JUSTICE STANLEY F. REED

and

THE AMERICAN CONSTITUTION

Chase, Hal Scripps III

1965

PREFACE

"Persons attempting to find a motive
in this narrative will be prosecuted."

Mark Twain

This paper is not an eulogy nor a polemic. Its purpose is neither to praise nor condemn the life and work of Justice Stanley Reed.

Its aspiration is rather that of a portrait "warts and all" of a man who occupied for nineteen years one of the highest and most responsible offices in the United States Government. This fact by itself merits a deeper study than is presented here and perhaps this will be expanded in the future.

I have been asked many times why I chose Justice Reed. It is a legitimate question. My answer is that he is relatively unknown, little has been written about him, he is a fellow-Kentuckian, and most significant, he is still living. I believe the latter factor is responsible for the vitality that I hope distinguishes this paper.

If the reader has made a new and rewarding acquaintance after reading this paper, it has been a success for I am writing not for self-expression but communication.

H. S. C. III

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ACKNOWLEDGEMENTS

This paper is especially indebted to Mr. Justice Reed, himself, who has kindly supplied me with information and interviews which have served as the backbone of my own impressions.

I also wish to thank Messrs. Gordon Davidson, Charles A. Horsky, Henry Harned, Gerald Ross and Edward Prichard for the information they supplied.

To Mrs. William H. Rees, wife of former Chief Justice William H. Rees of the Court of Appeals of Kentucky and life-long friend of Justice Reed, I owe a special debt of gratitude. Her invaluable introduction to Justice Reed on my behalf made the possibility of this paper a reality.

I also owe special thanks to Father Mark James Fitzgerald who was kind enough to send me his copy of his doctoral dissertation on Justice Reed, thus saving me the cost of having it microfilmed by the University of Chicago.

In conclusion I acknowledge the invaluable help of Mr. James William H. Stewart, former law clerk for Justice Black and presently Associate Professor of law at Washington and Lee. His interpretation of opinions and the long discussions we had concerning the different cases are among the experiences resulting from the creation of this paper that I prize most highly.

PART I

FROM MINERVA: TO THE MARBLE HALLS OF JUSTICE

Chapter I

The Early Years

As any Who's Who in America, published in the last thirty years, will tell you, Justice Stanley Forman Reed was born December 31, 1884. It gives many other vital statistics but what it fails to note as do his previous biographers is the significance of this period.

December 31, 1884 and the following twenty or twenty-five years was perhaps the most serene period in U. S. history as well as the most economically expansive. Stanley Reed would grow up in an era that supported manifest destiny, social Darwinism, Populism and the creation of Jim Crow. He was almost thirty when he witnessed the first real war of his lifetime. It was this same war that would destroy the social patterns under which he was reared. His lifetime connects the horse and buggy era with the nuclear age. To borrow a phrase Justice Reed has witnessed "The Big Change."

Other significant factors that contributed to his predilections were the established and professional nature of his background. His father was the well respected Doctor John A. Reed and his mother was the former Frances Forman. Both families were of colonial ancestry and thus distinguished residents of Mason

County, Kentucky. Another factor is possibly the fact that Stanley Reed was an only child. As such he was given a private education. Indeed by his own admission he never attended a public school. His first school, Hayeswood Elementary, was an embarrassing experience because he was the only boy in a school for girls.[1] Fortunately his stay there was brief as he was enrolled at the more advanced H. Walker School. At sixteen Reed was sent away to old Kentucky Wesleyan College then located in Winchester, a distance of some fifty miles. Here, for the first time, he roomed with William H. Rees, his boyhood friend from Washington, Kentucky, a small community just outside of Maysville. Reed participated in football at Kentucky Wesleyan but the team never played a game. In 1902 he received an A. B. from Kentucky Wesleyan as well as admittance to Yale University with sophomore standing. In 1906 he won his A. B. degree from Yale as well as the Bennett Prize for History. Reed then began his study of law which took him first to the University of Virginia for one year where he roomed for the second time with William H. Rees and then to Columbia University for another year. However, despite these two years of formal education, Justice Reed never obtained

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[1]Memo: Interview with Mr. Justice Reed. October 18, 1964.

his LL. B., a common practice in those days. For the 1909-10 Reed went to Europe and studied the Justinian Code at the University of Paris.[2]

Thus Stanley Reed acquired the education, complete with Continental sojourn, that was customary for one of his status.

However, unlike the proverbial wealthy young rake of his day, Reed was a conscientious student, not known for the pranks and drinking that characterized his exaggerated counterpart. He was a serious young man in that he knew he wanted to be a lawyer and worked to achieve that goal. To say that Reed was serious is not to say that he was a "bookworm" or "egghead" for while at the University of Virginia he participated on the track team and even boxed with some skill. Reed's prowess in boxing is attested by a story told by Chief Justice Rees. While at the University of Virginia Reed and Rees both took boxing lessons which Reed dropped after a while thinking he had acquired sufficient skill. Rees continued. Later Rees challenged Reed to a match and soundly drubbed his roommate. Consequently Rees dropped the lessons and Reed began them again. Having made what he considered sufficient progress Reed challenged Rees to a rematch

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[2]Who's Who resume, mimeograph from Mr. Justice Reed. Memo: Interview with Mrs. William H. Rees, November 27, 1964.

and in Chief Justice Rees' words "almost beat me to death."[3]

Although I think education is the most significant factor contributing to one's character, I would have to rank environment a very close second. It is from environment that one obtains his mores and convictions. Environment is also a strong factor in the determination of one's philosophy. Justice Reed's environment for the first seven years of his life was not Maysville, Kentucky as is erroneously reported in every biographical sketch, but the tiny community of Minerva just outside of Maysville. Indeed, the inhabitants of Minerva point with pride to the two story frame house now known as Dewran Newsom's General Store that is the true birthplace of Justice Stanley Reed. In 1891 Dr. Reed bought the substantial Georgian mansion, now known as the Fee House, located at 227 Sutton Street in downtown residential Maysville. It was here that Stanley Reed grew up. But what is Maysville, Mason County, Kentucky? It is an old river town nestled on the banks of the Ohio River. Its age and rich farm country produced the patrician families which are Reed's antecedents. As a male member of this stock, Reed naturally became a professional man.[4]

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[3]Memo: Interview with Mr. H. H. Harned. March 13, 1965.

[4]Maysville Public-Ledger. April 6, 1957, p. 5.

Maysville was a smaller town in Reed's youth than it is now and as such was characterized by the strict morality which typified small towns in that era. Maysville was definitely a town where the gospel of hard work and success was believed as devoutly as that of the four apostles. It was Reed himself who said: "Here every door to achievement in any line swings open to energy, determination, imagination and brains."[5] But Maysville was a healthy if not cosmopolitan environment and the people there knew and trusted one another. The people there believed in the idea of progress when belief in the idea of progress was popular. They were strong advocates of federalism. Just as strong was their support of the Democratic Party.

Maysville was small enough so that a young boy could easily walk to such favorite haunts as Raccoon and Lawrence Creeks. It was small enough so that every young boy knew and was known by the local policeman. For this reason, that one was known, Maysville was a secure environment protected by its smallness from the modern anxieties which permeate most cities today.

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[5] Ibid., p. 2.

Chapter II

Young Lawyer and Legislator

It was into these secure surroundings that Stanley Reed settled with his bride, the former Winifred Davis Elgin also of Maysville, in the latter part of 1910. The couple had been wed in a rather simple ceremony, owing to the fact of Dr. John Reed's recent death, on May 11, 1908.[6]

Stanley Reed was admitted to the Kentucky Bar in the same year as his return, when he found employment in the well-established, well-respected law firm of Worthington, Browning, and Zeigler. He soon became a full partner and by the 1920's the firm was known as Browning and Reed. One of the firm's biggest clients was the Chesapeake and Ohio Railroad. Reed defended the C&O against all claims and suits, and according to Mark Fitzgerald's chart (see Appendix) Reed won most of the cases for the years 1922-1929. While I am sure this experience of being a corporation lawyer had some effect on Stanley Reed, I am inclined to disagree with Father Fitzgerald as to its lasting effect. I do not think that this experience predisposed Reed to favor

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[6]Maysville Public-Ledger, op. cit., p. 3.

corporations.[7] In my opinion Reed would rule against a big corporation as quickly as the smallest shopkeeper if he were convinced of the evidence of injustice. On the other hand Reed did not believe that bigness in business or government was a crime.

I would also disagree with Father Fitzgerald on his point that Reed "ruffled the conservative calm of Kentucky politics" during his four years as state representative 1912-1916.[8] It is a fact that Reed did introduce some progressive labor legislation but it is not true that Kentucky politics experienced a conservative calm during this period as Governor Goebel had been assassinated just three years before.[8]

Deciding not to run for re-election in 1916 Stanley Reed turned his political prowess to the support of President Wilson as opposed to the Republican nominee Charles Evans Hughes, Reed's future Chief Justice and a man he much admired. Nevertheless in 1916 Reed was President of the Kentucky Young Democrats.[9]

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[7]Mark James Fitzgerald, C. S. C., Justice Reed: A Study of a Center Judge, Chicago, Illinois, March, 1950, p. 12.

[8]Ibid., p. 10.

[9]Ibid., p. 11.

When the war came to the United States, Reed, in 1918, at age thirty-four joined the U. S. Army and was commissioned a 1st lieutenant. He saw no overseas action but rather spent the brief remainder of the war at Camp Upton, New York.[10]

Returning to Maysville after the armistice, Reed was neither a member of F. Scott Fitzgerlad's "Jazz Age" nor Ernest Hemingway's "lost generation." Instead Reed became a charter member of the local American Legion and Country Club and went about his business with the conviction of a man who had two sons to support, John A. and Stanley Forman, Jr.[11]

Still sporting a mustache he had acquired his senior year at Yale and a fair amount of hair, Stanley Reed was instrumental in organizing the Burley Tobacco Growers' Association with James F. Stone as president. It would be this organization and its connections that would take Reed to Washington, D. C. and then to a place on the bench of the Supreme Court.

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[10]Maysville Public Ledger, op. cit., p. 5.

[11]Ibid., p. 5.

Chapter III

The Nation's Capital

Stanley Reed was certainly not a legal unknown when he was appointed counsel for the Federal Farm Board by the Hoover Administration in 1929. Three years previously he had declined Governor Field's nomination to the Court of Appeals of Kentucky.[12]

However, like most political appointments, it was the personal connections Reed had made as counsel for the Burley Tobacco Growers' Association that opened the door for his entrée into the nation's capital. James C. Stone, a Republican and former president of the tobacco cooperative, had been named earlier as a member of the newly created Federal Farm Board. When the question of hiring a legal counsel arose, Stone naturally thought of his friend Reed as an attorney who knew the legal aspect of the farm situation. Reed also had a knowledgeable acquaintance with Alexander Legge, president of the Federal Farm Board, and formerly president of International Harvester of Chicago, a firm Reed had represented on more than one occasion. Thus Reed's interview was a successful one

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[12] *Who's Who* resume: Mimeograph from Mr. Justice Reed.

and he moved with Mrs. Reed from their peaceful farm home, Edgemont, to the accelerated pace of Washington, D. C. Planning to remain but a single year, Mr. and Mrs. Reed took an apartment in the Mayflower which is still their permanent address.[13]

As attorney for the Federal Farm Board, Reed found himself going to the rescue of faltering agricultural groups who solicited aid from the wealthy federal agency. Reed was also instrumental in organizing various cooperatives. However, as Fitzgerald points out, Reed and the Federal Farm Board were not successful. Trying to support the Cotton Market the Board ran out of money and hence turned to the larger Reconstruction Finance Corporation for a loan. It was during these negotiations that Reed became acquainted with Jesse Jones, president of the R.F.C.[14]

This relationship led to Reed's appointment as general counsel for the R. F. C. in December, 1932. It was in this post that Reed, working some eighteen hours a day as the leader of the R. F. C.'s task force of seventy-five lawyers during the "bank holiday," came to the notice of Attorney-General Homer S. Cummings.[15] Attorney-General Cummings consequently asked Reed to present the famous Gold Clause Case, Norman v. Baltimore

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[13]Memo: Interview with Mr. Justice Reed, January 29, 1965.

[14]Memo: Interview with Mr. Justice Reed, January 29, 1965.

[15]Time, "No. 2; Conservative Appointment," January 25, 1938, p. 11.

& Ohio Railroad. Reed's appointment as special assistant to the Attorney-General probably came as the result of Reed's "Malolo Doctrine."

When the Gold Clause case was pending, both Stanley Reed and Homer Cummings were returning from a vacation in Hawaii on board the Malolo. Discussing possible arguments, Reed proposed "the idea that the government should take the position that while the abolition of the gold clause might not be constitutional (Reed believed it was) it would do not one any financial harm."[16] This became known as the "Malolo Doctrine" and Reed successfully employed it to win a 5 - 4 decision in February 1935.

This victory was, in my opinion, the turning point in Stanley Reed's career. If he had lost, I am inclined to believe that he would have been forgotten by an administration to whom success was imperative. But the fact is that Stanley Reed won, and due to the significance of the case, he became nationally known.

Thus, when Solicitor-General J. Crawford Biggs of North Carolina resigned in March, 1935 under pressure due to his record of failure, Cummings "persuaded Franklin Roosevelt that Stanley Reed should be given the Solicitor-Generalship."[17]

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[16]The New York Times, February 1, 1957, p. 12.

[17]Time, "No. 2; Conservative Appointment," January 25, 1938, p. 11.

As Solicitor-General, Stanley Reed worked more diligently than ever. Indeed, it was imperative as the three years he served as the Government's counsel was the most monumental in our legal history. It was during this term that Reed had to defend the New Deal that changed the social and economic aspects of American culture.

Among the monumental cases to which I referred were U. S. v. Schechter Poultry Corporation (the NRA case), Ashwander v. TVA (TVA case), U. S. v. Butler (the AAA case), Anniston Mfg. Co., v. Davis (the Processing Tax case), Alabama Power Co. v. Ickes (the PWA case), Virginia Railway Co. v. System Federation No. 40 (the Railway Labor Act case), NLRB v. Jones & Laughlin Steel Corp, Jones v. Securities & Exchange Commission and Carter v. Carter Coal Co.[18]

Reed's record was suprisingly good considering he was trying to convince the original "nine old men." Concerning the cases listed above Reed lost only four: the Schechter case, the Butler case, the Jones case and the Carter case. Besides the remaining significant cases named above, Reed won substantially more cases than he lost.

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[18] Who's Who resume: mimeograph from Mr. Justice Reed.

In his appearances before the high bench Reed distinguished himself by "solidity of performance."[19] He was not a phrase turner as his successor Robert Jackson, but rather won his cases with a simple but detailed presentation of facts. As is evident in his opinions later, Stanley Reed was a stickler for facts. This same perfectionism is witnessed in Reed's attempt to do all the work, to present all the cases, and even to answer his own telephone.[20]

This conscientiousness once led to his actual collapse. Having just lost the Butler case which came during his first year at his new post, Reed, without respite, threw himself into the Bankhead Act case. The case was actually that of Lee Moor v. Texas & New Orleans Railroad Co., in which Lee Moor claimed damages from the railroad and based his claim on the unconstitutionality of the Bankhead Cotton Act. Reed appeared as a "friend of the court" in an attempt to prevent the Court from making judgment on the Bankhead Act. An eye witness account is as follows:

> "He told the Court that its prerogative to declare a law unconstitutional should not be exercised except with the utmost care and for the gravest reasons. Very sour were the faces of the justices

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[19]Memo: Interview with Mr. Charles A. Horsky, February 13, 1965.

[20]Newsweek, "Success at Law," January 24, 1938, p. 13.

> at being thus instructed. As reason for the Court's not passing on the validity of the law Reed advanced the argument that the Moor case was a "nonadversary proceeding."
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> "How do you justify that statement? barked Mr. Justice McReynolds. Reed admitted that the record did not justify it, but tried the new tack: The Court ought not to decide on the Bankhead Act because the record of the case did not cover all the points that should be considered for an important decision. Again came volleys of questions from the bench. Suddenly Reed went ashen and stammered, "I ask the Court's indulgence. I...I... am too ill to proceed."[21]

Beginning with the Labor Board cases in which Justice Roberts first switched from the conservative to the liberal camp, Reed was more successful. Perhaps this switch to success was the result of a dinner party. After his loss in the Butler case, Reed's lively wife Winifred performed "the most audacious political feat of Washington's 1936 social season" when she successfully invited all the Supreme Court Justices to dinner.[22] However, it is truly significant that during this period Reed was opposed by the most expensive, experienced and learned legal talent available.[23]

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[21] Time, "Judiciary," December 23, 1935, p. 8.

[22] Time, "No. 2. Conservative Appointment," January 25, 1938, p. 11.

[23] Mark James Fitzgerald, Justice Reed: A Study of a Center Judge, op. cit., p. 33.

Also as Solicitor-General, Reed made many speeches. He spoke to the American Bar Association, the New York State Bar Association, the Tennessee State Bar Association and various others. His topics usually incorporated the word "constitution" in their titles and as such I think it is significant to see what Solicitor-General Reed said concerning the constitution he would soon have to interpret.

In one of his earliest speeches before the New York State Bar Association, "The Constitution", Reed expressed his beliefs concerning the function of the legal profession, courts included. "... at the Bar and upon the Bench it is ours to advocate and adjudge the future destinies of the American people under our Constitution. That is our task. May it be performed ... fearlessly and with full comprehension of the needs and aspirations of the American people."[24] Considering the situation of the Court at that time this seems to me to be the fearless plea of a New Dealer. Perhaps Reed expresses his belief in the New Deal even more strongly in his speech "The Constitution of the United States" which he gave to the American Bar Association. In it he claimed that "We must divorce ourselves from preconceived economic and social convictions." The important factor expressed here is that Solicitor-General Reed favored change. However, he qualified

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[24]Stanley F. Reed, "The Constitution," New York State Bar Association Journal, Volume 59, 1936, p. 443.

that change by restricting it to the "needs and aspirations of the American people." Note well that Reed thought in terms of the whole nation.[25]

Speaking more specifically of the Constitution but in the same progressive vein, Reed told the Georgia Bar Association that the constitution was an "instrument ... created to do no more than sketch broadly the powers to be exercised by the future Congresses. The Constitution is a guide for our progress not a gaoler to preserve the status quo."[26] Having expressed this opinion, Reed continued with an even more significant insight: "The Constitution is just as dear to those who look upon it as a liberal statement of policy as it is to those who look on it as a protection of present conditions."[27] It is obvious that these are not the words of a conservative, but, likewise, they are not the words of a flaming liberal. The words that best express Stanley Reed's political position are his own. "... Regretfully,

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[25]Stanley F. Reed, "The Constitution of the United States," American Bar Association Journal, Volume 22, September, 1936, p. 603.

[26]Stanley F. Reed, "The Constitution: A Vital Institution," Report, Georgia Bar Association, 1936, p. 188.

[27]Ibid., p. 183.

but inevitably we must adjust our lives and our government to modern means."[28] He believed in this change because he believed that the forces of modern society "were too powerful to permit the feeble force of the individual to survive."[29]

A powerful government logically leads to a problem of federalism on which Reed expressed himself in his speech, "The Constitution and the Problems of Today," given to the Virginia State Bar Association. In this speech Reed stated that the "Constitution was designed to weld the scattered states into a people; to guide the action of government within the lines of broad grants of power contained in the language of that instrument."[30] This statement combined with his earlier words to the Georgia Bar Association concerning the power of Congress leaves little doubt that Reed is a man who believes that the living should govern the living. However, his advocacy of wider federal power occasioned by the increased complexities of our national life "/did/ not mean a denial of the rights of states in their sphere."[31]

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[28]Stanley F. Reed, "The Constitution of the United States," American Bar Association Journal, op. cit., p. 602.

[29]Ibid., p. 602

[30]Stanley F. Reed, "The Constitution and the Problems of Today," Virginia State Bar Association Reports, Volume 48 1936, p. 277.

[31]Ibid., p. 299.

In his speech to the Tennessee Bar Association, "The State Today", Reed gave his personal definition of federalism. "It is a relationship of cooperation for the general welfare. In case of a conflict ... the authority of the Federal power prevails. Where there is no conflict each is sovereign in its own field. Neither may do aught to abridge the rights of the other as thus defined."[32] Although this statement reveals that Reed was "government minded," I tend to agree with Father O'Brian, as opposed to Father Fitzgerald, that Reed favored a less government minded view of federalism on the bench than he had expounded before it. His restrictive feelings concerning Congressional legislation were also expressed as Solicitor-General in his speech to the Virginia State Bar Association. Said Reed, "Our conclusions as to its constitutionality, however, must not be influenced by any predilections as to its desirability."[33] Moreover, Reed did not fear for our dual system of government as he considered it "a dual system of governmental activities and not a dual system of proprietary activities."[34]

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[32]Stanley F. Reed, "The State Today," Tennessee Law Review, December, 1937, p. 59.

[33]Stanley F. Reed, "The Constitution and the Problems of Today, Virginia State Bar Association Reports, op. cit., p. 300.

[34]Stanley F. Reed, "The State Today," Tennessee Law Review, op. cit., p. 62.

This then was Solicitor-General Stanley Reed. He was not an aggressive New Dealer and as such was by-passed in favor of Hugo Black to fill the first Court vacancy occurring under Franklin Roosevelt.[35] In my opinion, the fact is that Stanley Reed was never an aggressive advocate of any cause or ideology. Indeed, he has "the natural instincts of a man from a border state combined with the ad hoc disposition of a country lawyer to keep him out of the shooting."[36] He was a man who believed in the expanded use of federal power. He was a man who used the term "reservoir" as the word which best described the potential authority delegated to the Federal government within Constitutional limits.[37] He was a man who won the admiration as well as the respect of his associates for his unusual diligence. Reed was also a favorite with his subordinates for he frequently solicited and utilized their advice. Proof of his humility is evident in a story told by Mr. Charles A. Horsky, one of Reed's assistants for the year 1935-36. The incident involved the decision of

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[35]Fitzgerald, op. cit., p. 56.

[36]Arthur Schlesinger, Jr., Fortune, Jan. 1947, p. 79.

[37]Fitzgerald, op. cit., p. 47.

who should make the final rebuttal in the NLRB case. As Solicitor-General there is no doubt but that Reed could have done it and no one would have questioned his right to do so. However, Reed asked Horsky for his opinion and from the three possible candidates, Reed, Wyzanski and Madden, Horsky chose Wyzanski and Reed concurred with his decision. In line with this ability to seek the advice of his subordinates, was Reed's congenial characteristic of being a good listener. He was always willing to listen to questions, even those which questioned his point of view. However, Reed was also a "meticulous hard-hitter" who could support his own convictions with skill and authority. Perhaps his easy-going nature is best expressed by the composure he expressed after getting stuck in an elevator and climbing out through its ceiling in order to escape and by his habit of keeping a fire in the fireplace in his office.[38]

These are the traits of a man who likes to think things through; a man who lets you do most of the talking. This latter quality does not spring from the usual suspicion of strangers inherent in many Kentuckians but rather a sincere interest in what you have to say. These are the traits of a man who should be viewed as the normal

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[38]Memo: Interview with Mr. Chares A. Horsky, February 13, 1965.

product of his past. Born a well-to-do Southerner, reared in rich farm country in the security of a respected and established family, afforded an expensive but formal education, admitted into a respectable law practice, whose main clients were corporations not individuals, excluded from any real contact with big industry or big city finance, appointed to a high federal legal post and for three years the chief advocate and court defender of all the laws of the United States -- viewed thus Stanley Reed's impending judicial record loses its surface contradictions and appears as the consistent record of the man who is Mr. Justice Reed.[39]

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[39] Fred Rodell, Nine Men, Random House, New York, 1955, p. 269.

PART II

JUSTICE STANLEY F. REED AND GOVERNMENT REGULATION

"Take but degree away, untune that string
And hark! What discord follows;"

Shakespeare

Chapter IV

The Logical Choice

When Justice George Sutherland of Utah announced his retirement to be effective January 1938 many factors and much speculation filled the minds and newspaper columns of the day.

The first of these factors was the necessity of appointing a man who would not arouse the controversy that had surrounded the appointment of Hugo Black and whose past was exempt from such controversial items as membership in the Ku Klux Klan. As always the American Bar Association thought that the nominee should be a man with prior experience on the bench and no other.[40]

A second group led by Professor Fred Rodell of the Yale Law School believed that the nominee should be first and foremost "a judicial statesman and a wise master in the art of government." "The kind of content that is needed in the work of a Supreme Court Justice is not the nicety of legal needlework, the perfectionism in petty points of law ... but the breadth of vision, the statesmanship, the genius to fashion law instead of merely following it." As an advocate of these views

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[40]The New York Times, February 1, 1957, p. 12.

Fred Rodell was definitely not an admirer of Justice Reed.[41]

A third group, the most liberal of the lot, believed that all rigid generalizations should be avoided in making the selection of a nominee. The main thing they affirmed was to nominate and install the best man available.[42]

Other factors that were considered were the fact that Justice Sutherland's retirement left the Court without a judge from the states west of the Mississippi. Also pertinent was the fact that the politically important Central States had long been unrepresented on the Supreme Court bench.[43]

Considering the reaction to his nomination and his speedy approval by the Senate, Stanley Reed, disregarding the opinion of Mr. Rodell, was the best man available.

He was a well-educated lawyer of long experience, a condition which pleased the American Bar Association. He was a Democrat and experienced bureaucrat which pleased the politicians. He was a skillful and successful defender of the New Deal which pleased President Roosevelt and finally a non-controversial moderate who looked like a Supreme Court Justice which would please the public.

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[41] Ibid., p. 12.

[42] Ibid., p. 12.

[43] Newsweek, January 17, 1938, p. 11.

But these are merely the external, obvious, objective factors which supported the candidacy of Stanley Reed. What of the other factors, those that were unpublished and intangible?

One of these was Reed's close friendship with senior Senator Alben Barkley, usually a close friend of President Franklin Roosevelt. Although it is only speculation, Reed, himself, feels that Barkley advocated his nomination.

However, in terms of personal influence, Reed is of the opinion that it was Attorney-General Homer Cummings who did the most in advancing his appointment. As Reed pointed out, Cummings could have had the position if he had so desired. However, because of his advanced age, the Attorney-General disqualified himself and proposed the selection of Reed.[44]

Still another personal influence which was probably advantageous was that of Thomas G. Corcoran. Mr. Corcoran was personal friend, advisor and confidante of President Roosevelt and also a very close friend of Stanley Reed from Reed's R.F.C. days. It is merely speculation as to the actual amount of influence which Mr. Corcoran exerted concerning the final decision of Roosevelt to nominate Reed, but if it existed, it was certainly not harmful.[45]

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[44]Memo: Interview with Justice Reed, January 29, 1965.

[45]Ibid.

The final factor and perhaps the most significant was Reed's desire to sit on the highest bench of the land. He did not aggressively support his own cause but neither did he shun the opportunity. For as he, himself, stated, what lawyer would not like to be a justice on the Supreme Court of the United States? I would agree that the ranks would be thin.

Thus as a result of the combined effect of the above mentioned factors, Stanley Reed was nominated above such political competition as Senator Sherman Minton of Indiana and Governor Frank Murphy of Michian, both future Justices, plus Lloyd K. Garrison, dean of the University of Wisconsin law school, and Governor Philip LaFollette of Wisconsin.[46] His nomination was approved in the less than average length of time - thirteen days.

His acceptance brought a divided assessment of his philosophy but a uniform opinion concerning his capability.

Senator Minton and The New Republic, commenting upon Reed's nomination to the Court, both classified him as a liberal but the latter also noted that the conservative press greeted his acceptance with sighs of relief. Senator Connally of Texas and Time viewed Reed as "an able accomplished lawyer of the conservative type."

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[46] Newsweek, January 17, 1938, p. 11.

The Nation straddled the issue by stating that "while Mr. Reed's liberalism is punative, his conservatism is equally nebulous."[47] But it was Associate Justice Harlan F. Stone who made the most poignant observation concerning Reed as a Justice. Said Stone, "He is honest, straightforward, and a hard worker, and I think a good lawyer. The court ought to get many years of good service from him when he settles into the new job."[48]

For himself Reed spoke only four words: "I am deeply grateful." This modesty was in perfect keeping with a man whom the Literary Digest described as "extremely type-shy, possibly the most diffident-to-publicity person holding high governmental office."[49] However, modesty could not be his on this occasion when his portrait served as the cover of Newsweek magazine for January 24, 1938. After this sudden abundance of publicity Mr. Justice Stanley F. Reed settled down into a similarly uncontroversial position which would characterize his nineteen years on the highest court in the land. During the length of time Reed's votes ranged from his primary liberal position to the highly contested position of "swing man" in the center and finally to the conservative position on the right. However, as Arthur Krock, New York Times

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[47]Fitzgerald, op. cit., p. 57.

[48]The Baltimore Sun, February 2, 1957, mimeograph from Justice Reed.

[49]Literary Digest, December 21, 1935, p.

correspondent in Washington, pointed out on Reed's retirement, this movement from left to right is more a sign of the change and accomplishment of time rather than an indication of change in Justice Reed. Indeed, I would agree that Reed was ever consistent to his personal belief that "regretfully, but inevitably we must adjust..."[50]

Taking this basically conservative progressivism as the correct interpretation of the philosophy which best expresses Justice Reed, the man, the following discussion of Reed's opinions will seek to reveal the more specific facets of this philosophy and his consistent adherence to them. In the way of introduction it should be noted that Justice Reed's progressivism was largely expressed in cases involving the extension of federal power or regulation due to the commerce clause. On the other hand, Justice Reed's conservatism was generally expressed in those cases involving personal liberties and consequently law and order.

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[50]The New York Times, February 1, 1957, p. 12.

Chapter V

Patents and Mergers

In his unpublished doctoral thesis, Justice Reed: A Study of a Center Judge, Father Mark James Fitzgerald, now Professor of Economics at the University of Notre Dame, gives the best interpretation of Reed's views concerning the Constitution in the field of economics and commerce. His synopsis of Reed's views in the realm of economics was the only available source for this segment of Reed's opinions. As such the following portion of my paper is heavily indebted to him, although I am not in agreement as to his interpretation of Reed's philosophy in the economic sphere.

Fitzgerald interprets Reed's opinions here as "indications that the point of view expressed by Reed the attorney and administrator remained pretty much the point of view of Reed the judge."[51] This would infer that Reed remained an advocate of wide federal regulation instead of forsaking advocacy for adjudication as the New York Times remarked at the time of his retirement.[52] I would not disagree with Fitzgerald if all he meant was

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[51] Fitzgerald, op. cit., p. 372.

[52] New York Times, February 1, 1957, p. 12.

that Stanley Reed did not change his basic philosophy when he joined the Court. I would agree to the statement that Reed definitely remained "government minded." This means that, in my opinion, Reed gives a broad interpretation to the powers granted the Federal government in Section 8 of Article I of the Constitution.

The power discussed here is that of the regulation of commerce among the several states.

Under this broad heading is the "patent power" granted to Congress under the same Section 8 of Article I.

Concerning patents Justice Reed favored the use of "strict standards" when considering the justification of patent claims. This means that Reed was aware that the intention of the patent privilege, as stated in the Constitution, had been twisted by the big corporations to dominate production by monopolizing the rights to the means of production. As evidence of this fact Fitzgerald pointed out that such behemoth corporations as General Electric, American Telephone and Telegraph,, and the Radio Corporation of America developed a patent pool of over fifteen thousand patents between them. This fact is even more alarming when one realizes that Fitzgerald did not include the biggest patent holder, E. I. duPont. Hence Reed favored increased competition by requiring that a patent only be granted on the grounds of true and decisive innovation. As such this interpretation

favored the public interest, something which Reed would defend throughout his years on the bench. This interpretation, usually harmful to big corporations, would also contradict Fitzgerald's statement that Reed's experience as attorney for the Chesapeake & Ohio RR. predisposed him to favor the interests of big corporations.[53]

His policy of "strict standards" was first voiced in his opinion for the Court in the case of General Electric Co. v. Wabash Appliance Corporation (1938) in which Reed refused to grant a patent to General Electric concerning the filament for incandescent lamps.[54]

In the case of Universal Oil Products Co. v. Globe Oil & Refining Co. (1943) Reed again applied his strict standards test in deciding against Universal Oil Products Company who had sued the Globe Oil & Refining Company for violation of their patent for their process of producing gasoline from crude oil. Reed held that Universal's patent, received on the grounds that "substantial vaporization" was a true innovation, was invalid as their production operation was basically similar to the original process.[55]

Justice Reed also expressed his strict standards philosophy when he concurred in the dissent of Justice Black

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[53]Fitzgerald, op. cit., pp. 61-2.

[54]304 U.S. 364 (1938).

[55]305 U.S. 124 (1938).

in the case of General Talking Pictures Corp. v. Western Electric Co. (1938). Here the issue was whether the rights of a patent continued even after its sale. Justice Brandeis and a majority of the Court said that the patent rights did continue. Black and Reed dissented on the grounds of the decision handed down almost one hundred years before in Bloomer v. McQuewan (1842). Here the Court had held that when a patent "passes into the hands of the purchaser, it is no longer within the limits of the monopoly."[56] It is interesting here to note that Reed employed the principle of "stare decisis," although earlier in this same year in a speech before the Pennsylvania Bar Association, he had said that "the court must test its conclusions by the organic document rather than precedent." Actually this comparison is unfair as Reed adhered to his opinion of "stare decisis" in a famous case discussed later.

However, Reed seems to have contradicted his philosophy of "strict standards" for the public interest by his dissent in Scott Paper Co. v. Marcalus Manufacturing Co. (1945). This decision upset the doctrine handed down twenty years earlier in Westinghouse Electric and Manufacturing Co. v.

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[56]Fitzgerald, op. cit., p. 63.

Formica Insulation Co. (1924).[57] In this case it was held that the assignor could not introduce evidence for the purpose of destroying the patent. Fifty years later Marcalus was allowed to introduce evidence which did destroy the patent as it was in the public interest to do so. Reed did not believe that this was in the public interest as it might have led to the wholesale disqualification of patents by introduction of evidence such as that of Marcalus that his box-making machine was actually copied from an expired patent and thus a part of the public domain.[58] Although he has been accused of deciding cases without deference to consequences, I believe that this was one occasion when Reed was worried more by the consequences than by the immediate decision. Thus, in my opinion, Justice Reed was consistent with his philosophy concerning the public interest, the contradiction coming from his different interpretation of the facts.

In one of the most famous patent cases, United States v. Line Material Co. (1948) "a badly divided court placed Reed in a position where he could write the opinion of the Court and yet have no other member of the bench agree with him."[59] It was also this case that Fitzgerald

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[57] 326 U.S. 249 (1945). 266 U.S. 342 (1924).

[58] 326 U.S. 249.

[59] Lawrence I. Wood. "Patent Combinations and the Anti-Trust Laws." George Washington Law Review. Volume XVII. December 1948, p. 90, quoted by Fitzgerald, op. cit., p. 70.

ear-marked as the beginning of Reed's "center position." The case, itself, involved the basic issue of whether a patent holder may set the prices at which his several licensees shall sell the patented article. This price-fixing right had been enunciated by Chief Justice Taft in his opinion in United States v. General Electric Co. (1926). This doctrine remained an aggravating loophole to the provisions of the Sherman Anti-trust Act and as such a special target for eradication by government forces.[60]

"Mindful that there was no clear majority in this case and in keeping with the role of center judge," Reed sought to incorporate some aspects of both views into his opinion.[61]

He successfully straddled the issue by allowing price-fixing to continue "where a conspiracy to restrain trade or an effort to monopolize is not involved."[62] Under these conditions "a patentee may license another to make and vend a patented device with a provision that the licensee's sale price shall be fixed by the patentee."[63]

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[60] Fitzgerald, op. cit., p. 70.

[61] Ibid., p. 72.

[62] 333 U.S. 304.

[63] Ibid., 304.

However, to satisfy the liberal wing, Reed said:

> "Where two or more patentees with competitive, non-infringing patents combine them and fix prices ... competition is impeded.... As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly."[64]

Therefore, by virtue of this decision, to which Reed won four of his colleagues to win a five to three decision with Justice Jackson not participating, the Court stated that where competition is not impeded the General Electric doctrine is still in effect. Hence, in my opinion, Reed successfully upheld a legitimate right of a patentee but qualified that right if it infringed on fair competition which is in the best interests of the public. Obviously Justice Reed did not believe that Taft's opinion was in error, but that it had been taken advantage of by unscrupulous parties.

A companion case to United States v. Line Material Co. was United States v. United States Gypsom Co. (1948). Here the issue in question was whether the licensees had entered into a price-fixing conspiracy or whether the resultant price control was merely a lawful right of the patent holder's privilege. In addition the

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[64] Ibid., 312.

"umbrella patent," that is a patent so extensive as to incorporate an industrial concept, of United States Gypsum Co. was questioned.[65]

Writing the opinion of the Court in this case, also, Reed successfully won the concurrence of the entire Court. As for the point concerning conspiracy, Reed recognized "that such licensing agreements where all the members concerned knew of the participation of others in the industry, gave sufficient evidence of conspiracy in control over prices and methods of production."[66] As in the Line Material case, Reed pointed out that the General Electric doctrine gave no support to this type of commercial conspiracy.

Concerning the "umbrella patent," Frankfurter noted in his concurrence the possibilities left open to the Federal government by Reed's "deliberate dicta" in his Gypsum opinion. In Reed's view the Government should be permitted to challenge the validity of an unexpired patent where the anti-trust laws were concerned. Though this aspect of Reed's opinion might be restricted by future decisions, nevertheless it added "a potent weapon to the Anti-trust Division's arsenal. Patents will not

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[65] Fitzgerald, op. cit., p. 74.

[66] 333 U.S. 389.

necessarily be assumed to be valid in the future anti-trust suits."[67]

In his conclusion on Justice Reed's opinions and dissents concerning patents, Fitzgerald said that "Reed until recent years had rather consistently held to the belief that patent law should be viewed only from the statutory code and from the weight of strict judicial precedent."[68] In later years he claimed that Reed's thoughts concerning patents underwent a change. He credited Reed with giving more weight to the results of present decisions rather than to the decisions of a more economically naive era. If this change did in fact occur, I would claim that it was only consistent with Reed, the man, who always held the public interest utmost in his mind. Furthermore, with this factor of the public interest in mind, I do not see any contradiction or change between Reed's early opinions in the Wabash and Universal Oil cases and those of the Line Material and Gypsum cases.

In the closely associated field of mergers which are governed by the Sherman Act, Justice Reed again, as a center judge, wrote the monumental opinion in United States

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[67]Barnard and Zlinkoff, "Patents, Procedure and the Sherman Act," George Washington Law Review, Volume XII, December, 1948, p. 56, quoted by Fitzgerald, op. cit., p. 77.

[68]Fitzgerald, op. cit., p. 80.

v. Columbia Steel Co. (1948). In this five to four decision, the Court failed to accept the Government's action to prevent the United States Steel Corporation and its subsidiaries from purchasing the Consolidated Steel Corporation, a leading steel corporation on the West Coast.[69]

The criteria to which Reed adhered were the areas of market and the types of products involved, the same areas which the government complaint used in its argument. In his estimation based on the "facts of the case" the effect of the proposed merger on the competitors of United States Steel would be too small to violate the Sherman Act. Furthermore Reed did not judge that "the purpose or intent with which the combination was conceived" was in violation of the Sherman Act. However, highly significant for future cases was Reed's logical conclusion from his above statement, namely that "even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."[70]

This statement was without doubt the most significant aspect of Reed's opinion, but the fears it aroused among

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[69] Ibid., p. 82.

[70] 334 U.S. 525.

"corporation minded" attorneys have not been justified. Indeed,it was the immediate effect of allowing a large corporation to merge with a smaller one that has become the rule. This rule has been especially applied to railroads in the present day. Perhaps the reason for this reversal in merger policy was Reed's observation that the factual situation of all the previous decisions was so different from that of the present that they must be disregarded as pertinent precedents.[71] This use of present conditions as a yardstick for measuring the monopolistic nature of a merger seems to me to be a healthy innovation as does Reed's recognition of the relationship of a company's production and market to the total production and market involved. Here as in the patent cases, I believe that Reed was primarily concerned with the public interest. If a merger were harmful to the public, I believe that Reed would have voted against it, if not, I believe that he would have sustained it.

In conclusion I would say that Justice Reed, in the cases concerning patents and mergers, was more aware of the consequences of the respective decisions and thus more liberal than in cases concerning personal liberties. As a former attorney for the R. F. C., I think he was more experienced in the problems involved in maintaining a healthy economy which I believe he felt took preference

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[71] 334 U.S. 531.

over precedent. That he was "government minded" is better illustrated by the following chapter, for concerning patents and mergers Reed voted against the government in such significant cases as United States v. Line Material Co. and United States v. Columbia Steel Co. However, this is not to say that Reed voted against the extension of government power for in both cases he set forth new criteria which in fact offered new possibilities for the extension of federal power. This extension of federal power is, in my opinion, a complimentary expression of Reed's concern with the public interest.

Chapter VI

...Shall Have the Power to Regulate Commerce

Even before Justice Reed began his tenure on the bench, the Commerce Clause of Section 8 of Article I was the most broadly construed power delegated to the Federal Government by our Constitution. Under Reed it would suffer further stretching until it included everything from the sale of milk to the payment of fair wages. During Reed's tenure as Solicitor-General his position concerning the scope of federal regulation was decidedly left of center and his philosophy on this point did not noticeably change when he became a justice.[72]

The first of four areas to be discussed under commerce regulation is that of agriculture. Perhaps more than that of any other justice, Reed's early background had been closely associated with the problems of agriculture. As chief counsel for the Burley Tobacco Grower's Association in the early 1920's he had been a leader in applying the principles of orderly marketing and production control. As counsel for the Federal Farm Board, Reed struggled with the same agricultural problems only on a larger scale. In addition Reed still owned, as he does today, a five hundred acre farm south of Maysville and thus

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[72] Fitzgerald, op. cit., p. 95.

he knew the problems that beset a farmer. Hence this experience and background must have made him a receptive listener when the government argued that the "commerce clause" could be used to regulate the production and sale of farm commodities.[73]

Probably the most famous case dealing with this question was United States v. Rock Royal Cooperative, Inc. (1939) for which Reed wrote possibly the longest opinion on record. It certainly must include some of the longest footnotes. As it was a five to four decision, upholding the validity of the Agricultural Marketing Act and thus sweet redress for Reed for his previous loss of the Butler case (1936) concerning the A. A. A. of 1933. Moreover, Rock Royal is a definite illustration of Reed's belief in the expansion of governmental power.

Unlike Justice Roberts, who in his Butler opinion three years previously, stated that agricultural production was "a purely local activity," Reed wrote that while the act of selling milk may be a local transaction, the fact that it was "bought for use beyond state lines" made it part of interstate commerce. Moreover, the comcomitant sale of milk some for local sale and some for interstate sale permitted the "sweep of the "Commerce Clause" to cover the whole.[74]

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[73] Ibid., p. 100.

[74] 307 U.S. 568.

Justice Reed, in a well documented opinion which analyzed the Agricultural Marketing Act almost point for point, based his conclusion on the precedent set in the case of United States v. Houston, East and West Texas R.R. Co. (1914) known as the Shreveport doctrine. Reed applied the Shreveport doctrine to the Rock Royal case as justification for federal intervention. The Shreveport doctrine stated that the object of the commerce clause was to prevent interstate trade from being destroyed or impeded by the rivalries of local governments. Thus wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress and not the State who is entitled to prescribe the final and dominant rule. If it were otherwise the Nation would not be supreme within the national field. However, the Shreveport doctrine did not claim that Congress possessed the authority to regulate the internal commerce of a State as such, but that it did possess the power to foster and protect interstate commerce although in doing so, it may be necessary to control the intra-state transactions of interstate carriers.[75]

In conclusion of his opinion Reed left no doubt as to the extent to which he believed federal regulation

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[75] 234 U.S. 342,3.

extended. This statement came in an appended paragraph which referred to the apprehension expressed in the concurring opinions of Justices Black and Douglas concerning the limitation of Congressional power dependent upon the "use and nature of milk." Reed felt that he had indicated no such limitation, and in the appended paragraph stated that "they (Black and Douglas) do not believe that we are called upon in this case to indicate, as they think we do, that there is such a constitutional limitation on the power of Congress."[76]

Thus I would conclude that Justice Reed, while advocating the expansion of federal regulation, did no more than uphold the will of the people who expressed their desires through their Congress in the form of the Agricultural Marketing Act. This healthy regard for the vox populi is another aspect of Reed's concern for the public interest and one not to be taken lightly.

On the same day as the Rock Royal decision, June 5, 1939, Reed handed down the opinion of H. P. Hood & Sons, Inc. v. United States (1939) concerning the dairy region supplying Boston which upheld the same Agricultural Marketing Agreement Act.[77]

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[76]307 U.S. 582.

[77]Fitzgerald, op. cit., p. 100.

On this issue there is not even any external contradiction expressed by a conflicting dissent for when the question arose again in 1942 in the case of United States v. Wrightwood Dairy Co. concerning the dairy region for Chicago, Reed naturally voted with the majority.[78]

The strong advocacy of procedural due process, and administrative procedural power that was evident in Reed's Rock Royal decision was also evident in his opinion for Gray v. Powell (1942). This five to three opinion was hailed by Wesley McCune as "one of the most extreme opinions ever written on administrative power." Although this case involved the external question of taxation, it was similar to the Rock Royal case in that the disputed issue was concerned with the constitutionality of an administrative decision, in this case by the Director of the Bituminous Coal Division of the Department of Interior.[79]

As in the Rock Royal case Justice Reed upheld the Director's decision that the Seaboard Air Line Railway Co. was liable to taxation emphasizing in definite terms "that where a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched."[80]

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[78]315 U.S. 110.

[79]Fitzgerald, op. cit., p. 279.

[80]314 U.S. 412.

As if the above were ambiguous Reed went further and stated that "it is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."[81]

The above decision was written in 1941 but it definitely embodies the same philosophy to which Justice Reed adhered in the case of John P. Peters v. Oveta Culp Hobby (1934). This was a loyalty case in which the issue was whether or not the right of due process had been violated by an administrative action. Chief Justice Warren wrote the majority opinion which vindicated Peters solely on the grounds that the Loyalty Review Board had exceeded its powers. Reed, in his dissent, said, "I do not find it as easy as does the majority to analogize such review (of executive action) to judicial review of Congressional acts and administrative interpretation of those acts. The executive branch is traditionally free to handle its internal problems of administration its own way. The legality of judicial review of such intra-executive operations as this, is, for me, not completely free from doubt."[82]

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[81] Ibid., p. 412.

[82] The New York Times, June 5, 1955, p. 16.

Although the Rock Royal and Gray cases concerned administrative decisions and the Peters case an executive decision, Reed's opinions hold consistently to the philosophy he expressed to the Virginia State Bar Association in 1936, namely, "Congress may certainly delegate to others powers which the legislature may rightfully exercise itself."[83] I also think these decisions, especially the Peters decision, are evidence of Reed's fundamental belief in the sanctity of federalism. However, I would qualify Reed's federalism as one which gave the federal government the dominant position due to the expanding needs of modern society which only the federal government can alleviate.

A consistent example of Reed's definition of federalism was expressed in his opinion in the New River case. Both these opinions had their counterpart in the Rock Royal case where Reed upheld the power of Congress to regulate intrastate commerce as it would ultimately intermingle with interstate commerce.[84]

This case, United States v. Appalachian Power Co. (1941), contested the limits of federal power over waterways. Here the Appalachian Power Co. opposed a federal injunction against construction of a dam on the

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[83]Fitzgerald, op. cit., p. 278.

[84]Ibid., p. 103.

New River, a waterway that Appalachian Power held was unnavigable and thus not under federal jurisdiction, hence dismissing the need for a federal license.[85]

Justice Reed's majority opinion incorporated a new concept which, according to C. Herman Pritchett, extended to the widest possible scope "the plenary control of the federal government over navigable waters and the hydroelectric power derived from them."[86] This concept held that the navigability of a river should not be judged on its present navigability but rather on its potential navigability. Reed did not create this concept but rather incorporated it from the Water Power Act which defined "navigable waters" as those "which either in their natural or improved condition are so used or suitable for use."[87] Thus Reed does not deserve the onus imparted to his decision by Wendell L. Wilkie's famous but erroneous quote, "Now the running water in the men's room is navigable."[88]

Although this interpretation would have sufficed to substantiate his opinion, Reed went further and stated that as the power of the government over navigability is

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[85]311 U.S. 377.

[86]Fitzgerald, op. cit., p. 100.

[87]311 U.S. 407.

[88]The New York Times, February 1, 1957, p. 12.

derived from the commerce clause, federal authority goes beyond mere control of navigation. Federal authority, said Reed, extends into the areas of flood control, watershed development, and the recovery of the cost of improvements through utilization of hydroelectric power via the broad regulatory power contained in the commerce clause.[89]

This opinion is definitely an expression of Justice Reed's interpretation of federalism and his "government mindedness." Contributing to this belief in the extension of government power to solve modern social ills could have been Reed's Maysville heritage. Maysville, Kentucky is an old town nestled on the banks of the Ohio River where floods were hated as the perennial vandal of private property. Moreover, the flood of 1937, three years before this decision, was the worst in Kentucky history. Coupled with this fact was that of Reed's argument for flood control and watershed development in the case of Ashwander v. T.V.A. (1935) when he was Solicitor-General. I do not doubt the significance of these factors, but I think that they only served to reinforce Reed's belief in the necessity of extending governmental power.[90]

This belief was especially inherent in Reed's decisions concerning federal regulation of Labor.

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[89] 311 U.S. 426.

[90] Fitzgerald, op. cit., p. 104.

The first of these decisions were those that dealt with the National Labor Relations Act. As would be expected, when the power of the National Labor Relations Board was challenged, Reed upheld their decision and thus compiled a record favorable to the labor interest.

The first of such cases was that of Consolidated Edison Co. v. NLRB (1939). The issue here was the ability of an employer, Consolidated Edison, to give support, financial and otherwise, to a competitor union, the A. F. L., supposedly to destroy the position of an undesirable established union, the C. I. O. The C. I. O. faction charged Consolidated Edison with favoritism which they claimed was a violation of the NLRA. The NLRB sustained the claim of the C. I. O. and issued a cease and desist order to Consolidated Edison concerning recognition of the A. F. L. faction.[91]

Justice Reed, in an opinion that concurred in part and dissented in part, upheld the power of the NLRB. However, unlike Hughes, he did not call for the NLRB to delete its order concerning non-recognition of the A. F. L. faction by Consolidated Edison. Reed regarded it as a denial of delegated Congressional power for the

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[91] 305 U. S. 197.

Court to hold that a Board order cannot "nullify advantages obtained ... by the unlawful interference of the Edison companies with self-organization."[92]

This opinion was not only consistent with his opinions in the Rock Royal, Gray v. Powell, and Peters cases in the area of extension of federal power, but it was also compatible with Justice Reed's morality. Although this point will be further developed in the chapter on personal liberties, it will suffice here to say that Justice Reed, by his own admission, judged a case by its intrinsic facts and showed little sympathy to those that broke the moral code that the law embodies. Proof of this moral standard was Reed's statement that the evidence clearly showed that Consolidated Edison signed the contracts as part of an integrated plan "for coercion of and interference with the self-organization of their employees."[93]

Companion cases to Consolidated Edison Co. v. NLRB were NLRB v. Electric Vacuum Cleaner Co. (1942) and NLRB v. Southern Bell Telephone Co. (1943). As in the Consolidated Edison case, Reed's majority opinions in the latter two cases upheld the decision of the Board and consequently favored the labor interests. Again, as

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[92] 305 U.S. 245.

[93] 305 U.S. 247.

in the primary case, there was evidence of employer coercion which appeared to be the decisive factor in Reed's opinion.[94]

In "Reinstatement" cases Justice Reed again held true to form although this time in the form of two dissents. The cases in question were NLRB v. Fansteel Metal Corp. (1939) and Southern Steamship Co. v. NLRB (1942).[95]

The first of these struck down a reinstatement order issued by the NLRB to Fansteel Metal Corp. concerning their employees whom Fansteel had fired as a result of a stay-in strike. Although Chief Justice Hughes admitted the guilt of Fansteel in committing unfair labor practices as stated by the investigation of the NLRB, nevertheless he considered that Congress had not intended to prevent the discharge of employees guilty of unlawful conduct by the creation of the NLRA and as such the NLRB had transcended its powers.[96] On the other hand, Justice Reed believed that the "unfair labor practices" committed by Fansteel was ample justification for the Board's reinstatement order. Reed even thought that it was the purpose of the NLRA to prevent such injustice and that

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[94] NLRB v. Electric Vacuum Cleaner Co. 315 U.S. 685. NLRB v. Southern Bell Telephone Co. 319 U.S. 50.

[95] Fitzgerald, op. cit., p. 220.

[96] 306 U.S. 254, 255.

it was constitutional as such.[97] As before, he would also empower the NLRB with the right to make the decision deemed suitable and just on the basis of their investigation.

The companion case of Southern Steamship Co. v. NLRB (1942) was concerned with the reinstatement of five strikers as ordered by the NLRB. In a similar opinion to that of Chief Justice Hughes, Justice Brynes held that the Board had overstepped its authority in ordering reinstatement with back pay.[98]

Again Reed's dissent invoked the finding of the Board as justification for the Board's order. To his deep regret these two decisions deprived the NLRB of a remedy for discharged employees who, although guilty of wrongful and illegal conduct by striking, had been subjected to a long series of unfair practices by their employer.[99]

What is significant in these two dissents is the unique fact that they were both opinions that condoned disorder. That is, Reed's opinions, in effect, condoned the disorder of the stay-in strike in the Fansteel case and the small scale mutiny in the Southern Steamship case by supporting the conclusions of the NLRB in both these

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[97] 306 U.S. 267.

[98] 316 U.S. 35, 36.

[99] Fitzgerald, op. cit. p. 225.

cases. The NLRB had in both cases called for the reinstatement of discharged employees. Had Reed's opinion been the majority concerning these cases, it seems to me that they would have condoned violence as the proper means of obtaining redress for grievous working conditions. As such I cannot conceive that Justice Reed was aware of his latent vote for disorder. If he, indeed, was aware of the potentialities of his opinion it is the only true and basic contrast I find in his voting record. In all other cases, as in these, I believe that Justice Reed voted to uphold his interpretation of law, order and the public good.

This adherence to law, order and justice was partially witnessed by Reed's two votes against the NLRB in the cases Regal Knitwear v. NLRB and Southport Petroleum Co. v. NLRB.[100]

In his dissenting opinion in Regal Knitwear v. NLRB (1945) Justice Reed maintained that it was "a misuse of authority" for the Board "to threaten those who are not subject to its command."[101] Reed thought that the Court-approved power of the NLRB to apply its orders to the "successor and assigns" amounted to the infliction of an unwarranted penalty on an employer by discouraging prospective buyers from acquiring his property and business.

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[100] Ibid., p. 231.

[101] 315 U.S. 9.

This vote against an extension of the Board's power seems contradictory in view of Reed's previous opinions concerning the NLRB unless one regards those opinions as expressions of a belief in a philosophy that transcends the incidental NLRB. Viewed thus, Reed's opinions are consistent excepting the Fansteel and Southern Steamship cases.

In his dissent in Southport Petroleum Co. v. NLRB (1942), Justice Reed interpreted the facts as acts of good faith which warranted a new hearing with the introduction of new evidence as desired by Southport Petroleum. Although one could argue with his interpretation of the facts there is no doubt that Reed adhered to his code of justice.[102]

Justice Reed again invoked his sense of justice in the case of United Brotherhood of Carpenters and Joiners v. United States (1947) which dealt with the Norris-LaGuardia Act. In his opinion Reed held that the Brotherhood was not guilty of violating the Sherman Act. He stated Section 6 of the Norris-LaGuardia Act as justification for his absolution of the Brotherhood as a whole though he did admit that some of its individual

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[102] 315 U.S. 108.

members were guilty. Reed also held that the limited liability feature of Section 6 had not been sufficiently explained to the jury who had made the conviction. Thus the substantial rights of the defendants had been unjustly violated and the decision of the jury was hence invalid.[103]

However in sharp contrast to this liberal record stands Justice Reed's opinion in the case of Williams v. Jacksonville Terminal Co. (1942).

Speaking as Solicitor-General before the Tennessee Bar Association Reed had praised the pending Wage and Hour Bill as protection for "those states with modern labor standards from the competition of the relatively small group of industrialists who exploit the immature and helpless by reducing wages below the levels necessary for the maintenance of decent standards of living.[104]

Speaking as Justice Reed, however, in his opinion in Williams v. Jacksonville Terminal Co. he handed down a decision which McCune characterized as "perhaps the biggest defeat for labor in the wage-hour field."[105]

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[103] 330 U.S. 408, 412.

[104] Stanley F. Reed, "The State Today," Tennessee Law Review, Volume XV, December, 1937, p. 69. Quoted by Fitzgerald, op. cit., p. 243.

[105] Wesley McCune, The Nine Young, New York: Harper & Bros., 1947, p. 129. Quoted by Fitzgerald, op. cit., 243.

This case concerned the right of an employer to acknowledge "tips" as wages paid. The Jacksonville Terminal Company had done just that when the Wage-Hour law became effective. Twenty months later the "red caps" sued to recover unpaid wages by virtue of the wage provision in the Fair Labor Standards Act.[106]

Reed justifiably restricted his opinion to the nature and ownership of "tips". However, he came, I believe, to the false conclusion that "tips may be in reality the employee's compensation for his services and therefore wages."[107] This he stated in spite of his almost immediately previous statement that, "The absence of the word "tip" from the statutory extension of the ordinary meaning of wages makes it quite clear that not every gratuity given a worker by his employer's customer is part of his wages. If Congress had had it in mind to include in wages all tips, the words were readily available for expressing the thought."[108]

What then was the determining factor that made the case of the "red caps" of Jacksonville Terminal an exception? It was the fact, noted by Reed, that the

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[106] 315 U.S. 386.

[107] 315 U.S. 404.

[108] Ibid., p. 404.

"red caps" continued to work thus acquiescing in an understanding that all future tips would count as wages.[109] Although he cited numerous cases in a footnote where tips had been recognized as wages due to a previous agreement, I do not think that the singular fact that the red caps continued to work constituted an agreement. The evidence revealed that the red caps instituted action as early as November 3, 1938 just ten days after the effective date of the Fair Labor Standards Act. Thus I do not conclude that the red caps acquiesced to the terminal's plan. In addition, I would have to agree with Justice Black and his dissenting words that "I am unable to agree that tips given to red caps by travellers are 'wages' paid to the red caps by the railraod."[110] To me the very nature of a "tip" defies the conclusion reached by Justice Reed.

However, I would just as roundly disagree with Fitzgerald's implication that Reed's decision was possibly influenced by his erstwhile connection with the railroad, a form of industry he had defended as a private attorney.[111] Justice Reed might have been restricted by his dedication to facts, but he was certainly never restricted by prejudice.

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[109] 315 U.S. 397.

[110] 315 U.S. 410.

[111] Fitzgerald, op. cit., p. 245.

Perhaps the best defense of this statement was Reed's concurrence in Justice Black's dissent in the case of Stewart, Administrator v. Southern Railway Co. (1942). In deference to the majority opinion, Reed agreed that the Southern Railway Company was guilty of violating the Federal Safety Appliance Act via a faulty automatic coupler which had caused the death of Stewart and thus liable for damages.[112] Probably the decisive factor here was the revealing testimony of Mr. Stogner as recorded by Black in his dissent.[113] It is noteworthy here that Reed, who in his days of private practice had won a large percentage of similar cases for his client, the Chesapeake and Ohio Railroad, voted against the railroad.

In the case of Owens v. Union Pacific Railroad Co. (1943) Reed, in his dissent, upheld the railroad in contending that employee Owens had assumed the risk of injury which had proved fatal to him.[114] It should suffice to say that Reed's interpretation of the facts involved in this coupling accident differed from that of the majority opinion and that his interpretation was agreed to by Chief Justice Stone and Justice Roberts.

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[112] 315 U.S. 283.

[113] Ibid., p. 288.

[114] 319 U.S. 725.

As summation of the economic aspects of his opinions, I think that Justice Reed, despite his center position, adhered to his philosophy of justice and order which included an honest inclination for the extension of federal power to meet the demanding needs of a dynamic society. Although such cases as the Rock Royal Coop case and New River case, would support McCune's contention that, "It was at the RFC that Reed learned the finer points of using legal power for the administration's concept of economic justice,"[115] I disagree with any implication that Reed manipulated or expanded "traditional concepts of legal power" to suit administrative desires. I would agree that the traditional concepts of Constitutional law were out of step with the needs of the United States when Reed was appointed to the Court and that he was not adverse to changing these traditional concepts when the need presented itself.

This viewpoint was most decisively presented in a speech by Justice Reed to the Pennsylvania Bar Association entitled: "Stare Decisis and Constitutional Law" which given in April, 1938 coincides with his views expressed in the April decision of Erie Railroad v. Tompkins (1938). In his speech Reed made clear his belief that the theory of stare decisis "does not connote a slavish adherence to

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[115] Wesley McCune, op. cit., p. 60. Quoted by Fitzgerald, op. cit., p. 274.

past decisions."[116] This statement he made particularly applicable to the area of constitutional law by his words, "In the constitutional field the rule should be most liberally applied because the Court must test its conclusions by organic document rather than precedent."[117] Later in that same month, Reed declared in his concurring opinion in Erie Railroad v. Tompkins that "In this Court, stare decisis, in statutory construction, is a useful rule not an inexorable command."[118] In 1944, in the famous Texas primary case of Smith v. Allwright et. al (1944) Reed was more adamant when he said, "Stare decisis does not command that we err again when we have occasion to pass upon a different statute."[119]

Although this liberal view concerning stare decisis was held by Justice Reed, it is a definite fact that he does not have a liberal record in the field of criminal procedure. Here his predisposition for the public interest generally meant an adverse opinion concerning the individual. In this sector involving personal liberties Justice Reed lost his center position and voted consistently with the conservative wing of the Court.[120]

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[116]Stanley F. Reed, "Stare Decisis and Constitutional Law," Pennsylvania Bar Association Quarterly, Volume XXV, April, 1938, p. 133. Quoted by Fitzgerald, op. cit., p. 37.

[117]Ibid., p. 38.

[118]304 U. S. 92.

[119]321 U. S. 669.

[120]Fitzgerald, op. cit., p. 7.

PART III

JUSTICE REED AND PERSONAL LIBERTIES

Chapter VII

"We the people..."

Although Justice Reed switched voting positions, he did not switch philosophies. Unlike Fitzgerald, who attributed Reed's position concerning personal liberties at the "extreme right of the Court" to his legal and administrative background, I would attribute this position to his inherently conservative philosophy which was largely determined by his pre-legal background and education.[121] I would also contend that this philosophy is in agreement with that expressed by his opinions concerning the commerce clause. I think that Reed's conservative concern for "the public interest" is equally expressed in his Rock Royal and New River opinions, both of which upheld the power of their Congress, as well as in his opinions in such cases as Erie Railroad Co. v. Tompkins, Smith v. Allwright, McCollum v. Board of Education, Jones v. City of Opelika, Poulos v. New Hampshire, In re Sommers, Kovacs v. Cooper, McNabb v. United States, and even Louisiana ex rel. Willie Francis v. Resweber.

Wesley McCune stated that "It was in this field of civil rights that Reed's friends have been most

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[121]Fitzgerald, op. cit., p. 370.

disappointed, though Justice Reed's career offered little from which to predict which way he would vote in personal liberty cases."[122] It is my opinion that McCune and Fitzgerald err in searching for the key to Reed's voting record in his career. I believe that the key is to be found in Reed, the man. However, Mr. Rodell would disagree believing that, "only in the civil liberties cases did Reed, despite his personal good-will-toward-men, compile the most reactionary record of any Roosevelt justice."[123] Fitzgerald substantiates this claim as Rodell does not by calling into account Pritchett's analysis concerning Reed's voting record for personal liberties. The factor which creates consistency from contrast is Reed's application of his good-will-toward-men attitude in terms of the "community interest." This is not to say that Justice Reed was predisposed against the interests of the individual, but rather that he was wary of placing the rights of an individual above the rights and expressed desires of the remainder of the community. As such his decisions in this field are consistent with his predisposition for law and order. In his opinions against such individuals as Poulos, Kovacs, Marsh, Martin and Murdock, Reed upheld his concept of law and order.

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[122]McCune, op. cit., p. 65. Quoted by Fitzgerald, p. 310.

[123]Fred Rodell, Nine Men: A Political History of the Supreme Court from 1790 to 1955. New York: Random House, 1955, p. 268.

Justice Reed's philosophy was definitely conservative here and it suggests that of Henry March, a main character in William Dean Howells' A Hazard of New Fortunes. March, upon reading of a transit strike and the respective violation of rights by capital and labor wondered pointedly who was protecting the rights of those citizens who have no means of transportation to their jobs? My answer would be Justice Reed.

Merely as an aside before beginning the illustration of my thesis concerning Reed's voting record on civil liberties, I would like to refute the statement made by Mr. Rodell concerning Justice Reed. Said Rodell, "Only in the Negro cases has Reed been regularly on the side of the angels."[124] I can only answer that Mr. Rodell obviously overlooked Willie Francis who may or may not be "on the side of the angels," as a result of Reed's decision in Louisiana ex rel. Willie Francis v. Resweber (1947) which will be discussed later.[125]

In a class by itself stands the case of Erie Railroad Co. v. Tompkins (1938) by which the Swift v. Tyson doctrine handed down by Chief Justice Story in 1842 was declared unconstitutional.[126]

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[124] Ibid., p. 268.

[125] 329 U.S. 459.

[126] 304 U.S. 64.

In this famous case, involving the question of procedural or substantive due process and the question of equal protection of the laws, came about when one Tompkins, while walking along the right of way of the Erie Railroad Company one dark night, was injured. He claimed that the accident resulted from negligence on the part of the Erie Railroad. As the Erie Railroad was a New York corporation, he brought suit in a federal court via the diversity of citizenship statute.[127] Erie Railroad claimed that it was not liable to Tompkins in accordance with the unwritten, well established common law of Pennsylvania where the accident occurred.[128]

The jury for the federal court of southern New York brought in a verdict awarding Tompkins $30,000 which was upheld by the Circuit Court of Appeals on the grounds of the Swift v. Tyson doctrine which stated that "upon questions of general law the federal courts are free, in the absence of a local statute, to exercise their independent judgment as to what the law is -- or should be."[129] This legal doctrine had been derived by Chief Justice Story from Section 34 of the Federal Judiciary Act of September 24, 1789.

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[127] Ibid., p. 69.

[128] Ibid., p. 70.

[129] 16 Pet. 18. Quoted on 304 U.S. 70.

Justice Brandeis wrote the majority opinion of the Court which overruled the Swift v. Tyson doctrine and Tompkins' $30,000 grant. Moreover, Brandeis stated that, "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State.... And no clause in the Constitution purports to confer such a power upon the federal courts."[130]

Although Brandeis did not declare that Section 34 of the Federal Judiciary Act was unconstitutional, he did state that the Swift v. Tyson doctrine had invaded the rights of the several states reserved to them by the Constitution.[131]

Although Brandeis did not state it in literal terms, Bernard Schwartz claims "that the Erie opinion for the first and only time in our constitutional history held action of the Supreme Court itself to have been unconstitutional."[132]

Justice Reed, in what may well be his shortest opinion on record, may have been following the friendly advice of his old roommate, Chief Justice William H. Rees

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[130] 304 U.S. 64.

[131] Ibid., p. 64.

[132] Bernard Schwartz, The Supreme Court, New York: The Ronald Press Company, 1957, p. 155.

of the Kentucky Court of Appeals, who sent Reed congratulations on his appointment, along with the plea, "For God's sake keep them (opinions) short."[133] In any event, Reed's views were more important than his brevity.

In his concurring opinion Reed agreed with the disapproval of the Swift v. Tyson doctrine but he did not agree with the majority opinion in its declaration that the "course pursued" was "unconstitutional." This view stems from his liberal position concerning the power of Congress. Reed asserted that Congress was able "to declare what rules of substantive law shall govern the federal courts."[134] To avoid constitutional judgment on either the Swift v. Tyson interpretation of Section 34 or Section 34 itself, Reed would have had the Court simply state that the words "the laws" used in Section 34, line one, of the Federal Judiciary Act included "the decisions of the local tribunals."[135] Thus Swift v. Tyson would be merely erroneous but not unconstitutional.

This decision certainly went far to sweep away the confusing mass of federal common law that had accumulated as a result of Swift v. Tyson and as such restore a

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[133]Memo: Interview with Mrs. William H. Rees, November 27, 1964.

[134]304 U.S. 91.

[135]Ibid., p. 90.

higher degree of order to the legal system of the United States. It may be added that Fitzgerald does not note the railroad connection in this case as he had earlier in the Williams case. Furthermore, Reed's vote was adverse to the individual involved although few would argue that it was adverse to individuals in general. In this same vein would be his opinions concerning the First Amendment.

Chapter VIII

"The Community Argument"

In the following cases involving the First Amendment, Father F. William O'Brian, who has written a book on this subject, opined that Justice Reed always presented the "community argument."[136] I would agree with Father O'Brian from the standpoint of Reed's policy as well as philosophy. I believe that Reed, because of his conservative small town background, believed that all citizens owe a civic obligation to the community as a whole; an obligation that may well justify some restriction on personal liberties.[137] I would go further and claim that Justice Reed's definition of democracy would incorporate the idea that limitations are placed on one's personal liberties by mutual agreement to establish law and order for the good of the whole community.

This concept O'Brian saw as conceived in the United States Constitution by the incorporation of the principles of federalism and the separation of powers. O'Brian also saw Justice Reed as a stalwart in the defense of these principles in terms of his decision involving the First

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[136] F. William O'Brian, Justice Reed and the First Amendment: The Religious Clauses, Georgetown University Press, 1958, p. 34.

[137] Ibid., p. 34.

Amendment, which guarantees the freedoms of speech, press, religion, and assembly.[138] This statement, to which I agree, appears to be, on the surface, a contradiction of the traditional interpretation of Reed as "government minded." However, the facts of these opinions reveal that Reed was for the extension of government power especially in the area of law enforcement. But for the most part the following cases did not involve a conflict of state and federal power but rather an infraction, real or assumed, of personal liberty.

The first case in which Justice Reed expounded the "community argument" was that of Jones v. City of Opelika (1942). In this opinion, which McCune acclaims as Reed's literary high, the town ordinance of Opelika, Alabama requiring a $10 license fee previous to the sale of literature on the streets was held by Reed not to be a previous restraint on the freedom of religion as was claimed by one Jones, a Jehovah Witness.[139]

Accepting the license fee, which he treated as a tax, as reasonable, Reed then considered the case on the grounds of whether "a non-discriminatory license fee, presumably appropriate in amount, may be imposed upon

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[138] Ibid., p. 9.

[139] 316 U.S. 586-7.

these activities."[140]

Becoming eloquent in the defense of the City of Opelika Reed stated that, "There are ethical principles of greater value to mankind than the guarantees of the Constitution, personal liberties which are beyond the power of government to impair. These principles and liberties belong to the mental and spiritual realm...."[141]

However, said Reed, "Conflicts in the exercise of rights arise." Here the question was the conflict of the rights assured the individual by the First Amendment made applicable to the states by the Fourteenth Amendment and the rights reserved to the State in the Tenth Amendment "to insure orderly living, without which constitutional guarantees of civil liberties would be a mockery."[142]

Rising higher, Justice Reed affirmed that courts could not intrude into the consciences of men or compel them to believe contrary to their faith, but that courts could adjudge the acts of men: "So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows."[143]

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[140] Ibid., p. 593.

[141] Ibid., p. 593.

[142] Ibid., p. 593.

[143] Ibid., p. 594.

This philosophy plus the fact that Jones was selling his literature to raise funds convinced Reed that Jones was subject to the license which per se did not violate his religious freedom.[144]

Reed adhered to his belief that a judge should adjudicate and not legislate when he, unlike dissenters Stone, Black, Murphy and Douglas, did not comment upon the discriminatory facets of the town ordinance as Jones had not been subjected to them. He also affirmed the right of "the paper legislative body" to limit the actions of individuals to "times, places, and methods for the preservation of peace and good order."[145]

In the very similar case of Murdock v. Pennsylvania (1943) Justice Reed maintained the same views which he expressed in a vigorous dissent to the opinion of the Court, written by Justice Douglas, which upheld the claim of Murdock, another Jehovah Witness, that a city ordinance of Jeannette, Pennsylvania requiring a license for the privilege of soliciting literature was unconstitutional.[146]

In deference to Justice Douglas who claimed that the license was an obvious restriction on the religious freedom of Murdock, Justice Reed made a historical study in an attempt to determine the true intent of the framers

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[144] Ibid., p. 596.

[145] Ibid., p. 594.

[146] 319 U.S. 106.

of the First Amendment which states that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.[147]

Reed concluded that the First Amendment protected the right to "prayer, mass, sermons, and sacrament" without interference from government. However, that Murdock, like Jones, affixed a price to his literature, destroyed the sacred and spiritual character of his actions, and thus made himself liable, in Reed's eyes, to the license. Reed also cited the totally nondiscriminatory nature of the license, which the opinion of the Court had held was inconsequential, as well as defending the tax power on the grounds that it was not the power to destroy.[148] Moreover, unlike Douglas, Reed did not view the Rights secured by the First Amendment as preferred nor exempt from the power of taxation. The test for Reed was the nature of the tax. "If the tax power is used oppressively, the law will protect the victims of such action."[149]

To me this approach by Reed is more than a realistic one. It is an approach which reveals a faith in the

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[147] F. William O'Brian, Justice Reed and the First Amendment, op. cit., p. 5.

[148] Ibid., pp. 26-29.

[149] 319 U.S. 130.

goodness of man. Justice Reed did not want to invalidate a licensing ordinance merely because it could possibly be utilized to restrict the religious rights of a minority sect. That seems to me to be a dangerous criterion with which to judge governmental ordinances. But, this reveals faith in the court system of the United States as the arbiter of justice as well as the belief that those same courts should adhere to the facts of the case and not its possibilities.

Justice Reed held true to this philosophy in the similar case of Martin v. City of Struthers (1943) by submitting yet another dissent to the opinion of the Court which struck down an ordinance of Struthers, Ohio which prohibited "any person to knock on doors, ring doorbells or otherwise summon to the door the occupants of any residence for the purpose of distributing to them handbills or circulars,"[150] as applied to any person distributing religious material such as Martin, another Jehovah Witness.

Again the nature of the ordinance was a vital factor in Reed's opinion. He found that "No ideas ... no censorship" were involved in the Struthers ordinance and as such found himself unable to expand it into a violation of the First Amendment.[151] In addition he found that

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[150] 319 U.S. 141.

[151] Ibid., p. 154.

there were "excellent reasons" to support the ordinance although he failed to note them. In all fairness these reasons probably included those listed by Justice Black in his majority opinion, namely that Struthers was an iron and steel town where many inhabitants worked nights and slept days and the ever present possibility of a burglar using this device to gain entry.[152]

More significant to me was Reed's support of the legislative power of the people whose "determination should not be set aside by this Court unless clearly and patently unconstitutional."[153] Here is clearly a vote of confidence for the right of people to govern themselves.

One year later in the case of Follett v. Town of McCormick (1944) by which a town ordinance of McCormick, South Carolina was held violative of the religious clause of the First Amendment, Reed wrote a concurring opinion which in no way contradicts his stand taken in the Opelika, Murdock, or Struthers cases.[154] Said Justice Reed, in what is to me unintentionally dry humor, "My views on the constitutionality of ordinances of this type are set out at length in Jones v. Opelika ... and in a dissent

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[152] Ibid., p. 144.

[153] Ibid., p. 156.

[154] 321 U.S. 573.

on the rehearing of the same case. These views remain unchanged but they are not in accord with those announced by the Court."[155] Because "These opinions are now the law of the land"[156] Reed humbly acquiesced in the opinion of Douglas. That this concurrence signified a change in philosophy, there is no particle of proof.

Indeed the dissent of Justice Reed in the somewhat similar case of Marsh v. Alabama (1946) is definite proof to the contrary. Here Reed by his dissent upheld the Alabama statute which imposed criminal punishment on a person for the distribution of religious literature on private premises after having been warned not to do so.[157] Justice Black delivered the opinion of the Court and his conflict with Justice Reed involved the semantic problem posed by "private property." Black held that the company town of Chickasaw was undistinguishable from any other town "except that the title to the property belongs to a private corporation."[158] But "since these facilities were built and operated primarily to benefit the public and since their operation is essentially a public function," it is subject to the same Constitution that governs the citizens' rights of non-private towns.[159]

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[155] Ibid., p. 578.

[156] Ibid., p. 578.

[157] 326 U. S. 501.

[158] Ibid., p. 503.

[159] Ibid., p. 506.

Reed, on the other hand, significantly stated that, "The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech."[160] Reed also pointed to the danger inherent in the majority opinion which established as a principle that, "One may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views."[161] In light of these dangers of disorder Reed expressed the hope that "such principle may subsequently be restricted by this Court to the precise facts of this case."[162]

This hope appears to have been fulfilled in the subsequent case of Breard v. Alexandria (1951). Here in 1950, Reed was able to write the opinion of the Court which upheld the ordinance of Alexandria, Louisiana which prohibited the visitation of private residences for the purpose of soliciting for the sale of goods.[163]

Although this case involved a magazine salesman who claimed among other things a violation of his guarantee

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[160] Ibid., p. 516.

[161] Ibid., p. 512.

[162] Ibid., p. 512.

[163] 341 U.S. 622.

of free speech, it is substantially the same question as that of Martin v. City of Struthers (1943). Justice Reed's argument was basically the same as his dissent in the Struthers case with appropriate additions made to cover the additional claims made by Breard. Noting only the dissent of Chief Justice Vinson and Justice Douglas, I believe that Reed was able to carry the majority due to the fact that this case, unlike the previous cases, did not involve to an important degree the "preferred freedoms" of the First Amendment. That Reed held consistently to his doctrine of the "community argument" is revealed by his words "Everyone cannot have his own way and each must yield something to the reasonable satisfaction of the needs of all."[164] Moreover, "This case calls for an adjustment of constitutional rights in the light of the particular living conditions of the time and place," which Reed tried to impart by his words, "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when, and how one chooses."[165] This statement was only a reiteration of Reed's views expressed in his Marsh dissent. There he used the phraseology

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[164] Ibid., p. 625.

[165] Ibid., p. 642.

"It has never been held and is not now by this opinion of the Court that these rights are absolute and unlimited...."[166] This attempt at deleting the "preferred" status of the rights guaranteed by the First Amendment did not gain acceptance as the following cases involving the right of free speech will reveal.

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[166] 326 U.S. 512.

Chapter IX

The Freedom of Speech

Perhaps the most well-known of Justice Reed's opinions concerning the freedom of speech was that which he handed down in the case of Poulos v. New Hampshire (1952). Again the appellant was a Jehovah Witness who claimed that his freedom of speech and right to assembly were violated by a discriminating ordinance of Portsmouth, New Hampshire. That the ordinance was discriminatory through a grant of arbitrary power to the City Council, was affirmed by both Reed and the lower court. However, the conviction of Poulos was upheld on the grounds that he had deliberately proceeded to hold the religious meeting in spite of the invalid ordinance.[167]

Citing the case of Cox v. New Hampshire (1940), Reed declared that the appellant could have raised the question of constitutionality concerning the license by proper civil proceedings, but he noted that Poulos chose purposely to violate the ordinance.[168]

Poulos argued that the council's order was unconstitutional and relied on the well-established doctrine that a statute unconstitutionally restraining a basic

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[167] 345 U.S. 395-6.

[168] Ibid., p. 400.

right is void and hence a citizen need not challenge it judicially in order to have a defense against prosecution for disobedience. Moreover, he asserted that if he can be punished for violation of a valid ordinance because he exercised his right of free speech, after the wrongful refusal of the license, the protection of the Constitution is illusory.[169]

Reed answered this pertinent argument by distinguishing, as the Superior Court of New Hampshire had done, between the statute and the statute as applied. The license to Reed was actually police routine for "adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved."[170] That the decision of the City Council was arbitrary and unreasonable does not make the statute unconstitutional and thus Poulos must adhere to the existing legal channels which Reed admitted were "exulcerating and costly."[171]

To allow the practice initiated by Poulos was "apt to cause breaches of the peace or create public dangers."[172] Having expressed his belief in law and order as in the Struthers and Opelika cases, Justice Reed adds that delay

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[169] Harvard Law Review, Volume 67, 1953, p. 108.

[170] 345 U.S. 403.

[171] Ibid., p. 409. Exulcerating: To make sore, inflame, fret or chafe.

[172] Ibid., p. 409.

and cost of litigation is "a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning."[173]

In a vigorous dissenting opinion, Justice Black viewed Reed's decision in this case as "one more in a series of recent decisions which fail to protect the right of Americans to speak freely; a subtle use of creeping censorship loose in the land."[174]

Here as in the earlier Struthers and Opelika cases (1942) Reed's opinion hinged on his interpretation of the ordinance. Unlike Black, Reed did not view the existence of such an ordinance as inherently unconstitutional as a "prior restraint" to a "preferred freedom." Reed viewed the ordinance as a necessary restraint to preserve order and had the good faith in human nature to believe that it would be fairly construed. That it was unjustly construed did not invalidate it for Reed who believed in the principle behind it. To Reed there was no basis for saying that freedom and order are not compatible. "Regulation and suppression are not the same and the courts of justice can tell the difference."[175]

In the case of Kovacs v. Cooper (1948) the difference seemed to be the "loud and racuous" definition of sounds

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[173] Ibid., p. 409.

[174] Ibid., pp. 421-22.

[175] 345 U.S. 408.

contained in a Trenton, New Jersey ordinance prohibiting such sounds from being emitted by "sound trucks." For the first time in this discussion of personal liberties, excepting the Erie case, the appellant was not a Jehovah witness.[176]

Dismissing the contention of Kovacs that the definition of "loud and raucous" noises was "so obscure, vague and indefinite as to be impossible of reasonably accurate interpretation,"[177] with "only a passing reference," Reed turned to the question of vital concern in the case.

The vital question was whether or not the Trenton ordinance was a violation of the freedom of speech as made applicable to the states by the Fourteenth Amendment. Reed held that by the incorporation of the "loud and raucous" definition, the Trenton ordinance was constitutional, whereas the Lockport, New York ordinance because of its absolute nature was invalidated by Sara v. New York (1947).[178] As defense of this regulation Reed cited the opinion of the Court in Sara v. New York as proof that "the hours and place of public discussion can be controlled."[179] Thus, concluded Reed, "even the fundamental rights of the Bill of Rights are not

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[176]336 U.S. 78.

[177]Ibid., p. 79.

[178]Ibid., p. 82.

[179]334 U.S. 558, 562.

absolute."[180] As such the right of privacy of a citizen could justifiably be protected against indefensable intrusion by amplifiers emitting "loud and raucous" noises.[181] Moreover, concluded Reed, "the preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience."[182]

Again the final sentence revealed Reed's belief and defense of the community interests as opposed to that of the individual in order to secure peace and order.

However, proof of Justice Reed's strong belief in the freedom of speech, when it was confined to an orderly and accepted media such as a newspaper, was indicated in his opinion for the Court in the case of Pennekamp et. al v. Florida (1946).

The facts of the case were: Pennekamp, the publisher of the Miami Herald, was cited and convicted for contempt for allowing the publication of two editorials and a cartoon criticizing certain actions previously taken by a Florida court in certain non-jury proceedings. The citation for contempt claimed that the editorials and cartoons in question had "impugned" the integrity of the

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[180] 336 U.S. 85.

[181] Ibid., p. 87.

[182] Ibid., p. 88.

court by wilfully withholding and suppressing the truth. It also contended that the editorials and cartoon tended to obstruct the fair and impartial administration of justice in the pending cases.[183]

Pennekamp, besides denying the accusations of the court, claimed that the publications were legitimate criticism and within the guarantees of a free press as stated in the First Amendment.[184]

After a characteristically meticulous review of the facts, Reed concluded that "Freedom of discussion should be given the widest possible range compatible with the essential requirement of the fair and orderly administration of justice.[185] This strong advocacy of a free press was more brilliantly stated by Justice Frankfurter in his concurring opinion in the words, "Without a free press there can be no free society."[186]

In reply to Pennekamp's contention that the editorials and cartoon did not constitute a "clear and present danger" to the administration of justice Reed stated idealistically, "That a judge might be influenced by a desire to placate the accusing newspaper to retain public

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[183] 328 U.S. 331.

[184] Ibid., p. 331.

[185] Ibid., p. 347.

[186] Ibid., p. 354.

esteem and secure reelection at the cost of unfair rulings against the accused is too remote a possibility to be considered a clear and present danger to justice."[187] Although I admire Reed's faith in human nature, my first question would be. "When was the next election?"

In conclusion, it was this opinion which Justice Black hailed as "so extreme that surely free speech was thereby given as broad a scope as explicit language read in the context of a liberty-loving society will allow."[188] That this statement sharply contrasts with Black's words concerning Poulos v. New Hampshire is not unreasonable considering the six years that had elapsed between the two decisions. Moreover, the overall result of the Poulos case was the deletion of the "preferred position" of the rights guaranteed in the First Amendment as well as the consequent application of a more realistic approach to the doctrine of prior restraint. This dual result was naturally displeasing to Black and his view of the rights of the First Amendment.[189]

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[187] Ibid., p. 332.

[188] Fitzgerald, op. cit., p. 332.

[189] O'Brian, op. cit., 96, 83.

Chapter X

"... Without Due Process"

Although it was not a contested issue in the Pennekamp case the same judge who cited Pennekamp for contempt also convicted him of those charges.

This dual identity as both grand jury and judge was the central issue in the case of In re Murchison (1954).

The facts of this case were that a Michigan state judge acted as a "one-man grand jury" under Michigan law while investigating crime. This fact occurred when the same judge sitting as a "one-man grand jury" investigating crime cited policeman Lee Roy Murchison for contempt after long and secret interrogation concerning bribery had convinced the judge that Murchison was guilty of perjury. Later the same judge, after a hearing in open court adjudged Murchison guilty and sentenced him to punishment. Murchison then claimed that the Due Process Clause of the Fourteenth Amendment had been violated on the grounds of impartiality.[190]

Justice Black in his opinion for the Court cited In re Oliver (1947) as stare decisis that a Michigan

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[190] 349 U.S. 133-34.

"judge-grand jury" cannot consistently convict a witness of contempt for conduct in secret hearings.[191] Black was obviously convinced of the impartial nature of the Michigan magistrate to whom he referred throughout his opinion as a "one-man judge-grand jury" or some variation of that nomer.

In his dissent Justice Reed claimed justifiably that "The Court's determination is rested on the sole fact that the same judge first cited petitioners for contempt committed in his presence, and then presided over the proceedings leading to the final adjudication."[192] But more significant was Reed's assertion that "It is neither shown nor alleged that the state judge was in any way biased."[193] That this statement was true was not the point of In re Murchison. It was not the instant case that was questioned but the constitutionality of the proceedings. Here again, as in the Marsh case the difference of opinion originates in the contrasting beliefs of Justice Black and Justice Reed concerning human nature. Justice Black was inclined to be more cynical concerning human nature and thus he wanted to defend against any concentration of power, such as the "one-man judge-grand jury," which could conceivably be asserted to restrict

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[191] Ibid., p. 134.

[192] Ibid., p. 140.

[193] Ibid., p. 140.

the rights of the individual which he believes to be the essence of democracy. On the other hand Justice Reed believed that law enforcement officers were inherently honest and just and thus he believed that there was no danger in the concentration of power expressed in In re Murchison. However, he did not believe that the legal process was infallible as witnessed by his words concerning stare decisis, but until evidence was presented to the contrary, he was willing to allow the long arm of the law more leeway in apprehending criminals.

Very similar to In re Murchison, in the respect that the appellant was again a policeman being investigated for bribery, was the case of Regan v. New York (1955).

The facts here revealed that Regan, as provided by the New York City Charter, signed a waiver concerning a state statute which confers immunity from prosecution for any criminal activity disclosed before a grand jury in testimony relating to bribery. Twenty-one months after his separation from the police department, when he was again before the grand jury and asked whether he had accepted bribes while a policeman, Regan invoked the Fifth Amendment. He was consequently convicted of contempt and sentenced to imprisonment.[194]

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[194] 349 U.S. 58.

In his opinion for the Court Justice Reed held the New York immunity statute constitutional and hence adequate justification for Regan to testify. The validity or invalidity of the waiver was a matter of no consequence to Reed, "for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired."[195] In other words if the waiver was valid, Regan was liable for testimony as he had signed away his right of immunity. If the waiver was invalid, Regan was protected by the immunity statute and could not be prosecuted for the testimony that he was asked to disclose and thus, Reed concluded, he had no grounds for invoking the Fifth Amendment. It is this final factor that Justice Black overlooked when he stated in his dissent that Regan was caught in a dilemma in which "he must give evidence which might convict him of a felony or go to jail for refusing to give that evidence."[196] Although I disagree with the validity of the second half of Regan's dilemma, I must voice my concurrence with the first half. If Justice Reed implied, as I think he did, in his section discussing his conclusions drawn from the possibility of validity,[197] that Regan, as a

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[195] Ibid., p. 62.

[196] Ibid., p. 68.

[197] Ibid., p. 62.

policeman or otherwise liable to the validity of the waiver, "must give evidence which might convict him of a felony," then I would agree with Black that Regan's constitutional right guaranteed by the Fifth Amendment has been violated, indeed, invalidated by the New York City Charter. I would agree that policemen too have rights. That Justice Reed believed that the waiver was constitutional reveals the special nature he confers on policemen.

Moreover, I think that Regan v. New York (1955) revealed the consistent view held by Reed and expressed by him in the opinion for the Court in the case of Adamson v. California (1947), involving the same Fifth Amendment. This view is that "the guaranty of the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' is not made effective against state action by the Fourteenth Amendment."[198] The date of this case should be noted especially in light of the fact that the Court has since that time applied nearly every right expressed in the Bill of Rights to the states via the Fourteenth Amendment.

In Adamson v. California the appellant, convicted of murder in the first degree, held that a California statute, which provided that in any criminal case, whether the

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[198] 332 U.S. 46.

defendant testifies or not, the "failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by the counsel and may be considered by the court or jury,[199] did in effect violate due process by shifting the burden of proof from the prosecution to the defendant. Adamson argued that the statute permitting comment upon his failure to testify has the effect of compelling him to testify and thus violates the Fifth Amendment made applicable to the states by the Fourteenth Amendment.[200]

Justice Reed devoted the bulk of his opinion, as Justice Black did in his dissent, to revealing that "It is settled law that the clause of the Fifth Amendment... is not made effective by the Fourteenth Amendment as a protection against state action...."[201]

Justice Black's "study of the historical events that culminated in the Fourteenth Amendment" persuaded him that one of the "chief objects" of the Amendment was to make the Bill of Rights applicable to the states."[202]

Within this controversy lay Reed's conservative prejudice for federalism. In this area, Reed upheld State

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[199] Ibid., p. 46.

[200] Ibid., p. 68.

[201] Ibid., p. 51.

[202] Ibid., p. 71.

statutes even though they might have been violations of federal statute. Thus he is seen as preserving the power of the state as opposed to the extension of federal power. That is, he was unwilling to apply the First Amendment to the states via the Fourteenth Amendment and thereby strike down state statutes. This defense of federalism is certainly in contrast to his advocacy of federal government in the New River and Rock Royal cases. However, this facet of federalism contained in Justice Reed's philosophy is not, I think, a contradiction of his more basic belief in law and order in the public interest. In the area of law I think that Reed believed that localities and states were capable of administering justice and moreover that the Constitution definitely delegated this right to them. That Justice Reed believed in the New Deal as the means of correcting the woes of the nation I would agree. But I would not agree that Justice Reed favored government expansion for its own sake. The belief in federalism, expressed here, is, I believe, a characteristic, resulting from his early background and family heritage.

Other cases that could be presented as proof of Reed's belief in federalism were those of Louisiana ex. rel. Willie Francis v. Resweber, Akins v. Texas, Lyons v. Oklahoma and other personal liberty cases. In these cases Reed almost invariably voted to uphold the decision

of the state court as he believed that it was their responsibility and that the Supreme Court when it reviewed the facts of the case was not as qualified to make a decision as was the court who had heard the case first hand.

A case involving the double jeopardy clause of the Fifth Amendment was that of Louisiana ex rel. Francis v. Resweber (1947). The facts were that Willie Francis, a Negro, was duly convicted of murder, sentenced to death, placed in the electric chair and subjected to shock intended to cause his death but the generator connected to the chair failed to supply sufficent shock. The process was repeated with a similar lack of success and hence Willie was removed from the chair and returned to his cell to await future execution. Francis argued that an execution under the circumstances detailed would deny due process to him because of the double jeopardy provision of the Fifth Amendment and the cruel and unusual punishment provision of the Eighth Amendment.[203]

Reed's opinion for the Court, which denied Willie's petition, was divided into four sections. The first of these stated that "... where the accused successfully seeks review of a conviction, there is no double jeopardy

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[203] 329 U.S. 459-461.

upon a new trial." Hence, the significant fact here was that Willie Francis had been lawfully convicted and an execution was not to be equated with a trial. Thus the proposed execution would not violate the double jeopardy clause of the Fifth Amendment.

Reed's second section concluded that the proposed execution would not violate the cruel and unusual punishment clause of the Eighth Amendment, because "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[204] Thus Justice Reed answered Willie Francis' claim that to subject him to the psychological strain preceding his second execution would constitute cruel and unusual punishment.

In his third and fourth sections Reed dismissed as groundless the assertions of Willie Francis that a second execution without a second trial was a violation of due process and that his original trial was unfair because he was inadequately represented by counsel.[205]

It is with his first two sections that I would have taken issue with Reed. I would have disagreed that a

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[204] Ibid., p. 464.

[205] Ibid., p. 465.

second execution did not constitute double jeopardy and cruel and unusual punishment. I believe that capital punishment is of such a serious nature that only one attempt should be allowed. As such I would have quoted Reed, himself, who said in his first section, "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."[206] I, unlike Reed, would not have made the distinction between "accused" and "convicted". My mind rebels against double jeopardy in either case.

The case of Akins v. Texas (1945) is another example of Justice Reed's support for a state court decision as his failure to vote "on the side of the angels" concerning Negroes.

Here, a Negro, Akins, convicted for murder, alleged that the due process clause of the Fourteenth Amendment had been violated by the "arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one who was to be placed upon the grand jury panel of sixteen for the term of court at which the indictment against petitioner was found."[207]

Reed admitted that "... the transcript of the evidence presents certain inconsistencies and conflicts

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[206] Ibid., p. 462.

[207] 325 U.S. 400.

of testimony in regard to limiting the number of Negroes on the grand jury."[208] He therefore concluded that the court who had heard the witnesses first-hand had "a better opportunity than a reviewing court to reach a correct conclusion..."[209]

In his customary factual style Reed reported that, "On the strictly mathematical basis of population, a grand jury of twelve would have 1,852 negro members on the average."[210] He then included the individual testimony of Commissioners Wells, Tennant and Douglas all three of whom denied any intention of discrimination. Finding no facts to the contrary Reed therefore concluded that there had been no discrimination in the selection of the grand jurors.

I would have agreed with this conclusion as did Justice Murphy in his dissent. However, I doubt Reed's statement that "The mere fact of inequality in the number selected does not in itself show discrimination."[211] I am uncertain whether the eleven white jurors were as unprejudiced toward Akins as a fair trial would have demanded. To Reed, "Fairness in selection has never been

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[208] Ibid., p. 401.

[209] Ibid., p. 401.

[210] Ibid., p. 405.

[211] Ibid., p. 403.

held to require proportional representation of races upon a jury."[212] This statement, as well as those quoted above, are further expressions of his belief in the inherent goodness in human nature unless there is evidence presented to prove the contrary.

In spite of his good-will-toward-men Reed's opinions usually upheld the conservative decisions of state courts such as In re Murchison, Regan v. New York, Adamson v. California, and Akins v. Texas. Moreover, I think that his votes were never prejudiced by the fact that the appellant was a Negro as shown by the Willie Francis and Akins cases as well as the earlier "redcap" case.

However, Justice Reed's decision in the case of Smith v. Allwright (1944)was monumental in advancing the Negroes' quest for equality in voting. As such, this case has nothing to do with the due process clause of the Fifth Amendment and is to be distinguished from the cases discussed previously.

It should be noted that Smith v. Allwright struck down a Texas statute which in effect prohibited Negroes from voting in primaries and that this decision was handed down one year previous to the Akins v. Texas ruling. Thus it is obvious that Reed judged discrimination in the light of the facts of the case and not in view of a man's

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[212] Ibid., p. 403.

skin color. This fact is further validated by Reed's views as expressed in the two cases Lyons v. Oklahoma (1944) and Chambers v. Florida (1940) concerning criminal procedure.

Chapter XI

Criminal Procedure

In both Lyons v. Oklahoma (1944) and Chambers v. Florida (1940) the petitioner was a Negro, convicted of murder. Both Lyons and Chambers alleged that the confessions which had been instrumental in their convictions had been extorted by violence and terror and hence they were involuntary and therefore inadmissable as evidence under the due process clause of the Fourteenth Amendment.

In Chambers v. Florida Reed concurred in the opinion of Justice Black which held that the confession of Chambers had been coerced and hence was inadmissable as evidence, and therefore reversed the decision of the Supreme Court of Florida.[213]

The facts in Chambers v. Florida revealed that Chambers and other Negroes were arrested and jailed without warrants for the robbery and murder of an elderly white man.[214] Moreover, Chambers and the other Negroes were intensively questioned night and day for more than one week following their arrest without being able "to see or confer with counsel or a single friend or relative."[215] After an all night session which ended at sunrise on

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[213] 309 U.S. 227.

[214] Ibid., p. 229.

[215] Ibid., p. 231.

Sunday, May 21st "the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death" were obtained.[216]

On the basis of such overwhelming facts Reed concurred in Black's opinion to invalidate the conviction of Chambers.

However, in his opinion for the Court in Lyons v. Oklahoma (1944) Justice Reed affirmed the admissability of second confession received later in the same day as the first confession which was admittedly coerced.

The facts here were that Lyons, a Negro, was arrested on January 11, 1940 for the murder of Elmer Rogers, his wife and young son which had been committed December 31, 1939. Immediately following his arrest Lyons was interrogated for two hours and then was left in jail for eleven days without being able to see counsel, family or friends. On the eleventh day Lyons was subjected to an all night questioning which produced the first confession. The following day Lyons was taken to the state penitentiary where Warden Jess Dunn obtained the second confession. The date of the second confession was January 23. "The first formal charge that appears is at Lyons' hearing before a magistrate on January 27, 1940."[217]

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[216] Ibid., p. 235.

[217] 322 U.S. 598.

In almost identical words to those he would use in Akins v. Texas Reed declared that "... where there is a dispute as to whether the acts which are charged to be coercive actually occurred ... the trial judge and jury are not only in a better position to appraise the truth or falsity of the defendant's assertion ... but the legal duty is upon them to make the decision."[218] But Reed also asserted that in his view the earlier events at Hugo, Oklahoma did not in fact lead to the later confession at McAlester. As proof of this Reed cited the testimony that Lyons as a former inmate of the penitentiary knew Warden Dunn and that Dunn had warned Lyons that anything he might say would be used against him. Reed also cited "The fact that Lyons, a few days later, frankly admitted the killing to a sergeant of the prison guard, a former acquaintance from his own locality...."[219]

More significant than his judgment that the McAlester confession was voluntary was Reed's assertion that "The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession."[220] While the Fourteenth Amendment does not provide for review of error in jury verdicts, it definitely guarantees that

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[218] Ibid., p. 602

[219] Ibid., p. 604.

[220] Ibid., p. 605.

no State shall "deprive any person of life, liberty, or property without due process of law." Thus, if a jury verdict is in error because of evidence introduced and considered that was obtained without the due process of law I believe that the case must merit review if the due process clause is to have any meaning at all. Hence, I firmly disagree with the final statement made by Justice Reed in his opinion which is not to say that I disagree with his affirmation of the decision of the Criminal Court of Appeals of Oklahoma. My decision there would necessitate review of the testimony of the case which was not reproduced in Reed's opinion.

Surely Reed's decision in Lyons v. Oklahoma was certainly not on the "side of the angels." As further evidence of his impartiality to skin color stands Reed's opinion for the Court in the case of McNabb v. United States(1943).

This case, one of my favorites, was concerned with the question of the admissability of confessions obtained from Freeman, Raymond, and Benjamin McNabb.[221]

The McNabbs were a clan of Tennessee mountaineers living about twelve miles from Chattanooga in a locality known as the McNabb Settlement. On the night of July 31, 1940 officers of the Alcoholic Tax Unit attempted to apprehend the McNabbs in the act of selling moonshine.

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[221] 318 U.S. 333.

During the events that followed, an officer named Leeper was fatally wounded.[222] Between one and two o'clock Thursday morning Freeman, Raymond and Emvil McNabb were arrested by Federal officers. Benjamin McNabb gave himself up on Friday morning. None had ever lived outside the McNabb Settlement or been further than twenty-one miles from their home. The level of education achieved by Freeman, Raymond and Benjamin, the petitioners in this case, was the fourth grade. They were not brought before a United States commissioner or a judge nor were they allowed to see friends, relatives, or counsel. Following constant questioning confessions were obtained early Saturday morning from Freeman, Raymond, and Benjamin which accord with the physical facts of the case.[223]

On the basis of this evidence Justice Frankfurter delivered the opinion of the Court which ruled the confessions as inadmissable evidence on the ground that they were not voluntary and that the rights of the McNabbs had been violated in obtaining the confessions.

With this opinion Justice Reed was "unable to agree." "An officer of the United States was killed while in the performance of his duties."[224] This was sufficient

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[222] Ibid., pp. 333-334.

[223] Ibid., pp. 335-338.

[224] Ibid., p. 347.

motivation in Reed's view for the officers of the Alcoholic Tax Unit to arrest and question the McNabbs. Reed also declared that the opinion of the Court was based primarily on the fact that the McNabbs were not properly committed before a federal magistrate. Reed was opposed to establishing this as a requirement for the admissability of a confession, for he believed that it would broaden the possibilities of defendants escaping punishment. In conclusion he stated that, "The officers of the Alcoholic Tax Unit should not be disciplined by overturning this conviction."[225]

Here is proof again of Reed's belief in the honesty and justness of the law enforcement officials for this is what I believe is at the bottom of his advocacy of the extension of power to law enforcement officers. I believe that Justice Reed felt that the Court was in danger of giving criminals too much protection. I think that he thought the Court was in danger of going too far in restricting officers of the law in order to insure the protection of individual rights and thereby ironically destroying the peace and order of society for which the Constitution of the United States was ordained. This is what I think he meant when, checking the case, he mentioned that he had never had his way.[226] This conclusion

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[225] Ibid., p. 349.

[226] Memo: Interview with Justice Reed, October 18, 1964.

is substantiated by Reed's penchant for law and order noted so many times above with the exception of the Fansteel and Southern Steamship cases. This predisposition was not influenced by race but by the facts of the case. If these facts convinced Reed that the evidence was not extorted, he was willing to waive strict adherence to legal regulations which would have disqualified that evidence. As such he was not afraid that American law officers would degenerate into a prototype of the Gestapo. The check against this he saw as the courts for which he had the highest esteem. This esteem was witnessed in his reverence for the decisions of the state courts which he upheld, if there was any doubt as to the interpretation of the facts of the case. He was definitely conservative in opposing the application of the first Ten Amendments to the States via the Fourteenth Amendment, but realistic in acquiescing in the result. That his opinions and voting habits advanced rather than retarded the cause of liberty would be generally accepted by all, but his interpretation of liberty was conservative as evidenced by his views concerning the absolute or preferred status of the Bill of Rights. In light of this philosophy Justice Reed's opinions concerning personal liberties naturally favored the majority interest rather than the minority interest. As such this point of view also favored the status quo, but it did allow

for change. Here then is the essence of Reed's philosophy that "Regretfully but inevitably we must adjust...." This is the conservative approach to which he adhered in cases concerning personal liberties but it cannot be equally applied, as Arthur Krock concluded, to Reed's opinions concerning commerce and federal regulation. His opinions there were definitely more liberal in the sense that they favored change rather than the status quo.. This is not to infer that Justice Reed was a liberal concerning federal regulation, commerce and a conservative concerning personal liberties.

PART IV

JUSTICE REED IN RETROSPECT

Chapter XII

"The Sum of the Parts Equals the Value of the Whole"

Taking this rule from Algebra I from my freshman year at Lawrenceville I apply it to Justice Stanley F. Reed as the best way in which to evaluate his life on the Supreme Court.

Reed's years on the bench encompassed the tenures of nineteen other justices including Chief Justices Hughes, Stone, Vinson, and Warren. Those colleagues whom he especially admired were Justice Brandeis and Justice Burton. Concerning the latter he once remarked he was "the closest thing to Jesus Christ he knew of."[227] But it was Chief Justice Charles Evans Hughes whom Reed admired most. It was Hughes who gave him the sound advice never to accept a gift. This came in the form of a story concerning the refusal of Hughes of some twelve suits of underwear from a lawyer friend which soon after the refusal were the object of a patent suit.

Reed's years as a Justice also were characterized by conscientious, hard work which became his trade mark. His long hours might well be explained by his attention to detail which is expressed by his footnotes, another trade mark. During his nineteen years of legal service

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[227]Memo: Interview with Mr. Gordon Davidson, December 21, 1964.

Justice Reed wrote some three hundred opinions. Not known for his brevity or eloquent literary style, Reed often rewrote his opinions as many as four times. In these opinions he was very close to his law clerks and there was genuine give and take between the two. Indeed, Justice Reed favored law clerks who disagreed with him and once disqualified a prospective law clerk because "he agreed with everything I said."[228] Most of his law clerks came from Harvard and Yale and only one, Gordon Davidson, was a fellow Kentuckian.

As for his voting record during his nineteen years it is generally agreed that Justice Reed began on the left and then became the "swing man" in the middle forties and concluded his tenure on the right wing of the Court. For him the Court was endowed with the high and delicate duty of harmonizing conflicting views and of clearing away misconceptions as to the extent or limitation of State or Federal power.[229] His concept of this system is definitely federalistic as expressed in his words, "The State and the Nation are and should be correlative, auxiliary and cooperative."[230] As such, "our Nation is a voluntary federation" and the "States

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[228] Ibid.

[229] Fitzgerald, op. cit., p. 36.

[230] Stanley F. Reed, "The State Today," op. cit., p. 69.

are natural guardians of schools, health and prosperity."[231] These views were expressed some twenty years apart but could have been incorporated in the same speech. This is mentioned as proof for the statement that changing times caused the shift in Reed's judicial position and not a shift in his views.[232]

Indeed in this same speech given before the California Bar Association after his retirement, Reed consistently maintained positions he had taken years earlier. He noted that there is nothing sacrosanct in the right of judicial review and that it must be held in perspective, as it can harmfully set back or limit progressive legislation.[233] This statement coincides with his views concerning judicial review in the Peters loyalty case as well as the NLRB cases. He also stated that the adoption of the Fourteenth Amendment did not bring all the guarantees of the Bill of Rights to the states.[234] This he asserted in spite of the opposite trend which has almost been completed by the present Court. His views in this

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[231]Stanley F. Reed, "Law and Society, October 3, 1957, Copy received from Justice Reed, p. 1.

[232]New York Times, February 1, 1957, p. 12.

[233]Stanley F. Reed, "Law and Society," op. cit., p. 4.

[234]Ibid., p. 7.

speech were consistent with all his views expressed some fifteen years earlier in the Opelika, Murdock, and Struthers cases. Speaking of due process Reed observed that "There is no real disagreement among judges or people upon the principle that a man charged in state or federal courts ... is entitled to every protection of the Constitution in investigation and trial. The disagreements come as to when constitutional rights are infringed: the place where the balance will be struck between order for the public and the rights of the accused."[235] This is the same philosophy which formed the foundation for Reed's opinions in the Poulos, Akins, Lyons and McNabb cases.

He had expressed the similar views in almost identical words in a speech, given on April of the same year, before his native Kentucky Bar Association. The only important addition here was his assertion that, "Ultimate power rests with the people."[236] Although this belief was stated for the first time, it fits comfortably into Reed's views concerning the attention that the Court should have paid to the legislative expression of the people's will. Viewed in a collective way, the people, their rights, their peace and order, was the single consistent

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[235]Ibid., p. 12.

[236]Stanley F. Reed, "Our Constitutional Philosophy," Kentucky State Bar Journal, Volume 21, Number 3, June, 1957, p. 146.

interest to which Stanley Reed adhered during his tenure as Justice.

This was the factor that marked the path of "kindly, kingly, warm Stanley Reed;" a man who raises pure bred Holstein cattle rather than race horses on his five hundred acre farm because "cows are more profitable;"[237] a man who relished good food and especially that of the Peruvian Embassy, but who had to eat rice for lunch everyday in accordance with a diet for a heart condition he suffered in the late forties;[238] a man who realistically replied to the question concerning the cause of his retirement in January, 1957: "Because I'm seventy-two;" a man who liked to walk and who "played a respectable game of golf at Burning Tree Country Club and who left society to his wife."[239] Finally he is a man who possesses an honest gleam of good humor in his eye when he is joking, indulging in the light side of conversation or enjoying his own reception celebrating his twenty-seven years on the bench.[240]

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[237] New York Times, February 1, 1957, p. 12.

[238] Memo: Interview with Mr. Gordon Davidson, December 21, 1964.

[239] Newsweek, January 24, 1938, p. 13.

[240] Gordon Davidson, Address at the Presentation Ceremony of the Stanley F. Reed Bookfund to the University of Kentucky College of Law, April 5, 1957, p. 5.

His noncontroversial, conscientious contribution to United States jurisprudence plus his non-flamboyant character will not make him the subject of endless hours of discussion, nor will many take time to note his sound performance of nineteen years. This lack of recognition will not be due to the unconsequential nature of his decisions for he wrote his share of those, but rather to his personal character which shunned the limelight. As such his non-romantic life does not make the action-packed copy that sustains Americans. But as for myself, I prefer a judge who adjudicates not legislates and thereby adheres to the separation of power established by our Constitution. I am opposed to the idea that "the Constitution is what the Supreme Court says it is." I am pleased that there were such men as Justice Stanley Reed who defended this point of view and who would keep the Supreme Court in its proper perspective as regards the power structure of this country.

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APPENDIX II

DECISIONAL RECORD OF THE FIRM OF BROWNING AND REED BEFORE THE COURT OF APPEALS OF KENTUCKY 1922-1929

Case	Issue	Decision
Chesapeake and Ohio Railroad Co. v.:		
Adams, 207 Ky. 669 (1925)	Worker-death	Lost
Callahan's Administrator, 209 Ky. 348 (1925)	"	"
Equitable Trust Co., Administrator, 202 Ky. 173 (1924)	"	Won
Green's Administrator, 197 Ky. 139 (1922)	"	Lost
Cochran's Administrator, 232 Ky. 107 (1929)	Pedestrian-death	Won
Daniel, 216 Ky. 89 (1926)	"	"
Daniel's Administrator, 227 Ky. 570 (1928)	"	"
Fiddler's Administrator, 213 Ky. 729 (1926)	"	"
Goodman's Administrator, 218 Ky. 117 (1927)	"	"
McMath's Administrator, 198 Ky. 390 (1923)	"	"
Soward's Administrator, 208 Ky. 840 (1925)	"	"
Stone's Administrator, 200 Ky. 502 (1923)	"	"
Voorhee's Administrator, 220 Ky. 746 (1927)	"	"
Wiley's Administrator, 232 Ky. 15 (1929)	"	"
Davis' Administrator, 230 Ky. 268 (1929)	"	Lost
Fiddler's Administrator, 219 Ky. 619 (1927)	"	"
Kownord's Administrator, 222 Ky. 115 (1927)	"	"
Owen's Administrator, 217 Ky. 707 (1927)	"	"
McCoy's Administrator, 228 Ky. 752 (1929)	Motorist-death	Won, Lost (2 issues)
Coleman, 220 Ky. 64 (1927)	Worker-injury	Won
Vanlloose, 212 Ky. 259 (1925)	"	"

Case	Issue	Decision
Vanlloose, 208 Ky. 117 (1925)	Worker-injury	Won
Ward, 221, Ky. 748 (1927)	"	"
Dixon, 218 Ky. 84 (1927)	"	Lost
Kennard, 223 Ky. 262 (1928)	"	"
Trent, 221 Ky. 622 (1927)	Pedestrian-injury	Won
Johnson, 228 Ky. 296 (1929)	"	Lost
Dixon, 212 Ky. 728 (1926)	Autoist-injury	Won
Boren, 202 Ky. 348 (1924)	"	Lost
Bradford, 202 Ky. 26 (1924)	"	"
Fraley, 229 Ky. 814 (1929)	"	"
Hanson, 214 Ky. 310 (1926)	"	"
Pancake, 214 Ky. 308 (1926)	"	"
Arnott, 198 Ky. 491 (1923)	Passenger-injury	Won
Daniel, 199 Ky. 817 (1923)	"	"
Hollett, 199 Ky. 813 (1923)	"	"
Goldberg, 211 Ky. 115 (1925)	Autoist-injury	"
Caldwell, 213 Ky. 410 (1926)	"	"
Childers, 214 Ky. 361 (1926)	"	"
Crider, 199 Ky. 60 (1923)	"	"
Friend, 227 Ky. 676 (1929)	"	"
Rice, 221 Ky. 694 (1927)	"	"
Scott, 197 Ky. 636 (1923)	"	"
Childers, 219 Ky. 768 (1927)	"	Lost
Honaker, 209 Ky. 550 (1925)	"	"
Johnson, 218 Ky. 550 (1927)	Property-appropriated	Won
Lewis, 202 Ky. 300 (1924)	Employer Liability Act	Won
Rowe, Administrator, 215 Ky. 525 (1926)	"	"
Vanlloose, 214 Ky. 594 (1926)	"	"
Stapleton's Guardian, 223 Ky. 154 (1928)	"	Lost
Hill, 222 Ky. 41 (1927)	Award Excessive	Won
Litteral, 230 Ky. 632 (1929)	"	"
McCullough, 230 Ky. 478 (1929)	"	"
Weddington, 231 Ky. 611 (1928)	"	"
Jones, 223 Ky. 611 (1928)	Excessive Damages	Lost
Lee, 201 Ky. 287 (1923)	Fed. jurisdiction	Won
Moore, 202 Ky. 339 (1924)	Eminent Domain	"
Robertson, 213 Ky. 1 (1925)	"	"
Coleman Limit Co., 218 Ky. 794 (1927)	Freight Charge	"
Hill, 215 Ky. 222 (1926)	Passenger-ejected	"
McClintock-Field, 221 Ky. 142 (1927)	Baggage	"
Sturgill, 227 Ky. 44 (1928)	Non-schedule stop	"
Burley Tobacco Growers' Assn. v. City of Carrolltown, 208 Ky. 270 (1925)	Tax	Lost

Case	Issue	Decision
Burley Tobacco Growers' Assn. v. Liberty Warehouse Co., 208 Ky. 642 (1925)	Police Power	Won
Burley Tobacco Growers' Assn. v. Rowland, 208 Ky. 300 (1925)	Agreement Broken	"
Burley Tobacco Growers' Assn. v. Tipton, 227 Ky. 297 (1928)	Use of 1% Fund	"

APPENDIX II

AN ANNUAL RECORD OF JUSTICE REED'S DISSENTS*

Year	Number of Dissents
1939	1
1940	2
1941	5
1942	2
1943	4
1944	3
1945	4
1946	8
1947	5
1948	8
1949	5
1950	2
1951	7
1952	2
1953	4
1954	11
1955	5

*The New York Times. February 3, 1957, IV, p. 3.