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SEARCH AND SEIZURE AND THE SUPREME COURT, by Jacob W. Landynski. Johns-Hopkins Press, Baltimore, Md. (1966). 286 pp. $8.50.

Jacob W. Landynski accurately sets forth in terse style the course of the decisions of the United States Supreme Court with respect to search and seizure under the Fourth Amendment. Since the author has already been chided by Chief Justice Taft of the Ohio Supreme Court for failing to recognize that the exclusion from evidence of items illegally seized undermines public confidence in the law,[1] further criticism on that score, even if merited, would be redundant. For the same reason, well-deserved plaudits[2] and undeserved cant[3] need no repeating. The following critical comments are made, with some trepidation, however, because Landynski's work has already been sanctified by the citation of Justice Brennan in the recent decision of *Warden v. Hayden*.[4]

Landynski's book is well worth reading for both laymen and general practitioners. But for the more sophisticated student of the Court, the book has certain, basic shortcomings. By largely limiting his study and presentation to an analysis of the historical background and the cases decided by the Court with respect to the Fourth Amendment, the author excludes three areas of consideration which, as measured against precedent, logic and symmetry, may be the prevailing influence on the course of the Supreme Court's constitutional law decisions. Landynski does not place the search and seizure decisions in perspective with other contemporary decisions by the Court in the human rights area; he fails to analyze the search and seizure decisions in terms of the individual and legal philosophies of the justices rendering them; and he does not view such decisions as an exercise of power by a judicial institution whose ultimate effectiveness depends upon the extent of faith vested in it by the public. In short, Landynski's presentation unduly stresses the influences of precedent and logic rather than experience as the basis for decision.[5]

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1 Taft, Book Review, 42 Notre Dame Law. 589, 592 (1967).

2 Ringel, Book Review, 12 New York L. F. 700 (1966).

3 McNally, Book Review, 12 South Dakota L. Rev. 167 (1967).

4 87 S. Ct. 1642, 1647 (1967).

5 Holmes, The Common Law 1 (1881).

> It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Perhaps no more than Landynski has done can be expected in such a compact work. If, however, other contemporary decisions of the Court had been mentioned briefly, the particular significance and background of the search and seizure problems would be better illuminated. For example, in the same Term in which the Court rendered its fragmented decision of *Irvine v. California*[6] concerning the use in state court proceedings of items illegally seized by state officers, the Court unanimously undertook to de-segregate the public schools.[7] The Court's fragmentation in *Irvine*[8] attains particular significance when contrasted to the Court's unanimity in the school segregation cases. Such contrasts are largely missing in Landynski's work.

On the other hand, where Landynski does contrast the apparently inconsistent decisions by an unanimous Court in *Weeks v. United States*[9] and *Adams v. New York*,[10] he fails to point out that during the ten years between such decisions, five new justices[11] had been appointed to the Court. Likewise, Landynski's scholarly analysis of *Boyd v. United States*[12] and the *Adams*[13] and *Weeks*[14] decisions in Chapters Two and Three loses much of its significance when it is realized that these decisions spanned twenty-eight years and involved twenty-two different justices. None of the justices participated in all three decisions; only one participated in the first two decisions,[15] and only four participated in the later two decisions.[16] Landynski may well have assumed that his readers were fully aware of the changes of the membership of the Court and their significance on the course of the Court's decisions. He may, therefore, be excused from focusing his attention on such mundane matters.

Landynski's failure to analyze the search and seizure decisions in terms of the individual and legal philosophies of the justices must, however, be viewed in a different light. The most glaring distortion resulting from such failure appears in the author's presentation of Justice Frankfurter's majority opinion in *Wolf v. Colorado*.[17] Although Landynski concedes that "the decision was based on considerations of federalism,

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[6] 347 U.S. 128 (1954).

[7] Brown v. Board of Education, 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

[8] *Supra* note 6.

[9] 232 U.S. 383 (1914).

[10] 192 U.S. 585 (1904).

[11] Hughes, Lamar, Lurton, Pitney and Van Devanter.

[12] 116 U.S. 616 (1886).

[13] *Supra* note 10.

[14] *Supra* note 9.

[15] Harlan.

[16] Day, Holmes, McKenna and White.

[17] 338 U.S. 25 (1949).

the same considerations that are largely responsible for the prevailing interpretation of the due process clause in a manner other than as a synonym for the Bill of Rights," [18] Landynski fails to articulate, even in a shorthand fashion, the basic precepts of federalism which Frankfurter had, on so many occasions, advocated.

As early as 1928, Frankfurter had stated:

> "Like all courts, the federal courts are instruments for securing justice through law. *But unlike most courts, they also serve a far-reaching political function. They are a means, and an essential one, for achieving the adjustments upon which the life of a federated nation rests. The happy relation of states to nation—our abiding political problem—is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined.*" [19]

The "political" function of the Court was, in Frankfurter's mind, inevitably coupled with each substantive question before the Court. With respect to the business of the Supreme Court in the 1934 term, Frankfurter had written:

> "While great changes have thus ensued during the course of a century in the details for coping effectively with the vast changes in the amount of business that has come to the Court, the essential conditions remain the same under which the ultimate issues of federalism—the distribution of power as between the nation and the states—added to the ultimate issues of every government—the conflict between authority and liberty—are with us left for settlement by the Supreme Court through the form of an ordinary lawsuit." [20]

As Landynski points out, Frankfurter "saw the haunting specter of the police state" back of each unlawful search.[21] Before his appointment to the Court, Frankfurter had indicated that

> . . . . anxiety over the deep shadows which crime casts upon the American scene should not tempt relaxation of the moral restraints which painful history has prescribed for law officers. Our own days furnish solemn reminders that police and prosecutors and occasionally even judges will, if allowed, employ illegality and yield to passion, with the same justification of furthering the public weal as their predecessors relied upon for the brutalities of the seventeenth and eighteenth centuries.[22]

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[18] Landynski, Search and Seizure and the Supreme Court, 127 (1966).

[19] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Corn. L. Q. 499, 500 (1928). (Emphasis added.)

[20] Frankfurter & Hart, The Business of the Supreme Court at October Term, 1934, 49 Harv. L. Rev. 68, 107 (1935).

[21] Landynski, *supra* note 18.

[22] Frankfurter, Mr. Justice Brandeis and the Constitution, 45 Harv. L. Rev. 33, 95 (1931).

Notwithstanding Frankfurter's deep concern with the problems of illegal activities on the part of law enforcement agencies, he ruled, in *Wolf v. Colorado,* that the rule excluding illegally seized items from evidence was not then to be made applicable to the States. The basis for this ruling is not found so much in Frankfurter's opinion as it is in his views concerning the proper functioning of the Court in the federal system. Frankfurter once stated:

> For the very reason that accretions of the power of the central government and of national tribunals are inevitable, it becomes more important than ever not to draw into the national authority matters, which, on any basis of local sensitiveness and greater local competence, can be wisely left to state authorities and to state courts.[23]

Without making the reader aware of these views of Frankfurter, Landynski presents a distorted course of the Court's decisions with respect to the adaptation to the States of the exclusionary rule of evidence. Similarly, Landynski's failure to analyze other search and seizure decisions in terms of the individual and legal philosophies of the justices may well be regarded as one of the shortcomings of the work.

Landynski has also failed to view the search and seizure decisions as an exercise of power by a judicial institution whose ultimate effectiveness depends upon the extent of *political* faith vested in it by the public. In the final instance, enforcement of the Court's decrees depends almost exclusively upon the President. Congress also has almost unlimited authority to make exceptions to the Court's appellate jurisdiction. To maintain itself with such limitations as an effective tribunal for the effective resolution of all cases and controversies, the Court must foster faith for all of its rulings in the mind of the public.

The means by which public acceptance of its decisions is engendered by the Court, differs greatly from simply following the election returns. It requires first an application and determination of the vague concepts of the Constitution so as to resolve finally the controversy before the Court in accordance with the best legal and intellectual thinking of the day and yet completely in step with all current economic and social developments. Secondly, it requires that the Court communicate its determination to the Bar and the general public in such a manner as to gain respect for the Court and its rulings.

Although Landynski sets forth in Chapter Seven the problems of illegal search, he fails to relate the criticism of the exclusionary rule of evidence to the problem of the effective functioning of the Court as a judicial institution. The difficulty of the search and seizure questions is largely that they do not tend to "foster faith" in the Court as an institution in the mind of the public. This difficulty is not analyzed or evalu-

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[23] Frankfurter & Hart, The Business of the Supreme Court at October Term, 1932, 47 Harv. L. Rev. 245, 291 (1933).

ated by Landynski as influencing the course of the Court's search and seizure decisions.

Finally, it is to be noted and regretted that Landynski's work was published prior to the search and seizure decisions by the Court at its October Term, 1966,[24] and likewise prior to the "stop and frisk" decisions which are to be rendered at October Term, 1967.[25] Although Landynski's work unduly stresses precedent and logic rather than experience as the predominant influence on the course of the Court's search and seizure decisions, the book is a valuable contribution to the understanding of the interpretation of the Fourth Amendment for the general practitioner and well worth reading.

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[24] Hoffa v. United States, 385 U.S. 293 (Dec. 12, 1966) (Planting of informer in councils of accused is not violative of Fourth Amendment); Osborn v. United States, 385 U.S. 323 (Dec. 12, 1966) (Use of tape recording of accused's private conversations as evidence permitted where a court authorizes the wire tap to protect its procedures); Lewis v. United States, 385 U.S. 206 (Dec. 12, 1966) (Misrepresentation of identity insufficient to constitute illegal intrusion into home under Fourth Amendment); Cooper v. California, 386 U.S. 58 (Feb. 20, 1967) (Not unreasonable under the Fourth Amendment to search a vehicle held for use as evidence in forfeiture proceedings); McCray v. Illinois, 386 U.S. 300 (March 20, 1967) (Probable cause for arrest and search exists when reliable informant tells police that accused is selling narcotics in a general vicinity on the streets); Warden v. Hayden, 387 U.S. 294 (May 29, 1967) (No distinction between "mere evidence" and "fruits of crime" for purpose of Fourth Amendment searches); Camara v. Municipal Court, 387 U.S. 523 (June 5, 1967) (Administrative inspections without warrant violate the Fourth Amendment), and Berger v. New York, 388 U.S. 41 (June 12, 1967) (New York State statute authorizing wire taps violative of Fourth Amendment).

[25] Sibron v. New York, U.S. S. Ct. Docket No. 1139 (October 6, 1966) (1966 Term) probable jurisdiction noted, renumbered 63 (1967 Term); Peters v. New York, U.S. S. Ct. Docket No. 1192 (October 10, 1966) (1966 Term) probable jurisdiction noted, renumbered 74 (1967 Term) and Terry v. Ohio, U.S. S. Ct. Docket No. 1161 (March 18, 1967) (1966 Term) cert. granted, renumbered 67 (1967 Term).