SUPREME COURT: DECISION TIME

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Mr. HUMPHREY. Mr. President, recently I had the honor of participating in a televised program for WTOP here in Washington on the subject "Supreme Court: Decision Time." The program grew out of the considerable public discussion which has been provided by S. 2646, the so-called Jenner-Butler bill.

Contributing separate interviews to the program were the distinguished senior Senator from North Carolina (Mr. Ervin), the distinguished president of the American Bar Association, Mr. Charles Rhyne, and myself.

Associate Justice William O. Douglas, of the Supreme Court, discussed the processes and methods of operation of the Supreme Court, without, of course, commenting on the legislation itself.

Mr. President, I think this program was a helpful contribution to wider public understanding of both sides of the controversy over S. 2646. Consequently, I ask unanimous consent that the transcript of this telecast be printed at this point in the Record.

There being no objection, the transcript was ordered to be printed in the Record, as follows:

Supreme Court: Decision Time

Here, within this marble temple, the Supreme Court of the United States, preside nine judges charged with the protection and interpretation of the Constitution.

These 9 men, or more properly, 5 out of these 9, have the last word in all legal disputes which involve a constitutional question. In this respect, the Court is indeed supreme over Presidents, Congresses, mayors, schoolteachers, police, prosecutors, and other judges, responsible solely to their own consciences. But down through the history of our country, the Court has come into conflict, through its exercise of judicial review, with Presidents, Congresses, and individuals. Through the years of its growth, ever since John Marshall, speaking for the Court in 1803, first held an act of Congress unconstitutional, the Court has resisted all attempts to check or change its powers and functions.

Today an old cry has been raised anew against the Court -- that the Court has exercised too wide a power over the content of legislation, that the Court is not interpreting laws, but making laws in usurpation of a right reserved to Congress. One critic summed it up by saying the judicial camel has gotten too far into the legislative tent. While the complaint is old, it has brought forth several proposals in Congress designed in one way or another to limit the Court's power. The most notable among these has come from the United States Senate just across the plaza from our highest legal sanctuary.

Senator William Jenner, Republican, of Indiana, introduced a bill designed to limit the appellate jurisdiction of the Court in five areas in which the Court had made controversial decisions.

As the measure was originally proposed, it would have removed from the Court's review cases arising out of congressional investigations, the Federal loyalty-security program, State subversive laws, public and private regulation of schoolteachers, and State bar examinations for lawyers.

The Jenner bill was aimed specifically at the Court's recent decisions in those areas. Some Members of Congress were irked at the Court for its decision in the Watkins case, holding that a congressional committee must inform a subpena witness why information sought from him is pertinent to its investigation, and a witness need answer only those questions which are pertinent. Others were disgruntled over the Cole and Service cases in which the Court said the Federal loyalty-security program applies only to persons in sensitive jobs, not to janitors; the Nelson and Sweezy cases, in which the Court held that State subversive laws are invalid because they conflict with Federal law in that field; and the Slochower case where the Court said a teacher may not be fired solely for taking the fifth amendment. Controversy also arose over the Schware and Koenigsburg decisions by the

Court, holding that a man should not arbitrarily be deprived of the right to practice his chosen profession.

The most bitter criticism directed against the Court began with the school desegregation decision. The Court has also been attacked for the Jencks case in which it held that an accused witness has the right to confidential FBI reports pertinent to the subject matter on which he is questioned. And the Mallory decision stirred protests from local law-enforcement officers when the Court said confessions cannot be used against a suspect if there is an unreasonable delay between the time of arrest and arraignment. Critics say these decisions threaten the security of the country, impede the work of the police, the FBI, and the military.

For these decisions, the Court has been flayed for intruding too far into the role of Congress, and some charge that the justices are trying to impose their own personal ideas and notions of what the law is upon the Nation. Others claim the Court has violated a principle of constitutional law by refusing to observe precedent, by overruling its previous decisions. Some assail the Court as a foe of States' rights and attack the justices as irresponsible. The high tribunal has been characterized by some as free-wheeling, without direction, and composed of legally inexperienced judges. One group even alleged the Court has become a subversive instrument for global conquest by the Communist Party.

Among the more moderate critics of the Court is Representative Kenneth B. Keating, of New York, ranking Republican on the House Judiciary Committee. He agrees with some Court decisions; he objects to others. There are still others where he feels the ruling was probably right, but Congress was not clear in its intent, so the result was wrong.

In the following interview, Keating states one of the dangers of the Jenner proposal as it was originally presented. This was one reason for amendments introduced by Maryland Republican Senator John Marshall Butler:

"Mr. Sutton. There have been several proposals, the Jenner bill being one, designed to restrict certain legislative areas from the Court's appellate jurisdiction. What about the Jenner bill and what would be the effect if it were enacted?

"Mr. Keating. The effect of that would be this. You've got now one Court which is the final word on interpretation of the Constitution. And the decisions of that Court, if they are felt by Congress to be erroneous, can be corrected. If you deprive them of the right to pass on these questions, you would have the highest courts of all 48 States, plus the 11 courts of appeal in the Federal jurisprudence --you'd have 59 different interpretations, or could have, of what the Constitution says on those subjects where the Supreme Court was prevented from acting on it. You would have a chaotic condition and the controlling law would be as apt to depend on where you live as on what the actual law was. So I don't think that that proposal is carefully thought out."

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Also in the House, the chairman of the Judiciary Committee, Democratic Emanuel Celler, of New York, while disagreeing with some decisions, takes a strong position against any tampering with the Federal judicial system:

"Mr. Sutton. The Jenner bill has been designed to limit certain areas from the Court's appellate jurisdiction. What about that? What would be the effect of the Jenner bill?

"Mr. Celler. That would be a fine kettle of fish and you'd make confusion worse confounded. The Jenner bill to my mind would undoubtedly violate the fundamental Constitutional provision of the balance of power between the three independent branches of Government, the judiciary, the legislative and the executive. And for these reasons and many others I could take time to relate to you. I am opposed to the Jenner bill. Of course, the Senator, the distinguished Senator from Indiana, has brought to bear upon this bill all his forces in an endeavor to push the bill through the Judiciary Committee, and I think he has as allies those who are disgruntled as a result of the desegregation decision that emanated from the Supreme Court, although I take it that even many of the southern Senators and southern

Congressmen couldn't very well swallow even the Jenner provisions."

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The Jenner bill as originally proposed, thus proved too strong a measure, even for some of the southern critics who didn't like the desegregation decision. The bill had to be made more palatable if it was to stand a chance of passage, and this was undertaken by a series of provisions offered in the Senate Judiciary Committee by Senator John Marshall Butler, Republican, of Maryland. The Butler amendment struck out the most criticized features of the original Jenner bill -- those denying the Court jurisdiction in cases arising out of the five controversial categories.

Thus the Butler amendment, by restoring the Court's right to review in these areas, sought to remove the biggest impediment to the bill as a serious proposal and enhances its chances of passage in Congress.

Senators Jenner, Butler, and James O. Eastland, leading southern proponents of the measure and chairman of the Senate Judiciary Committee, declined to have their comments recorded for this program. From their public statements, their main argument is that the measure will restore States rights, save the country from unbridled rule by the Court, and return to Congress its broad powers of congressional investigation. The Butler amendment to the Jenner bill would accomplish this by re-establishing the laws declared unconstitutional by the Court. For instance, the amendment called for extension of the loyalty-security program to all Government employees, whether in sensitive or nonsensitive jobs, but this provision failed to win committee approval.

However, three other provisions were approved. One permits Congress to determine whether questions asked in investigations are pertinent, where that is now a question for the courts. Another says that all acts passed by Congress in the antisubversive field will supersede State laws only to the extent that they specifically say they will. And the third declared that not only advocating and teaching violent overthrow of the government is a crime, but mere teaching of the abstract doctrine is a crime as well.

The measure was approved in the Judiciary Committee by a surprising 2 to 1 majority, suggesting that it could conceivably be pushed through the Senate.

"Mr. Sutton. While the authors of the bill refused to speak publicly at this time, North Carolina Democratic Senator, Sam Ervin, voting with the majority, consented to explain the modified Jenner measure.

"Mr. Ervin. The Jenner bill attempted to curb the inordinate exercise of power of the Supreme Court by denying it appellate jurisdiction in the cases covered by the bill. The Butler bill abandons this concept, except in the first provision, and adopts a method of amending laws.

"Mr. Sutton. Why was the Butler amendment necessary?

"Mr. Ervin. Well, I think there were some people who felt that something should be done in this field, people who did not like the concept of the Jenner bill -- that you would allow lower Federal courts to try and convict a man of a crime and then deny him the right of appeal.

"Mr. Sutton. Doesn't the Butler amendment, however, in effect, accomplish the same thing since what it proposes, in its last three provisions, is to change the law in those decisions by the Court which are controversial?

"Mr. Ervin. Well, no; it does not in the last provisions, because the last provisions only represent an attempt by the Congress, at least by the proponents of this bill, to make those acts conform to the recent congressional intent and to circumvent the erroneous interpretation put on them by the Court. In other words, the Court said Congress intended so and so, and this bill merely says Congress didn't intend that at all; it intended this other thing. And that is something which has been done times without number in our history.

"Mr. Sutton. Well, why do you object to these controversial decisions of the Court which the Jenner-Butler bill is designed to get around?

"Mr. Ervin. Well, I think that the power of the Court -- that the Court as one of the great authorities on constitutional law in the United States, Prof. Edwin S. Corwin, of Princeton University, said, the Court's been sticking its judicial nose into areas where it has no business, that are beyond its competence.

"Mr. Sutton. Well, Senator, what do you object to specifically about these decisions? Would you take some of these cases and outline wherein you object to the Court's decision?

"Mr. Ervin. Well, let me do this first and refer to an old decision of the Supreme Court that was very sound, in which the Court said it is a fundamental principle of our institutions, indispensable to the preservation of public liberty, that one of the separate departments of the Government shall not usurp powers committed by the Constitution to another department. Now, my objections to some of these decisions, such as in the Yates case, is that the Court has taken and misconstrued the acts of Congress, either consciously or unconsciously, because those acts did not reflect what the Supreme Court -- the majority of the Supreme Court -- would have enacted if they had been Congressmen instead of judges. And therefore, under the guise of construction, they take and substitute their personal notions as to what kind of laws that Congress ought to enact for the laws which Congress has actually enacted.

"Mr. Sutton. In the Koenigsburg decision, didn't the Court say that you can't deny --

"Mr. Ervin. Well, just one other thing before that. Then, in the Watkins case, the Supreme Court was doing just exactly what is contrary (as this excerpt I read), to our fundamental institutions -- it is usurping the power of Congress to prescribe how a congressional investigation is to be made. Now, in the Koenigsburg case: I object to it because the Court invaded the powers of the State of California, and, under our Constitution, the State is just as important as the Federal Government. As Chief Justice Chase said in the celebrated case of Texas against White, our Constitution in all of its provisions looks to an indissoluble union composed of indestructible States. And decisions like the Koenigsburg case tend to destroy the States. Now, that case, in effect, holds that the 14th amendment -- that, the due process clause of the 14th amendment -- precludes the State bar examiners of California from asking questions of an applicant for a law license which were very relevant to show whether or not he possessed the qualifications prescribed by California law for obtaining a law license to practice law in the courts of California.

"Mr. Sutton. Well, now, Senator, is that what the Court said, or did the Court say this: that a man cannot be denied the right to practice his chosen profession by a regulation which will be in violation of the due process clause of the 14th amendment?

"Mr. Ervin. Well, the Court - the majority opinion would attempt to put it on the ground you put it, but the effect of it was, they said that California law says that in order for a person to receive a license to practice law in California he must not believe in the overthrow of the Government by force and violence. This man, Koenigsburg, said he did not believe in the overthrow of the Government by force and violence at the time he applied for his law license. And he absolutely refused to answer questions put to him by the Board of Law Examiners of California as to his writings in the past, and as to his activities in the past, and as to his membership in organizations in the past, which were relevant to determine whether or not he had answered the first questions truthfully.

"Mr. Sutton. Well, now, isn't one of the dangers of the Butler Bill aimed at the Koenigsburg decision, that it makes not merely advocating and teaching violent overthrow of the Government a crime, but mere teaching of the abstract doctrine as well; so that it would seriously affect our colleges. For instance, a college professor would be impeded if he were doing nothing more than teaching, disinterestedly, a course in communism?

"Mr. Ervin. Well, of course, that is an argument made by those who are believers in unlimited academic freedom. I don't like to put restraints on courts, fundamentally. I don't like to put restraints on teaching. I don't like to put restraints on anything. I think that judges and professors ought to have some self restraint, but there are some objections to any kind of law of this nature; but, on

the other hand, to my mind, there's a very much more fundamental objection. I mean, a more serious question is this: if judges are going to make laws, if judges are going to destroy the States, if judges are going to ignore the fundamentals of our constitutional system and attempt to limit the power of Congress to discharge its constitutional duties, then we are in danger of being ruled by a judicial oligarchy; and, I think that that danger is such a more transcendant danger than these other things, that we may have to put some restraints on judges if judges are not going to put restraints on themselves.

"Mr. Sutton. Well, some of our opponents have said, Senator, that some of the Senators who are criticizing the Court are disgruntled over the desegregation decision, but you overlook the decisions of the Court which upheld States' rights. They point out the recent decision by the courts granting the States the right to tax a Federal facility. What is your answer to that?

"Mr. Ervin. The only thing I can explain: I do not know any decision of this Court in recent years that has contributed anything to States' rights, except that one that apparently favors States being allowed to tax people. There has been a constant whittling away and a judicial erosion of States' rights during latter years, and I can't think of a single decision offhand which protects any right on the part of the State, except the right of the State to tax. And I believe the Court once said that the power to tax is the power to destroy, and maybe they think that by taxation the States would be more effectively destroyed than any other way, I don't know.

"Mr. Sutton: Well, I'm still wondering what's going to happen to the bill, Senator?

"Mr. Ervin. Well, I think that if the bill reaches the floor, that regardless of its ultimate fate, if the bill is adequately debated on both sides, I think that the American people will understand better than they do now our system of government and will understand that under our Constitution that legislative powers belong to Congress and that the States have functions in local matters,and that it is not the policy of the Supreme Court of the United States to make itself a judicial oligarchy."

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The leading opponent of the bill, Senator Thomas C. Hennings, a Missouri Democrat, declined for now to discuss the bill for this program. He and other members of the Judiciary Committee minority who voted against the bill have filed a sharply worded report in the Senate saying the measure reflects a kill-the-umpire philosophy. They charge the measure would in fact frustrate efforts to combat Communist subversion in this country. One of the group, Senator Alexander Wiley, a Wisconsin Republican, said flatly that the bill would rob individuals of important civil rights, and undermine and unbalance the constitutional separation of governmental powers. If and when the Senate does debate the bill, one of the leaders in the fight to kill the measure will be Senator Hubert H. Humphrey, Democrat, of Minnesota. These are his views:

"Mr. Sutton. Senator Humphrey, what are the dangers of the Jenner-Butler bill?

"Mr. Humphrey. Well, first of all this bill is a legislative hodgepodge that attempts to reverse several Supreme Court decisions that are unpopular with one group or another. The Butler bill, for example, would deny the jurisdiction of the Supreme Court in a particular type of case,that dealing with admissions to the State bar, the right of lawyers to practice. The consequences, it seems to me, of that particular provision of the legislation would be rather severe. It could leave a lawyer defenseless against arbitrary denial of his rights under the United States Constitution -- denial of due process. States might very well exclude without a remedy whole groups of lawyers from practicing because of their race. The legal profession, mind you, would be singled out for this special consideration -- no other profession is so treated. It seems to me that this legislation would establish the practice here of the Congress of the United States literally picking and choosing what cases it wished the Supreme Court to handle or to have jurisdiction over. In this way you would destroy the so-called separation of powers and the balance of power in your constitutional system. I think that's the chief danger implicit in the bill.

"Mr. Sutton. To your knowledge, Senator, is this the first time in our political history that such an attempt has been made to limit the powers of the Court?

"Mr. Humphrey. No; it is not the first time. It's the second time, I believe, if my memory serves me accurately. There was another instance which historians cite with shame. Following the War Between the States, the radicals in the Congress snatched jurisdiction away from the Court in the particular area of habeas corpus. The lower courts were denying such rights, the Supreme Court was reviewing these decisions, and the Congress of the United States decided otherwise, limiting the jurisdiction of the Supreme Court. It's fair to say this was one of the examples in American history of irresponsibility, of a lack of fairness and decency in our constitutional processes.

"Mr. Sutton. Senator Humphrey, you're an old political science professor and have taught American government to students before. What is the proper relationship of the Court to the other branches of our Government?

"Mr. Humphrey. Well, the more I serve in Government the more I respect the Founding Fathers. They really were inspired men, and they possessed a rare genius when it came to government. They knew what tyranny was; they had to live under it. They saw authoritarian government at work. They witnessed people's rights being denied. Therefore, they set up a constitutional system based not on theory but upon explicit practice.

"They tried to devise a constitutional system in which there was a separation of powers -- the legislative, the executive, and the judicial -- each having a precise function to perform, and each of these powers balancing off the others. Actually our Government is not only a government of the majority but it is a government of the minority. A majority can be as tyrannical as a minority of one with dictatorship. But our governmental process is set up so that the majority must at all times respect the minority, and at times the Court has been the protector of minority rights. We remember the decisions of Cardozo, Holmes, and Brandeis, which later on came to be a majority; but for a while those were the voices of the minority. Now the legislative branch, at times, has been the protector of minority rights, and there have been times when the executive branch has had to take the courageous position and the unpopular position of being the protector against a current hysteria that would have overridden the rights of the minority. So as I see it, what we had designed here in our Constitution was a system that not only made possible government but made possible government with justice -- government that protected human rights, civil rights, civil liberties. In fact that's the whole purpose of the Bill of Rights. It's the whole purpose of due process of law in the amendments to the Constitution and in the basic Constitution itself.

"Mr. Sutton. Well, in your view, Senator, is there any one case or group of cases which has motivated the current criticism directed at the Court?

"Mr. Humphrey. Well, I think all of us know that in recent years there has been grave concern in our country over subversion and over the activities of those who would undermine our Government. The Congress has engaged in all kinds of investigations. There have been cases that have come to the Supreme Court as a result of these congressional investigations where individuals felt that their rights had been denied, their rights as defined in the fundamental law of our country, the Constitution of the United States. That's what we call civil-liberties cases.

"Then there has been the other, the civil-rights issue, the human-rights issue, the race issue. It's become involved in the Court's decisions relating to school desegregation and integration and a host of other cases, the bus cases, the interstate transportation cases. Now, there've been some that have resented the ruling of the Court under the 14th amendment, and, therefore, they would like to overrule the Court's jurisdiction in these matters by denying the Court jurisdiction through congressional action. But may I point out that one of the reasons that people went to court was because they couldn't get any relief for their rights in the Congress or in the executive, so they appealed to the third branch, namely, the judiciary. Lately in the field of civil liberties in our country the courts have been the protector of minority rights.

"So you have two groups of cases,the civil-liberties cases and the civil-rights cases, in which the Supreme Court has had to exercise jurisdiction, jurisdiction which it has under the Constitution, jurisdiction which belongs to it under the doctrine of the separation of powers, jurisdiction which belongs to it by the very nature of the article of the Constitution setting up the judicial system. Now there are those who don't like these Supreme Court rulings, and I would appeal to them by saying: Let's not burn down the Constitution just to get at a specific case. It's perfectly true that some of us may not like these decisions in particular cases. But if we're going to argue constitutional law and constitutional principles on the basis of a particular case or an individual act, I'm afraid we're going to lose the substance of our Constitution. The Constitution was made for the ages; it was made for the enduring Nation as well as for the current moment."

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The Jenner-Butler measure has been strongly condemned by the American Bar Association. Lawyers have their reasons for objecting to the measure, as explained by Washington Attorney Charles Rhyne, president of the American Bar Association:

"Mr. Rhyne. The American Bar Association has voted through its house of delegates, which represents some 200,000 American lawyers, almost unanimously to oppose the Jenner bill, which would curb in part the jurisdiction of the Supreme Court of the United States. Senator Jenner makes no secret of the fact that his proposal to take jurisdiction from the Supreme Court stems from disagreement with, and would reverse, in effect, certain of its recent decisions. My personal reasons for supporting the American Bar Association's resolution is that the institution of the Supreme Court as the ultimate resolver of all judicial controversies in our Nation is sound. Even though that institution might not always provide decisions with which all of our people, or even a majority of our people, would agree, and that no American in any case can be denied access to that institution without imperiling his constitutional rights, our independent judiciary is the envy of other peoples throughout the whole world. They look upon it as the institution which insures the greatest thing we have in our Nation, individual liberty under law."

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As the debate grows hotter, the Court itself remains, as is its tradition, aloof and silent, impervious to its critics. Justices do not as a rule speak off the bench on controversial matters, and never on a case or measure pending before Congress. Most decline all public comment for fear that their statements will be misconstrued so as to endanger the Court's traditional objectivity. Yet to understand more fully the criticisms aimed at the Court, it's important to know something of the Court's inner workings, its procedures for deciding cases, its principles of judicial review, its internal application of judicial self-restraint. These processes, of course, are challeneged by the Jenner-Butler bill. For an explanation of these Supreme Court processes, we talked to Associate Justice William O. Douglas:

"Mr. Sutton. Mr. Justice, many regard the Court with something akin to religious awe and think that the nine Justices sitting in secrecy arrive at the final decision as to what kind of Government ours will be through a process of lonely contemplation. I wonder, sir, if you would explain for us the day-to-day operation of the Court -- the routine, the schedule, the workload.

"Mr. Douglas. Well, usually the Court sits for 2 weeks and then recesses for 2 weeks, beginning from October down through June until all the business is taken care of. When we sit, we sit from 12 to 2 and 2:30 to 4:30. We have our conferences every week on a Friday, and we convene on Friday at 11 o'clock and we sit most of the day, sometimes the entire day on Friday discussing the cases that have been argued that week, and considering the petitions for certiorari and the applications to be heard that have come in during the week.

"Mr. Sutton. When you consider a petition for certiorari how do you decide, or how does the Court decide to accept a case for review?

"Mr. Douglas. Well, the standards are prescribed in an act of Congress, the Jurisdictional Act of 1925. Those standards are of necessity somewhat general. They give the Court discretion to grant or deny the petition in light of certain circumstances. For example, if the court in San Francisco, the court of appeals there, has decided one question one way and the court of appeals in Boston has decided it another way, then there's a conflict and we automatically take the case. If it's a case on which dozens or hundreds of other cases are awaiting decision, in

which there is great public interest or monetary interest to the Government or taxpayers involved, then we usually take that kind of a case. It takes, as a matter of practice -- this is custom, it's not written into law -- it takes 4 votes out of 9 judges to bring a case up on certiorari. That's what we call our discretionary jurisdiction. There are other groups of cases that come up under different headings. The appeal cases are here as a matter of right. They come largely from the State courts. Then we have the cases of original jurisdiction, controversies between States over water rights and boundaries and so on, that start here and end here.

"Mr. Sutton. Is there much discussion or argument in your conferences or do you generally accept the views of the man who was assigned to the case?

"Mr. Douglas. Well, at the beginning of the conference, there is no opinion of anybody that has been written and that is submitted. There's no division of labor until after the conference is over and the vote has been taken and all the discussion had. It's very free discussion, informal, just the nine of us present and we discuss it pro and con. Sometimes various views are exchanged back and forth and when the Court members are finished discussing it, we take a vote. And then the senior judge in the majority assigns the opinion, that's usually the Chief Justice, and then the opinion is sent to a branch of the Government Printing Office that's in the building and we get printed copies and circulate them among the entire Court.

"Mr. Sutton. Well, why does --

"Mr. Douglas. It is only at the end of the conference discussion and perhaps some weeks later that there is an opinion circulated.

"Mr. Sutton. And that opinion is assigned to a specific judge to write.

"Mr. Douglas. Yes, that is the first division of labor in our court.

"Mr. Sutton. Why does the court speak as a body? Why does one man write the opinion for the entire court? Why not separate opinions?

"Mr. Douglas. The British system is a little different. The British have developed throughout the centuries a system of each judge handing down his own opinions. The seriatim opinion is in vogue in England. And when we started as a country years ago, Jefferson had the idea that every one of our judges should hand down his own opinion. But Marshall, another strong-minded man, was of another view, and he thought it would be better if they had one opinion announcing the views of the entire court. So Marshall really started that custom and it has been a custom that has been adhered to, and in every case we try to get a majority of the nine agreed on one opinion.

"Mr. Sutton. I think Jefferson said that by not writing seriatim opinions that it is difficult to fix responsibility and it was one of his objections, I think, to Marshall's custom.

"Mr. Douglas. I think so. I think he once said, 'Let every man on the Court state his opinion and stand before God and man unashamed,' or something like that.

"Mr. Sutton. I take it you feel that writing the opinion as a body is a better procedure.

"Mr. Douglas. Well, it is a better guide to the community and to the Congress and to the members of the bar as to exactly where the court stands.

"Mr. Sutton. Well, do split decisions indicate a serious doubt as to what the law is?

"Mr. Douglas. Well, it indicates that you are dealing with a problem that is in the penumbra of the law that is not settled, on which reasonable men can differ, that it is not as clear as black and white, there are intermediate shades in between and those doubts have historically been the prerogative of the members of our Court to express.

"Mr. Sutton. What was the role of the Court as envisaged by the Founding Fathers? Did they intend that the Court have the power to invalidate acts of Congress?

"Mr. Douglas. Well, there is nothing in the Constitution that speaks directly upon that and specifically. That step was taken in 1803 in a unanimous opinion of the Court in Marbury v. Madison, very early in our history, in which the Court said that if it was asked to apply an act of Congress and enforce an act of Congress against the citizens that it would first examine the question as to whether or not that law was constitutional; and that practice has continued down to this date. The Court has not in its history declared many acts of Congress unconstitutional but the power has been used.

"Mr. Sutton. As I understand it, it was another 50 years after Marbury v. Madison before another act of Congress was declared unconstitutional.

"Mr. Douglas. It was quite a while. I think it is probably pretty clear that the Founding Fathers intended that there be some referee over the Federal system. Holmes once said, I think, that he didn't believe the Union would come to an end if the Court did not have the power to declare an act of Congress unconstitutional but that it would be somewhat in jeopardy if somebody did not have the power to declare acts of the States unconstitutinnal.

"Mr. Sutton. Was that not really one of the worries of the Founding Fathers; that the doctrine of judicial review was really well known and though it was not specifically spelled out in the Constitution that perhaps they really did intend the Court to have that power?

"Mr. Douglas. Certainly that was the assumption of the Court in 1803 and that has been the assumption ever since. And of course one of the very important roles that the Court performs is the referee in the Federal system; otherwise the students of this branch of government have felt that over the years we would probably tend to a Balkanization in the country if. ***

"Mr. Sutton. That would be the effect if the Court did not have that power?

"Mr. Douglas. ***If there was not some referee in the Federal system, whether it is the Court or some other agency.

"Mr. Sutton. Sir, what are the doctrines or principles of judicial review used in deciding a question which comes before the Court? What about the doctrine of stare decisis law? Does the Court follow that in constitutional matters?

"Mr. Douglas. Well, stare decisis is a Latin expression meaning to stand by a previous decision or to observe a precedent which was established years ago. And in the field of private law, that is a custom that is still largely adhered to. The law is not a changing thing from day to day so far as court decisions. We make a decision on construction of a statute and abide by it. That usually stands, although very often if you go back in the last 10 or 20 years you'll find many of the Court decisions construing acts of Congress have been changed by Congress, by an amendment to the statute in question.

"Mr. Sutton. In other words, all the law is not written and on constitutional matters you don't follow the doctrine of stare decisis.

"Mr. Douglas. Well, now, I wasn't speaking of constitutional questions when I was talking about stare decisis; I was talking merely in the field of statutory law or so-called common law. In the field of constitutional law, the Court has never in its history accepted the principle that stare decisis should control. It has always assumed, and I think quite properly, that every constitutional question is always open for reconsideration and review. That is due to the fact in the first place that the provisions and clauses of the Constitution are written in large generalities for the most part, not always, but there are many large generalities like due process of law in the Constitution; and furthermore that the times change, the problems change and each oncoming generation should be able to breathe its own views and life into the basic charter, and it shouldn't become frozen to reflect a political philosophy of the 1850's or hereafter of the 1950's.

"Mr. Sutton. What about the principle of judicial self-restraint which we hear mentioned quite frequently? What is that and how actually is it employed?

"Mr. Douglas. Well, the judges sit to construe the law as written and not to rewrite it, and one of the foremost tasks of a judge is to be truthful and conscientious in adhering to the congressinnal scheme in the case of a statute. And furthermore, every Member of Congress, every State court judge, every official throughout our country, also takes an oath to support the Constitution, and so the Court naturally owes deference to other officials who are trying to enforce the law -- the President, and the Senate, and all the rest of them -- and thus should not and does not take into its own hands the settlement of all constitutional questions as if it and it alone knew what the answer was. That's it -- it gives deference to the other branch of the Government, that's what it means.

"Mr. Sutton. Thank you very much, sir."

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There is nothing new about the current arguments swirling about the Court. The Court has always been criticized whenever it took a clear-cut stand on a controversial issue and told Congress, the administration, or others that they couldn't do something that they wanted to do.

When President Thomas Jefferson ran into political conflict with Federalist Chief Justice John Marshall, he castigated the Federal judges as a subtle corps of sappers and miners constantly working underground to undermine the foundations of our society.

When the Northern Securities case was decided against him, President Theodore Roosevelt said of Justice Oliver Wendell Holmes, "Why, I could make a man with a better backbone out of a banana."

Now, the Jenner-Butler bill appears, and presents, incidentally a direct challenge for the Supreme Court to declare the measure unconstitutional should it be enacted. Sponsors, of course, hope to stir up a great debate and arouse public indignation against the Court.

We hope that Senator Hennings and his supporters will succeed in the Senate in burying the bill, and in blocking the threat it presents to the continued effectiveness of the Supreme Court. It would be a national tragedy for the Congress to erase the Court's power to defend our civil liberties as it has done so well in the decisions for which it is most criticized.

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