imprisoned, successfully use this remedy; and once he has been convicted of the crime, habeas corpus is no longer an available remedy, since an unlawful arrest will not deprive a court of jurisdiction to try an offender.<sup>59</sup> In determining the validity of an arrest, the result of a search and seizure following an arrest may *not* be taken into consideration, but the existence or not of probable cause must depend on the facts present *at the time of the arrest*.

In the federal courts on motion to suppress evidence obtained as a result of an arrest, the court may determine that the suspicion was not in fact reasonable and may suppress the evidence. One result of a 1961 decision by the Supreme Court, under the Fourteenth Amendment due process clause, is that the state courts will probably now have to follow the federal practice of suppression.

The dearth of civil and criminal actions for false arrest in comparison with an apparent copious amount of illegal detentions by the police (explained *infra* this section), may indicate inefficacy of these two remedies in preventing illegal seizures. One method which would surely be a rigid deterrent to illegal arrest would be to bar prosecution of those who are illegally arrested. However, this seems to be too onerous on the authorities, and may be a case where the remedy would beget more harm than the original evil.

(d) *By whom are warrants of arrest granted?*

Judges of the inferior courts who may be called magistrates or justices of the peace, are most frequently the persons vested with statutory authority to issue warrants of arrest, but statutes may constitutionally empower higher court officials to grant such warrants.<sup>60</sup> Generally, however, warrants of arrest in fact emanate from lower judicial authorities.

3. *On any arrest, has the arrested person the right to be informed at once of the grounds of his arrest?*

A warrant for arrest is defective, and consequently an officer making an arrest under it is protected only by the rules governing

<sup>57</sup> Cf. Prosser, *Law of Torts*, Sec. 26 (2 ed., 1955).

<sup>58</sup> 2 Alexander, *Law of Arrest*, Sec. 589 (1949).

<sup>59</sup> Cf. *Ker v. Illinois*, 119 U.S. 436, 440 (1886).

<sup>60</sup> American Law Institute, *Restatement, Torts*, Sec. 113 (1939).

arrest without a warrant, if it does not state a specific offense for which an arrest may be made. Thus in the case of arrest with a warrant the question posed above may realistically be whether or not the arrested person has a right to see the warrant of arrest at the time it is effected. Generally at common law it was held that an officer making an arrest on a warrant must have the warrant in his possession and must, if such a demand is made, show it to the person arrested. Today there is considerable support for the position that an arresting officer whose official character is known (e.g., a police officer in uniform) need not show the warrant before making an arrest thereunder. But the preponderance of judicial authority still seems to require the officer to show the warrant before making an arrest under its authority, except where the person to be arrested flees or forcibly resists, or when the giving of such information will imperil the arrest. Under modern city enforcement conditions, the officer making the arrest often does not have the warrant with him, and in this event it is generally required that the warrant shall be shown to the person arrested as soon as practicable.<sup>61</sup>

Where the arrest is effected without warrant, it is normally required that the arresting officer inform the accused of his authority to arrest, his intention to make the arrest, and the offense for which the person is arrested – otherwise there is no duty to submit to the arrest. This rule, however, is subject to the sensible exception that an officer need not inform a person who is committing an offense in his presence, or who is pursued immediately after the commission, of the cause of the arrest. Moreover such information need not immediately be given where it would imperil the effecting of the arrest, or where the person to be arrested forcibly resists the attempted arrest.

4. (a) *Has the arrested person the right to the assistance of a legal adviser of his own choice at once and at all times thereafter?*

The Sixth Amendment to the Constitution guarantees that in all criminal cases the accused shall enjoy the right to have the assistance of counsel in his defense. (See discussion, *post*, under Clause V.) This provision is of course subject to two possible interpretations: (a) if he can afford to do so, the defendant has a right to retain counsel of his own choice; or (b) if defendant cannot afford to procure legal assistance, he must be provided with counsel assigned by the court. Moreover, the express guarantee of the Sixth Amendment applies only to criminal defendants in the federal

<sup>61</sup> Cf. Moreland, *op. cit.*, *supra*, note 8, pp. 19-20 (1959).

courts. State court criminal defendants are given a federal constitutional right to counsel only when they would otherwise be deprived to the due process guarantee of a "fair trial." In this discussion, the right of the accused in the federal courts will first be examined, then the right of the accused in the states. Each of these discussions will be further subdivided into the accused's right to retained counsel, and his right to assigned counsel.

### (1) *The federal criminal defendant*

*Right to retained counsel.* Since the adoption of the Sixth Amendment, it has been clear that an accused has an absolute right to retained counsel in every federal criminal prosecution. It is not so clear, however, that the Constitution guarantees the accused in a federal case the right to the assistance of his own counsel at every step of the proceedings subsequent to arrest and before trial.

Under the Federal Rules of Criminal Procedure, an arrested person must be taken for a preliminary examination before the nearest available commissioner or some other nearby judicial officer who is authorized to commit persons charged with federal offenses, and at this examination the commissioner shall inform the accused of his right to retain counsel.<sup>62</sup> But a considerable amount of time, hours and sometimes days, may elapse before this requirement reaches the stage of effective operation. It is in this period of time that the most prolonged police questioning of the arrested person invariably takes place, and it is in these same hours that no effective means of obtaining counsel, retained or assigned, is constitutionally available to the accused.

In the period between arrest and preliminary examination, the accused's right to be advised by his retained counsel depends effectively upon the discretion of the officers who have him in custody. In the federal courts, however, not only is it true that any confession found to be coerced may not be admitted as evidence against the accused, but even a voluntary confession obtained during illegal detention prior to preliminary examination or commitment is also excluded.<sup>63</sup> These exclusionary rules undoubtedly serve as an effective deterrent to prolonged questioning of persons accused of federal crimes prior to preliminary examination, at which time their right to retained counsel becomes fixed and absolute.

*Right to assigned counsel.* The Sixth Amendment is interpreted to guarantee to the indigent accused in the federal courts the right to court-assigned counsel.<sup>64</sup> The Federal Rules of Criminal Pro-

<sup>62</sup> Rule 5(a) (1946).

<sup>63</sup> Provided the confession occurred during the illegal portion of detention. *McNabb v. United States*, 318 U.S. 332 (1943).

<sup>64</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

cedure provide that if the defendant appears *in court* without counsel, the court shall advise him of his right to counsel and shall assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.<sup>65</sup> It is to be noted that the federal right to assigned counsel is more limited than the federal right to retained counsel in that the accused does not have a right to have counsel assigned by the court until the arraignment for trial, whereas he has a right to be represented by retained counsel at and after the preliminary proceedings before a committing magistrate. In all other respects the accused's right to assigned counsel parallels his right to retained counsel.

Of course, where the accused is unable to retain his own counsel he does not have a right to "a legal adviser of his own choice." Assigned counsel must, however, be reasonably competent.

### 2. *The state criminal defendant*

*Right to retained counsel.* Prior to the preliminary examination, the accused in a state criminal proceeding has no effective right to retain his own counsel or to be heard by such counsel.<sup>66</sup>

The express guarantee of the Sixth Amendment has been held to apply solely to the federal government prosecutions,<sup>67</sup> and consequently the only federal constitutional provision which limits the right of a state to deny access to counsel is the due process clause of the Fourteenth Amendment. This has been construed to guarantee the essentials of a fair trial to state criminal defendants. Use of an involuntary confession as evidence against the accused violates the due process guarantee. However, the Supreme Court has held that "due process does not always require immediate honoring of a request to obtain one's own counsel in the hours after arrest."<sup>68</sup> It seems clear that the denial of a chance to retain, or to have assigned, counsel does afford a basis for Supreme Court reversal of a state criminal conviction in a capital case and also in a non-capital case if the defendant has been so prejudiced by this denial that his subsequent trial is fundamentally unfair. What is fair or unfair will depend upon all the circumstances of each case, and the mere fact that the accused does not have counsel when he gives a confession will not of itself establish that the confession was coerced, at least in a non-capital case.<sup>69</sup>

Two conflicting objectives are always present in this type of

<sup>65</sup> Rule 44 (1946).

<sup>66</sup> Cf. *Moreland, op. cit., supra*, pp. 177-178.

<sup>67</sup> *Betts v. Brady*, 316 U.S. 455, 461-462 (1942).

<sup>68</sup> *Crooker v. California*, 357 U.S. 443, 441, n. 6 (1958).

<sup>69</sup> Cf. *Powell v. Alabama*, 287 U.S. 45 (1932); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940).

case. It seems obvious that the purpose for prolonged detention of a suspect without counsel is the law enforcement officer's zeal to solve the crime which has been committed. As Mr. Justice Jackson once observed:

This presents a real dilemma in a free society. To subject one without counsel to questioning which may and is intended to convict him, is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client — guilty or innocent — and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the subject in no uncertain terms to make no statement to police under any circumstances.

If the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel. Any lawyer who has ever been called into a case after his client has 'told all' and turned any evidence he has over to the Government, knows how helpless he is to protect his client against the facts thus disclosed.

I suppose the view one takes will turn on what one thinks should be the right of an accused person against the State. Is it his right to have the judgment on the facts? Or is it his right to have a judgment based on only such evidence as he cannot conceal from the authorities, who cannot compel him to testify in court and also cannot question him before? Our system comes close to the latter by any interpretation, for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him.

Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body . . . But if ultimate quest in a criminal trial is the truth and if the circumstances indicate no violence or threats of it, should society be deprived of the suspect's help in solving a crime merely because he was confined and questioned when uncounseled?

I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitting murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society.<sup>70</sup>

<sup>70</sup> From his concurring opinion (U.S. Supreme Court) in *Watts v. Indiana*, 338 U.S. 49, 57 (1949); and dissenting opinions in *Harris v. So. Carolina*, 338 U.S. 68 (1949) and *Turner v. Pennsylvania*, 338 U.S. 62 (1949).

What has been said above applies primarily to the accused's right to retain counsel prior to the preliminary examination and commitment (or release on bail). States are divided on the question whether the accused has the right to be represented by his own counsel at this hearing, and denial of this right is probably not a denial of due process. At further stages in the proceedings, the Supreme Court has described a state court defendant's right to be heard through his own counsel as "unqualified."<sup>71</sup> This is probably an apt description. Of course, the defendant may waive this right.

*Right to assigned counsel.* As with retained counsel, the state court criminal defendant's federal constitutional rights are determined under the due process clause of the Fourteenth Amendment. It seems to be established that due process requires adequate representation by counsel in a state prosecution for a capital offense, and if the defendant is unable to afford his own attorney he has a constitutional right to assigned counsel.<sup>72</sup> To date, however, this rule has not been extended to all non-capital cases as an absolute rule, and in this area due process depends upon the offense and a determination of the defendant's ability, in the light of his age, education, and the like, to defend himself without counsel.<sup>73</sup> The trend of decisions seems to be to require assignment or clear, voluntary waiver in all trials of serious charges. See further discussion, *post*, under Clause V, 1.

The Fourteenth Amendment has not been construed in any case, capital or otherwise, to guarantee to an indigent accused person a right to assignment of counsel at any stage of the proceedings prior to arraignment of the defendant for trial. Apparently, only one state guarantees to indigent defendants assignment of counsel before arraignment (California); in this state statute requires the assignment to be made at the preliminary hearing.<sup>74</sup> With this exception, the right to assigned counsel in state criminal cases prior to arraignment is practically non-existent.

(b) *If not, at what point does this right become available?*

In the federal courts, the Federal Rules of Criminal Procedure provide that the accused's right to retain, and be represented by, counsel of his own choice commences at the preliminary hearing, and that his right to assigned counsel commences at his arraignment for trial.<sup>75</sup>

<sup>71</sup> *Chandler v. Fretag*, 348 U.S. 3 (1954).

<sup>72</sup> *Powell v. Alabama*, *supra*, p. 99, n. 69.

<sup>73</sup> *Schaefer*, 70 Harv. L. Rev. 1, 9 (1956).

<sup>74</sup> California, by statute; see *People v. Williams*, 268 P. 2d, 156 (1954).

<sup>75</sup> Rule 5 (1946).

Most state courts which have considered the question have held that the accused is entitled at the preliminary hearing to representation which he himself furnishes.<sup>76</sup> As discussed above, the denial of a request to be represented by retained counsel at this stage may result in a violation of due process if the defendant is so prejudiced thereby that the subsequent trial cannot be conducted with "that fundamental fairness essential to the very concept of justice."

In the state courts, the defendant's right to be represented by assigned counsel normally commences at his arraignment in capital cases.<sup>77</sup> In non-capital cases, he may be accorded no right to assigned counsel, and this denial will be constitutional if the trial is otherwise conducted fairly, in accordance with due process. Thus it is impossible to generalize about the time at which a right to assigned counsel accrues in the state courts.

- (c) *Does the law require that an arrested person be informed of his right to the assistance of a lawyer, if he has such a right, in a way that he would understand?*

Both the Federal Rules of Criminal Procedure<sup>78</sup> and the statutes of most states provide that the committing magistrate, or the court, must inform the defendant of his right to be represented by counsel. Neither the rules nor statutes go on to require specifically that the defendant understand his right, but this would undoubtedly be essential to compliance with the meaning of the statutory language. (A defendant would not be deemed to have waived this right unless it was known by him and unless he voluntarily relinquished it.) In some states, statute or local practice requires that the person arrested be immediately permitted to telephone family, friends or counsel. Holding the person *incommunicado*, beyond a short time, is denial of due process, which may, when discovered and depending on the circumstances, bring about discharge from custody in response to habeas corpus, or excluding a confession obtained during this period, or setting aside in appellate review of an ensuing verdict and judgment.

5. (a) *Has the arrested person the right to be brought before a judicial authority?*

Under the Federal Rules of Criminal Procedure, the arrested person must be taken before the nearest available "commissioner,"

<sup>76</sup> Moreland, *op. cit.*, p. 176.

<sup>77</sup> Moreland, *op. cit.*, p. 178.

<sup>78</sup> Rule 5(b), 44 (1946).

who is a quasi-judicial officer.<sup>79</sup> At least forty-four states have legislation to the same effect.

The American Law Institute in its (model) Code of Criminal Procedure has drafted several sections which illustrate the usual provisions ensuring the right of an arrested person to be brought before a judicial authority. For example, No. 6 provides:

When the arrest by virtue of a warrant occurs in the county where the alleged offense was committed and where the warrant issued, the officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county.

- (b) *If he has, is the duration of the period within which this must be done fixed by law, and if so, what is the duration?*

Statutory law does not generally prescribe the amount of time within which the arrested person must be brought before a judicial authority. However, a hearing before a judge or magistrate within a reasonable time is required by statutory or decisional law, and there is law and practice in some areas setting twenty-four hours or other fixed time limit.

The Federal Rules provide that the arrested person be taken before the commissioner "without unnecessary delay." The states also require that the arrestee be taken before a magistrate promptly: e.g., "without unnecessary delay," "without delay."<sup>80</sup>

- (c) *If the law fixes "a reasonable period," what length of time is regarded as reasonable and who determines this?*

The judiciary determines what is a "reasonable time" under the circumstances of each case, with the prevailing rule one of required prompt arraignment. Although this question may arise in reviewing a pre-trial petition for habeas corpus, the question is most often presented to the courts in the context of a motion at trial to exclude from evidence a confession made by the defendant before he has been brought before a judicial officer. The courts tend to disagree only in their views of how much delay is reasonable, within relatively narrow limits, and of what causes of delay are acceptable.

In the federal courts, the so-called McNabb rule holds that an illegal delay in presenting the arrestee before the proper committing officer is itself a sufficient basis for excluding from evidence a confession made during the illegal part of the detention. The crucial

<sup>79</sup> Rule 5(a) (1946).

<sup>80</sup> *McNabb v. United States*, *supra*, p. 98, n. 63.

question is whether postponement of arraignment for purposes of questioning the arrestee or further investigation was legally justified. What is "unreasonable" and therefore "unnecessary" and illegal depends upon the circumstances of each case, particularly the time and place of the arrest, and the immediate availability of a proper committing magistrate. Thus, eight hours has been held unreasonable where it appeared that the defendant was arrested close to a magistrate's office but he was instead taken to the police station for questioning;<sup>81</sup> on the other hand, a delay of two days has been held reasonable where each day was a legal holiday and where it was not shown that a (judicial) commissioner was available.<sup>82</sup> Almost any delay arising during detention for questioning may be held unreasonable, if a hearing is thereby delayed unnecessarily.

The McNabb exclusionary rule is a rule of evidence and not a constitutional requirement. Therefore, although a few states have acknowledged its persuasive force, most have refused to adopt it. As a result, illegal detention *alone* will not render a confession inadmissible. This means that a voluntary confession obtained during an unreasonable detention may be admitted as evidence and that the only effective deterrent to prolonged questioning prior to production of the accused before a magistrate is the general due process guarantee against conviction based upon a coerced confession. Where this situation exists there is normally no specific need to construe the requirement of "without unnecessary delay" or "without delay", and accordingly there is much less law in the state courts on what is a reasonable time.

*(d) Before which judicial authority is an arrested person brought?*

Under the Federal Rules of Criminal Procedure, the arresting officer or any person making an arrest without a warrant is required to take the accused "before the nearest available commissioner or any other officer empowered to commit persons charged with offenses against the United States."<sup>83</sup> After this preliminary hearing the accused must be arraigned, generally at least several days later, before the court which is to try him. At the arraignment the formal charges are read to the accused and he enters a plea of guilty or not guilty.

Under state practice, substantially this same procedure is followed. Statutes generally prescribe that a justice of the peace or local magistrate will preside at the preliminary hearing.

<sup>81</sup> *Akowskey v. United States*, 158 Fed. 2d 649 (1946).

<sup>82</sup> *United States v. Walker*, 176 Fed. 2d 564 (1949).

<sup>83</sup> Rule 5(a) (1946).

*(e) After the arrested person has appeared before a judicial authority, have the police any power to hold him in custody other than as, or for a longer period of time than the judicial authority has authorized?*

No. The practice of continuing hearings to enable the police to complete the investigation is highly questionable. In each jurisdiction there is a procedure which an imprisoned person can use to test the legality of his detention and to secure release if the detention is illegal. The procedures vary in detail.

At the preliminary hearing the presiding commissioner or magistrate who, on the evidence, concludes there is probable cause to believe that the arrested person has committed a crime will, unless sufficient bail has been posted, commit the accused by issuing a warrant of commitment. This warrant is in substance an order by which the magistrate directs a ministerial officer to take a person to prison or to detain him there. There is an important practical question whether the remand is to police custody (where resumption of questioning is at least tempting) or to independent custody responsible for the prisoner's safety, viz. the jail. The warrant must specify that it appears that a specific offense has been committed and that there is probable cause, supported by oath or affirmation, to believe that the accused is guilty of such offense. Normally the warrant of commitment does not specify the duration of the imprisonment as it is understood that he is being held for trial. But where the commitment is upon default of giving bail for a bailable offense, the warrant does not authorize the jailer to detain the prisoner after the expiration of the term of the court to which he was to answer for the charge; if he is to be detained for a longer period of time, it must be by virtue of a separate order of court made in his case. Similarly an accused who is committed pending the action of a grand jury is entitled to release if the grand jury is thereafter discharged before it has returned an indictment against him, unless there is an order by the court directing a continuance for further grand jury action.

*(f) Are there any provisions of the constitution or other laws which require that an accused person be brought to trial within a specified period and if so what is its duration?*

The Sixth Amendment to the United States Constitution provides that the accused shall have a right to "speedy and public trial." The Supreme Court has not yet decided whether this specific guarantee is incorporated in the due process clause of the Fourteenth Amendment and thereby extended to criminal defendants in state cases. However, nearly all of the state constitutions also contain

guarantee provisions essentially the same.<sup>84</sup> Moreover, most state criminal statutes, unlike the Federal Rules of Criminal Procedure, require that trial be brought within a definite period. Such statutes often divide the proceedings into two stages, requiring a shorter period from commitment to accusation (information or indictment), and allowing a longer period to elapse between accusation and trial. Where this statutory approach is followed, states generally require that the indictment be filed by the end of the first or second term of court following the commitment of the defendant. The permitted lapse between the filing of the accusation and the trial varies from sixty days to the conclusion of the third term following such proceeding. Some statutes provide a shorter time if the defendant is in jail. A "term" of a trial court is generally of short duration, often only one calendar month.

(g) *If the law fixes "a reasonable period," what length of time is regarded as reasonable and who determines this?*

In states which have not enacted statutes requiring trial within a definite period of time after commitment, and in the federal courts, all the circumstances of the case are evaluated in determining whether undue or reasonable delay has occurred. The defendant will not be allowed to raise the objection of undue delay where he has caused the delay or consented to it. Many statutes provide that the criminal charges may not be dismissed where "good cause" is shown for the delay, and where this is the case courts are divided on the importance of a congested trial docket as a factor in determining the unreasonableness of delay. (Where "good cause" exceptions are not included in definite statutory time limits, the crowded trial court docket will normally not justify the delay.)

Since speedy trial is generally considered to be a personal right of the defendant, it is deemed to have been waived if not properly asserted before trial. Moreover, most jurisdictions require the defendant to make an affirmative demand for prompt trial or to resist postponement of his trial as a condition to his right to raise the denial of a speedy trial.

(h) *Is there an appeal, and if so to which authority, against failure to comply with the requirements of the law?*

(i) *What is the effect of failure to comply with such requirements?*

(These two questions are discussed together inasmuch as each

<sup>84</sup> Cf. Note, 57 Col. L. Rev. 846, 847, n. 7 (1957).

involves a consideration of the statutory dismissal for want of prosecution.)

The sanction most commonly employed against denial of a speedy trial is dismissal of the criminal charge. This is generally available to the prisoner through the procedure of a motion addressed to the trial court, and appeal to a court of appellate jurisdiction would seem generally to be available, as any other question of law, if such motion is denied. If the question cannot be raised by motion, or if the motion is denied and no appellate remedy is available, the question could presumably be raised by petition for writ of habeas corpus.

States are divided on the effect of a dismissal for want of prosecution, some holding that it is a bar to a subsequent prosecution for the same offense, others that it is not, and still others that it is a bar to another prosecution on the same charge if it is a misdemeanor but not if it is a felony. There is very little "authority" on the effect of dismissal for violation of the accused's constitutional right to a speedy trial (as opposed to dismissal for delay in excess of definite statutory standards) as a bar to subsequent charges. But the little authority available suggests that denial of the constitutional right is a bar, and on principle this must be so, since a later trial could not be any speedier than the too-slow prosecution already dismissed.

Other sanctions and remedies for denial of speedy trial include possible punishment of prosecuting officials for undue delay, mitigation of the accused's sentence if he is convicted, and a conditional order for dismissal of the case if not tried by a definite date.

#### Clause IV

1. (a) *In what circumstances is it possible for a person to be deprived of his liberty on grounds of public security other than on a charge of a specific criminal offense?*

The basic rule is that it is not possible for a person to be (legally) deprived of his liberty on grounds of public security, other than on a charge of a specific criminal offense. Our law does not recognize the concept of "preventive detention." However, there are exceptional circumstances in which persons are or have been detained by the state and federal governments without presentment of criminal charges. On the state level such confinement is related to public security in the sense that the confinement is sometimes necessary to insure the fair functioning of criminal justice or to protect society from mentally abnormal or neglected people. On the national level, temporary detention is ordered to aid criminal justice and, on at least one occasion, unusual restrictions have been placed on the liberty of citizens to protect the public security in the face of danger of military invasion.

The Fifth and Fourteenth Amendments to the Constitution of the United States forbid both the federal government and the separate state governments to deprive any person of life, liberty or property without due process of law. The constitutions of a majority of the states contain a similar provision. "Liberty" is of course a relative concept, but as used in this question it is assumed that the word refers to an absence of detention, confinement or imprisonment by governmental authorities. In the Anglo-American legal system, the writ of habeas corpus has historically been the mechanism for presenting to the proper court the question whether a person under custody is held in accordance with law.<sup>85</sup> Thus the procedural side of this question concerns the circumstances in which the remedy of habeas corpus is denied to a confined person. In the federal courts, this remedy is guaranteed by the constitutional provision that the writ of habeas corpus shall not be suspended, with one exception when, in cases of rebellion or invasion, the public safety may require it.<sup>86</sup> Similar guarantees are included in most of the state constitutions.

Habeas corpus, perhaps the most important procedural remedy available against unlawful arrest or detention, has been known to English law since prior to the Magna Carta of 1215, found its modern form and scope in the British Act of 1679 and its counterpart, by direct inheritance, as part of the common law of the American states – and specifically adopted by statutory enactment in most. This "writ" is an order issuing from a court or single judge, upon a sworn petition by one held in detention setting up at least a probable case of illegal confinement, directed to the person holding the petitioner in custody and requiring that person to bring the petitioner-prisoner forthwith before the court for hearing to determine the jurisdiction of the court, tribunal or person detaining the prisoner, the legal sufficiency of the proceedings taken against him or the validity of the judgment or order of confinement. It is an immensely valuable protection to the individual against lawless arrest and confinement in the absence of orderly process. It is not, however, a substitute or short-cut for appellate review and determination of "error" in a criminal trial.

Where the privilege of the writ of habeas corpus is available, it has been said that it provides "adequate security that everyone who without legal justification is placed in confinement shall be able to get free."<sup>87</sup> There is overstatement coupled with truth in this generalization. But it may be stated as a valid proposition that where habeas corpus is available, there are no circumstances in

<sup>85</sup> See *McNally v. Hill*, 293 U.S. 131 (1934) for a short description of the development of the writ and the scope of review which it affords.

<sup>86</sup> Art. 1, Sec. 9.

<sup>87</sup> Dicey, *Law of the Constitution*, 213 (9th ed., 1941).

which a person may be held in custody without having been accorded "due process of law." "Due process" is itself another relative concept, but among its many elements there is normally the requirement that there must be a fair accusatory procedure by which the prisoner is given notice of the charges against him.<sup>88</sup> Unless there is probable cause that a crime has been committed and some evidence that the accused committed the crime, the prisoner may thus secure his release.

There are some exceptions to this general rule. The first, and the one with which this part of the survey is basically concerned, is the situation in which the privilege of the writ of habeas corpus is constitutionally suspended "in cases of rebellion or invasion" where "public safety requires it." The content of this phrase, so far as it has been clarified in this country, will be examined below. A short preliminary explanation of the scope of habeas corpus protection in the context of our intricate federal system is regrettably necessary, however.

The constitutional guarantee of the privilege applies only to the federal government, not to the states. However, where a state does not afford a procedure substantially similar to that provided by the writ of habeas corpus, prisoners held unconstitutionally by state authorities in violation of the requirements of due process of law may petition for the writ in the federal courts to secure relief.<sup>89</sup> In this country cases on the availability of federal habeas corpus to state prisoners are for the most part limited to the question of post-conviction habeas corpus, and in this context the rule is that the prisoner must exhaust the remedies available in the state courts before he may apply for the writ in the federal courts.<sup>90</sup> The same rule would probably be held to apply to pre-trial habeas corpus to test the constitutionality of the state process according to which the prisoner is confined. But if a state did not provide habeas corpus or a similar corrective process for such a prisoner, the federal court would presumably entertain his petition, since there would be no adequate state procedure to exhaust. If the prisoner were held by the state without having been charged with an offense, the detention would be a denial of due process,<sup>91</sup> and the federal court would presumably order his discharge.

As noted above, there are other types of situations in which the concept of public security, in a broad sense, may be said to justify legal confinement without a charge of a criminal offense:

(1) Quarantine of the individual by public health authorities

<sup>88</sup> See Amer. Bar Assoc., Committee to Cooperate with the Internat. Comm. of Jurists, *The Rule of Law in the United States*, 85-86 (1958).

<sup>89</sup> Wharton, *Criminal Law and Procedure*, Vol. V, Sect. 2222, 2224 (Anderson ed., 1957).

<sup>90</sup> 28 U.S. Code, Sec. 2254 (1948).

<sup>91</sup> See *Ex parte Royall*, 117 U.S. 241, 253 (1886).

where there otherwise is likelihood of spreading communicable disease;

(2) Custody of insane persons and habitual inebriates even though there is no criminal charge. The state statutes cover a range of mental deficiencies and thus define the needs of public security. The courts do not redetermine the danger to society, but do decide whether a particular person is within the category of persons whom the legislature has decided should be confined;

(3) Detention of aliens seeking admission to the United States by the Commissioner of Immigration and Naturalization. (Such detention may in reality amount to confinement. The problems in this area seem to arise, not from the unavailability of habeas corpus to such aliens, but from the fact that the normal procedural safeguards of due process do not apply.<sup>92</sup> Therefore, although a recent Supreme Court case has been construed to give an alien a right to a hearing on the basis of the Commissioner's refusal to admit him to the United States,<sup>93</sup> the scope of review is apparently limited to the statutory authority of the Commissioner to exclude on the grounds given. There are a number of statutory grounds for exclusion other than the existence of criminal charges against the alien);<sup>94</sup>

(4) Temporary custody of children who have been mistreated or abandoned.

Other qualifications of the basic rule are the vagrancy laws (see discussion, *ante*, under Clause I, 1(b)), denial of bail or high bail based on probability of commission of further offenses (see Clause II, 2, *post*), and the holding of "material witnesses" pending trial.

(b) *If there are such circumstances, outline the interpretation of public security which is followed in this context in your country. Give recent examples.*

The Constitution allows suspension of the privilege of the writ of habeas corpus only when, "in cases of rebellion or invasion, the public safety may require it." In an early case Chief Justice Marshall asserted that the decision as to when public safety requires this drastic action depends "on political considerations on which the legislature is to decide."<sup>95</sup> During the Civil War it was at first held that the President had no inherent power to suspend the privilege of the writ, either as the chief executive officer or as Commander-in-Chief of the Army and Navy, but the validity of a sub-

<sup>92</sup> *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 554 (1953).

<sup>93</sup> *United States ex. rel. Paktorovics*, 260 Fed. 2d. 610 (1958).

<sup>94</sup> 8 U.S. Code 1182(a) 1952, i.e. thirty-one classes.

<sup>95</sup> *Ex parte Bollman*, 4 Cr. (U.S.) 75, 101 (1807).

sequent Act of Congress authorizing the President to suspend the privilege "whenever, in his judgment, the public safety may require it," and of suspensions under such authority, was later assumed by the Supreme Court.<sup>96</sup> In World War II, the privilege was suspended by the territorial governor of the Hawaiian Islands immediately after Pearl Harbor, but this was also pursuant to authorization from Congress. Whether a Presidential suspension without Congressional authority would be upheld today is unclear.

Another example was the detention, by removal to a limited area, of Japanese enemy aliens and citizens of Japanese ancestry during World War II. This was initiated by an order of the President, later confirmed by Act of Congress, with criminal penalties for knowing violation of the restrictions. Those found loyal after an administrative screening were eligible for resettlement. Although the constitutionality of the whole program was not established, two of its features were sustained. Substantial doubts have been expressed as to other aspects.<sup>96(a)</sup>

(c) *Is public security in this context defined by law?*

Suspension of habeas corpus has been an extraordinary occurrence in our history, and for this reason the law in this area has never been adequately articulated. Moreover in the two instances in which the Supreme Court has considered cases arising from areas in which the writ has been suspended,<sup>97</sup> it has focused its attention principally upon the imposition of martial law in the areas and held such impositions invalid. For this reason it has on each occasion been unnecessary to determine the validity of the suspension. On the subject of martial law, the Supreme Court has apparently consistently followed the rule that martial law cannot be established where the civil courts are open and functioning: "Martial rule cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."<sup>98</sup> But it is doubtful that the same test would be applied to a suspension of habeas corpus without more. The answer to this question is that public security is defined broadly by the Constitution but that what this provision means is no more clear today than it was in 1789.

(d) *Is it interpreted by the courts by means of review or otherwise?*

The early dictum by Chief Justice Marshall may suggest that

<sup>96</sup> *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 18 L. Ed. 281 (1866).

<sup>96(a)</sup> See Rostow, *The Sovereign Prerogative*, pp. 193-266 (1962).

<sup>97</sup> *Ex parte Milligan*, *supra*; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>98</sup> *Ex parte Milligan*, *supra*.

even today there would be no judicial review of a legislative decision to suspend the writ.<sup>99</sup> Where the suspension is by the President pursuant to Congressional authorization, the Supreme Court opinions on martial law intimate that the Supreme Court would review the limited question whether the President in his discretion had adhered to the statutory standards for suspension laid down by Congress. This issue could presumably be presented in a petition by a prisoner for habeas corpus after the questioned suspension was put into effect.<sup>100</sup>

- (e) *Is detention of this kind consequent upon judicial trial or can there be an appeal to a judicial authority?*

As noted above, the writ of habeas corpus may be used to effect the release of a prisoner illegally restrained prior to trial. Following trial, habeas corpus will not normally be available unless and until the prisoner has exhausted all available appellate remedies.

Even where the privilege of the writ is constitutionally suspended, the due process clause requires that the prisoner be tried "by the course of common law."<sup>101</sup> In such a case, however, the prisoner would apparently be deprived of his remedy to enforce this mandate except at the trial itself or on subsequent review of the trial court's decision.

Habeas corpus is available to test the judicial procedure used to determine the finding of insanity; these procedures differ from those used in administering criminal law. These differences, however, do not remove the mentally ill from the rule of law, but rather reflect the special needs of a particular class of people.

Detention of material witnesses who cannot, or who refuse to, give bail is not imposed in the interest of "public security" in the normal meaning of the phrase, but for the fair functioning of criminal justice.

2. (a) *Does every arrested person have the right to apply for bail?*

In the great majority of jurisdictions in the United States, a prisoner held for trial on a charge of a non-capital offense (one not punishable by death) has not only the right to apply for bail but also an absolute right to release upon furnishing bail fixed in a reasonable amount. Moreover, even for capital offenses, most

<sup>99</sup> *Ex parte Bollman*, *supra*, p. 110, n. 95.

<sup>100</sup> There is no reported decision on this question.

<sup>101</sup> *Ex parte Milligan*, *supra*, p. 111, n. 98.

states require the setting of bail except in cases where the proof of guilt of a capital offense is evident or the presumption is great. But even in these cases the prisoner would have the opportunity to *apply* for bail, and in passing on his application the court would consider these factors.

The only noted exceptions to the general rule that every arrested person has the right to apply for bail are (1) that there is no provision for bail for military personnel arrested and confined under the Uniform Code of Military Justice,<sup>102</sup> and (2) that certain aliens held for deportation may be held without bail at the discretion of the Attorney General.<sup>103</sup>

- (b) *What authorities are empowered to grant or refuse bail?*

In the absence of special statutory authorization, the power to admit to bail is vested exclusively in the courts, and the authority to grant or refuse bail is generally regarded as a judicial or quasi-judicial power. Where the right to admit to bail is discretionary, there must first be a judicial determination of the fact that the circumstances warrant such allowance. Where the prisoner has an absolute right to release on bail, committing officers and inferior court officers may be empowered to release prisoners charged with misdemeanors on bail. Sheriffs and police officers are normally without power to grant bail except for misdemeanor cases where statutes so authorize. In no case are these authorities permitted to make a final decision that bail is not available.

The general rule is that a court having jurisdiction of a habeas corpus proceeding has authority to admit the petitioner to bail pending the determination of the proceeding. Except in habeas corpus, an appellate court may not allow bail while the case is pending and undisposed of in the trial court.

- (c) *Are there any constitutional or other legal requirements governing the reasonableness of bail? If so, please indicate briefly the criteria by which reasonableness is determined.*

The Eighth Amendment to the Constitution of the United States guarantees that "excessive bail shall not be required." This guarantee applies only to the federal government, not to the states,<sup>104</sup> but forty-nine state constitutions contain the same guarantee.

"Excessive" has been construed as a figure which is higher than that reasonably calculated to assure the presence of the defendant

<sup>102</sup> United States Code, Title 10, Secs. 801-940 (1950).

<sup>103</sup> United States Code, Title 8, Sec. 1252(a) (1952).

<sup>104</sup> *McKane v. Durston*, 153 U.S. 684 (1894).

at his trial.<sup>105</sup> This in turn is largely dependent upon the ability of the accused to give bail. However, the mere fact that the accused cannot deposit bail in the amount fixed by the court does not mean that the amount is *ipso facto* excessive. Other criteria which may be referred to in making this determination include the seriousness of the charged offense, the strength of the evidence of his guilt, the general character and reputation of the accused, and the strength of his ties to the locality where he is to be tried.<sup>106</sup>

(d) *Indicate whether circumstances other than those below may lawfully be taken into account in hearing an application for bail:*

- (i) *the gravity of the charge;*
- (ii) *the likelihood of the accused failing to appear for trial;*
- (iii) *the likelihood of interference with witnesses;*
- (iv) *the likelihood of the accused committing a further offense.*

In addition to these enumerated circumstances, it is common for courts in the United States to take into consideration the probable strength of the evidence that the accused did commit the offense charged, the age and physical condition of the accused, and the fact, if applicable, that a grand jury has found an indictment. However, each of these factors is probably relevant to the likelihood that the accused might fail to appear for trial (see (ii), above).

(e) *Is there any machinery for appeals against the refusal of bail, and if so, what?*

It is probably safe to say that there is always some machinery for securing review of a denial of bail, but the type of procedure may vary from jurisdiction to jurisdiction. In some jurisdictions a refusal to allow bail may be reviewed on appeal or writ of error. In others special statutory provisions for review of denial of bail have been enacted. Moreover, where there is no other adequate appellate remedy, or where other remedies have been exhausted, habeas corpus may be used to procure the admission to bail of a party who is entitled to it.

Where the lower court has discretion to allow or refuse bail, the review of the lower court's decision will, of course, be limited to the question of abuse of discretion.

<sup>105</sup> *Stack v. Boyle*, 342 U.S. 1 (1951).

<sup>106</sup> See Corp. Juris, Sec. 8, "Bail," Sec. 49 (1962).

## Clause V

1. *Is an accused person free to choose his own legal adviser?*

An accused person is free to choose, and be represented at trial by his own legal adviser, provided he has sufficient funds to retain an attorney.

The Sixth Amendment of the United States Constitution requires federal courts to assign counsel to an indigent defendant tried for any offense under federal statutes, unless he waives this right.<sup>107</sup> In addition, despite the fact that this constitutional provision does not require assignment of counsel prior to the actual trial, in practice the defendant is usually allowed counsel at his arraignment.

An indigent accused facing prosecution in a state court will find that a right to assigned counsel may or may not exist depending upon which state is prosecuting him and for what offense. The United States Constitution as interpreted by the Supreme Court requires a state to assign counsel to an indigent defendant being tried in a state court, only if the trial is for a capital offense and, in non-capital cases, under circumstances constituting lack of essential fairness in the trial as a denial of due process. See the discussion, *ante*, under Clause III, 4(a). Otherwise, the state law will determine the defendant's rights and the laws of the various states are far from uniform. Twenty-nine of these state statutes provide for assigned counsel in all criminal cases, six in all capital cases, and seven in all felony cases. The remainder of the state statutes designate other particular situations wherein counsel must be assigned.<sup>108</sup>

An accurate portrayal of the qualified federal right of an indigent defendant to counsel in a state court trial must include consideration of the essential fairness factor which does enhance this protection. The facts of each case must be examined to determine whether the accused should have been assigned counsel, to satisfy the requirements of the due process clause of the United States Constitution. The Court will consider such factors as the seriousness of the charge, the age of the defendant, his intelligence, his prior education, his previous contacts with criminal courts and other factors.<sup>109</sup> (See discussion, *ante*, under Clause III, 4(a) and (b).)

<sup>107</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>108</sup> Cf. *Betts v. Brady*, 316 U.S. 455, 470-471 (1942); Brownell, *Legal Aid in the United States*, 300 (1951).

<sup>109</sup> *Gibbs v. Burke*, 337 U.S. 773 (1949); *Bute v. Illinois*, 333 U.S. 640 (1948).

2. (a) *Is there a right to free and private communication with legal advisers?*
- (b) *Is such communication*
  - (i) *immune from disclosure against the wishes of the accused?*

Due to the inter-relation of these two questions, they will be discussed together. The answer to them is yes, but this rule of privilege is subject to some limitations, of relatively minor nature. Probably the most important one is that the privilege applies only to past, terminated wrongs, not future or continuing wrongdoing. In addition, this rule of privilege does not bar disclosure by a third party who, by accident, eavesdropping or design, overhears the communication.<sup>110</sup> However, the conversation between the attorney and client is privileged by law, and thus immune from disclosure, in all but rare instances. The privilege affords an important opportunity for counsel to confer, privately, with the client-prisoner, to ascertain the facts and to map defenses for his trial. Any attempt to impose serious limitations would arouse strong protest and invite court protection.

- (b) *Is such communication*
  - (ii) *immune from civil and criminal liability in respect to what is communicated?*

Since, as seen above, the information communicated may not be disclosed by the adviser, it seems clear that no criminal or civil liability will result from the communication. However, if the communication fits the exception, that is, if it concerns either a future or a continuing wrongdoing, then the client will be liable in a civil or criminal action as the case may be.

3. (a) *Is there a legal obligation to give notice to the accused of the law under which he is charged?*
- (b) *Is it essential that the charge should specify the details of the alleged infringement of the particular law?*

The governing principle applicable to both these two questions is that the accused has the right to demand the legal basis and alleged facts of the accusation.

The Supreme Court has stated that a failure to give notice of the charge is a failure of due process.<sup>111</sup> More specifically, the charge

<sup>110</sup> *Canty v. Halpin*, 294 Mo. 96, 242 S.W. 97 (1922).

<sup>111</sup> *In Re Oliver*, 333 U.S. 257 (1948).

must either specify all of the elements of the offense or, if the offense is a violation of a statute, the charge must be substantially in the language of the statute.

In narrowing the inquiry to question 3(b), which relates to the specification of the details of the alleged infringement, one is met at the outset with the problem of attempting to describe diverse state requirements in a single statement. The states lack a uniform set of distinct requirements for the charge against the defendant; they each have individual criteria to test the sufficiency of indictments.

One principle, however, appears through all of the state tests, that regardless of the method used, the accused must be sufficiently apprised of the nature of the charge against him.<sup>112</sup>

Some states use a rather simplified form of indictment as, for example, the charge that "A murdered B." Such a charge, standing alone, gives little information of the details of the crime. However, these states allow defendants to be apprised of the particulars of the offense by the filing of a "bill of particulars."

Other states still require a more formal, particular form of indictment which will give the details of the alleged offense.

- (c) *What period of notice, if any, is fixed by law?*

In order to answer this question it is necessary to describe first the steps that follow an arrest of an accused for alleged commission of a mere misdemeanor. After a defendant is arrested he is taken before a judicial officer to have the charge against him read to him. At this time, the defendant is allowed to make his plea (e.g., guilty or not guilty). Following this procedure, known as the arraignment, a period of time passes and then the defendant is brought to another court for his trial in chief.

With respect to felonies, the usual procedure is (1) arrest (with or without warrant) and (2) initial appearance before a magistrate, (a) to determine whether a preliminary examination is desired (by the prisoner) and if so to set a time for it, and (b) to set bail. This is followed by the preliminary examination (unless waived) before a magistrate whose duty it is to determine whether there is probable cause to believe that the suspect has committed a crime. If the answer is affirmative, the suspect is "bound over" for trial and the prosecutor prepares an "information" or seeks an indictment from a grand jury (unless an indictment has already been filed, before the arrest). Upon the information or the indictment the accused is formally arraigned and required to plead guilty or not guilty. If the indictment has preceded the arrest — as is often the case — the pre-trial procedure, in these respects, consists of the arrest under warrant, the initial appearance and the arraignment.

<sup>112</sup> *People v. Belcher*, 302 N.Y. 529 (1951).

The first problem is, then, how much time the defendant is allowed between the time that the charge is read to him and the time that he must enter his plea. In California, for example, when a defendant is brought in for arraignment, he is allowed a "reasonable time" to give his responsive plea. This time "shall be not less than one day for [the more serious offenses] and not more than seven days for [less serious offenses]."

The next problem is how long after the defendant enters his plea he has to prepare for the trial in chief. Statutes in some states give him one day, in others two days, in others three days, in one four days, in one five days,<sup>113</sup> and in some a "reasonable time."

If the defendant feels that he needs more time to prepare for trial, he can get a continuance (i.e., postponement).

- (d) *If the period fixed is "a reasonable time" what length of time is regarded as reasonable and who determines this?*

The answer (c) immediately preceding discusses "reasonable time" between the notice to the accused of the law under which he is charged and the entry by the accused of his plea. The more important question of the permissible time between the arrest and the notice to the accused upon being brought before a judicial authority for preliminary examination of probable cause is considered under Clause III, 5(c) *supra* page 103.

- (e) *Is the accused entitled to be present when all evidence is given and when all directions of law, or summings-up by the judge, are made?*

The accused has an absolute right to be present throughout the trial. The prosecution has the corresponding right to require his presence, effected by initial arrest, the requirement of bail conditioned upon appearance at trial, forfeiture of bail and liability to second arrest for failure to appear and remain. Voluntary waiver by the accused of his right to attend is generally provided by statute for non-felony prosecutions if he be represented by counsel or for minor infractions, such as traffic law violations.

- (f) *Is the accused entitled to call witnesses in defense, including the right to give evidence himself if he wishes?*

There is no question, in the United States, that the accused is

entitled to call witnesses and that he is entitled to be a witness himself if he so desires. But see the brief discussion, *infra*, of rights of discovery, pre-trial [3(h)].

- (g) *Is the accused entitled to cross-examine the witnesses for the prosecution or, according to the particular procedure, to put questions through the judge?*

Again, there is no question in the United States that the accused is entitled to cross-examine the witnesses for the prosecution, orally and in open court. In the federal courts the Sixth Amendment of the United States Constitution guarantees this privilege. In the state courts, even though the Sixth Amendment does not apply, the rule remains that the defendant is entitled to cross-examine the witnesses of the prosecution.<sup>114</sup>

There are exceptions to this rule but they apply, not to the trial-in-chief, but to proceedings such as post-conviction proceedings.

- (h) *Is the accused entitled to prior notice of the nature of the evidence to be called by the prosecution? If there is no legal requirement for the prosecution to do this, please indicate what the professional practice is.*

There has existed in the courts of the United States an "inertial force of a long and deeply embedded practice designed to keep the defendant in the dark as long as possible."<sup>115</sup>

Although the procedure whereby an accused may be apprised of the evidence that the prosecution intends to use against him has not been accepted in many state courts, it is apparent that there is evolving a more liberal attitude in this regard. The federal courts at the present lead the states in the move for more liberal criminal discovery;<sup>116</sup> but under the Federal Rules of Criminal Procedure the right of discovery available to the defendants is limited to documents and things, and neither the names of government witnesses are required to be disclosed nor may their depositions be taken in advance of trial. Both of these remedies are provided under the laws of some of the states. The common law recognized no right of discovery in criminal cases.

In some states the names of prosecution witnesses must be endorsed on the indictment. The preliminary hearing offers an opportunity to defense counsel to form a preliminary view of the

<sup>114</sup> E.g., Missouri Supreme Court, Rule 23.03.

<sup>115</sup> Fletcher, *Pre-Trial Discovery*, 12 Stanford L. Rev. 293,50, 294 (1960).

<sup>116</sup> Federal Rules of Criminal Procedure, 16(a), 17.

<sup>113</sup> California Penal Code Sec. 1049.

case against his client. Professional practice often makes additional material available.

- (i) *Is the accused allowed to make allegations against the witnesses or the prosecution or against anyone involved in the prosecution which if true would be relevant to the good faith or impartiality of those witnesses? Depending on the particular procedure, is this allowed for the purpose of challenging the witness's competence on these grounds?*

Yes, to both portions of the Question.

- (j) *If the accused is permitted to make such allegations, is he immune from civil or criminal liability in connection therewith?*

Yes, the accused enjoys such immunity at least as to allegations broadly relevant to the trial made to the court as formal part of the trial proceedings.

#### Clause VI

1. *Are there any rules of law or practice which define the duty of the prosecution? If so, please state them.*

The public prosecutor is considered to have a duty not to convict but to see that justice is done. Breaches of duty by prosecuting attorneys fall into three general categories.<sup>117</sup> First is the knowing use of perjured testimony.<sup>118</sup> Second, the knowing suppression of evidence favorable to the defendant is a breach of the prosecutor's duty. Third, any act by the prosecutor that "so shocks the court that it will be deemed a breach of the prosecutor's duty to insure a fair trial" is forbidden.

The first two categories are self-explanatory. The third category is as limitless as the ingenuity of over-zealous prosecutors. Examples of this breach of duty are as follows:

- a. In a rape case the prosecutor kept the victim's blood-stained clothing on display during the trial.
- b. A remark by the prosecutor calculated to give the jury the impression that the court believed that the defendant was guilty.
- c. The prosecutor stated to the jury during the trial that he

<sup>117</sup> Cf. Note, 32 New York L. Rev. 607 (1957).

<sup>118</sup> *Pyle v. Kansas*, 317 U.S. 213 (1942).

would try the defendant for perjury after the trial at hand was finished.

- d. *Calling eight witnesses to establish a single incriminating point.*

The above examples merely point out the type of activity that some prosecutors will engage in and the courts will not allow.

There remains the question of what action a court will take when one of these abuses has already been committed. If the prosecutor uses perjured testimony, there is a presumption of prejudice and almost always automatic reversal regardless of how clear the guilt of the defendant appears to be.<sup>119</sup> Knowing use of perjured testimony violates due process. If the prosecutor knowingly suppresses evidence favorable to the accused, the court will be extremely prone to find fatal prejudice. If the prosecutor commits abuses mentioned in the third category, the question of whether the court will reverse a conviction depends primarily upon the degree of misconduct and the opinion of the court as to whether or not it affected the fairness of the trial.

2. *Have the judges power to protect the accused from what they consider to be unfair questions by the prosecution?*

Yes, either by the judges *sua sponte* or on objection by the accused or his counsel.

3. *Is it (a) allowed (b) customary for the prosecution to press for a particular type or extent of sentence on the accused?*

Yes, it is both permissible and customary. The only exception to the "customary" is when the determination of the sentence is within the province of the jury, as permitted or in some instances and jurisdictions is required by statute, e.g., under a murder indictment either to execution or life imprisonment. The sentence is then mandatory upon the trial judge, who has no discretion to be invoked by the prosecutor.

4. *Can the prosecution be compelled to put at the disposal of the accused or his legal adviser evidence favorable to the accused which the prosecution does not propose to use in court?*
5. *If not, is it considered essential by the rules of legal practice that this should be done? If so, what effect is attached to failure to do so?*

<sup>119</sup> *Mooney v. Holohan*, 294 U.S. 103 (1935).

Yes, if, as a practical matter, the existence of such evidence is known to or suspected by the accused or the court. Failure of the prosecution to do so may result in setting aside the conviction either by the trial court on a post-conviction motion by the accused or by the reviewing court on an appeal. Suppression by the prosecutor of available evidence favorable to the accused is, if uncommon, ground for severe reprimand.

## Clause VII

1. *Is there any provision of the Constitution or other rule of law which protects witnesses (whether the accused or not) from being compelled to answer questions which expose them to the risk of self-incrimination?*

2. *Can an accused person be compelled to give evidence?*

(Answers to 1 and 2 are here combined.)

In all courts of this country, both federal and state, one who stands under criminal charge may by virtue of constitutional<sup>120</sup> protection against compulsory self-incrimination refuse to take the witness stand and submit to questioning. If, however, he does take the stand to testify on his own behalf, he must then submit to cross-examination.<sup>121</sup>

Witnesses other than the accused generally are allowed to refuse to answer, on plea of fear of self-incrimination. But as to such witnesses there are exceptions to this rule.

In most states the protection provided by the self-incrimination rule does not allow a person (other than the accused) to refuse to testify if his refusal is based on the assertion that his testimony will subject him to criminal prosecution in another state or in a federal court for a federal crime; and testimony so required is admissible against the former witness when he is the accused in a federal court prosecution. The same rule in reverse applies to the federal courts; that is, a witness may not refuse to testify in those courts because he claims that his testimony will subject him to prosecution in a state court. Almost all courts in the United States, both state and federal, hold that a witness may not refuse to testify upon the ground that this testimony will subject him to criminal prosecution in a foreign court.<sup>122</sup>

<sup>120</sup> U.S. Constitution, Amendment V (1791).

<sup>121</sup> *Brown v. Walker*, 161 U.S. 591 (1896).

<sup>122</sup> Cf. generally, Mayer, *Shall We Amend the Fifth Amendment?* (1959), *passim* and Note 7, p. 261.

In addition, there are immunity statutes in both the federal and state courts under which the prosecution may guarantee to the witness that if he testifies he will not be prosecuted for any crime that he has committed which is revealed by his testimony.

The major infirmity in the immunity statute's purported protection of the witness is that a state can only protect against prosecution in its own courts. The witness may be compelled to testify in the state court, under the immunity statute, but then when he is prosecuted in a federal court the testimony compelled to be given in the state court may be used as evidence against him.

The present federal immunity statutes give immunity against state prosecution through invocation of the supremacy clause of the federal Constitution.

3. *Are statements by the accused admissible against him on proof of the following:*  
(a) *physical violence against the accused?*

The admissibility of the confession or "statement" hinges on whether or not the confession was "involuntary," according to the particular circumstances of each case.<sup>123</sup>

As to confessions obtained through physical violence against the accused, the Supreme Court has stated that:

Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. When present there is no need to weigh or measure its effect on the will of the individual victim . . . [Judges] long ago found it necessary to . . . [treat] any confession made concurrently with torture or threat of brutality as too untrustworthy as to be received as evidence of guilt.<sup>124</sup>

The rule that a confession obtained through physical violence against the accused is inadmissible as evidence against him applies to both federal and state courts.

- (b) *prolonged and harassing interrogation?*

Where a confession admitted into evidence was the result of prolonged or harassing interrogation, the Supreme Court of the United States has applied different rules to federal courts and to state court trials.

In the federal courts, Rule 5a of the Federal Rules of Criminal Procedure provides that, after an arrest made with or without a

<sup>123</sup> *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

<sup>124</sup> *Stein v. New York*, 346 U.S. 156 (1953).

warrant, the officer "shall take the arrested person without unnecessary delay before any nearby officer empowered to commit persons charged with offenses against the laws of the United States." The Supreme Court, exercising its supervisory power over the federal courts, has held inadmissible against the accused a confession obtained seven and one-half hours after arrest, when the accused was "within the vicinity of numerous committing magistrates."<sup>125</sup>

When the Court is dealing with a confession admitted in a state criminal trial, however, the length of the interrogation alone will not vitiate a judgment based on a resulting confession. However, the question presented speaks of "prolonged and harassing interrogation." Thus, the question vis-a-vis state courts turns on the extent of harassment. Again, it must be emphasized that the Court will look for factors which show that the confession was involuntary or "not the product of any meaningful act of volition."<sup>126</sup>

The Court has considered the following factors pertinent to determining the voluntary character of a confession; the length of time the accused was interrogated; the absence or presence of friends of the accused or his counsel during the interrogation; the mental stability of the accused, his age, intelligence and education; the number of interrogators; the condition of the interrogation room.

The Supreme Court has no hard and fast rule regarding confessions admitted into state criminal trials following a prolonged interrogation. The Court will look at the factors listed above and if it decides that the interrogation was not "voluntary," the confession will not be admitted, or more generally as the appeal follows conviction at trial in which the confession has been received in evidence over objection, the conviction may be set aside.

The circumstances under which the Court will reverse a conviction if it appears that the confession may have been involuntary present four possibilities.

First: If the conviction is based wholly on a confession and the undisputed facts show that the confession was coerced, the Court always will reverse.

Second: If the conviction is based solely on the confession but the issue of coercion is unclear and this issue of coercion was left to a jury pursuant to state procedural law, the Court will not reverse if a jury was instructed that if they find the confession coerced, they must acquit.

Third: If the conviction could be based either on the confession or on other facts admitted into evidence and the issue of coercion is

<sup>125</sup> *Mallory v. United States*, 354 U.S. 449 (1957).

<sup>126</sup> *Blackburn v. Alabama*, ante p. 121, n. 123.

unclear, the conviction will be allowed to stand if the jury was instructed to consider the confession only if it finds it voluntary.

Fourth: If the conviction could be based either on the confession or on other facts admitted into evidence, but the confession was clearly coerced, the Court probably will reverse, regardless of the instructions given to the jury.

Quite apart from the highly important and vexatious question treated in the immediately preceding discussion of the voluntary or coerced character of the confession – a recurrent subject of appellate review of criminal convictions – it is the general rule under common law and a generality of statute that an extra-judicial confession alone (one not made freely in open court) cannot support a conviction and that it requires corroboration by independent evidence of the *corpus delicti*.

(c) *threats of unpleasant consequences to*

(i) *the accused?*

Threats of unpleasant consequences are enough to vitiate a judgment based on a resulting confession.<sup>127</sup>

(c) *threats of unpleasant consequences to*

(ii) *his family?*

(iii) *his property?*

In a recent state court case,<sup>128</sup> a factor which induced the Supreme Court to reverse was that the police induced a childhood friend of the accused (the friend was a policeman himself) to tell the accused that his activities had gotten the friend into "a lot of trouble." The police also had the friend attempt to extract sympathy from the accused for the pregnant wife and children of the friend.

Courts consider the total effect of the various measures taken by the police or others, and attempt to determine whether or not the confession was voluntary. On the basis of present decisions it appears that if the court determines that the threat of unpleasant consequences to either the family or the property of the accused forced the accused to confess, the judgment will not be allowed to stand.

(d) *inducements offering some advantage, pecuniary or otherwise?*

<sup>127</sup> *Payne v. Arkansas*, 356 U.S. 560 (1958).

<sup>128</sup> *Spano v. New York*, 360 U.S. 315 (1959).

Again, the inducements offered will be considered as a factor that may have caused a confession to be involuntary. In another leading case the fact that the defendant was induced to confess through assurances that his brother would not be prosecuted for a parole violation and that his father would be released from custody was considered by the Supreme Court to be pertinent to the inquiry of the voluntariness of the confession.<sup>129</sup>

4. (a) *Is it lawful to intercept postal or telephonic communications?*  
(b) *If so, who has authority to permit this?*

First as to postal communications, the rule is that "first class" mail only be examined under a search warrant issued by a judicial officer,<sup>130</sup> the prohibition is generally respected and known instances of violation are rare.

As to telephonic communications, the rule is that there is no constitutional protection against intercepting this type. However, the Federal Communications Act of 1934 prohibits both the act of interception of messages across state lines and the divulging of information obtained through interception of telephonic messages; enforcement through prosecution to impose the criminal penalties there provided for violation has been practically non-existent and violations are common practice.

The states are divided as to lawfulness of intercepting intrastate messages and admissibility in evidence of its fruits. Most states apply the "exclusionary" rule; others, however, permit this to law-enforcement authorities under specific court order on ex parte showing of probable cause to believe commission of specific offenses is occurring or imminent. One may speculate whether the rule announced in the 1961 Supreme Court decision *supra* may be extended to exclude telephonic interceptions of messages across state lines: i.e., in "interstate commerce" as a subject of federal power.

- (c) *Are the circumstances under which interception is allowed defined by law? If so, please state them.*  
See the discussion under 4(a) on this point.

- (d) *If the circumstances are not defined by law, please state any rules of practice which govern the permissibility of such interception.*  
See the discussion under 4(a) for the answer to this question.

<sup>129</sup> *Stein v. New York*, 346 U.S. 156 (1953).

<sup>130</sup> *Oliver v. United States*, 239 F. 2d 818 (1957).

*The questions posed in 4(e), 5(e), 6(c) and 7 of Clause VII will be discussed here as a single problem:*

4. (e) *Is evidence obtained by the illegal interception of postal or telephonic communications admissible against the accused?*
5. (e) *If a search of premises is illegal in respect of the foregoing or any other matters, is the evidence thus obtained admissible against the accused?*
6. (c) *Is evidence obtained by these methods admissible against the accused if obtained illegally?*
7. *If evidence is obtained by any means which are illegal, is such evidence admissible against the accused?*

The reason for grouping these questions under a single heading is that the circumstances described by those questions are treated as a common question for purposes of admissibility as evidence in the United States. The question is whether or not evidence illegally seized may be admitted in a trial against the accused. The following discussion pre-supposes that the court has held the evidence to have been illegally seized. For a discussion as to whether or not, in a particular situation, the evidence would be held to be illegally seized, see discussions under specific questions.

The topic of admissibility will be considered in three parts:

First: Whether illegally obtained evidence, obtained either by state or federal law enforcement officers, is admissible in a federal criminal case;

Second: The extent to which such evidence has been admissible in state proceedings under pertinent case law or statutes (until very recently);

Third: In what situations the United States Supreme Court will hold that the United States Constitution was violated by the admission of illegally obtained evidence in a state court even though the state court had held the evidence to be admissible.

First: Products of illegal searches and seizures are inadmissible in federal criminal proceedings regardless of whether or not they were obtained by federal law enforcement officers or by state law enforcement officers.<sup>131</sup>

Second: The state courts have been divided on the admissibility of illegally obtained evidence. Twenty-six states have excluded evidence obtained through illegal search and seizure, and twenty-

<sup>131</sup> *Weeks v. United States*, 232 U.S. 383 (1914).

four states have admitted evidence so obtained. Alaska and Hawaii were both listed as "exclusionary states" on the basis of decisions entered prior to statehood; neither has considered the point since being admitted as states.

Third: Until 1961 the Supreme Court of the United States refused to hold unconstitutional the introduction in state courts of evidence illegally seized unless the circumstances surrounding the seizure were "so offensive to human dignity" that they "shocked the conscience of the court." An examination of two pre-1961 Supreme Court cases will illustrate this last statement.

In a 1952 decision,<sup>132</sup> law enforcement officers illegally entered the accused's room, saw him swallow two morphine capsules, handcuffed him and took him to a hospital and proceeded to have his stomach pumped. Through this means they recovered the morphine tablets. The question was whether the evidence obtained — the morphine tablets — could be admitted in a state trial at which the accused was the defendant; the admission of this evidence was held unconstitutional and a judgment of conviction reversed.

However, in a 1957 decision, the Court held that taking blood from an unconscious highway collision victim to establish the alcohol level of his blood did not shock the Court sufficiently to warrant a reversal of a conviction of drunken driving subsequently obtained in a state court, where the conviction was based on the evidence illegally obtained.<sup>133</sup> The "shock-the-conscience test," however seemed bound to produce confusion and uncertainty.

In 1961 the Court<sup>134</sup> reversed its previous position that the states were free in their own courts to admit, if they so chose, evidence (illegally) obtained by violation of the federal (and state) prohibitions against searches made and seizures effected in the absence of a proper warrant. No evidence so obtained may now be admitted in a state court trial; it is barred by the federal Fourth Amendment ban on "unreasonable searches and seizures" and the Fourteenth Amendment requirement of due process of law. New York State, for example, has already recognized and applied to a case pending on appeal in its own courts the sweeping scope of this new federal constitutional rule.

This decision illustrates forcefully the persisting tradition of flexible (to a degree) interpretation of constitutional commands couched in broad, general terms, the capacity of a court of last resort to revise its own views in adaptation to changes in the considered judgment of bench, bar and the public. Reversal of position, to be sure, engenders the criticism that in so doing a court ignores

<sup>132</sup> *Rochin v. California*, 342 U.S. 165 (1952).

<sup>133</sup> *Breithaupt v. Abram*, 352 U.S. 432 (1957).

<sup>134</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

the great value of certainty in judge-made law. The painful choice is between rigidity and adaptation by a process other than the cumbersome and time-consuming method of formal amendment of a written constitution.

5. (a) *Is it lawful to search the premises of a suspected person without a warrant and against his wishes? If so, please specify.*

In a 1925 decision the Supreme Court stated:

The search of a private dwelling without a warrant, is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant . . . We think there is no state statute authorizing the search of a house without a warrant . . . Save in certain cases as incident to arrest, there is no sanction in the decisions of the court, federal or state, for the search of a private dwelling house without a warrant . . . Searches are held unlawful notwithstanding facts unquestionably showing probable cause.<sup>135</sup>

There are two exceptions to the rule that it is illegal to search without a warrant. The first is that officers are allowed to search and seize without a search warrant when incident to making a lawful arrest. The reasons have been stated as:

First, in order to protect the arresting officer and to deprive the prisoner of potential means of escape . . . Second, to avoid destruction of evidence by the arrested person.<sup>136</sup>

The exact limitations on the search pursuant to a lawful arrest appear to vary. A five-hour search of a four-room apartment has been held valid; but postponing arrest until the suspect enters the place which the police wish to search invalidates the search.

The second exception is that an automobile or other moveable object may, in some circumstances, be searched without a warrant. If an officer encounters circumstances which would warrant one of reasonable caution to believe that an offense is being committed in his presence, he may search a moveable object. The reason for this rule is stated thus:

The guaranty of freedom from unreasonable searches and seizures has been construed . . . as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper search warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be

<sup>135</sup> *Agnello v. United States*, 269 U.S. 20 (1925).

<sup>136</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950).

quickly moved out of the locality or its jurisdiction in which the warrant must be sought.<sup>137</sup>

Thus, the rule is that premises and property of the accused may not be searched without a search warrant, unless, first, the search is made in conjunction with a lawful arrest or, second, the search is made of a moveable object under the specified circumstances.

(b) *By whom are warrants granted to enable such a search to be carried out?*

In the federal courts the Federal Rules of Criminal Procedure state:

... a search warrant authorized by this rule may be issued by a Judge of the United States or of a state or territorial court of record or by a United States Commissioner within the district wherein the property sought is located.<sup>138</sup>

The state statutes similarly provide for specific judicial officers from whom warrants may be obtained.

(c) *Is it lawful to search premises, with or without warrant, other than those of which the suspected person is the occupier? If so, please specify.*

The answers given above to Question 5(a) are equally applicable to the various circumstances here stated.

Under the Federal Rules of Criminal Procedure, in order to qualify as a "person aggrieved by an unlawful search and seizure..." one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through use of evidence gathered as a consequence of a search or seizure directed at someone else." One claiming a constitutional protection must belong to the "class for whose sake the constitutional protection is given." The "occupier," one actually living in the premises searched, even though not formally the lessee, would seem to have standing to invoke the constitutional protection against fruits of an unlawful search of or seizure from those premises.

(d) *In the case of search warrants, does the law require that the premises to be searched must be specifically indicated?*

<sup>137</sup> Moreland, *op. cit.*, p. 115 (1959).

<sup>138</sup> Rule 41(a).

As stated in an authoritative annotation of the federal Constitution:<sup>139</sup>

The requirement of the Fourth Amendment that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken nothing is left to the discretion of the officer executing the warrant.

The rule of inclusion and exclusion applies to the federal courts.

Accused persons are protected in the state courts against abuses by state enforcement officers by the Fourteenth Amendment, which has been held applicable to searches and seizures.<sup>140</sup> Whether or not the requirements in the Fourth Amendment relating to the specificity of the warrant are carried over into the Fourteenth Amendment and thus made applicable in state court proceedings is unclear.

However, as stated in an authoritative text,<sup>141</sup>

The constitutional provisions relating to search warrants heretofore provide that the warrant must contain a particular description of the place or premises to be searched. Statutes which authorize issuance of such warrants without requiring a compliance with this provision are unconstitutional.

Thus, in both the federal and state systems, the search warrant must specifically designate the area to be searched.

6. (a) *Can a suspected or accused person be compelled to undergo any of the following in order to obtain evidence against him:*
- (i) *medical or other physical examination as, for example, blood test?*

Apparently as a general rule, a suspect may be examined for scars, marks and wounds, and, to some extent, evidence such as blood may be removed from him over his objection.<sup>142</sup> However, this statement must be considered in conjunction with specific cases indicating that the circumstances surrounding the taking of the evidence may be all-important. In states which (commonly) prescribe automatic revocation of automobile driving licenses for refusal to submit to blood, urine or breath tests in infraction of driving charges, such as driving while under the influence of liquor, the suspect is under a practical compulsion to submit to the test.

<sup>139</sup> Constitution, Revised and Edited, 825 (1952).

<sup>140</sup> *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>141</sup> 47 Am. Jur. Sect. 34, p. 521.

<sup>142</sup> *Imbau, Self-Incrimination*, Ch. II, III, XII; Moreland, *op. cit.*, p. 74-78.

(ii) *interrogations under the effect of the truth drug?*

Apparently the issue of enforcing truth serum tests on suspects has not arisen. But some writers feel that, should it arise, their use will be struck down as in violation of the privilege against self-incrimination.

(iii) *interrogations of which answers are tested by mechanical lie detector?*

This question poses two difficulties. It is submitted that if a defendant wants to avoid taking a lie detector test, he can make it worthless by refusing to co-operate. Therefore, it is unnecessary to discuss whether this sort of test can be forced on the accused. And, secondly, the results of these tests are universally made inadmissible as evidence by statutes of the states and federal government, irrespective of the circumstances surrounding the administration of the test.

(vi) *interrogation by any other method where the subject is deprived by artificial means of his free will?*

This question is phrased somewhat in the terms used by the Supreme Court in discussing the admissibility of improperly obtained confessions. Therefore, the earlier general discussion pertaining to admissibility of improperly obtained confessions is applicable here – see this discussion under Clause VII, 1–3, above.

(b) *Can he be compelled to attend an identity parade against his will?*

Answer, yes.

### Clause VIII

1. *Is it provided by the Constitution or other law that criminal trials should in principle take place in public? If not, please indicate the practice which is followed, and in either case whether the public or the press or both are excluded.*

The federal Constitution<sup>143</sup> accords to the accused “in all criminal prosecutions . . . the right to a speedy and public trial by an impartial jury . . .” The constitutions of forty-one states make similar guarantees, with respect to trials in state courts. Statutes and

<sup>143</sup> Amendment VI.

judicial decisions complete the coverage of this protection, in the absence of specific constitutional provision. These guarantees are interpreted to mean that although the court has the right to limit the number of spectators in the interest of health and sanitation, the accused is at the very least entitled to have his friends, relatives and counsel present.

In most states, however, statutes make specific exceptions, to the general rule, for special classes of cases such as divorce (of course a civil, not criminal trial), rape and the like, and, as to minors, the trial of criminal charges against them. The immediate relatives or guardians of minors, however, are not excluded from such trials.

Whether or not the power of the court to exclude spectators from these few classes of cases and persons includes the power to exclude the press is a question upon which not all courts agree. The general rule is that the press may, in these same instances, be excluded.

2. *Does the Constitution or other law admit of circumstances in which*

- (a) *criminal trials and*
- (b) *preliminary judicial investigations can take place in the absence of*
  - (i) *the public;*
  - (ii) *the press?**If so, please specify.*

As Question (a) of Question 2 presents the same matter discussed under Question 1 above, the answers there given need not be repeated here.

As to (b), preliminary judicial investigations, the general rule is that these hearings are open to the public. The same exceptions discussed above as to general trials are applicable here.

3. *If the courts have discretion whether or not to exclude the public or the press or both please indicate the extent of this discretion in law practice. Give examples.*

This question was discussed in the material above.

4. (a) *To what extent is it open to the press to make statements or comments which can affect the outcome of a trial after the accused has been arrested and charged?*

The answer to this question, always difficult to find and to

formulate, lies midway between the conflicting interests of orderly operation of courts, any clear and present danger of disrupting the fair administration of justice on the one hand and freedom of the press as a specific example of the general right of freedom of speech on the other hand. The accused is entitled to trial without prejudice against him created by press charges or stories of guilt; the public is entitled to full disclosure by the press of what occurs in the trial room.

The frank answer is that American courts, unlike those in Great Britain, afford virtually no protection to the accused against inflammatory or prejudiced pre-trial publicity, and that in many areas the police and prosecutors exhibit little or no restraint in so doing, nor does the press in publishing statements of this nature received from the authorities. Some prosecutors, be it said – but all too few – are scrupulously careful not to make pre-trial statements of the assumed guilt of the accused or of adverse testimony expected to be offered. Control, then, depends almost wholly on the sense of self-restraint of prosecutor and police.

Control by the courts stems from the inherent power to punish for contempt an interference with orderly process. In practice "[t]he evil consequences of comment must be extremely serious and the degree of imminence extremely high before utterances can be punished," as the Supreme Court has declared.<sup>144</sup> Thus although the right of the press to comment – beyond strictly factual reporting of charges, defense and trial proceedings – is not unlimited, the scope of permissible comment is broad. When the right to such comment has been abused, by substantial detriment to the accused and to orderly administration, the inherent power of the courts to punish offenders for contempt may be invoked. However, the instances of such punishment sustained upon appeal and review are rare.

There is a substantial and recurrent volume of thoughtful criticism of the lengths to which the less responsible elements of the press resort, with impunity. The press defends such publications by pointing out that many publicity-seeking prosecutors deliberately utter pre-trial statements of the guilt of the accused and other compromising facts and beliefs. Such emanations are indeed "news." Where prosecutors, of more scrupulous and sensitive mold, do refrain from advance disclosure of expected evidence adverse to the accused, the trial can then be held in an atmosphere devoid of prejudicial publicity.

Juries are habitually cautioned by the court not to discuss with anyone a case in which they are sitting and to abstain from reading press reports of the case on trial, but the caution is of necessity a thin shield of protection.

<sup>144</sup> *Bridges v. California*, 314 U.S. 252 (1940).

When it can be shown that residents of the trial district are so pre-conditioned by prejudice that fair trial is improbable, the defendant can, depending on the color of such proof, obtain removal of the trial to another court in a different area. Voir dire examination of prospective jurors permits both attorneys to seek out and exclude those who may have been prejudiced by newspaper articles or other modes of information influence.

(b) *If restrictions of this nature come into operation at a later stage, please indicate when.*

As noted above, the restrictions actually imposed on the press are very minimal in the United States. The restrictions that do exist, however, exist throughout the entire period that the case is pending.

#### Clause IX

1. *After a final conviction or acquittal is it possible for any person to be tried again on the same facts, whether or not for the same offense, in the following situations:*

(a) *by any court after trial by a foreign court?*

No cases dealing directly with this point have been found, but it is believed that this would not be constitutionally barred in a federal court.<sup>145</sup> It would be a rare occurrence in which the same facts would constitute an offense in two countries at the same time. But in the New York State statute the protection is expressly extended to cases of prior conviction or acquittal in "another state, territory or country" – of an act at the same time criminal in New York.

(b) *by a federal court after a state trial?*

The American constitutions, federal and state, provide in slightly varying words that no one shall be "twice put in jeopardy": i.e., subjected to a second trial for "the same offense." The principle is clear; the question is what constitutes the "same offense." A recent Supreme Court decision ruled that the federal government was not precluded by the double jeopardy clause of the Constitution from trying a man for violation of a federal statute following a state court trial under a state statute on the same facts constituting a separate offense.<sup>146</sup>

<sup>145</sup> Cf. *Bartkus v. Illinois*, 359 U.S. 121, 136 (1959).

<sup>146</sup> *Abbate v. United States*, 359 U.S. 187 (1959).

- (c) *by courts of one state after trial in another state (i.e., in a federal system)?*

The answer depends upon the law of each state, constitutional or statutory. In New York State, for example, a local prosecution would be barred – assuming “the same facts” – and irrespective of the names of the offense or sanctions imposed.

- (d) *by a state court after a federal trial?*

A person may be tried in some state courts for violation of a state law after a trial in a federal court on the same facts – but not so in all states – and this situation seldom arises.

A closely similar problem is presented under the sentencing provisions of multiple offender statutes, following conviction and proof in State A of prior conviction(s) in States B (and C) of one or more similar offenses. The conviction in A may be for a “misdemeanor,” but the same offense in B and C may be a “felony”; the sentence imposed in A may therefore be more severe than if the prior conviction(s) had been in A.

- (e) *by courts of one jurisdiction after a trial by another court of a different jurisdiction in the same non-federal system (e.g., England and Scotland in the United Kingdom)?*

This question is not applicable to the United States judicial system.

#### Clause X

1. *Is there a right of appeal to a court or a higher court, as the case may be, against the refusal of bail?*

An authoritative text-writer states the accepted rule thus:

If an arrested person is denied release on bail, or if excessive bail is required, his remedy is to apply to the proper judge or court by writ of habeas corpus. After a hearing, the court will admit him to bail if the offense is bailable, and will fix the amount of bail.<sup>147</sup>

The federal Constitution forbids “excessive bail,” the state constitutions generally guarantee the right to pre-trial bail and specify the offenses charged as to which freedom on bail is not allowable. Appeals to higher courts are generally available when bail is denied.

<sup>147</sup> Orfield, *Criminal Procedure* 107 (1947).

2. (a) *Is there a right of appeal to a higher court against*  
(i) *conviction;*  
(ii) *sentence?*

In both the federal and state judicial systems of the United States there is a right of appeal from conviction of guilt of a criminal offense and from the sentence imposed, except in some states from some minor offenses. This right is grounded in “due process” under the several constitutions and is moreover expressly provided by statute in all jurisdictions. The only known exception lies in the so-called “original jurisdiction” of the Supreme Court (very rarely invoked), when that Court is vested in time of war by the President with *ad hoc* jurisdiction as a military commission or tribunal to try charges of extreme gravity; there being no higher court, there can be no judicial appeal.

- (b) *On what grounds is there such a right of appeal?*

There is an absolute right on any claim, timely asserted, of violation of constitutional right in the indictment or charge, in pre-trial detention or abuse, or in the conduct of the trial; or on a claim that the sentence imposed was harsh and unusual (rarely allowed) or exceeded the statutory prescription applicable to the offense proved. Beyond the constitutional area, the scope of appellate review is governed by the applicable statute, federal or state. An appeal will lie based on alleged “errors of law,” as, for example, in the interpretation by the trial court of the statute under which the indictment was laid, or in improper admission of adverse evidence or exclusion of exculpatory evidence, or in the charge of the court to the jury at the end of the evidentiary sessions. Prejudice of jurors or of immediately surrounding circumstances of the trial, and misconduct of the prosecutor are other examples of claims which will be considered on appellate review.

The “weight” of the evidence and the question whether the evidence was sufficient to establish guilt beyond a reasonable doubt are not generally within the scope of permissible review, as the higher court will not try the case *de novo* and thus substitute itself for the original triers of the facts. However, the appellate court may reverse the conviction – if rarely – on the ground that there was no sufficient evidence of guilt, properly admitted, on which the case should have been allowed to go to the jury for determination of guilt. Conviction without evidence of offense violates due process. The tendency in recent years has been to broaden by statute or rule, rather than to restrict, the scope of review of the evidence and indeed of the entire trial record.

In addition to the formal writs of appeal and review of the

record from the arrest and charges through trial to conviction and sentence – in which all alleged or observed possible errors are considered by the appellate court – there are available the remedies of habeas corpus and, commonly, the writ of “*coram nobis*.” Brief general description of the function and importance of habeas corpus has been given, *ante*, under Clause IV, 1(a). While the scope of habeas corpus varies somewhat from one state to another, depending on the statutory specifications, the writ is in general limited to consideration of possible defects, from the standpoint of due process, in the formal basis of detention, such as the jurisdiction of the court, if any, under whose authority the prisoner is held and the apparent regularity of the proceedings; it does not extend to consideration of facts and circumstances *dehors* the record.

Not infrequently, however, there are other facts, not appearing upon the face of the trial record or other detention proceeding, which may have constituted a denial of due process and for the disclosure of which there should be a procedural remedy. These are, for example, insanity of the defendant at the time of trial; perjured testimony within the knowledge of the prosecutor (however rare) or withholding by the prosecutor of disclosure to the accused of exculpatory testimony; guilty plea by the defendant in reliance upon some promise by the prosecutor, unfulfilled; conditions of danger to life imposed upon the defendant which induced him to file a plea of guilty.

It is apparent that facts of this nature are not within the scope of a normal appellate review or habeas corpus, these being confined to the record of the court and proceedings below and, moreover, these facts may have been discovered only after the trial and normal review have been completed resulting in affirmance of the verdict and judgment. The remedy by which the trial or appellate court may inquire into such extraneous facts is afforded by the ancient common law of *coram nobis*, which is widely available under its original name or modern equivalent.

With the broadening of the scope of review of criminal conviction mentioned above has come a revival of the use of *coram nobis*. This is a procedural post-conviction remedy by which the trial or appellate court can re-examine a judgment for possible violation of due process and for which there is no other available procedural remedy. Although use of the writ under this name has been abolished in the federal courts, under the Federal Rules of Criminal Procedure a motion or independent action based upon facts and circumstances of this nature is available at any time, even after the prescribed time for a motion to set aside the verdict and judgment on any of these grounds or for a regular appeal has expired.

- (c) *If leave to appeal is required in all or any circumstances please specify, and indicate from whom such leave must be obtained. Please indicate also the circumstances in which such leave is granted.*

As stated in (a) and (b) immediately above, there is a right of appeal from conviction and sentence, to the next higher court in the echelon. Whether there is a further right of appeal to the highest court, federal or state, depends upon the applicable statute which specifies the grounds, circumstances and requisite procedure of such further appeal. The statutes generally do not provide for an absolute right of appeal to the highest court, except, commonly, from a conviction of murder. In some jurisdictions this may be accorded either by the intermediate court of appeal or by the highest court, in other areas only by the latter.

Where such further appeal is allowed, it is for a “probable” error at trial which presents a question of constitutional due process, material deviation from prescribed procedure, a first interpretation of a new statute or conflicting interpretations of the same statute or rule of court by lower courts of coequal jurisdiction.

3. *In the event of technical differences between appeal and other remedies please indicate whether judgments may be set aside for*

- (a) *error of law, defeat of jurisdiction, or denial of the essential rights of the defence;*
- (b) *errors of fact which have probably led to the conviction of the accused.*

“Technical differences” may arise, after expiration of the statutory period prescribed for invoking and completing an appeal, from failure to have specified known and available grounds in the appeal as taken or otherwise to have complied therein with procedural requirements. If the “error of law” which was not asserted in the normal appeal procedure appears to be so material that if it had not been committed the trial might have led to acquittal or to conviction of a lesser offence or to a lesser sentence, *habeas corpus* or “extraordinary” remedies other than formal appeal may be invoked to obtain reversal. Want of jurisdiction in the trial court may always be asserted at any time. Assertion of breach of a constitutional right constituting a denial of due process may also be invoked; the federal courts are particularly sensitive to such claims – with respect of course to the federal Constitution.

The only “error of fact” for which judgment may be set aside, after the normal appeal procedure has been exhausted, is belated

discovery of exculpatory evidence of material content. A second review of "weight of the evidence" or whether there was any evidence on which the case should have been permitted to go to the jury can not be obtained by "other remedies."

#### Clause XI

1. Please indicate whether any of the following forms of punishment is lawful and if so to what extent:
  - (a) flogging, whipping or other corporal punishments;
  - (b) mutilation;
  - (c) public exposure for the purpose of inflicting humiliation;
  - (d) period of solitary confinement
    - (i) of indefinite or prolonged duration;
    - (ii) in aggravated conditions (darkness, cramped space, etc.);
  - (e) heavy manual labour by the aged or infirm, or women, or children;
  - (f) physical or psychological torture in any form;
  - (g) involuntary indoctrination by means of psychological torture and/or artificial stimuli;
  - (h) slow forms of execution;
  - (i) total forfeiture of property rights other than for the purpose of affording compensation.
2. In the event of unlawful physical maltreatment of persons serving terms of imprisonment, is machinery available for the ventilation of complaints to an independent authority?

Sentencing in the United States is restricted by the Eighth Amendment to the Constitution which provides that "cruel and unusual punishments" shall not be inflicted. The Amendment is binding on the federal courts. Whether it is a guaranty against state action by being incorporated into the concept "due process" in the Fourteenth Amendment has not yet been decided. The Amendment was "assumed" to be applicable to the state in a 1947 case before the United States Supreme Court, but the decision did not resolve the issue because the Court found that, in any event, the punishment there imposed was not cruel or unusual. There is lower federal court authority for the proposition that the Eighth Amendment restricts federal action only.

In the federal system the constitutional provision against cruel and unusual punishments was adopted to prevent inhuman, barbarous, or torturous punishment; it does not forbid the punishment of imprisonment or death. Yet an excessively long imprisonment dis-

proportionate to the offense might well fall within the constitutional prohibition.

This prohibition stems from the English Bill of Rights of 1688.<sup>148</sup> The earlier cases presented the question of the degree of severity with which a particular offense was punished or the element of cruelty present; a punishment out of all proportion to the offense could bring it within the ban.<sup>149</sup> So may mere conviction of a criminal offense. In *Robinson v. California*<sup>150</sup> the Supreme Court voided the conviction and sentence to imprisonment under a California state statute, as an unconstitutional violation of the prohibition of this Amendment, of a man for addiction to narcotics without proof of purchase, sale, possession or use within that state. Mere addiction was found to be an illness, not a crime, upon which alone the stamp of criminality may not be imposed.

The Eighth Amendment might apply also to imprisonment under unusually harsh conditions, although it would be applied only in an extreme case; for example, the incarceration of a woman prisoner awaiting death in a cell twelve feet long and four feet wide containing a minimum of furniture, was held not cruel and inhuman within the meaning of the amendment.

The restriction of the Eighth Amendment is relative to time and place. Punishments such as mutilation and banishment which were imposed under common law in earlier centuries clearly would not be constitutional in the present day. The standard which is appropriate under the Amendment will be influenced by the moral tone of the community as it exists in 1961.

Women may be sentenced to hard labor notwithstanding the Amendment or its counterpart which is found in some state constitutions.

Corporal punishment once so frequent in common law jurisdictions has generally been abolished in the United States, although the whipping post was employed as recently as March 16, 1940, in the State of Delaware when eight men were subjected to ten lashes each upon the bare back, apparently under recent statutory authority. Mutilation, branding, the use of stocks and pillories, all familiar in the earlier Anglo-American legal tradition, are no longer imposed upon sentence in the United States.

Quite separate issues are presented when harsh punishments are imposed because of breach of prison discipline as opposed to their imposition by way of sentence following a conviction. Prison officials are given a wide latitude in the treatment of prisoners. The

<sup>148</sup> See 3 Catholic Law Rev. 117 (1953).

<sup>149</sup> See *O'Neil v. Vermont*, 144 U.S. 323 (1892); 4 Blackstone, *Commentaries* (Lewis ed. 1897) 25.

<sup>150</sup> *Robinson*, U.S., 8 L. ed. 2d 758, June 25, 1962.

due process clause of Amendment XIV, applicable to action by the states, affords protection only against extreme mistreatment of prisoners (after conviction by a fair trial and sentencing in accordance with law). The same limitation exists under Amendment V with respect to prisoners convicted in a federal court and serving sentences in a federal prison.

There is authority for the proposition that federal courts will not inquire into such matters as the use of solitary confinement, work assignments, etc. Some states have legislative restrictions upon prison administrators in contrast to those which are judicially imposed. For example, in California the Penal Code forbids subjecting prisoners to corporal punishment. The use of solitary confinement is widespread in extreme cases of misconduct in prison. But generally speaking, the intentional infliction of pain for purposes of punishment has disappeared from the prison scene of the United States.

If constitutional or legal rights have been infringed by sentencing authorities or penal administrators, a convicted person may secure release by a writ of habeas corpus. If the right infringed is a federal right, the prisoner who has exhausted the remedies given to him under state law may employ a writ of habeas corpus in a federal court.

#### COMMITTEE IV

### THE JUDICIARY AND THE LEGAL PROFESSION UNDER THE RULE OF LAW

The American judiciary is a more complex institution than that of most other countries. Because of the federal organization of the American government, there are federal and state court systems, of partly overlapping jurisdiction. In the states there are many county and municipal courts of limited or special jurisdiction. Hence, generalizations about methods of selection, qualifications for appointment, tenure and dismissal are bound to be inaccurate and confusing. The following discussion does not attempt to spell out the many local variations that exist.

A dominant characteristic and fundamental principle of American legal-constitutional history is the true "independence" of the judiciary, irrespective of the methods of selecting the judges or of the time-period of their tenure of office. At the very least, that independence means and requires that the judge recognizes no obligation of compensating favor to those responsible for his selection, that he is beyond the covert reach of litigant, counsel and friends, and that he applies the law as he finds it to be even in the teeth of his personal opinion that the law (particularly the command of statute) should be other than it is. Changes in decisional law are determined and announced from time to time by the bench of the high court, practically never by a single trial court judge. On the other hand, no man, merely by donning a judicial robe, divests himself of the intellectual and subconscious accumulations of his past experience. This is why members of the same multi-judge panel often differ, honestly, in the same case upon the interpretation of what the law of the case is. The layman expects certainty in the law, unanimity in its application; frustrated or bewildered at times, he belabors bench, bar and the very institution of the law – yet in the long run and on balance retains his respect for the bench.

Some judges, chiefly of lower courts, are, on occasion, susceptible to suggestions for favors which should not be made or received, but the instances in which a judge is consciously faithless to the high standards are, happily, rare. The American bench does, therefore, command high, general respect and confidence – in its integrity, in its endeavor to do equal justice. As relatively long ago as 1834, De Tocqueville, that astute traveler-student of American government and society, observed that the American aristocracy "occupies the judicial bench and bar." That would be, perhaps, less true today of the bar – given the larger recognition accorded now

than then to some other professions – but the Frenchman's placement of the judiciary remains valid. The aphorism of a "government of laws, not of men" is a badge which may justly be worn by our judges.

The power of judicial review of legislation, to determine whether the statute under examination in a given case before the court is within the command or prohibition of the constitution, is a fearful power, albeit a necessary power in any viable federal system of government. Substantial and recurrent lack of judicial independence would so shake general confidence in the judiciary as to erode the very basis upon which rests acceptance of the judge-made power to declare statutes "unconstitutional" and would endanger the balance between the respective rights of the federal and state governments. This would be, of course, but one of many adverse cross-currents created by any appreciable loss of public belief in the judiciary.

#### Clause I

1. *Are the provisions of law which govern the appointment and tenure of office of the Judiciary to be found in a written Constitution?*

The provisions of law governing the methods of appointment and tenure of office of the federal judiciary are found in the Constitution of the United States of America, and as to the office of the judiciary of the several states, in their constitutions or statutes.

2. *To what extent is it (a) possible and (b) actually known for the Executive to interfere with the Judiciary in the discharge of its functions?*

Generally speaking, it is impossible for the executive to interfere effectively with the judiciary in the discharge of its functions. The federal government, as well as the governments of the several states, is a structure which orders a division of organic functions among three differentiated branches of government – the executive, the legislative and the judicial. The judicial branch of government is separate from and independent of the other two branches. Hence, judicial action within its proper scope is entirely independent of executive or legislative review or other action.

This constitutional structure which is designed, in part, to assure the independence of the judiciary, is reinforced in the federal Constitution by an explicit provision that federal judges shall hold their office during good behavior, which means that a federal judge's

tenure may be ended only by death, resignation, voluntary retirement or impeachment, and by a provision that the compensation of federal judges may not be diminished during their terms of office. These provisions sometimes occur in state constitutions as well, although many states do not provide life tenure for judges nor give assurance of the maintenance of compensation.

On those rare occasions in which the executive has attempted to influence the judiciary in the discharge of its functions, public opinion has supported the independence of the judiciary. The most significant instance in the last 100 years occurred in 1937 when President Roosevelt sought to bring about an increase, by a bill introduced in the Congress, in the number of justices of the Supreme Court, so as to obtain by Presidential appointment a majority of justices who, it was hoped, would be more disposed to sustain, in the event of future challenge, the constitutionality of certain kinds of administration-favored legislation than the then members of that Court had revealed in recent decisions. The number of Supreme Court justices is not specified in the Constitution nor is it within the power of the executive to determine. Although vigorously supported in the federal legislature (by a majority of Senators and Representatives), the bill aroused such strong opposition from outspoken judges, members of the bar and influential segments of lay public opinion that it failed of passage. It should be noted that the bill, even if it had been enacted into law, would not have invalidated any past decision of the Court nor prevented any justice of the Court from voting to decide a future case as he felt the decision should be; nor would it have impaired in any way a future decision by a majority of the justices. The bill would have changed the composition of the Court, by increase in its numbers. Those who did support that bill could contend that the proposal of the President did not constitute "interference" with the judiciary.

Under certain circumstances, it might be possible for the executive to frustrate collaterally the decrees of the judiciary by refusing to enforce its orders. The judicial branch of government does not have the machinery to execute its own orders and relies upon the executive to do so. There are few instances of the executive refusing to implement a judicial decree.

3. *To what extent is it (a) possible and (b) actually known for the legislative to interfere with the judiciary in the discharge of its functions?*

The general comments made above in answer to Question 2 apply equally here. The legislative may, however, influence the judiciary indirectly in certain circumstances. For example, the Constitution of the United States establishes only the Supreme Court

and provides for "such inferior courts as Congress may from time to time ordain and establish" – Article III, Section 1, and Article I, Section 8, which specifically grants to the Congress the power "To constitute tribunals inferior to the Supreme Court." Under the Constitution, Congress not only has the power to establish inferior courts but such courts have no constitutional jurisdiction, their jurisdiction depending upon Congressional enactment. Hence, Congress can extend or limit the jurisdiction of the lower federal courts. It also has the power to extend or limit the so-called "statutory" (i.e., "non-constitutional") jurisdiction of the Supreme Court. Congress cannot, however, confer jurisdiction, either original or appellate, upon the federal courts over cases and controversies that are not within the judicial power of the United States, nor can it dictate the judgments to be rendered by the federal courts. Congress can deprive a federal court of jurisdiction in a case pending before it, except in the case of a matter involving the constitutional jurisdiction of the Supreme Court. However, this right has been exercised with great restraint and any abuse by Congress would undoubtedly create an adverse public reaction. There is further discussion of this topic in the answers to Clause VI, *post*.

Since the legislative alone has the power to appropriate monies for the support of the judicial establishment and for the payment of claims against the government, it could refuse to appropriate the funds necessary to support the courts or refuse to provide funds for the payment of claims adjudged against the state. As in the case of the executive, such collateral legislative frustration of decrees of the courts has been most noticeable by its absence.

With respect to the state judicial systems, the state constitutions usually prescribe specifically the organization of the state's court system, leaving to the legislative a sharply restricted area, particularly with regard to the higher courts or courts of general jurisdiction. Similarly, state constitutions customarily limit the power of the legislative to alter the jurisdiction of the higher courts as specified in detail in the constitution itself or as considered to be inherent under general constitutional grant of judicial power to such courts.

Occasionally a particular court decision arouses sharp public disagreement with the results. Though that decision may not be altered or revoked by subsequent legislative action, nevertheless a statute (or executive regulation) may, within constitutional limitations, change the basic rule applicable to future cases and controversies falling within the same context. Such a change, however, cannot fairly be deemed "interference."

The Congress did in effect intervene, in March 1868, in a case pending on appeal before the Supreme Court. One McCardle had been arrested and tried for a wartime offense before a military commission functioning under Presidential mandate in an area which

had lately been in armed revolt in the "Civil War" of 1861–65. McCardle made application for a writ of habeas corpus and upon denial appealed to the Supreme Court which heard argument. While the case was *sub judice*, Congress passed, over veto by the President, a bill revoking the existing statutory appellate jurisdiction of the Court invoked by the petitioner in the case; the new Act also provided specifically that the Court should have no jurisdiction over pending or future appeals. The Court first postponed final action on the case, then held that it had no power of decision, by reason of the revoking Act.

This action by the federal legislature is unique in the relations between the legislature and judicial branches of the federal government. The Court had bowed to a clear abuse of Congressional power and to the humiliation thus inflicted.

Attempts have been made within very recent years by the legislative bodies of a few Southern states and municipalities to nullify the effects of Supreme Court and lower federal court decisions in applying the "equal protection of the laws" clause in the Fourteenth Amendment to rising demands of Negro citizens. These courts have now consistently held since 1954 that it is no longer lawful, under that clause, to require racial segregation (complete physical separation) of whites and Negroes in public schools, interstate transportation and the use of other tax-supported public facilities. Such segregation has been the near-universal practice in the Southern states, commonly *de facto* in housing and in some communities as to public schools in many other localities and areas outside the "South." Both the problem and the attack upon it are national in scope. These court decisions have given rise to strong criticism in Southern states, taking form in ingeniously evasive state legislation and local ordinances too detailed to describe here. The federal courts, at all levels, have stood firm, generally by declaring such legislative acts to be invalid.

One or two state legislative bodies have in recent years adopted resolutions denouncing the Court for "usurpation" of power and demanding formal impeachment of the participating justices for their opinions written in explanation of decisions striking down segregation practices and acts. Another state body recommended impeachment for a Supreme Court decision which affirmed federal ownership, against state claim, of lands rich in oil deposits. Sporadic emotional outbursts of this kind have not reached the proportions of effective legislative interference and have borne no fruit in general support or actual intimidation of the courts.

The theme of alleged usurpation of power is voiced sincerely and temperately by those who believe the area of tax-supported public education to be reserved under the Constitution to the exclusive jurisdiction of the states; and that on this contested premise

the Court has, unlawfully, in effect amended the Constitution by the judicial fiat of extending federal constitutional rules and doctrines into the state field. The Court at large and some individual justices by name have been denounced, less temperately, by others for decisions and opinions upholding, in new context, other forms of civil liberties. The criticisms and attacks on these latter grounds have not constituted attempts at any kind of interference with the judiciary and are therefore only tangential to the present inquiry.

The allusion here made to criticism of courts, particularly the Supreme Court, should not be interpreted to imply that in the American scene judges are deemed to be *per se* beyond the pale of critical disagreement, by the informed, for their opinions or their judicial acts. The privilege of this form of dissent by members of the bar and the public is frequently exercised and universally recognized as fully appropriate and useful. Since 1803, in fact, specific Court decisions – singly or in related groups – have been under sharp attack during six periods, including the present. The famous decision of the Supreme Court in 1803, *Marbury v. Madison*,<sup>1</sup> in which Chief Justice John Marshall, speaking for the Court, gave utterance to the doctrine of the right of the judiciary to rule upon the constitutionality of a federal statute, touched off a wave of critical protest against this assumption of power by the judicial branch.<sup>2</sup>

4. *Mention any other rules of law or practice which contribute towards an independent judiciary.*

The independence of the American judiciary is usually ascribed to the strict separation of powers upon which the American form of constitutional government is based, tenure for judges holding office for life or for fixed terms or years and constitutional guarantees of undiminished judicial compensation. However, perhaps of even greater importance is the deeply rooted public respect for the judiciary in the exercise of its constitutional function, as noted in the preceding pages. This is based upon the public's awareness of the historic role of the American courts as derived from the great tradition of the English common law courts, nourished and strengthened by the American experience in the colonial period before 1776 and in the developing period immediately after 1800.

5. *Is there any generally accepted view in your country, and if so what, on the extent to which the judge should interpret the law with flexibility?*

<sup>1</sup> 1 Cranch (5 U.S.) 137.

<sup>2</sup> Swisher, *The Supreme Court in Modern Role*, 12, 148, 159 (1958).

There is probably no generally accepted view among the lay public as to the extent to which a judge should interpret the law "with flexibility." To the extent that the general public thinks about the law, it is probably of the opinion that the law is an absolute statement which the judge finds and invariably applies, or should apply, to the case before him.

Among the members of the learned professions, in the universities and in the courts, there are, however, certain generally accepted principles of judicial interpretation. At the outset it may be observed that, to the extent that American jurisprudence is based upon common law, the judge must be able to apply the law with sufficient flexibility to adapt it to new and emerging situations. Mr. Justice Oliver Wendell Holmes said, in a justly famous remark, that the life of the law is not "logic but experience." The common law has provided a viable basis for reconciling conflicting interests only because judicial interpretation and application of accepted principles have been flexible. It is no overstatement to say that the ability to change to meet new problems may be called the heart of the common law.

It is commonly accepted that constitutions should be (as they are in fact) more flexibly interpreted than statutes, largely because constitutions are written in more general terms, perhaps in part because they cannot be readily amended. The very nature of a constitution as the structure of intended permanent governance requires its major statements of basic rules to be couched in terms of general principles. These statements – of "unreasonable search and seizure," "due process," "equal protection of the laws" – offer, by original intention and the accepted course of a century and more of our judicial history, greater room for "interpretation" than does the specificity of implementing statutes. These are born of the demands of the year and day; they can be far more readily amended. The difference in judicial approach to interpretation stems more from the contrasting nature of the two kinds of instruments than from an initial and formal doctrine of "flexibility" or the denial of it.

Penal statutes are construed "strictly," to protect the accused, with rigid adherence to precedent; remedial statutes are construed "liberally," to give effect to the declared purpose. These expressions, however commonly used by commentators, are not cutting tools of precise meaning; they can, at best, be used sparingly and with great caution.<sup>3</sup>

There is, however, recurrent criticism of the Supreme Court for failing to adhere more frequently than it has to the doctrine of *stare decisis* in matters of constitutional law. This is, probably, a

<sup>3</sup> Hall, *Strict or Liberal Construction*, 48 Harvard Law Review, 748, 765-766 (1935).

minority view and there does not appear to be great prospect of major impact upon that Court.

## Clause II

### 1. *What are the qualifications for appointment to the Judiciary?*

As a general proposition, apart from any constitutional or statutory requirements, there are a number of specific qualities which it may fairly be said are generally looked for in prospective members of the American judiciary and particularly for the more important courts. These are the qualities of character, mind and temperament which are associated in the public mind with members of the judicial branch, and include honesty and lack of bias, intelligence and objectivity and judicial temperament.

*Federal judiciary:* The only statutory qualification of importance for the appointment of federal judges relates to residence requirements. Judges of the district courts are, for example, required to reside in the district for which they are appointed.

*State judiciary:* In most states, to be qualified for appointment for a court of general jurisdiction, the appointee must be "learned in the law" or "an attorney and counselor of . . . [the] state." See, for example, Article VI, Section 19 of the Constitution of the State of New York. There may also be other qualifications for state judges or for judges of lower courts of political subdivisions of states, such as age, citizenship and residence. Other states require the appointee to be of good character, a qualified voter or of sober manner.

#### (a) *By whom are judicial appointments made?*

*Federal judiciary:* The President of the United States, pursuant to constitutional or statutory authority, appoints all members of the federal judiciary "by and with the advice and consent of the Senate."

*State judiciary:* In most states, judges of courts of general jurisdiction are not appointed but elected. In a few states, judges are appointed either by the governor alone or by the governor subject to confirmation by his council or the state senate. In two states, Vermont and South Carolina, judges are elected by the legislature.

The Constitution of Missouri prescribes that when a judicial vacancy occurs, the governor shall fill this by appointing one of three persons nominated by a small *ad hoc* non-partisan judicial commission composed of a senior judge, members of the bar selected by the bar at large, and laymen selected by the governor. The judge so appointed holds office until the next general election (after a

minimum period of twelve months); if he desires to continue in office, his name goes on the ballot – and no other name – for election to the full term of years prescribed by the state constitution for that particular court. If at the expiration of that term he desires to succeed himself, his name alone goes before the voters for re-election. If he declines to stand for election by popular vote or is rejected by such vote, his successor is then selected and appointed by the same process.

Since adoption of this so-called Plan in 1940, its nominative and appointive features had been invoked on forty-three occasions up to February 1958, and no judge so appointed had been rejected in any election or repudiated in any bar association poll. The Plan has removed the selection of Missouri state court judges from the area of partisan politics which commonly surrounds or influences the selection of candidates for judicial office in most of the states (where judges are elected, not appointed). The result in Missouri has been that more better qualified men move to the bench than under the old system of partisan-political selection and popular candidacy, and the state judiciary enjoys, deservedly, a larger measure of general confidence in its ability, integrity and independence.

In California the principal judges are appointed by the governor, subject to confirmation by a judicial commission, and at the end of twelve years stand for re-election for another term.

The Missouri Plan has attracted wide attention, has been adopted in a few other states and is under consideration elsewhere. It has the support of the American Bar Association.

#### (b) *From what sources does the appointing person or organ either customarily or as a result of provisions of law, obtain advice on appointments to the Judiciary?*

*Federal judiciary:* In making appointments to the federal judiciary, the President receives advice from a number of sources, including members of the Senate, the Attorney General of the United States, and bar associations. Before a nomination is made by the President, each nominee, since 1953, is investigated by the American Bar Association's Standing Committee on the Judiciary, which reports to the Attorney General and to the Senate Judiciary Committee with a recommendation for or against confirmation. Adverse recommendations are almost universally followed by the President.

*State judiciary:* In the "appointment" of state judges, the views of the local bar, particularly as expressed through local bar associations, are very important. In states where the judges are elected, political considerations are, of course, significant, but the local bar is usually consulted and in many states considers the qualifications

of each candidate and publicly expresses itself on the question of whether the candidate is qualified for the office.

(c) *Is there any evidence to indicate that political considerations influence appointments to the Judiciary?*

Political considerations, of political party membership, often influence appointments to the federal bench and nominating selections of candidates for the state judiciary, but are often not conclusive. In many instances, the appointment will be made from a member of the President's or governor's own political party, but there have been numerous occasions in which members of other political parties have been selected. Such considerations do not mean that the selection is necessarily, or indeed commonly, bad, that the new judge or candidate is not qualified for judicial service or that after appointment or popular election his decisions will be pleasing to the selecting power. Tenure of office, the impact of independence of the judiciary and long service of itself all tend strongly to minimize any original allegiance to "party."

Even where judges are elected, it is not uncommon for candidates of outstanding reputation to be backed by all of the major political parties; and after an elected judge has completed his term of office with generally satisfactory service, accepted practice calls for his nomination and support for a succeeding term by all political parties. This tends to make even elected judges appointees for life by re-election for successive periods.

### Clause III

1. *In what circumstances is it possible to dismiss a judge?*

*Federal judiciary:* The Constitution of the United States provides that federal judges "shall hold their offices during good behavior." Hence, all federal judges have life tenure and can only be dismissed from office for misconduct which constitutes bad behavior.

*State judiciary:* Generally speaking, the circumstances under which a state judge may be dismissed from office are found in the state's constitution or statutes. These circumstances vary widely in definition and include legal cause, misconduct, abandonment of the office, intemperance, incapacity or incompetence, engaging in a prohibited business or occupation, acceptance of inconsistent employment, and a lack of one or more of the qualifications required to hold the office, such as a minimum period of legal practice or meeting a residence requirement.

2. *Examples of the grounds which have been regarded as justification for removal:*

*Federal judiciary:* The United States Supreme Court said in 1871:

If in the exercise of the powers with which... [judges of superior courts of record] are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to account by impeachment and suspended or removed from office....

Usually the bad conduct which would constitute grounds for removal will relate to the judge's conduct of his office. Generally a judge's private life or his expression of opinion on political questions would not constitute grounds for impeachment.

*State judiciary:* The intermediate appellate court of New York State defined the grounds for removal of a judge for cause as:

... corruption, general neglect of duty, *delinquency affecting general character and fitness for office*, acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigants' rights, and acts justifying 'the finding that future retention of office is inconsistent with fair and proper administration of justice.

Errors of judgment or mistake based on errors of judgment, however, if made without a corrupt or improper motive, do not constitute grounds for removal.

3. *Is it in practice possible for a judge who is dismissed to enter upon or resume practice as a lawyer?*

A judge who has been dismissed may, if he is and remains a member of the bar, enter upon or resume practice as a lawyer. Even if he were removed from office by impeachment, he would not be *per se* disqualified from the practice of law. Disqualification would follow only upon his disbarment. The proceeding to disbar the removed judge could consider the reasons for his impeachment and his subsequent disbarment might be based on the same facts which led to his impeachment.

### Clause IV

1. *Does the procedure for the removal of a judge provide for removal by a judicial tribunal, and if so, of what personnel is it composed?*

*Federal judiciary:* The federal Constitution provides that a judge may only be removed by impeachment. The procedure is laid down in the Constitution. The House of Representatives institutes the impeachment proceedings, usually by demand from a member that a committee be appointed to investigate the official conduct of a certain person. After the investigation by the committee, the committee's report, if adverse and if adopted, constitutes the actual impeachment, which is analogous to a criminal indictment. The impeachment charge is then sent by the House to the Senate, where the person impeached is tried. The House conducts the prosecution through managers appointed for the task. Conviction requires the concurrence of two-thirds of the members of the Senate present. The judgment on impeachment may not extend further than the removal from office and disqualification from holding any government office in the future. The individual convicted is also liable to criminal indictment, trial and punishment according to law.

It is significant to note that the Senate of the United States has sat as a court of impeachment in only nine cases since 1789 involving members of the judiciary of all the federal courts. In four of these cases the accused judge was acquitted, in four he was convicted and removed from office, and in one he resigned before a decision was reached.

*State judiciary:* State judges may be removed in a great variety of ways, some of which require removal by a judicial tribunal and others of which do not. Examples of the latter methods of removal include recall, request by the legislature to the governor and a joint resolution by both houses of the legislature. Where the removal requires action by a judicial tribunal, this body is composed of judges sitting either in their usual capacity or as members of a specially constituted bench.

2. *Whether or not judges are removed by judicial process, is the removal subject to judicial review?*

*Federal judiciary:* There is no judicial review of a conviction of impeachment by the Senate.

*State judiciary:* Where the removal of a state judge takes place pursuant to judicial process, state constitutions and statutes sometimes provide for judicial review. Generally speaking, if a non-judicial process for removal is provided, the removal is not subject to judicial review.

3. *In either the removal or review procedure or both are there rights available to a judge who wishes to defend himself?*

*Federal judiciary:* A judge who is being impeached is entitled

to notice of the charges against him and an opportunity to be heard. Customarily the House, before sending an impeachment to the Senate for trial, would receive evidence bearing on the charges made against the judge sought to be impeached. In the Senate, an opportunity is afforded for the judge to present his defense.

*State judiciary:* In general, the state procedure for impeachment is similar to the federal procedure and the same rights are available to a judge to defend himself. If judicial process is used to remove a judge, he is entitled to the usual rights of defense, including the right to counsel, confrontation and cross-examination of the witnesses against him.

#### Clause V

1. *Does the procedure for the removal of a member of an administrative tribunal provide for removal by a judicial tribunal and, if so, of what personnel is it composed?*

*Federal administrative tribunals:* The legislation creating federal administrative tribunals customarily contains language to the effect that the members of such tribunals "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." This removal power of the President is not unlimited and is subject to judicial review. In the leading case, *Humphrey's Executor v. United States*, 395 U.S. 602, 629 (1935), the Supreme Court said:

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

A member of a federal administrative tribunal can judicially challenge any attempt on the part of the executive to remove him from office. No particular judicial tribunal is provided to consider such challenges and the case would be handled by the general court system.

*State administrative tribunals:* State constitutions or statutes may provide for a variety of ways in which members of administrative tribunals may be removed. Some of these procedures are judi-

cial in nature and are prosecuted before the regular courts; others do not require any judicial proceedings.

2. *Whether or not members of administrative tribunals are removed by judicial process, is the removal subject to judicial review?*

Members of federal administrative tribunals can secure judicial review of their removal through the judicial process. In some states and in some circumstances such review can be obtained by members of state administrative tribunals.

3. *What rights are available to a member of an administrative tribunal who wishes to defend himself?*

Generally speaking, a member of an administrative tribunal has the same rights available for his defense, where the removal or the review procedure is judicial, as a party to other types of litigation.

[NOTE: Questions 1(b) and 1(c) seem to have no application to the United States.]

#### Clause VI

1. *Assuming that the Legislature is competent to fix the general structure of courts, and to fix in principle the organization of judicial business, is there any reason to feel that in your country this power can be or has been used to interfere with judicial independence?*

The constitutional structure of the federal government and of the several states is one of a tripartite separation of powers among the executive, the legislative and the judicial branches. From this principle it follows that it is improper for one branch to interfere with matters which are within the jurisdiction of another branch. Although the line of demarcation between the executive and the legislative is sometimes unclear, the boundaries between the legislative and the judicial are clearly marked. It is commonly accepted that the legislative must recognize the independence of the judicial. Any attempted interference by the legislative in a pending case would be viewed by the bar and by the general public with the greatest concern and, as a practical matter, this does not occur. The instance mentioned in the answer to Question 2 under Clause II above of Congress declining to enact the bill proposed at the

request of the executive to increase the number of justices of the Supreme Court is a forceful illustration of the nearly universal refusal of American legislatures to attempt to interfere with judicial independence by exercise of whatever power the legislature may possess to fix the general structure of the courts or to prescribe the organization of judicial business. The question (much discussed) of the extent to which the courts should be made free to prescribe the rules of procedure (commonly called "codes"), instead of leaving that power with the legislatures, which are generally loathe to surrender this, lies beyond the apparent scope of this inquiry.

2. *Is there any rule of the Constitution, statute or rule of practice which ensures that legislative power shall not be exercised to affect the course of a pending or impending case in the courts? If so, please specify.*

There is no rule which automatically "ensures" that legislative power shall not be exercised to affect the course of a pending or impending case in the courts. As stated in the answer to Question 1 of this Clause, the independence of the judiciary is a basic premise of our federal and state constitutions. There are, in addition, certain specific limitations upon legislative power contained in the Constitution of the United States. Article I, Section 9, provides that in criminal matters no *ex post facto* law shall be passed and this prohibition, by virtue of Article I, Section 10, also applies to the several states. Therefore, the legislature is constitutionally prohibited from rendering criminal those acts which at the time of commission were not criminal. This restriction, however, does not apply to retroactive legislation on civil matters. Subject to the requirements of due process of law, retroactive legislation in the civil field is permissible, if relatively infrequent.

There are other ways in which the legislature can influence the course of pending or impending cases. By repealing a criminal statute, the legislature can prevent impending prosecutions and, in effect, free defendants from pending prosecutions. By limiting or abrogating the appellate jurisdiction of the Supreme Court of the United States and of other federal appellate courts, Congress could, within certain limits, prevent the appeal of lower court decisions; but Congress has refrained from so doing. It is doubtful that the legislature could constitutionally destroy the right of appeal of a criminal conviction.

3. (a) *To what extent, if at all, is it possible for the legislative power referred to in Question 1 to be delegated to any other organ of government? If so, please specify.*

Generally speaking, the legislative power referred to in Question 1 of this Clause, to make rules covering practice before various courts, has been delegated to the courts themselves. For example, the Congress of the United States has given the Supreme Court of the United States the power to prescribe for the district courts general rules covering pleadings, practice and procedure in civil and criminal cases. Many states have followed this example. In New York State, the Judiciary Law permits a majority of the Justices of the Appellate Division (the intermediate appellate courts) to adopt, amend or rescind any rule of civil practice. The same law permits the Court of Appeals (the highest appellate court of the State of New York) to make rules concerning the admission to practice of attorneys and counselors at law in all courts of record of the State. Moreover, both the Supreme Court of the United States and the Court of Appeals of the State of New York have been granted by the legislatures of the United States and the State of New York, respectively, the power to make rules regarding the conduct of their own business. The extent of such rule-making delegation varies from state to state.

- (b) *If such delegation is possible, is it possible for this power to be used for the purposes referred to in Questions 1 and 2 of this Clause? If this has actually happened, please give examples.*

In those jurisdictions where the delegation has been made to the courts themselves, such power cannot be used to interfere with judicial independence. In certain situations, it is possible for the courts themselves to make changes in procedure which will affect either pending or impending cases.

## Clause VII

The American legal profession is, like the judiciary, a complex institution. The magnitude and difficulty of many of the problems which it must handle have led in many large cities to the practice of law by firms composed of a substantial number of lawyers — some of the larger firms have more than 100 partners and associates. Although the American bar is not divided, as is the English, into barristers and solicitors, there are a number of practice specialties such as, for example, tax, admiralty, anti-trust, patents, etc. The American bar contains a broad spectrum of practice ranging from the country lawyer who serves all the legal needs of his community to the specialist in the great urban center who practices only within a narrow legal area. These differences do not, however, affect the

fundamental obligations of the lawyer as an officer of the court; the Canons of Professional Ethics apply to all members of the profession. The following discussion, while it does not attempt to consider local variations in detail, is generally applicable to the whole of the American legal profession.

- (a) *To what extent is the legal profession as an organized body free to manage its own affairs?*

The legal profession is, in a large measure, free to manage its own affairs. Members of the bar are "officers of the court" and the courts necessarily exercise a general supervision. However, the bar associations (organizations of members of the bar on a national, state or local basis) carry much of the real responsibility for formulating the rules of ethical conduct which govern the legal profession and, under delegation from the courts, the initiative to institute disciplinary proceedings against members of the bar who are alleged to have acted improperly. It is usual for bar associations to have a committee which is concerned with answering inquiries as to whether proposed conduct violates the Canons of Professional Ethics and to have another committee which hears complaints against members of the bar, investigates those complaints and makes recommendations to the courts for disciplinary action. The bar association concerned may also present the case in court for disciplinary action against a member of the bar.

In a growing number of states the bar is "integrated"; that is, all those admitted to practice must join an organization of members of the bar which is created by statute. In these states most of the disciplinary jurisdiction lies with the organization rather than with the purely voluntary "bar associations."

- (b) *What other bodies exercise or share supervisory powers over the legal profession?*

In the United States the courts have inherent power to control and supervise the practice of law both in and out of court, and to discipline the members of the profession. This power has long been recognized by the legislative and executive branches of the government. The practice of law is a profession affected with public interest and for that reason it is also recognized that the legislature may prescribe minimum requirements for the admission of lawyers to practice and for their discipline. The courts hold that in so doing the legislature acts in aid of the judiciary, not in denial or exclusion of the basic constitutional power of the judiciary to admit, deny, disbar, suspend or censure. The executive has no supervisory power over the bar.

In the absence of a statute specifying causes for disbarment, the courts themselves may exercise over lawyers the disciplinary power. The legislature does not assume to exercise its supplementary power by enactments addressed to any specific individual, nor except rarely to admit a candidate to practice or to prescribe the technical qualifications. Actual admission is generally by order of the highest court of the state. Some administrative agencies make their own rules governing admission to practice before them.

#### Clause VIII

1. *Apart from cases where there may be a conflict between a lawyer's personal interests and his professional duty, is there any legal or practical obstacle to his freedom to accept any case which is offered to him?*

Assuming that the case involves a matter within the area in which the lawyer is admitted to practice and that it is one with respect to which he feels himself competent, there still remain other obstacles to his complete freedom to accept any case offered to him. The Canons of Professional Ethics provide that it is unprofessional to represent conflicting interests. Therefore, the fact that a lawyer has acted in the past or is presently acting for a client whose interests conflict with that of the other prospective client in the case offered to him may prevent him from undertaking the new representation. There are certain statutory restrictions upon lawyers who have been in governmental service undertaking to represent clients against the government for certain specified periods of time after the lawyer has left that service. There is a practical obstacle to the representation of the so-called "unpopular causes," an obstacle which the lawyer of necessity considers. It should be emphasized, however, that many distinguished lawyers have undertaken to represent "unpopular causes" without regard to the effect that such representation might have on their practice and that many bar associations have made sincere and fully effective efforts to secure competent representation in all unpopular causes. Finally, every lawyer has a right to decline employment and on his own responsibility to decide what employment he will accept as counsel, what causes he will bring into court as cases for plaintiffs, and what cases he will contest in court for defendants. Thus, the nature of the case and the propriety of the potential client's conduct should be considered by the lawyer before accepting the case.

#### Clause IX

1. *Are there any rules of law or practice whereby, apart from the*

*reservation in Clause VIII, a lawyer is under an obligation to accept any case which is offered to him?*

The basic rule is that the lawyer is free to accept or decline professional employment, subject to one important exception. If appointed by the court to represent a party in a case then pending, the lawyer is, in the absence of overwhelming personal reasons of compelling nature, bound to accept that appointment. Also, if he is requested by the court to represent an indigent person unable to pay the customary fee, the lawyer feels bound to accede to that request.

2. *Have there been any cases in your country when a member of the legal profession has in any way been victimized as a result of his undertaking a case in which an unpopular person or cause was involved?*

As a general matter, there probably have not been many such instances in the United States; but it is impossible to make any universal or dogmatic statement, for knowledge of such occurrences would tend to be narrowly confined. Fear of loss of status and of clientele does persuade many white lawyers in Southern state communities to refuse to represent Negroes in matters involving civil liberties.

3. *In what circumstances is it permissible to relinquish a case other than at the wish of the client?*

A lawyer has the right to withdraw from employment, once accepted, only for good cause. Even the desire or consent of his client is not always sufficient. The lawyer must determine whether good cause is present and must not relinquish his unfinished tasks to the detriment of his client except for reasons of honor or self-respect. If the representation is in a case already before the court, the lawyer should obtain the consent of the court to withdraw, upon full disclosure of the compelling reasons, and many jurisdictions require the lawyer to obtain such formal consent.

4. *To what extent is a lawyer free from civil or criminal liability in respect of*

*(a) allegations of fact made in court or in connection with professional acts which are preparatory to court action?*

Even when there is actual malice, statements made by judges, counsel, parties and witnesses in the course of a judicial proceeding

are absolutely privileged from prosecution for libel or slander so long as the statements are pertinent to the issues. However, allegations of purported facts known to be false or misleading will subject the lawyer to disciplinary action.

- (b) *arguments of law which are or are considered by the Executive or Legislative to be contrary to the public interest?*

We know of no instance in which the executive or legislative have attempted to limit or censure arguments of law on the ground that they are contrary to the public interest. Any such effort would probably violate the due process clause of the Constitution.

5. (a) *To what extent may a lawyer be prevented from making allegations of fact which may be unpopular or embarrassing by*

- (i) *the court?*

If allegations of fact are not pertinent to actionable issues raised in good faith, they can be subject to action of libel or slander or they might be punished by the judge as contempt of court.

- (ii) *the Executive?*

If made in connection with a court proceeding, any action by the executive to prevent the making of such allegations of fact would probably be unconstitutional. We do not know of any such attempts at executive interference.

- (iii) *the Legislative?*

If made in connection with a court proceeding, any action by the legislative to prevent the making of such allegations of fact would probably be unconstitutional. There are likewise no such instances known to us.

#### Clause X

1. *Is it in principle possible to obtain legal advice and if necessary legal representation irrespective of means in connection with*

- (a) *criminal causes?*

A defendant in a criminal cause in a federal court is entitled to counsel and, irrespective of his means, must be furnished with counsel – who serve without compensation from public funds. All defendants in capital causes tried by state courts are entitled to counsel irrespective of their means; modest compensation, widely varying in amount, is provided from public funds. There exists great diversity in statutory provisions by the states in non-capital cases and, in some states, a person can today be convicted of a non-capital offense in a trial in which, because of lack of means, he has been forced to defend himself. The concept of the “right to counsel” and the practical means whereby the indigent accused does in fact obtain trial counsel or legal advice are in the process of expanding evolution within the bar, the courts and the legislatures.

- (b) *civil causes?*

There is no constitutional requirement that legal representation be furnished to persons involved in civil causes. However, the bar recognizes the desirability of counsel being provided for the indigent in civil causes. Through legal aid societies and bar associations, such representation is widely available, chiefly in the larger urban centers.

2. *If so, what restrictions are imposed on the right to free or financially-assisted legal advice or representation?*

The principal restriction is a means test which limits such free legal advice or representation to persons having less than certain minimum means. The precise standards applied vary from one jurisdiction to another. If a person is not entitled to free legal advice or representation, he will be referred in many jurisdictions to a panel of lawyers who are prepared to give the requested advice at very modest fees.

3. (a) *To what extent are members of the legal profession prepared to offer their services without fee or at a lower fee in cases where any of the following are threatened:*

- (i) *life;*
- (ii) *liberty;*
- (iii) *property;*
- (iv) *reputation?*

Generally speaking, unless the factors considered in the answers to Questions 1 and 2 of Clause X are present, members of the legal profession are not prepared to offer their services without fee or at a lower fee in cases involving property. Depending upon a specific

situation, members of the profession would be prepared, within the practical limits imposed upon them by the necessities of their practice, to offer their services without fee or at lower fee in cases involving life, liberty or reputation. As members of the bar and officers of the court, they are under an obligation to represent indigent defendants in criminal causes when appointed by the court to do so, irrespective of compensation, whether little or none at all.

- (b) *If there is a scheme of free and assisted legal aid or advice in operation in your country, does experience show that lawyers of the requisite standing and experience are prepared to participate?*

There are various schemes of free and assisted legal aid or advice in operation in the United States. With respect to civil causes, such advice is usually given by full-time staff members of legal aid societies or through bar association panels. Generally speaking, the quality of service rendered is high.

The situation with respect to criminal causes is more complex. There are four principal ways in which such service is given to indigent defendants in criminal causes: (1) the court-assigned counsel, (2) the voluntary defender paid from private charitable sources, (3) the public defender of publicly appointed and publicly paid counsel, and (4) the mixed private-public system. With respect to the assigned-counsel system, there is substantial evidence that it does not offer representation which is uniformly experienced, competent and zealous; moreover, the appointments are commonly made too late for effective preparation in non-capital cases, and there is little or no provision of public funds for adequate investigation expenses or for representation in appeals from conviction. Voluntary-defender units (legal aid or voluntary-defender associations) and public defenders generally provide a higher quality of representation, more prompt and more extended than that given by court-assigned counsel. There is some evidence that the quality of the representation afforded by voluntary and public defenders is better than that obtained by many defendants in criminal cases who retain their own counsel. Given sufficient financial backing, it seems proven that the voluntary and public defenders can provide representation which is experienced, timely, competent and zealous. The mixed private-public system, by which public funds are used to support voluntary-defender organizations, has not been widely developed. It should afford the same quality of representation as by voluntary and public defenders and should provide an effective way of financing the costs of operating a competent and practical method of defending indigent defendants in criminal causes.

\* \* \*

## BIBLIOGRAPHY

Apart from the thousands and thousands of case decisions in the federal and state courts, which in their respective high courts are the final authority of what the law is, there are many texts, general and special, which are illuminating. Judicial opinions often cite the works of accepted text writers and the more specialized articles published in the monthly "Law Reviews" of a score or more of the law "schools" of high repute. The list of texts which follows is limited and selective, to stimulate the professional interest of a foreign reader in lieu of stifling that interest under a mass of volumes. These are grouped under the principal topics here treated and the formal Sections of the Survey.

### A. Jurisprudence and the Growth of American Law:

Pound, Roscoe, *Jurisprudence* (West Publishing Co., 5 vols., 1959).

Tunc, André et Suzanne, *Le Droit des Etats-Unis d'Amérique* (Paris, Librairie Dalloz, 1955).

### B. Concepts of the Rule of Law Embedded in Constitutional Liberties:

Chafee, Zechariah, Jr., *Three Human Rights in the Constitution of 1787* (Lawrence, University of Kansas Press, 1956).

Hand, Learned, *The Bill of Rights* (Cambridge, Harvard University Press, 1958).

Corwin, Edward S., *The Constitution and What It Means Today* (Princeton, Princeton University Press; 12th ed., 1958).

Sutherland, Arthur E., Editor, *Government Under Law: A Conference* (Cambridge, Harvard University Press, 1956).

### C. The Supreme Court and Judicial Process:

Cardozo, Benjamin N., *The Nature of the Judicial Process* (Yale University Press, 1928).

Cahn, Edmond, Editor, *Supreme Court and Supreme Law* (Bloomington, Indiana University Press, 1954).

Konvitz, Milton R., *Bill of Rights Reader: Leading Constitutional Cases* (Cornell University Press, 1954).

Jackson, Robert H., *The Supreme Court in the American System of Government* (Harvard University Press, 1955).

Swisher, Carl Brent, *The Supreme Court in Modern Role* (New York University Press, 1958).

Tunc, André et Suzanne, *Le Système Constitutionnel des Etats-Unis d'Amérique* (Paris, Editions Donat Montchrestien, 2 vols., 1954).

Warren, Charles, *The Supreme Court in United States History* (Little Brown and Co., 2 vols., 1935).

#### **D. The Legislative and the Law:**

Chamberlain, Joseph P., *Legislative Processes National & State* (New York and London, D. Appleton-Century Co., 1936).

Griffith, Ernest S., *Congress, Its Contemporary Role* (New York, New York University Press; 2nd. ed., 1956).

Tompkins, Dorothy C., *Investigating Procedures of Congressional Committees - A Bibliography* (Berkeley, Bureau of Public Administration - University of California, 1954).

#### **E. The Executive and the Law:**

Cooper, Frank E., *Administrative Agencies and the Courts* (Ann Arbor, University of Michigan Law School, 1951).

Davis, Kenneth Culp, *Administrative Law Treatise* (West Publishing Co., 3 vols., 1958).

Gellhorn, Walter, *Federal Administrative Proceedings* (Baltimore, The John Hopkins Press, 1941).

U.S. Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies* (Washington, U.S. Government Printing Office, 1941).

#### **F. The Criminal Process and the Law:**

Joint Committee on Continuing Legal Education of American Law Institute and American Bar Association (1961):

No. 2 - Police Interrogation

No. 4 - Assistance to the Indigent Accused

No. 5 - Discovery

No. 10 - Sentencing

Rogge, O. John, *The First and the Fifth, with Some Excursions into Others* (T. Nelson, 1960).

Schwartz, Louis B., *Crime and the American Penal System* (American Academy of Political Science, 1962).

Wharton's *Criminal Law and Procedure*, 5 vols. (Anderson ed., Lawyers Co-operative Publishing Co., 1957) [especially vol. 4, Criminal Procedure, chs. 62, 63, 66, 68; vol. 5, chs. 73, 79, 86, 95 (habeas corpus)].

#### **G. The Judiciary and the Bar:**

Brown, Esther L., *Lawyers and the Promotion of Justice* (New York, Russell Sage Foundation, 1938).

Brownell, Emory A., *Legal Aid in the United States* (Rochester, Lawyers Co-operative Publishing Co., 1951).

*Canons of Professional Ethics and Canons of Judicial Ethics* (Year Book, Association of the Bar of the City of New York, 1960, 304, 322).

Drinker, Henry S., *Legal Ethics* (New York, Columbia University Press, 1953).

Haynes, Evan, *The Selection and Tenure of Judges* (New York, Russell Sage Foundation, 1938).

Hicks, Frederick C., *Organization and Ethics of the Bench and Bar* (Rochester, Lawyers Co-operative Publishing Co., 1932).

*Selected Annotated Bibliography on Judicial Administration and the Legal Profession* (Oceana Publications, Dobbs Ferry, N.Y., 1962).

## Appendix

# SURVEY ON THE RULE OF LAW

## Committee I

### The Legislative and the Rule of Law

It is recognised that special difficulties might arise concerning answers in respect of a Federal State. In answering these questions, due account should be taken, if need be, of both the Federal and State Legislatures.

1. (a) Are there provisions in the Constitution or other laws which place limits on the powers of the Legislature?  
(b) In the event of the enactment of legislation which is outside the limits of the Legislature's powers, is there any judicial machinery for setting aside such legislation as invalid?  
(c) If there is no such judicial machinery, is there any other machinery or recognised practice which fulfils this purpose?
2. (a) Is it provided by the Constitution or other law that a special procedure must be followed before legislating on certain matters?  
(b) In the event of the enactment of legislation without the requirements of this procedure being fulfilled, is there any judicial machinery for setting aside such legislation as invalid?  
(c) If there is no such judicial machinery, is there any other machinery or recognised practice which fulfils this purpose?
3. Please indicate whether the Constitution or other laws contain provisions which ensure the following:  
(a) universal adult suffrage (please indicate disabilities);  
(b) that a candidate from any or no political party is free to present himself for election;  
(c) that voting is secret.
4. (a) Please indicate whether and if so to what extent the Constitution or other laws limit the powers of the Legislature in respect of  
(i) discrimination between citizens;  
(ii) freedom of religious belief and observance;  
(iii) freedom of speech, assembly and association;  
(iv) retroactive legislation;  
(v) guaranteed rights under the Constitution.

- (b) To the extent that there are not legal restrictions on the powers of the Legislature in respect of the matters referred to in (a) please indicate the extent if any to which legislation on these matters has in fact restricted the rights mentioned or rights which, in your view, are properly regarded as fundamental.

5. (a) In respect of rights guaranteed by the Constitution or otherwise, please indicate whether indirect means of circumventing these rights are practised.  
(b) If the indirect means referred to in (a) are practised, please indicate briefly the extent to which such means have undermined judicial protection.  
(c) In both cases please indicate whether the rights in question are guaranteed by the Constitution or not.
6. Please answer such of questions 1-5 as are applicable to dependent territories, if any, of your own country.

## Committee II

### The Executive and the Rule of Law

(Do not deal with times of public emergency in answering questions 1 and 2)

1. (a) To what extent, if any, has any organ of the Executive powers of the Legislature in respect of the matters referred out express constitutional or legislative authority?  
(b) Are such laws subject to judicial review, and if so on what grounds?
2. Assuming that the Legislature has delegated power to make laws to organs of the Executive, give figures, if they are available, showing the quantum of such legislation in comparison with the quantum of legislation passed by the Legislature itself.
3. (a) Are there any restrictions in the Constitution on the power of the Legislature to delegate legislative power to any Executive organ? If so, please state the restrictions.  
(b) If there are no such restrictions, are there any rules of law or of constitutional practice which restrict the competence of the Legislature in this respect?

(Questions 4-6 should exclude details of delegated legislation in time of public emergency)

4. (a) When power to enact delegated legislation is conferred by the Legislature, is the power defined with precision in respect of its
  - (i) extent;
  - (ii) purpose?
- (b) If delegated legislation exceeds the extent or purpose of the enabling law is this a ground for setting it aside? If so, state by whom such legislation can be set aside.
5. (a) What is the effect of failure to comply with the procedure required by law for the enactment of delegated legislation?
- (b) If such legislation is liable to be set aside for failure to comply with a procedural requirement, by whom may this be done?
- (c) Please indicate whether there is a code of procedure for the enactment of delegated legislation, or whether the procedure depends on the particular enabling law or on established practice.
- (d) If there is such a code of procedure, or established practice, outline its principal requirements.
6. If the answers to Questions 4 and 5 include the fact that delegated legislation is subject to judicial review, whether by a specialised or by an ordinary court, please answer the following questions:
  - (a) Is it legally possible to exclude judicial review of delegated legislation?
  - (b) If it is, indicate whether this is done, and give examples.
  - (c) What interpretation do the courts place upon powers which are conferred in terms which call merely for a subjective decision by an Executive organ on matters which afford grounds for judicial review?  
(E.g., the Minister may make such laws *as appear to him* to be necessary, etc.)
  - (d) If the courts interpret this to mean that they have virtually no power to review the particular delegated legislation, please indicate, with examples:
    - (i) whether this form of words continues to be used,
    - (ii) whether it exists in law enacted before the judicial decision giving this interpretation.

(Questions 7-9 relate to times of public emergency only.)

7. (a) Who decides whether a state of emergency exists?
- (b) Is the question whether a public emergency exists open to judicial investigation, whether in an ordinary or special court?
- (c) (i) Has the Executive or any organ of the Executive autonomous power to legislate in a time of public emergency?
- (ii) If so, please indicate whether there are any constitutional or other legal restrictions on this power.
- (iii) Are such laws subject to judicial review?
8. Please answer Questions 4-6 with reference to delegated legislation in times of public emergency only.
9. Does the Constitution define the law relating to the existence of a state of emergency and the powers then exercisable by the Executive?
10. (a) Are there any legal provisions whereby delegated legislation is open to annulment by an organ of the Legislature?
- (b) Are there arrangements for some organ of the Legislature to pay particular attention to the content of delegated legislation, whether with power or act or with advisory or scrutiny powers only? If so, describe such arrangements briefly.
- (c) Describe briefly any other institution, independent of the Executive, which has any of the powers referred to in (a) or (b). Indicate whether the existence of such institutions is widespread.
11. To what extent are the following activities of the Executive subject to review in the courts:
  - (a) acts interfering with freedom to travel within or outside the country;
  - (b) compulsory acquisition of privately-owned property;
  - (c) deprivation of liberties under licence or other form of permission to carry on any lawful calling;
  - (d) refusal under licensing control to permit the pursuit of any lawful calling;
  - (e) restraints imposed on freedom of assembly;

- (f) restraints imposed by seizure or ban on freedom of literary expression;
  - (g) deportation of aliens;
  - (h) deprivation of citizenship;
  - (i) any rights guaranteed by the Constitution?
12. If judicial review is available, explain broadly the grounds upon which such acts may be reviewed on the merits.
13. (a) To what extent does the law require that an opportunity to present one's case be given before Executive action is taken in the cases listed in Question 11 above?
- (b) What are the minimum legal requirements which are connoted in the duty, if any, in the cases listed in Question 11 above, to give a fair hearing to the persons whose interests are threatened by Executive action?
- (c) What is the source of the legal obligation, if any, to comply with the duties under (a) and (b)? If the answer is simply that in each case a particular law expressly so requires, it is not necessary to specify each law separately.
14. (a) In the case of duties to give a fair hearing under 13 (a) and (b), please indicate whether the following requirements are imposed by law or in practice carried out:
- (i) Advance notice is given of the procedural rules which will govern the hearing.
  - (ii) The opposing case is known in advance.
  - (iii) The hearing is in public.
  - (iv) Legal representation is allowed.
  - (v) Reasons are given which are adequate to convey to the individual why a particular decision has been reached.
15. If the requirements under Questions 13 and 14 are not imposed or carried out before the act of the Executive in question, are they so imposed or carried out in proceedings for judicial review?
16. (a) What other procedures are laid down to afford to persons whose interests are threatened by Executive action the opportunity to make representations
- (i) in public;
  - (ii) in private?

- (b) Is it possible for the individual's point of view to be expressed in the Legislature by his elected representative or any other member of the Legislature?
17. (a) To what extent are the orders of the courts effective to prevent or stop illegal acts by the Executive?
- (b) If an act of the Executive amounts to a legal wrong according to the ordinary law, is it possible to obtain judgment for monetary compensation against
- (i) the Executive;
  - (ii) the individual wrongdoer?
- (c) Has the individual any assurance that a judgment against either the Executive or the individual will be satisfied?
18. (a) In circumstances in which the interests of individuals are affected or threatened by acts of the Executive is it possible to obtain a statement of the reasons for such action in matters of
- (i) adjudication;
  - (ii) administration?
- (b) To what extent is the public interest urged by the Executive as a reason for not giving reasons under (a) (i) and (ii)? Give examples.

### *Committee III*

#### **The Criminal Process and the Rule of Law \***

##### **Clause I**

1. (a) Is the content of the criminal law readily ascertainable?
- (b) If not, or in cases where the law is doubtful, give specific examples, paying particular attention to crimes which are defined in wide or imprecise terms.
- (c) In the case of crimes mentioned in (b) above, is it possible to effect changes by normal processes of legislation or other flexible means?
- (d) Can rules of criminal law be extended by analogy?

\* The questions in this part are grouped according to the Clauses of the *Conclusions* of Committee III of the International Congress of Jurists held in New Delhi, India, in January 1959.

2. (a) Are there cases in recent times where criminal offences have been created with retrospective effect? If so, please list them.
- (b) Does the Constitution or the Criminal Code forbid this?

## Clause II

1. In what circumstances, if any, is it necessary as a matter of law for an accused person to prove facts or give evidence raising doubts in order to establish his innocence? Give examples, if any.

## Clause III

1. Is the power of arrest, whether in *flagrante delicto* or not, strictly defined by law?
2. (a) In what cases, if any, is arrest without warrant permitted other than on grounds of reasonable suspicion that a crime has been committed? Who has power to arrest without a warrant?
- (b) If the approval of a higher authority is needed to effect such an arrest, from whom must such approval be obtained?
- (c) In the case of an arrest without warrant on allegedly reasonable suspicion, has any judicial authority, before or after the arrest, power to determine whether the suspicion was in fact reasonable?
- (d) By whom are warrants of arrest granted?
3. On any arrest, has the arrested person the right to be informed at once of the grounds of his arrest?
4. (a) Has an arrested person the right to the assistance of a legal adviser of his own choice at once and at all times thereafter?
- (b) If not, at what point does this right become available?
- (c) Does the law require that an arrested person be informed of his right to the assistance of a lawyer, if he has such a right, in a way that he would understand?
5. (a) Has the arrested person the right to be brought before a judicial authority?
- (b) If he has, is the duration of the period within which this must be done fixed by law and if so, what is its duration?

- (c) If the law fixes "a reasonable period", what length of time is regarded as reasonable and who determines this?
- (d) Before which judicial authority is an arrested person brought?
- (e) After the arrested person has appeared before a judicial authority have the police any power to continue to hold him in custody other than as or for longer than the judicial authority has authorised?
- (f) Are there any provisions of the constitution or other laws which require that an accused person be brought to trial within a specified period and if so what is its duration?
- (g) If the laws fixes "a reasonable period", what length of time is regarded as reasonable and who determines this?
- (h) Is there an appeal, and if so to which authority, against failure to comply with the requirements of the law?
- (i) What is the effect of failure to comply with such requirements?

## Clause IV

1. (a) In what circumstances is it possible for a person to be deprived of his liberty on grounds of public security other than on a charge of a specific criminal offence?
- (b) If there are such circumstances outline the interpretation of public security which is followed in this context in your country. Give recent examples.
- (c) Is public security in this context defined by law?
- (d) Is it interpreted by the courts by means of review or otherwise?
- (e) Is detention of this kind consequent upon judicial trial or can there be an appeal to a judicial authority?
2. (a) Does every arrested person have the right to apply for bail?
- (b) What authority (authorities) is (are) empowered to grant or refuse bail?
- (c) Are there any constitutional or other legal requirements governing the reasonableness of bail? If so, please indicate briefly the criteria by which reasonableness is determined.
- (d) Indicate whether circumstances other than those below may lawfully be taken into account on hearing an application for bail:
  - (i) the gravity of the charge;
  - (ii) the likelihood of the accused failing to appear for trial;

- (iii) the likelihood of interference with witnesses;
- (iv) the likelihood of the accused committing a further offence.
- (e) Is there any machinery for appeals against the refusal of bail, and if so, what?

#### Clause V

1. Is an accused person free to choose his own legal adviser?
2. (a) Is there a right to free and private communication with legal advisers?
- (b) Is such communication
  - (i) immune from disclosure against the wishes of the accused;
  - (ii) immune from civil and criminal liability in respect of what is communicated?
3. (a) Is there a legal obligation to give notice to the accused of the law under which he is charged?
- (b) Is it essential that the charge should specify the details of the alleged infringement of the particular law?
- (c) What period of notice, if any, is fixed by law?
- (d) If the period fixed is "a reasonable time" what length of time is regarded as reasonable and who determines this?
- (e) Is the accused entitled to be present when all evidence is given and when all directions of law, or summings-up by the judge, are made?
- (f) Is the accused entitled to call witnesses in his defence, including the right to give evidence himself if he wishes?
- (g) Is the accused entitled to cross-examine the witnesses for the prosecution or, according to the particular procedure, to put questions through the judge?
- (h) Is the accused entitled to prior notice of the nature of the evidence to be called by the prosecution? If there is no legal requirement for the prosecution to do this, please indicate what the professional practice is.
- (i) Is the accused allowed to make allegations against the witnesses or the prosecution or against anyone involved in the prosecution which if true would be relevant to the good faith or impartiality of those witnesses? Depending on the particular procedure, is this allowed for the purpose of challenging the witness's competence on these grounds?

- (j) If the accused is permitted to make such allegations, is he immune from civil or criminal liability in connection therewith?

#### Clause VI

1. Are there any rules of law or practice which define the duty of the prosecution? If so, please state them.
2. Have the judges power to protect the accused from what they consider to be unfair questions by the prosecution?
3. Is it (a) allowed (b) customary for the prosecution to press for a particular type or extent of sentence on the accused?
4. Can the prosecution be compelled to put at the disposal of the accused or his legal adviser evidence favourable to the accused which the prosecution does not propose to use in court?
5. If not, is it considered essential by the rules of legal practice that this should be done? If so, what effect is attached to failure to do so?

#### Clause VII

1. Is there any provision of the constitution or other rule of law which protects witnesses (whether the accused or not) from being compelled to answer questions which expose them to the risk of self-incrimination?
2. Can an accused person be compelled to give evidence?
3. Are statements by the accused admissible against him on proof of the following:
  - (a) physical violence against the accused;
  - (b) prolonged and harassing interrogation;
  - (c) threats of unpleasant consequences to
    - (i) the accused,
    - (ii) his family,
    - (iii) his property;
  - (d) inducements offering some advantage, pecuniary or otherwise?
4. (a) Is it lawful to intercept postal or telephonic communications?
- (b) If so, who has authority to permit this?

- (c) Are the circumstances under which such interception is allowed defined by law? If so, please state them.
  - (d) If these circumstances are not defined by law, please state any rules of practice which govern the permissibility of such interception.
  - (e) Is evidence obtained by the illegal interception of postal or telephonic communications admissible against the accused?
5. (a) Is it lawful to search the premises of a suspected person without a warrant and against his wishes? If so, please specify.
- (b) By whom are warrants granted to enable such a search to be carried out?
- (c) Is it lawful to search premises, with or without warrant, other than those of which the suspected person is the occupier? If so, please specify.
- (d) In the case of search warrants, does the law require that the premises to be searched must be specifically indicated?
- (e) If a search of premises is illegal in respect of the foregoing or any other matters, is the evidence thus obtained admissible against the accused?
6. (a) Can a suspected or accused person be compelled to undergo any of the following in order to obtain evidence against him:
- (i) medical or other physical examination, as, for example, blood tests;
  - (ii) interrogation under the effects of a truth drug;
  - (iii) interrogation in which his answers are tested by a mechanical lie detector;
  - (iv) interrogation by any other method where the suspect is deprived by artificial means of his free will?
- (b) Can he be compelled to attend an identification parade against his will?
- (c) Is evidence obtained by these methods admissible against the accused if obtained illegally?
7. If evidence is obtained by any means which are illegal, is such evidence admissible against the accused?

#### Clause VIII

1. Is it provided by the Constitution or other law that criminal trials should in principle take place in public? If not, please indicate the practice which is followed, and in either case indicate whether the public or the press or both are excluded.

2. Does the Constitution or other law admit of circumstances in which
- (a) criminal trials and
  - (b) preliminary judicial investigations can take place in the absence of
    - (i) the public;
    - (ii) the press?
 If so, please specify.
3. If the courts have a discretion whether or not to exclude the public or the press or both please indicate the extent of this discretion in law or practice. Give examples.
4. (a) To what extent is it open to the press to make statements or comments which can affect the outcome of a trial after the accused has been arrested and charged?
- (b) If restrictions of this nature come into operation at a later stage please indicate when.

#### Clause IX

1. After a final conviction or acquittal is it possible for any person to be tried again on the same facts, whether or not for the same offence, in the following situations:
- (a) by any court after trial by a foreign court;
  - (b) by a federal court after a state trial;
  - (c) by courts of one state after trial in another state (i.e., in a federal system);
  - (d) by a state court after a federal trial;
  - (e) by courts of one jurisdiction after a trial by another court of a different jurisdiction in the same non-federal system (e.g., England and Scotland in the United Kingdom)?

#### Clause X

1. Is there a right of appeal to a court or higher court, as the case may be, against the refusal of bail?
2. (a) Is there a right of appeal to a higher court against
- (i) conviction;
  - (ii) sentence?
- (b) On what grounds is there such a right of appeal?

- (c) If leave to appeal is required in all or any circumstances please specify, and indicate from whom such leave must be obtained. Please indicate also the circumstances in which such leave is granted.

3. In the event of technical differences between appeal and other remedies please indicate whether judgments may be set aside for
- (a) error of law, defect of jurisdiction, or denial of the essential rights of the defence;
  - (b) errors of fact which have probably led to the conviction of the accused.

#### Clause XI

1. Please indicate whether any of the following forms of punishment is lawful and if so to what extent:
- (a) flogging, whipping or other corporal punishments;
  - (b) mutilation;
  - (c) public exposure for the purpose of inflicting humiliation;
  - (d) periods of solitary confinement
    - (i) of indefinite or prolonged duration;
    - (ii) in aggravated conditions (darkness, cramped space, etc.);
  - (e) heavy manual labour by the aged or infirm, or women, or children;
  - (f) physical or psychological torture in any form;
  - (g) involuntary indoctrination by means of psychological torture and/or artificial stimuli;
  - (h) slow forms of execution;
  - (i) total forfeiture of property rights other than for the purpose of affording compensation.
2. In the event of unlawful physical maltreatment of persons serving terms of imprisonment, is machinery available for the ventilation of complaints to an independent authority?

#### Committee IV

#### The Judiciary and the Legal Profession under the Rule of Law \*

##### Clause I

1. (a) Are the provisions of law which govern the appointment and tenure of office of the Judiciary to be found in a written Constitution?  
(b) If not, please state where they are to be found.
2. To what extent is it
  - (a) possible and
  - (b) actually known
 for the Executive to interfere with the Judiciary in the discharge of its functions?
3. Repeat for Legislative.
4. Mention any other rules of law or practice which contribute towards an independent Judiciary.
5. Is there any generally accepted view in your country, and if so what, on the extent to which the judge should interpret the law with flexibility?

##### Clause II

1. What are the qualifications for appointment to the Judiciary?
  - (a) by whom are judicial appointments made? Please indicate broadly the constitutional position of the person or organ by whom such appointments are made, i.e., by which branch or branches of government;
  - (b) please indicate the sources from which the appointing person or organ either customarily or as a result of provisions of law obtains advice on appointments to the Judiciary;
  - (c) is there any evidence to indicate that political considerations influence appointments to the Judiciary?

##### Clause III

1. In what circumstances is it possible to dismiss a judge?

\* The questions in this part are grouped according to the Clauses of the *Conclusions* of Committee IV and of the New Delhi Congress.

2. If these grounds are widely defined, give examples of the grounds which have been regarded as justification for removal.
3. Is it in practice possible for a judge who is dismissed to enter upon or resume practice as a lawyer?

#### Clause IV

1. Does the procedure for the removal of a judge provide for removal by a judicial tribunal, and if so, of what personnel is it composed?
2. Whether or not judges are removed by judicial process, is the removal subject to judicial review?
3. In either the removal or review procedure or both please indicate the rights available to a judge who wishes to defend himself.

#### Clause V

1. Please answer the questions in Clause IV in respect of
  - (a) members of administrative tribunals, whether lawyers or laymen;
  - (b) laymen exercising judicial functions other than (a);
  - (c) any other court or tribunal in your country, whether part of the administrative or judicial system, of which the members can properly be called judges. Exclude those who merely act in such a capacity *ad hoc*.

#### Clause VI

1. Assuming that the Legislature is competent to fix the general structure of courts, and to fix in principle the organisation of judicial business, is there any reason to feel that in your country, this power can be or has been used to interfere with judicial independence?
2. Is there any rule of the Constitution, statute or rule of practice which ensures that legislative power shall not be exercised to affect the course of a pending or impending case in the courts? If so, please specify.
3. (a) To what extent, if at all, is it possible for the legislative power referred to in Question 1 to be delegated to any other organ of government? If so, please specify.

- (b) If such delegation is possible, is it possible for this power to be used for the purposes referred to in Questions 1 and 2? If this has actually happened, please give examples.

#### Clause VII

1. (a) To what extent is the legal profession as an organised body free to manage its own affairs?
- (b) What other bodies exercise or share supervisory powers over the legal profession?

#### Clause VIII

1. Apart from cases where there may be a conflict between a lawyer's personal interests and his professional duty, is there any legal or practical obstacle to his freedom to accept any case which is offered to him?

#### Clause IX

1. Are there any rules of law or practice whereby, apart from the reservation in Clause VIII, a lawyer is under an obligation to accept any case which is offered to him?
2. Have there been any cases in your country when a member of the legal profession has in any way been victimised as a result of his undertaking a case in which an unpopular person or cause was involved?
3. In what circumstances is it permissible to relinquish a case other than at the wish of the client?
4. To what extent is a lawyer free from civil or criminal liability in respect of
  - (a) allegations of fact made in court or in connection with professional acts which are preparatory to court action?
  - (b) arguments of law which are or are considered by the Executive or Legislative to be contrary to the public interest?
5. (a) to what extent may a lawyer be prevented from making allegations of fact which may be unpopular or embarrassing by
  - (i) the court;
  - (ii) the Executive;
  - (iii) the Legislative?

Clause X

1. Is it in principle possible to obtain legal advice and if necessary legal representation irrespective of means in connection with
  - (a) criminal causes;
  - (b) civil causes?
2. If so, what restrictions are imposed on the right to free or financially-assisted legal advice or representation?
3. (a) To what extent are members of the legal profession prepared to offer their services without fee or at a lower fee in cases where any of the following are threatened:
  - (i) life;
  - (ii) liberty;
  - (iii) property;
  - (iv) reputation?

(b) If there is a scheme of free and assisted legal aid or advice in operation in your country, does experience show that lawyers of the requisite standing and experience are prepared to participate?