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Book Reviews

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The Law of AWOL. By Alfred Avins. New York: Oceana Publications 1957. Pp. xxxi, 288. $4.95.

It is not often that one finds a book devoted entirely to a single criminal offense. This is such a book. Nearly three hundred pages (with type too small for easy reading) are devoted to the military offense of absence without leave. Before reading this book, my reaction was: The author must have "padded" or unduly repeated himself in order to use so many pages to discuss one offense. After reading this book, I have taken a complete "about-face" with one of my principal criticisms being that he failed to discuss sufficiently a few points of vital interest to persons concerned with the trial of AWOL cases.

The book obviously required a tremendous amount of research. Its table of authorities consumes twenty-one pages. The author cites not only military cases and cases from the civil courts of the United States, but cases from practically all English speaking countries. The cases cited date back to 1327. With the number of cases cited so monumental, this book should serve as an excellent guide to primary source materials.

In the introduction the author points out the seriousness of the problem of absenteeism in the Armed Forces of the United States, noting that it has always been a problem. He cites a statement made by the assistant director of the Personnel Analysis Division of the United States Navy Department's Bureau of Naval Personnel in the JAG Journal, July 1955, that "AWOLism costs the services over $100,000,000 a year in lost time and official action." Other statistics are quoted indicating that far more than half of all military offenses involve AWOL.

The author begins with a preface in which he states that the book is designed for multiple-purpose use. He believes that it will be useful for the law student, the practicing attorney, the military service school presenting a law course, the military attorney, the ROTC student, and the non-lawyer officer administering non-judicial punishment or sitting as a summary court officer. The author's beliefs in this respect may be somewhat overly ambitious, although there is, unquestionably, material in this book of some value to each of these groups. So much of the book is devoted to legal theory, I feel that it will be of considerable value to the military lawyer but of less value to the non-lawyer groups.

The author correctly states, in his preface, that "no special format has been used in this book," and that "in some places, it resembles a casebook, in others a textbook, and in still others a law review article."

The fact is that all three styles may be found within a single section. The discussion within each topic is full and complete but a further breakdown of subject subheadings would increase the book's utility and would facilitate research. The intermixture in one running text of quotations from cases, citation of authorities, textual discussion, hypotheticals and critical analysis makes comprehension sometimes difficult. The use of footnotes would have made for easier reading without having destroyed the book's technical value.

The book is divided into three parts. Part One, the introduction, examines the rationale, importance, and history of the offense, and its relation to such other offenses as desertion, missing movement, misbehavior before the enemy, escape from confinement, disobedience of orders, and failure to repair. The chapter on relation to other offenses contains no subheadings although it discusses the relation of AWOL to several offenses. This chapter demonstrates the need for a further breakdown of subject headings. Approximately two pages are devoted to the relationship between AWOL and desertion. Because of the importance of the offense of desertion, the complications involved in attempting to prove a case of desertion, and its close association to the crime of AWOL, a more detailed discussion of desertion (and items of evidence indicating desertion) would appear to have been justified and would have increased the value of the book.

Part Two, entitled "The Prosecution's Case," discusses the subjects of what persons may be AWOL; the beginning, duration and termination of the period of absence; leave; the problem of communication; place of duty; fault; attempted AWOL; and, aggravation.

Part Three, entitled "The Defense's Case," deals with the matters of impossibility; mistake of fact; illegality; ambiguity of duty; de minimus; condonation; other defenses; and, mitigation. These subject headings indicate that the author covers a great variety of matters dealing with this offense. One item of great interest to military lawyers dealing with these cases is that of the evidence needed to prove these various matters. Although the usual proof in the typical AWOL case is a certified copy of an extract of a morning report, where does the trial counsel turn for proof when the morning reports are defective? When are the morning reports defective? These and like items are not sufficiently discussed.

Over-all, I feel that this book is a very valuable contribution to the field of military law for which Mr. Avins should be commended. I do not think it is as readable as a different format might have made possible. Mr. Avins has done an outstanding job of research and his analysis of the legal problems involved is penetrating. I would wholeheartedly

recommend it to any library used by persons whose work or study requires frequent reference to military law problems.

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Three on the Court: Marble Palace, The Supreme Court in American Life; The Political Offender and the Warren Court; and The Honorable Eighty-Eight

In 1790 the Supreme Court met for the first time, had nothing to do, so adjourned. Thereafter followed good times and bad. In 1793 the Court held that a state could be sued, without its consent, by a private individual. The states objected and within a short time the Court was overruled by the eleventh amendment. In 1803 the Court held it had power to compel Secretary of State Madison to commission the "midnight" court of appeals judges and the Jeffersonian Congress responded with an act eliminating the courts of appeal. In 1857 the Court held in the case of *Dred Scott* that Congress could not prohibit slavery in the territories. This and the decisions enforcing the Fugitive Slave Law led to the Northern cry that the Court was stamping out states' rights. In 1866 the Court declared Lincoln's wartime use of military commissions invalid. In the same year Congress reacted by reducing the size of the Supreme Court from ten to seven to keep President Johnson from filling vacancies and in 1868 Congress deprived the Court of jurisdiction to decide a pending case involving the reconstruction measures establishing military rule in the south.

Thereafter for a period of almost seventy years the Court was in a different type of controversy. When the states attempted to curb the excesses of the giant corporations, the Court construed the "commerce clause" as giving Congress exclusive jurisdiction to regulate these matters. When Congress was finally prompted to attempt regulation of manufacturing and other processes preceding interstate shipment of goods, the Court held that this was a matter of exclusive state concern. Robert La Follette, Charles Beard, and Gustavus Myers were a few of the intellectual leaders of the anti-Court movement.

In the area of speech, press, assembly and religion, the Court was long immune from attack because it had no occasion to act. The Espionage Act of 1917 was the first Congressional attempt since John Adam's alien and sedition laws to regulate political freedoms. Moreover it was not until 1925 that the Court for the first time extended the

protection of the first amendment to the states by way of the fourteenth amendment. When the Court was initially called upon to strike down the World War I espionage and sedition laws, it held that first amendment freedoms were subject to restraint in the event of a clear and present danger, and in applying this standard, sustained all convictions. Among those sent to the federal penitentiary were three elderly German Americans in Cincinnati whose backroom complaints about the war were detected by means of an electrical device. This was a "clear and present danger" to the body politic justifying infringement of first amendment rights. The ensuing attacks on the Court came mostly from left-wing publications with small circulation and went in large part unheeded.

It was not until the 1930's that the Court found itself again in serious difficulty. The "nine old men" by five to four vote had declared most of the New Deal economic reform measures unconstitutional and President Roosevelt's response was the so-called "court packing plan." A crisis was avoided when Mr. Justice Roberts joined the four liberal members of the Court. Pundits said "A switch in time saved nine."

The "Stone Court" almost without exception approved the legislation designed to get us through World War II, and the "Vinson Court" sustained the cold war measures. During this whole period the Court received little attention. In 1954, however, the "Warren Court" held that the fourteenth amendment barred forced segregation in public schools, and the Court was once again in controversy. The South called for open defiance, massive resistance, interposition, nullification, and impeachment.

The anti-Court southerners formed an alliance with those alarmed by the Court decisions such as those preventing states from punishing sedition, investigating subversion, and barring suspect subversives from admission to practice law. This alliance introduced and voted for legislation designed to "curb" the Court by depriving it of jurisdiction to decide cases in these areas of the law. One result of the controversy begun with the 1954 school desegregation cases is the publication of a large number of books dealing with the Court. This is a review of three of them.

Marble Palace, The Supreme Court in American Life. By John P. Frank. New York: Alfred A. Knopf. 1958. Pp. xi, 301. $5.00.

John P. Frank, author of *Marble Palace, The Supreme Court in American Life,* makes the difficult seem effortless. He discusses a score or more thorny problems about the Court in a style that makes the reader think he is reading fiction. The pedant might carp, but the

breezy and sometimes even gossipy language serves up a lot of tough meaty ideas.

Mr. Frank, a former law clerk of Mr. Justice Black, a former professor of constitutional law at Indiana and Yale, and now a practicing attorney in Phoenix, Arizona, is well qualified to write at least two books about the Supreme Court, and in many ways he has. The opening chapters tell us why it is the disappointed litigant won't and can't carry his case to the highest Court in the land; why it is the Court is effective in some areas and almost powerless in others; what it is that makes for a balanced smooth functioning respected Court and something about the leading Court personalities and their interrelationships; why and how the Court is persuaded to arrive at a given decision; and the role of and justification for an appointed body of men with life tenure in a democratic society. The following portion of the book of particular interest to the lawyer, relates to the Court's special functions and is divided into chapters dealing respectively with the governmental function, speech and press, color and crime, a flourishing economy, and international relations. Here the landmark cases are discussed both for their own importance and as illustrative of historical trends in our economic and social development. The book, though easily halved, is connected by a central theme: the role of the Court in American life. Appended to this theme are discussions of myriad timely topics: the increasing use of the per curiam opinion without aid of briefs or oral argument; the value of concurring and dissenting opinions in the run of the mill case; alternative methods for keeping abreast of the growing volume of business; the role of the congressional interrogation during the appointive process; and judicial restraint versus judicial activism. These are but a few random selections illustrating the breadth of the discussion. Throughout, historical episodes and the anecdotal device are used to illustrate and sharpen the problems. All in all, a very informative, interesting, provocative, and useful book.

The Political Offender and the Warren Court. By C. Herman Pritchett. Boston: Boston University Press. 1958. Pp. 74. $3.00.

C. Herman Pritchett proves in *The Political Offender and the Warren Court,* that it is possible for a political scientist to write a good book about the law, a book better than most lawyers can write. Lawyers, trained to recognize and appreciate legal niceties, tend to work within a narrow frame of reference. To illustrate, the average lawyer might well be expected to begin a discussion of free speech by reference to Justice Holmes' classic remarks about the right to shout fire in a crowded theater. Mr. Pritchett, however, begins his discussion of free

speech with an outline of the societal conditions prerequisite to an agreement on the right to disagree politically—a broader, and hence a truer, view of the problem. Moreover, when Mr. Pritchett reaches the nub of the problem as expressed in the case decisions, with lawyer-like precision rare in the political scientist, he tells the reader what was held as contrasted with what was said. This happy combination of an ability to see the forest and still see the trees results in a book of only 74 pages (originally the 1957-58 Boston University Bacon Lecture) which provocatively and adequately discusses the fashion in which the Warren Court has faced the ever present problem of accommodating personal freedom with national security.

Briefly reviewing the work of the Roosevelt and the Vinson Courts, Mr. Pritchett moves on to fundamental and exciting analysis of the Warren Court decisions in the areas of criminal punishment for speech (*Yates* and *Jenks*), punishment by legislative inquiry (*Watkins* and *Sweezy*), punishment by denial of public employment (*Peters v. Hobby, Cole v. Young,* and *Slochower v. Board of Higher Education*), punishment by denaturalization and deportation (*Galvan v. Press, United States v. Minker, United States v. Zucca, United States v. Witkovich,* and *Jay v. Boyd*), punishment by denial of admission to the bar (*Schware v. New Mexico* and *Konigsberg v. California*), and punishment by denial of passports. We are reminded that although, on most occasions, the Court ruled for the individual and against the government, the Court refrained from creating any new constitutional doctrine. For example, in the field of deportation and denaturalization the Court refrained from holding that the resident alien is entitled to constitutional due process and contented itself with interpreting congressional statutes to arrive at results temporarily helpful to the particular litigant. Similarly, in the area of public employment the Court refrained from holding that the Constitution requires confrontation by accusers before an employee can be stigmatized as "disloyal." The Court set aside the security discharges on the most narrow and technical grounds of statutory construction. Mr. Pritchett concludes his book with a chapter entitled "The Obligation to Judge." Here he discusses the philosophical problems inherent in the doctrine of judicial self-restraint as illustrated by the tendency of the Warren Court to avoid basic constitutional issues and secure libertarian effects through the interpretation of statutes, a process which provides Congress with an opportunity for a second look at what it might well have done initially without thinking through the consequences. The discussion here, as elsewhere in the book, is illuminating, provocative, well written, and well worth reading.

The Honorable Eighty-eight. By James Barbar. New York: Vantage Press. 1957. Pp. 124. $2.75.

The Honorable Eighty-Eight, by James Barbar purports to give a "complete survey of the educational and legal backgrounds, political associations, and the judicial philosophy of the eighty-eight men who have worn United States Supreme Court robes since President Washington made the first appointments to the Court in 1789." The reader can decide for himself whether the book jacket overstates the case by reading the following account the author gives John Marshall, an account neither more nor less imaginative and inclusive than the accounts of the other eighty-seven Justices.

"A Virginian by birth and a Revolutionary War soldier, John Marshall furthered his legal education by attending the law lectures given by Chancellor George Wythe at the College of William and Mary.

"Marshall was admitted to the bar August 28, 1780.

"His rapid rise in politics soon took him to the state assembly. As a member of the assembly, he voted to ratify the Constitution. Washington offered him the post of Attorney General, but Marshall declined. President Adams appointed him Secretary of War without consulting him, but he declined, accepting the office of Secretary of State instead.

"Marshall became Chief Justice upon the resignation of Oliver Ellsworth. His first duty was to administer the Presidential oath to Thomas Jefferson.

"He was tall, meager, and inelegant in dress. He earned permanent recognition as the first vigorous advocate of a strong national government.

"He died July 6, 1835, in the thirty-fifth year of his incumbency."

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