

(1995) 09 AHC CK 0007
In the Allahabad High Court
Case No : C.M.W.P. No. 1672 of 1995

L. Agrawal

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-09-1995

Acts Referred:

Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 — Rule 3, 3(1), 3(2)
Constitution of India, 1950 — Article 226, 229, 229(1), 229(2), 291
Government of India Act, 1935 — Section 241, 242

Citation : (1995) 3 UPLBEC 1476

Hon'ble Judges : V.N. Khare, J;U.P. Singh, J;Palok Basu, J

Bench : Full Bench

Advocate : Suneet Kumar and Rakesh Dwivedi, for the Appellant;

Judgement

V.N. Khare, J.—The question which arises for consideration before this Full Bench is as to whether it is the Chief Justice of the High Court or the Governor of the State who is empowered to create post in the C.L. Agrawal v. State of U.P. and Ors. establishment of the High Court. This controversy has arisen in the context of the exercise of power by the Chief Justice of Allahabad High Court granting advance/premature Increment to the employees of the High Court. But the Impugned letter dated 27.6.92, which is Annexure-1 to the writ petition, the Joint Secretary, Government of U. P. has questioned the power of the Chief Justice of the High Court to grant advance premature increments to the officers and servants of the High Court on the premise that since it is the Governor of the State who creates posts in the establishment of the High Court Under Article 229 of the Constitution and as such, the Chief Justice of the High Court is not empowered to grant advance/premature increment to the employees of the High Court Under Rule 27 of the Financial Handhook, Vol. II, Parts II to IV which is extracted below:

27. An authority may grant a premature increment to a Government servant on a time scale of pay if it has power to create a post in the same cadre on the same

scale of pay.

2. To give the relevant factual background, the Petitioner was initially appointed as a Lower Division Assistant in the Allahabad High Court and retired on 31.7.94 after serving about 37 years. During the course of employment, the Petitioner was granted four advance increments by the different Chief Justices of the Allahabad High Court. When, the Petitioner's pension papers were being processed, Respondent No. 2 excluded the four advance increments given to him from computation on the basis of the Government Order dated 27.6.92 which is impugned in this writ petition. This exclusion of four increments and denial of benefit of computation in the pension, it is alleged, is contrary to the past practice in the matter of finalisation of pension meant for the retired employees of the Allahabad High Court.

3. Before coming into force of the Constitution of India in 1950, the then Hon'ble the Chief Justice of Allahabad High Court had framed rules known as Allahabad High Court (Conditions of Service of Staff) Rules, 1946 (hereinafter referred to as 1946 Rules), u/s 241/242 of Government of India Act, 1935. The said rules had approval of the Governor in accordance with the provisions of Government of India Act, 1935. Proviso to Sub-rule (1) of Rule 7 of the 1946 Rules provided that the power exercisable by the Governor of State Under the rules framed by the State Government shall be exercised by the Chief Justice of the High Court. After coming into force the 1946 Rules, different Chief Justices of Allahabad High Court exercised the power to grant advance increment to the staff and servants of the Allahabad High Court. In the year 1955, the question arose as to whether the Chief Justice of the High Court has power to grant advance Increment to the employees of the High Court, when the Accountant General, Uttar Pradesh doubted the power of the Chief Justice to grant such increment to one Sri L. Jauhari. Consequently, the matter was referred to the Government. The Government after considering the matter issued a letter dated 30.5.1955 with the concurrence of the Finance Department holding that the Chief Justice of Allahabad High Court is fully competent to grant premature increment to Sri L. Jauhari. A copy of the letter dated 30.5.1955 is Annexure-3 to the writ petition. The said letter is still intact and has never been recalled, rescinded or revoked by The Uttar Pradesh Government or any other authority.

4. In the year 1976, the 1946 Rules were substituted by the new rules known as Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976 (hereinafter referred to as 1976 Rules) which was published in the U. P. Gazette of 31st July, 1976 after its approval by the Governor of Uttar Pradesh. It is noticeable that even after coming into force of 1976 Rules, the successive Chief Justices of Allahabad High Court continued to exercise powers to grant advance/premature increment to the employees of the High Court and no objection of any sort was taken against it by the Government.

5. However, in the year 1991 in the matter of payment of pension to one Nazim Hussain, the Director of Pension took objection to grant of premature increment

by the Chief Justice of Allahabad High Court. He referred the matter to the State Government. On reference, the State Government issued certain directions to the Directorate of Pension that pending decision on the matter, pension be released to Sri Nazim Hussain after excluding premature increment granted to him during the course of employment by the Chief Justice of Allahabad High Court. Thereafter, the Joint Secretary, Uttar Pradesh Government issued the letter which is impugned in this writ petition. Aggrieved, the Petitioner has come up before this Court by means of this petition Under Article 226 of the Constitution challenging the impugned order. The prayer in the writ petition is that the letter dated 27.6.92 issued by the Joint Secretary of the Government of U.P. be quashed and further a direction be issued to the Respondents to make immediate payment of balance of the Petitioner's pensionary dues without reducing the amount of premature increments granted by the Chief Justice of Allahabad High Court.

6. Since the matter was of some importance, the Hon'ble Chief Justice by order dated 18.1.95 Referred this petition for decision to the Full Bench. Accordingly, this Full Bench has been constituted to decide this writ petition. Initially, when the matter came up before this Full Bench, a statement was made on behalf of the Respondents that the case may be adjourned to enable the Government to rethink over the matter for modifying the fundamental rules. After two adjournments, it was stated on behalf of the Respondents that the State intends to contest the writ petition. A counter-affidavit has been filed on behalf of Respondent Nos. 1 and 2. The stand taken therein is that Under Fundamental Rule 27 the power to grant advance increment lies only with those authorities who are empowered to create posts and since the Chief Justice of Allahabad High Court has no power to create post for the employees of Allahabad High Court, he is not empowered to grant any advance/premature increment to the employees of the High Court. It is also stated therein that it is the Governor of Uttar Pradesh who is empowered to create posts for the Allahabad High Court and as such, it is he who can exercise the power to grant advance increment to the employees of the Allahabad High Court. So far as the past practice of the Chief Justices granting advance increment to the employees of the Allahabad High Court is concerned, it is stated in the counter-affidavit that Under Rule 7 of 1946 Rules, the Chief Justice of Allahabad High Court was empowered to exercise the power of Governor and as such the grant of such increment by the Chief Justice of the High Court to the employees was permissible. However, after revocation of 1946 Rules, the power exercised by the Chief Justice in the matter of granting advance increment to the employees is not In conformity with Article 229 of the Constitution and Rules of 1976.

7. Sri Rakesh Dwivedi, advocate appearing on behalf of the Petitioner contended that in fact, the power to create posts of officers and servants in the High Court vests in the Chief Justice of the High Court and as such, the Chief Justices of the High Court acted within their power while granting advance/premature increment to the employees of the High Court. It was also contended that once the State

Government having conceded the power of the Chief Justice to grant advance increment to the employees of the High Court by Government Order dated 30.5.55 and such exercise of powers by the Chief Justice having never been objected to by the State Government, the exercise of powers by the Chief Justice to grant advance increment to the employees over long period of time has taken a shape of constitutional practice/convention and thus Article 229 of the Constitution has to be read accordingly. Sri Vineet Saran, Additional Advocate General appearing for the State Government contended that the power to create posts of officers and servants in the High Court exclusively vests in the Governor and as such, the Chief Justice of the High Court is not empowered to grant advance/premature increment to the employees of the High Court without approval of the Governor of the State.

8. Learned Counsel for the parties cited several decisions in support of their arguments which I propose to deal with at the appropriate place.

9. Before advertng to the arguments of the parties, it is necessary to look into legislative developments In respect of the powers of the Chief Justice in relation to officers and servants of the High Court, Allahabad. Allahabad High Court was established under the provisions of Letters Patent, 1866 wherein the power in respect of all the matters regarding staff was conferred upon the Chief Justice of the High Court. Clause 6 which Is relevant for the purpose of this case is extracted below:

And do we hereby authorise and empower the Chief Justice of the said High Court of Judicature at Allahabad from time to time as occasion may require and subject to any Rules and restrictions which may be prescribed by the Lt. Governor of the United Provinces of Agra and Avach to appoint so many and such Clerks and other ministerial officers as shall be found necessary for the administration of Justice and due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent and it Is our further will and pleasure and we do hereby for us our heirs and successors give grant direct and appoint that all and every the officers and clerks to be appointed as aforesaid shall have and received respectively such reasonable salaries as the Chief Justice shall from time to time appoint for each office and place respectively and as the Lt. Governor of the United Provinces of Agra and Avach subject to control of the Governor General In Council shall approve of.

Provided always and it is our will, pleasure that all and every officers and clerks to be appointed as aforesaid shall be resident within the limits of the jurisdiction of the said court so long as they shall hold their respective office but this proviso shall not interfere with or prejudice the right of any officer or clerk to avail himself of leave or absence Under any Rules prescribed by the Governor General in council and to absent himself from the said limits during the term of such leave in accordance with the said Rules.

10. In the Government of India Act 1915-19, the position as it was in the Letters

Patent continued to be the same. By virtue of Sections 241 and 242 of the Government of India Act, 1935, the power of control and supervision was vested in the Chief Justice who was also conferred with the powers to frame the rules. But in respect to the rules relating to salary, allowances, leave and pension, it was provided that approval of the Governor of the United Provinces (the Governor of the State) was also to be obtained. Thereafter, in 1950 the Constitution of India was enforced and Article 229 of the Constitution provided me power of Chief Justice In relation to officers and servants of the High Court. Article 229 of the Constitution is as under:

229. Officers and servants and the expenses of High Courts.

(1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule, no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission.

(2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made Under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon the Consolidated Fund of the State and any fees or other moneys taken by the Court shall form part of that Fund.

11. On the argument of learned Counsel for the parties, the question that arises for consideration is as to whether Article 229 of the Constitution of India empowers the Chief Justice to create posts for the officers and servants of the High Court. If the answer to this question is in the affirmative, surely, the Chief Justice of the High Court is within his power to grant advance increment to the staff of the High Court Under Fundamental Rule 27.

12. The nature and scope of the powers of the Chief Justice Under Article 229 of the Constitution has been the subject-matter of number of decisions of the Apex court as well as of this Court. Here, I would like to refer those decisions which have been cited by learned Counsel for the parties in support of their arguments.

13. In the case of *Predate Kumar v. Hon"ble Chief Justice of Calcutta High Court*

AIR 56 SC 285 , it was held that from the time of passing of the Government of India Act, 1935 as well as Under Article 229 of the Constitution of India, the power of appointment and dismissal of the staff of the High Court vests in the Chief Justice of the High Court. In the case of M. Gurumoorthy Vs. Accountant-General, Assam and Nagaland and Others, , the Apex Court was of the view that the exclusive power conferred to the Chief Justice by Clause (1) read with Clause (2) of Article 229 is not only in the matter of appointments but is also with regards to prescribing the conditions of service of officers and servants of the High Court by rules and further the said power cannot be abridged or modified. The Appex court was of the view that the approval of the Governor in the matter of Rules is confined only when it relates to salaries, allowances, leave or pension of the staff and all other rules in respect of other conditions of service do not require his approval. In the case of Darshan Lal Vs. State of Jammu and Kashmir, , it was held that payment of higher salary not permitted by the Rules requires approval of the Governor as the same involves financial burden on public exchequer. In the case of State of Andhra Pradesh and Another Vs. T. Gopalakrishnan Murthi and Others, , the view taken by the Supreme Court was that Under Article 229 of the Constitution the Chief Justice of the High Court is empowered to make the rules laying down the conditions of service of the High Court staff. But if the Rule made Under Clause (2) of Article 229 relates to salaries, allowances, leave or pension, then the rule requires the approval of the Governor that means the State Government, as it involves question of finance. In the case of Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, , it was held that in the context of Article 229 read as a whole, the power of appointment vested in the Chief Justice of the High Court is of wide amplitude and it includes power of suspension, dismissal, removal or compulsory retirement from service Including the power to prescribe their conditions of service and no extraneous executive authority can interfere with the exercise of that power by the Chief Justice or his nominee, except to a very limited extent indicated in the proviso to Clause (2) of Article 229 of the Constitution. In the case of State of U. P. v. Class A" Employees Association 1993 UPLBEC 1083. It was held by this Court that if the grant of benefit to the employees involves financial burden on the State exchequer, the approval of the Governor is mandatory. In writ petition No. 2672 of 1993, Sunil Kumar and Ors. v. State of U. P. and others decided on 28.4.93, a Division Bench of this Court was of the view that grant of dress-allowance to the employees of the High Court requires approval of the Governor as provided in the proviso to Clause (2) of Article 229 of the Constitution.

14. The series of decisions referred to above show firstly that the Chief Justice of the High Court has got unfettered power in the matter of appointment and termination of the staff and servants of the High Court Under Article 229 of the Constitution and such power cannot be abrogated or modified. Secondly, the Chief Justice has a power to frame Rules laying down the conditions of service of the staff of the High Court without approval of the Governor, if the same do not involve salary, allowances, leave and pension. Thirdly, if any rule is to be framed

as contemplated Under Clause (2) of Article 229 of the Constitution by the Chief Justice and it relates to salary, allowances leave and pension, the same requires approval of the Governor of the State.

15. In none of the decisions referred to above, the question as to whether who is the authority empowered to create posts for the staff of the High Court or, in other words, who is the creator of posts in the establishment of the High Court has been expressly decided. Similarly, Article 229 of the Constitution also does not expressly provide as to who is empowered to create posts in the High Court. Undisputedly, dispensation of Justice by the High Court is sovereign function which is inalienable function. Further, the independence of the judiciary and separation of powers are part of basic structure of the Constitution. Thus, the framers of the Constitution have conferred supreme power on the Chief Justice only with the view to ensure independence of the High Court in the matter of administration of justice. In view of this, the law in respect thereof should be interpreted in that light. If Article 229 of the Constitution does not expressly provide for the creation of post in the High Court, the authority who is empowered to create post in the High Court has to be located. Clause (1) of Article 229 of the Constitution provides that the appointment of officers and servants in the establishment of the High Court vests in the Chief Justice of the High Court or such other Judge or Officer of the High Court as he may direct. The power of appointment cannot be exercised by the Chief Justice unless there is a post. The creation of post is anterior in making the appointment and laying down the conditions of service is posterior to the appointment. In fact, it is only the Chief Justice who knows what kind and numbers of posts are required to be created for administration of Justice. The Governor of the State had no knowledge of the working of the High Court. Under such circumstances, the doctrine of implied power has to be pressed into service. The doctrine of implied power can be legitimately invoked when it is found that the duty has been cast or power conferred on an authority by a statute and it is further found that duty cannot be discharged or power is incapable of being exercised unless some power is assumed to exist. In such a case, in the absence of an implied power, the statute itself would become impossible of compliance. In fact, the provision will not be workable. The words "Appointment shall be made" occurring in Clause (1) of Article 229 has to be construed widely. In Webster Dictionary of Synonyms, the word make is synonym to conceive or to originate. Thus, the creation of post in the High Court is implied in the exclusive power of the Chief Justice "to make appointment" of officers and servants in the High Court. This is also borne out from Rule 3(1) and (2) of 1976 Rules which provides that the number of permanent post of various categories in classes I, II, III and IV respectively in the establishment of the High Court shall be such as may be determined by the Chief Justice from time to time with approval of the Governor of Uttar Pradesh. Sub-rule (2) further provides that the Chief Justice may from time to time create such temporary post as may be considered necessary. It is only on appointment the question of approval of Governor is required in the

terms of proviso to Clause (2) of Article 229 of the Constitution. In case such implied power is not culled out, it would be difficult for the Chief Justice to run the administration of the High Court. I am, therefore, of the view that the power to create post in the establishment of the High Court is implicit in power of the Chief Justice to make appointment of officers and servants in the High Court.

16. This matter can be examined from another angle. The scrutiny of provisions of Chapter I. Part 14 of the Constitution relating to services and other provisions of the Constitution shows that the expression "recruitment" and "condition" of service is not one and the same thing. In fact, they are two different expressions and convey different meanings. Recruitment is first and conditions of service comes later on.

17. In the case *Keshav Chandra Joshi and others etc. Vs. Union of India and others*, , it was held that there is distinction between the rules of recruitment and conditions of service. In the case of *State of Punjab Vs. Kailash Nath*, , the Supreme Court was of the view that the expression "condition of service" means anything which regulates the holding of a post by a person such as wages, subsistence allowance, periodical increment, pay-scale, leave, fund, gratuity, confirmation, promotion, seniority, tenure, termination, compulsory retirement, pension, disciplinary proceedings, right from the time of his appointment till retirement. In the case of *I.N. Subba Reddy Vs. Andhra University and Others*, , It was held that expression "condition of service" means all those conditions which regulate the holding of a post by person right from the time of his appointment till his retirement and even beyond it. In the case of *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, , it was the view of the Supreme Court that a post may be created before the appointment or simultaneously. The State may regulate the condition of service of persons appointed to the posts.

18. From the decisions referred to above, It is crystal clear that the recruitment is anterior to laying down the condition of service or anterior to making of appointment whereas condition of service is posterior to recruitment. As seen earlier, Under Clause (2) of Article 229 the approval of Governor is required only in the matter of rules laying down condition of service if they relate to salary, allowances, pension and leave. Since salary, allowances, leave and pension come within the expression "condition of service", proviso to Clause (2) of Article 229 comes into play after the post has been created. In other words, after the post in the establishment of the High Court is created by the Chief Justice, the approval of Governor Under Clause (2) of Article 229 is required for laying down the condition of service in respect of salary, allowances, pension and leave of such employee appointed on such posts. Thus, there being no requirement of approval of the Governor in the matter of recruitment. I am of view that it is the Chief Justice who has power to create post in the establishment of High Court and approval of Governor in terms of proviso to Clause (2) of Article 229 is required only for salary, allowances, leave and pension which are matters of condition of service.

19. Learned Additional Advocate General then referred to Sub-Rules (1) and (2) of Rule 3 of 1976 Rules and argued that since the Rules themselves provide for approval of the Governor for the creation of post in the establishment of the High Court and as such, it is the Governor who is, In law, creator of post in the establishment of the High Court. Assuming what the learned Additional Advocate General says is correct that approval of Governor Is required for the creation of post, but it does not mean that requirement of approval confers powers In the Governor of the State to create post in the establishment of High . Court. In the case of State of Assam etc. Vs. Kripanath Sarma and Others etc., , Section 14(3) Assam Elementary Education Act. 1962 came for interpretation before the Apex Court. Clause (Hi) of Section 14(3) runs as Under:

to appoint teacher in recognized schools on the advice of a Committee constituted by the State Board u/s 16 and transfer them as necessary and also grant such leave, other than casual leave, to them as may be admissible.

Supreme Court while interpreting Section 14(3) of the Act held as thus:

Even assuming that recommendation of the committee is necessary before appointment is made by the Assistant Secretary, the fact will remain that it is not the committee which appoints and the appointment is made only by the Secretary. Even if the word "advice" in this provision is equated to the word "recommendation", it is still clear that the Committee only recommends and it is the Assistant Secretary who is the appointing C.L. Agarwal v. State of U.P. and others authority on the recommendation of the Committee. In the case of H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, , It was held as thus:

We have earlier seen while discussing the scope of Article 366(22) that the President has a constitutional duty to recognise a Ruler. Article 291 proceeds on the basis that the President has to recognise a Ruler to each one of the Indian States contemplated by Article 366(15). By recognising, the President merely locates the Ruler. He does not appoint or create a Ruler. No sooner the President recognises the Ruler of an Indian State, he becomes entitled to the privy purse guaranteed Under Article 291 from the date the Constitution came into force.

20. The requirement of approval by the Governor to the post created by the Chief Justice as envisaged by Sub-Rules (1) and (2) of Rule 3 of 1976 Rules, is only for the purposes of salary, allowances, leave and pension of the person appointed on such post In the terms of proviso to Clause (2) of Article 229 of the Constitution. Such requirement of approval by the Governor to the post created by the Chief Justice cannot make the Governor as creator of post in the establishment of the High Court. In law and in fact, it is only the Chief Justice who is creator of the post In the establishment of High Court and is required to take approval of the Governor in the matter of financial implications.

21. In view of what has been stated above, I am of view that it is the Chief Justice who has power to create post in the establishment of the High Court and

it Is within his power to grant advance/premature Increment to the employees of High Court Under Fundamental Rule 27 of the Financial Handbook.

22. In view of the above, I am not deposed to enter in the second argument of the learned Counsel for the Petitioner that exercise of powers by the Chief Justices in granting advance increment over long period of time has taken shape of constitutional conventions.

23. In the result, the writ petition is allowed with costs. The impugned letter dated 27-6-1992 (Annexure 1 to the writ petition) is quashed and the Respondents are directed to determine the pension of the Petitioner after Including the advance increments given to him by different Chief Justices of the High Court.

Palok Basu, J. (concurring)

24. The learned judgment prepared by Hon"ble Mr. Justice V.N. Khare has to be wholeheartedly concurred with. All the points argued for and against the writ petition have been elaborately dealt with by my learned Brother whose reasoning and conclusions are fully endorsed. Only a few words may be added for concurring with those conclusions.

25. It has been seen that Hon"ble the Chief Justice is the only constitutional authority who could be knowing the requirements of the High, Court. Likewise, as and when exigency would require, the Chief Justice shall create posts and refer to the Governor for funds. Therefore, creation of the post will precede the appointment of a person to the said post and the only authority to do so is the Chief Justice. There does not seem to be any deviation from this interpretation which has been In vogue ever since the Constitution of India came into being.

26. It may be mentioned here that facts giving rise to this petition have already been adverted to in the judgment of Hon"ble V.N. Khare, J. Hence those are not repeated here. To this Court, it appears that no controversy was raised if and when the Chief Justice granted any special increment to a member of the staff working in the High Court. What has made the Government to alter the said practice is not very clear, may be it is only an Individual officer thinking. It was, therefore, rightly suggested at the commencement of the hearing by learned Advocate General that the case be adjourned as serious discussion about "he validity of the stand of the Government was on. The Advocate General thereafter did not argue the matter on behalf of the Government and the case was entrusted to the Addl. Advocate General.

27. It is once in a blue moon that one or the other of the staff may get special increment from the Hon"ble the Chief Justice for some extraordinary work. Such grant of extra increment on those rare occasions extends impetus to the remaining staff to discharge its duties with absolute sincerity and integrity and emulate the working method and mannerism of his colleague who is so rewarded. It was, therefore, right that no objection was ever raised about the

grant of special increment by the Chief Justice to some members of the staff. It was not necessary for this litigation to have cropped up In view of the opinion of an Individual officer when a long chain of his predecessors had chosen to concede to the existence of such a right in the Hon''ble the Chief Justice.

28. There was and there is no conflict in exercise of power between the Chief of the Executive and the Chief of the judicial wings. Hopefully there shall never be one In the future. This writ petition and the consequent decision on it Is outcome of the view of an individual officer which this Court does not cherish.

29. Before concluding, it may be added that the facts and circumstances Under which this litigation has its origin, incidentally attract aptly some of the observations of the Hon''ble Supreme Court in Indira Sawhney case 1992 Siqip 2, SCC page 215

The judiciary derive their authority as much from the people", the ultimate sovereign as the Legislature or the executive. Each wing is a delegate of the Constitution. Each stand committed to be ruled Under and governed by it The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation" "When new societal conditions and factual situations demand the Judges to speak, they, without professing the tradition of judicial lock-jaw, most speak out.