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JUDICIAL NEGLECT: THE SUPREME COURT AND THE RED SCARE 1949-1961

VOLUME I

By

David Edmund Murley

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ABSTRACT

JUDICIAL NEGLECT: THE SUPREME COURT AND THE RED SCARE 1949-1961

By

David Edmund Murley

This paper examines how the Vinson and Warren Courts reacted to the Red Scare from the 1949 to 1960 Terms. The Vinson Court (1949-1952 Terms) attempted to address the important constitutional issues implicated by the government's domestic anti-Communist programs. Unfortunately, it faced several major impediments, including deep ideological divisions among the justices and lack of precedent from which to evaluate the constitutionality of the government's programs. The Court, which generally upheld the government, provided some constitutional guidance in its Communist cases, but the rationale behind its opinions and judgments was often confusing.

The Warren Court (1953-1960 Terms) was more ideologically unified than the Vinson Court. Despite this advantage, the Court neglected its duty to determine the constitutionality of the government's anti-subversion programs. The Court generally decided Communist cases against the government from the 1953-1957 Terms and in favor of the government from the 1958-1960 Terms. Whether supporting or opposing the government, the Court avoided important constitutional questions, ignored its own Communist case precedent, and engaged in highly suspect statutory interpretation. The Court, by neglecting its constitutional duties, left both the government and alleged subversives to wonder whether the government's anti-subversion programs comported with the Constitution.

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I would also like to thank Georgetown Law Professor Peter Tague for teaching me how to read a Supreme Court case properly. Tague, my Criminal Procedure Professor, constantly badgered the class to read the dissenting opinions in cases. Why? Because that dissenting justice may, one day, get to write the majority opinion on the same issue. Tague would also ask the class: What are the justices saying to one another? His point was that the justices often used their opinions as vehicles to attack one another, show off to some constituency, etc.—in other words, for purposes other than addressing the narrow facts of the case at hand. At the time, I ignored his discussions and turned my focus to that day's Washington Post. Yet, as I worked on this paper, I realized that he was absolutely correct.

Finally, I would like to thank my long-suffering wife for enduring my endless promises that my dissertation would be finished "next semester." Thank you, Sarah, for your love and support.

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INTRODUCTION

The events of September 11, 2001 led the federal government to implement several national security measures. From the Patriot Act to the creation of the Department of Homeland Security to detainment of potential security risks, the government has sought to guard the nation from subversion. From the perspective of 2005, it appears that the United States is in the first years of a long, undeclared battle against radical Islam.

The United States has often sought to prevent activities that might give aid and comfort to the enemy during wartime. During the Civil War, the government suspended habeas corpus. During World War I, it passed both the Espionage Act and the Sedition Act, and prosecuted and jailed numerous persons for anti-war activities. During World War II, the government detained large numbers of people of Italian, German, and, most notably, Japanese descent as possible security risks.

These examples are not exactly analogous to today's fight against radical Islam. Each concerned war against a nation, or, in the case of the Confederacy, a *de facto* nation. The individuals prosecuted, interned, or jailed were perceived to be providing, or likely to provide, assistance to an enemy nation. The fight against radical Islam, in contrast, seems to be more of a struggle against an ideology than a nation. Obviously, the United States has fought radical Islamists in other nations, most notably in Iraq and Afghanistan. Yet it remains an ideology, rather than allegiance to a foreign nation, that motivates the adherents of radical Islam.

History provides us some analogies to this phenomenon. During the late 1790's, the fears aroused by the radical impulses of the French Revolution led Congress to pass

the Alien and Sedition laws. During the late Nineteenth and early Twentieth Centuries, Anarchism became the major threat to the United States. The nation responded with Anarcho-Syndicalism laws, vigilantism, and criminal prosecutions. Shortly after World War I, the United States experienced its first Red Scare, which resulted in the arrest, detention, and deportation of a large number of foreign-born radicals.

While these examples are useful for analyzing America's current struggle, the Second Red Scare may provide the most useful historical comparisons. The government's response to the Second Red Scare proved to be the most comprehensive governmental response to a peacetime national security threat in America's history. Congress passed numerous statutes aimed at registering, deporting, or prosecuting Communists, and, through its committees, sought to investigate and expose Communists. The Executive Branch issued orders that created loyalty review boards, banned Communists from federal employment, and sought to prosecute the leaders of the Communist Party. States, too, sought to fight Communists by refusing to grant them professional licenses and banning them from public employment. In short, the government perceived a threat to its security and responded not with violence but with law—an enormous number of statutes, regulations and policies which often led to prosecutions, deportations, and employment dismissals.

That the government responded to this threat to its national security by passing laws and issuing orders did not necessarily make these actions constitutional; that determination was, and still is, ultimately left to the Supreme Court. This dissertation analyzes the role of the United States Supreme Court during the Second Red Scare (hereafter "Red Scare"). More specifically, it focuses on the Court's reaction to the

decision of the political branches of the federal government (and the states) (hereafter referred to generally as "the government") to combat domestic Communism. This dissertation will not analyze the methods chosen by the government to fight Communism as it did. Nor will it label a particular Court decision "good" or "bad" because it protected civil liberties or sustained the government's actions. Such discussion may be useful for predicting the author's political party registration, but is worthless as historical analysis.

Instead, this paper focuses on the Court's decision to support or oppose the government and the cogency of its arguments for doing so. More important, it analyzes the Court's willingness to draw bright lines that clearly separated the constitutional from the unconstitutional; to instruct alleged subversives regarding the reach of the Bill of Rights; and to create, and then follow, its own precedent in Communist cases.

Unfortunately, the Supreme Court's Red Scare Communist case jurisprudence provides scant assistance to scholars seeking to ascertain the scope of the government's power to fight the threat of domestic subversion posed by radical Islam. The Court's record of providing constitutional guidance regarding the government's anti-subversion programs during this period analyzed by this paper—from the 1949 Term through the 1960 Term—was highly disappointing.¹

The aforementioned statement implies a uniform twelve-year period of judicial neglect. That was not the case; from the 1949 through the 1952 Terms, the Vinson Court, despite deep divisions and a dearth of precedent, did a reasonable job of providing guidance regarding the constitutionality of the government's anti-subversion programs.

¹ Supreme Court Terms run from October through June of the next year. For example, the 1960 Term ran from October 1960 through June 1961.

The Vinson Court was not always artful or eloquent in providing this guidance. For example, it often struggled in trying to reconcile awkward judicial doctrines, such as the clear and present danger test, to the international threat posed by Communism. Further, the Court often experienced great difficulty in getting five justices to join an opinion. Yet, for all of its difficulties, the Vinson Court did a reasonable job in drawing the bright lines separating the constitutional from the unconstitutional.

The Warren Court had several advantages over the Vinson Court, including a body of Communist case precedent and a more unified Court. Despite these advantages, the Warren Court failed miserably in its duty to provide constitutional guidance in Communist cases during the 1953-1960 Terms. The Court often suggested that a particular statute or order "raised serious constitutional questions," but decide the case on non-constitutional grounds. Sometimes, to avoid constitutional questions, the Court would construe statutes and orders in a manner seemingly contrary to legislative intent. Other times, it disposed of Communist cases on seeming technicalities, but only after pages and pages of dicta that attacked the government for its anti-subversion programs. The Court's consistent avoidance of constitutional issues kept both the government and alleged subversives guessing regarding the constitutionality of many anti-subversion programs.

Finally, after the Warren Court shifted right during the 1958-1960 Terms, it often contradicted the reasoning, if not the holding, of its 1953-1957 Communist case decisions. Rather than overturn these earlier decisions, the Court merely sought to distinguish them, but its efforts were often unconvincing. Thus, neither the government, nor alleged subversives, could ever really know whether a particular Communist case

would bind future courts or merely represented the policy preferences of five members of the Court at any given time.

The Warren Court failed to delineate the legal from the illegal, avoided deciding important constitutional questions, and refused to overturn the very cases it seemed to reject. Prosecutors, relying on the Court's interpretation in one case, would learn that the Court had changed the ground rules. Radical defendants would cite a Communist case in their defense, only to discover that the Court could always find a way to distinguish a case when it suited its purpose. Congress would enact a statute prohibiting certain subversive activity, only to have the Court ignore the clear language of the statute. States would discover that Congress had stripped them of the ability to fight subversion, despite the complete absence of evidence that Congress had done so. In short, the Warren Court neglected its duty to interpret the Constitution in Communist case decisions.

Chapter One provides a brief overview of the Red Scare's onset and the Court's historical role in national security cases. It also presents short portraits of the nine justices who comprised the Vinson Court in October 1949.

Chapters Two and Three review the Vinson Court's record in confronting the Red Scare. The Court, often by 6-3 or 7-2 majorities, voted to sustain most of the government's anti-Communist legislation and policies. While the Court sometimes issued confusing opinions, it usually provided reasonably clear holdings that delineated the extent of the government's constitutional powers to enact legislation or issue executive orders to combat domestic subversion.

Chapter Four analyzes the Warren Court's first three terms. When Warren became Chief Justice in the 1953 Term, he embraced a moderate pro-government

ideology and joined the Court's anti-Communist wing in two major Communist cases. By the 1955 Term, he had adopted an ideology similar to the Court's two civil libertarians, Hugo Black and William O. Douglas. While Warren may have shared their philosophical ends, he was considerably more pragmatic about his means; he, in alliance with Felix Frankfurter, led the Court in nullifying the government's anti-Communist programs by interpreting the statutes and orders it examined against the government and in a manner that avoided constitutional questions.

Chapter Five examines the 1956 Term, perhaps the most controversial term of the post-World War II era. The Court continued to curb state and federal anti-Communist programs by avoiding constitutional questions or by inventing various attenuated rationales to interpret statutes and practices. This time, the Court employed harsh rhetoric that assailed the government's motives in fighting subversion. Many future defendants would rely to their detriment on the Court's inflammatory rhetoric in future Communist cases.

Chapter Six examines the 1957 and 1958 Terms. The Court began the 1957 Term by continuing to attack the government's anti-Communist programs, sometimes by inventing formerly unknown constitutional rights, such as the right to travel. Yet by the end of the term—as Congress began considering legislation that would curtail judicial power—the Court began retreating from its position. In the 1958 Term, a five-justice anti-civil libertarian coalition—comprised of the former Warren allies Frankfurter, John Harlan, and Tom Clark, and recent Court appointees Charles Whittaker and Potter Stewart—demonstrated that the Court's apparent reversal at the conclusion of the 1957 Term was not an aberration; the Court's pendulum had swung back to the government's

anti-Communist position. Unfortunately, the Court began distinguishing, rather than overturning, its previous Communist cases, leaving many befuddled regarding when the Court would follow its own precedent.

Chapter Six also examines the political storm that surrounded the Warren Court after its seemingly "pro-Communist" decisions in 1956 and 1957. Despite the strong opposition of respectable establishment opinion—the Attorney General, most newspapers, and many prominent legal scholars—Congress nearly passed legislation that would have severely curtailed the Court's jurisdiction to hear Communist cases.

Chapter Seven examines the 1959 and 1960 terms, the high-water mark of the anti-civil libertarian coalition. The five justices continued to uphold the government at nearly every turn, again by distinguishing, rather than overruling, past cases. Unfortunately, the Court missed several opportunities to issue opinions regarding the constitutionality of the government's anti-subversion efforts, or issued opinions that misread the clear language of anti-subversive legislation.

Chapter Eight concludes this paper. An appendix, which summarizes the Warren Court's Communist case jurisprudence during the 1961-1967 Terms, follows.

CHAPTER ONE: BACKGROUND AND BIOGRAPHY

AMERICA'S FEAR OF COMMUNISM

The government's first attack on Communism began shortly after World War I. Attorney General A. Mitchell Palmer, with the assistance of a young J. Edgar Hoover, oversaw the arrest and deportation of numerous Communists, Anarchists, and other assorted radicals.¹ Congress, for the first time, created a body to investigate Communism: the so-called Overman Subcommittee, which held its first hearing in February 1919.²

This First Red Scare was a short-lived phenomenon. While America's fear of Communism never disappeared, it subsided by 1921 and remained dormant until the late 1930's. During this time, the government dismantled much of the country's intelligence infrastructure, thereby allowing the Soviets to construct an espionage network in the United States. President Calvin Coolidge's Attorney General, Harlan Fiske Stone, dissolved the Bureau of Investigation's (later known as the Federal Bureau of Investigation) Intelligence Division, which monitored Communist activities.³ The United States also provided the Soviets a diplomatic base from which to conduct espionage activities; the Soviet trade Agency, Amtorg, opened in New York in 1924 and President Roosevelt extended diplomatic recognition to the Soviet Union in 1933.

¹ Robert K. Murray, Red Scare: A Study in National Hysteria, 1919-1920 (Minneapolis: University of Minnesota Press, 1955); William Preston Jr., Aliens & Dissenters: Federal Suppression of Radicals, 1903-1933 (Urbana: University of Illinois Press, 1963); Stanley Coben, A. Mitchell Palmer: Politician (New York: Columbia University Press, 1963).

² Ted Morgan, Reds: McCarthyism in Twentieth Century America (New York: Random House, 2003).

³ *Ibid.*, 113-114.

Congress occasionally made Communism a political issue. The Dies Committee—forerunner to the House Un-American Activities Committee (HUAC)—made headlines in 1938 for its investigation of Communists in government. That same year, Congress passed the Foreign Agents Registration Act, which allowed the FBI to arrest unregistered agents of foreign governments. It followed in 1939 with the Hatch Act, which barred federal employees from membership in any political party that advocated the overthrow of the government, and in 1940 with the Smith Act, which prohibited the advocacy of the overthrow of the government.⁴

American relations with the Soviet Union reached their zenith during World War II, when the United States and Britain joined the Soviet Union as part of the Grand Alliance that defeated Hitler. That fragile alliance was shattered by the onset of the Cold War, when the preeminent goal of the United States became stopping the spread of Communism both at home and abroad.

Both major political parties attempted to use America's fear of Communism for political gain. During the 1946 elections, the Republicans accused the Democrats of being soft on Communism, a charge that helped the GOP capture both Houses of Congress. For the next several years, the Republicans—or at least certain Republicans—would accuse President Truman and his advisors, including Secretary of State Dean Acheson and General George Marshall, of harboring, ignoring, or surrendering to Communists.

Truman responded to the Republican charges by issuing Executive Order 9835 on March 1, 1947. The order required the U.S. Attorney General to collect a list of organizations that he considered "totalitarian, fascist, Communist, or subversive." It also

⁴ Ibid., 148-49.

sought to ferret out subversive employees by requiring government agencies to create loyalty boards, which would determine whether to dismiss an employee as a loyalty risk. In making that determination, the boards were to consider membership in, or sympathetic association with, organizations on the Attorney General's list of subversive organizations.⁵

Truman, in issuing Executive Order 9835 and launching the Smith Act prosecutions against the leadership of the Communist Party (See Chapter Two) sought both to destroy the political far left and placate—or at least preempt—the political right. Henry Wallace, whom Truman replaced as the Vice-Presidential candidate on the 1944 Democratic ticket, loudly criticized Truman's Cold War policies and sought the Presidency on the Progressive Party ticket in 1948. Truman sought to paint Wallace as a Communist tool and to isolate him from the Democratic Party's liberal-labor constituency.⁶ Further, by taking a hard line against domestic subversion, Truman helped protect himself—and much of his party—from Republican charges that he was soft on Communism.⁷ Indeed, well before the phrase was associated with Bill Clinton and Dick Morris, Harry Truman and his advisor, Clark Clifford, practiced their own version of triangulation.

⁵ The exact numbers of terminated federal employees is difficult to determine. Ted Morgan notes that of the over 2.5 million federal government employees, only 8,323 underwent a complete field investigation; 5,450 of those were granted a hearing; of those granted a hearing, 5,118 were cleared. Morgan, *Reds*, 305. David Caute notes that approximately 1210 federal employees were dismissed during the Truman Years, while an additional 6000 employees resigned. David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* (New York: Simon & Schuster, 1978), 275.

⁶ Peter L. Steinberg, *The Great "Red Menace": United States Prosecution of American Communists, 1947-52* (Westport: Greenwood Press, 1984), 122-123.

⁷ Michal R. Belknap, *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties* (Westport: Greenwood Press, 1977), 43.

The executive branch did not have a monopoly on investigating Communism. Both Houses of Congress investigated subversion through both standing and special committees and sub-committees. These committees, ostensibly created to explore and expose Communist infiltration of Hollywood, labor unions, higher education, and government, garnered sensational headlines for committee members. While HUAC was the most famous of these committees, others, including the Senate Internal Security Subcommittee (SISS) and the Senate Subcommittee on Investigations (a unit of the Senate Committee on Government Operations), played a prominent role in investigating Communists.

These legislative committees, besides exposing Communism, also drove uncooperative witnesses from their jobs. In formal reality, a committee could expose a witness, but not discharge him from employment. Yet committee members realized that witnesses who failed to relinquish their Communist past and cooperate with the committee—often by naming other Communists—often lost their jobs.

Some non-cooperating witnesses claimed First Amendment protection from committee probes into their Communist associations. The witnesses argued that the Constitution prohibited legislative committees from inquiring into their political beliefs and compelling them to answer questions. Yet, as the Hollywood Ten discovered to their dismay, the federal courts did not yet recognize a First Amendment right to silence before legislative committees, and witnesses who invoked that right remained vulnerable to contempt of Congress charges.⁸

⁸ The D.C. Court of Appeals rejected the Hollywood Ten's First Amendment defense in Lawson v. United States and the Supreme Court denied certiorari. Lawson v. United States, 176 F.2d 49 (1949), cert denied, 339 U.S. 934 (1950).

This left the witness the option of invoking the Fifth Amendment. The Supreme Court in 1951 permitted a witness to invoke the Fifth Amendment in response to a grand jury's questions concerning her Communist associations.⁹ The Court reasoned that a witness, in providing testimony concerning her Communist Party activities, might provide evidence that would leave her vulnerable to a Smith Act prosecution. Four years later the Supreme Court issued its Quinn and Emspak decisions, which extended Fifth Amendment protection to witnesses appearing before Congressional committees.¹⁰

Whatever the excesses of the Red-hunting legislative committees and the Truman Administration's loyalty-security programs and Smith Act prosecutions, it is now clear that several Communists, or members of Communist espionage rings, successfully infiltrated the United States Government during the Roosevelt Administration. Some of these spies, such as Alger Hiss and the Rosenbergs, became public figures. Others, such as Harry Dexter White and John Stewart Service, were accused of spying for the Communists but, for a variety of reasons, were never successfully prosecuted. Others held high-ranking jobs in the OSS, performed invaluable research on the Manhattan Project, or directed American foreign policy from the State Department.¹¹ Indeed, even some members of Congress appear to have belonged to the Communist Party.¹²

⁹ Blau v. United States, 340 U.S. 159 (1950).

¹⁰ Sometimes the witness could invoke the "diminished Fifth." A legislative committee would require a witness to testify whether he or she currently belonged, or had previously belonged, to the Communist Party, but waive any requirement that the witness name others as Party members. Ellen W. Schrecker, No Ivory Tower: McCarthyism and the Universities (Oxford: Oxford University Press, 1986), 212.

¹¹ The Venona cables identified more than three hundred Americans involved in espionage on behalf of the Soviet Union. John Earl Haynes & Harvey Klehr, In Denial: Historians, Communism & Espionage (San Francisco: Encounter Books, 2003), 6. See also Haynes & Klehr, Venona: Decoding Soviet Espionage in America (New Haven: Yale University Press, 1999); Joseph Albright and Marcia Kunstel, Bombshell: The Secret Story of America's Unknown Atomic Spy Conspiracy (New York: Random House, 1997).

Three events slowed the Red Scare in the 1950's. First, the state of panic that had reached a crescendo in the late 1940's and early 1950's began to subside by 1952-53. In 1949-50, American "lost" China to the Communists, the Soviet Union successfully exploded an atomic bomb, and North Korea invaded South Korea. With the election of Dwight Eisenhower, the death of Joseph Stalin, and the end of the Korean War, those fears slowly began to dissipate. America still feared Communism, and rightly so, but the fear that had gripped the nation during the Truman Administration diminished in intensity.

Second, by the mid-1950's many Red-hunters had been discredited in the American mind. Joseph McCarthy's political career collapsed in 1954 when he tried to prove, in televised hearings, that the United States Army harbored Communists. Some professional anti-Communist witnesses, most notably Harvey Matusow, admitted that their charges against alleged Communists were fabricated, while other witnesses, such as Manning Johnson and Paul Hewitt, provided contradictory or implausible testimony which diminished their credibility.¹³ By the late 1950's, those charging that the government was knowingly harboring Communists were most likely to be associated with the John Birch Society or other extremist organizations.

Finally, and most important for purposes of this paper, the Supreme Court played a major part in slowing the Red Scare. Even if the Red Scare had peaked by the early

¹² These include John Bernard of Minnesota and Hugh DeLacy of Washington. Vito Marcantonio, of New York was closely tied to the Party but not a formal member. Herbert Romerstein & Eric Breindel: The Venona Secrets: Exposing Soviet Espionage and America's Traitors (Washington D.C.: Regnery Publishing, 2000), 92, citing John Abt, Advocate and Activist: Memoirs of An American Communist Lawyer, (Urbana: University of Illinois Press, 1993), 117.

¹³ Jeff Broadwater, Eisenhower & The Great Anti-Communist Crusade (Chapel Hill: University of North Carolina Press, 1992), 179; Robert Lichtman & Ronald Cohen, Deadly Farce: Harvey Matusow & The Informer System in the McCarthy Era (Urbana: University of Illinois Press, 2004).

1950's, the government's anti-Communist apparatus continued to function. The laws Congress enacted in the 1940's and early 1950's remained on the books. The FBI still investigated Communists; HUAC still held committee hearings; public universities and school systems could only hire those who signed an anti-Communist oath.

The Court slowed, if not halted, many of these practices by the mid 1950's. The Court generally refused to declare the government's anti-subversion programs unconstitutional and rarely articulated a plausible explanation for why the government's actions could not stand. Yet whatever the limitations of the Court's legal rationale in these Communist cases, it is indisputable that the Court played an important role of blunting the potential impact of the government's anti-subversion programs.

THE COURT AND NATIONAL SECURITY: A VERY BRIEF HISTORY

Prior to the Red Scare, the Court had only rarely considered national security issues. The Court never had the opportunity to consider the Alien and Sedition Acts; they expired before the Court could hear a challenge to them.¹⁴ Indeed, the Court did not decide a First Amendment case until World War I. This dearth of national security cases meant that the Vinson Court, and to some extent the Warren Court, could not consult precedent for guidance in addressing the constitutionality of the government's anti-Communist program.

Civil War Cases

The Court first began to review the political branches' national security decisions during the Civil War. The Court's first national security case, Ex Parte Merryman,

¹⁴ Congress passed both Acts in 1798; the Alien Act expired in 1800 and the Sedition Act expired in 1801. The latter Act resulted in at least twenty-five arrests and fifteen indictments. Arthur J. Sabin, In Calmer Times: The Supreme Court & Red Monday (Philadelphia: University of Pennsylvania Press, 1999), 14-15.

concerned Lincoln's suspension of the writ of habeas corpus.¹⁵ After Lincoln had suspended the writ, U.S. military forces arrested pro-secessionist agitator John Merryman and detained him in Baltimore's Fort McHenry. Chief Justice Roger Taney, sitting in the United States Circuit Court, held that Lincoln could not suspend the writ and ordered Merryman released. Fort McHenry's commanding officer ignored Taney's order and refused to release Merryman.

Historian Robert Steamer has described Merryman as "the very first American judicial decision condemning arbitrary military power and upholding individual liberty."¹⁶ However, Merryman also delineated the judiciary's impotence in controlling wartime national security decisions.

Not all of the Civil War cases went against the government. In The Prize Cases, the Court recognized the government's power, even without an express declaration of war, to confront threats to national security.¹⁷ In April 1861, President Lincoln ordered the seizure of any ship that violated the blockade he had imposed on Southern ports. In July 1861, Congress authorized the President to blockade Southern ports and in August 1861 retroactively approved Lincoln's earlier decision to blockade Southern ports.

The Court, in upholding Lincoln's actions, declared that the Constitution authorized the President to protect the nation and prevent civil war. Further, a civil war, unlike war against foreign enemies, need not be declared. According to Justice Grier: "As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual

¹⁵ Ex Parte Merryman, 17 Fed. Cases 144 (1861).

¹⁶ Robert J. Steamer, The Supreme Court in Crisis: A History of Conflict (Amherst: University of Massachusetts Press, 1971), 94.

¹⁷ The Prize Cases, 67 U.S. 635 (1863).

existence is a fact in our domestic history which the Court is bound to notice and to know."¹⁸

The Prize Cases demonstrated the Court's deference to the political branches in executing a war, albeit an undeclared one, against the rebellious Southern states. The Court was not so generous in reviewing the government's punishment of allegedly disloyal Northern citizens in Ex Parte Milligan.¹⁹ That case concerned Lambdin Milligan, an Indiana anti-war Democrat arrested in 1864 for conspiring to seize munitions and liberate Confederate prisoners of war. A military court tried Milligan and sentenced him to hang, but a 9-0 Court overturned the sentence. Justice David Davis, for the majority, held that the Constitution was not suspended during emergency, but was "a law for rulers and people, equally in time of war and peace."²⁰ Because the civilian courts in Indiana still functioned, the military could not try civilians in military court. Milligan was an important case and has never been overturned. However, it is worth noting that the Court did not issue its decision until December 1866, approximately twenty months after the civil war concluded. How the Court would have ruled on, say, July 1, 1863—the eve of the Battle of Gettysburg—is pure speculation.

Clear and Present Danger Cases

The Court reconsidered national security issues until after the United States entered World War I. This time the Court was concerned less with the executive branch's constitutional powers than with a defendant's First Amendment rights. This was new territory for the Court; in fact, Schenck v. United States, decided shortly after World War

¹⁸ Ibid., 667.

¹⁹ Ex Parte Milligan, 71 U.S. 2 (1866).

²⁰ Ibid., 120-121.

I, was the Court's first significant foray into the First Amendment's Free Speech Clause.²¹

The government convicted Socialist Party member Charles Schenck of violating the Espionage Act of 1917, which prohibited persons from obstructing military recruiting.²² Schenck had sent anti-war propaganda to military recruits, urging them to oppose the war and sign an anti-conscription petition. The government contended that Schenck's actions interfered with the Government's military draft procedures. Schenck argued that the Espionage Act violated the First Amendment and that the anti-war literature constituted a heartfelt personal opinion, not incitement.

Oliver Wendell Holmes, writing for a 9-0 Court, upheld the constitutionality of the Espionage Act. More important, he formulated the "clear and present danger" test, which was an outgrowth of the "bad tendency" test.²³ Under the clear and present danger test, the Court must evaluate the circumstances to determine whether a law restricting speech could withstand constitutional scrutiny. Said Holmes, "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that congress has a right to prevent."²⁴ Noticeably absent from this standard was any type of imminence requirement.

²¹ Schenck v. United States, 249 U.S. 47 (1919). See also, Carol E. Jenson, "Schenck v. United States," in Kermit L. Hall, ed., The Oxford Companion to the Supreme Court of the United States (Oxford: Oxford University Press, 1992), 758.

²² Other Espionage Act cases of note include Frohwerk v. United States, 249 U.S. 204 (1919) and Debs v. United States, 249 U.S. 211 (1919).

²³ The Court, in using the bad tendency test, sought to determine whether speech tended to cause illegal action. Statutes, or government actions, which restricted speech which tended to cause illegal conduct did not violate the First Amendment. See Patterson v. Colorado, 205 U.S. 454 (1907); Fox v. Washington, 236 U.S. 273 (1915). In Schenck, Holmes used the terms "bad tendency" and "clear and present danger" test interchangeably. David M. Rabban, "Bad Tendency Test," in Hall, Oxford History, 54-55.

²⁴ Schenck, 52.

The Court utilized the clear and present danger test several times over the next decade, but began to modify its terms. Abrams v. United States, decided shortly after Schenck, concerned a Russian immigrant anarchist arrested in August 1918 for distributing fliers condemning President Wilson for deploying American troops in Russia.²⁵ The government alleged that the fliers violated the Sedition Act of 1918, which criminalized any effort to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" concerning the United States Government. Abrams was convicted and sentenced to 15-20 years in prison.

The Court, by a 7-2 vote, sustained the conviction. Justice John H. Clarke, following Schenck's reasoning, wrote the majority opinion: The fliers hampered the American war effort and thus constituted a clear and present danger. More important, however, was the dissenting opinion. Holmes, joined by Brandeis, significantly modified his Schenck test; Congress may "constitutionally punish speech that produces or is intended to produce a clear and imminent danger that will bring about forthwith certain substantial evils that the United States constitutionally may seek to prevent."²⁶ The publishing of a "silly leaflet by an unknown man," said Holmes, did not create such a danger.²⁷

The Court returned to the clear and present danger test in Gitlow v. New York.²⁸ New York convicted Benjamin Gitlow of violating its criminal Anarchy Law, which prohibited a person from advocating the overthrow of the government. Gitlow had

²⁵ Abrams v. United States, 250 U.S. 616 (1919).

²⁶ *Ibid.*, 627.

²⁷ *Ibid.*, 628.

²⁸ Gitlow v. New York, 268 U.S. 652 (1925); Paul L. Murphy, "Gitlow v. New York" in Hall, Oxford Companion, 339.

distributed a pamphlet calling for "the establishment of socialism by strikes and class action of any form." The Court, in a 7-2 decision, sustained the conviction. Justice Edward T. Sanford, writing for the majority, stated: "[A] state may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means."²⁹ While Gitlow's pamphlet did not immediately threaten the state, it might constitute "a revolutionary spark" that could later burst into a "sweeping and destructive conflagration."³⁰ Holmes and Brandeis, in dissent, vehemently protested the Court compounding action with speech. Action and speech were separate phenomena, and while the government could punish the former, it could not punish the latter.

Although the Holmes-Brandeis version of the clear and present danger test did not prevail in the decade after Schenck, the Court eventually adopted it beginning in the 1930's.³¹ When the Court began hearing Communist cases in the late 1940's, the clear and present danger test required evidence of both a significant and an imminent danger.

World War II Cases

The Court, following its practice from World War I, deferred to the political branches of government in setting national security policy during World War II.³² For example, in Ex Parte Quirin, the Court sustained the government's use of military

²⁹ *Ibid.*, 667.

³⁰ *Ibid.*, 669.

³¹ Herndon v. Lowry, 301 U.S. 242 (1937); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. Chicago, 337 U.S. 1 (1949). See also David M. Rabban, "Clear and Present Danger Test," in Hall, Oxford Companion, 158.

³² Hartzel v. United States, 322 U.S. 680 (1944); Baumgartner v. United States, 322 U.S. 665 (1944); Keegan v. United States, 325 U.S. 478 (1945). An exception to this rule was Schneiderman v. United States, 320 U.S. 118 (1943), in which the Court ruled that the government could not denaturalize a citizen unless it had "clear, unequivocal, and convincing evidence" that he committed fraud in procuring citizenship. *Ibid.*, 135. The Warren Court would cite Schneiderman in blocking the government's attempts to denaturalize Communists.

tribunals to try German saboteurs.³³ The Court's opinion, released after the government had executed the Germans, also declared that enemy belligerents were not entitled to either a grand jury or a jury trial.

In Hirabayashi v. United States, a 9-0 Court upheld the government's authority to impose a curfew on persons of Japanese origin living in the Western United States.³⁴ Chief Justice Harlan Fiske Stone, for the Court, allowed the political branches to consider racial classifications in order to protect the national defense. Stone would not overturn Presidential and Congressional judgments "that there were disloyal members [among those of Japanese origin], whose numbers and strength could not be precisely and quickly ascertained."³⁵

The next year, the Court had to consider a more controversial case, Korematsu v. United States.³⁶ In a 6-3 decision, the Court sustained the constitutionality of the military order that both excluded persons of Japanese ancestry from the West Coast and required them to report to an assembly center. Hugo Black, for the majority, stated, "Korematsu was not excluded from the [West Coast] because of hostility to him or his race. He was excluded because we are at war with the Japanese empire, because the properly constituted military authorities feared an invasion of our West Coast," and that "military urgency" necessitated "that all citizens of Japanese ancestry be segregated from the West Coast temporarily."³⁷

³³ Ex Parte Quirin, 317 U.S. 1 (1942).

³⁴ Hirabayashi v. United States, 320 U.S. 81 (1943).

³⁵ *Ibid.*, 99.

³⁶ Korematsu v. United States, 323 U.S. 214 (1944).

³⁷ *Ibid.*, 223.

The Court confronted national security issues during the Civil War, World War I, the First Red Scare, and World War II. Generally, the Court affirmed the government's authority to take measures necessary to protect the government's security. This, of course was not absolute. As Milligan demonstrated, the Court could rebuke the political branches of government for their overreaching—but perhaps only after the perceived threat had passed.

The government could not be certain of the degree to which the Court would allow it to infringe First Amendment rights. The Court, in Schenck, had articulated the clear and present danger test. Weeks later, the author of that decision, joined by Brandeis, had already changed the test's requirements to add an "imminent danger" requirement. By the late 1930's, the Court finally accepted the Holmes version of the test. Would the Court rely on this test when sitting in judgment of Communist Party members during the height of the Cold War?

THE VINSON COURT

The Supreme Court, as comprised in 1948, was not necessarily inclined to support the Truman Administration's campaign against domestic Communism. Two of its members—the Chief Justice, Frederick Vinson, and his fellow Kentuckian, Stanley Reed—were reliable votes for upholding the government. Three Justices—intellectual heavyweights Felix Frankfurter and Robert Jackson, along with the less distinguished Harold Burton—sometimes sustained anti-Communist legislation. The remaining four justices comprised a rock-solid civil libertarian alliance: Wiley Rutledge, William O. Douglas, Hugo Black, and Frank Murphy. With a base of four votes, the civil libertarians needed only one of three justices from the "moderate" block to thwart the government's

anti-Communist program. Given that the Court would hear several Communist cases in the 1949 Term, civil libertarians had reason for optimism.

Fate played a cruel trick on the civil libertarians when Frank Murphy and Wiley Rutledge died in the summer of 1949. Their deaths provided Truman with a chance to stack the Court with justices likely to sustain his anti-Communist programs, and Truman did not waste his opportunity. Attorney General Tom Clark and former Senator Sherman Minton—the two men Truman chose to replace Murphy and Rutledge—proved reliable supporters of the government's anti-Communist campaign.

JUSTICE TOM CLARK

Tom Campbell Clark, born in Dallas, Texan in 1899, received his law degree from the University of Texas.³⁸ After a stint as a Dallas district attorney, Clark moved to Washington and joined the Justice Department in 1937. Clark helped coordinate the Japanese-American relocation program in World War II and later headed the Justice Department's Criminal and Anti-Trust Divisions. Truman appointed Clark Attorney General in 1945.

Clark implemented many of the Truman Administration's anti-Communist programs and oversaw several important Smith Act prosecutions during his tenure as Attorney General. This experience proved a double-edged sword once Clark joined the Court. While Clark undoubtedly sympathized with the Truman Administration's goals of rooting out subversion, his role in executing the administration's anti-Communist agenda

³⁸ Clark's father was an attorney, and his son, Ramsey, served as Lyndon Johnson's Attorney General. In fact, Johnson used Ramsay to get Clark to retire from the Court. Johnson wished to appoint Thurgood Marshall to the Court, but no vacancies appeared imminent. In a vintage Johnson maneuver, he announced the appointment of Ramsey Clark to the position of Attorney General, knowing that the Senate would probably not confirm him if his father continued to serve on the Court. To save his son from potential embarrassment, Justice Clark retired in 1967.

required him to recuse himself from many of the Court's early Communist cases. His recusal prevented the Court from issuing an opinion in important cases, such as Dennis v. United States, and from reaching a judgment in others, such as Bailey v. Richardson.

Clark moderated his staunch anti-Communist positions, especially in the area of state anti-subversion legislation, after Warren's elevation to the Court. This apparent reversal came to an abrupt halt after the 1955 Term, when Clark assumed the mantle of the Court's leading anti-Communist, a position he held until his retirement from the Court in 1967.

Despite Clark's anti-Communist ideology, he joined the Court's liberal wing in most of the important civil rights and voting rights cases of the Vinson and Warren Courts. He died in 1977.

JUSTICE SHERMAN MINTON

Sherman ("Shay") Minton was born in Indiana in 1890. He received bachelors and law degrees from Indiana University, and later attended Yale Law School on a post-graduate scholarship.

Minton, a Democratic Party loyalist, served as public counselor for the Indiana Public Service Commission before his election to the United States Senate in 1934. In the Senate, he befriended fellow freshman Harry Truman and served with Hugo Black on the Senate Lobbying Investigating Committee, which investigated, and arguably harassed, political opponents of the New Deal.³⁹ Minton also championed Roosevelt's Court-packing plan. When Justice Willis Van Devanter retired in 1937, Roosevelt narrowed his list of replacements to Minton and Black.

³⁹ Linda C. Gugin & James E. St. Clair, Sherman Minton: New Deal Senator, Cold War Justice (Indianapolis: Indiana Historical Society, 1997), 98.

Minton did not get the appointment, but his partisan loyalty paid dividends: Roosevelt appointed him to the Seventh Circuit Court of Appeals shortly after Minton lost his Senate re-election in 1940. Nine years later, his former Senate colleague, Harry S. Truman, appointed Minton to take the seat of the late Wiley Rutledge.

Minton was neither an intellectual nor a great legal craftsman, and left a rather undistinguished legacy as a justice. He was a strict constructionist who generally deferred to the decisions and legal interpretations of the legislature and administrative agencies. More important, Minton was a staunch anti-Communist who joined Justices Vinson and Reed in supporting the government in nearly every Communist case. Minton resigned from the Court at the beginning of the 1956 term and in 1965.

CHIEF JUSTICE FREDERICK VINSON

Clark and Minton joined two other Truman appointees on the Court, Chief Justice Frederick Vinson and Justice Harold Burton. Vinson, whom Truman appointed to replace Chief Justice Harlan Fiske Stone in 1946, was born in Kentucky in 1890 and received his law degree from Centre College. He was elected to Congress in 1924 and served on the House Appropriations and Ways and Means Committees before Roosevelt appointed him to the Court of Appeals for the District of Columbia in 1938. Vinson held a number of executive posts during World War II before Truman appointed him Secretary of the Treasury in 1945.⁴⁰

After Stone's death in 1946, many expected Truman to elevate Justice Robert Jackson—then serving as the American Special Prosecutor in Nuremburg—to Chief

⁴⁰ Linda C. Gugin & James E. St. Clair, Chief Justice Fred M. Vinson of Kentucky: A Political Biography (Lexington: University of Kentucky Press, 2002).

Justice. Truman, seeking to appoint a Chief Justice who could heal the Court's deep divisions, instead turned to his poker-playing buddy Vinson.

While Vinson certainly supported many of the New Deal programs and generally was friendly toward organized labor, his sympathy had its limits. Vinson had long been allied with United Mine Workers (UMW) President John L. Lewis; the UMW had supported Vinson's re-election to Congress and Lewis had praised Vinson for passing the Guffey-Vinson Coal Stabilization Act of 1936. But when Lewis led the UMW on strike in 1946, in defiance of both Truman's orders and a court injunction, Vinson and the Court declared the strike illegal (by a 5-4 vote) and upheld Lewis's contempt of Court conviction (by a 7-2 vote).⁴¹

What had led to the schism between Lewis and Vinson? According to Vinson biographers James St. Clair and Linda Gugin, two factors worked against Lewis. First, Lewis had not only attacked Truman's authority as President, but attacked him personally, calling him "[A] malignant scheming sort of an individual who is dangerous not only to the United Mine Workers, but dangerous to the United States of America."⁴² Such an attack was not only a slap at one of Vinson's closest friends, but a slap at the President Vinson continued to serve as Chief Justice. While Vinson enjoyed playing poker with Truman, his visits to the White House were more than social.

Today, such a close personal and professional relationship between a Chief Justice and a President probably would not be possible. In fact, by 1968, the propriety of a sitting justice advising a President came under withering attack when the public discovered that Justice Abe Fortas served as a political advisor to President Johnson. But

⁴¹ United Mine Workers of America v. United States, 330 U.S. 258 (1947).

⁴² Gugin & St. Clair, Vinson, 204.

in the late 1940's, such fraternization did not raise the press's eyebrows. Truman sought the Chief Justice's advice on who to choose as his Vice-Presidential running mate, and later tried to convince him to run for President. During the Korean War, Vinson advised Truman that the Court would support his seizure of steel mills, advice Truman followed, to his regret, in the Youngstown Sheet & Tube Co. v. Sawyer.⁴³

Sometimes, the conversations went beyond advice. When Truman's poll numbers were faltering in early 1948, he asked Vinson to resign from the Court and undertake a special "peace mission" to Moscow. Truman doubted the mission's chances, but believed that it would aid his re-election in November. Vinson agreed to undertake the mission, but Truman scrapped the plan after Secretary of State George Marshall threatened to resign.⁴⁴

Truman's request and Vinson's response indicate their trust in one another. Truman's motive in asking Vinson to resign was crassly political, but not Machiavellian. President Lyndon B. Johnson had asked Justice Arthur Goldberg to resign from the Court to become the United Nations Ambassador; Johnson's real motive was to replace Goldberg with Johnson loyalist Abe Fortas. Truman, in contrast, was not looking to rid the Court of Vinson, but to improve his political prospects. It is also instructive that Truman asked his trusted friend, who lacked diplomatic experience, rather than his Secretary of State, to undertake the mission. The trust went both ways; Vinson's willingness to resign his coveted position as Chief Justice to undertake the mission demonstrated his unswerving loyalty to Truman.

⁴³ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁴⁴ Gugin & St. Clair, Vinson, 194.

The second factor St. Clair and Gogin identified in the rift with Lewis was Vinson's "strong suspicion of individual's or groups that posed threats to the nation's well-being...To Vinson, the rule of law was at stake, and the only way to preserve it was to support the government."⁴⁵ In the case of the UMW strike, that meant upholding the injunction and contempt sanctions for Lewis. In Youngstown Sheet & Tube, that meant seizing the steel mills. In Communist cases, that meant upholding the government.

It is not surprising that Vinson upheld nearly every facet of the government's anti-Communist program. The prosecutions, deportations, and employment terminations Vinson reviewed were creatures of the Truman Presidency. To declare these actions unconstitutional would be tantamount to declaring the Truman Administration lawless. Further, to curb Congress's power to enact anti-Communist legislation would constitute a unilateral disarmament of the United States Government in the face of a grave threat to its national security. Whatever his limitations, Vinson did not lard his Communist case opinions with ambiguous phrases and nuanced distinctions.

Vinson died of a heart attack in 1953, the last justice to expire while still on the bench.

JUSTICE STANLEY REED

Vinson's fellow Kentuckian, Stanley Forman Reed, provided the Court's other solid anti-Communist vote. Born in 1884, Reed studied law at, but did not graduate from, the Sorbonne, Virginia, and Columbia. He practiced law in Kentucky before Herbert Hoover appointed him Counsel to the Federal Farm Board and later the

⁴⁵ Ibid., 204.

Reconstruction Finance Corporation. Roosevelt chose Reed to serve as Assistant Attorney General and Solicitor General before elevating him to the Court in 1938.⁴⁶

Reed faithfully supported the New Deal from the bench, but strongly disagreed with fellow Roosevelt appointees Douglas and Black on civil liberties questions. Reed believed the government's interest in preserving national security trumped any free speech concerns. Thus, in Communist cases, Reed invariably upheld the government's power to prosecute alleged subversives, deport suspected radical aliens, and dismiss potentially disloyal government employees. In these cases, Reed joined Truman appointees Minton and Vinson in providing a trio of votes that uncritically sustained the government's anti-Communist programs. Unlike Vinson, but similar to Minton, Reed did not bequeath an intellectual legacy in his Communist case opinions. In fact, Reed did not write the Court's opinion in any major Communist case.

Communist cases were not the only area of the law where Reed followed, rather than led, the Court's debates. Although a bright man, Reed proved an undistinguished justice and left no intellectual mark on the Court. He is perhaps best remembered for withdrawing his dissenting vote in Brown v. Board of Education of Topeka in 1954. Reed did not agree with Warren's opinion in the case, but after several discussions, opted to join the opinion in the interests of Court unanimity.⁴⁷

Reed retired from the Court in February 1957 and died in 1980.

JUSTICE HAROLD BURTON

⁴⁶ John D. Fassett, New Deal Justice: The Life of Stanley Reed of Kentucky (New York: Vantage Press, 1994).

⁴⁷ *Ibid.*, 574-76.

Harold Hitz Burton, the Vinson Court's only Republican, often joined the Court's anti-Communist wing. Burton was born in 1888 and graduated from Harvard Law School in 1912. After practicing law for several decades, he entered politics, first as an Ohio State Representative and later as Mayor of Cleveland. He was elected to the United States Senate in 1940, where he served with, and befriended, then-Senator Truman on the War Investigation Committee. When Owen Roberts, the Court's last Republican-appointed justice, vacated his seat in July 1945, Truman selected his friend Burton to fill the vacancy.⁴⁸

Burton generally joined the Court's Minton-Vinson-Reed wing in Communist cases, but did decide against the government on several occasions. In Joint Anti-Fascist Refugee Committee v. McGrath, Burton provided the Court's crucial fifth vote that limited the Attorney General's ability to list organizations as subversive, while in Carlson v. Landon, he joined Frankfurter in dissenting against the government's bailless detention of subversive immigrants. Burton decided against the government more often in Communist cases after Warren's appointment to the bench.

Burton, too, left behind an undistinguished intellectual legacy as a justice. He produced few opinions of lasting note and did not cling to any particular belief system or ideology. Justice Frankfurter said of Burton: "One has an easy and inviting access to his mind. The difficulty is with what one finds when one is welcomed to enter it."⁴⁹ Burton served on the Court until 1958 and died in 1964.

⁴⁸ Truman's motives were not quite as benign as they may seem. Ohio's Democratic Governor, Frank Lausche, appointed Democrat James Huffman to take Burton's place. Henry J. Abraham, Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton (New York: Rowman & Littlefield Publishers, 1999), 182.

⁴⁹ *Ibid.*, 182-183

JUSTICE ROBERT JACKSON

Historians and legal scholars have yet to evaluate fully Justice Robert Houghwout Jackson's legacy on the Court, but he surely stands as one of the great legal minds of the Twentieth Century, and perhaps in the Republic's history.

Jackson, born in 1892, grew up in Frewsburg, New York. He attended, but did not complete, Albany Law School before commencing his legal practice in Jamestown, New York. Jackson hitched his star to Governor Franklin Delano Roosevelt and later joined Roosevelt in Washington, where he served as General Counsel to the Bureau of Internal Revenue, Assistant Attorney General in the Antitrust Division, and Solicitor General.⁵⁰ It was in this latter role that Jackson excelled; Justice Louis Brandeis commented, "Jackson should be Solicitor General for life."⁵¹

Roosevelt elevated him to Attorney General in 1940. While Attorney General, Jackson delivered a speech that would provide a window into his thinking and help explain many of the Communist case opinions he would deliver a decade later. Jackson delivered the speech, entitled "Democracy under Fire," to the Law Society of Massachusetts on October 16, 1940. The speech began by taking aim at critics of democracy, such as Charles Lindbergh, and concluded with a picture of America under siege. Said Jackson:

We are witnessing the most ominous gathering of forces against freedom and democracy that has been seen in my time. Even though these enemies of democracy gain no foothold as a result of our elections, the drawing together of powerful groups making common cause under such common slogans is still an ominous development.⁵²

⁵⁰ Ibid., 177.

⁵¹ Ibid.

Jackson seemed to view America as standing for one set of principles in the face of the danger posed by Nazi and fascist regimes, and believed critics of American democracy undermined America's unique position in the world. He would espouse a similar philosophy during the Cold War, viewing America under siege at both home and abroad.

Roosevelt chose Harlan Fiske Stone to succeed the retiring Chief Justice Charles Evans Hughes in 1941 and chose Jackson to take Stone's seat. Jackson supported the New Deal as a Justice, but was not as accepting of governmental encroachment on civil liberties.⁵³ For example, he filed a dissent in Korematsu v. United States.

In 1945, Truman appointed Jackson to head the U.S prosecution team at the Nuremburg War Crime Trials. Jackson returned from the trials with a different attitude toward civil liberties. In his "Democracy under Fire" speech, Jackson expressed a vision of America, and all that it stood for, under attack. After Nuremburg, Jackson began using his position on the Court to protect America from a similar threat, this time from Communism. Jackson began interpreting the Bill of Rights more narrowly and saw government suppression of certain types of speech as necessary for, rather than at odds with, civil liberties.⁵⁴ Perhaps Jackson believed that the Weimar Republic's permissive attitude toward dissenters and malcontents led to the establishment of Hitler's Nazi Regime. Jackson's new attitude toward civil liberties manifested itself in his famous

⁵² Robert H. Jackson, "Democracy under Fire," 9 Law Society Journal 301 (1940), retrieved from www.robertjackson.com, the website of the Robert Jackson Center.

⁵³ Jackson authored Wickard v. Filburn, 317 U.S. 111 (1942), which appeared to make Congress's power over interstate commerce absolute.

⁵⁴ Abraham, Court Appointments, 178.

Terminiello v. Chicago dissent, where he warned the majority against converting the Bill of Rights "into a suicide pact."⁵⁵

Jackson's change in attitude was also evident in his Communist case opinions. Jackson, an ardent anti-Communist, believed that the government should treat Communists different from other radicals. Yet while Jackson often voted to uphold the government in Communist cases, he rarely joined the Vinson faction's opinions. The reasons were two-fold. First, Jackson did not believe that all of the government's anti-Communist measures passed constitutional muster. For example, in Bailey v. Richardson, Jackson acknowledged that the Government could purge its ranks of suspected Communists, but only if it granted public employees due process rights. Second, although Jackson denied that every harsh policy made America the moral equivalent of Nazi Germany or Soviet Russia, he also realized that at some point the United States could begin to mimic the governments from which it sought protection.

Although Jackson refused to accept the government's arguments at face value, he still had no illusions about the evils of Communism. Jackson demonstrated this in the following letter to FBI Director J. Edgar Hoover:

It usually occurs that, when there are Communist cases pending before the Court, we are bombarded with letters from sympathizers telling us how to decide them.

Communications are rare in other classes of cases and usually are self-explanatory of the reason for writing. I have made a practice of throwing these communications into the waste basket, but it occurs to me that they might be of some use to you in identifying persons following the party line or perhaps full-fledged members of the Party. A good many of them undoubtedly are false names but they might tie in with something and I am wondering if you would like them as they come, without comment, instead of in the waste basket.⁵⁶

⁵⁵ Terminiello, 37.

⁵⁶ Robert Jackson to J. Edgar Hoover, April 8, 1950, Box 14, General Correspondence, Robert Jackson Papers, Manuscript Division, Library of Congress.

Jackson was the Court's best hope to offer a muscular anti-Communism tempered with a healthy skepticism of the government's actions. Unfortunately, his philosophy never captured majority support. Burton was not wedded to either the civil libertarian faction or the Vinson faction, but tended to join one side or the other on a case-by-case basis. Frankfurter proved the closest to Jackson ideologically, but usually could not bring himself to join Jackson's opinions. While Jackson's Communist case opinions stand the test of time better than those of any other justice, they rarely were the opinions of the Vinson Court.

Jackson died of a heart attack on October 9, 1954, shortly after the beginning of the term.

JUSTICE FELIX FRANKFURTER

Felix Frankfurter's tenure on the Court began with high expectations and concluded in tremendous frustration. Frankfurter became the Court's leading disciple of judicial restraint, a doctrine that the activist Warren Court rejected.

Frankfurter was born in Vienna, Austria in 1882, emigrated to New York in 1894, and graduated from City College of New York and Harvard Law School. After a brief stint in private practice, Frankfurter joined U.S. Attorney Henry Stimson's legal staff, later following him to the Department of War. Frankfurter accepted a faculty appointment at Harvard Law School in 1914.⁵⁷

While on the Harvard Law Faculty, Frankfurter emerged as a nationally renowned intellectual and civil libertarian. He served as a delegate to the Versailles Conference and as counsel to the Presidential commission investigating Tom Mooney's conviction.

⁵⁷ James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (New York: Simon & Schuster, 1989), 39-40.

Frankfurter publicly condemned the practices of Attorney General A. Mitchell Palmer's Justice Department and called for diplomatic relations with the Soviet Union. He published a lengthy article in the Atlantic Monthly in 1927 in which he decried the lack of procedural fairness in the Sacco and Vanzetti trial.

Frankfurter first met Franklin Roosevelt during their years in the Wilson Administration, when the former served in the War Department while the latter served as Assistant Secretary of the Navy.⁵⁸ After Roosevelt became Governor of New York, Frankfurter became one of his closest advisors, a role that continued after Roosevelt became President. Frankfurter not only provided legal advice and helped draft legislation, such as the Securities Act, but also staffed the various New Deal agencies with his protégés, known as "Happy Hot Dogs." Frankfurter gained so much power in the Roosevelt Administration that Fortune Magazine in 1936 described him as "the single most influential individual in the United States."⁵⁹ Roosevelt finally appointed Frankfurter to the Supreme Court in 1939.

Frankfurter's reputation as a civil libertarian was somewhat diminished during his tenure on the bench. Frankfurter, although still a liberal, championed the causes of judicial restraint and federalism, believing that the Courts must respect the political decisions of state and federal governments. His philosophy became most pronounced later in his tenure when Frankfurter dissented from the civil libertarian majority in cases such as Mapp v. Ohio (which prevented state trial courts from allowing the introduction

⁵⁸ Ibid., 59.

⁵⁹ Abraham, Court Appointments, 166.

of illegally seized evidence) and Baker v. Carr (which held that the configuration of state legislative districts was not a political question, exempt from judicial review).⁶⁰

Frankfurter also fought a twenty-year battle with Hugo Black concerning the proper interpretation of the Bill of Rights. When ratified in 1791, the Bill of Rights did not apply to the states, but instead checked federal power. That changed with the ratification of the Fourteenth Amendment in 1868. Over the next several decades, the Court began to incorporate certain provisions of the Bill of Rights—those fundamental personal rights and liberties protected by the Fourteenth Amendment's Due Process Clause—to apply to the states. For example, in Gitlow v. New York, the Court held that the Fourteenth Amendment incorporated the First Amendment's free speech and free press protections against state interference.

The Court long struggled with the question of which rights to incorporate. Black believed that the Fourteenth Amendment incorporated the entire Bill of Rights, and that every right—from the First Amendment's free speech protection to the Third Amendment's prohibition against the quartering of troops in peacetime—applied with equal vigor against state and federal action. Frankfurter believed that the Court should incorporate those rights that were "fundamental to the fairness and decency of government."⁶¹ While the Court never accepted Black's total incorporation theory, it ultimately incorporated nearly every major provision of the Bill of Rights.

Frankfurter's philosophy in Communist cases shifted several times from the late 1940's until the early 1960's. During the Vinson years, he generally condemned the government's anti-Communist programs. When Frankfurter did uphold the government,

⁶⁰ Mapp v. Ohio, 367 U.S. 643 (1961); Baker v. Carr, 369 U.S. 186 (1962).

⁶¹ Adamson v. California, 332 U.S. 46 (1947); Simon, The Antagonists, 178.

he filed concurring opinions and refused to join the Vinson faction's opinions. Early in Warren's tenure, Frankfurter helped derail the government's anti-Communist programs by rejecting the government's interpretation of the statutes upon which it based its prosecution, deportation, or denaturalization of alleged subversives. In so doing, Frankfurter thwarted the government's anti-Communist measures without having to declare them constitutionally invalid. This approach did not last; during Frankfurter's last years on the Court, he turned against Warren and began sustaining the government's attack on Communism.

Frankfurter suffered from a stroke in 1962 and retired shortly thereafter. He died in 1965.

JUSTICE WILLIAM O. DOUGLAS

William O. Douglas, born in 1898, grew up in the Yakima, Washington area. He graduated from Columbia Law School and after a short time in private practice joined the Columbia (1927-29) and Yale (1929-1934) Law School Faculties. Douglas moved to Washington to advance the New Deal, serving as Commissioner, and later Chairman, of the Securities and Exchange Commission. Roosevelt appointed Douglas to succeed Louis Brandeis after the latter retired in 1939.⁶²

Douglas became the longest serving justice in the Court's history—he served from 1939 until 1975—but found the bench limiting. Douglas wanted to be President, and nearly secured the Democratic nomination for the Vice-Presidency in 1944. Had Douglas succeeded, he, not Truman, would have replaced Roosevelt as President in April

⁶² Bruce Allen Murphy, Wild Bill: The Legend & Life of William O. Douglas, America's Most Controversial Supreme Court Justice (New York: Random House, 2003).

1945.⁶³ Douglas tried again in 1948 when he, with the assistance of Americans for Democratic Action President Joseph Rauh, sought to convince Truman to quit the 1948 race. Despite Douglas's failed maneuver, Truman still offered him the Vice-Presidential slot on the ticket, an offer he declined.⁶⁴

Douglas often sustained the government in civil liberties cases during his first years on the Court. For example, Douglas upheld the government's internment of Japanese-Americans in Hiribayshi and Korematsu, and sustained the government's warrantless search of a gas station in Davis v. United States.⁶⁵ By 1947, Douglas's pro-government attitude began to change. Why it changed is not clear. Perhaps Douglas sought liberal support for his 1948 Presidential run; or perhaps Douglas, while taking the Nazi threat seriously, dismissed the Communist threat. Regardless, after this apparent switch in philosophy, Douglas ceased deferring to the government and began championing individual rights from the bench. He even invented new rights, such as the right to travel and the right to privacy.⁶⁶

Douglas was a bona fide civil libertarian by the late 1940's, and not once did he side with the government in a Communist case. Regardless of the facts or circumstances, the government was wrong, and the alleged subversive was right.

Douglas left the Court in 1975, having served with five different Chief Justices, and died in 1980.

⁶³ James Simon, Independent Journey: The Life of William O. Douglas (New York: Harper & Row, 1980) 262-265.

⁶⁴ Murphy, Wild Bill, 250-268. Although Douglas never became President, he was not afraid to share his opinions regarding politics or foreign policy. For example, in 1951, he called upon the United States to recognize Red China. *Ibid.*, 307.

⁶⁵ *Ibid.*, 235. Davis v. United States, 328 U.S. 582 (1946).

⁶⁶ Kent v. Dulles, 357 U.S. 116 (1958); Griswold v. Connecticut, 381 U.S. 479 (1965).

JUSTICE HUGO BLACK

Hugo Lafayette Black was born in Harlan, Alabama in 1886, the son of a relatively prosperous storekeeper and landowner. He attended Birmingham Medical College for one year before switching to the University of Alabama Law School. After graduation, Black held a variety of legal jobs, including county solicitor and municipal judge. Black eventually became Alabama's premier trial attorney before winning a U.S. Senate seat in 1926.⁶⁷

Senator Black was an ardent liberal. He introduced a bill creating a thirty-hour workweek and later led a heavy-handed investigation into the government's awarding of air- and sea-mail contracts. Black also unabashedly supported Roosevelt's 1937 Court-packing plan. Although the plan failed, Roosevelt did not forget Black's support. When Willis Van Devanter, one of the Court's notorious Four Horsemen, retired in 1937, Roosevelt appointed Black to the seat.

Rumors that Black belonged to the Ku Klux Klan plagued his nomination, but those were, at the time, mere rumors. The Senate confirmed Black by a 63-16 vote, with 17 abstentions.⁶⁸ Only after the confirmation did the public learn that those rumors were true; Black had been a Klan member in the 1920's. Despite the post-revelation firestorm, Black did not resign.⁶⁹

Black in his early years, like Douglas, supported the government on many national security matters. For example, he upheld the government's internment of Japanese-Americans in Korematsu and Hiribayashi. Black also embraced a balancing

⁶⁷ Roger K. Newman, Hugo Black: A Biography (New York: Pantheon Books, 1994).

⁶⁸ Ibid., 233-246.

⁶⁹ Ibid., 247-63.

test in First Amendment cases and rejected the total incorporation theory of the Bill of Rights, positions that he later relinquished.⁷⁰

Black nurtured long-standing feuds with two fellow Justices, Robert Jackson and Felix Frankfurter. Black's feud with Jackson stemmed from a perceived conflict of interest. The Court had sustained the constitutionality of the Fair Labor Standards Act in 1941. Four years later, in Jewell Ridge Coal Corporation, the Court considered whether the act required mine owners to pay coal miners for portal-to-portal travel, or only for the time they actually spent in the mine.⁷¹ Crampton Harris, Black's former law partner, represented the miners. Justice Jackson insisted that Black disqualify himself from hearing the case, but Black refused to do so. Jackson was livid.

The controversy remained confidential—until Chief Justice Stone died in 1946. Both Jackson and Black coveted the position of Chief Justice, or barring that, to prevent the other from becoming Chief Justice. Jackson, then serving in Nuremburg, leaked the Jewell Ridge controversy to the press, while Black and Douglas allegedly threatened to resign from the Court if Truman appointed Jackson Chief Justice.⁷² It is no wonder that Truman sought Vinson's deft diplomacy to conciliate the Court's warring factions.⁷³

This paper has discussed Black's dispute with Frankfurter regarding incorporation. Black also waged an ideological battle with Frankfurter concerning the First Amendment's Free Speech Clause. Frankfurter, never a constitutional literalist, rejected the notion that any infringement of free speech constituted a *per se* First

⁷⁰ Simon, The Antagonists, 126, 173.

⁷¹ Jewell Ridge Coal Corporation v. Local 6167, United Mine Workers of America, 325 U.S. 897 (1945).

⁷² Simon, The Antagonists, 166-67.

⁷³ Jackson and Black eventually settled their personal differences and did not have any major blow-ups after 1946. Newman, Hugo Black, 420.

Amendment violation; instead, the government had to balance an individual's interest in free speech against other factors, such as national security.

Black, in contrast, embraced an absolutist view of the First Amendment.⁷⁴

Indeed, said Black in his 1960 James Madison Lecture on the Bill of Rights, "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"⁷⁵ Added Black:

To my way of thinking...the history and language of the Constitution and the Bill of Rights...make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the government all power to act in certain areas—whatever the scope of those areas may be. If I am right in this then there is, at least in those areas, no justification whatever for 'balancing' a particular right against some expressly granted power of Congress. If the Constitution withdraws from Government all power over subject matter in an area, such as religion, speech, press, assembly, and petition, there is nothing over which authority may be exerted.⁷⁶

Black's Communist case jurisprudence certainly supported this theory. Black considered any restraint on the political speech or associational rights of subversives to violate the First Amendment and any forced disclosures regarding Communist activity—whether in a courtroom or before a Congressional committee—to violate the Fifth Amendment. The government's allegedly "compelling" reason for seeking the deportation or prosecution of Communists was irrelevant; the Bill of Rights said what it said, and the protections against government infringement were absolute.⁷⁷

⁷⁴ Black did not embrace an absolutist view of the First Amendment early in his career. For example, in Bridges v. California, 314 U.S. 252 (1941), he still analyzed government infringement of speech through the lens of the clear and present danger test. See Simon, The Antagonists, 125; Newman, Hugo Black, 291-92.

⁷⁵ Hugo L. Black, "The Bill of Rights," New York University Law Review 35 (April 1960): 865-81.

⁷⁶ *Ibid.*

Black left the Court in summer 1971 and died a week later.

CONCLUSION

The Vinson Court faced an extremely difficult task when it was required to examine the constitutionality of the government's anti-Communist program. While the nation had confronted external enemies before, and had reacted to perceived threats of internal subversion, it had never confronted a situation similar to the post-World War II Red Scare. The Republicans sought to use the issue to dislodge the Democrats from power, while the Democrats sought to use the issue to crush their opposition and neutralize Republican charges. The American public certainly had reason to fear the threat of Communism. With the establishment of the Iron Curtain, the fall of China, the Soviet detonation of the atomic bomb, the Korean War, and the Hiss and Rosenberg cases, Americans expected and demanded that their government do something to protect the country from Communism. The government responded by prosecuting Communist Party leaders, purging the government of suspected subversives, and instituting deportation proceedings.

Unfortunately, the Court had very little precedent to guide it in confronting these issues. The Court had generally upheld the government's national security programs in time of war. The Cold War, however, was not a declared war, and it was not clear whether the Court could allow the government to institute such harsh measures in peacetime.⁷⁸ Further, many of the government's anti-Communist measures penalized

⁷⁷ Black, an ardent reader of history, viewed the McCarthy Era as a grave danger to the Bill of Rights: "This country is in the most desperate trouble on the First Amendment than it has ever been in, much worse than during the Palmer Raids. The present period of fear is even more ominously dangerous to speech and press than was that of the alien and sedition laws." Newman, Hugo Black, 411.

⁷⁸ The Court had indicated that it would not allow Congress to violate the Constitution's Bill of Attainder Clause. In 1943, Congress attached an amendment to an appropriations bill that prohibited the executive

speech, which ran contrary to the court-created clear and present danger test. The Court had to decide whether that test was even applicable in Communist cases.

The Vinson Court of October 1949 was comprised of three major factions: the hard-line anti-Communists, consisting of Vinson, Minton, Reed, and, when he was available, Clark; the independents—who did not usually vote as a block—comprised of Burton, Jackson and Frankfurter; and the civil libertarians, comprised of Black and Douglas. With the battle lines so drawn, the Vinson Court began hearing Communist cases in 1949.

from paying any compensation to three named employees. The Court deemed this action by Congress to violate the Constitution's Bill of Attainder Clause. United States v. Lovett, 328 U.S. 303 (1946).

CHAPTER TWO: 1949-1950 TERMS

The Vinson Court generally issued clear constitutional judgments in its Communist case opinions. Sometimes, the price for this guidance was unclear legal reasoning, or the failure to issue a Court opinion, or both. For example, in interpreting the substantive provisions of the federal anti-Communist statutes, such as the Taft-Hartley Act and the Smith Act, Vinson wrote sloppy, confusing opinions that failed to carry a majority of the Court. Sometimes the Court's factionalism even prevented it from even rendering a judgment in important Communist cases. For example, the Court could not issue a decision in Bailey v. Richardson, which examined the Government's authority to utilize secret evidence in employee termination proceedings.

Even if the justices sometimes disagreed why the government could prosecute Communists or require non-Communist affidavits, they still agreed that the Constitution permitted the government could do these things. Moreover, the Court was usually able to produce opinions, with clear legal reasoning, upholding facets of the government's domestic Cold War program. For example, the Court fully sanctioned the government's power to deport or exclude Communist aliens. It affirmed the states' power to purge "knowing" Communists from their payrolls. It did not hesitate to punish hostile witnesses who refused to cooperate with Congressional committees.

Yet the Vinson Court did not merely rubber-stamp the government's anti-Communist programs. The Court was not afraid to check the excesses of those programs when they violated the Constitution. For example, the Court allowed Communist defendants to prove actual juror bias in criminal trials. It expanded the reach of the Fifth Amendment's Self-Incrimination Clause. It prevented state governments from arbitrarily

dismissing government employees. In short, the Vinson Court did not hesitate to provide a Constitutional basis for sustaining or checking the government's anti-subversion programs.

1949 TERM¹

The United States appeared to be losing the Cold War when the Vinson Court began the 1949 Term. One year earlier, a Communist government had seized power in Czechoslovakia and the Soviet Union had blockaded Berlin. In September 1949, the Soviet Union announced that it had successfully tested an atomic bomb, and China fell to Mao Tse Tung's Communist Army. Evidence of the Communist threat also appeared on the domestic front. In January 1950, a jury convicted Alger Hiss of perjury. One month later, Senator Joe McCarthy spoke to the Republican Women's Club of Wheeling, West Virginia, and accused the State Department of knowingly harboring Communists. To put it mildly, the Vinson Court operated in a highly charged political atmosphere.

Most of the Communist cases decided by the Court in 1949 concerned the procedural protections granted to Communist witnesses and defendants in legislative hearings and criminal trials. In Dennis v. United States, the Court refused to impute bias to federal employees serving on juries. In Morford v. United States, the Court required that a Communist have the opportunity to prove juror bias. In United States v. Fleischman and United States v. Bryan, the Court indicated that it would not allow a witness to obstruct Congress's investigatory powers. Finally, in American Communication Association v. Douds, the Court turned to Congress's anti-subversion programs, upholding the Taft-Hartley Act's non-Communist affidavit requirement.

¹ Douglas suffered a serious injury from a horse riding accident in October 1949 and did not participate in most of the Term's cases. Murphy, Wild Bill, 273-74. Clark did not participate in any of the Term's Communist cases because, as Attorney general, he had overseen the prosecution of many of these cases.

DENNIS v. UNITED STATES²

Could a federal employee, subject to dismissal pursuant to Executive Order 9835, impartially judge a Communist? The Court, in Dennis v. United States, answered yes.

Eugene Dennis, the Communist Party's General Secretary, was convicted of contempt of Congress for ignoring a HUAC subpoena. Dennis attacked the verdict on two grounds. First, the trial court violated his Sixth Amendment rights when it refused to automatically disqualify (by imputing bias to) the seven federal employees on his jury. Dennis argued that federal employees, frightfully aware of the spirit behind Executive Order 9835, would not dare risk the stigma of disloyalty, and possibly their jobs, by acquitting a Communist. Second, he contended that the Court should take notice of the public's intense hostility toward the Communist Party and realize that it prevented the jurors from rendering a fair verdict.

Dennis did not have precedent on his side. In the 1948 Term, the Court sustained an all-federal employee jury from Sixth Amendment challenge in Frazier v. United States.³ Minton, writing for three other justices, affirmed Frazier and rejected any imputation of bias to federal employees. He also denied that anti-Communist hysteria among federal employees entitled Dennis to a change of venue. Each juror had testified to his or her impartiality, which Dennis did not refute. Yet in rejecting Dennis's argument, Minton did emphasize that a defendant—Communist or not—was always entitled to prove actual juror bias.

Jackson, demonstrating his hallmark independence, concurred with the Court's judgment but proposed that it overturn Frazier. While the Court had "dug a pit dangerous

² Dennis v. United States, 339 U.S. 162 (1950).

³ Frazier v. United States, 335 U.S. 497 (1949).

for civil liberties” in Frazier, “the Court should not dig itself another hole” by ruling that a defendant’s political opinions determined the composition of his jury. It was true, said Jackson, Communists

are the current phobia in Washington. But always, since I can remember, some group or other is being investigated and castigated here. At various times, it has been Bundists and Germans, Japanese, lobbyists, tax evaders, oil men, utility men, bankers, brokers, labor leaders, Silver Shirts and Fascists. At times, usually after dramatic and publicized exposures, members of these groups have been brought to trial for some offense. I think that none of them at such times ever should be forced to defend themselves against the Government’s accusations before the Government’s employees. But so long as the accused persons who are Republicans, Dixiecrats, Socialists, or Democrats must put up with such a jury, it will have to do for Communists.⁴

Black and Frankfurter each dissented. Black read Frazier (a case he had joined) to allow the courts to exclude federal employees from juries if “particular issues or circumstances” prevented their impartiality. To Black, the fear caused by the combination of Executive Order 9835, Congressional investigations, and threatened government purges precluded federal employee impartiality. In essence, Black adopted Dennis’s argument of a “Communist exception” to the juror law.

Frankfurter’s dissent emphasized the Court’s role as the final protector of the Bill of Rights. Whether a juror could analyze evidence disinterestedly in a particular case was a psychological judgment, one “founded on human experience,” that only the courts could make. Thus, while federal employees might serve as jurors in some cases, the Sixth Amendment would not allow them to serve in all cases. In this case, the courts could take judicial notice of the national hostility against Communists and disqualify government employees from the jury. By doing this, America would show the world that its court system was above reproach. Said Frankfurter:

⁴ Dennis, 175.

Many and conflicting are the criteria by which a society is to be deemed good, but perhaps no test is more revealing than the characteristics of its punitive justice. No single aspect of our society is more precious and more distinctive than that we seek to administer criminal justice according to morally fastidious standards.⁵

The Court's alignment in Dennis was to repeat itself throughout the Vinson era. Minton, Reed, and Vinson, without exception, deferred to the federal government's political branches. In Dennis, their decision was not a difficult one. The justices had precedent on their side and were understandably reluctant to reopen a question they believed settled. Jackson often agreed with the Vinson faction, but refused to join their uncritical acceptance of Congress's will. Frankfurter sometimes reluctantly accepted the government's anti-Communist programs, but reserved the Court's absolute right to scrutinize any statute or regulation through his personal lens of fairness. Black, without exception, saw the Communists as victims. Burton was the only justice whose decisions were not predictable. Of the two non-participating justices, Douglas always joined Black, while Clark usually joined Vinson.

MORFORD v. UNITED STATES⁶

The Court soon had an opportunity to fulfill its Dennis promise regarding actual juror bias in Morford v. United States. Reverend Richard Morford, the National Council of American-Soviet Friendship's Executive Director, was convicted of contempt of Congress for failing to comply with a HUAC subpoena. During *voir dire*, the trial judge prohibited the defense from asking federal employees whether Executive Order 9835 precluded them from impartially deciding the case. The Court reversed, holding that the Sixth Amendment permitted defendants to prove actual juror bias.

⁵ Ibid, 184.

⁶ Morford v. United States, 339 U.S. 258 (1950).

UNITED STATES v. BRYAN

UNITED STATES v. FLEISCHMAN⁷

The Court began defining HUAC's power over hostile witnesses in United States v. Bryan and United States v. Fleischman. HUAC subpoenaed several Joint Anti-Fascist Refugee Committee (JAFRC) board members and officers, compelling both their attendance and production of records. JAFRC's attorney prepared a statement which each board member and officer read or delivered to HUAC. Each statement claimed that Ms. Helen Bryan, JAFRC's Executive Secretary, was the legal custodian of the subpoenaed records. HUAC asked each board member if he or she would vote to compel Bryan to produce the records. One board member, a Mrs. Fleischman, declared the question "not pertinent" and declined to speculate how she might vote at JAFRC's next meeting. HUAC later called Bryan, who refused to surrender the records. Both Fleischman and Bryan were convicted of contempt of Congress.

Vinson's opinions signaled that the Court would not tolerate games by hostile witnesses.⁸ Bryan argued that a jury should have considered the question of whether HUAC had a quorum and thus constituted a committee of Congress.⁹ To Vinson, that argument, whatever its merits, should have been raised before HUAC so that it had an opportunity to correct the problem. Moreover, quorum or not, Bryan left no doubt that she would not comply with the subpoena. Said Vinson, "A subpoena has never been

⁷ U.S. v. Bryan, 339 U.S. 323 (1950); U.S. v. Fleischman, 339 U.S. 349 (1950).

⁸ Jackson and Frankfurter concurred. Black filed a dissent

⁹ Two years earlier, a 5-4 Court decided Christoffel v. United States, 338 U.S. 84 (1948). The Court reversed the conviction of a Communist witness convicted of perjury for his testimony before HUAC. Christoffel challenged the conviction with a novel argument: He did not deny that he perjured himself, only that he had not done so before a competent tribunal. Although Christoffel had not objected to the possible lack of quorum when he testified, at trial he argued that the requisite 13 members (of the 25-member committee) might not have been present. Murphy and four other justices bought the argument.

treated as an invitation to a game of hare and hounds, in which the witness might testify only if cornered at the end of the chase.”¹⁰

Fleischman argued that she could not be in contempt of Congress if she did not have personal control of the records. Vinson disagreed: “When one accepts an office of responsibility...in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order.”¹¹

Bryan and Fleischman indicated that the Vinson Court would not tolerate shenanigans before congressional committees. Perhaps this attitude is explained by the backgrounds of the majority justices—three former legislators and two former prosecutors. The Court also employed an expansive interpretation of the criminal law of contempt, one that put the burden on the witness to decide whether he or she would cooperate with a Congressional committee. Those who cooperated were not in danger of contempt charges; those who refused to cooperate did so at their peril.

AMERICAN COMMUNICATIONS ASSOCIATION v. DOUDS¹²

The Court finally considered the constitutionality of the federal government’s anti-Communist legislation in American Communications Association v. Douds. § 9(h) of the Taft-Hartley Act of 1947 required each union officer to submit a non-Communist

¹⁰ Bryan, 338. Another statute, 18 U.S.C. § 3486, read “No testimony given by a witness...before any committee of either house shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury, committed in giving such testimony.” Bryan contended that this provision prohibited the introduction of her testimony regarding ownership of the records in a contempt trial. Vinson rejected her proposed interpretation of the statute.

¹¹ Fleischman, 356-57. Frankfurter and Black dissented.

¹² American Communications Association v. Douds, 339 U.S. 382 (1950).

affidavit to the National Labor Relations Board (NLRB). The affidavit required the officer to swear that he neither belonged to the Communist Party nor believed in the overthrow of the United States Government by force or by any illegal or unconstitutional methods.¹³ The NLRB could not investigate or adjudicate complaints of unfair labor practices by labor organizations whose officers did not submit the affidavit.

The case represented a profound challenge for the Court. Since 1937, the Court had affirmed Congress's constitutional power, derived from the Commerce Clause, to legislate in the field of economic activity. However, the Vinson Court, like its predecessor, had generally prohibited government from infringing First Amendment rights without a showing of a clear and present danger. Ordinarily, the Court's analysis would end there. But 9(h) was not aimed at speech *per se*; it did not prohibit any person from believing in, or belonging to, the Communist Party. Nor did it prohibit labor unions from electing Communist officers. Instead, it withheld NLRB recognition from any union whose officers refused to submit the affidavit.

Vinson, writing for Reed and Burton, affirmed the constitutionality of the affidavit requirement. Two other justices—Frankfurter and Jackson—concurred in part. Together, these five sustained a major pillar of the Government's anti-Communist program. Vinson's opinion is significant not only for its result, but also for the deference shown to the political branches in national security matters.

Vinson began by analyzing Taft-Hartley as economic legislation. In 1947, Congress heard testimony describing Communist influence in organized labor, and determined that political strikes threatened the nation's free flow of commerce. In

¹³ The affidavit also prohibited membership in an organization that believed in, or taught, the overthrow of the United States Government by force or by any illegal or unconstitutional means.

response, it passed the Taft-Hartley Act, which included the non-Communist affidavit requirement. Congress had a rational basis for concluding that Communist infiltration of labor unions presented a serious threat to the nation's economy, and its solution—§ 9(h) of the Taft-Hartley Act—bore a reasonable relation to its goal of preventing political strikes.¹⁴

Vinson acknowledged that the affidavit requirement infringed a Communist officer's "lawful exercise of political freedoms," and limited a union's ability to choose its officers. Ordinarily, political affiliations and beliefs are not relevant to Congress, but this prohibition is not absolute. Congress could draw distinctions based on perceived likely behavior. For example, the Glass-Steagall Act prohibited certain securities industry employees from serving on the board of a national bank. The Court, sustaining this prohibition in Board of Governors v. Agnew, held that preventing "tempting opportunities" for corruption justified any infringement of employment opportunities.¹⁵ Said Vinson, "Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that the persons proscribed by 9(h) would be subject to the 'tempting opportunities' to commit acts deemed harmful to the national economy."¹⁶

¹⁴ In affirming Congress's decision to treat Communists differently from other political parties, Vinson added:

Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many persons who believe in the overthrow of the government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.

Douds, 391.

¹⁵ Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441 (1947).

¹⁶ Douds, 392.

The Court usually employed the clear and present danger test when analyzing legislation that infringed First Amendment rights. Vinson rejected the traditional application of the test:

...[I]t was never the intention of this Court to lay down an absolutist test measured in terms of danger to the nation. When the effect of a statute or ordinance upon the exercise of First Amendment freedoms is relatively small and the public interest to be protected is substantial, it is obvious that a rigid test requiring a showing of imminent danger to the security of the nation is an absurdity.¹⁷

Despite that significant qualification, Vinson rejected the use of even a modified clear and present danger test in the case. Congress was attempting to prevent political strikes, a form of unlawful conduct. Congress was not saying that the advocacy of Communist doctrine causes the political strike; instead, a class of people—Communist union officers—were likely to misuse their power to cause political strikes.

Professor Robert McCloskey, in The Modern Supreme Court, diagrams Vinson's argument as follows:

The traditional clear and present danger test:

Speech (including belief and association)

Toward

Persuasion

Toward

Action

In this case, “countervailing discussion” can enter at the second (persuasion) stage to neutralize the force of the message, unless the danger, posed by the action stage, is imminent. The clear and present danger test is concerned with the interval between

¹⁷ Ibid., 397.

speech and action. The government may impose restrictions only if there is not sufficient time to counteract the speech.

To Vinson, the problem posed by Douds was:

Speech (including belief and association)

Toward

Action

In Douds, there was no second stage. The “speech”—or, more accurately, the qualities associated with membership in the Communist Party—will cause the “action”—political strikes—without ever reaching the persuasion stage.¹⁸ The clear and present danger test did not apply. Said Vinson, “When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented...”¹⁹ In other words, the Court would employ a First Amendment balancing test. Because the legislation aimed at conduct, the Court would defer to Congress in determining the necessity of legislation. On the other side of the scale, the affidavit’s effect on free speech was minimal. With that, Vinson had no trouble upholding the affidavit.

The government could introduce membership cards, membership lists, or other evidence to prove that a union officer belonged to the Communist Party. But § 9(h) also required that the affiant to swear that he did not believe in the overthrow of the

¹⁸ Robert McCloskey, The Modern Supreme Court (Cambridge: Harvard University Press, 1972), 76.

¹⁹ Douds, 399.

government by force or violence. How did the government prove that a person believed in the violent overthrow of government? Vinson acknowledged that the prohibition, read broadly, might encompass any person, who at any time, harbored violent, anti-government beliefs, an interpretation that would raise serious constitutional questions. However, realizing that “beliefs are springs to action,” Vinson provided a narrow interpretation of 9(h)’s scope. The provision could apply only to those who believed in violent overthrow “as an objective, not merely a prophecy.”²⁰ For proof, the government could introduce evidence of a person’s mental state, such as statements or actions.

Frankfurter, concurring in part and dissenting in part, agreed that the affidavit, as applied to Communist Party members, was a reasonable exercise of Congress’s Commerce Clause powers. His opinion typified his vision of the judicial branch in substantive national security issues: insulate the court from political questions, use reasoned, neutral-sounding language, and defer to the political branches’ judgment. In short, “To deny that this is a judgment which Congress may, as a matter of experience, enforce even though it involves the indicated restrictions upon freedom would be to make naïveté a requirement in judges.”²¹ However, he could not abide by the affidavit’s “belief” provision, contending that any government inquiry into beliefs would invariably lead to dangerous speculation.

Jackson, too, upheld the oath as applied to Communist Party members. His opinion, the most damning indictment of Communism in the Court’s history, focused less on Congress’s regulatory powers and more on the insidious nature of the Communist Party. Further, it foreshadowed a debate that would plague the Court for nearly two

²⁰ Ibid., 408.

²¹ Ibid., 418.

decades: Can the government treat the Communist Party differently than it treats other political parties? To Jackson, the answer was an unequivocal “yes.”

Jackson believed that § 9(h), if aimed at other, even radical, political parties, would be unconstitutional. But the Communist Party was different. Congress could conclude that the Party was a “conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system,” possessing the following distinguishing characteristics:²²

1. The Communist Party’s goal is to seize power rather than acquire it through free elections.
2. The Communist Party is dominated and controlled by a foreign government and “placed Moscow’s demand above every patriotic interest.”
3. The Communist Party will utilize violence and coercion to gain power. Said Jackson:

It would be incredible naiveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. In not one of the countries it now dominates was the Communist Party chosen by a free or contestable election. The international police state has crept over Eastern Europe by deception, coercion, coup d’etat, terrorism and assassination.²³

4. The Communist Party has sought to gain leverage over the American economy by controlling the labor movement.
5. Every Communist Party member is an agent to execute the Party’s program, often by operating secretly, using code names, and forming cells in labor unions.

Jackson then aimed at Black and his use of the phrase “guilt by association,” (see below) describing it as “an epithet frequently used and little explained, except that it is generally accompanied by another slogan, ‘guilt is personal.’ Of course it is; but personal

²² Ibid., 425-433.

²³ Ibid., 430.

guilt may be incurred by joining a conspiracy.”²⁴ Further, joining the Communist Party to advance its goals made one guilty of conspiracy.

Attorney General Jackson delivered the "Democracy under Fire" in 1940 when he saw American democracy undermined from within while being threatened by fascism abroad. Now Justice Jackson, veteran of the Nuremburg trials, saw an even graver threat to America and its democracy coming from Communism. The courts could not consider these government-imposed restrictions on Communists in a vacuum, but had to be cognizant that the American way of life was at stake:

In weighing claims that any particular activity is above the reach of the law, we have a high responsibility to do so in the light of present-day actualities, not nostalgic idealizations valid for a simpler age. Our own world, organized for liberty, has been forced into deadly competition with another world, organized for power. We are faced with a lawless and ruthless effort to infiltrate and disintegrate our society.²⁵

However, like Frankfurter, Jackson would not sanction the oath’s “belief” provision. Joining the Communist Party was an overt act, easily provable at trial; proving thoughts was far more difficult, and invited unlimited governmental power over beliefs.

Black, in dissent, asserted that only an individual’s actions—not his memberships (including Communist Party membership), associations, or beliefs could provide evidence of guilt. Moreover, said Black, the government would not stop with the § 9(h) oaths. The logic that upheld oaths “would apply just as forcibly to statutes barring Communists and their suspected sympathizers from election to political office, mere

²⁴ Ibid., 432.

²⁵ Ibid., 435.

membership in unions, and in fact from getting or holding any jobs whereby they could earn a living.”²⁶

Finally, the fear aroused by anti-Communist hysteria would not be limited to Communists: “Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack...” or have views similar to Communist Party.²⁷

1950 TERM

The outbreak of the Korean War in June 1950 further exacerbated America's tense international political situation. Now, America did not merely have to worry about the Communist threat, but had to answer it in blood.

The Communist issue continued to boil on the domestic front. Shortly before the term began, Congress passed the Subversive Activities Control Act, which required the Communist Party and its affiliated organizations to register with the Attorney General. Other provisions of the Act prohibited Communists from obtaining passports and simplified the process for deporting subversives. President Truman vetoed the measure, calling it a threat to civil liberties. The Senate, by a 57-10 margin, and the House, by a 248-48 margin, overrode his veto.

The 1950 Term proved the most important of the Vinson Court. The Court both sustained and checked many of the government's anti-Communist efforts. It also failed to issue opinions in two major cases. The Court, acknowledging the threat of prosecution faced by Communists, extended the Fifth Amendment's Self-Incrimination Clause

²⁶ Ibid., 449.

²⁷ Ibid., 448-49.

protections to questions about Communist Party membership in Blau v. United States. But, on the same day, the Court limited Blau's reach in Rogers v. United States. In Garner v. Board of Public Works of Los Angeles, the Court affirmed a state's ability to discharge subversive employees, but mandated that a scienter requirement be read into the anti-subversive legislation. Although not explicitly stated, the Court extended some form of due process protection to state employees. In Bailey v. Richardson, a 4-4 Court left intact a major pillar of the Government's Loyalty-Security Program, while in Joint-Anti-Fascist Refugee Committee v. McGrath, it seemed incapable of agreeing on anything. In Dennis, the Court sustained the constitutionality of the several provisions of the Smith Act, thereby affirming the convictions of eleven Communist defendants.²⁸

BLAU v. UNITED STATES

ROGERS v. UNITED STATES²⁹

Blau v. United States and Rogers v. United States proved important in delineating the reach of the Fifth Amendment's Self-Incrimination Clause. A federal grand jury summoned Patricia Blau, a former employee of the Denver Communist Party, and asked about her Party activities. Blau invoked the Fifth Amendment and refused to answer the questions—claiming that the answers may incriminate her—and was found guilty of contempt. The Court, in an opinion by Black, overturned the contempt sentence, holding that a witness could invoke the Fifth Amendment in response to any grand jury question

²⁸ Another Communist case—or at least a case relevant to the issue of domestic subversion—worth noting was Tenney v. Brandhove, 341 U.S. 367 (1951). In that case, the Court protected state legislative committees from suits alleging deprivation of Constitutional rights, as long as the committee was acting within the area of permissible legislative authority. Black concurred, but clarified that anti-Communist legislative hearings did not constitute permissible legislative activity. Douglas dissented.

²⁹ Blau v. United States, 340 U.S. 159 (1951); Rogers v. United States, 340 U.S. 367 (1951). A companion case, Blau v. United States, 340 US 332 (1951), was decided the same day. Mr. Blau refused to reveal the location of his wife, who was attempting to avoid the grand jury's subpoena. He asserted a spousal privilege against having to reveal her location. Black, for the court, upheld this privilege.

that might furnish a link in the chain of evidence in a Smith Act prosecution. Blau essentially immunized Communists from having to testify in criminal trials (unless granted immunity), and laid the foundation for the Warren Court to extend the Fifth Amendment privilege to witnesses who appeared before Congressional committees.

But the Court curtailed Blau's potentially expansive holding in Rogers. A federal grand jury (the same grand jury at issue in Blau) summoned Jane Rogers, the former Treasurer of the Denver Communist Party, and instructed her to bring the Party's records. Rogers admitted belonging to the Party and previously possessing the records. She also admitted transferring the Party records to another person, but refused to divulge that person's identity, claiming, "I don't feel that I should subject a person or persons to the same thing I'm going through."³⁰ When given the chance to purge her contempt before the grand jury the next day, she again refused to reveal names. She finally invoked her Fifth Amendment privilege against self-incrimination when called before a federal district judge, who denied her claim and cited her for contempt.

Vinson, for a 5-3 majority, both decided against Rogers and narrowed Blau on several grounds.³¹ First, Rogers had waived her Fifth Amendment rights when she cited a non-privileged ground—not wanting another to suffer—as her reason for not testifying. The Court seemed to be telling Communist witnesses that they did not get a second bite at the Fifth Amendment apple. Second, Rogers had admitted her Communist Party activities, and, unlike Blau, would not provide a link in the chain of evidence by naming

³⁰ Rogers, 368.

³¹ Minton, Reed, Burton, and Jackson joined Vinson's opinion. Clark did not participate.

the recipient of the records. Finally, disclosure of a fact—in this case, her Communist Party activities—waived any privilege against providing details.³²

Black dissented, attacking the waiver doctrine as a device for “whittling away the protection afforded by the privilege [against self-incrimination].”³³ Further, he disagreed that Rogers’ admission relieved her of legal jeopardy; the person to whom she gave the records may serve as a witness in a prosecution against Rogers.

BAILEY v. RICHARDSON

JOINT-ANTI-FASCIST REFUGEE COMMITTEE v. MCGRATH³⁴

In Bailey v. Richardson and Joint Anti-Fascist Refugee Committee v. McGrath (JAFRC), the Court confronted the constitutionality of the federal loyalty-security program. Bailey concerned the use of confidential evidence in employee loyalty hearings. JAFRC concerned the Attorney General’s authority to list subversive organizations. Unfortunately, the Court failed to expound a coherent rationale for either rejecting or affirming the governmental programs, and both continued unabated for several more years. The opinions represented a major exception to the Vinson Court’s generally solid record of providing rulings regarding the constitutionality of the government’s anti-Communist programs.

Dorothy Bailey worked in the federal classified civil service from 1939 until laid off in 1947. She was reinstated in 1948, subject to the Civil Service Commission’s regulation that should an investigation revealed that “on all the evidence, reasonable

³² Vinson added that even if Rogers validly claimed the privilege, she could extend only to records kept in her personal capacity and could not be invoked for records kept in her official capacity. Rogers, 371-72.

³³ Ibid., 377. Douglas and Frankfurter joined Black’s dissent.

³⁴ Bailey v. Richardson, 341 U.S. 918 (1951); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

grounds exist for belief that the person involved is disloyal to the United States,” she would lose her job.³⁵ The Civil Service Commission’s Regional Loyalty Board informed Bailey that its investigation revealed that she had belonged to the Communist Party and other organizations designated as subversive by the Attorney General.³⁶ The Regional Loyalty Board, relying on secret evidence, deemed her a security risk. Bailey appealed the decision to the Loyalty Review Board, which, after another hearing that utilized secret evidence, sustained the finding against her.³⁷

The Court of Appeals, in a 2-1 decision, affirmed the Loyalty Review Board’s decision. It noted that Executive Order 9835 authorized the government to rely “on all evidence,” including secret evidence, and specifically protected the identity of government informants.

It also rejected several constitutional challenges to the Board’s decision, including First Amendment free speech, Fifth Amendment due process, and Sixth Amendment fair trial grounds. Federal employees held their positions at the discretion of the executive branch and were subject to dismissal for virtually any reason, including membership in a subversive organization. Further, the termination of federal employees did not constitute legal “punishment,” which would require due process protections.³⁸

Jackson and Frankfurter joined Douglas and Black in reversing the Court of Appeals, but it was not enough. The Supreme Court split 4-4 (Clark not participating), and in keeping with its tradition, did not issue an opinion. The Court’s failure to issue an

³⁵ Reg 2.112, 12 Fed Reg. 5937.

³⁶ The other organizations included the American League for Peace and Democracy and the Washington Committee for Democratic Action. Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950).

³⁷ *Ibid.*

³⁸ *Ibid.*

opinion kept the Court of Appeals' opinion, and the government's loyalty-security program, intact for several more years.

If Bailey was a missed opportunity for the Court, JAFRC demonstrated how Communist cases could fracture the Court. The Attorney General, purportedly acting pursuant to Executive Order 9835, had designated JAFRC as a Communist organization in a list furnished to the Loyalty Review Board (The infamous "Attorney General's list").³⁹

JAFRC filed suit in federal district court, claiming the Attorney General's designation of it as a subversive organization constituted both defamation and an invasion of its right of privacy. JAFRC also claimed to be a charitable organization. The Attorney General, in its motion for dismissal, neither disputed JAFRC's self-characterization, nor produced any contrary evidence, but sought to dismiss the suit because it failed to state a claim on which the court could grant relief.⁴⁰ In other words, even if the district court accepted JAFRC's "charitable" label, the Attorney General could still list it as a subversive organization. The district court agreed, and dismissed JAFRC's suit.

JAFRC proved the most confusing decision of the Vinson Court. The Court's judgment—it did not produce an opinion—was inconsequential: Executive Order 9835

³⁹ The National Council of American-Soviet Friendship and the International Workers Order joined JAFRC in its suit.

Executive Order 9835, § 3 read in pertinent part:

The Loyalty Review Board shall be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means....The Loyalty Review Board shall disseminate such information to all departments and agencies.

⁴⁰ A motion to dismiss requires a court to accept the truth of the non-moving party's statement of facts. In this case, the district court had to accept JAFRC's description as a charitable organization. Because the Executive Order did not allow the Attorney General to list charitable organizations, but only subversive ones, the district court should not have granted the Attorney General's motion to dismiss.

did not authorize the Attorney General to furnish the Loyalty Review Board with a list that designated charitable, non-subversive organizations. The Court did not decide whether the Attorney General could list subversive organizations, or the circumstances when he may do so, or whether JAFRC was a subversive organization.

For all the Court did not do, it still managed to produce several opinions that were to prove significant in later years. Burton, writing the Court's judgment, noted that Executive Order 9835 required the Attorney General to designate an organization as subversive only after he had made an "appropriate determination." This required that the Attorney General have some reasonable basis for making his decision, and did not authorize arbitrary designations that were contrary to known facts. Because the motion to dismiss required the district court to assume that JAFRC was a charitable, non-subversive organization, it could not summarily dispose of JAFRC's suit.⁴¹

The Court construed Executive Order 9835 to require the Attorney General to engage in a reasoned process of determination; otherwise, "the conclusion would rest on the premise that the Attorney General has attempted to delegate to himself the power to act arbitrarily. We cannot impute such an attempt by the Nation's highest law enforcement officer any more than we can its President."⁴² Burton did not know it, but he was foreshadowing the rhetoric the Warren Court would employ in its effort to halt the Government's Loyalty-Security Program.

Black, concurring, did not waste time with the procedural niceties of the case. He asserted that the executive did not ever have authority—whether or not it provided an

⁴¹ Burton also validated JAFRC's standing to bring suit; Said Burton, "The touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry out its work, free from defamatory statements of the kind discussed, is such a right." JAFRC, 141.

⁴² *Ibid.*, 138.

organization a hearing—to designate organizations as subversive. Such a list constituted punishment for holding political beliefs, which violated the First Amendment and constituted a Bill of Attainder. Black required federal courts to conduct any loyalty determinations and that both organizations and their members be granted the full protection of the Bill of Rights.

Frankfurter's concurrence has proved extremely influential in the evolution of modern administrative law. It is significant not only because Frankfurter discarded his usual practice of avoiding constitutional issues, but because of his assertion of the Court's role in determining the fairness—and, ultimately, legality—of administrative procedures.

Frankfurter first established JAFRC's standing to sue. While he usually deferred to the political branches in national security matters, this case was different; the primary issue was whether the order authorized the Attorney General's action, not whether it was substantively correct. But did JAFRC actually have standing to sue? Had it suffered injury? Frankfurter admitted that the Attorney General's designation did not impose legal sanctions on the organization, but given the national mood toward Communists, it would be "blindness" for the Court to ignore the reputational damage to JAFRC.

Frankfurter explained his concept of due process:

[I]t is not a technical conception with a fixed content unrelated to time, place and circumstances...Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, due process is a compound of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.⁴³

⁴³ Ibid., 162-63.

JAFRC was not notified of, nor provided any justification for, the Attorney General's designation, nor any opportunity to challenge the undisclosed evidence upon which that designation was based. On the other hand, the designation did not directly deprive anyone of life or property; the Attorney General, the nation's top law enforcement officer, made the designation; and, the designation concerned national security, a matter in which the Court generally deferred to the executive branch.

Frankfurter, in attempting to achieve a result consistent with due process, read fairness into executive orders. Regarding Executive Order 9835, fairness did not include arbitrary decisions or secret hearings: "[D]emocracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."⁴⁴

To Frankfurter, this unchecked discretion by the Attorney General offended fundamental fairness and violated due process. The public interest was not harmed by requiring the Attorney General to disclose the evidence it utilized in making its decision, and by allowing the listed organization to contest it.⁴⁵

Douglas's concurrence is notable for its rhetoric, and for its attack on Jackson. Douglas compared the Attorney General's list to "the totalitarian techniques of our

⁴⁴ Ibid., 170.

⁴⁵ Frankfurter was upset with Reed for taking too long to write his dissent. In a note which demonstrated his arrogance, and how annoying he could be to his colleagues, Frankfurter stated:

Dear Stanley,

You are aware of my distress over holding up the judgment in the loyalty cases long after a majority has been ready for their disposition. The situation has had no equal since I have been on the Court.

With considerable knowledge of the past doings of this court, I venture to believe that nothing like it has happened for at least 50 years.

Felix Frankfurter to Stanley Reed, March 19, 1951, Set 1, Reel 47, Felix Frankfurter Papers (microfilm version), Library of Congress.

opponents.” He denied that the Government had an inherent interest in purging subversives from its ranks: “The security problem...relates only to those sensitive areas where secrets are or may be available, where critical policies are being formulated, or where sabotage may be committed...The question is one of fitness or qualifications for a particular position. One can be transferred from those areas.”⁴⁶

Finally, Douglas took aim at his ideological opponent, former Nuremberg Prosecutor Jackson: “The technique [of designating an organization as subversive] is one of guilt by association—one of the most odious institutions of our history. The fact that a technique of guilt by association was used in the prosecutions at Nuremberg does not make it congenial to our constitutional scheme.”⁴⁷

While Jackson believed that Executive Order 9835 violated due process, he was apoplectic over Douglas’s attack on the federal government’s motives. In a revealing memo, he rejected Douglas’s opinion and defended the government for making a good faith mistake in the “unsettled and debatable field” surrounding the balance among due process and national security. Said Jackson:

It does not seem necessary also to join the Communist campaign to smear our own Government by accusing this measure of being ‘totalitarian’ in trend, of borrowing ‘totalitarian’ techniques, of starting down a ‘totalitarian path’ and of taking a ‘leaf from totalitarian jurisprudence.’ I think the Executive branch thus accused is entitled to have some further facts stated and that to fail to challenge this smear would be to play a consenting part of it.

Jackson cited the government’s attempted denaturalization of Communist William Schneiderman, which the Court, in an opinion joined by Douglas, had frustrated in 1943; and its attempted deportation of Harry Bridges, which the Court, in an opinion by

⁴⁶ JAFRC, 183.

⁴⁷ *Ibid.*, 179. Douglas also demanded that the executive branch treat the hearings as judicial trials, with the full protections of the Bill of Rights.

Douglas, had halted in 1945.⁴⁸ In the latter case, a federal district judge had determined that Bridges had helped run, recruit members for, and attended the meetings of the Communist Party. The judge concluded that Bridges was affiliated with the Communist Party and subject to deportation. Douglas disagreed, opining that one who cooperated with the Communist Party “only in its wholly lawful activities” cannot be said to be “affiliated with” it. Jackson asked:

What were government employees with little opportunity to probe to the bottom of Communist purposes and intents to assume from these declarations by a majority of the highest court in the land? I think they would be led only to the impression, first, that there was nothing about the Communist Party or its subsidiary front organizations that was inconsistent with good citizenship and attachment to the Constitution and that they would not be subject to criticism for joining it; secondly, that in any case even if they discovered or suspected some illegal activities they could go along and promote the organization as a whole if they personally abstained from the illegal actions. No one can estimate how many of the persons who have been involved in trouble over this loyalty order would have avoided the Communist organizations if this Court had not” struck down the government’s actions against Communists.

Under the encouragement of members of this Court, the situation built up until it has been disclosed that it was a menace to the security of the nation, and the present administration thought quick and drastic action necessary to overcome it. Now, from the same voice that contributed so much to bring about this emergency, they find themselves denounced as “totalitarians”—by one who never has been able to see totalitarianism in any Communist case before this Court.⁴⁹

Jackson, despite his strong disagreement with Douglas regarding the government's motives, concurred with Burton’s opinion, but provided a much more thoughtful explanation. Jackson denied that JAFRC or similar groups had standing to sue for defamation or invasion of privacy. The alleged disabilities the organizations suffered—lost donations and decreased membership—were caused by public

⁴⁸ Bridges v. Wixon, 326 U.S. 135. For explanation of Schneiderman, See Chapter 1, n. 32.

⁴⁹ Jackson Memorandum, April 12, 1951, Set 1, Reel 47, Felix Frankfurter Papers. It is not clear with whom, besides Frankfurter, Jackson shared this memo.

disapproval, not the Attorney General's list. The organizations were not exempt from public criticism or exposure, and were that JAFRC's only claim, Jackson would deny it.

But the government's real goal in compiling the list was to attack federal employees who belonged to the listed organizations. The federal employees were barred from challenging the Attorney General's designation of an organization as subversive.⁵⁰ Thus, while JAFRC did not have standing to sue based on invasion of privacy, it could assert the interests of its members in challenging the Attorney General's designations.

Jackson granted that the executive branch had full discretion to hire and fire whom it chose, but when it acted pursuant to an Executive Order, it must follow law. The Attorney General's list, by designating an organization as subversive, effectively labeled its federal employee members as subversive. Denying both an organization and an employee the right to contest the Attorney General's designation of the organization as subversive constituted a denial of due process.

Reed, in a dissent joined by Minton and Vinson, defended the Attorney General's action as a reasonable response to the dangers of subversion. That danger outweighed any due process concerns, for,

Due process requires appraisal in the light of conditions confronting the Executive during the continuation of the challenged action. Power lies in the Executive to guard the nation from espionage, subversion and sedition by examining into the loyalty of employees, and due process in such investigation depends upon the particular exercise of that power in particular conditions.⁵¹

Nor did Reed have any concerns about whether the Attorney General could properly identify subversive organizations, or at least Communist organizations:

⁵⁰ Loyalty Review Board Order, Memorandum #2, March 9, 1948.

⁵¹ JAFRC, 212.

Communism is well understood to mean a group seeking to overthrow by force and violence governments such as ours and to establish a new government based on public ownership and direction of productive property. Undoubtedly, there are reasonable grounds to conclude that accepted history teaches that revolution by force and violence to accomplish this end is a tenet of Communists. No more is necessary to justify an organization's designation as Communist.⁵²

Bailey and JAFRC are significant for several reasons. First, in Bailey, the Court's 4-4 decision left the Court of Appeals' decision in place. Consequently, the government's loyalty-security program went largely unchecked—but without the Supreme Court's seal of approval—until the end of the decade.

Second, the JAFRC opinions of Burton, Jackson, and especially Frankfurter, questioned the limits of executive power. Burton's opinion that the President had not authorized the Attorney General to act arbitrarily and Jackson's opinion regarding the need for due process highlighted the frustrations of those Justices who believed that the government must fight subversion but who denied that the scope of the danger gave the government *carte blanche* authority to adopt any statute or regulation it chose.

Frankfurter's opinion had a much more profound influence on administrative law and the Court's Communist case jurisprudence. Frankfurter, ordinarily deferential to the government's political branches, articulated a new level of procedural review: fundamental fairness. Unfortunately, Frankfurter's notion of fundamental fairness was extremely fluid and proved useless in providing constitutional guidance to the political branches. He reserved for judicial determination the question of whether the nation's anti-Communist mood justified a change of venue in Dennis, but upheld deportations, non-communist affidavits, and Communist conspiracy violations as the necessary, if distasteful, decisions of the political branches.

⁵² *Ibid.*, 195.

More important for purposes of this study, Frankfurter's opinion foreshadowed the Court's future practice of refusing to interpret statutes and orders as written and instead interpreting them in a manner that avoided constitutional questions. In JAFRC, Frankfurter sought to avoid a Due Process Clause violation by reading fairness into Executive Order 9835. Frankfurter further posited that fairness did not include arbitrary decision-making or secret hearings. Therefore, Executive Order 9835, read in a manner consistent with fairness, could not authorize the Attorney General to compile a list of subversive organizations without also providing them a hearing.

Were these valid assumptions? If President Truman wished to allow organizations the right to contest their designation as "subversive," presumably he would have included such a requirement in his order. Further, even if Executive Order 9835 did not contain such express language, Truman could have ordered his Department of Justice to grant hearings. That the executive branch did not grant hearings to allegedly subversive organizations indicates that it never intended to create such a right. Frankfurter certainly had good reason for seeking to avoid confrontation with the executive branch by declaring that the Attorney General's actions exceeded constitutional parameters. Sometimes, however, circumstances make such confrontations necessary.

JAFRC, perhaps more than any other Communist case, encapsulated the different philosophies of the justices. We have already discussed the opinions of the Court's three swing votes—Burton, Jackson, and Frankfurter. JAFRC is also valuable in highlighting the refusal of Black and Douglas to legitimize any aspect of the government's campaign against Communists. Black denied the executive branch ever had the authority to compile a list of subversive organizations. The anti-Communist programs were

stigmatizing, constituted a Bill of Attainder, and violated the First Amendment. Black would not vary from this line of thinking in any Communist case over the next seventeen years. Douglas, if not quite as absolutist in his interpretations as Black, still employed incendiary rhetoric: the Attorney General's actions were totalitarian, a list of subversive organizations constituted guilt by association, the government should concern itself only with those workers employed in security-related areas. Douglas, too, would never change his approach in Communist cases.

Vinson, Minton, and Reed matched the intransigence of their colleagues Black and Douglas. The Vinson block believed that the overriding importance of national security justified virtually any executive action and rendered due process a secondary consideration. They did not confine this deference—or obeisance—to Communist cases. Two years later, these three justices were Truman's only supporters in Youngstown Sheet & Tube.

GERENDE v. BOARD OF SUPERVISORS OF ELECTIONS

GARNER v. BOARD OF PUBLIC WORKS OF LOS ANGELES⁵³

The Court finally turned to state anti-subversion programs in Gerende v. Board of Supervisors of Elections of Baltimore and Garner v. Board of Public Works of Los Angeles. In Gerende, the Court reviewed Maryland's Ober Law, which required political candidates to deny, under oath, that they were subversive persons. The Court, in a not-so-subtle hint, urged Maryland to interpret the law to require a candidate to swear that he had neither attempted, nor knowingly belonged to an organization that attempted, the

⁵³ Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1951); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951).

violent overthrow of the government. Maryland agreed to that interpretation, and the Court sanctioned the oath.

Garner was a far more complex case than Gerende. In 1941, California amended the Los Angeles City Charter to bar from public office or employment any person who within the last five years advocated, or belonged to an organization that advocated, the violent overthrow of California or the United States. In 1948, Los Angeles enacted an ordinance requiring its officers and employees to swear an oath that since 1943 they had not, and while a public employee or officer, would not, advocate, or belong to an organization that advocated, the violent overthrow of the state or federal government. Employees and officers were also required to file an affidavit stating whether and when they had belonged to the Communist Party.

Clark, writing for the Court, upheld the constitutionality of both the oath and the affidavit. Clark affirmed the state's interest in collecting information regarding an employee's previous Communist Party membership, deeming it "relevant to their fitness and suitability for the public service. Past conduct may relate to present fitness; past loyalty may have a reasonable relationship to present and future trust."⁵⁴

Clark had more difficulty justifying the oath under the Fourteenth Amendment's Due Process Clause. The ordinance did not differentiate among "innocent" and "knowing" membership in subversive organizations. Clark did not want to punish the employee who joined, say, a patriotic organization during World War II that Communists

⁵⁴ Garner, 720. The Court also rejected two other challenges to the oath and affidavit. Neither constituted an Ex-Post Facto law, since the conduct and membership attested to in the oath and affidavit had been illegal since 1941. Nor did the affidavit constitute a Bill of Attainder, for that required legal punishment. The affidavit was not punishment, but a "general regulation which merely provides standards for qualifications and eligibility for employment." *Ibid.*, 722.

later infiltrated. Clark assumed—in effect mandated—that Los Angeles would accommodate the "innocent" member of a subversive organization. Said Clark:

We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or by the California courts as affecting adversely those persons who during their affiliations with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or another during the period covered by the ordinance were engaged in proscribed activity but not at the time's of the affiant's affiliation.⁵⁵

Garner proved to be an important case. By deeming Communist Party membership relevant to an employee's suitability for public service, the Court cleared the way for the states to purge their public ranks of Communists. Yet equally important was the implication of the decision: Public employees had some constitutionally protected interest in their positions.⁵⁶ Heretofore, the courts had generally considered public employment a privilege granted by the state. Clark implicitly rejected that notion, instead mandating an innocent/known distinction for public employees. A state that could prove an employee's knowing membership in a subversive organization could overcome this interest; a state that could not demonstrate that an employee was aware of the subversive nature of an organization could not overcome the employee's interest in his position.

⁵⁵ Ibid., 724.

⁵⁶ Frankfurter concurred in part and dissented in part. He upheld the constitutionality of the affidavit, conceding that such information may be relevant "in the context of our time." However, he rejected the Court's theory of "innocent" membership. Frankfurter argued that while the Courts would interpret criminal statutes to uphold them from constitutional attack, it could not do so with municipal employment ordinances. Thus, the oath requirement, as written, violated due process. Burton agreed on substantially similar grounds, but wrote a separate opinion. Black and Douglas deemed the ordinance a Bill of Attainder.

UNITED STATES v. DENNIS⁵⁷

In Douds, the Court decided that clear and present danger test was not applicable to legislation designed to regulate action that only indirectly infringed speech. In Dennis, the Court had to determine whether national security concerns permitted the direct regulation of speech. The Court, through three opinions, answered that question with an unequivocal yes.

Background

Congress passed the Smith Act in 1940. § 2(a)(1) of the Smith Act prohibited a person from knowingly or willfully advocating or teaching the duty, necessity or desirability of the violent overthrow of any government in the United States. § 2(a)(2) prohibited a person from printing, publishing, or circulating printed or written material that advocated the violent overthrow of any government in the United States. § 2(a)(3) prohibited a person from organizing, helping to organize, joining, or knowingly affiliating with, a group that teaches, advocates, or encourages the violent overthrow of any government in the United States. § 3 prohibited a person from attempting or conspiring to violate the Smith Act's prohibitions.

In the summer of 1948, the Truman Administration arrested twelve leaders of the Communist Party and charged them with conspiring to overthrow the government (Smith Act § 3). In a lengthy trial before Judge Harold Medina, the government sought to prove that the defendants conspired to teach and advocate the violent overthrow of the federal government. Relying on expert witnesses Louis Budenz (former editor of the Daily Worker) and Herbert Philbrick (of "I Led Three Lives" fame), the government sought to prove that Communist teachings from books such as The Communist Manifesto and

⁵⁷ United States v. Dennis, 341 U.S. 494 (1951).

Stalin's Foundations of Capitalism were tantamount to advocacy of the violent overthrow of the federal government. The government convicted all eleven Communist defendants.⁵⁸

The Smith Act defendants made two major arguments. First, the jury could convict them only if the prosecution proved the existence of a clear and present danger that the defendants' advocacy would lead to violent overthrow of the government. Because the government failed to prove the requisite danger, the Smith Act's restrictions constituted an unconstitutional infringement on speech. Second, the jury, and not the trial judge, was responsible for determining the existence of a clear and present danger. Medina asserted that the existence of a clear and present danger was a question of law, and thus reserved exclusively for the trial judge.

After making his assertion, Medina determined that a clear and present danger did exist. The Court of Appeals affirmed the convictions of the Communist defendants. The Supreme Court limited its grant of certiorari to whether § 2 and § 3 of the Smith Act, either inherently or as construed, violated the First or Fifth Amendments.

The members of the Court, after hearing arguments, wasted little time at conference discussing their respective positions. Said Douglas of these discussions:

The amazing thing about the conference in this important case was the brief nature of the discussion. Those wanting to affirm had minds closed to argument or persuasion. The conference discussion was largely pro forma. It was more amazing because of the drastic revision of the clear and present danger test which affirmance requires.⁵⁹

Vinson, in an opinion joined by Burton, Reed, and Minton, sustained the challenged provisions of the Smith Act. Congress, he said, had the power to protect the

⁵⁸ Steinberg, The Great "Red Menace." While the government arrested twelve Communists, one of them, William Z. Foster, had a separate trial.

⁵⁹ Newman, Hugo Black, 402.

government from violent overthrow, but did the means it employed conflict with the First and Fifth Amendments?

In Douds, the Court determined that the Taft-Hartley Act's affidavit provision only indirectly infringed speech. The Court therefore refused to employ the clear and present danger test. Vinson conceded that the Smith Act, by prohibiting certain teaching and advocacy, directly infringed speech, thereby necessitating the use of the clear and present danger test. However, in Douds, the Court also clarified that it could reinterpret the "traditional" clear and present danger test in national security cases. Expanding on that theme in Dennis, Vinson stated:

Neither Justice Holmes nor Justice Brandeis ever envisioned a shorthand phrase should be so crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case. Speech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction... To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straightjacket we must reply that all concepts are relative.⁶⁰

Given that qualification, how would Vinson employ clear and present danger test in this case? Vinson denied that the test required the danger to be imminent; the government need not "wait until the putsch is about to be executed." Nor was probability of success relevant, for even a doomed attempted overthrow could cause incalculable damage. Instead, Vinson explicitly adopted Judge Learned Hand's test: In each situation, the courts "must ask whether the gravity of the 'evil' discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid the danger."⁶¹

⁶⁰ Dennis, 508.

⁶¹ United States v. Dennis, 183 F.2d 201, 212 (1950). Hand wrote the Dennis opinion for the Court of Appeals.

Vinson affirmed Medina's finding that the requisite danger existed. It was irrelevant that the defendants had not yet attempted to overthrow the government; they were ready to make the attempt. Said Vinson:

The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.⁶²

Vinson also denied that the First Amendment required a jury, rather than the trial judge, to determine whether a clear and present danger existed. To Vinson, it was simple: The Constitution permitted the application of the Smith Act only when a clear and present danger existed, which was a question of law for the judge to decide.

Finally, Vinson denied that § 2 and § 3 were so vague as to violate the Fifth Amendment's Due Process Clause. The Smith Act's language was vague, and in the future, if doubt existed regarding a defendant's intention, or the nature of their allegedly subversive activities, the Court would intervene. Such was not the case in Dennis; the defendants knew that they were breaking the law by advocating the violent overthrow of government.

Vinson tried to get Frankfurter to join his opinion, thereby providing the critical fifth vote necessary for a Court opinion. Frankfurter rejected Vinson's entreaties, responding as follows:

Dear Chief:

You and I differ, I'm afraid considerably, in the importance we attach to generally to a court opinion for an agreed result. Long before I came here I reached the conviction that in the kind of questions—matters of constitutional and public

⁶² Dennis, 511.

law—which are the court’s primary concern, the manner of stating a result may be as important as the result itself.

We would not now be in what I believe to be a mess regarding ‘clear and present danger’ if there had not from time to time been acquiescence in expressions by those who really did not subscribe to them but acquiesced for what was deemed to be the desirability of having court opinions.⁶³

After rejecting Vinson's offer, Frankfurter produced a forty-four page concurrence in which he expressly rejected the clear and present danger test. He conceded that self-preservation was perhaps the government’s most important duty, but even that power was subject to constitutional limitation. Frankfurter asked: Did the demands of national security outweigh the infringement of First Amendment rights? To resolve this conflict, Frankfurter turned to his familiar judicial balancing test. He placed free speech on one side of his scale and Congress's interest in protecting national security on the other side of the scale. JAFRC concerned procedural due process protections; Dennis, in contrast, concerned substantive national security provisions, and Frankfurter was unwilling to upset Congress’s substantive powers to determine the national security interest:

History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures. Congress is primarily responsible for weighing the competing interest, and the Courts will set aside that judgment only if there is no reasonable basis, or violation of due process, or separation of powers problem.⁶⁴

Frankfurter, in reviewing the speech interests, noted that the First Amendment was not absolute; different types of speech had different values. For example, freedom of the press was more constitutionally valuable than was violent advocacy. With the Smith Act, Congress had determined that the danger created by advocacy of violent overthrow

⁶³ Felix Frankfurter to Frederick Vinson, Dec. 26, 1950, Set1, Reel 39, Felix Frankfurter Papers.

⁶⁴ Dennis, 517.

outweighed any restrictions on speech. The Court cannot overturn that judgment; its duty was to determine whether Congress had this power, not whether it was a sound judgment. Said Frankfurter: “Our duty is to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge’s private judgment is deemed unwise and even dangerous.”⁶⁵

Frankfurter concluded with a slap at Black: “There are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment instead of being words that have called into being a nation with a past to be preserved for the future...”⁶⁶

Jackson, although skeptical of the Smith Act prosecutions, believed that the Court could not allow the Bill of Rights to shelter America's enemies. If it did, the public would turn against any protections offered by the Bill of Rights. Indeed, he seemed to realize that if the courts were to keep the foes of democracy that he identified in his "Democracy under Fire" speech at bay, the judiciary could not become myopic in its defense of civil liberties. He set forth his thoughts on civil liberties in a revealing memo in his Dennis papers:

⁶⁵ Ibid., 522.

⁶⁶ Ibid., 521. Frankfurter taunted Reed for his decision to join Vinson’s opinion.

Which is it: A free speech case, and as such to be tested by the clear-and-present danger, or as Bob’s opinion argues, and you seem to agree, not a free speech case at all? It seems of profound importance to me to decide which it is. Just as the past talk of clear and present danger has built up difficulties which have now to be evaded and averted, so a new opinion regarding clear and present danger, adjusted to meet the circumstances of this case, will beget difficulties for cases having very different circumstances coming here in the future.

Felix Frankfurter to Stanley Reed, March 14, 1951, Set 1, Reel 39, Felix Frankfurter Papers.

If the people of this country become convinced that civil liberties are the weapons of their enemies, they will turn against civil liberties. If civil liberties threaten the destruction of our society, our society will react by destroying civil liberties.

We went through World War II with relatively little infraction of civil liberties, if we exclude the expulsion and relocation of the Japanese from the West Coast, which we held, quite erroneously I think, was not a violation of civil liberties. That case should teach us something. When society believes that freedoms endanger its existence, the freedoms are brought into danger.

The fear that if they had to fight an enemy on the outside they would be undermined by enemies within is what has caused the great wave of hysteria of which my brothers complain.

One of the frightening things about this feeling is that the chief weapon against us which the enemy can use is our own Bill of Rights. In the least alarming of the present trends is the fear that the Bill of Rights ties our hands in a struggle for survival. If by ill-considered interpretation we make the Bill of Rights a weapon or a shelter for enemies of society, society will become enemies of what it holds most sacred. If our enemy posts his snipers in the spire of our cathedral, we will bomb the house of worship. Maybe we should submit to being sniped at rather than do violence to the house of God, but that isn't the way God made us.

I regard the enemy of our Bill of Rights who really threatens its existence as the one who would interpret it beyond its meaning and require it to be a shelter for the enemies of our society. For the will to survive is a lot stronger than the will to protect civil liberties.⁶⁷

With that, Jackson, in concurrence, rejected the clear and present danger test for use against the Communist Party. While the test worked fine for use against Anarchists or the hotheaded street corner speaker, the Communist Party was altogether a different animal. It did not seize power immediately, but infiltrated a nation's government and social institutions before striking its mortal blow. For example, in Czechoslovakia, the Party infiltrated the police force, labor unions, and leading newspapers, forced the government to abdicate, and instituted a reign of terror.

⁶⁷ Robert Jackson memo, undated, Box 168, October 1950, Dennis v. United States, Robert Jackson Papers.

To apply the clear and present danger test to Communists, the Court would have to predict the effectiveness of Communist propaganda and the Party's ability to infiltrate the government. Said Jackson, "No doctrine can be sound whose application requires us to make a prophecy of this sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answer given would reflect our own political predilections and nothing more."⁶⁸ Further, when the Court finally realized the danger to the Republic, they could no longer act to stop it.

Jackson believed Dennis's legal issues very simple. The government charged and convicted the defendants of conspiracy, and the Court need limit its consideration to the question of conspiracy, rather than the clear and present danger test. The conspiracy itself was the crime, and Congress could punish conspiracy for an illegal purpose.⁶⁹

Black and Douglas each filed a dissent. Black deemed the Smith Act a prior restraint on speech and press, and a flagrant violation of the First Amendment. He concluded his short dissent with a vision of a more hopeful future:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later court will restore the first amendment liberties to the high preferred place where they belong in a free society.⁷⁰

Douglas argued that while the First Amendment did not protect some speech, such as teaching sabotage, Dennis did not concern such speech. The government

⁶⁸ Dennis, 570.

⁶⁹ Jackson asked: What about conspiring to do something legal? Congress could not outlaw a conspiracy for a constitutionally protected end, such as the adoption of communal property laws, "or any political philosophy unassociated with advocacy of its imposition by force or seizure of government by unlawful means could not be reached through conspiracy prosecution." But Congress can put down violence, or the advocacy of violence, "and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose." Ibid., 575.

⁷⁰ Ibid., 581.

convicted the defendants of conspiring to teach Marx and Lenin. Teaching these authors, according to the Court, was not illegal by itself; instead, the intent behind the teaching was dispositive. Said Douglas, "The crime then depends not on what is taught but on who the teacher is. That is to make freedom of speech turn not on what is said, but on the intent with which it is said."⁷¹

Douglas enunciated his version of the clear and present danger test: "When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt...[but] there must be some immediate injury to society that is likely if speech is allowed."⁷² Douglas could not find evidence of this danger; the Communist Party was politically weak, had failed miserably at the ballot box, and most Americans detested it.

Douglas added:

To believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible. It is safe to say that the followers of the creed of Soviet Communism are known to the FBI; that in case of war with Russia they will be picked up overnight as were all prospective saboteurs at the commencement of World War II; that the invisible army of petitioners is the best known, the most beset, and the least thriving of any fifth column in history. Only those held by fear and panic could think otherwise.⁷³

Dennis marked the effective end of the clear and present danger test in Communist cases. Vinson conceded that the freedom of speech was a conditional, not an absolute, right, one that Congress could infringe under some circumstances. Further, the threatened harm need only be "imminent"; the government need not wait for "the putsch is almost to be executed." Given this extreme latitude on the use of the clear and present

⁷¹ Ibid., 583.

⁷² Ibid., 585.

⁷³ Ibid., 589.

danger test, was it even a constitutional test? Or merely a post-hoc justification for upholding the government's prosecutions of Communist leaders?

Perhaps Vinson, after extolling the relevance of the clear and present danger test in Doubs, felt obligated to use it in Dennis. Regardless, Vinson was still trying to fit a square peg into a round hole. He would have been better off scrapping the clear and present danger test in this case and instead adopt Frankfurter's balancing test or Jackson's conspiracy rationale. Had Vinson rejected the use of the test, he might have convinced Jackson or Frankfurter to join him, and the Court could have issued a Dennis opinion.

The Jackson and Frankfurter opinions may have been insufficiently "judicial" for some, but those two were more realistic about the Court's inherent limitations than was Vinson. Jackson was correct in acknowledging that courts are not predictive bodies and are not equipped to determine when the danger to the Republic was, in fact, clear and present. Indeed, the timing of Dennis supports his point. The actions giving rise to the conspiracy charges occurred from 1945-1948. The trial began in January 1949 and the verdicts rendered in September 1949. The Supreme Court heard the Dennis arguments in December 1950 and decided the case in June 1951. Was the Republic in graver danger in, say, 1945-46 than in 1949? Was it in more danger after China fell and the Soviets exploded an atomic bomb? Should the Supreme Court have weighed the Korean conflict in determining whether a clear and present danger existed?

Douglas's dissent encapsulated everything that Jackson had warned about in his memorandum arguing that the use of civil liberties as a sword will destroy civil liberties as a shield. Indeed, Douglas's version of the clear and present danger test was even more unworkable than Vinson's test. Douglas's statement that "When conditions are so critical

that there will be no time to avoid the evil that speech threatens, it is time to call a halt..." when applied to national security is hardly a useful judicial test. When are conditions "so critical"? How can government, let alone the Courts, know when the danger has grown so great that additional speech will cause "evil"? Indeed, must government wait until "there will be no time to avoid" that evil? Douglas's test would seem to invite, if not create, the very danger the government would seek to avoid. Douglas, like Vinson, would have produced a more sound opinion by abandoning a constitutional test that did not fit world conditions of 1951.

While Dennis did little to satisfactorily explain the limits of the government's power to control subversive speech, it sustained some of the Smith Act's most important provisions and dispelled any doubt that the government could prosecute Communist Party members who conspired to advocate the overthrow of the United States government. Both the Justice Department and Communist Party members could adjust their behavior accordingly.⁷⁴

CONCLUSION

History chose the Vinson Court to confront the Red Scare, one of the most politically tumultuous eras of American History. The Vinson Court, in undertaking this challenge, could consult neither history nor a large body of case to law to guide it in its

⁷⁴ The Court had to confront the fallout from the Dennis trial in Sacher v. United States, 343 U.S. 1 (1952). At the trial's conclusion, Judge Medina, acting pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure, summarily adjudged the Dennis attorneys guilty of contempt. The Supreme Court upheld Medina's authority to adjudicate the contempt charge summarily. More important, Jackson, writing for the Court, rejected Sacher's argument that the contempt sentence would prevent Communists from getting adequate legal representation. Jackson stated:

[T]his Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the process of orderly trial, which is the supreme object of the lawyer's calling.

Sacher, 14. Black, Douglas, and Frankfurter each filed separate dissents. Clark did not participate.

decision-making process. Worse, it was plagued by extreme ideological divisions which made obtaining a majority difficult, and a consensus impossible.

Despite these limitations, the Vinson Court Communist case holdings during the 1949 and 1950 Terms were relatively clear. The Court sustained the government's ability to treat Communist defendants similar to other Americans, while still giving those defendants the right to prove juror bias. It expanded the scope of Fifth Amendment's protections, while prohibiting Communist witnesses from flaunting Congress's investigative powers. It sustained the government's right to prevent both Communist-led strikes (through the non-Communist affidavit) and conspiracy to advocate the violent overthrow of the United States Government.

The Court's factionalism prevented it from issuing opinions in two very important cases: Bailey and JAFRC. As a result, the Court did not examine what rights a federal government employee had in his or her job and could not explain whether the Attorney General could compile a list of subversive organizations.

Finally, the Court should have explained itself better in Garner. The Court, without stating as much, recognized a due process right to public employment. This led the Court to interpret California's oath requirement in a matter contrary to the clear language of the statute. The Court needed to clearly state whether a state employee had a constitutionally protected interest in his or her position, and why. If the Court answered that question in the positive, it should have sent the case back to the California Supreme Court for its interpretation of the oath.

CHAPTER THREE: 1951-52 TERMS

The Court, which had generally sided with the government in Communist cases in the 1949 and 1950 Terms, demonstrated a more militant anti-Communism during the 1951 and 1952 Terms. This occurred for two primary reasons. First, Justice Tom Clark participated in all of the Court's major Communist cases, giving the Vinson faction a crucial fourth vote. Vinson needed only one more vote—usually from Burton or Jackson—to guarantee a Court opinion.

Second, the Court began to review cases involving the government's power to deport, detain, or exclude Communist aliens. Unlike Dennis or Douds, where the Court weighed a subversive's First Amendment interests, the Court did not ascribe any weight to the aliens' constitutional rights. Indeed, the Court gave full constitutional sanction to the government's program to rid the nation of subversive foreigners.

If the Court was harsh toward alleged subversives in the 1951 and 1952 terms, at least its position—and legal reasoning—was very clear. In addition to giving the federal government near-absolute control over the detention, deportation, and exclusion decisions regarding subversive aliens, the Court upheld every major federal anti-Communist statute or procedure that it reviewed. A person might criticize the Court for the pro-government bias of its decisions, but could not criticize it for equivocating in the face of the harsh reality of the Red Scare.

The Court dodged an important constitutional decision in only one case during the 1951-52 Terms, when it refused to opine on the constitutionality of a state Communist registration statute. By avoiding the issue in the 1952 Term, the Vinson Court allowed the Warren Court to answer the question.

1951 TERM

The Court's Communist decisions took a decidedly pro-government tilt during the October 1951 Term. In Adler v. Board of Education of the City of New York, the Court expanded its Garner holding to allow the states to terminate suspected Communists employed in public education. In Harisiades v. Shaughnessy, the Court addressed Congress's immigration power, and in a strongly worded opinion by Jackson, seemed to remove any barrier to the deportation of Communists. While the Court prohibited lower courts from setting unreasonably high bail for Communists in Stack v. Boyle, it had no qualms allowing the government to hold Communist aliens without bail in Carlson v. Landon.

ADLER v. BOARD OF EDUCATION OF THE CITY OF NEW YORK¹

The Court addressed the constitutionality of teacher loyalty oaths in Adler v. Board of Education of the City of New York. The New York Civil Service Law prohibited any person who belonged to an organization that advocated the violent overthrow of the government from serving as a teacher, principal, or superintendent. The New York Education Law, better known as the Feinberg Law, required the New York State Board of Regents, after full notice and hearing, to prepare a list of subversive organizations. A school or university employee who belonged to a listed organization, cognizant of its illegal objectives, was presumed disqualified from employment. However, the employee could challenge that presumption in a hearing.

Minton, writing for the Court, granted that the First Amendment, incorporated by the Fourteenth, allowed teachers to “assemble, speak, and believe as they will.”² But if

¹ Adler v. Board of Education of the City of New York, 342 U.S. 485 (1952).

the teachers worked for the New York School system, they were subject to reasonable terms of employment. Garner had authorized state inquiries into an employee's membership in subversive organizations, finding them relevant to an employee's fitness and suitability for public service.³

Adler presented a similar situation, and according to Minton, the state may exercise its police power to "protect the schools from pollution and thereby defend its own existence" by purging its schools of subversives.⁴

Minton added,

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern...One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty . . .we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."⁵

Black, Frankfurter, and Douglas each filed dissents.⁶ Douglas's dissent is particularly revealing:

The law inevitably turns the school system into a spying project. Regular loyalty reports on the teachers must be made out. The principals become detectives; the students, the parents, the community become informers. Ears are cocked for tell-tale signs of disloyalty...What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous

² Ibid., 492.

³ The New York Schools were also required to remove any person who advocated the violent overthrow of the government. Minton had no trouble sustaining this provision of the statute under Gitlow. Ibid., 493.

⁴ Ibid.

⁵ Ibid. Minton also dismissed the teachers' due process challenge to the Feinberg Law, concluding that the presumption of disqualification was reasonable, and the state, by offering a hearing, had provided adequate procedural protections.

⁶ Black contended the Feinberg Law violated the First Amendment, applicable to the states through the Fourteenth Amendment. He also joined Douglas's dissent. Frankfurter dissented on grounds of ripeness. Because none of the respondents had been subject to a hearing, they had no standing in the federal courts.

thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment...A “party line”—as dangerous as the “party line” of the Communists—lays hold. It is the “party line” of the orthodox view, of the conventional thought, of the accepted approach.

Of course the school systems of the country need not become cells for Communist activities; and the classrooms need not become forums for propagandizing the Marxist creed. But the guilt of the teacher should turn on overt acts. So long as she is a law-abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.⁷

Douglas’s dissent is instructive for two reasons. The first is the ideological prism through which Douglas viewed America’s schools during the McCarthy Era. In his view, the schools had assumed a Nazi-like climate of fear, where each child and parent was a potential informant. Yet his opinion does not reference a single example of his vision coming to fruition in the United States. Nor does he cite a single court case to support his opinion. His dissent was not really a legal opinion, but a diatribe against the dark, bleak world Douglas believed America had become.

Second, the New York law required procedural safeguards that went far beyond those provided by the federal government. Each organization was given notice and hearing before it was listed as subversive; each employee could challenge the state’s presumption of disqualification from employment; and the state was required to prove that an employee knew of the organization’s subversive purposes. The Feinberg Law simply did not paint the innocent and the guilty with the same broad brush.

Yet to Douglas, even a Communist Party member, fully aware of the Communist Party’s subversive objectives, was beyond the government’s reach. That Communist Party member had not committed an overt act, and terminating a person because of his

⁷ Ibid., 511.

beliefs or associations was the first step toward an Orwellian nightmare. More important to Douglas, it was simply un-American.

HARISIADES v. SHAUGHNESSY⁸

The Court decided its first Communist deportation case in Harisiades v. Shaughnessy. In 1920, Congress authorized the deportation of aliens who joined organizations that advocated the violent overthrow of the United States Government. But what of the alien who joined and later quit such an organization? In 1938, then-Solicitor General Robert Jackson argued in Kessler v. Strecker that Congress had authorized the deportation of aliens who joined a subversive organization any time after entering the United States.⁹ The Court disagreed, holding that Congress had authorized deportation only for aliens presently affiliated with a subversive organization. The Communist Party, responding to Kessler, sought to immunize its foreign-born members from deportation by nominally "expelling" them from its membership roles. Congress followed by enacting the Alien Registration Act of 1940 (ARA), which authorized the deportation of aliens who belonged to a subversive organization at any time during or after their entry into the United States.

Peter Harisiades, a Greek citizen, entered the United States in 1916 and joined the Communist Party (then the Workers Party) in 1925. He served as a party organizer, newspaper editor, and secretary of its Greek section before his post-Kessler expulsion in 1938. The Immigration Bureau had issued a warrant for Harisiades' deportation in 1930, but by using aliases, he avoided service of process until 1946. Harisiades, at his deportation hearing, admitted that he was familiar with, and still adhered to, the

⁸ Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

⁹ Kessler v. Strecker, 307 U.S. 22 (1939).

Communist Party's principles. The hearing officer ordered him deported pursuant to the ARA.

Harisiades alleged that his deportation violated the Fifth Amendment's Due Process Clause.¹⁰ Jackson, for the Court, displayed little sympathy for that argument. Harisiades had only himself to blame. He could have attained American citizenship upon his pledge of loyalty to the United States; instead, he maintained his Greek citizenship for more than three decades after arriving in the United States. By maintaining foreign citizenship, Harisiades voluntarily subjected himself to the vicissitudes of Congressional immigration policy.

Second, the nation's immigration policy was vital to foreign relations, the war power, and the maintenance of Republican government. Said Jackson, "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."¹¹

Third, Jackson put Harisiades' alleged suffering in perspective; the Due Process Clause did not stop American citizens from conscription and the "consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard for finding justification for holding the constitution requires that its hardships must be spared the Communist alien."¹²

¹⁰ Jackson also dismissed Harisades' First Amendment challenge, holding the issue settled by Dennis.

¹¹ Harisiades, 588-89. Jackson added, "[S]uch is the traditional power of the nation over the alien and we leave the law on the subject as we find it. *Ibid.*, 588.

¹² *Ibid.*, 591.

Jackson also rejected Harisiades' plea to read an "atonement" or "redemption" procedure into the ARA. Congress might have considered allowing aliens who joined, but later quit, the Communist Party to stay in the country. However, after Kessler, Congress could not discern which aliens quit the Communist Party because they rejected Communism, and which quit to avoid deportation. Rather than assume the burden of distinguishing between the different types of ex-Communist aliens, Congress chose to deport them all, and the Jackson would not overrule that judgment.

Finally, Harisiades contended that his deportation violated the Constitution's Ex-Post Facto Clause. Specifically, he argued that Congress could not pass a law—in this case, the ARA—that imposed punishment for past conduct. Jackson disagreed; the Court had construed the Ex-Post Facto Clause to apply only when the government imposed criminal punishment. Jackson admitted that both of those assumptions were debatable, but accepted the court's holdings in those cases.

Frankfurter, in a revealing memo to Jackson, tried to get him to tone down his opinion:

I have now got around to the deportation cases and entirely agree with your views. I very much want to join your opinion. I can now accept 95.7% of it; I am glad to join it because it is admirably executed. The 4.3% at which I balk I might call, I hope without offense, a rhetorical spree. Ah, there's the rub! All of us at times feel more attached to our rhetoric than to our law. But you have lots more where that came from. The appeal I am about to make to you will, I am convinced, add to the impact of your opinion without needlessly adding to the McCarthy-McCarran-McCormick-McArthur excitation of public feeling.

[W]e ought if possible to radiate examples of a self-contained, calm, and austere attitude toward the anxious situation confronting the country. Strong men do not have to indulge in rhetoric except when they want to whip up feeling. I hope I am second to none in indifference to the consequences of whatever decision is compelled within the frame of choice of adjudications. But just as we shouldn't write for the groundlings we should avoid writing what good sense tells us will be exploited for our ends not within our desire and outside our duty to promote.

This brings me to the 4.3% of what I do not want to float. A bit of blue can color a whole tub of water; a bit of anti-Communist harangue is the stuff that will be put to uses far from your own wisdom of action by people who have none of your scrupulosity.

I may be wrong, but I have a feeling that these gratuitous bits of rhetoric were employed as anticipatory replication to the flapdoodle that is likely to be said in dissent. [Frankfurter was referring to the bombastic rhetoric of Black and Douglas]. It is because I think that a rigorously restricted, yes austere, treatment of the narrow constitutional questions and a complete disregard of the other fellow's flapdoodle will increase the weight and persuasiveness of what you have written, that I urge you to eliminate the rhetorical patches to which I have called attention, saving the kernel of judicial relevance by the kind of pithy sentence or two that you can so well fashion.¹³

The memo captures many of Frankfurter's most noted qualities and offers a view on his philosophy regarding the role of the Court. In it, he demonstrates his arrogance, condescension, his mistrust of anti-Communist public figures, and his hostility toward Black and Douglas and their bombastic dissents. Most important, Frankfurter elucidates his vision for the ideal Communist case Court opinion: one with a very narrow holding that is utterly devoid of rhetoric. Frankfurter sometimes ignored that philosophy and other times followed it to extremes.

Jackson rejected Frankfurter's suggested changes, leading the latter to write a short concurrence. Frankfurter, ignoring his advice to Jackson, criticized the harshness of Congress's deportation policy, saying that it may "offend American traditions." But Frankfurter conceded that immigration policy was a political question belonging to the political branches and beyond the competence of the judiciary. Frankfurter, breaking with his JAFRC concurrence, refused to read fundamental fairness into immigration laws.

¹³ Felix Frankfurter to Robert Jackson, February 27, 1951, Box 72, Harisiades v. Shaughnessy, Robert Jackson Papers.

Douglas, joined in dissent by Black, agreed with Jackson that precedent supported Congress's authority to deport aliens, but dismissed those cases as "inconsistent with America's philosophy of law." Instead, Douglas would grant the alien full due process protections, including life, liberty, and property; and "If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity."¹⁴

In response to Jackson's ex-post facto interpretation of punishment, Douglas equated deportation, which he termed "banishment," with punishment:

Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worthwhile. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.¹⁵

Harisiades could not have been clearer: the Court would not second-guess—or set aside—the government's immigration policy, regardless of its alleged harsh effects on aliens. Harisiades also represented a change by Jackson. In Dennis and Douds, Jackson refused to join the Vinson faction's opinions. In Harisiades, Jackson not only joined the Vinson faction, but also employed their anti-Communist rhetoric. Further, the Korean War shaped Jackson's opinion. The War should not have made a difference to Harisiades' rights in a deportation cases, but Jackson's rejection of Harisiades' due process argument further demonstrated that the Court did not operate in a political vacuum.

¹⁴ Harisiades, 599.

¹⁵ *Ibid.*, 600. Douglas would also have read an "atonement" requirement into the law, holding the "principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who once erred." *Ibid.*, 601.

STACK v. BOYLE

CARLSON v. LANDON¹⁶

The Vinson Court examined the question of bail in two cases, Stack v. Boyle and Carlson v. Landon. Stack concerned twelve California Communist Party members indicted for conspiring to violate the Smith Act. The judge initially set bail in sums ranging from \$2500 to \$100,000 for the defendants. After the government sought to increase bail for some of the defendants, the judge set bail at \$50,000 for all of them. The defendants sued, alleging that \$50,000 bail violated the Eighth Amendment's excessive bail clause. The Justice Department, in response, asserted that four of the Dennis defendants had fled bail; because the California Communists were tools of the same Communist conspiracy, they, too, might flee bail. The judge agreed with the Justice Department.

Vinson rejected this approach, which would "inject into our system of government the very principles of totalitarianism which Congress was seeking to guard against" in passing the Smith Act. The judge could set high bail only upon evidence demonstrating that these defendants were a flight risk; further, he could not infer such qualities from the defendant's Communist Party membership.¹⁷

The Court did not reach the same conclusion in Carlson v. Landon. In 1949, four Communist aliens, all active Communist Party members, were arrested and released on bail pursuant to the Immigration Act of 1918.¹⁸ In 1950, Congress passed the Subversive

¹⁶ Stack v. Boyle, 342 U.S. 1 (1951); Carlson v. Landon, 342 U.S. 524 (1952).

¹⁷ Stack, 6. The Court did not reach the Eighth Amendment issue, holding that the trial judge had not followed the proper bail determination requirements in the Federal Rules of Procedure.

¹⁸ The Immigration Act of 1918 prohibited an alien from belonging to an organization that believed in the violent overthrow of the government. The SACA declared the Communist Party to be such an

Activities Control Act (SACA). SACA § 22 deemed Communist aliens a threat to the United States and authorized their deportation, while § 23 granted the Attorney General the discretionary authority to detain Communist aliens without bail, pending their deportation hearing. Armed with these new powers, the Attorney General ordered the four Communists re-arrested and held without bail.

Reed, for a 5-4 Court, held § 23 consistent with the Fifth Amendment's Due Process Clause.¹⁹ Because deportation constituted neither a criminal proceeding nor legal punishment, the aliens were not entitled to full due process rights. Further, as established by Harisiades, Congress possessed the constitutional power to control immigration, including deportation. Reed extended that constitutional power to include the detention of aliens, which he deemed incidental to the deportation process. Certainly, Reed argued, Congress could authorize the Attorney General to hold an alien without bail if he believed the alien constituted a flight risk.

However, the Justice Department never argued that the four aliens constituted a flight risk, so Reed had to justify their detention on other grounds. According to Reed, the detention of the aliens was incidental to the deportation power—not to aid the actual deportation, but to stop the aliens from engaging in the harmful activities that Congress, in passing the SACA, sought to prevent. Congress could authorize the detention of dangerous Communist aliens to prevent them from inflicting the harm that justified their deportation in the first place. Reed concluded that if the government reasonably feared

organization, thereby eliminating the government's need to prove the Party's subversive nature at each hearing.

¹⁹ Reed also rejected an Eighth Amendment challenge to §23.

that the Communist aliens would spread propaganda, then their pre-hearing detention did not violate the Due Process Clause.

Reed interpreted § 23 as a limited grant of discretion to the Attorney General. Congress could not impute dangerous motives to all aliens awaiting deportation, so it granted the Attorney General the discretion to determine which aliens constituted a threat. The federal courts would not overturn this decision unless the Attorney General clearly abused his discretion. In this case, the Attorney General did not abuse his discretion; the detainees were “active” Communist Party members, exactly the type that Congress wanted detained.

Black dissented on several grounds, but focused his attack on the “special danger” the Court imputed to Communists.²⁰ The deportation power did not justify the detention of aliens whom the government deemed dangerous. More important, the government would not stop with alien Communists. “The stark fact is that if Congress can authorize imprisonment of ‘alien Communists’ because they are dangerous, it can authorize imprisonment of citizen ‘Communists’ on the same ground.”²¹

Black also attacked the detentions on First Amendment grounds: The Court justified the detentions as a check on the spread of Communist propaganda, but Black would extend the right to spread such propaganda to Communist aliens:

My belief is that we must have freedom of speech, press, and religion for all or we may eventually have it for none. I further believe that the First Amendment grants an absolute right to believe in any government system, discuss all governmental affairs, and argue for desired changes in the existing order.²²

²⁰ Douglas and Burton also filed dissents.

²¹ Carlson, 552.

²² Ibid, 555.

Frankfurter dissented on statutory grounds. Congress granted the Attorney General the discretion to deny bail to certain Communists. In Frankfurter's view, the Attorney General had not exercised that discretion, but instead had denied bail to all “active” Communists, contrary to Congress’s intent. Frankfurter tried desperately to get Jackson to join his dissent, and stop Reed from gaining the crucial fifth vote. In a memo to Jackson, Frankfurter argued:

The opportunity for the unhampered preparation of a defense is quite as important to the alien arrested for deportation as it is to the Smith Act defendant. We can reach a different conclusion here than we did in Stack v. Boyle only if Congress gave substantially less right to bail to persons arrested under the deportation laws than to others arrested under the Smith Act. The language used by Congress is consistent only with the traditional concept of bail.

In Smith Act cases the danger was that the defendant will flee the jurisdiction has been emphasized as relevant to the bail question. On the facts of the present cases there affirmatively appears good assurance that the aliens will remain on hand for all proceedings against them. However, in deportation proceedings the consideration that the individuals concerned may skip the country is minimized in importance, first, because compulsory departure from the United States is just what they are contesting, and secondly, if they do skip, the very purpose of the deportation proceedings is realized.²³

After Jackson declined to join Frankfurter’s offer—Jackson contended that the power to deport included the power to detain, and that the Court should review the Attorney General's decision only to determine to make certain it is “reasonably incident to the exercise of the deportation power”—Frankfurter tried again:²⁴

If there is one thing that is clear about the McCarran Act it is that Congress precludes denial of prospective Communist deportee solely because he is a Communist. It would be sheer willfulness to contend otherwise.

²³ Felix Frankfurter to Robert Jackson, January 16, 1952, Box 172, Carlson v. Landon, Robert Jackson Papers.

²⁴ Robert Jackson to Felix Frankfurter, February 21, 1952, Box 172, Carlson v. Landon, Robert Jackson Papers.

The point of my opinion is to establish that the treatment of these bail cases by the Attorney General in fact—that is, as disclosed by the record—amounts to a general rule that no potential Communist deportee shall be admitted to bail.

I think I have a right to ask you to take the necessary time to read what I have written de novo, without impatience. I do this not because I give a damn about these aliens even though I, though perhaps not you, might reflect: ‘there but for the something or other go I.’ [Frankfurter was an atheist.] No, it isn’t that at all. It is because the Rule of Law seems to me more and more under threat and more and more in need of the aseptic, unsentimental guardianship of those whose peculiar and privileged position is to guard it.”²⁵

Jackson replied:

You reach my mind but you do not change it. I cannot see the justification for the assumption that the Attorney General believes he has no discretion and must regard all Communist deportees as unbailable.

Certainly there is nothing in the record which expressly takes this position. It was denied in argument. At the request of the Court, details were furnished which [indicate] that detention without bond has been the exception. All that you have to the contrary, it seems to me, is an assumption to the contrary based on these cases. I do not think that is broad enough base for holding that the Attorney General is not using his discretion and certainly not unless we say that in the facts of these cases he had no reason other than his assumption for denying them.

I do not like the provisions we are applying, but I do not think your escape from applying it is a sound one.²⁶

Jackson was alluding to one of Frankfurter’s flaws: While he generally deferred to the political branches in political matters, and rarely challenged their constitutional authority to enact substantive constitutional provisions, he did not hesitate to use legislative interpretation to achieve a constitutional result. By citing the example of these four Communist aliens, Frankfurter tried to impute a general violation of the legislative will. It is clear why Jackson would have none of it.

²⁵ Felix Frankfurter to Robert Jackson, February 23, 1952, Box 172, Carlson v. Landon, Robert Jackson Papers.

²⁶ Robert Jackson to Felix Frankfurter, February 25, 1952, Box 172, Carlson v. Landon, Robert Jackson Papers.

1952 TERM

Several important changes on and off the Court marked the 1952 Term. The nation elected Dwight David Eisenhower President; the Republicans, having pilloried the Truman Administration for being soft on Communism, all but stopped such attacks against the executive branch. America's great nemesis, Joseph Stalin, died in March 1953. With Stalin gone, relations between the world's two superpowers began to thaw.

The Court considered several important non-Communist cases in the 1952 Term, Vinson's last. It heard the arguments in Brown v. Board of Education, but held the case over for re-argument until the 1953 Term. More important for purposes of this paper, it decided United States v. Rumely, a case that profoundly influenced the Warren Court's Communist case jurisprudence.²⁷ Rumely concerned a First Amendment challenge to a congressional committee's investigation powers. In an opinion by Frankfurter, the Court avoided determining whether Congress's investigation powers superseded an individual's First Amendment rights. Instead, it claimed that Congress had not authorized the committee to investigate in an area that might raise serious First Amendment questions. It was not obvious at the time, but Frankfurter's decision would go from a principle to a fetish, allowing the Warren Court to derail much of the government's anti-Communist programs without ever having to declare them unconstitutional.

In Youngstown Sheet and Tube, the Court marked an end of an era. The United Steel Workers announced that it would strike on April 9, 1952. In response, Truman, citing danger to the national defense, issued an Executive Order directing the Secretary of Commerce to seize and operate the mills. The Court ruled the seizures illegal, claiming that the President did not have the inherent power to seize the mills in the name of

²⁷ United States v. Rumely, 345 U.S. 41 (1953).

national security; that power could derive only from an act of Congress or the Constitution itself.

For the first time in its modern history, the Court rejected the President's claim of power to act in the interests of national security. As with Rumely, the effects of Youngstown were not immediately obvious. But over the next several terms, the Court began to reject national security as a sufficient justification for the government's anti-Communist programs.

Returning to the Court's Communist cases, the Court upheld the federal government, but not necessarily the states, during the 1952 Term. In Shaughnessy v. Mezei, the Court sustained the government's power to exclude Communist aliens, even if the exclusion resulted in permanent detention. It refused to release a suspected Communist physician from his military obligations in Orloff v. Willoughby. The Court refused to opine on the constitutionality of state anti-Communist legislation in Albertson v. Millard. In Wieman v. Updegraff, the Court, building on Garner, explicitly mandated that states treat innocent Communist Party membership different from knowing membership. Finally, in a special June 1953 Term, the Court refused to halt the execution of the Rosenbergs.²⁸

²⁸ Other Communist cases the Court decided in the 1952 Term included Bridges v. United States, in which a 4-3 Court dismissed an indictment of Longshoreman's Union (ILWU) President Harry Bridges. In 1949, the government indicted Bridges under the Immigration and Nationality Act of 1940, alleging that he falsely denied Communist Party membership during his 1945 naturalization hearing. The Court found a 3-year statute of limitations to apply to the alleged offense and dismissed the indictment as untimely. Bridges v. United States, 346 U.S. 209 (1953).

In In Re Isserman, the Court continued to battle the after-effects of the Dennis trial. Judge Medina had cited Attorney Abraham J. Isserman for contempt, which prompted New Jersey to disbar him. U.S. Supreme Court Rule 2(5) required the Supreme Court to disbar an attorney who had been disbarred by a state, unless he could show good cause to the contrary. The Court divided 4-4 on the question, resulting in his disbarment. In Re Isserman, 345 U.S. 286 (1953).

SHAUGHNESSY v. MEZEI²⁹

Shaughnessy v. Mezei forced the Court to reconcile legal theory with the real world of immigration law. The record indicated that Ignatz Mezei was born in Gibraltar to Rumanian parents and lawfully resided in Buffalo, New York from 1923 to 1948.³⁰ That year, Mezei began an unauthorized journey to Rumania, ostensibly to visit his dying mother. He never made it; turned away at Rumania, Mezei remained in Hungary for nineteen months. The U.S. Consulate in Budapest, believing him to be a British subject, granted Mezei a quota immigration visa. Unfortunately for Mezei, American immigration officials, considering him a possible security risk, denied him entry to the United States pursuant to the Passport Act of 1918. Mezei stayed at Ellis Island, pending the Attorney General's full review of his case.

The Passport Act of 1918 authorized the Attorney General to exclude aliens from the United States if he deemed their entry was prejudicial to America's national interest. That Act also authorized him to consult confidential information in determining whether to grant an excluded alien a hearing. After reviewing confidential information, the Attorney General, acting pursuant to the Passport Act, ordered Mezei permanently excluded.

No other nation would take Mezei. Twice he boarded a ship for Europe, only to be refused permission to land. Several other nations also refused his request for entry. He remained on Ellis Island, unable to enter—or exit—the United States.

After twenty-one months on Ellis Island, Mezei filed a habeas corpus petition in federal district court. The judge agreed that the government could exclude Mezei from

²⁹ Shaughnessy v. Mezei, 345 U.S. 206 (1953).

³⁰ The record the Court reviewed proved inaccurate. See pp. 105-106.

the United States, but it could not detain him further without proof of his danger to public. The judge ordered Mezei paroled after the government refused the judge's offer to review the secret evidence *in camera*.³¹

Clark, for a 5-4 Court, reversed the lower court. The government was excluding, not imprisoning, Mezei, and neither his stay on Ellis Island nor his twenty-five years in Buffalo made it less of an exclusion. Once Clark deemed Mezei's stay on Ellis Island an exclusion, the result was foreordained; in Knauff v. Shaughnessy, decided three years earlier, the Court had reaffirmed the Government's absolute power to exclude aliens from the United States.³² The Court deemed these exclusions to be political decisions, beyond the scope of judicial review. Further, because the Passport Act made the Attorney General's decisions final and conclusive, the Court could not compel him to disclose the confidential information upon which he based his decision.

Clark concluded:

That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored. But, the times being what they are, Congress may have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs. Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the Congressional will and courts cannot substitute their judgment for the legislative mandate.³³

Black, joined by Douglas in dissent, defined Mezei's confinement as imprisonment; more specifically, as "arbitrary one-man imprisonment." Due process required that the government present all of the evidence used to justify Mezei's imprisonment in court, subject to judicial review.

³¹ The Court of Appeals affirmed in a 2-1 decision.

³² Knauff v. Shaughnessy, 338 U.S. 537 (1950).

³³ Mezei, 216.

Jackson, in a dissent joined by Frankfurter, demonstrated how his liberalism differed from that of Black and Douglas. Jackson's law clerk, William Rehnquist, urged Jackson to accept the government's position that Mezei's stay on Ellis Island did not constitute imprisonment; Mezei, according to Rehnquist, was "perfectly free to get on the first outbound boat that comes along."³⁴ Jackson rejected the future Chief Justice's advice.

The government, Jackson conceded, had a strong legal case. Confinement was an ancillary part of the exclusion process, and the Attorney General had unreviewable discretion to exclude aliens. But that legal determination led to an "artificial and unreal conclusion." Jackson would consider the case closed if the government could ship Mezei to another country, but no other nation would take him. His temporary confinement had obviously become permanent, resulting in a deprivation of Mezei's liberty. Was that deprivation sufficient to establish a Due Process Clause violation?

Mezei's detention did not violate substantive due process, which required a high degree of deference to the political branches regarding what is "a reasonable policy under conditions at particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion."³⁵

Procedural due process, in contrast, was both less flexible and less malleable to changing times and circumstances. The judiciary, in interpreting it, did not owe the same degree of deference to the political branches as in matters of substantive law. Further,

³⁴ William Rehnquist to Robert Jackson, "Reflections on *Shaughnessy v. Mezei*," undated, Box 181, *Shaughnessy v. Mezei*, Robert Jackson Papers.

³⁵ *Mezei*, 222.

severe substantive laws required strong procedural due process. Said Jackson, “[O]ne might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.”³⁶

While Jackson agreed that aliens should have fewer substantive rights than citizens have, both should have the same procedural protections. This required due process, including the right to know charges, confront an accuser, and cross-examine witnesses. Jackson added, “Quite unconsciously, I am sure, the government’s theory of custody for ‘safekeeping’ without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the ‘protective custody’ of the Nazis more than any detaining procedure known to common law.”³⁷ Unfortunately for Jackson, he could not convince a majority of the Court to agree with him.

Mezei’s story did not end with the Court’s decision. His plight—the story of a man without a country—attracted national attention, leading the Department of Justice to conduct a hearing in 1954. A Board of Special Inquiry determined that Mezei had falsely denied his conviction for a crime of moral turpitude (petty larceny); falsely claimed that he had been born in Gibraltar, in order to procure a quota visa; held membership in the Communist Party from 1925 to 1934; and expressed a belief in Communism as late as 1948.³⁸

³⁶ Ibid., 224.

³⁷ Ibid., 225.

³⁸ Alfred P. O’Hara to Robert Jackson, Correspondence, (including a copy of Findings of Fact & Conclusions of Law, Board of Special Inquiry, Department of Justice), May 27, 1954, Box 180, *Shaughnessy v. Mezei*, Robert Jackson Papers.

Clark undoubtedly felt vindicated by the revelations. Jackson undoubtedly wondered why the government would want to keep such damning evidence secret. The issue was moot, for the Justice Department released Mezei from Ellis Island and allowed him to return to Buffalo in 1954.

The Court, with Mezei, reaffirmed that Congress had given the Attorney General absolute authority to exclude allegedly subversive aliens from the United States. If that exclusion resulted in de facto imprisonment, then so be it. The excluded or imprisoned alien would have to petition the political branches, not the Courts, to grant humanitarian exceptions to these harsh policies.

ALBERTSON v. MILLARD³⁹

The Court avoided addressing the constitutionality of state anti-Communist statutes in Albertson v. Millard. In 1952, Michigan Governor G. Mennen William signed the Michigan Communist Control Act (also known as the Trucks Act) which required Communists, the Communist Party, and Communist front organizations to register with the state. The Act also prohibited the Communist Party or Communist front organizations from appearing on any election ballot in the state. William Albertson, the Michigan Communist Party's Executive Secretary, challenged the statute as unconstitutionally vague.

The Court, citing ripeness concerns, refused to interpret the statute as written; instead, it would wait until the Michigan Courts had an opportunity to interpret it.⁴⁰

³⁹ Albertson v. Millard, 345 U.S. 242 (1953).

⁴⁰ Black and Douglas each dissented. Douglas found the statute's definitions sufficiently clear to indicate that it applied to the Communist Party and Albertson. In 1956, the Michigan Supreme Court, relying on Pennsylvania v. Nelson (see Chapter Five) held the Trucks Act unconstitutional. Albertson v. Attorney General, 345 Mich. 519, 77 NW 2d 104 (1956).

While this gesture may have been consistent with the principles of federalism, it would prove to be a lost opportunity for the anti-Communist wing of the Court. Three years later, the Warren Court would gut state anti-subversion laws in Pennsylvania v. Nelson.

ORLOFF v. WILLOUGHBY⁴¹

Must the U.S. Army commission a suspected Communist? If not, must the Army release that suspected Communist from duty? The Court confronted these questions in Orloff v. Willoughby. Stanley Orloff, a psychiatrist, was drafted for military service during the Korean War pursuant to the Universal Military Training and Service Act. That statute authorized the military to conscript physicians, many of whom were past draft age, for service as commissioned officers in the medical services. The United States Army refused to commission Orloff after he invoked his Fifth Amendment right against self-incrimination in response to the Army's question regarding his Communist Party membership.⁴² The Army denied him a commission and assigned him—as a private—to duty as a medical laboratory technician. Orloff sued for habeas corpus relief, contending that the Army must commission him as a physician or release him from military service.

Jackson, for a 6-3 Court, divided his opinion in two parts. He first asked: “Could this Court, whatever power it might have in the matter, rationally hold that the President must, or even ought to, issue a commission to one who will not answer whether he is a member of the Communist Party?”⁴³

⁴¹ Orloff v. Willoughby, 345 U.S. 83 (1953).

⁴² Orloff admitted belonging to the Civil Rights Congress and the National Council of American-Soviet Friendship, both of which the Attorney General had listed as subversive.

⁴³ Orloff, 91.

The statute obligated the Army to commission Orloff as a physician, but that appointment was contingent upon his answers to certain question. The President, as Commander-in-Chief, was not obligated to commission a person who refused to deny Communist Party membership. Orloff, while protected by the Fifth Amendment from having to answer the Army's questions regarding his Communist affiliations, could not also expect it to commission him under those circumstances.

Jackson also rejected Orloff's demand for habeas relief, which required him to show that the Army was detaining him unlawfully. Once the Army had lawfully inducted Orloff, habeas relief was unavailable, and the Court could not order him commissioned or discharged.

Jackson, as he had done in Harisiades, compared Orloff's plight with that of an American sent to Korea:

Orloff was ordered sent to the Far East Command, where the United States in now engaged in conflict. By reason of these proceedings, he has remained in the United States...Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place.⁴⁴

When the Roosevelt Administration sought the Court's seal of approval for its Japanese-American internment policies during World War II, Jackson refused to succumb to patriotic fervor. Instead, he defied Roosevelt—Jackson's great patron—in a national security case by filing a dissent in Korematsu. Thus, when Jackson minimized the plight of both Harisiades and Orloff by comparing their situation with that of the American soldier, he was not blindly supporting the President during wartime. Instead,

⁴⁴ Ibid., 94. Black and Frankfurter each filed dissents, and Douglas joined both. In response to Frankfurter's assertion that legislative history seemed to indicate that Congress intended that the military commission or discharge all drafted physicians, Jackson replied: "This would be a great situation—any Communist can simply refuse to state as to loyalty, and completely avoid the draft while the loyal doctors serve." Robert Jackson, written comments, undated, written on Frankfurter memo to conference, February 4, 1953, Box 183, Orloff v. Willoughby, Robert Jackson Papers.

Jackson demonstrated that the Court had to keep its decisions in perspective. The alleged injustice—as Black and Douglas would characterize it—that the government imposed upon Harisades or Orloff was insignificant compared to burdens the government imposed upon those forced to fight in Korea. Perhaps these references were not germane to the legal issues before the Court, but they reminded the political branches—and the American public—that the Court did not exist in a political vacuum.

In Orloff, the Court acknowledged that it simply could not second-guess the U.S. Army's decisions regarding its personnel decisions:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests with Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.⁴⁵

Jackson's opinion assured the United States Army that it was responsible for determining the rank and assignment of its members. Further, it demonstrated judicial deference to the customs and procedures of the military, a part of the government that the Court was ill-equipped to supervise. The Warren Court would not prove so deferential to the government.

WIEMAN v. UPDEGRAFF⁴⁶

Through the 1952 Term, the Vinson Court acquiesced to state anti-Communist programs. For example, to sustain the oath requirement in Garner from a Fourteenth

⁴⁵ Orloff 93-94.

⁴⁶ Wieman v. Updegraff, 344 U.S. 183 (1952).

Amendment Due Process Clause challenge, the Court implicitly mandated that the states differentiate between knowing and innocent membership in subversive organizations. In Wieman v. Updegraff, the Court made that mandate explicit.

Oklahoma required its employees to file an oath denying membership (within the last five years) in any organization designated by the United States Attorney General as subversive. The Oklahoma Supreme Court, in interpreting the oath, ignored Garner and refused to impose a scienter requirement.

Clark, in an opinion joined by Vinson, Reed, and Minton, deemed the law to violate the Fourteenth Amendment's Due Process Clause. The Government may confront the Communist threat, said Clark,

but it must do so without infringing the freedoms that are the ultimate values of all democratic living. In the adoption of such means as it believes effective, the legislature is therefore confronted with the problem of balancing its interest in national security with the often conflicting constitutional rights of the individual.⁴⁷

Did the Due Process Clause allow states to exclude persons from public employment on the sole basis of membership in a subversive organization, regardless of scienter? Garner, Adler, and Gerende provided an answer to that question. All three cases involved the state imposition of disabilities on Communists—whether via public employment or ballot access—and in all three cases the Court imposed a scienter requirement. The Oklahoma Supreme Court ignored those cases and lumped "innocent" Communist Party membership with "knowing" Communist Party membership, which Clark deemed arbitrary and offensive to the Due Process Clause.

Clark did not elaborate on exactly how Oklahoma deprived anyone of due process of law, but focused on the potential reputational damage a dismissal caused. Said Clark,

⁴⁷ Ibid., 188.

“In the view of the community, the stain [of being labeled a subversive] is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when ‘each man begins to eye his neighbor as a possible enemy.’”⁴⁸

With Wieman, the Court clarified that the states had to treat "innocent" membership different from "knowing" membership in the Communist Party. The states were free to purge their ranks of subversive employees, but could not equate "innocent" membership in a subversive organization with subversion itself.

While the holding of Wieman was reasonably clear, Clark's rationale was not. Clark premised his holding on the "stain" or "badge of infamy" concept. The state, in dismissing an employee as a subversive, affixed a subversive label to that employee. Clark agreed that a state could deem an employee who embraced the Communist Party's agenda as subversive but did not want the state labeling an employee who had unknowingly joined a Communist-front group as subversive.

Perhaps the Court was justified in Gardner and Adler in avoiding a lengthy discussion of employee rights. It was not justified in avoiding such a discussion in Wieman. To prevail in a Fourteenth Amendment Due Process Clause challenge, a party must establish the deprivation of life, liberty, or property without due process of law. By simply assuming that a state employee had a right to a job (presumably the property of which the state deprived him), rather than explaining why a state employee had a right to that job, the Court put the government on the defensive; it was the government, and not the employee, that had to justify its actions. The Warren Court would use Clark's

⁴⁸ Ibid., 191, citing Learned Hand. Jackson did not hear the argument or participate in the decision; Burton concurred; Black concurred and wrote an opinion; Frankfurter, joined by Douglas, concurred, asserting that the oath endangered academic freedom.

Wieman opinion—and his "badge of infamy" comment—to justify the dismantling of the government's anti-Communist programs.

ROSENBERG v. UNITED STATES⁴⁹

The Vinson Court's final case, Rosenberg v United States, proved to be its most contentious. The details of the Rosenberg case are beyond the scope of this study. However, some discussion is necessary, for the case demonstrate the bitterness that existed among some of the justices.

Julius and Ethel Rosenberg were sentenced to death for conspiring to violate the Espionage Act of 1917. Throughout the 1952 Term, the Court denied several appeals and petitions for rehearing, usually by a vote of 8-1. Surprisingly, Douglas joined the majority in denying the petitions for review, leaving Black as the sole dissenter. Frankfurter agreed that the Court should grant review, but opposed filing dissents in appeal denials, and he joined the majority once it became clear that it would deny the appeal.

In April 1953, the Court considered a new appeal, this one alleging prejudicial conduct by the prosecution. The vote was again 8-1, but Frankfurter asked for additional time to determine whether he would write a dissent. He agonized over the decision for a month; Jackson agreed to join his dissent if it was limited to discussing the misconduct of the prosecuting attorney. However, on May 20, Frankfurter decided against dissenting, resulting in another probable 8-1 vote to deny.

Or so it seemed. Three days before the Court planned to issue the denial, Douglas circulated a memo containing his planned dissent: "Mr. Douglas, agreeing with the Court of Appeals that some of the conduct of the United States Attorney was 'wholly

⁴⁹ Rosenberg v. United States, 346 U.S. 273 (1953).

reprehensible' but believing, in disagreement with the Court of Appeals, that it probably prejudiced the defendant seriously, votes to grant certiorari.”⁵⁰

Frankfurter and Jackson assumed that this was a cynical ploy, a way for Douglas to curry favor with civil libertarians without actually having to hear the case. Moreover, the denial would lead to an execution, one in which a Supreme Court Justice had alerted the world that the Rosenbergs had not received a fair trial. Jackson called Douglas's memo “the dirtiest, most shameful, most cynical performance that I think I have ever heard of in matters pertaining to law.”⁵¹

To thwart Douglas, Jackson agreed to vote to grant certiorari. When joined by Frankfurter, Jackson's vote would provide the required fourth vote for a certiorari petition and deprive Douglas of his “costless” dissent. Douglas withdrew his memorandum (but not his vote for certiorari), and Jackson reverted to his initial position of denying certiorari. Jackson, walking out of the conference chambers, said to Frankfurter: “That S.O.B.'s bluff was called.”⁵²

The Court broke for the summer on June 15, after rejecting another motion by the Rosenberg's for a stay of execution. On June 16, Douglas denied another motion for a stay of execution.⁵³ Later that day, attorneys for an Irving Edelman—who was not a party to the case—applied to Douglas for a stay of execution.⁵⁴ Edelman argued that the

⁵⁰ Murphy, Wild Bill, 317

⁵¹ Ibid.

⁵² Simon, Independent Journey, 304.

⁵³ During the summer, when the Court is not in session, litigants can appeal to individual justices to grant stays and other procedural motions.

⁵⁴ The attorneys, Fike Farmer and Daniel Marshall, also sought habeas corpus relief.

government should have brought its prosecution under the Atomic Energy Act of 1946 (“AEA”), which had more stringent death penalty hurdles, instead of the Espionage Act.

The next day, Douglas granted the stay until the lower courts could determine whether the government should have prosecuted the case under the AEA.⁵⁵ Douglas then left Washington, D.C. for his cabin in Washington State. The execution, scheduled for June 19, would now be delayed at least until the Court reconvened in the fall.

Attorney General Herbert Brownell, after consulting with Vinson, petitioned the Court to convene a special term and vacate the stay. Vinson scheduled oral arguments for the morning of June 18, 1953. The next day, in an unprecedented action, the Court vacated Douglas’s stay. The Rosenbergs were executed on the evening of June 19, 1953.⁵⁶

CONCLUSION

The substance of the Rosenberg decision was less important than its symbolism. Seven years earlier, President Truman appointed Vinson to unite a divided Court. If history is to use that objective as its guide, Vinson’s tenure was a failure.

The Court may have stopped, or at least decreased, its public battles, but was still bitterly divided ideologically. Vinson, Reed, and Minton, often joined by Clark, seemed to approve every aspect of the government’s anti-Communist program. Jackson, while sympathetic to the substance of the government's anti-Communist programs, viewed the

⁵⁵ St. Clair & Gugin, Vinson, 250. Douglas sought the advice of Vinson and Frankfurter before granting the stay.

⁵⁶In a Per Curiam opinion, issued after the execution, the Court held that whether the AEA repealed portions of the Espionage Act was not a substantial question. Further, it held that the AEA did not repeal the Espionage Act. With that, the Court vacated Douglas’s stay. Clark and Jackson wrote concurring opinions, while Frankfurter, Black, and Douglas dissented. Rosenberg v. United States, 346 U.S. 273 (1953).

Vinson wing as the Government's rubber stamp. Black and Douglas seemed to view the government as the villain, and the alleged Communist, the victim. Frankfurter seemed appalled by the simplistic approaches by both the Vinson and Black-Douglas factions and, even when he did agree with them, disdained the practice of joining a majority opinion. Only Harold Burton could claim to be unpredictable.

Despite these deep divisions, the Vinson Court did a descent job of delineating the constitutional powers of the government in executing its campaign against subversion. In Douds, it upheld the non-Communist oath provisions of the Taft Hartley Act; in Dennis, it upheld the prosecution of Communist Party leaders. In Mezei, it upheld the government's power to exclude aliens, while in Harisiades, it upheld the government's near-absolute power to determine immigration policy.

Undoubtedly, the Vinson Court resolved ambiguity in favor of the government. In Carlson, the Court deferred to the Attorney General's determination that particular aliens posed a threat to the government. In Orloff, it refused to order the government to commission an alleged subversive, and prevented him from evading military service. In Bryan and Fleischman, the Court indicated that it would not allow witnesses to flaunt the authority of Congress by employing a hyper-technical reading of laws relating to Congressional testimony.

Many historians have derided the Vinson Court for ignoring civil liberties and succumbing to hysteria.⁵⁷ While the Vinson Court tended to defer to the government, it

⁵⁷ "The most important factor in enabling and consolidating the [anti-Communist] purge, the great cleansing of American working life, was the performance of the Supreme Court under Chief Justice Fred Vinson. This was the Truman Court, a compliant instrument of administrative persecution and Congressional inquisition." Caute, The Great Fear, 144. The Supreme Court was "slow to rise to [the Constitution's] defense..." Belknap, Cold War Political Justice, 282; See also Sabin, In Calmer Times, 81-82.

did exercise a considerable degree of independence from the political branches and stood willing to check the excesses of anti-Communist zeal. In Morford, it upheld the right of a Communist defendant to prove juror bias. In Blau, it expanded the reach of the Fifth Amendment's Self-Incrimination Clause. In Stack, it stopped the lower courts from setting unreasonably high bail for Communist defendants. In JAFRC, it limited the government's practice of designating organizations as subversive without a hearing. In Gerende, Garner, Adler, and Wieman, the Court narrowed the reach of state anti-Communist oaths. Finally, the latter three cases implicitly extended due process protections to state government employees.

Given the tenor of the times, the division within the Court, and, most important, the utter lack of precedent upon which to rely, the Vinson Court did reasonably well in performing its duty to interpret the Constitution. Previous Courts had never had to watch as much of the free world fell to the Communist menace. They had rarely had to balance national security concerns with individual liberties in wartime, let alone peacetime. This lack of constitutional and historical foundation may have led the Court to promulgate awkward constitutional rationales, such as a twisted clear and present danger test in Dennis. However, even with these considerable constraints, the Court gave the government and alleged subversives clarity in Communist cases.

Unfortunately, this clarity would not survive Vinson's death. Youngstown Sheet & Tube marked a new era of judicial activism, one in which the Court stopped deferring to the political branches of government and began reserving for itself the right to review government policies and statutes. This shift, combined with the influence of Rumely, led the Court to articulate an incoherent judicial interpretation of Communist cases.

CHAPTER FOUR: 1953-1955 TERMS

Although it was not obvious at the time, the Red Scare had peaked by the 1953 Term. The Korean War, which had cost the lives of more than 50,000 Americans, ended shortly before the Term began. The War's strain on the Court, so evident in Jackson's Harisiades and Orloff opinions, abated, as did the sense of urgency to fight the Communist menace on the domestic front. Before the 1953 Term ended, America watched Senator Joseph McCarthy begin his self-destruction in his televised hearings with the Army. The fear of Communism was still a major force in American political life, but the sense of impending doom, which characterized the late 1940's and early 1950's, was gone.

While Communism would slowly begin to fade as a political issue, race emerged as *the* issue of the 1950's. Warren, in announcing the Court's Brown v. Board of Education decision, ushered in arguably the most profound social change of the Twentieth Century.¹ Communism and race appeared to be distinct legal issues, but converged at times during the Warren Court.

Eisenhower appointed California Governor Earl Warren to replace Vinson as Chief Justice in September 1953. This radically altered the Supreme Court's direction, especially in Communist cases. The change was not immediate; in fact, Warren generally joined the anti-Communist wing in his first year on the Court. It was not until the 1954 Term that several factors combined to shift the Court's approach to Communist cases. First, Warren and Clark abandoned the Court's anti-Communist faction, and began

¹ Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

aligning themselves with Felix Frankfurter. Second, anti-Communist stalwart Robert Jackson died, replaced by Eisenhower with the moderate John Marshall Harlan.

More important, the Court stopped addressing the major constitutional issues raised in Communist cases, and instead began deciding them on questionable, at times frivolous, non-constitutional grounds. For example, the Court's 1954 Communist case opinions—Quinn, Emspak, and Peters—did not directly challenge the government's power to conduct its anti-subversion campaign. Instead, the Court adopted Frankfurter's Rumely method for handling Communist cases: imply that the government had overstepped its constitutional authority, but decide the case on non-constitutional grounds.

The Court continued to employ this approach through the 1955 Term, with some changes. First, Warren began to distance himself from the lofty, neutral-sounding rhetoric of Frankfurter and began to employ the civil libertarian rhetoric of Black and Douglas. Second, Clark ended his temporary dalliance with Warren and became the Court's leading anti-Communist.

The Court's approach to Communist cases in the 1954 and 1955 terms began an era of constitutional neglect. If a majority of the Court believed that the government's anti-Communist programs violated the Constitution, it was obligated to express those opinions. Perhaps a wholesale repudiation of the government's anti-Communist programs was impossible in 1949 or 1950. However, by 1955 and 1956, the public's fear of domestic Communism had subsided, thereby relieving the Court of any excuse to fulfill its constitutional duties.

THE APPOINTMENT OF EARL WARREN

The man President Eisenhower chose to replace Chief Justice Vinson appeared well suited to continue the Vinson Court's anti-Communist tilt. California Governor Earl Warren was born in 1891, graduated from the University of California Law School, and was elected Alameda County Prosecuting attorney in 1926. Warren, as prosecutor, displayed hostility to un-American ideas. For example, he ordered a thorough examination of the political affiliations of potential assistant prosecutors to prevent radicals from joining his staff.² Warren also employed an investigator to collect information on the German-American Bund and the Communist Party, and shared that information with other government agencies.³

Warren continued his anti-radical practices after his election as California Attorney General in 1938. As a member of the California Committee on Judicial Qualifications, Warren torpedoed University of California Professor Max Radin's nomination to the California Supreme Court. According to a committee member's notes, Warren argued that Radin constantly gave aid and comfort to Communists and other radicals.⁴ Yet Attorney General Warren did not limit his ire to Communist and fascists; he advocated the internment of Japanese-Americans, a political stand that helped elect him Governor in 1942.⁵

Governor Warren backed away from his former anti-Communist positions during the University of California loyalty oath controversy of 1949 and 1950. Warren opposed

² Ed Cray, Chief Justice: A Biography of Earl Warren (New York: Simon & Schuster, 1997), 58.

³ Ibid., 66.

⁴ G. Edward White, Earl Warren: A Public Life (New York: Oxford University Press, 1982), 58-67.

⁵ Warren was re-elected in 1946 and 1950, and was the Republican Party's candidate for Vice-President in 1948.

the University of California Board of Regents' plan to require faculty members to sign an oath disavowing Communism. Instead, Warren proposed that faculty members sign an oath to support and defend the United States and California Constitutions—the same oath signed by state civil servants.

The two sides finally reached a compromise: The Regents would drop the formal oath, instead inserting the oath's language into the faculty contracts. But the outbreak of the Korean War changed the public mood. A month before the 1950 Gubernatorial election, Warren proposed the adoption of the so-called Levering Oath. That oath required all state employees, including faculty members, to swear that they would not advocate nor belong to an organization that advocates the violent overthrow of the United States Government.⁶ Even with a more liberal attitude toward Communists, Warren was still politically expedient.

In late November 1952, President-elect Eisenhower called Warren—who had helped him secure the GOP nomination—and offered him the first vacancy on the Supreme Court. But no vacancy appeared imminent and Warren privately agreed to accept the position of Solicitor General in August 1953. That scenario was upset on September 8, 1953, when Chief Justice Vinson succumbed to a heart attack.

Warren thought the Chief Justice's seat his; Eisenhower did not believe his offer to extend to the office of Chief Justice, but whom else would he appoint? The undistinguished Harold Burton was the only Republican then on the bench. John Foster Dulles had no desire to relinquish his position as Secretary of State. The 1953 Term was set to begin in a matter of weeks. Eisenhower, believing that he had no choice,

⁶ Cray, Chief Justice, 204.

announced Warren's appointment on September 30, 1953, days before the new term began.⁷

It is difficult to describe Warren's judicial approach. Warren was not committed to a firm ideology in his first years on the Court, and both Frankfurter and Black attempted to win him to their camp. Even after Warren joined the civil libertarian faction, his views were not always consistent. For example, he abandoned his civil libertarian positions in areas such as pornography and the burning of draft cards. Perhaps the best description of Warren's ideology comes from Professor G. Edward White, who said Warren

conceived of the Constitution as an embodiment of values that he believed in and as a basis for granting him, as a judge, power to protect those values. Warren repeatedly emphasized that he had a "duty" under the Constitution to see that his understanding of its imperatives was implemented, and he saw the Constitution's imperatives as ethical imperatives. The ethical imperatives that Warren read in the Constitution were so clear to him, and his duty to implement them so apparent, that matters of doctrinal interpretation were not simple and matters of institutional power became nearly irrelevant. If a branch of government had engaged in or tolerated a practice that Warren found inconsistent with his conception of American citizenship under the Constitution, the power of that branch was thereby undermined. Warren's conception of constitutional values overwhelmed institutional values in his decision making calculus.⁸

Warren's judicial record supports White's assessment. Precedent, constitutional textual analysis, and the danger of deciding political questions mattered less to Warren than his particular set of values, his idea of fairness, and his certainty that the Constitution—as interpreted by the Court—was the paramount law of the land. Even his experiences as California Attorney General and Governor seemed to make little difference in his judicial decisions. For example, in Reynolds v. Sims, the Court decreed

⁷ The Senate confirmed Warren by a voice vote on March 1, 1954. Bernard Schwartz, Super Chief: Earl Warren & His Supreme Court—A Judicial Biography (New York: New York University Press, 1983), 22.

⁸ White, Earl Warren, 218

that state legislative districts containing unequal population violated the Fourteenth Amendment.⁹ Said Warren, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."¹⁰ Yet Warren, as Governor of California, had rejected the idea "of restricting the representation in the [state] senate to a strictly population basis" for "the same reason that the Founding Fathers of our country gave balanced representation to the states of the union—equal representation in one house and proportionate representation based on population in the other."¹¹

Warren laughed when discussing his old position with his law clerk: "You know, I never really thought very much about it then. As a political matter it seemed to me to be a sensible arrangement. But now, as a constitutional matter, with the point of view of the responsibilities of a Justice, I kind of got to look at it differently."¹²

In Communist cases, Warren would show a similar disregard for the realities of the political branches. He would lecture Congress regarding its investigative committee practices, decree that a Court opinion sustaining governmental deportation practices violated "the American spirit of fair play," and ignore Congress's decision to exclude Communist Party members from defense facilities.

Yet even if Warren often based his opinions on his set of values rather than rigorous legal reasoning, his importance as a leader on the Court cannot be overemphasized. While he may have discarded the political perspectives he had as

⁹ Reynolds v. Sims, 377 U.S. 533 (1964)

¹⁰ Schwartz, Super Chief, 562

¹¹ *Ibid.*, 503-504 quoting U.S. News & World Report, July 6, 1964, 34.

¹² Schwartz, Super Chief, 504

Governor of California when he joined the Court, he did not discard the art of persuasion. Warren demonstrated his leadership ability and consensus-building skills in Brown v. Board of Education. The Court first heard the case in December 1952, and only five justices—Frankfurter, Minton, Burton, Black, and Douglas—seemed ready to support an opinion that would hold segregation *per se* unconstitutional. The other four justices—Vinson, Jackson, Reed, and Clark—refused to join such an opinion. Frankfurter was able to get the case held over to the next term for reargument, by which time Warren had replaced Vinson as chief justice.

The parties reargued Brown on December 7-9, 1953, and the Court met in conference on December 12 to discuss the case. Warren's goal was to secure a unanimous opinion. Segregationists would point to a dissenting opinion to claim that the constitutionality of separate but equal was an open question upon which even the Court divided. Said Bernard Schwartz, "Until then [the December 12 conference], his Brethren had found a bluff, convivial colleague, who disarmed them with his friendliness and lack of pretension. Now they were to learn that he was a born leader, whose political talents were to prove as useful in the Judicial Palace as they had been in the State House."¹³

To secure a unanimous decision, Warren began by taking the virtually unprecedented step of suggesting that the justices discuss the various constitutional issues raised by the case without taking any votes, thereby prevented polarization among the justices.¹⁴ Warren's techniques worked. By replacing Vinson, Warren had already eliminated one of the dissenting votes. Now, after the December 12 conference, Clark

¹³ Ibid., 84.

¹⁴ Frankfurter said that Brown was the only case he can recall where the justices delayed a vote after argument for further study. Ibid., 85.

and Jackson indicated that they would be willing to join, or at least concur with, an opinion striking down "separate but equal" in public schools.

That still left Reed. Warren tried several different approaches to get Reed's vote. For example, he often lunched with Reed, Minton, and Burton, knowing that the latter two justices were Reed's closest colleagues and would emphasize the potentially disastrous effects of a dissent. Finally, in spring 1954, as Reed clung to his plan to write a pro-segregation dissent, Warren said to him, "Stan, you're all by yourself in this now. You've got to decide whether it's really the best thing for the country." Reed agreed to join Warren and provide him his unanimous opinion.¹⁵

By the later 1950's, Warren and Frankfurter became bitter adversaries, and Warren would have much more difficulty in getting unanimous consent in cases. Yet even after his rift with Frankfurter, Warren could still count on the Court's other civil libertarians to support him in Communist cases.

Warren served on the Court until 1969 and died in 1974.

1953 TERM

The Court decided only two major Communist cases during the 1953 Term, both of which favored the government.¹⁶ In Barsky v. New York Board of Regents, it affirmed New York's decision to suspend the license of a physician convicted of contempt for refusing to testify before HUAC. In Galvan v. Press, it upheld the constitutionality of the Subversive Activities Control Act's deportation provisions and

¹⁵ Ibid., 75-96.

¹⁶ In Sacher v. New York Bar Association, the Court reviewed the permanent disbarment of Harry Sacher, whom Judge Medina held in contempt by Judge Medina at the conclusion of the Dennis trial. Shortly after Medina's ruling, the U.S. District Court for the Southern District of New York (SDNY) permanently disbarred Sacher. The Supreme Court reversed, calling permanent disbarment "unnecessarily severe." Clark did not participate and Reed dissented. Sacher v. New York Bar Association, 347 U.S. 388 (1954).

dispensed with any need to prove that an alien actually knew of the Communist Party's violent objectives. Warren joined the majority in both cases.

BARSKY v. NEW YORK BOARD OF REGENTS¹⁷

The Warren Court's first major Communist case was Barsky v. New York Board of Regents. Dr. Edward K. Barsky, National Chairman of the JAFRC, was convicted of contempt of Congress for refusing to testify and produce records in response to a HUAC subpoena. The judge sentenced to six months in jail and fined him \$500.

The New York Board of Education, acting pursuant to § 6514 of the New York Education Law, sought the suspension of Barsky's license. § 6514 allowed the Department of Education, after notice and hearing, to impose discipline, including the suspension or revocation of a license, upon any physician convicted of a crime in any court.

Barsky began a long series of hearings before several panels. The Department of Education's Medical Committee on Grievances recommended a six-month suspension of his license; The New York Regent's Committee on Discipline recommended only a reprimand. The New York Board of Regents overturned the latter committee's decision and reinstated the former committee's recommended six-month suspension. The New York Court of Appeals affirmed the Regents' decision and the U.S. Supreme Court granted certiorari.

Burton, for the Court, examined whether § 6514 was a valid licensing statute. Did it bear a reasonable relation to the regulation of a legitimate state interest? Burton made the following analysis: a state, acting pursuant to its police power, had the authority to regulate the health, safety, and welfare of its citizens. New York exercised that power

¹⁷ Barsky v. Board of Regents, 347 U.S. 422 (1954).

when it enacted laws and regulations governing the practice of medicine. New York had an interest not merely in the practice of medicine, but also in the integrity of those licensed to practice it. In assessing a physician's integrity, the state need not limit its review to crimes of moral turpitude, but may consider all criminal convictions. Further, New York had suspended Barsky's license only after providing a hearing to determine the circumstances surrounding his conviction. Burton believed that the state had demonstrated a legitimate interest and had not violated due process.¹⁸

Black, Douglas, and Frankfurter each filed dissents. Douglas believed the state suspended Barsky's license because he held unpopular beliefs and was active in the JAFRC, not because of his criminal conviction. Said Douglas:

If, for the same reason [for a contempt conviction], New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of his due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession.¹⁹

Black excused Barsky's recalcitrance before HUAC, noting that his attorney had advised him to ignore the subpoena. Barsky was simply trying to preserve JAFRC's rights, and "[t]he right to test the constitutional power of a Committee is itself a constitutionally protected right in this country."²⁰

¹⁸ Barsky attacked his suspension on several grounds before Court. He challenged New York's Education Law as unconstitutionally vague, a challenge that the Court dismissed. Barsky also contended that because contempt was not a crime under New York law, it could not be a crime within the meaning of the New York Education Law. The Court, accepting New York's interpretation of its own law, disagreed.

¹⁹ Barsky, 473.

²⁰ *Ibid.*, 459. Black cited 2 cases for this proposition—Ex Parte Young, 209 U.S. 123 (1908) and Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920). Both cases concerned situations where a regulated entity was prohibited from challenging the rates set by a commission. The Supreme Court opined that because rates, if set at a certain level, would themselves be illegal, a party was authorized right to challenge them. Neither case seemed to support Black's argument.

Further, New York had violated Barsky's due process rights by allowing him to be tried by an agency "vested with intermingled legislative-executive-judicial powers so broad and so devoid of legislative standards...in effect an agency with arbitrary power to decide, conceivably on the basis of suspicion, whether physicians will lose their license."²¹ That this so-called trial occurred with one indisputable fact in evidence—Barsky's contempt conviction—was irrelevant to Black, for Barsky's "crime" was a political, not a criminal, offense.

GALVAN v. PRESS²²

Harisiades sustained the government's authority under the Alien Registration Act (ARA) to deport aliens who, at any time during or after their entry into the United States, belonged to an organization that advocated the violent overthrow of the United States government. The ARA required the government to prove the Communist Party's violent nature in each deportation case. The Subversive Activities Control Act (SACA) dispensed with the need to prove the Communist Party's violent nature in each deportation case.

Robert Galvan, a Mexican alien, entered the United States in 1918. He belonged to the Communist Party from 1944 to 1946, but, at a hearing, claimed ignorance of its violent purposes. The government sought Galvan's deportation, which he challenged on both constitutional and statutory grounds.

Galvan argued that "member," as used in the SACA, applied only to those who joined the Communist Party fully conscious of, and committed to, its advocacy of

²¹ Barsky, 459.

²² Galvan v. Press, 347 U.S. 522 (1954).

violence. Frankfurter, for a 7-2 Court, did not agree.²³ Other SACA provisions required that the United States deport or exclude an alien who joined a Communist front group, unless he established that he neither knew, nor had reason to know, of the organization's political orientation. The SACA did not make such an exception for Communist Party members. Frankfurter concluded that Congress had obviously considered the possibility of the innocent alien, and chose not to apply it to Communist Party members.

Frankfurter next addresses SACA § 22's constitutionality. Did SACA's specific designation of Communist Party members violate due process? Frankfurter thought not, for Congress had made the designation only after it had made detailed findings that the Party used deceit and treachery to establish a totalitarian dictatorship.

Frankfurter rather gratuitously added that he wanted to say that the Due Process Clause prohibited the deportation of aliens ignorant of the Communist Party's purpose. Aliens, as persons, had the same due process protections of life, liberty, and property as citizens. The SACA's prohibition against an alien demonstrating his ignorance of the Communist Party's teachings seemed incongruous with due process. Said Frankfurter: "If due process bars Congress from enactments that shock the sense of fair play—which is the essence of due process—one is entitled to ask whether it is not beyond the power of Congress to deport an alien who was duped into joining the Communist Party"

²³ Black and Douglas each filed dissents. Douglas contended that Galvan was being deported not "for what he presently is, but for what he once was." Aliens who "live in peace cannot be molested by the government in times of peace unless they present a threat to safety." *Ibid.*, 534. Black complained that Galvan believed that the CPUSA was a legal party when he joined it, on the ballot in Galvan's native California. Wrote Black in his dissent: "I am unwilling to say....that this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal." *Ibid.*, 536.

particularly when the conduct antedated the enactment of the SACA.²⁴ Frankfurter added:

In light of the expansion of the concept of substantive due process as a limitation upon the powers of Congress, even the war power...much could be said for this view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress is regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to the punishment of crime, it might fairly be said also that the ex-post facto clause, even though applicable only to punitive legislation, should be applicable to deportation.²⁵

Yet Frankfurter reluctantly acknowledged that the slate was not clean. Precedent dictated that deportation be treated as a political issue, belonging solely to the legislative and executive branches. Moreover, “Whatever might have been said about ex-post facto, it has been an unbroken rule of this court that it has no application to deportation.”²⁶

Frankfurter’s Galvan opinion was curious. He was famous for admonishing his colleagues to tone down their rhetoric and address only relevant legal issues. Yet, in Galvan, Frankfurter—with the Court’s backing—did the opposite. He intimated that Congress’s actions were unfair and violated the spirit of due process. Consistent with his JAFRC opinion, he appeared to warn Congress that if it enacted harsh deportation statutes, the Court would reserve the right to interpret them in a humane manner.

Yet it is not clear what Frankfurter, or the Court, accomplished by these warnings. If Frankfurter believed the Constitution permitted the government to deport aliens without first demonstrating that the alien was, in fact, aware of the Party’s nefarious purposes, or that deportation constituted legal punishment, then he should have said so in

²⁴ Ibid., 530.

²⁵ Ibid., 531.

²⁶ Ibid.

a short, succinct opinion. After all, in Harisiades, Frankfurter admonished Jackson, telling him that "[W]e ought if possible to radiate examples of a self-contained, calm, and austere attitude toward the anxious situation confronting the country." Frankfurter ignored his own advice; by casting grave doubts on the justice and humanity of the deportation policy, and by implying that, but for precedent, he would deem Galvan's deportation a violation of the Due Process Clause, he engaged in an unnecessary rhetorical spree. Indeed, if he believed that precedent was inconsistent with the clear meaning of the due process clause, or that the ex-post facto clause applied to deportation, then Galvan was his opportunity to make that declaration.

Conclusion

Warren's decision to join the majority in the 1953 Term's two major Communist cases indicated that he might sympathize with the government's anti-Communist programs. While Warren did not mimic Vinson's rhetoric, he certainly did not show any inclination to join Douglas or Black in Communist cases. Looks can be deceiving; during the next term, Warren abandoned his anti-Communist Barsky and Galvan positions and began moving toward the Court's civil libertarian faction.

1954 TERM

Justice Robert Jackson died on October 9, 1954. Jackson, an anti-Communist stalwart, was also the Court's best legal craftsman. His death not only deprived the Court of perhaps its greatest legal mind; it also assured that the Court would not develop a "third way," a strong anti-Communism combined with stringent procedural protections. According to historian Bernard Schwartz, Jackson's death had two other important effects. First, it allowed Warren to lead a more unified Court—a luxury that had eluded

Vinson. Warren could not have emerged as a great leader in a court ideologically torn between Black and Jackson. Second, it allowed Black to win over Warren to his view of the judiciary. For example, in Irvine v. California—which permitted the prosecution to enter illegally obtained evidence—Jackson was able to convince Warren to join his opinion, much to Black's displeasure.²⁷ After Jackson's death, only the abrasive Frankfurter could vie against Black and Douglas for Warren's allegiance.

THE APPOINTMENT OF JOHN HARLAN

Jackson's death also allowed Eisenhower to make his second appointment to the bench. Eisenhower chose John Marshall Harlan, whom he had appointed to the Second Circuit Court of Appeals one year earlier. The grandson of the first Justice John Marshall Harlan, most renowned for his dissent in Plessey v. Ferguson, Harlan graduated from Princeton and won a Rhodes Scholarship. He joined the prominent New York law firm of Root, Clark where he befriended future Eisenhower Attorney General Herbert Brownell. In short, Harlan was Joe McCarthy's nightmare—the prototype of the East Coast establishment.

In choosing Harlan, Eisenhower believed that he was appointing a reliable anti-Communist. While on the Court of Appeals, Harlan wrote the opinion in United States v. Flynn, which, in strongly worded language, upheld the Smith Act conviction of Elizabeth Gurley Flynn.²⁸ However, in a 1954 address to Brooklyn Law School, Harlan warned the

²⁷ Schwartz, Super Chief, 175. Said Schwartz, "[W]arren was greatly influenced when he first came to the Court by the urbane New Yorker. Jackson would have been a strong second to Frankfurter's efforts to win the new Chief to his judicial philosophy, supplying just the bonhomie that the waspish Frankfurter lacked." *Ibid.*; Irvine v. California, 347 U.S. 128 (1954).

²⁸ United States v. Flynn, 216 F. 2d 354 (1954)

students of “false prophets” against subversion, and that America would need “men who can rise above the hysteria.”²⁹

Those seemingly contradictory approaches to Communist cases were typical; in fact, nearly all of Harlan’s Communist cases fell into two categories: either he upheld the constitutionality of the government’s position; or he joined—more often than not, wrote—opinions that accused the government of overreaching, but with a twist. Harlan, unlike Black or Douglas, refused to declare a particular statute or regulation unconstitutional. Instead, he used statutory interpretation to avoid the constitutional issues. Some of these interpretations were highly questionable, such as the 1956 Term’s Yates opinion.

Given Harlan’s approach, it is not surprising that he most closely aligned himself with Frankfurter, adopting the latter’s usually restrained rhetoric and cautious approach to contentious constitutional issues. In fact, critics often derided Harlan as “Frankfurter lite.” However, unlike Frankfurter, Harlan was able to forge friendships with his ideological adversaries, most notably Hugo Black.

The Court considered three major Communist cases in the 1954 Term. In Quinn v. United States and Emspak v. United States, the Court broadened the protections afforded by the Fifth Amendment’s Self-Incrimination Clause to witnesses testifying before HUAC. In Peters v. Hobby, it had the opportunity to address the issue upon which it deadlocked in Bailey v. Richardson: whether the government’s loyalty-security program comported with due process. Instead of answering that question, the Court avoided the constitutional issues and decided the case on technical grounds. In all three

²⁹ Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court (New York: Oxford University Press), 86.

cases, the Court derailed the government's efforts to fight subversion, but also refused to declare the underlying statute or practice unconstitutional.

QUINN v. UNITED STATES

EMSPAK v. UNITED STATES³⁰

In Quinn v United States, the Court had to answer the question: What constituted the invocation of the Fifth Amendment before a Congressional committee?³¹ Mike Quinn, Thomas Fitzpatrick, and Frank Panzino—all members of the United Electrical, Radio and Machine Workers of America (UE)—appeared before HUAC to answer questions concerning their alleged Communist Party membership. Fitzpatrick refused to testify based on “the First and Fifth Amendments” as well as “the First Amendment to the constitution, supplemented by the Fifth Amendment.” Panzino adopted Fitzpatrick’s statement. The next day, HUAC called Quinn, and he and the HUAC chair engaged in the following dialogue:

Mr. Quinn: I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.

Mr. Wood: And for those reasons do you decline to answer that question?

Mr. Quinn: I didn’t say that I was declining to answer the question. Before I do answer the question I should like to say that I support the position taken by Brother Fitzpatrick yesterday.

Mr. Wood: Did you hear his statement yesterday?

Mr. Quinn: Yes, I did.

Mr. Wood: Do you support it in its entirety?

³⁰ Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955).

³¹ The Court decided a third Fifth Amendment case on the same day—Bart v. United States, 349 U.S. 219 (1955), which required HUAC to clearly accept or reject a witness's objections on grounds of pertinency.

Mr. Quinn: In its entirety.

Mr. Wood: Is there anything else you want to add to it?

Mr. Quinn: No, I don't.

Mr. Wood: Will you accept it as the expression of your views, then?

Mr. Quinn: You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood: Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn: I hold that the Constitution holds sacred the rights of people—

Mr. Wood: You have stated your position. Having appreciated your statements and position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer?

Mr. Quinn: I decline to discuss with the committee questions of that nature.

Mr. Wood: Proceed, Mr. Tavenner [HUAC's Counsel].

Mr. Tavenner: I believe in light of that answer it is not necessary to ask any further questions relating to those matters.³²

The three witnesses were indicted for contempt of Congress. The trial judge dismissed the charges against Fitzpatrick and Panzino, holding that, despite their equivocation, they had invoked the Fifth Amendment. The judge found Quinn in contempt, holding that a witness cannot invoke the Fifth Amendment by citing another witness's response.

Warren, for the Court, disagreed: "If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to

³² Quinn, 178-80.

invoke the privilege, it must be respected both by the committee and by a court” in a prosecution for contempt. The committee may then either accept or reject the witness’s claim; or ask if the witness actually invoked the privilege.³³

If Warren had stopped his opinion after that statement, Quinn might be remembered as a minor case that concerned legislative hearings. Instead, Warren revealed that his 1953 Communist case opinions were an aberration, and that in the future, he would align himself with Black and Douglas. Said Warren:

Particularly this is so if it is true...that petitioner feared the stigma that might result from a forthright claim of his constitutional right to testify. It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise.³⁴

The federal contempt statute, like most federal criminal statutes, required *mens rea*; specifically, it required a “deliberate, intentional refusal to answer,” which the government must prove beyond a reasonable doubt to secure a conviction. Warren noted that unless HUAC informed the witness that it demanded his answer despite his objections, the government could not convict the witness for contempt. If HUAC was uncertain whether the witness was invoking the Fifth Amendment, it was required to ask him. In this case, HUAC neither informed Quinn whether it overruled his Fifth Amendment objection nor specifically directed him to answer its queries. HUAC never gave Quinn the clear choice between either a contempt charge or answering its questions.

Emspak v United States

³³ Ibid., 163. Quinn also implicitly extended that rationale of Blau—that a witness before a grand jury could refuse to answer questions regarding his associations with communism, on the grounds that an answer could provide a lead to a Smith Act prosecution—and extended it to legislative hearings.

³⁴ Quinn, 164.

Warren extended the Quinn holding in Emspak v. United States. Julius Emspak, the UE's General Secretary-Treasurer, was convicted of contempt for refusing to answer HUAC's questions. Emspak had invoked his Fifth Amendment right against self-incrimination, but the government contended that he had waived the right in the following exchange:

Moulder: Is it your feeling that to reveal your knowledge of [certain UE officers] would subject you to criminal prosecution?

Emspak: No. I don't think this committee has a right to pry into my associations. That is my own position.³⁵

The government contended that Emspak had not invoked the Fifth Amendment in the exchange. Further, he was not protecting himself from criminal prosecution, but instead was trying to stop the government from learning about his associations—information not protected by the Fifth Amendment.

The Court originally heard Emspak during the 1953 Term. The conference vote was originally 6-2 in favor of affirming Emspak's conviction, with Warren stating that Emspak "did not want to testify and yet not look guilty. We should not condone that action."³⁶ Reed wrote the proposed draft opinion, which rejected Emspak's Fifth Amendment claim and denied that the First Amendment protected a witness from revealing Party membership. Black, in response to Reed's opinion, protested:

Except by outright repeal, I cannot readily conceive of a way to give less effective meaning to the First Amendment than Justice Reed does in the opinion he has circulated in this case. I hope it is not too much to ask that other members of the court will not go along with his opinion until its devastating effect on free speech and press can be pointed out in dissent.³⁷

³⁵ Emspak, 196-97.

³⁶ Schwartz, Super Chief, 177.

The Court voted to hold the case over to the 1954 Term, and switched to a 6-3 vote in favor of reversing.³⁸ As he had in Quinn, Warren extended Blau's holding—that a witness may invoke the Fifth Amendment if an answer incriminates or could incriminate him—to legislative hearings. Emspak, by revealing the names of a UE officer, might provide the government with the first link in a Smith Act prosecution. Specifically, Emspak may reveal the name of a UE officer, who might be a Communist. If questioned, that UE officer might accuse Emspak of being a Communist. Thus, the only way to ensure that Emspak—or any committee witness—does not provide incriminating testimony is to allow them to invoke the Fifth Amendment.

Whether the Court truly believed that Emspak had invoked the Fifth Amendment, or instead sought to curb Congressional practices that it found distasteful, is questionable. Frankfurter said of the decision: "I thought and think it was right to charge those loose-mouthed, loose-mannered, and loose-headed men on the Hill with a little more responsibility in the serious business of Congressional investigations. That's all the [Quinn and Emspak] requirement gets down to."³⁹

Prior to Quinn and Emspak, neither witnesses nor legislators knew—although most assumed—that the Fifth Amendment's self-incrimination clause applied to legislative investigations. The Warren Court must be credited for clarifying that the Fifth Amendment's protections were not confined to criminal trials or grand juries.

³⁷ Hugo Black to Stanley Reed, April 24, 1954, Box A-30, Folder 2, Tom Clark Papers, Tarlton Law Library, University of Texas.

³⁸ Reed, Minton, and Harlan dissented.

³⁹ Schwartz, Super Chief, 179.

While Quinn and Emspak did not constitute a rejection of the Vinson Court's Bryan and Fleischman decisions, they did represent a profound change in attitude toward the deference a witness owed to a legislative committee. In the latter two cases, the Vinson Court put the burden of cooperation on the subversive witness, requiring him to assert, clearly and unambiguously, any rights or claims so that the legislative committee could react. In Quinn and Emspak, the Warren Court shifted that burden; nearly any refusal to answer a question was, *prima facie*, an invocation of the Fifth Amendment. The legislative committee was under an affirmative obligation to ask the witness whether he had invoked the Fifth Amendment and then state whether it accepted the witness's assertion.

Congress could still function with the additional burdens imposed by Quinn and Emspak; the Court had not declared HUAC's practices *per se* unconstitutional. However, it could not have been aware of the epochal nature of these cases. Between the 1953 and 1954 Terms, Earl Warren changed his philosophy in Communist cases. The Court changed, too; rather than defer to the legislative branch, it reserved for itself the right to pass judgment on the legislature's procedures. In Peters v. Hobby, it extended that reach to the executive branch.

PETERS v. HOBBY⁴⁰

In Bailey v. Richardson, the Court could not muster a majority to opine on the constitutionality of the federal government's loyalty-security program. The Court had another opportunity to address the program's constitutionality in Peters v. Hobby, but chose to demur.

⁴⁰ Peters v. Hobby, 349 U.S. 331 (1955).

With Peters, the Court began applying the Rumely precedent to Communist cases: Claim that a particular statute or executive order, as interpreted by the government, would raise very serious constitutional questions. To avoid these questions, the Court interpreted orders and statutes in a manner that avoiding addressing these questions. Without exception, these interpretations favored the defendant. Further, to avoid constitutional questions, the Court resorted to implausible interpretations of the statute or order. The results of this judicial approach were harmful to the government; at every turn, the Court frustrated its efforts to combat subversion, but refused to address the fundamental constitutional questions at issue. The government was not the only loser in this exercise; alleged subversives were still vulnerable to termination or prosecution because the Court refused to opine on the constitutionality of these measures.

Executive Order 9835 required each federal department and agency to establish loyalty boards to hear loyalty cases and make recommendations for the removal of disloyal employees. The order also established a Loyalty Review Board (LRB) within the Civil Service Commission, authorized “to review cases involving persons recommended for dismissal...by the loyalty board of any department or agency.”⁴¹

John Peters, a Yale University Professor of Medicine, served as a special consultant to the United States Public Health Service, housed within the Department of Health, Education, and Welfare (HEW).⁴² In 1949, HEW’s Board of Inquiry on

⁴¹ Executive Order 9835’s standard was “reasonable grounds exist for belief that the person involved was disloyal to the United States.”

⁴² Actually, the Federal Security Agency, the predecessor agency to Health, Education, and Welfare, conducted the inquiry. For clarity purposes, I use “HEW” throughout the case explanation.

Employee Loyalty (Board) questioned Peters regarding his associations with subversives, and determined that it did not have reasonable grounds to question his loyalty.

Executive Order 10241, issued in 1951, revised the government's loyalty standards.⁴³ The LRB directed HEW to re-open Peters' case and re-adjudicate it pursuant to the new standards. HEW conducted a hearing, in which it relied on secret evidence, but did not find reasonable doubt as to Peters' loyalty.

In January 1952, the LRB promulgated Regulation 14, which gave it the authority to conduct "post-audit" reviews of agency decisions.⁴⁴ The LRB conducted a "post-audit" review of HEW's decision regarding Peters' loyalty. The LRB conducted a hearing that relied on confidential witness testimony, found reasonable doubt as to Peters' loyalty, and terminated his employment.

Warren, for the Court, acknowledged that the LRB's hearing procedures "would obviously present serious and far reaching problems in reconciling fundamental constitutional guarantees with the procedures used to determine the loyalty of governmental personnel."⁴⁵ But instead of addressing those constitutional problems, Warren held that the LRB had exceeded its delegated authority—an argument never made by Peters!

Warren reviewed the LRB's authority to give itself post-audit authority. Executive Order 9835 authorized the LRB to "make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes

⁴³ "[O]n all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." Executive Order 10241, 16 Fed. Reg. 3690.

⁴⁴ 17 Fed. Reg. 631.

⁴⁵ Peters, 338.

and executive orders relating to employee loyalty.” This did not allow the LRB to grant itself the authority to conduct post-audit reviews, said Warren, but only to review appeals from adverse agency decisions. To read Executive Order 9835 otherwise would “sanction administrative lawlessness.”⁴⁶

However, the Civil Service Commission had promulgated Regulation 14 in 1952, and acted against Peters in 1953. Had not the President, who did not object to the LRB's post-audit review, believed Regulation 14 consistent with Executive Order 9835? Not according to Warren; only “explicit Presidential action” would suffice to prove that the LRB had not exceeded its authority, and Warren could not find evidence that the President was aware of Regulation 14. Finally, Wieman recognized that “a badge of infamy” attached to public employees deemed disloyal, and Warren refused to recognize the LRB’s authority to impose such a badge without explicit language in the Executive Order.⁴⁷

Black and Douglas each concurred, but rejected Warren’s reasoning. Black could not opine without addressing the constitutional issues, and termed Executive Order 9835 “a broad, far-reaching espionage program over government employees,” that violated the First Amendment.⁴⁸

Douglas's concurrence was even more striking. Prior to the final disposition of the case, Douglas wrote to Black, “I hope we can work it out so that Peters does not go off on the narrow ground of the regulations...A decision on the merits would be a

⁴⁶ Ibid., 345.

⁴⁷ After that stern lecture to the executive branch, Warren provided only paltry relief to Peters: He deemed Peters’ removal was invalid, but because his contract with HEW had expired, he could not have his job back

⁴⁸ Peters, 350.

wonderfully healthy thing. A decision on the regulations would, I fear, be tantamount to a victory for the government. For their system of the faceless informer would continue.”⁴⁹ Douglas would not get his wish and refused to join Warren's opinion.

Douglas's opinion conceded that Executive Order 9835 gave the LRB authority to hear loyalty cases on its own motion. He supported reversal on due process grounds, believing Peters entitled to cross-examine the witnesses who provided confidential information. Douglas did not seem concerned that this would lead to the disclosure of confidential information or informants: “If the sources of information need protection, they should be kept secret. But once they are used to destroy a man’s reputation and deprive him of his ‘liberty,’ they must be put to the test of due process of law.”⁵⁰

Reed, joined by Burton, filed a strong dissent. The President was aware that the LRB had promulgated Regulation 14, and chose not to revoke it. Reed was more concerned about the massive leap the Court had made in reviewing executive orders and regulations. Judicial review of statutes and their accompanying rules was one thing; lecturing the executive branch that it was violating its own order was quite another.⁵¹

⁴⁹ Schwartz, Super Chief, 140.

⁵⁰ *Ibid.*, 352.

⁵¹ Reed also noted that on April 27, 1953, Eisenhower had issued Executive Order 10450, which included the substance of Regulation 14’s Post-audit review authority. The order became effective on May 27, 1953. Peters was notified of his hearing on April 6, 1953, which was held on May 12, 1953. Reed concluded that this indicated that the President obviously knew of Regulation 14’s post-audit review authority. This prompted the following condescending remark from Frankfurter:

Dear Stanley,

Your dissent in Peters is truly funny. On many counts. Two will suffice: 1. The fact that the President “recognized” something in 1953 hardly proves that he knew what the order of 1947 authorized or required. Still less does it prove that President Eisenhower knew what President Truman required or authorized. 2. I should think that anybody who knows as much as you do about how regulations are signed by a President would be less confident than you are that because there is a reference in something signed by a President in 1953, that carries with it the legal implication that he authorized something to be done, as it were, by incorporating the past by reference.

Felix Frankfurter to Stanley Reed, June 1, 1955, Set 2, Reel 12, Felix Frankfurter Papers.

Peters was a flawed decision. The Court had missed a prime opportunity to opine on the constitutionality of Executive Order 9835 and the LRB's use of secret evidence in Bailey; it passed on the opportunity again in Peters. While Warren took a backhanded slap at the LRB's hearing procedures, he refused to declare the use of secret evidence illegal. Was Warren saying that the LRB could use secret evidence in LRB hearings if only Eisenhower would issue the appropriate executive order? The Court did not say, and would not ever say.

Further, as Reed noted, judicial review of the executive branch's interpretation of a statute was quite different from ruling that the executive had misinterpreted its own executive order. The Court, in Peters, assumed that executive branch was unaware of its own executive order, a finding tantamount to a declaration of executive incompetence; not even Douglas would agree with the majority on this point. This assumption not only represented judicial arrogance, but also a dangerous encroachment on the executive power. Unfortunately, Peters was not an aberration.

1955 TERM

Warren was willing to join the anti-Communist wing of the Court in the 1953 Term and embraced Frankfurter's "non-constitutional" approach to cases in the 1954 Term. Warren began to adopt Black and Douglas's civil libertarian approach in the 1955 Term. This embrace was not absolute; he was still willing to join Frankfurter at times. However, whether embracing the Frankfurter or the Black-Douglas approach, Warren had clearly abandoned his former anti-Communist stance and moved toward a civil libertarian position.⁵²

⁵² Warren, in a Fortune Magazine article, explained that he viewed the Bill of Rights as an evolving document, one that "will not have exactly the same meaning it had when we received it from our fathers."

The 1955 Term marked the anti-Communist faction's lowest point to date. Reed and Minton proved its only two stalwarts; Clark, Harlan, and Burton often refused to join them, instead joining Frankfurter in thwarting the government's programs. To make matters worse for the anti-Communists, the emerging Warren-Douglas-Black faction needed only one more justice to obtain the requisite fourth vote to grant certiorari. As a result, the Court began reviewing an increasing number of Communist cases.

Ullmann v. United States upheld the constitutionality of the Immunity Act of 1954, allowing federal grand juries to extract testimony from Communist witnesses, even at the expense of state subversion prosecutions. One week later, Pennsylvania v Nelson held that federal law preempted nearly all state anti-Communist statutes. The anti-state decisions continued with Slochower v. New York City Board of Higher Education, which appeared to build on Wieman and limit Garner and Barsky. In Communist Party v. Subversive Activities Control Board, the Court refused to decide the constitutionality of the Subversive Activities Control Act, the cornerstone of the government's domestic anti-subversion program. The anti-Communist faction had two minor victories in Black v. Cutter Labs, in which the Court refused to stop private employers from dismissing Communists, and Jay v. Boyd, which sustained the use of secret evidence in deportation hearings. Finally, in Cole v. Young, the Court used the Peters precedent to limit the summary dismissal of suspected Communists.⁵³

He also called for a "Constant and imaginative application" of the Bill of Rights to different sets of facts. Warren, "The Law and the Future," Fortune, November 1955, 106, 204, cited in White, Earl Warren, 223.

⁵³ Another notable case from the 1955 Term was United States v. Zucca, 351 U.S. 91 (1956). The Department of Justice sought to denaturalize Ettore Zucca, claiming that he had lied about his Communist Party affiliations during his naturalization hearing. Zucca sued, citing § 340(a) of the Immigration and Nationality Act of 1952 (I & N Act): "It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor," to institute denaturalization proceedings.

The Court's 1955 Communist case decisions were generally confusing and highly questionable. The Court misconstrued statutes and executive orders; it unjustifiably dismantled the various state loyalty-security programs; most important, it refused to discuss the constitutionality of the Subversive Activities Control Act of 1950, the centerpiece of the government's anti-Communist program.

ULLMANN v. UNITED STATES⁵⁴

The Immunity Act of 1954 allowed a U.S. Attorney to petition a federal judge to compel a witness to testify or produce documents in cases involving espionage, national security, and treason. In return, the witness received transactional immunity from having that testimony used against him in any criminal prosecution.⁵⁵

William Ludwig Ullmann, part of the Silvermaster spy ring that infiltrated the government during the New Deal, was called before a federal grand jury and questioned regarding his Communist Party activities.⁵⁶ Ullmann invoked his Fifth Amendment privilege against self-incrimination and, after refusing a judge's order to testify, was found in contempt and sentenced to six months' imprisonment.

The government had not received an affidavit. However, it contended that it had the general authority—exclusive of § 340(a)—to bring a denaturalization suit.

Warren, writing for a 5-3 Court, disagreed, claiming that the I & N Act was the exclusive procedure for denaturalization. Warren's opinion avoided case law, cited an unpublished 1907 Attorney General's memorandum, and ignored decades of administrative practice. But the legal reasoning of Warren's opinion was less important than its result. First, by requiring the Attorney General to produce an affidavit—which required the affiant to have first-hand knowledge—Warren introduced in denaturalization proceedings what the Court had refused to require in *Bailey* and *Peters*: an end to the use of anonymous evidence. Second, Warren sought to hamper the denaturalization process, which he viewed as stigmatizing. Whether or not the government succeeded in denaturalizing a citizen, the process itself was harmful. “The mere filing of a proceeding for denaturalization results in serious consequences for the defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged.” *Zucca*, 99-100.

⁵⁴ *Ullmann v. United States*, 350 U.S. 422 (1956).

⁵⁵ The Immunity Act's protections did not apply to perjury or contempt prosecutions.

⁵⁶ Haynes & Klehr, *Venona*, 136-37.

Frankfurter, for the Court, upheld the Immunity Act's constitutionality. In Brown v. Walker, the Court held that the Fifth Amendment Self-Incrimination Clause's objective was achieved upon a grant of immunity.⁵⁷ Ullmann sought to distinguish Brown, claiming that the disabilities he suffered—loss of employment, public disapproval—prevented him from obtaining true immunity. The Court did not agree. The Fifth Amendment's Self-Incrimination Clause applied only when a witness could incriminate himself by his own testimony. Other potential disabilities were irrelevant; once the threat of prosecution disappeared, the clause ceased to apply.

Ullmann's second challenge to the Immunity Act was more far-reaching: because the Act did not and, according to Ullmann, could not prevent a state prosecution that utilized the compelled testimony, the protections it offered were illusory. Frankfurter agreed that Congress had not explicitly applied the Immunity Act to state prosecutions, but rejected Ullmann's argument that Congress's interest in national security could not trump a state interest in a criminal prosecution. The constitution charged Congress with the power to provide for the national defense and to make all "necessary and proper" laws for executing the powers of government. Said Frankfurter:

The Immunity Act is concerned with national security. It reflects a Congressional policy to increase the possibility of more complete and open disclosure by removal of fear of state prosecution. We cannot say that Congress's paramount authority in safeguarding national security does not justify the restriction it has placed on the exercise of conceded federal power.⁵⁸

Douglas, joined by Black, dissented. Douglas contended that the Self-Incrimination Clause's protections attached in any criminal proceeding, whether or not the government offered immunity. The clause was more than a protection against

⁵⁷ Brown v Walker, 161 U.S. 591 (1896).

⁵⁸ Ullmann, 436.

prosecution; it was “a safeguard of conscience and human dignity and freedom of expression as well.”⁵⁹ It protected the accused not only from prosecution, but also the infamy that attaches from inquiries into subversion, an ordeal that “practically excommunicates” the witness from society.⁶⁰

Ullmann represented the exception to the Warren Court's general rule against addressing the constitutionality of a statute in Communist cases. Warren, the former Alameda County Prosecutor and California Attorney General, joined the anti-Communist faction for the last time. Moreover, Ullmann also represented the last time that Warren would take a position opposite Black and Douglas in a Communist case.

If the anti-Communist faction was hopeful that Ullmann represented a swing back to the right, they were sadly mistaken. One week after the Court announced Ullmann, it announced its decision in Pennsylvania v. Nelson. Only then was it clear why Frankfurter and Warren had been so eager to discard Ullmann's federalism arguments.

PENNSYLVANIA v. NELSON⁶¹

In Ullmann, the Court cited Congress's national security power to justify the Immunity Act's supercession of state prosecutions. Just one week later, the Court eliminated the states' power to combat subversion against the United States in Pennsylvania v. Nelson. Pennsylvania had convicted Communist Party official Steve

⁵⁹ Ibid., 453.

⁶⁰ Ibid. Douglas was frank about his rejection of precedent, in this case the relevance of Brown: “It is said that we should not disturb Brown v. Walker because it is an old and established decision...[it] has no greater claim to sanctity than the other venerable decisions which history showed had outlived their usefulness or were conceived in error.” Ibid., 455.

This apparent disregard of precedent was consistent with an earlier speech he had made to the New York Bar Association: “[T]he decisions of yesterday, or of the last century are only the starting points...it is better that we make our own history than to be governed by the dead.” Murphy, Wild Bill, at 340.

⁶¹ Pennsylvania v. Nelson, 350 U.S. 497 (1956).

Nelson of violating its Sedition Act, which prohibited sedition against both the state and federal government, and sentenced him to twenty years in prison. The Pennsylvania Supreme Court reversed, holding that the Smith Act preempted state laws aimed at sedition against the United States.⁶²

Warren, for a 6-3 Court, affirmed the Pennsylvania Supreme Court's holding that federal law preempted state anti-subversion statutes.⁶³ Warren granted that a state could protect itself from "sabotage or attempted violence," and could prohibit sedition against the United States if "Congress has not occupied the field and is not protecting the entire country from seditious conduct."⁶⁴ While Congress had never specifically prevented the states from prosecuting subversion against the United States Government, it had, in Warren's view, intended to "occupy the field" in that area. Warren employed the following three tests to determine congressional intent:⁶⁵

⁶² Nelson was not the first time the Court struck down a Pennsylvania law as inconsistent with the U.S. Constitution. The U.S. Supreme Court held that the federal Alien Registration Act of 1940 superseded the Pennsylvania Alien Registration Act of 1939. The Court reasoned that Pennsylvania's law might interfere with foreign relations. Hines v. Davidowitz, 312 U.S. 52 (1941).

⁶³ Reed, dissenting with Burton and Minton, attacked the Warren's preemption argument. The Court had created the preemption doctrine to regulate interstate commerce, not preempt state subversion statutes. Further, Congress had never indicated that it intended to preempt state anti-subversion laws. Reed also challenged Warren's dismissal of the Title 18 argument. Title 18 had been around since 1825 and the Court had interpreted it to allow concurrent state legislation in the absence of clear congressional intent to the contrary.

⁶⁴ Nelson, 502.

⁶⁵ The Department of Justice argued that federal law did not preempt states sedition statutes. Thus, to conclude that federal law preempted state anti-subversion statutes, Warren had to ignore the federal government's own pleadings and, apparently, federal law. Title 18 of the Federal Code—the criminal offense section—read:

The District courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.

Warren denied that this could mean what it said, stating, in a footnote, "The office of the second sentence is merely to limit the effect of the jurisdictional grant of the first sentence. There was no intention to resolve particular supercession questions by the Section." *Ibid.*, 501, n. 10.

1) The federal regulation was so pervasive as to indicate that Congress left no room for the States to supplement it.

Congress had enacted several anti-subversion statutes since 1940, including the Smith Act (1940), the Subversive Activities Control Act (1950), and the Communist Control Act (1954). Taken together, these statutes left no doubt that “Congress intended to occupy the field of sedition...and that no room has been left for the States to supplement it.”⁶⁶

2. The federal statutes concern an area where the federal interest was so strong that it precluded the enforcement of similar state laws.

Congress had made large appropriations for defense against foreign and domestic subversion and charged the FBI and CIA with gathering intelligence. Congress had done these things “to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government...”⁶⁷ By treating subversion as an important national security concern, Congress precluded states from treating it as a local law enforcement problem.⁶⁸

3. State sedition acts present a serious danger of interfering with the federal anti-subversion program.

Since 1939, the federal government had requested that states provide it with all evidence of subversive activities. A September 6, 1939 directive from President Roosevelt stated: “I request that all police officers, sheriffs, and all other law enforcement officers in the United States promptly to turn over to the nearest representative of the Federal Bureau of Investigation any information obtained by them related to espionage...”

⁶⁶ Ibid., 504.

⁶⁷ 50 USC §781(5).

⁶⁸ Nelson, 505.

In August 1940, J. Edgar Hoover called for local law enforcement agencies to share information related to espionage, sabotage, or subversive activities.

To that point in the opinion, Warren had presented a palatable if legally dubious argument, one that Frankfurter or Harlan, wishing to avoid any substantive issues, might have made. The second part of his opinion, heavy on the civil libertarian rhetoric, was a different story. In a pattern that would worsen in the 1956 term, Warren veered from the legal questions and mounted his political soapbox. Adopting the words of the Pennsylvania Supreme Court as his own, Warren found that the Pennsylvania statute interfered with federal anti-subversion programs in another way:

Unlike the Smith Act, which can be administered by federal officials acting in their official capacities, indictment for sedition under the Pennsylvania Statute can be initiated upon information provided by a private individual. The opportunity thus present for the indulgence of spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is important that punitive sanctions for sedition against the United States be such as have been promulgated by the Central Government authority and administered under the supervision and review of that authority's judiciary. If that be done, sedition will be detected and punished, no less wherever it may be found, and the right of the individual to speak freely and without fear, even in criticism of the government, will at the same time be protected.⁶⁹

Warren's legal argument was highly questionable. As Reed noted in his dissent, Congress never sought to preempt states from combating sedition against the United States. Several states had already enacted statutes prohibiting sedition against the United States when Congress enacted the Smith Act in 1940, the Subversive Activities Control Act in 1950, and the Communist Control Act in 1954. Yet Congress never indicated that

⁶⁹ Nelson, 508, citing Nelson v. Pennsylvania, 104 A.2d at 141, 377 Pa. 58 (1954). Warren also noted that forty-two states had statutes that prohibited the advocacy of the violent overthrow of the United States government. Some state anti-subversion laws appeared to protect constitutional rights, while others did not. Some state laws even punished membership in the Communist Party, membership that the SACA required Communists to disclose.

these statutes interfered with national security, or that it sought to preempt those statutes. Presumably, if Congress had sought to prevent states from combating subversion against the United States, it would have said so explicitly.

Warren also displayed a trait that would become common in his opinions: The citation of evidence that did not support his argument. For example, his third argument for why Congress intended to preempt state sedition acts—"state sedition acts present a serious danger of interfering with the federal anti-subversion program"—was dubious. His references to FDR and Hoover were curious, for as the dates indicated (1939 and 1940) those statements concerned possible Nazi espionage, and not the Communist menace. Further, the quotations from Roosevelt and Hoover indicate that they simply asked the states to supply information, not abandon their subversion programs. Finally, only Congress can enact legislation preempting state activity, and the actions or statements of executive officials, while interesting, were legally irrelevant to any judicial determination regarding Congressional intent.⁷⁰

Warren's conference notes provide an insightful glance into his thinking. Below are some revealing excerpts:

We should not infer that Congress intended multiple punishments, at least unless it said so. It is against the concept of justice throughout the civilized world.

Congress requires Communist organizations to register. Some of the states make membership per se a violation of sedition laws.

Civil Rights.⁷¹

⁷⁰ During arguments, the US Attorney General claimed that no state sedition statute had ever interfered with the enforcement of federal sedition statutes.

⁷¹ Earl Warren, notes, undated, Box 576, *Pennsylvania v. Nelson*, Earl Warren Papers, Manuscript Division, Library of Congress.

The first note indicated that Warren was happy to trade a legal interpretation of the law for an interpretation that achieved his vision of justice. This was perfectly consistent with his opinion in Brown and several other cases.

The second note demonstrated that Warren was concerned about the effect that the registration requirements of the Subversive Activities Control Act would have on state prosecutions. This was a straw man; the Communist Party had been litigating the SACA's registration requirement for years, but the Supreme Court refused to decide the issue; in fact, the Court had an opportunity to opine on the constitutionality of the registration requirement during the 1955 Term, but refused to do so. (See p. 160) In legal terms, Warren's concern that a state would use a Communist Party member's SACA-required registration in a subversion prosecution was not ripe for decision. In fairness to Warren, he did not make that argument in his opinion; however, it is impossible to believe that he did not consider it in reaching his decision.

Finally, Warren's "civil rights" notation indicated that he intended Nelson not only restrained state-based red hunters, but to advance the civil rights movement. Nelson stripped segregationists of an extremely potent weapon: the ability to use their state courts to charge members of the civil rights movement with subversion against the United States. After Nelson, only the Department of Justice could charge a person with subversion against the United States. Just as the Supreme Court made the federal district courts the primarily responsible for enforcing school desegregation in Brown II, so Warren made them solely responsible for hearing subversion cases.⁷² Warren, by judicial

⁷² Brown v. Board of Education of Topeka, 349 U.S. 294 (1955). Brown I declared separate but equal unconstitutional; the next year, in what came to be known as Brown II, the Court declared that schools would have to begin desegregation "with all deliberate speed."

fiat, had guaranteed that the Court would exercise ultimate control over every case charging subversion against the federal government.

Nelson informed states that they could not charge Communists with subversion against the United States. However, by bifurcating his opinion—part of it was based on federal preemption, part of it was based on his sense of fairness—Warren did not clarify whether a state could prosecute subversion or treason against a state. When the Court revisited Nelson in the future, members of that case's six-justice majority would provide diametrically opposing answers to that question.

SLOCHOWER v. NEW YORK CITY BOARD OF HIGHER EDUCATION⁷³

The Court continued its attack on state anti-Communist programs in Slochower v. New York City Board of Higher Education. New York City's Charter § 903 prohibited city employees from invoking the Fifth Amendment's privilege against self-incrimination before a legislative committee. The charter stated that an employee who invoked the Fifth Amendment in response to questions concerning his official duties forfeited his office and was ineligible for future City employment. In 1952, the Senate Internal Security Subcommittee (SISS) summoned Professor Harry Slochower, a tenured Brooklyn College German Professor, to testify regarding Communism in American higher education. Slochower was not a stranger to legislative committees, having been identified as a Communist and forced to testify before the Rapp-Coudert Committee in 1941. Slochower agreed to explain his post-1941 associations and political beliefs to the SISS, but asserted the Fifth Amendment in response to questions concerning his 1940-41

⁷³ Slochower v. Board of Education of New York City, 350 U.S. 551 (1956).

activities and associations. The SISS did not question or overrule his assertion of the Fifth Amendment privilege.

Brooklyn College, acting pursuant to § 903, declared Slochower's position vacant. Brooklyn College could remove a tenured professor only for cause, and then only after notice, hearing, and appeal. Yet, legally speaking, Brooklyn College had not removed Slochower. The New York Courts, in interpreting § 903, treated an employee's invocation of the Fifth Amendment as a resignation, negating the need for a hearing or showing of cause.

Clark, writing for a five-justice majority, held that New York had violated Slochower's due process rights.⁷⁴ Clark, employing the constitutional balancing test, weighed New York's interest in a loyal workforce against the traditional safeguards of individual rights. Responding to the dissenters, and justifying the apparent switch from his Garner and Adler positions, Clark said: "To state that a person does not have a constitutional right to government employment [the words of the majority opinion in Adler] is only to say that he must comply with the reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."⁷⁵ Adler allowed the New York school system to dismiss employees if it determined after notice and hearing that an employee advocated the overthrow of the Government by unlawful means. In Garner,

⁷⁴ Black and Douglas joined the Court's opinion and judgment, but contended that Adler and Garner were wrongly decided.

In an example of Frankfurter's effort to curry favor with the Chief Justice, he sent the following note to Warren:

I have had what I believe was a searching talk with Tom, and my clear conviction is that he is anchored for reversal in Slochower. His ground is my ground for reversal, namely, due process. This handles John's [Harlan's] difficulty, that the Fifth Amendment wasn't raised in the state court. My talk with Tom left me with confidence that he can work the case out as to secure the agreement of those of us who are for reversal.

Felix Frankfurter to Earl Warren, March 13, 1956, Box 353, Correspondence to Felix Frankfurter 56-57, Earl Warren Papers.

⁷⁵ Slochower, 555.

the Court upheld the discharge of employees who refused to file oaths or affidavits regarding past or present Communist Party membership—information that the Court deemed relevant to the state.

Yet, Clark noted, the Court emphasized in both Adler and Garner that the states must conform to the Due Process Clause's requirements. Further, Wieman had condemned Oklahoma's practice of lumping together both "knowing" and "innocent" membership in subversive organizations. Slochower's situation, like that of the Wieman professors, "rests squarely on the proposition that 'Constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.'"⁷⁶

The New York Courts determined that Slochower had properly invoked the Fifth Amendment; that Brooklyn College could not infer, as a matter of law, from Slochower's invocation of the Fifth Amendment that he was a Communist; and, that Brooklyn College did not make such an inference. Clark rejected these determinations, concluding that both the New York Courts—and the Regents—effectively treated Slochower's use of the Fifth Amendment as an admission of guilt—that is, of Communist Party membership.⁷⁷ Because neither the courts nor Regents could infer guilt from Slochower's claim of Fifth Amendment privilege before the SISS, his discharge was invalid. Clark conceded that Slochower did not have a constitutional right to his job, and the Regents, after a proper

⁷⁶ Ibid., 556, citing Wieman, 192.

⁷⁷ Clark contended that the New York Courts had not considered the subject matter of SISS's questions, Slochower's justification for invoking the privilege, or if, in asserting the privilege, Slochower had relied on legal advice.

inquiry, could determine that he was not fit to teach. But the City had not made such an inquiry, and therefore had violated due process.⁷⁸

Reed, in a dissent joined by Burton and Minton, held that New York could offer its employees a choice: answer legislative inquiries or surrender your job.⁷⁹ An employee may invoke the Fifth Amendment as protection against a criminal charge, but the protection against self-incrimination did not include protection against job loss.

Moreover, the Court was violating states' rights:

To require, as the Court does, that New York stay its hand in discharging a teacher whom the city deems unworthy to occupy a chair at its Brooklyn College, demands that this Court say, if it follows our prior cases, that the action of the Board in declaring Professor Slochower's position vacant was inconsistent with the fundamental principles of liberty and justice [hitherto, the Court's standard in analyzing Fourteenth Amendment cases] which lie at the base of all our civil and political institutions.... Surely no such situation exists here.⁸⁰

New York's § 903 could not have been clearer: public employees were expected to assist, not obstruct, legislative inquiries. An employee who invoked the Fifth Amendment before a legislative committee would have his or her position declared vacant. The Court believed it was upholding due process by requiring New York to

⁷⁸ Clark noted to his colleagues:

This way we retain the power of the City to inquire as set out in Garner in a proper inquiry. We can point out that Slochower is not all bad; that can't be automatic dismissal for plea unless question is clearly relevant and clearly designed to elicit information by city or, if other information creating inference from plea.

By getting rid of Garner this way we indicate that in the future we may consider the information gathering of cities, to determine whether an answer to the question would assist the city, and whether the question was arbitrary.

Tom Clark, memorandum to Slochower majority justices, March 28, 1956, Box A-41, Folder 10, Tom Clark Papers.

⁷⁹ Harlan filed a separate dissent in which he attacked the majority for mischaracterizing § 903. The Court ignored the New York Courts' determination that Brooklyn College did not draw a negative inference from Slochower's claim of privilege. The real question was: Did New York violate due process by making the claim of privilege itself the grounds for discharge? Harlan thought Garner and Adler indicated that the answer was no.

⁸⁰ Slochower, 563.

conduct an inquiry into the circumstances regarding Slochower's actions before the SISS. But did the Due Process Clause truly require the Regents to conduct an inquiry each time an employee invoked the Fifth Amendment? Clark would have the Regents weigh whether the legislative committee was state or federal; whether or not the committee indicated that it was interested in the employee's conduct; and whether or not the state agency already possessed the information in question. Clark seemed to be inviting, rather than discouraging, arbitrary and discriminatory state action and encouraging endless litigation on the part of dismissed employees.

Clark chastised the Regents and New York Courts for equating Slochower's Fifth Amendment defense with an admission of Communist Party membership. He seemed to miss the point; the very purpose of § 903 was to avoid making such conclusions. Perhaps a witness invoked the Fifth Amendment because he was a Communist; perhaps he had committed a crime; perhaps it would expose an extra-marital affair. By adopting a policy that dispensed with the need to examine an employee's motivation for invoking the Fifth Amendment, no one could plausibly accuse New York of improperly inferring Communist Party membership. Yet, despite the clear language of § 903 and the conclusions of the New York Courts, Clark disagreed.

Slochower represented an epoch for Clark, marking the end of his cooperation with Warren and the other civil libertarians. The coalition that had produced Peters, Quinn, Emspak, Nelson and Slochower came to an end. Clark would emerge as the leader of the Court's shrinking anti-Communist wing and, almost without exception, dissent from any Communist case opinion joined by Warren.

COMMUNIST PARTY v. SUBVERSIVE ACTIVITIES CONTROL BOARD⁸¹

In Communist Party v. Subversive Activities Control Board, the Court avoided its responsibility to rule on the constitutionality of a key feature of the government's anti-subversion program: the SACA's Communist registration requirement. Instead of gutting or affirming the SACA's registration requirement, the Court dodged the constitutional question altogether, leaving the future of the cornerstone of Congress's anti-subversion program in doubt.

SACA § 7 required Communist-action organizations to register with the Attorney General.⁸² If the Attorney General believed that a Communist-action organization failed to register, SACA § 13 required him to initiate proceedings before the Subversive Activities Control Board (SACB). The SACB would determine whether the organization met the definition of Communist action organization, and if so, would order it to register. In November 1950, Attorney General McGrath requested that the SACB declare the Communist Party a Communist-action organization. In April 1953, the SACB found by the preponderance of evidence that the Communist Party was a Communist-action organization and ordered it to register with the Attorney General.

The Communist Party appealed the SACB's order and attacked the SACA's constitutionality. While awaiting appeal, it filed a motion to adduce more evidence, alleging that three of the Government's witnesses who testified before the SACB—Harvey Matusow, Paul Crouch, and Manning Johnson—had committed perjury in other

⁸¹ Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956).

⁸² SACA § 3 defined Communist-action organization, in relevant part, as:
[A]ny organization in the United States [other than a diplomatic mission] which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement [as referenced in SACA § 2] and (ii) operates primarily to advance the objectives of such world Communist movement [as referred to in SACA § 2].

cases and hearings and that the Department of Justice did not consider them credible witnesses.⁸³

The government, in its opposition motion, attacked the Party's argument on two grounds: First, whether or not the witnesses had provided false testimony in other hearings—a fact that the government did not concede—the Party had not challenged the veracity of any portion of the witnesses' testimony before SACB. Second, the SACB would conclude that the Communist Party was a Communist-action organization even if it struck the three witness's testimony from the record. The Court of Appeals agreed and affirmed the SACB's order that the Party register.

At conference, the Court initially opted to decide the case on the constitutional merits. Black, Douglas, Burton, and Warren believed that the severe disabilities imposed by the SACA made the statute unconstitutional. Reed, Clark, and Minton disagreed, believing the statute constitutional; Frankfurter and Harlan wished to confine the Court's review to SACA's registration requirement, which they believed constitutional.⁸⁴

While the Court did not have the votes necessary to opine on the SACA's constitutionality, it did, according to Frankfurter's poll, have the votes to uphold the SACA's registration requirement. However, after counting the votes, Frankfurter changed his mind and decided that the Court should not avoid the perjury allegation. The Court, instead of addressing the merits of the SACA, or even its registration requirement, should send the case back to the SACB for reconsideration. Frankfurter assumed that the other justices would agree to this disposition. Said Frankfurter:

Dear brethren:

⁸³ Lichtman & Cohen, Deadly Farce, 150.

⁸⁴ Schwartz, Super Chief, 185-87.

During all my years here very, very few decisions have given me such deep satisfaction as the unanimous reversal of the Communist Party case because of the Court of Appeals denial of the motion, under 14(a) of the Act, to adduce newly discovered evidence before the board to establish the claim, uncontested by the government, that three of the government's witnesses were perjurers. This action will afford a striking demonstration of the Court's regard for the moral requirements in the administration of law touching the most despised group in the community. It will do more. It will rebound to the great honor of the nation everywhere. And for a unanimous court to render this decision will be doubly impressive. Such a demonstration of the impartial and untainted administration of justice could not come at a better time.

Since the case must be reversed on this ground, I have come to the conclusion, after considerable reflection and with great reluctance, that the case must now be disposed of exclusively on this ground without reaching the constitutional validity of the act. I do not see how we can at this stage pass on these constitutional questions when only the other day, in the Peters case, we reaffirmed and acted on the settled doctrine that a case that can go off on a non-constitutional ground must be restricted in its decision to that ground.⁸⁵

Clark protested, arguing that at conference, the Court had agreed to decide the constitutional issues. Frankfurter retorted:

I agree that at Conference we all agreed to pass upon the constitutional issues. But I equally assert that all such agreements are necessarily tentative. This is demonstrated by the fact that the writer of an opinion, after performing the careful study required for preparing a written expression of the court's decision, not infrequently reaches a different conclusion from that initially agreed upon.

The integrity of the federal judicial system is involved here—which is a very different thing from this court's scope of review, under the 14th Amendment, of a State's power over its criminal procedure.⁸⁶

Said Clark, in response:

The court has never avoided passing on constitutional issues on the subterfuge that there exists a question of the credibility of witnesses.

The motion of the Party is entirely insufficient in that it points out no perjured testimony offered in this case and does not controvert a single fact.

⁸⁵ Felix Frankfurter to Justices, April 2, 1956, Box A-43, Folder 4, Tom Clark Papers.

⁸⁶ Felix Frankfurter to Tom Clark, April 4, 1956, Box A-43, Folder 4, Tom Clark Papers.

The disposition of this case, as proposed by Brother Frankfurter, is but another effort to shirk our plain responsibility to pass on constitutional questions involved in the suit. It is camouflaged behind the battle cry that the “untainted admin of justice” requires a hearing as to allegations of perjury by 3 government witnesses as to their testimony in other cases. I certainly abhor the use of perjured testimony, but this motion fails to point out any testimony here that is false, relying entirely on allegations in other proceedings...”

I find no case in the history of this court that dodges the constitutional issues—so important for decisions now—on such a flimsy pretext [reliance on Peters]... This will require a new hearing, because it is a new board, and a new trial. This would bring on such a delay as to cause a serious miscarriage of justice, frustrate the Congressional purpose and at this most serious time in world history strike down for all practical purposes the most effective tool against world communism.⁸⁷

Clark’s argument did not convince Frankfurter. Neither did the volume of evidence demonstrating that the Communist Party was a Communist action organization; the Communist Party’s failure to allege false testimony from Matusow, Johnson, or Crouch; nor the fact that the SACB hearing was a civil, rather than a criminal, proceeding. To Frankfurter, the integrity of the federal courts was the only relevant issue:

The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This court is charged with supervisory functions in relation to proceedings in the federal courts. Therefore, fastidious regard for the honor of the administration of justice requires the court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.⁸⁸

Frankfurter, for a 6-3 Court, remanded the case to the SACB to determine whether the Communist Party was, in-fact, a Communist Action organization.

Clark, in dissent with Reed and Minton, refused to change his earlier position. Said Clark, "I have not found any case in the history of the Court where important

⁸⁷ Tom Clark to Felix Frankfurter, April 17, 1956, Box A-43, Folder 4, Tom Clark Papers.

⁸⁸ Subversive Activities Control Board. 124.

constitutional issues have been avoided on such a pretext."⁸⁹ Further, the entire exercise was a waste of time; the SACB had stated that even with the testimony of the three witnesses expunged, it would find, by overwhelming evidence, that the Communist Party was a Communist action organization. Finally, Clark could not understand why the Court would return the case to the SACA when the Communist Party was challenging the constitutionality of that body; if the existence of the SACA was repugnant to the Constitution, why remand the case back to that organization?

While Frankfurter's concern for fair proceedings was admirable, it represented the triumph of symbolism over substance. Congress had passed the SACA in 1950. The Act addressed the concerns raised in JAFRC regarding declaring an organization "subversive" without granting it a hearing. Now, six years later after SACA's enactment, the Court finally had an opportunity to opine on its constitutionality. The Court missed its opportunity, leaving Congress, and members of the Communist Party, to speculate whether the law would withstand constitutional scrutiny.

Frankfurter seemed absolutely giddy at the prospect of declaring the SACB hearing tainted—"very, very few decisions have given me such deep satisfaction"—and of making a statement to the world regarding the purity of American justice—the case "will afford a striking demonstration of the Court's regard for the moral requirements in the administration of law" and "rebound to the great honor of the nation everywhere." Yet, as Clark noted, the volume of evidence against the Communist Party was overwhelming, and the SACB would find against the Party whether it struck the "tainted" witness testimony. Moreover, a SACB finding that the Communist Party was a Communist action organization was not tantamount to a guilty verdict in a criminal trial,

⁸⁹ Ibid., 128.

but an adverse ruling in an administrative case. Such a finding by the SACB would merely require the Party to register with the government, not result in imprisonment. While the Court certainly made a clear statement, it did so, unjustifiably, at the expense of making a clear judicial ruling regarding the constitutionality of Congress's cornerstone anti-subversion statute.

The case also demonstrated the insidious effects of Peters. The Court's policy of avoiding constitutional issues had become a crusade to Frankfurter. The Court, in Peters, had sought to avoid an important constitutional question by employing a highly dubious interpretation of an executive order. That case by no means permanently bound the Court to avoid all constitutional questions at all times in all Communist cases. Frankfurter viewed Peters as requiring the Court to avoid constitutional questions if "the case that can go off on a non-constitutional ground." As Peters, and now Subversive Activities Control Board, demonstrated, the Court could always dispose of a case on a non-constitutional ground when it chose.

Finally, Frankfurter viewed the Court's decision as enhancing the nation's prestige in the eyes of the world. The Court remanded the case back to the SACB and eventually partially sustained the SACA's registration requirement. Frankfurter's myopic view begs the question: Where else but America could the Courts take more than a decade to determine whether the Communist Party was a Communist Action organization?

BLACK v. CUTTER LABS

JAY v. BOYD⁹⁰

While neither Black nor Jay were major Communist cases, both were important in tracing Earl Warren's transformation from a Frankfurter ally to a civil libertarian. In

⁹⁰ Black v. Cutter Labs, 351 U.S. 292 (1956); Jay v. Boyd, 351 U.S. 345 (1956).

Black, Warren joined his first civil libertarian Communist case opinion; in Jay, Warren authored his first civil libertarian Communist case opinion.

In Black, the Court considered the case of Doris Walker, a Communist attorney who misrepresented her employment and education history to secure employment with Cutter Laboratories.⁹¹ Cutter discovered Walker's ruse in 1947 but in an attempt to avert labor problems, did not discharge her until 1949.

Cutter's union contract obligated it to submit all employment termination decisions to an arbitration panel. That panel determined that Cutter, by waiting two years, waived its right to terminate Walker for either her deception or her Communist affiliations.⁹² The California Supreme Court reversed, rejected the use of the waiver doctrine in the case, and decreed that Communist Party membership constituted sufficient grounds for just cause termination.

Walker challenged that ruling on Fourteenth Amendment grounds. Clark, for a 6-3 Court, affirmed the California Supreme Court, holding that the case did not present a federal question, but instead a state interpretation of a local contract under local law.

Douglas, joined by Black and Warren, dissented. Douglas believed that Cutter's actions, and the Court's approval of them, implicated the First and Fourteenth Amendments. The California Supreme Court had allowed Cutter to discharge Walker because she was a Communist. The Court's majority viewed the case as a simple question of contracts; but when those contracts were enforced, "It violated the First

⁹¹ Three different companies discharged Walker for her union activities. She also omitted the fact that she had graduated from the University of California-Berkeley Law School.

⁹² The panel concluded that Cutter discharged Walker because of her union activities, not her misrepresentations regarding Communist activities.

Amendment guarantees of citizens who are workers in our industrial plants.”⁹³ To Douglas, the Court itself violated the Constitution when it permitted a corporation to terminate a Communist worker.

Douglas's logic that judicial enforcement of illegal private actions constituted state action was not without some foundation. The Vinson Court, in 1948's Shelley v. Kraemer, used a novel legal theory to justify the nullification of racially restrictive real estate covenants.⁹⁴ Vinson, for the majority, acknowledged that courts could not prohibit private discrimination. However, racially restrictive covenants ceased to be private discrimination once the state, through the courts, enforced it. The state courts would contribute to the discrimination—and violate the Fourteenth Amendment—if they enforced the covenants.

Douglas would extend Shelley's rationale to private employers, such as Cutter Labs, who sought the judiciary's assistance in terminating Communist workers. A judicial decision to affirm such a termination would constitute state, rather than private, action, subject to Douglas's version of the Fourteenth Amendment. Said Douglas:

Government may not favor one political group over another. Government may not disqualify one political group from employment. And if the courts lend their support to any such discriminatory program, Shelley teaches the Government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their ideology. This cannot be done in America, unless we forsake our Bill of Rights.⁹⁵

Warren went even further in Jay, when he wrote his first civil libertarian Communist case opinion. Jay concerned whether the Immigration and Nationality Act of

⁹³ Cutter Labs, 302.

⁹⁴ Shelley v. Kraemer, 334 U.S. 1 (1948).

⁹⁵ Jay, 303.

1952 permitted an INS hearing officers to rely on confidential information in determining whether to suspend a deportation.⁹⁶ Reed, for the majority, held that the Attorney General had unfettered discretion to grant or not grant relief to an alien under order of deportation. Further, an alien could not prevent the Attorney General or his subordinates from consulting confidential information.

Black, Douglas, Frankfurter, and Warren each wrote dissents. Hitherto, Warren's Communist case opinions had generally employed cautious rhetoric, conducive to consensus building. In Jay, Warren began employing the rhetoric that marked the remainder of his Court tenure. Warren did not review the language of the Act, or its legislative history, or even its constitutional problems. Said Warren:

In conscience, I cannot agree with the opinion of the majority. It sacrifices to form too much of the American spirit of fair play in both our judicial and administrative process.

Later in the opinion:

Such a hearing [a hearing in which secret evidence was utilized] is not an administrative hearing in the American sense of the term. It is no hearing.⁹⁷

Warren added:

If confidential information was used against immigrants, it may be recognized as a principle of law to be extended against American citizens in a myriad of ways....I am unwilling to write such a departure from American standards into the judicial or administrative process or to impute to Congress an intention to do so in the absence of much clearer language than it has used here.⁹⁸

⁹⁶ The Immigration and Naturalization Act of 1952 required the deportation of subversive aliens, but permitted the Attorney General to suspend the deportation in certain circumstances. The Attorney General promulgated implementing regulations permitting the INS to both consult confidential information in deportation proceedings and to withhold disclosure of the confidential information when prejudicial to the public interest, safety, or security.

⁹⁷ Jay, 361.

⁹⁸ Ibid., 362.

"In conscience," "fair play," "departure from American standards," "not an administrative hearing in the American sense of the term"—notably absent was any legal analysis. Warren's Jay dissent marked the beginning of Warren's stream of consciousness approach to Communist cases, where his sense of America and fairness ruled the day, and Congressional intent, judicial balancing, and precedent were irrelevant.

COLE v. YOUNG⁹⁹

The Summary Suspension Act of 1950 (SSA) provided that "the head of any agency to which the act applies may, in his absolute discretion and when deemed necessary in the interest of national security," suspend without pay and, after an opportunity for a hearing, terminate, an employee. The SSA also dispensed with an employee's right to appeal to the Civil Service Commission, a protection afforded to classified executive branch employees.

The SSA applied to eleven government agencies, including the Justice, Defense, and State Departments, but its provisions permitted the President to extend its coverage to other departments and agencies. President Eisenhower extended the SSA's coverage to all departments and agencies in 1953.¹⁰⁰

The Department of Health, Education, and Welfare (HEW) suspended Kendrick M. Cole, a Food and Drug Administration inspector, without pay for his associations with the Communist Party and Communist-front organizations. HEW later terminated Cole after he failed to dispute the charges.¹⁰¹

⁹⁹ Cole v. Young, 351 U.S. 536 (1956).

¹⁰⁰ Executive Order No. 10450, 18 Fed. Reg. 2489.

Harlan, for a 6-3 Court, decreed that the SSA did not authorize HEW to terminate Cole. The SSA permitted the executive branch to terminate employees in the "interest of national security," but did not define that term. Harlan provided his own analysis, concluding that whether an employee constituted a national security risk required an evaluation of: 1) his character; 2) the likelihood of his misconduct; and, 3) whether his misconduct would affect the national security.

Harlan limited this third category to those governmental positions directly concerned with the defense of the United States from internal subversion or foreign attack, not those concerned with the general welfare.¹⁰² He concluded that the SSA permitted agency and department heads to summarily suspend employees in "sensitive positions," but not those employees who could not affect national security. Because HEW had not determined that Cole, as a FDA inspector, could implicate national security, the SSA was not applicable and the discharge was invalid.¹⁰³

Yet Harlan's language indicated he reached his conclusion not because he believed the language of the SSA mandated it, but because he found the government's policy distasteful:

¹⁰¹ Cole also sought a Civil Service Commission review of his discharge, claiming that his termination was controlled by the Veterans Preference Act, which provided that Veterans may only be discharged "for cause that will promote the efficiency of the service."

¹⁰² Congress specifically listed eleven agencies covered by the SSA; Harlan asserted that had Congress intended "national security" to include all government activities, it would have extended the SSA's reach to all government agencies.

¹⁰³ Harlan appeared concerned that the government would use the mantra of "national security" as an excuse to circumvent personnel laws. Harlan added:

For why could it not be said that national security in that sense requires not merely loyal and trustworthy employees but also those that are industrious and efficient. The relationship of the job to the national security being the same, its demonstrated inadequate performance because of inefficiency or incompetence would seem to present a surer threat to national security, in the sense of the general welfare, than a mere doubt as to the employee's loyalty.

Cole, 547.

It is difficult to justify summary suspensions and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive positions' and thus are not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears.¹⁰⁴

Indeed, Harlan's opinion, at times, sounded as if Warren wrote it:

Indeed, in view of the stigma attached to persons dismissed on loyalty grounds, the need for procedural safeguards seems even greater than in other cases, and we will not lightly assume that Congress intended to take away those safeguards in the absence of some overriding necessity, such as exists in the case of employees handling defense secrets.

Clark, joined by Reed and Minton, dissented on three grounds. First, Congress knew of Eisenhower's executive order and made appropriations to fund investigations under the SSA, an action the Court had traditionally interpreted as ratification of the President's action.¹⁰⁵ Second, Clark attacked the Court's intrusion on executive's Article II powers to authorize the dismissal of executive employees. Finally, and most pointedly, Clark lambasted Harlan for applying the SSA only to "sensitive" jobs: "One never knows just which job is sensitive. The janitor might prove to be in as important a spot security-wise as the top employee in the building."¹⁰⁶

Cole represented the Court's continued use of statutory interpretation to intrude on the constitutional powers of the political branches of government. The opinion paralleled Peters in many respects: the Court claimed to avoid constitutional questions; the Court assumed that it, rather than the executive or legislative branches, was in the best position to interpret the statute or executive order.

¹⁰⁴ Ibid., 546.

¹⁰⁵ Clark cited Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

¹⁰⁶ Cole, 569.

The Court also produced an implausible interpretation of a clear statute. Indeed, the Court placed the political branches in an impossible position by its incredibly narrow reading of statutes and executive orders. The Court, with Cole and Peters, had imposed a *de facto* requirement that statutes and executive orders concerning subversion, absent clear language to the contrary, be construed against the government. This would have required the political branches to alter radically the manner in which they drafted legislation and executive orders. In Peters, that would have required the President to state, in an executive order, that he wished to allow the Loyalty Review Board to impose a "badge of infamy" on government employees. In Cole, Congress would have to draft the SSA to read that the head of an agency or department "may, in his absolute discretion and when deemed necessary in the interest of national security, suspend without pay, any civilian officer or employee, *regardless of whether that employee presents a threat to national security.*" (Hypothetical language in italics)

What were the political branches to do in response to the Court's hitherto unknown method of interpreting statutes and orders? Would Congress have to review and re-enact all of their statutes relating to subversion? Would the President have to review and re-enact all executive orders related to subversive employees? Finally, were the Court's Peters and Cole objections actually straw men? In other words, if the political branches altered their long-standing methods of drafting statutes and orders to meet the Court's concerns, would the Court deem these enactments constitutional? The Court did not, and would not, say.

CONCLUSION

When Warren became Chief Justice in 1953, it appeared that the Court would retain its generally pro-government stance in Communist cases. Warren appeared to embrace the anti-Communist cause, joining with the majority in Barsky and Galvan, and, initially, voting to convict in Emspak.

The Court's pro-government tilt in Communist cases ended in 1954. First, the intellectually potent Jackson died of a heart attack, replaced by the ideologically malleable Harlan. Second, Warren discarded his anti-Communism of the previous term and began to embrace Frankfurter's anti-government position in Communist cases. Finally, Clark, who as Attorney General helped initiate the Red Scare, began to join Warren and Frankfurter in these cases.

While the Court began deciding against the government in Communist cases in the 1954 Term, it still did not adopt the Black-Douglas policy of declaring the government's anti-Communist efforts unconstitutional; instead, the Court began to limit the government's anti-Communist programs by using statutory or administrative interpretation to limit their effect. The Court would generally reference, but did not decide, the constitutionality of the government's anti-Communist program. Black and Douglas were usually glad to supply a concurring opinion, one that addressed the constitutional issues. For example, in Peters, the Court refused to declare the government's use of confidential information unconstitutional. Instead, the Court noted that while that practice raised serious constitutional concerns, it must decide the issue on non-constitutional grounds. Black and Douglas concurred, but believed that the Court should have addressed the constitutional issues.

The 1955 Term began where the 1954 Term ended: With both Clark and Warren—and sometimes Harlan—joining Frankfurter in derailing the government's anti-Communist programs. The Court gutted state anti-subversion programs in Nelson and seemed to limit state anti-subversion statutes—as well as its own Garner and Adler decisions—in Slochower. The Court, following its Peters model, refrained from deciding the important constitutional issues in these cases.

The Warren—Clark—Frankfurter—Harlan coalition began to fray midway through the 1955 Term. In Subversive Activities Control Board, Frankfurter convinced a majority of justices to avoid determining the constitutionality of key provisions of the Subversive Activities Control Act. That act, passed over Truman's veto in 1950, represented the centerpiece of the government's anti-Communist effort. Frankfurter's dodge proved too much for Clark, who abandoned Frankfurter and joined Reed and Minton as a staunch anti-Communist.

While Clark veered right, Warren went left. In Cutter Labs, Warren for the first time joined a Black-Douglas Communist case dissent. In Jay, Warren for the first time wrote a Communist case dissent. These two decisions represented Warren's permanent alignment with Black and Douglas in Communist cases. While Warren would still join Frankfurter if necessary to obtain a majority—he had been a politician, after all—he preferred the rhetoric of the civil libertarians.

Finally, the Court's last Communist case decision of the 1955 Term, Cole, proved that Peters was not an aberration; now, the Court would scrutinize every anti-Communist statute or executive order and find some way to frustrate the government's intent.

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JUDICIAL NEGLECT: THE SUPREME COURT AND THE RED SCARE 1949-1961

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David Edmund Murley

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CHAPTER FIVE: 1956 TERM

The 1956 Term proved to be the most controversial of the Warren Court. The Court—with new Justices William Brennan and Charles Whittaker having replaced Sherman Minton and Stanley Reed—heard twelve Communist cases that term; the government lost all twelve. In previous terms, the Warren Court had avoided addressing the constitutionality of the government's anti-Communist program by employing implausible interpretations of statutes and executive orders. For example, in Peters v. Hobby, the Court avoided the "serious and far-reaching" constitutional issues implicated by the executive branch's interpretation of its own executive order. In Communist Party v. Subversive Activities Control Board, the Court declined to address the constitutionality of the government's legislative response to the Red Scare. Instead, the Court decreed that the SACB relied on tainted testimony in decreeing the Communist Party a Communist-action organization, and ordered the matter remanded to the Board.

The Court limited this practice during the 1956 Term and instead began to decide constitutional issues more frequently. Unfortunately, this willingness to address constitutional issues often created more confusion than clarity. For example, the Court considered the contempt conviction of a witness who refused to provide testimony to the HUAC in Watkins v. United States. Warren, for the majority, criticized the practices of Congressional investigative committees, implied that Congress had not authorized HUAC to investigate Communist activities, and decreed that the First Amendment limited Congress's investigative powers. Yet the Court, after raising and discussing the aforementioned issues, disposed of the case on rather suspect grounds: witness confusion. Because HUAC had failed to explain the purpose of its investigation, Watkins could not

be certain if his testimony was relevant to HUAC. Therefore, the Court held, his conviction violated the Fifth Amendment's Due Process Clause. This reasoning begs the question: if the Court was going to decide the case on such a technical ground, why did it discuss so many issues unrelated to the holding?

The Court replicated the Watkins approach many times during the 1956 Term. In several cases, the Court criticized, if not assailed, the government for its anti-Communist programs and practices, but then decided the case on constitutionally tangential grounds. This approach left Congress, the executive branch, potential Communist defendants, and defense lawyers thoroughly confused regarding the constitutionality of the government's anti-Communist programs. The Court's tone and language in its Communist case opinions denoted extreme hostility to the government's anti-Communist programs and practices; yet, by the end of the 1956 Term, the Court had yet to declare a single anti-Communist statute unconstitutional.

THE APPOINTMENT OF WILLIAM BRENNAN

Sherman Minton, a victim of pernicious anemia for nearly a decade, officially notified Eisenhower on September 7, 1956 that he would resign his seat effective October 15, 1956.¹

Attorney General Herbert Brownell provided Eisenhower the names of several possible replacements, including New Jersey Supreme Court Justice William Brennan. Appointing Brennan seemed to offer Eisenhower several advantages. The first was age. Brennan, only fifty, would be the Court's youngest justice, and could stay on the Court for decades. Second, Brennan came highly recommended. New Jersey's eminent Chief

¹ Minton made his decision to retire in May 1956, but had to remain on the Court until October 15, 1956 to qualify for his full pension. Gugin & St. Clair, Sherman Minton, 270-76.

Justice, Arthur Vanderbilt, told Eisenhower that Brennan possessed “the finest legal mind that he had ever known.”² Third, Brennan was a Democrat. Eisenhower wanted his judicial appointments to be above the political fray, and he had already appointed two Republicans. Finally, Eisenhower believed that appointing Brennan, an Irish Catholic, might garner him Catholic support in November's Presidential election.

Eisenhower certainly was not getting another staunch anti-Communist with Brennan, who vehemently opposed Senator Joe McCarthy and his tactics. Brennan took aim at McCarthyism in a 1954 Boston St. Patrick's Day speech:

The enemy deludes himself if he thinks he detects in some practices of the contemporary scene reminiscent of the Salem witch-hunts, any signs that our courage has failed us and that fear has palsied our hard-won concept of justice and fair play. These are but passing aberrations even now undergoing systematic deflation.³

In a February 1955 speech to the Monmouth County Rotary Club, Brennan condemned red-hunting legislative committees:

The power to extract answers will beget a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and even to physical force and torture...Intentionally conceived or merely misguided, the result had been to engender hate and fear by one citizen of another, to have us distrust ourselves and our institutions, to have us become a nation afraid. That path brings us perilously close to destroying liberty in liberty's name.⁴

Brennan took his Court seat as a recess appointment on October 16, 1956 and began confirmation hearings in February 1957. Brennan's nemesis, Senator Joe McCarthy, had been savoring this moment. Senate Judiciary Chairman James Eastland

² Hunter R. Clark, Justice Brennan: The Great Conciliator (New York: Birch Lane Press, 1995), 77

³ *Ibid.*, 68.

⁴ Kim Isaac Eisler, William J. Brennan, Jr., and The Decisions That Transformed America (New York: Simon & Schuster, 1993), 82.

gave McCarthy, who did not serve on the Committee, special permission to interrogate Brennan. Brennan, under the pressure of McCarthy's questioning, retreated from his outspoken civil libertarian position. For example, McCarthy asked Brennan for evidence of the congressional witch-hunts described by Brennan in his Boston St. Patrick's Day Speech. Brennan sheepishly admitted that no congressional committee had engaged in such scurrilous practices.⁵

Nor could Brennan remember if he had ever spoke in favor of HUAC or SISS, but if he had, he would say, "[t]hat I am very much for it, very, very much for it." Brennan's back-pedaling did not fool McCarthy; he cast the lone "nay" vote to Brennan's confirmation. Despite his Senate testimony to the contrary, Brennan soon demonstrated that he did object to legislative investigations. While Minton provided a reliable pro-government vote in Communist cases, Brennan, without exception, voted against the government in each such case before him.

Brennan's primary legacy to the Warren Court was to provide the civil libertarian wing with sorely needed intellectual heft in Communist cases. Douglas, while undoubtedly a man of incredible ability, was an ideological extremist and, unfortunately, intellectually lazy. Black, a First Amendment absolutist, was both predictable and frankly, difficult to take seriously in all cases. Warren, while a superb Court leader, was hardly a great legal mind.⁶ It was Brennan who emerged as the Court's intellectual voice, not only in Communist cases, but in all areas of the law. An article in the conservative National Review Magazine made the following telling observation in 1984:

⁵ Clark, Justice Brennan, 106-110.

⁶ Warren became Brennan's closest ally on the Court; the two usually met on Thursdays to discuss the cases on the agenda for Friday's conference. Schwartz, Super Chief, 206.

Today, after more than a quarter-century of service on the High Court... William Brennan remains a figure largely overlooked by the public. Yet an examination of Brennan's opinions and his influence upon the opinions of his colleagues, suggests that there is no individual in this country, on or off the Court, who has had a more profound and sustained impact upon public policy in the United States [since 1956].⁷

Brennan, a graduate of Harvard Law School, had once been Felix Frankfurter's student, but did not adhere to his former pedagogue's judicial restraint doctrine.

Frankfurter said of his former student, "I always encouraged students to think for themselves, but Brennan goes too far!"⁸ It a few short years, Brennan would eclipse Frankfurter as the Court's top legal mind.

THE APPOINTMENT OF CHARLES WHITTAKER

On January 31, 1957, Stanley Reed announced that he would retire at the end of the next month. Why did Reed retire from the Court during the term? According to Reed's biographer and former clerk John Fassett, "[T]he reason seems obvious—he foresaw nothing but defeat and frustration to come by his participation in the significant number of major cases scheduled to be argued and decided during the balance of the term."⁹

Reed's replacement, Charles Evans Whittaker, proved among the least distinguished justices in the Supreme Court's history. Whittaker, a University of Kansas City Law School alumnus, practiced with a leading Kansas City law firm until his federal district court appointment in 1954. Eisenhower appointed Whittaker to the Eighth Circuit Court of Appeals two years later, and elevated him to the Supreme Court in 1957.

⁷ Clark, Justice Brennan, 6, citing Stephen J. Markman & Alfred Regnery, "The Mind of Justice Brennan: A 25-year tribute," National Review (May 18, 1984), 30.

⁸ Schwartz, Super Chief, 205.

⁹ Fassett, New Deal Justice, 627.

Warren Court historian Bernard Schwartz noted that Whittaker suffered from two major defects: a lack of intellectual capacity and an inability to reach decisions. Whittaker tended to vacillate in important cases, often agreeing with the last person who had spoken.¹⁰ For example, in In Re Sawyer, a case concerning the disbarment of a Communist attorney, Whittaker vacillated between the Brennan block (opposing disbarment) and the Frankfurter block (supporting disbarment). Said Whittaker,

I have studied as carefully as I am able your opinion and Felix' dissenting opinion in this case, both of which are strong. However, you and Felix appear to be talking about different cases. This tends to emphasize that the conclusion to be drawn from the evidence is a matter about which reasonable men may differ.¹¹

Whittaker did not embrace the staunch anti-Communism of Reed, but joined the Court's anti-Communist wing more often than not. None of his opinions was particularly distinguished or noteworthy. Whittaker, absolutely exhausted from the Court's busy schedule, retired during the 1961 Term.

1956 CASES

The Court refused to allow the use of potentially tainted ex-Communist witness testimony in Mesarosh v. United States. In United States v. Witkovich, it used statutory construction to limit the Attorney General's authority to question aliens. In Schwartz v. Board of Bar Examiners of New Mexico and Konigsberg v. State Bar of California, the Court prohibited states from denying bar membership to persons because of their Communist Party membership. In Jencks v. United States, the Court mandated that a defendant—in that case, an alleged Communist defendant—have access to reports from government witnesses.

¹⁰ Schwartz, Super Chief, 216.

¹¹ Charles Whittaker to William Brennan (copy to Felix Frankfurter), June 24, 1959, Set 2, Reel 38, Felix Frankfurter Papers.

These cases were a mere preview of the explosive last day of the 1956 Term. On June 13, 1957—known to history as “Red Monday”—the Court issued a series of decisions that appeared to hamper severely the government's anti-subversion program. In Service v. Dulles, the Court set aside the termination of John Stewart Service, one of the old “China hands.” In Yates v. United States, it effectively invalidated the Smith Act. The Court provided a stern, rambling lecture regarding Congressional committees in Watkins v. United States. Finally, in Sweezy v. New Hampshire, the Court limited state legislative inquiries into subversive activities.

MESAROSH v. UNITED STATES

UNITED STATES v. WITKOVICH¹²

The Court had cast a jaundiced eye upon the government's use of ex-Communist “expert” witnesses in Communist Party v. Subversive Activities Control Board. The Court extended that policy in Mesarosh v. United States. The Justice Department had obtained convictions against Steve Mesarosh (alias Steve Nelson, the defendant in Pennsylvania v Nelson) and four others for conspiracy to violate Smith Act. After Supreme Court arguments, the Solicitor General informed the Court that one of the witnesses against Nelson—a Joseph Mazzei—*may* have provided false testimony in other proceedings. The Solicitor General requested that the Court remand the case to the district court for a determination of Mazzei’s credibility.

Warren—who admitted not reviewing the trial record—determined that Mazzei was not a credible witness and ordered a new trial for all five defendants. But Mazzei had testified against only two of the five defendants; why overturn the other three convictions? Warren was not concerned with specifics; Mazzei, he decreed, had tainted

¹² Mesarosh v. United States, 352 U.S. 1 (1956); United States v. Witkovich, 353 U.S. 194 (1957).

the trial for all of the defendants.¹³ Said Warren: “The dignity of the United States Government will not permit the conviction of any person on tainted testimony. The conviction is tainted, and there can be no just result than to accord petitioners a new trial.”¹⁴

Witkovich concerned Congress's deportation power. § 242(d)(3) of the Immigration and Nationality Act of 1952 required an alien against whom a final order of deportation had been entered “to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper.” The Attorney General’s office asked Witkovich, an alien under order of deportation, for information regarding his Communist Party activities. Witkovich refused to answer and was indicted under § 242(d)(3).

Frankfurter, for a 7-2 Court, declined to discuss § 242(d)(3) constitutionality. Instead, Frankfurter interpreted that section to limit the Attorney General inquiry to questions concerning an alien’s availability for deportation. Because § 242(d)(3) did not authorize the government to ask an alien regarding his Communist Party associations, it could not punish him for refusing to answer such questions.

Clark sent a note to Frankfurter, trying to convince him of the necessity of a broader interpretation:

Certain information permitted under subdivision (3) might well be relevant to the continued availability for departure of an alien who had been ordered deported.

¹³ Harlan, joined by Frankfurter and Burton, dissented. He criticized the Court for claiming that the entire case was tainted, when it had not read the record. Further, the reversal of the convictions was “an unprecedented and dangerous departure from the sound principles of judicial administration.” Mesarosh, 20.

¹⁴ *Ibid.*, 9.

For example, a deportee who has been a racketeer should be required to give information as to habits and associations, otherwise his underworld friends might well secret him away...Likewise in Communist Party cases, the history of the Party indicates that it encourages its members who are in trouble to become fugitives and other members to harbor them. In cases involving higher-ups in the party it is not at all speculative to say that continued association in the Party might easily result in the alien not being available for his departure...If you could add some generalization that would permit all questioning reasonably necessary to keep the Attorney General advised as to the continued availability of the alien it might be I could go along with you.¹⁵

Clark's efforts were in vain. If Frankfurter agreed to Clark's proposed interpretation, he would have to address the constitutionality of the section. Rather than violate his long-standing aversion to providing constitutional interpretations in Communist cases, Frankfurter instead chose a highly implausible interpretation of a statute.¹⁶

Mesarosh and Witkovich were not major Communist cases, but both were illustrative of Warren's and Frankfurter's judicial reasoning. Warren's approach to Mesarosh was cavalier. He did not need a lower Court to determine the witness's credibility, did not need it to determine whether the witness prejudiced the trial of three of the defendants, he did not even need to read the trial record; but Warren was certain that "the dignity of the United States Government" required this "just result." Warren had substituted his conscience for legal argument before in Communist cases, but had not so proudly worn his indifference to facts on his sleeve.

If Mesarosh was devoid of law, Witkovich was devoid of credibility. The language of the § 242 (d)(3) seemed quite clear. If a justice found it ambiguous, he

¹⁵ Tom Clark to Felix Frankfurter, April 17, 1957, Box A-57, Folder 2, Tom Clark Papers.

¹⁶ Clark, joined by Burton, dissented, arguing that Frankfurter's interpretation contradicted Congress's plan to prevent aliens, under order of deportation, from engaging in the very conduct that caused their deportation. Clark conducted a balancing test: the collection of information from aliens regarding potentially detrimental conduct outweighed any possible liberty interest of the alien

needed merely ask, why would Congress deport a Communist alien, but be indifferent to his pre-deportation Communist activities? Congress was not indifferent. It believed that it had authorized the Attorney General to monitor those activities, and compel aliens to answer questions related to those activities. Yet as long as Frankfurter could convince a majority of the Court regarding the virtues of avoiding constitutional questions, he would continue to frustrate congressional intent.

SCHWARTZ v. BOARD OF BAR EXAMINERS OF NEW MEXICO¹⁷

The Court stripped the states' ability to enforce subversion laws in Nelson and limited their authority to terminate employees in Wieman and Slochower. In Schwartz v. Board of Bar Examiners of New Mexico, the Court analyzed whether a state violated the Fourteenth Amendment's Due Process Clause by denying a former Communist Party member admission to the bar.

The New Mexico Board of Law Examiners (Board) concluded in 1954 that Rudolph Schwartz, a University of New Mexico Law School graduate, did not possess the requisite moral character to take the bar examination. Several character witnesses had attested to Schwartz's virtues as a citizen. However, the Board was more concerned about Schwartz's activities in the 1930's: Communist Party membership, numerous arrests (but not convictions), and use of several aliases. The New Mexico Supreme Court affirmed the Board's conclusion, adding: "We believe one who has knowingly given his loyalties to [the Communist Party] for six to seven years during a period of responsible adulthood is a person of questionable character."¹⁸

¹⁷ Schwartz v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

¹⁸ *Ibid.*, 237.

Black, for the Court, held New Mexico's actions to violate Schware's Fourteenth Amendment Due Process rights. Black asked: Did the record contain sufficient evidence to indicate that Schware had not proved good moral character? Black answered that question with a resounding "no."

Black dismissed New Mexico's concerns regarding Schware's arrests and use of aliases in the 1930's, deeming neither relevant to the questions of his good moral character in 1954. Black's analysis of Schware's Communist Party membership was much more complicated.

Black chastised the New Mexico Supreme Court for relying on Jackson's Douds concurrence to characterize the Communist Party. Specifically, the New Mexico Court assumed that the Communist Party Schware belonged to in the 1930's, "was dominated by a foreign power and was dedicated to the violent overthrow of the Government and that every member was aware of this."¹⁹

Black rejected New Mexico's characterization of the Party and asserted that Wieman, which distinguished between "knowing" and "innocent" Communists, was the controlling legal precedent. Black placed Schware squarely in the latter category. First, the Communist Party was a legal party in the 1930's; in fact, many states allowed the Party on the election ballot. Second, New Mexico had not demonstrated that Schware participated in any illegal or morally reprehensible activities as a Party member. Finally, and most important, Black asserted that previous Communist Party membership was not prima facie evidence of bad moral character.

Frankfurter, joined by Clark and Harlan, concurred in the result. Frankfurter deferred to the concept of federalism and the primary state role in bar admission

¹⁹ Ibid., 244.

decisions. In this case, however, New Mexico violated due process by its absolutist standard on prior Communist Party membership. The New Mexico Supreme Court held that as a matter of law, it *must* reject for questionable character anyone who *ever* belonged to the Communist Party. New Mexico's conclusion was “so dogmatic an inference as to be wholly unwarranted,” and violated due process.²⁰ Frankfurter did not answer whether New Mexico *could*, as a matter of law, reject any individual bar applicant because of his or her prior Communist Party membership.

Schwartz's result may seem obvious today, but in the 1950's, it signified a major shift in judicial philosophy. Schwartz's true significance, according to Professor McCloskey, was to destroy the “privilege doctrine” as a valid defense in state licensing cases. The privilege doctrine had allowed states to grant or withhold a particular privilege, such as public employment or a professional license, at its discretion. The Court had chipped away at the state's absolute discretion over public employment in Garner, Wieman, and Slochower, and seemed to limit state discretion over professional licensing in Schwartz.²¹ After these cases, states could no longer grant or deny employment or professional licensing at their whimsy.

Black's Schwartz opinion was significant for its express expansion of Wieman's distinction between “knowing” and “innocent” membership in subversive organizations to the Communist Party. In Wieman—and, to a lesser extent, Garner and Gerende—the Court sought to add a scienter requirement to membership oaths. A person may have joined an organization such as the Joint Anti-Fascist Refugee Committee without realizing that the Communist Party controlled it. By adding a scienter requirement, the

²⁰ Ibid., 251.

²¹ McCloskey, The Supreme Court Today, 168.

Court prevented states from terminating those who "accidentally" joined a Communist front organization.

However, the Court in the aforementioned cases discussed "subversive organizations," not the Communist Party. The Communist Party certainly would fall within the definition of subversive organization, but did a person join the Party "unaware of its activities and purposes?" Did the desire to protect the innocent employee who joined the Joint Anti-Fascist Refugee Committee extend to the employee who joined the Communist Party? Was it proper to place the burden of proof on the state, rather than the person seeking the state-granted privilege? After Schwabe, the Court answered these questions in the positive.

KONIGSBERG v. STATE BAR OF CALIFORNIA²²

The Court's common ground in Schwabe disappeared in Konigsberg v. State Bar of California. Raphael Konigsberg graduated from the University of Southern California Law School and passed the California Bar examination in 1953. The California Board of Bar Examiners (Board) had to approve Konigsberg before it would admit him to the bar. The Board had reviewed evidence indicating that Konigsberg had attended Communist Party meetings (in 1941) and wrote numerous editorials critical of America's Korean War policy and the Court's Dennis decision. The Board, after reviewing the evidence, asked Konigsberg if he belonged to the Communist Party.

Konigsberg denied that he advocated the violent overthrow of the government. He volunteered to take an oath to uphold the U.S. and California Constitutions but, citing his First and Fourteenth Amendment rights to free speech and association, refused to tell

²² Konigsberg v. State Bar of California, 353 U.S. 252 (1957).

the board if he was a Communist.²³ The Board refused to certify *Konigsberg* because he failed to prove that: 1) he possessed good moral character; and, 2) failed to prove that he did not advocate the overthrow of the United States or California.²⁴

Black, for a 5-3 Court, reversed California's decision.²⁵ The evidence in the record, according to Black, did not rationally support the Board's rejection of *Konigsberg's* bar application. The rejection thus constituted a denial of the Fourteenth Amendment's Equal Protection and Due Process Clauses.

Black began his opinion warning of the nebulous nature of "good moral character," a term which

can be defined in an almost unlimited number of ways, for any definition will necessarily reflect the attitude, experience and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.²⁶

Black reserved for the Court the authority to provide a definition, or at least to review a state's definition, of good moral character. He found California's definition of the term wanting on two fronts. First, Black decreed that *Konigsberg's* alleged Communist Party membership did not demonstrate bad moral character. The record was devoid of evidence indicating *Konigsberg* engaged in or supported any unlawful or

²³ Several witnesses—forty-two—attested to *Konigsberg's* good moral character.

²⁴ The Board also denied him certification because he had failed to prove that he did not advocate the overthrow of the governments of the United States or California by unconstitutional means. Section 6064.1 of the California Business and Professional Code prohibited the Board from certifying any person who advocated the overthrow of the state or federal governments by force, violence, or other unconstitutional means. *Konigsberg*, 259.

²⁵ Whittaker did not participate in the decision.

²⁶ *Konigsberg*, 263. Black concluded that California's good moral character standard required "honesty, fairness, and respect for the rights of others and for the laws of the state and nation." It did not reference political affiliation. Thus, according to Black, California's own standard prevented it from using *Konigsberg's* possible Communist Party membership as evidence of lack of good moral character.

immoral activities. Moreover, the Communist Party was a legal political party in California in 1941, when Konigsberg allegedly attended its meetings. Said Black, “[t]hose who accepted the state at its word [that the Communist Party was “legal”] and joined the Party had a right to expect that the State would not penalize them, directly or indirectly, for doing so thereafter.”²⁷

Second, Black prohibited California from inferring bad moral character from Konigsberg's refusal to discuss his alleged Communist activities. Black did not address the validity of Konigsberg's First and Fourteenth Amendment assertions in response to the Board's questions, but instead deemed his refusal to answer “not frivolous” and made “in good faith.” Further, California could not infer bad moral character “if [Konigsberg's] refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the committee was making.”²⁸

Finally, Black denied that California could conclude from the evidence in the record that Konigsberg advocated the overthrow of California or the United States. Neither Konigsberg's writings nor his alleged Communist Party activities in 1941 demonstrated that he sought the overthrow of any government. Further, California could not infer from Konigsberg's his failure to answer questions regarding his current Communist Party ties that he sought to overthrow the government.

Black expressly avoided answering whether Konigsberg's obstruction of the Board's inquiry was sufficient grounds for rejection. Instead, he took Konigsberg's good moral character as a given. Black added:

²⁷ Ibid, 268.

²⁸ Ibid., 270.

Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is a disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the committee's action.²⁹

With that, the Court ordered the case remanded to the California Supreme Court, for disposition in conformance with the opinion.

Harlan, joined by Clark, filed a dissent.³⁰ Harlan attacked Black for avoiding the case's major issues, such as the constitutionality of California's "good moral character" and "violent overthrow" requirements and the propriety of Konigsberg's First and Fourteenth Amendment claims. The majority attacked the Board for failing to certify Konigsberg, but how could it do so without proof of his good moral character? Konigsberg's recalcitrance, concluded Harlan, made certification impossible.

Harlan concluded by attacking the Court's overreach:

[I]t seems to me altogether beyond question that a state may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area. The opinion of the court does not really question this; it solves the problem by denying that it exists. But what the Court has really done, I think, is simply to impose on California its own notions of public policy

²⁹ Ibid., 274. Perhaps substituting "Ku Klux Klan" for "Communist Party" provides insight into Black's reasoning

³⁰ Frankfurter filed a separate dissent. Frankfurter doubted that the California Supreme Court had passed on a federal question, and wanted to remand the case to California to allow it to answer this question.

Frankfurter's law clerk wrote the following:

I was somewhat puzzled about why Konigsberg was depicted as being so noble, as relative to Schwere, but at lunch today, Bob Girard [Black's law clerk], hard-pressed from all sides, let loose at Schwere groveling on his stomach before the committee and answering everything...Of course! How stupid can I have been not to think of that.

Said Frankfurter in response: "This is the best 'constitutional' basis for the opinion I have yet heard." Felix Frankfurter response, undated, Konigsberg, Set 2, Reel 22, Felix Frankfurter Papers.

and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.³¹

Black mistakenly treated Konigsberg as if it was Schware. In the latter, the Court prevented states from treating an applicant's previous Communist Party membership as *prima facie* grounds for rejection to the state bar. While Black and Frankfurter differed on the decision's rationale, both rejected New Mexico's apparent "zero tolerance" regarding previous Communist membership as constitutionally unjustifiable.

Black treated Konigsberg as if it concerned those same issues. Indeed, he focused on Konigsberg's alleged Communist Party membership in 1941 and argued such membership, if true, proved neither his bad moral character nor his alleged advocacy of the overthrow of the government. While that analysis worked in Schware, it did not work in Konigsberg. California law permitted the Board to admit to the Bar only those applicants who possessed good moral character and who did not believe in the overthrow of the government. Yet the Board could not make these determinations if the witness refused to answer its questions regarding Communist Party membership. If Konigsberg, while under oath, stated that he had never belonged to the Communist Party, or had not been a member since 1941, that would probably end the inquiry. But what if Konigsberg belonged to the Communist Party after 1941? The Board would be derelict in its duty if it did not press such an inquiry. Konigsberg, by refusing to answer relevant inquiries, left the Board no other choice but to reject him.

Black's opinion, as noted by the dissent, avoided the primary issues raised by the case. This is somewhat surprising, given that Black usually confronted, rather than avoided, constitutional controversies; perhaps this was necessary to secure Burton's

³¹ Konigsberg, 311-312.

crucial fifth vote. Regardless, the Court had a prime opportunity to decide a number of important questions, including whether California's "good moral character" and "violent overthrow" requirements violated the constitution; whether an applicant's current or recent Communist Party membership provided sufficient grounds for a state to deny his admission to the bar; and, whether Konigsberg had a First or Fourteenth Amendment basis to refuse to provide answers to the Board's questions. The Court's failure to confront these issues would come back to haunt it in the 1960 Term, when it reheard Konigsberg.

JENCKS v. UNITED STATES³²

The Justice Department prosecuted Mine, Mill and Smelter Workers official Clinton Jencks for violating the Taft-Hartley Act's non-communist affidavit provision (§ 9(h)). At trial, the notorious Harvey Matusow testified that Jencks had admitted his Communist Party membership to him, while another witness, J.W. Ford, testified that Jencks served as a board member of the New Mexico Communist Party. Upon cross-examination, both admitted providing written reports to the FBI. Jencks sought to compel the government to submit the records to the trial court for an in-camera inspection, to determine whether the witness's written reports corroborated their trial testimony.

The trial court denied Jencks' motion, noting that he had failed to lay a preliminary foundation of inconsistency between the witness' oral testimony and their written reports. Jencks had entered a catch-22 world, where the written reports could contradict a witness's testimony, but without proof of the contradiction, the judge would not order their disclosure.

³² Jencks v. United States, 353 U.S. 657 (1957).

Brennan, for the majority, reversed the lower court and held:

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless [the witness] admits conflict...the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal courts and must therefore be rejected.³³

Brennan went beyond Jencks' request for an in-camera inspection of the records.

Instead, he ordered the government to submit the records directly to Jencks, because "only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."³⁴

Brennan conceded that disclosing certain records and reports may jeopardize national security, and granted the government a choice. The government could release the records and commence its prosecution, or it could withhold the records and forego prosecution. Regardless, the government, and not the Court, would have to balance the relevant interests before it brought the case to trial.

Harlan, joined by Burton in concurrence, believed that Brennan had gone too far. He agreed that Jencks was not required to demonstrate inconsistency between the reports and the testimony. Yet Jencks never asked for the reports; he requested only that a judge review them and grant him access only to those non-privileged portions useful in impeaching the witnesses. The Court went far beyond that request:

³³ Ibid., 667-668.

³⁴ Ibid., 669.

[The Court] seems to hold that the Government waives any privileges it may have with respect to documents in its possession by placing the author of those documents on the witness stand in a criminal prosecution. The Government's privileges with respect to state secrets and the identity of confidential informants embody important considerations of public policy. They are peculiar privileges in that they require the withholding of evidence not only from the jury, but also from the defendant.³⁵

Harlan believed that a trial judge's review of the reports was sufficient. The Court could balance the conflicting interests of the defendant and the government by giving the judge authority to review the records.

Clark dissented, agreeing with Harlan that the trial judge should review the reports. His dissent is most noteworthy for its bombastic tone:

Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the court has opened their files to the criminal and thus afforded him a Roman Holiday for rummaging through confidential information as well as vital national secrets.³⁶

In retrospect, it is amazing that Jencks' access to the reports and notes was even in question. Access to potentially contradictory evidence is an essential element of a fair trial, and, at least by contemporary standards of justice, Jencks' request appears eminently reasonable. Yet Brennan never explained why the defendant must have access to the records. Was it a mandate of the Due Process Clause? Was it a question of the Court's administrative power? Brennan did not provide a legal basis for his holding, but justified it with the statement "justice requires no less." Further, his opinion went far beyond what Jencks himself had requested. Had Brennan simply explained why the Constitution required the government to provide relevant portions of reports to a trial court judge for an in-camera inspection, the Court's opinion would have been more acceptable to the

³⁵ Ibid., 675.

³⁶ Ibid., 681-682.

public. But by foregoing any legal explanation of his opinion, and requiring the government to submit all potentially relevant reports to the defendant, Brennan's opinion—aided by Clark's bombastic dissent—created the perception that subversives would have unlimited access to government files and reports.

Jencks also demonstrated the Court's division on the question of the balancing test. The majority appeared to deny that the Court should play a role in balancing the government's needs against an individual's constitutional rights. Brennan's opinion required the government, rather than the Court, to balance these interests—with the consequence that the government must release potentially classified information to subversive defendants in a prosecution. Brennan's opinion signaled that he was not concerned with the potential harm the Jencks decision may cause the government. In essence, the majority believed that its mission was to uphold the Bill of Rights, regardless of its affect on any countervailing governmental interest.

Harlan, usually joined by Frankfurter, considered the government's interests. In Jencks, Harlan (but not Frankfurter) would have balanced the interests by requiring the government to provide the reports to the trial judge review and release any information germane to the defense. While the Harlan/Frankfurter desire to balance individual and governmental interests often led them to create seriously flawed interpretations of statutes and executive orders, at least it demonstrated a cognizance that the political branches had powers and responsibilities.

Clark, the sole dissenter, might join a Harlan or Frankfurter opinion that discussed balancing, but only if that opinion upheld the government. Clark did not ignore individual rights, but clearly tipped the balance in favor of the government. In the

process, Clark became the government's most vociferous advocate in Communist cases, often sprinkling his dissents with "the sky-is-falling"-type rhetoric. That rhetoric would grow harsher over the next few terms.

RED MONDAY

The Court decided Jencks on June 3, 1957. Two weeks later, on "Red Monday," the Court issued four decisions—Service, Yates, Watkins, and Sweezy—that appeared to derail the government's anti-Communist programs.

"Red Monday" was a take-off on "Black Monday," the last day of the 1935 Term when the Hughes Court declared several New Deal statutes unconstitutional. As with Black Monday, Red Monday led to a legislative assault on the Court. As Chapter Six explains, Red Monday, unlike Black Monday, prompted Congress to vote on legislation to curtail the Court's jurisdiction.³⁷

SERVICE v. DULLES³⁸

John Stewart Service, one of the State Department's "China Hands," was arrested in 1945 for violating the Espionage Act by providing confidential information to Phillip Jaffe of Amerasia Magazine.³⁹ Service returned to the State Department's Far East Desk after a grand jury refused to indict him.

³⁷ Congress never voted on Roosevelt's Court-packing plan. The anti-New Deal coalition started falling apart by spring, 1937; In March, Justice Owen Robert abandoned the anti-New Deal forces and began upholding New Deal legislation, and in May, Justice Willis Van Devanter, one of the "Four Horseman" who had voted to strike down New Deal legislation, resigned from the Court. Thus, when Senate Majority Leader Joseph Robinson, Roosevelt's leader on the Court restructuring plan, died of a heart attack in July, Roosevelt had already neutralized the Court as an effective obstacle to the New Deal. William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt (New York: Oxford University Press, 1995), 132-62.

³⁸ Service v. Dulles, 354 U.S. 363 (1957).

³⁹ For an explanation of the Amerasia case, see Harvey Klehr & Ronald Radosh, The Amerasia Spy Case: Prelude to McCarthyism (Chapel Hill: University of North Carolina Press, 1996).

Service was subjected to several hearings before the Department of State's Loyalty Security Board (LSB) after his return, but was cleared each time. Finally, the Civil Service Commission's Loyalty Review Board (LRB) conducted its own hearing and found reasonable doubt as to Service's loyalty. Secretary of State Dean Acheson adopted the LRB's findings and terminated Service on December 13, 1951.

In Peters v. Hobby, the Court held that Executive Order 9835 did not grant the LRB the authority to review Department determinations favorable to an employee. In Service, the government was acting pursuant to both Executive Order 9835 and the so-called "McCarran Rider." This rider, attached to all Department of State appropriations since 1947, granted the Secretary of State absolute discretion to terminate any Department of State or Foreign Service employee if deemed in the interests of the United States.

Although not required to do so, the Department of State enacted regulations in 1949 and 1951 providing administrative hearings to employees accused of loyalty or security violations. Harlan, for an 8-0 Court, opined that once the Department promulgated the regulations, it was required to follow them, regardless of the language of the McCarran rider.⁴⁰ Because the Department did not follow its own procedures, the discharge was invalid.

Service was Red Monday's minor case. The other three Communist cases the Court decided that day appeared to take the muscle from the government's anti-Communist efforts.

YATES v. UNITED STATES⁴¹

⁴⁰ Clark did not participate in the decision.

The Warren Court effectively nullified Dennis with Yates v. United States. Yates concerned fourteen West Coast Communist Party leaders convicted of conspiring to 1) advocate and teach the necessity of overthrowing the United States Government by force and violence, in violation of Smith Act § 2(a)(1); and, 2) organize a group (the Communist Party) that advocated and taught the necessity of the violent overthrow of the United States Government in violation of Smith Act § 2(a)(3). Smith Act § 3 prohibited a person from attempting or conspiring to violate any provision of the Act.

Organize

Smith Act § 2(a)(3) made it unlawful to

organize or help organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group or assembly of persons, knowing the purposes thereof.

The Smith Act did not define “organize.” The defendants argued that “organize,” as used in the Act, meant to found, establish, or bring into existence. The Government argued that “organize,” meant to perpetuate the life of an organization. The definition was crucial, for the Smith Act had a three-year statute of limitations. The Communist Party, founded in 1919, had morphed into the Communist Political Association in 1942, and re-formed as the Communist Party in 1945. If the Court accepted the Party’s definition of “organize,” the indictments (obtained in 1951) would be stale and the convictions reversed.

In a quintessential example of how the phrasing of a question can dictate the answer—or how a desired answer can dictate the phrasing of a question—Harlan queried: “Stated most simply, the problem is to choose between two possible answers to the

⁴¹ Yates v. United States, 354 U.S. 298 (1957).

question: When was the Communist Party ‘organized’?”⁴² It was a loaded question for, when phrased in the past tense, it implied a singular, rather than a continuous, process.

The government argued that Congress would not have enacted a statute (the Smith Act) that immunized the Communist Party from the very conduct that Congress sought to prohibit. For the Court to decide otherwise—for the Court to determine that “organize” means to found or create, not perpetuate—would have Congress say: We want to curb the Communist Party’s illegal conduct, but because it was founded in 1919, we will immunize it from the Smith Act’s “organize” section. However, if other subversive organizations form in the future, or the Communist Party ever dissolves and then reforms (as it did, but that was not foreseeable when the Smith Act passed in 1940), then Justice Department will have a three-year window in which to prosecute.

Harlan rejected the government’s argument, noting that while the Smith Act’s legislative history indicated that fear of Communism was a “strong factor” in its passage, the Act “was aimed equally at all groups falling within its scope.” The Smith Act derived from New York’s Criminal Anarchy Act, which aimed at Anarchists and Syndicalists, and the Court would not read it as primarily an anti-Communist measure.⁴³

Harlan also denied that Congress intended “organize” to have a broad meaning. While Congress may have aimed at those who created an illegal organization, Harlan “[found] nothing” indicating Congress wished the Smith Act’s “organize” section to apply to those who perpetuated the organization. Finally, because the Smith Act’s

⁴² Yates, 306.

⁴³ For evidence of this, Harlan quoted Rep. John McCormick, one of the “leading proponents” of the Smith Act, as stating: “This bill is not alone aimed at Communists; this bill is aimed at anyone who advocates the overthrow of the Government.” *Ibid.*, 307, n. 8.

"membership" and "advocacy" sections already applied to Communists who helped perpetuate the organization, Harlan refused to fill the statute's gaps by utilizing a broad definition of "organize."

Harlan, after explaining his reasoning, declared the Smith Act's use of the term "organize" ambiguous. Because violation of the Smith Act's "organize" section constituted a criminal offense, Harlan construed it strictly and resolved all ambiguity in favor of the defendant, limiting the "organize" section's reach to those who "re-founded" the Communist Party in 1945.⁴⁴ The Yates indictments were returned in 1951. Because the statute of limitations for a Smith Act prosecution was only three years, Harlan had no choice but to throw out the convictions of the Communist Party leaders. More important, Harlan had effectively immunized the Communist Party's leadership from prosecution pursuant to the Smith Act's organize section.

Advocacy

Harlan turned to the second issue in Yates: whether the trial judge properly instructed the jury on the meaning of the term "advocacy." Smith Act §2(a)(1) read:

It shall be unlawful for any person to knowingly or willingly advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.

The Yates trial judge had instructed the jury that it could not convict the defendants unless it determined that their advocacy included the use of force or violence as the means of overthrowing the government. Specifically, the jury must find:

The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the government of the United States be overthrown and destroyed by force and violence and not

⁴⁴ Harlan cited the Marshall Court case US v. Wiltberger, 5 Wheat. 76, 95-96 for the proposition that ambiguous criminal statutes must be resolved in favor of the defendant.

merely a prophecy but a duty to overthrow and destroy the government of the United States by force and violence.⁴⁵

The instructions, unlike the Dennis instructions, did not require the jury to find incitement—advocacy that would stir listeners to undertake violent action.⁴⁶ Harlan, who believed that the Smith Act prohibited incitement, not “abstract” advocacy, deemed this omission a fatal flaw.

Harlan refused to pass on the constitutionality of the Yates judge's instructions and instead sought to glean the legislative intent behind the Smith Act's "advocacy" section. However, in performing this task, Harlan declared the "abstract advocacy" interpretation off limits: “[W]e should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words ‘advocate’ and ‘teach’ in their ordinary dictionary meanings when they had already been construed as terms of art carrying a special and limited connotation.”⁴⁷ Harlan was referring to the Smith Act’s legislative history, which showed “beyond all question” that Congress intended to distinguish between the advocacy of abstract doctrine and the advocacy of violent action, and aimed the statute at the latter.

Had not Dennis decided this question? Not according to Harlan; in *Dennis*, the government convicted several defendants for the advocacy of future violent action. That is, the defendants taught Lenin and Marx and preached class struggle not because they were advocating violence in the abstract, but because they were inciting violent action—violent action that would occur sometime in the future, when the time was right. Said

⁴⁵ Yates, 315. The Dennis Court focused on the "advocacy" section's constitutionality under the “clear and present danger” test, not the degree of proof necessary for a conviction under that section.

⁴⁶ The Government requested the Yates judge to read the Dennis jury instructions, which required that the jury find incitement.

⁴⁷ Yates, 319.

Harlan, “Dennis was thus not concerned with a conspiracy to engage at some future time in seditious advocacy, but rather with a conspiracy to advocate presently the taking of forcible action in the future. It was action, not advocacy, that was to be postponed until circumstances would permit”⁴⁸

In contrast, the Yates jury instructions permitted the jurors to convict if they believed that the defendants merely advocated, in the abstract, the violent overthrow of the government. Said Harlan, “[t]hat sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in Dennis.”⁴⁹

With that, Harlan dismissed the Yates jury instructions as statutorily inadequate and overturned the verdicts against all fourteen defendants. In an unprecedented move, he ordered five of the defendants acquitted—thereby preventing the government from retrying them using the new jury instructions—because the government could never prove the requisite “advocacy of action.” He allowed the government to retry the remaining nine, conceding that the government might prove incitement to violent action. Because the evidentiary bar had been set so high, however, the government did not bother retrying them.⁵⁰

⁴⁸ Ibid., 324.

⁴⁹ Ibid., 322.

⁵⁰ Burton concurred in part, but did not join Harlan’s explanation of “organize.” Whittaker and Brennan did not participate. Clark dissented. Black, joined by Douglas, concurred with Harlan regarding the organize provision of the Smith Act, and agreed with him that the trial judge’s instructions regarding advocacy were inadequate. However, they went a step further than did Harlan. In their opinion, Congress could never impose restrictions on speech, whether it was advocacy of violent action or abstract advocacy. “I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.” Ibid., 340.

Harlan's arguments do not withstand even superficial scrutiny. Congress might have intended the Smith Act to apply to Nazis and Fascists, rather than just Communists, but was not concerned with Anarchists and Syndicalists in 1940. Harlan correctly noted that Congress modeled the Smith Act after the New York Criminal Anarchy Act. Congress did so because the latter Act had withstood constitutional scrutiny, not because in 1940 it feared the power of anarchists. Contrarily, the Nazi-Soviet non-aggression pact and the Dies Committee investigations had shown the Communist Party to pose a major threat to the United States.

Second, Harlan denied that Congress intended the "organize" section to apply to those responsible for perpetuating the Communist Party if the "membership" and "illegal advocacy" clauses already applied to them. The retort should have been obvious. Congress wanted the "organize" section to apply to non-members who constituted an integral part of the organization. For example, recruiters or strategists might not belong to the Communist Party, but were essential for its continuing operation. Aliens expelled because of 1938's Kessler decision might still be active in Party activities. Yet according to Harlan, these crucial elements in the Communist Party's operation were exempt from the Smith Act's "organize" section.

Harlan's interpretation of the Smith Act's "advocacy" section was also seriously wanting. Harlan required the prosecution to prove that the Yates defendants incited—not advocated—others to engage in future attempts to overthrow the government by violence. Yet, as noted by Professor Lucas Powe in The Warren Court and American Politics:

How this could be done was left unsaid because inciting people to do something later is almost impossible. Consider a rousing speech by a football coach at the opening of training camp whose purpose is to incite the team to beat its arch rival

two years hence. Even Vince Lombardi would have had trouble doing that—which was the point of Yates.⁵¹

Further, Congress would be shocked to learn that by using the term “advocacy” in the Smith Act, it actually meant “incitement.” § 2 of the Smith Act not only prohibited advocacy, but also mere advising, advising, and teaching the duty or necessity of the violent overthrow of the government. Presumably, Congress would have used the word “incitement” had it intended to require prosecutors to meet such a high evidentiary threshold. That advocacy would be listed with other activities that did not rise to the level of incitement indicated that Congress did not, in fact, desire such a high constitutional hurdle.

Finally, the Court repeated the pattern that it had begun in Peters: While denying that it was deciding constitutional issues, it had effectively decided constitutional issues. Congress required advocacy, not incitement, for a Smith Act prosecution. Yet Harlan, wishing to avoid constitutional concerns, refused to take Congress's words at face value, and thereby demonstrated flagrant disregard from Congressional intent.

What was Congress to do in the spring of 1957, now that the Court had gutted the Smith Act? How could Congress alert the Court that the latter had misinterpreted the terms “advocacy” and “organize”? Congress, in theory, could have amended the Smith Act to clarify the definition of those terms, especially emphasizing that when it used the term “advocacy,” it meant “advocacy.” Would amending the Smith Act do any good? The Court, with Peters, Cole, and now Yates, demonstrated that it would interpret statutory language in ways that ignored the political branches' intent. Thus, if Congress amended the Smith Act by clarifying the terms “organize” and “advocate,” the Court

⁵¹ Powe, The Warren Court and American Politics (Cambridge: Belknap Press, 2000), 95.

would almost certainly interpret the amended language so as to avoid a "clearly marked constitutional danger zone," but which frustrated the government's purpose. Congress was entitled to believe that any statutory change in the Smith Act would be an exercise in futility.

WATKINS v. UNITED STATES⁵²

In Yates, the Court took aim at the Smith Act, the substantive lynchpin of Congress's anti-Communist program. The Court continued the attack in Watkins, but switched its aim to the investigative committee, Congress's primary procedural tool for exposing Communists.

HUAC called John Watkins, a Farm Equipment Workers Union official, to testify regarding Communist infiltration of the labor movement in 1954. Watkins testified regarding his own Communist Party activities, but refused to discuss the Communist activities of those persons whom he believed had left the Party. Watkins expressly disclaimed reliance on the Fifth Amendment, but claimed that HUAC not possess the authority either to ask the questions or to expose persons publicly. Watkins was convicted of contempt of Congress.

Warren, joined by the three other civil libertarian justices and Harlan, overturned the conviction.⁵³ The Court, in Quinn and Emspak, had extended the Fifth Amendment's protections to witnesses in legislative investigations. Because Watkins had not invoked the Fifth Amendment, Warren had to turn to another avenue: the First Amendment. That

⁵² Watkins v. United States, 354 U.S. 178 (1957).

⁵³ Warren's opinion began by providing a brief history of legislative investigations, noting that throughout most of American History, Congress had investigated political corruption and economic problems. But after World War II, Congress began a different type of investigation, one which "involved a broad-scale intrusion into the lives and affair of private citizens." *Ibid.*, 195.

the Court had never extended the First Amendment's protections to legislative hearings did not concern Warren:

Clearly, an investigation is subject to the command that Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedom by law or lawmaking.⁵⁴

With that statement, Warren had extended First Amendment protection, or at least some degree of First Amendment protection, to committee witnesses. Yet, this legal conclusion was utterly irrelevant to his decision. In fact, almost the entire opinion was irrelevant to the final decision. After only a few pages, it became clear that Warren had not written an opinion, but a rambling diatribe against Congress and its investigative committees. Said Warren of Congressional investigations:

Abuses of the investigative process may imperceptibly lead to an abridgment of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions, or associations is a measure of governmental interference. And when those revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous. The effect is even more harsh when it is past beliefs, expressions, or associations that are disclosed and judged by current standards rather than those contemporary with the matters exposed.⁵⁵

While Congress could not "expose for the sake of exposure," bad motives alone did not invalidate a legislative investigation that served Congress's purpose. Warren sought to discern that purpose by reviewing HUAC's authorizing resolution. Congress was required to spell out the committee's "jurisdiction and purpose with sufficient particularity...The more vague the committee's charter is, the greater becomes the

⁵⁴ Ibid., 197.

⁵⁵ Ibid.

possibility that the committee's specific actions are not in conformity with the will of the parent House of Congress."⁵⁶

HUAC's authorizing resolution read as follows:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of Subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.⁵⁷

Said Warren, "It would be difficult to imagine a less explicit authorizing resolution."⁵⁸ Congress did not provide HUAC any direction, but instead allowed it to define its own authority. HUAC's questions could result in the "ruthless exposure of private lives" in a quest to collect information that Congress does not even seek. But Warren could not determine from the authorizing resolution whether Congress wanted Watkins' information, how highly Congress valued the information, or whether HUAC had a valid legislative purpose in forcing Watkins to disclose the information.

2 U.S.C. § 192—the contempt of Congress statute—made the refusal to answer "any question pertinent the question under inquiry" a crime. Thus, according to Warren, HUAC's questions must be pertinent, and HUAC must inform the witness of the matter under inquiry "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."⁵⁹

⁵⁶ Ibid., 201.

⁵⁷ Ibid., 202.

⁵⁸ Ibid.

⁵⁹ Ibid., 209.

Warren next sought to determine the matter under inquiry. He denied that Watkins could make that determination from HUAC's authorizing resolution, for it was confusing and broad. The government claimed that the subject under inquiry was Communist infiltration of the labor movement. Warren disagreed, noting that HUAC also sought information regarding persons not in the labor movement from Watkins. Said Warren, "When almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the subcommittee was not defined in terms of Communism in labor."⁶⁰ Finally, HUAC's chairman said it was investigating "subversion and subversive propaganda," but Warren believed that description excessively vague. After rejecting all of these explanations, Warren articulated the new rule for congressional investigations:

Unless the subject matter has been made to appear with *undisputable clarity* [emphasis added], it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.⁶¹

Because HUAC's chair did not adequately explain the subject matter under inquiry, Watkins did not have sufficient information to determine if the question was pertinent. Thus, his § 192 conviction violated the Fifth Amendment's Due Process Clause.⁶²

Warren concluded his thirty-five page harangue by chastising Congress:

⁶⁰ Ibid., 214.

⁶¹ Ibid., 214-215.

⁶² Ibid., 215.

[The protections of the rights of individuals] can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice. That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of Congress to inform itself.⁶³

Frankfurter, after reading Warren's draft opinion, suggested that he tone down the rhetoric. In a rather insightful analysis, Frankfurter opined:

As a matter of principle, it is, I believe, our duty to keep strictly within the limited confines of judicial review of congressional action. As a matter of prudence, the stiffer our condemnation by Congress the less provocative should be the expression of it. I have not a particle of doubt that were Black still in the Senate he would raise hell about this opinion. There are other Blacks still in the Senate. I do not remotely mean Jenner, Malone, Bridges [anti-Communist Senators] and their kind, but I do mean people who have strong feelings about the powers of Congress... The sensibilities of the Congress seem to me an irrelevant consideration in finding them to have exceeded their power or to have been disobedient of a constitutional right of a litigant before us. But their sensibilities should be taken into account in what we say and what we leave unsaid. It bears repeating that the stiffer the pill they have to swallow, the more important it is to give it sugar coating, or at least not to administer it too bluntly. The atmosphere that emanates from our opinion is an inevitable part of it.⁶⁴

Frankfurter also warned Warren that future Courts might misconstrue his rhetoric and tone. Watkins sought to prevent marauding committees from tainting reluctant witnesses as subversive. But what of "legitimate" Congressional inquiries into areas such as organized crime or political corruption? Future Courts could use the Watkins dicta to derail those investigations. Said Frankfurter:

I know it may well be said that there is a difference between dealing with matters of property and so-called civil liberties. In relation to the power of Congress, such a generalization is baseless. At least when Black and Douglas and I and the

⁶³ Ibid., 215-216. Burton and Whittaker did not participate in the opinion.

⁶⁴ Felix Frankfurter to Earl Warren, May 31, 1957, Box 580, Watkins & Sweezy, Earl Warren Papers.

rest of us are gone, our successors will find, and I believe rightly, such a distinction to be baseless.⁶⁵

Warren refused to modify his opinion, thereby leading Frankfurter to file a concurrence in the judgment. Frankfurter, a justice known for his verbosity, limited his opinion to four paragraphs.

Clark, the Court's sole dissenter, deemed the Court's new Congressional committee requirements "unnecessary and unworkable." HUAC may have viewed its mission broadly, but that was Congress's, not the Court's, business. To hold otherwise violated the constitutional principle of separation of powers. Said Clark: "The majority has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations."⁶⁶

Clark was also perturbed at the Court's naiveté. The majority complained that Congress provided HUAC a vague charter and did not strictly regulate its investigations. That, according to Clark, was how congressional committees worked. For example, the Committee on Armed Services had jurisdiction over "common defense generally," while the Interstate and Foreign Commerce Committee has jurisdiction over "interstate and foreign commerce generally." Certain special committees were endowed with broad jurisdiction—to investigate whether "organized crime utiliz[ed] the facilities of interstate commerce" or literature "contain[ed] immoral or obscene matter, or plac[ed] improper

⁶⁵ Ibid.

⁶⁶ Ibid.

emphasis on crime.” These committee charters were at least as broad as HUAC’s charter.⁶⁷

The Court's narrow holding in Watkins was questionable. Watkins undoubtedly knew that HUAC was investigating the Communist infiltration of the labor movement. That HUAC also asked him for information regarding individuals who were not in the labor movement could hardly have made a difference; HUAC’s broad charter gave it the latitude necessary to investigate nearly anything related to Communism. As Clark noted, if HUAC’s charter was too broad, then nearly every legislative committee has exceeded its charter.

Yet the narrow holding was probably the least significant feature of the opinion. Far more important were the issues the Court discussed in detail, but did not make the basis of its holding: That witnesses had a First Amendment right to withhold certain information from congressional committees; that HUAC's authorizing resolution did not permit it to conduct these hearings; that Congress had unconstitutionally separated power from responsibility; that HUAC had treated witnesses unfairly in its hearings; and that HUAC engaged in the "ruthless exposure of private lives."

These discussions by the Court were not mere surplusage. The Court, with United States v. Rumely, had only recently begun to pass judgment on Congress's investigative procedures. In Rumely, the Court referenced possible Constitutional concerns with a congressional investigative committee's questions, but rather than address the constitutional questions, the Court simply interpreted the resolution not to

⁶⁷ Clark also attacked the majority for its misuse of the Fifth Amendment's Due Process Clause, arguing that the Courts had not previously applied that Clause to legislative investigations. Further, he opined, legislative hearings were not criminal trials and witnesses did not have the same procedural rights.

authorize the inquiry. Whatever the problems with that approach—and, as should be obvious by this paper, there were many—it did not attack the motives of Congress.

Watkins, in contrast, represented a shrill broadside by the judicial branch against the policy choices of a political branch. Congress had not merely misinterpreted the law, according to the Court, but had engaged in scurrilous and sinister activities. A Court that was trying to move the South—and the rest of the nation—forward on civil rights could not afford to jeopardize its legitimacy with gratuitous harangues that were irrelevant to its narrow holding. Frankfurter was correct in warning Warren to narrow his opinion and avoid attacking Congress.

Watkins not only failed to clarify the constitutionality of legislative investigations into subversive activities; in many ways, it provided witnesses with a false sense of protection. For example, Warren, in describing HUAC's authorizing resolution, noted, "it would be hard to imagine a less explicit authorizing resolution." Future witnesses would rely on those words, believing, or at least arguing, that Watkins prevented HUAC from probing into their political associations. They would discover, to their detriment, that the Watkins holding was limited to the witness's understanding of the subject matter under inquiry.

SWEETZY v. NEW HAMPSHIRE⁶⁸

Watkins concerned federal legislative investigations; Sweetzy v. New Hampshire concerned state legislative investigations. The New Hampshire legislature enacted a statute in 1951, which regulated subversive activities and prohibited the state from employing subversives. Two years later, it adopted a "Joint Resolution Relating to the Investigation of Subversive Activities" which directed New Hampshire Attorney General

⁶⁸ Sweetzy v. New Hampshire, 354 U.S. 234 (1957).

Louis Wyman to locate subversive persons within the state and to investigate and prosecute violations of the 1951 Act.

Wyman called University of New Hampshire (UNH) economics professor Paul Sweezy to testify regarding his political activities. Sweezy answered some questions, but he would not explain his Progressive Party activities or provide details of a lecture he had delivered to a UHN Humanities class earlier in the year. Sweezy claimed that Wyman's questions were not pertinent to the matter under inquiry and infringed his First Amendment rights. The New Hampshire Courts disagreed, and found Sweezy in contempt.

Warren, in an opinion joined by Brennan, Black, and Douglas, overturned the contempt sentence. Repeating one of his Watkins themes, Warren declared the New Hampshire Legislature responsible for the conduct of Wyman's investigations. The legislature, despite its delegation, was required to supervise the investigation, for the safeguard of legislative oversight "can be nullified when a committee is invested with a large and ill-defined jurisdiction."⁶⁹

Not surprisingly, Warren found the legislature's jurisdictional grant to Wyman ill defined. For example, who were the "subversive persons" that Wyman was to investigate? Warren concluded that the 1951 statute defined "subversive person" as a person who "by any means, aids in the commission of any act intended to assist in the alteration of the constitutional form of government by force or violence."⁷⁰ To Warren, that definition permitted Wyman to investigate any conduct, even conduct that indirectly and unintentionally aided subversion.

⁶⁹ Ibid., 245.

⁷⁰ Ibid., 246.

These investigations could result in severe damage to a person's reputation. Warren compared Sweezy's situation with those of the Wieman respondents. The latter concerned the loss of employment, while Sweezy concerned a contempt sanction. Yet, said Warren:

the stain of the stamp of disloyalty is just as deep. The inhibiting effect in the flow of democratic expression and controversy upon those directly affected and those touched more subtly, is equally grave. Yet here, as in Wieman, the program for the rooting out of subversion is drawn without regard to the presence or absence of guilty knowledge in those affected⁷¹

The New Hampshire Supreme Court had determined that Wyman's investigation violated Sweezy's academic and political freedom, but concluded that the state had a sufficiently important interest to justify the infringement. Warren disagreed, making the bold assertion that "[w]e do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields."⁷² But, true to his Watkins practice, Warren avoided deciding the case on constitutional grounds and instead looked to the New Hampshire legislature's 1953 resolution authorizing Wyman's investigation.

Warren admonished the New Hampshire legislature for abandoning its responsibility for overseeing the scope of Wyman's investigation. The 1953 resolution had granted Wyman such a broad investigatory mandate that he, and not the legislature, determined both the witness list and the investigation's direction. True, the legislature may want some of the information Wyman uncovered, but they could not want all of it. Moreover, the Constitution prohibited Wyman from seeking some of the information.

Warren then turned to Sweezy's situation. Had the 1953 legislative resolution authorized Wyman to interrogate Sweezy about the Progressive Party or the UNH

⁷¹ Ibid., 248.

⁷² Ibid., 251.

lecture? Warren could not say; the resolution was unclear. The New Hampshire Supreme Court had determined that the legislature had wanted the information; Warren ignored that holding, denying that the New Hampshire court had sufficient information to make that determination. Instead, he decreed that because the legislature had not expressly indicated that it wanted the Progressive Party or the UNH lecture information, that silence “must be treated as the absence of authority.”⁷³ Because the legislature had not expressly authorized Wyman to conduct the inquiry, Sweezy's contempt sanction violated the Fourteenth Amendment's Due Process Clause.

Warren, in conclusion, denied that his opinion addressed New Hampshire's separation of powers. Echoing his words in Watkins, Warren asserted that the opinion rested upon “the power of a state legislature to conduct investigations from the responsibility to direct the use of that power insofar as the separation causes a deprivation of the constitutional rights of individuals and the due process of law.”⁷⁴

Both Frankfurter and Harlan wished to join Warren's opinion, agreeing with him that New Hampshire had violated Sweezy's due process rights, but disagreed with him regarding why New Hampshire violated due process. Frankfurter argued that Sweezy was not Watkins; the scope of the inquiry and the relevance of the questions that were integral to Watkins were not relevant in Sweezy. Said Frankfurter,

In a case like Sweezy, [these questions] cease to be relevant. When a case comes here for review from a judgment of a state court, questions of evidentiary relevance, the scope of the powers conferred on the committee, and regard for separation of powers, of which one phase or derivative doctrine is the non-delegability of legislative power have been denied by the state court, and those are not state determinations subject to limitation in the United States Constitution.⁷⁵

⁷³ Ibid., 254.

⁷⁴ Ibid., 255. Whittaker did not participate in the case.

Instead, Frankfurter insisted, the Due Process Clause's limitation on state power was the only proper question for Court review.

Warren disagreed, contending that the Fourteenth Amendment's Due Process Clause acted as a check on a state government's delegation of power. Said Warren,

It would be unthinkable for a legislature to create an independent investigative satellite and turn it loose with the full, plenary powers of compulsory process to use that power for any reason it saw fit.

From this I have concluded that when an investigating agency endangers the constitutional rights of witnesses, there must be apparent the tie between the legislature and the individual hurt. If the circumstance is such that the investigators are independent agencies, no one can demonstrate whether any tie exists. Anyone looking at the facts after the event must engage in the invidious retroactive rationalization we are asked to perform in these cases. It seems to me that the invasion of constitutional rights in the absence of any indication of object, therefore, is a denial of due process of law.⁷⁶

Warren soon stopped talking constitutional doctrine and revealed his true concern with Wyman's investigation. Warren's concern was not delegation or separating power from responsibility, but stopping Wyman's vendetta against Sweezy:

The cause of the problem is the abuse of power by investigators for a variety of reasons. We could go a long way toward eliminating those abuses by requiring a greater assumption of responsibility by the full legislature. The entire assembly will at least not be guided by the personal motives that frequently seem to lead to the most egregious cases. In short, the problem of the nature of judicial review of investigations by the Congress or State Legislatures can be enormously reduced, I feel sure, if we strip away a measure of the personal vendetta power that exists.⁷⁷

This was too much for Frankfurter, who did not believe that the Due Process Clause limited the channels by which states conducted legislative investigations. Said Frankfurter,

⁷⁵ Felix Frankfurter to Earl Warren, June 3, 1957, Box 580, Watkins & Sweezy, Earl Warren Papers.

⁷⁶ Earl Warren to Felix Frankfurter, June 5, 1957, Box 580, Watkins & Sweezy, Earl Warren Papers.

⁷⁷ Ibid.

To put my view as clearly as I can, let me say that if under the Constitution of New Hampshire the investigating power of the legislature were separately vested in the Attorney General of the State, I know of nothing to prevent it so far as the Constitution of the United States is concerned....I do not think it is for the Court to employ the Due Process Clause in order to enforce greater responsibility by state legislatures in carrying on their investigations.⁷⁸

Frankfurter, realizing the futility of further discussions with Warren, joined with Harlan in filing a separate concurrence. Frankfurter assumed that the New Hampshire legislature was interested in Sweezy's answers to Wyman's questions; in fact, the Court should consider Wyman's questions to have come directly from the legislature. To do otherwise "would make the deepest inroads upon our federal system for this court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states."⁷⁹ The New Hampshire Supreme Court had declared the legislature's delegation to the Attorney General valid, and the United States Supreme Court was required to accept that determination.

Frankfurter, unlike Warren, analyzed the New Hampshire Supreme Court's balancing of competing interests. The New Hampshire Supreme Court recognized that Wyman's demands interfered with Sweezy's First Amendment rights, but believed the state's interest in preventing subversion outweighed Sweezy's interest in keeping his lecture notes private. Frankfurter disagreed and put forth a compelling defense of academic freedom:

When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appear grossly inadequate....Political power must abstain from intrusion into this activity of [academic] freedom, pursued in

⁷⁸ Frankfurter to Warren, June 5, 1957, Box 580, Sweezy & Watkins, Earl Warren Papers.

⁷⁹ Sweezy, 256.

the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.⁸⁰

Frankfurter also rejected Wyman's inquiries regarding Sweezy's involvement with the Progressive Party. Frankfurter, noting that interference with a person's political autonomy required a compelling state interest, again balanced the respective interests of Sweezy and New Hampshire. In Sweezy's case, "the inviolability of privacy belonging to a citizen's political loyalties" was of such overwhelming importance compared to New Hampshire's countervailing interest, described by Frankfurter as "the remote, shadowy threat to the security of New Hampshire" allegedly presented by Sweezy's Progressive Party activity.⁸¹ While the Court may have reason for treating the Communist Party differently than other political parties, no such justification existed for discrimination against the Progressive Party.

After reviewing the results of his balancing tests, Frankfurter declared Sweezy's contempt sentence to violate of the Fourteenth Amendment's Due Process Clause. He concluded by affirming the Court's paramount responsibility in adjudicating due process cases:

To be sure, this is a conclusion based on judicial judgment in balancing two contending principles—the rights of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of a state to self-protection. And striking the balance implies the exercise of judgment. This is the inescapable judicial task in giving substantive content, legally enforced, to the Due Process clause, and it is a task ultimately committed to this Court.⁸²

Clark, in a dissent joined by Burton, claimed betrayal. Not only did he reject Warren's "power separated from responsibility" argument, he thought that Pennsylvania

⁸⁰ Ibid., 262.

⁸¹ Ibid., 265.

⁸² Ibid., 267.

v. Nelson had allowed states to combat subversive activities directed against the state.

He also aimed at Warren's gratuitous references to constitutional issues:

Since the conclusion of a majority of those reversing is not predicated on the First Amendment questions presented, I see no necessity for discussing them. But since the principal opinion devoted itself largely to these issues I believe it fair to ask why they have been given such an elaborate treatment when the case is decided on an entirely different ground.⁸³

Warren's Sweezy opinion resembled his Watkins opinion in many ways. Both opinions discussed free speech rights, implying that they protected the witness from having to discuss information regarding his political associations. Both opinions cast doubt regarding whether the relevant governing body—Congress (Watkins) or the New Hampshire Legislature (Sweezy)—actually wanted the information that the interrogator—HUAC or Wyman—sought to extract from the witness. Finally, Warren viewed the seminal issue in both cases as fundamental fairness for the witness and abuse of power by the interrogator.

Yet the legal ramifications of Warren's Sweezy opinion went far beyond his Watkins opinion. For all of Warren's anger and frustration, for all of the reference to fairness and the First Amendment, the Watkins holding was simple: the witness could not ascertain HUAC's subject under inquiry and could not determine whether the questions were relevant.

Warren's Sweezy opinion, in contrast, flagrantly disregarded a state's interpretation of its own statute by ruling that neither he, nor the New Hampshire Supreme Court, was capable of determining whether the New Hampshire legislature had authorized Wyman to interrogate Sweezy regarding his partisan and academic pursuits. Warren's decision was without precedent; the Court had never before disregarded a state

⁸³ Ibid., 270.

supreme court's interpretation of its own law. Certainly, in Gerende and Garner, the Vinson Court had strongly suggested that the states interpret a law in a particular manner. In Wieman, it declared the Oklahoma Supreme Court's interpretation of its oath law unconstitutional. Warren's Sweezy opinion went far beyond those cases.

Frankfurter's split with Warren prevented the latter's opinion from carrying a majority. Frankfurter, for all of his maddening interpretations in Communist cases, was at his best in Sweezy. He made adroit use of the constitutional balancing test, provided a ringing defense of academic freedom, and differentiated between the respective threats posed by the Communist Party and the Progressive Party. Frankfurter's concurring opinion, not Warren's plurality opinion, has endured in legal circles to this day.

Sweezy left state leaders utterly confused. Nelson had prevented states from prosecuting subversion against the United States, but seemed to permit them to prosecute subversion against the state. Warren's Sweezy opinion seemed to reject that notion. For one hundred and seventy years, the Supreme Court operated on the assumption that states were competent to interpret their own statutes. Warren's Sweezy opinion rejected that notion. Frankfurter's concurrence suggested that states could investigate the Communist Party, but not necessarily Communist front organizations. Further, he suggested that employees of a university—even a state-run university—might be entitled to greater constitutional protection than, say, civil servants. Any of these positions, by themselves, would leave state officials confused. When coupled with the fact that none of these positions enjoyed majority support, they made it impossible for states to understand the scope of their power to fight subversion.

CONCLUSION

The 1956 Term was a year of unalloyed triumph for the Court's civil libertarian wing.⁸⁴ While Watkins was decided on narrow grounds, the Court's rhetoric indicated that HUAC's motives in questioning witnesses were at best negligent and at worst evil. Moreover, Watkins made the recalcitrant witness who blocked HUAC's inquiry the victim. In Yates, the Court, using a statutory interpretation that Congress would find inconceivable, made Smith Act prosecutions virtually impossible. While the Court could not issue an opinion in Sweezy, six justices agreed that New Hampshire had violated the witness's due process rights. In Konigsberg, the Court seemed to reward a bar applicant's obstruction of a state licensing committee's investigation. Jencks permitted subversives to see FBI files, because "justice requires no less." Mesarosh threw out a verdict because the "dignity of the U.S. Government" would not allow it to stand.

The 1956 Term appeared to leave the government's anti-Communist program in absolute shreds. The government could not know whether its anti-Communist legislation or practices could ever pass the Warren Court's review. The Court's incendiary tone indicated that the answer would be negative. The Court consistently interpreted statutes and orders in a manner absolutely contrary to either long-standing practice or their plain language. The only alternative to this exercise in futility seemed to be a suspension of the government's anti-Communist programs.

⁸⁴ The Court considered several other Communist cases of some note during the 1956 Term. In Kremen v. United States, 353 U.S. 346 (1957), the court reversed convictions against three Communists because the FBI illegally searched their cabin. Leedom v. International Union of Mine, Mill, & Smelter Workers, 352 U.S. 145 (1956) limited the National Labor Relations Board's powers to regulate unions. § 9(h) of the Taft-Hartley Act required union officers to file non-Communist affidavits. The National Labor Relations Board sought to withhold National Labor Relations Act recognition and benefits from the union after it determined that a Mine-Mill officer had filed a false affidavit. The court disagreed; once the NLRB had received the affidavit, it could not withhold benefits from the union. The holding was affirmed in a companion case, Amalgamated Meat Cutters v. NLRB, 352 U.S. 153 (1956).

To the civil libertarian wing, the Communist case decisions not only checked the government's anti-subversion programs; they shaped America's world image as a fair, just nation. This sense of mission was best summarized by a note that Douglas sent Warren from London: "Watkins, Sweezy and Jencks have done more over here than anything in a long time to dispel anti-American feeling. Every single British paper has applauded these decisions."⁸⁵ The civil libertarians would soon learn that Congress had little toleration for their diplomatic efforts. They would also learn that Frankfurter's unwillingness to join their Watkins and Sweezy opinions was not an aberration, but a sign that he had grown weary of their confrontational approach.

⁸⁵ William O. Douglas to Earl Warren, June 29, 1957 Correspondence, William O. Douglas 57-58, Box 350, Earl Warren Papers.

CHAPTER SIX: 1957-58 TERMS

The 1957 and 1958 Terms were important transition years for the Court. The Court began the 1957 Term by continuing its attack on the government's anti-Communist programs, but the civil libertarian faction appeared to be losing momentum.

Significantly, the first four major Communist case decisions of the term employed the Peters and Cole approaches of the 1954 and 1955 Terms and not the Watkins and Sweezy approaches of the 1956 Term. Further, by the end of the 1957 Term, the civil libertarians suffered their first major Communist case defeat in four years as the Court sought to narrow the reach of Slochower. That rightward trend continued during the 1958 Term, where the Court limited Sweezy and Watkins.

Whether the Court's change was due to Congress's hostile reaction, Frankfurter's disgust with the overreach of the civil libertarians, or simply the different facts presented by the new Communist cases, the Court—or, more accurately, a five-justice anti-civil libertarian coalition comprised of Frankfurter, Harlan, Clark, Whittaker, and the recently-appointed Justice Potter Stewart—retreated from its Red Monday excesses.

Yet whether the Court was striking down or upholding the government's anti-subversion programs, confusion was its rule. When the Court was thwarting the government's anti-subversion programs, it ignored precedent and clear statutory language; read procedural requirements into executive orders; and, for the first time in a Communist case, created new constitutional rights. The new five-justice anti-civil libertarian coalition was hardly better. It began upholding the government in Communist cases, but seemed to ignore recent Warren Court precedent. The coalition, rather than overturning this precedent, distinguished it, often unconvincingly. By the end of the

1958 Term, neither the government nor alleged subversives could possibly know the limits of the government's power to combat subversion or whether the Court valued its own precedent.

1957 CASES

The Court decided seven Communist cases during the 1957 Term. In the first four, the Court used statutory construction to decide the cases. In two of those cases—Rowoldt v. Perfetto and Nowak v. United States—the Court continued to frustrate the government's efforts to deport or denaturalize former Communists. In the next two—Kent v. Dulles and Dayton v. Dulles—the Court decreed that Congress did not authorize the Passport Office to violate the hitherto-unknown constitutional right to travel by withholding passports from suspected Communists.

The Court used constitutional interpretation to decide three cases decided on the 1957 Term's last day. In Speiser v. Randall the Court broadly interpreted the First Amendment to effectively prohibit states from denying tax deductions to suspected Communists. Yet, in an apparent ideological reverse, the Court upheld a municipality's authority to dismiss allegedly subversive employees who invoked their Fifth Amendment rights in Beilan v. Board of Education and Lerner v. Casey.

The 1957 Section concludes with an explanation of the Congressional and institutional attacks on the Court. While the major anti-Court bills did not pass, their near-passage signaled that a significant portion of the public believed that the Court had gone too far in protecting civil liberties and chastising the government. These efforts represented the fiercest political attack on the Court since Roosevelt's 1937 Court-

packing plan, and may explain why, at the 1957 Term's conclusion, the Court shifted to the political right.

ROWOLDT v. PERFETTO¹

The Court, which interpreted the Subversive Activities Control Act (SACA) to authorize the government's deportation of Communist aliens in Galvan v. Press, seemed to reverse itself in Rowoldt v. Perfetto. Charles Rowoldt had entered the United States in 1914 and joined the Communist Party in 1935. After attending its meetings and running its local bookstore, he quit the Party that same year. After Congress passed the SACA in 1950, the Immigration and Naturalization Service, which had interviewed Rowoldt previously, sought additional information from him. He refused to cooperate and was ordered deported.

Galvan author Felix Frankfurter held the government's evidence insufficient to support a deportation. The SACA required the government to deport aliens who were members of, or were affiliated with, the Communist Party during or after their entry into the United States. But a 1951 amendment to the SACA limited the terms "membership" and "affiliated with" to include only voluntary membership or affiliation, and specifically excluded from the definition of membership anyone who joined the Communist Party: 1) when under 16 years of age; 2) by operation of law; and, 3) to obtain the necessities of life.

¹ Rowoldt v. Perfetto, 335 U.S. 115 (1958). The Court further frustrated the Government's Communist deportation program in Bonetti v. Rogers, 356 U.S. 691 (1956). Bonetti, a French immigrant, first entered the United States in 1923, joined the Communist Party in 1932, and quit it in 1936. He left the United States to fight in the Spanish Civil War in 1937 and returned in 1938. The SACA required the deportation of any alien who belonged to the Communist Party after entering the United States. Had Bonetti entered the United States in 1923 or 1938? Whitaker, for a 6-3 Court, held that Bonetti entered in 1938, and was not subject to deportation.

Frankfurter declared that the amendment indicated that the three specific exceptions were not, in fact, the sole exceptions for relief, but were examples “illustrative of the spirit” by which the SACA’s deportation provisions should be construed.² Galvan required the government to prove that the alien knew he was “joining an organization known as the Communist Party that operates as a distinct and active political organization.”³ Frankfurter could not say that Rowoldt’s Communist Party connections established the requisite “meaningful association”—Frankfurter’s requisite “spirit”—required by the 1951 amendment, for his activities “may have been devoid of ‘political’ implications.” Frankfurter declared the record too insubstantial to support deportation.⁴

Harlan, in a dissent joined by Burton, Clark, and Whitaker, claimed that the Court had misconstrued the SACA and its 1951 amendments. Rowoldt was a dues-paying Communist Party member in 1935. Galvan required proof that the alien knowingly joined the Communist Party as a distinct and active political organization, an evidentiary threshold easily met by the government in this case.⁵ Harlan also criticized the Court for interfering with a political question best left to Congress.

Why Frankfurter’s apparent reversal of Galvan? Frankfurter, at heart, agreed with the civil libertarians’ ends, if not their means. Warren recognized that Frankfurter, the ostensible champion of judicial restraint, could sometimes be a judicial activist. When Warren’s law clerks asked him why Frankfurter seemed to reverse his Galvan position,

² Rowoldt, 120.

³ *Ibid.*, citing Galvan, 528.

⁴ Rowoldt, 120.

⁵ *Ibid.*, 123, quoting Galvan at 528. Harlan also rejected Frankfurter’s “spirit” argument concerning the 1951 amendments. The legislative history indicated that those amendments applied to aliens entering, not those being deported from, the United States.

Warren replied, "I think Frankfurter is capable of human instinct now and then. Frankfurter really obviously just felt sorry for this poor old immigrant...I think Frankfurter may well have thought threat there but for the grace of God go I."⁶

Warren was almost certainly correct, and Frankfurter's pangs of conscience seemed to limit Congress's constitutional power to control immigration. Congress could not have made the SACA, or its subsequent amendments, any clearer. By including only three very limited exceptions in the 1951 amendments, Congress clearly was not inviting INS hearing officers—or the Court—to interfere with its political decision to remove Communist aliens from the United States. Frankfurter, by claiming that the "spirit" of the amendment allowed the Court to add to Congress's short list of exceptions, usurped the power of the legislative branch and left intact two cases—Galvan and Rowoldt—that seemed to conflict.

NOWAK v. UNITED STATES⁷

Nowak, a Polish immigrant, entered the United States in 1913 and was naturalized in 1938. The government initiated denaturalization proceedings in 1952 pursuant to the Nationality Act of 1940, alleging that Nowak had: 1) fraudulently obtained citizenship by providing false answers on a preliminary examination form; and 2) illegally obtained citizenship by his lack of attachment to the principles of the United States Constitution within 5 years of his naturalization.

⁶ Schwartz, Super Chief, 267.

⁷ Nowak v. United States, 356 U.S. 660 (1958). Nowak's companion case was Maisenberg v. United States, 356 U.S. 670 (1958), decided the same day. Maisenberg concerned the same issues as Nowak, but under the Immigration and Nationality Act of 1952, rather than the Nationality Act of 1940. Harlan, for the Court, found the Government's proof insufficient to support denaturalization.

Nowak's preliminary examination form contained the following questions: Are you a believer in anarchy? Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of the existing government in this country? Nowak answered both questions in the negative.

Harlan, for the Court, reiterated the Schneiderman test for denaturalization: the government must prove its case by "clear, unequivocal, and convincing evidence" which does not leave the issue in doubt.⁸ Said Harlan: "[The question were] not sufficiently clear to warrant the firm conclusion that when Nowak answered it in 1937 he should have known that it called for the disclosure of "membership in a non-anarchistic organization advocating violent overthrow of government and, more particularly, membership in the Communist Party."⁹

Harlan had to stretch with the second count. The government had proved that Nowak belonged to the Communist Party within five years of his naturalization, but not his knowledge of the Party's illegal advocacy. To reach his result, Harlan minimized Nowak's attendance at closed Communist Party meetings and his active participation in Party activities. Harlan also ignored Nowak's statements, contained in the trial record, that "it would be necessary to destroy capitalism in order to set up a workers' government;" that "it would be necessary to resort to bullets, instead of the ballot box, for the Party to obtain power;" that "it may be necessary to use violence" to control labor unions; and, that "the goal of all of this activity was to extend the Soviet system around the face of the earth."¹⁰

⁸ For a summary of Schneiderman, see Chapter One, n. 34.

⁹ Nowak, 663-664.

Harlan, citing his Yates opinion, concluded that these statements did not indicate a lack of attachment to the Constitution, for “read in context, they can be taken as merely the expression of opinions or predictions about future events, rather than as advocacy of violent action for the overthrow of government.”¹¹ Further, Nowak was not discussing political action, but rather “party activity designed to strengthen the American labor movement.”¹² The record did not indicate that Nowak advocated, or knew the Communist Party advocated, the violent overthrow of the United States Government. The implication of Harlan’s Nowak opinion was clear: Communist Party membership was not prima facie evidence of lack of attachment to the Constitution.¹³

Yates concerned a criminal prosecution under the Smith Act. Nowak concerned denaturalization, a civil proceeding that did not implicate the same constitutional issues as a prosecution. The distinction was meaningless to the Warren Court, which refused to distinguish between criminal and civil proceedings when something as important as citizenship was at stake. However, the Justice Department would be justified in asking: If Nowak’s actions and statements did not demonstrate a lack of attachment to the Constitution, what did?

KENT v. DULLES

DAYTON v. DULLES¹⁴

Kent v. Dulles

¹⁰ Ibid., 666.

¹¹ Ibid., 667. Note that Yates, unlike Nowak, was a criminal case.

¹² Ibid.

¹³ Burton, Clark, Whittaker dissented, concluding that the Nowak was aware of the meaning of question 28 and that he was not a person attached to the principles of the United States Constitution.

¹⁴ Kent v. Dulles, 357 U.S. 116 (1958); Dayton v Dulles, 357 U.S. 144 (1958).

During the 1954-55 Terms, the Court avoided prolonged discussion of constitutional questions in Peters v. Hobby and Cole v. Young and instead decided those cases on statutory grounds. During the 1956 Term, it discussed, often at great length, important constitutional questions in Watkins, Sweezy, and Yates, but, again, ultimately decided those cases on statutory or technical constitutional grounds. In the 1957 Term, the Court went a step further; it discovered hitherto-unknown constitutional rights, decreed that the legislature did not indicate that it intended to permit the executive branch to infringe these rights, and then declared that executive branch was acting without legislative permission to violate these unknown rights.

The State Department's Passport Office, purportedly acting pursuant to the Immigration and Nationality Act of 1952, denied artist Rockwell Kent's application for a passport, alleging that: 1) he was a Communist; and, 2) he had "a consistent and prolonged adherence to the Communist Party line." The Passport Office permitted Kent to refute these conclusions by submitting an affidavit disclosing past or present Communist Party membership, an offer Kent refused.¹⁵

Douglas, for a 5-4 Court, reversed the Passport Office, claiming that Congress had not delegated to it the power to infringe Kent's "right to travel" by refusing to issue him a passport. Douglas contended that Congress, in drafting the 1952 Immigration and Nationality Act's passport provisions, relied exclusively on a 1926 peacetime passport statute. When Congress adopted the 1926 statute, the Department of State denied passports to only two types of persons: 1) those not owing allegiance to the United States;

¹⁵ The Court considered Kent's case with that of psychiatrist Walter Briehl. The Passport Office denied Briehl a passport because of his Communist affiliations, and he, too, refused to submit an affidavit regarding Communist Party membership.

and, 2) those participating in illegal conduct. Kent, according to Douglas, fit within neither category. Said Douglas:

...We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We therefore hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport for any substantive reason he may choose.¹⁶

Yet Congress had been denying Passports to alleged subversives for years.¹⁷ Why was the Court suddenly calling this long-standing practice into question? Because the practice interfered with the newly discovered constitutional right to travel:

The right to travel is a part of the “liberty” of which the citizen cannot be deprived without due process of law under the Fifth Amendment....Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads.¹⁸

The passport’s primary purpose was control over exit from the United States, which fell within the Fifth Amendment’s liberty interest. Said Douglas, “If that liberty is to be regulated, it must be pursuant to the law-making functions of Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests.”¹⁹ Douglas did not find the requisite congressional delegation in this case. In

¹⁶ Kent, 128. Douglas also cited Korematsu, noting that the Court had permitted the government to restrict the freedoms of the Japanese-Americans only upon a showing of “the gravest imminent danger to the public safety.” Congress and the President moved in coordinated action, and the nation was at war. In contrast, said Douglas, no emergency existed in 1952, and Congress and the President did not move jointly to curtail the citizen’s constitutional rights. *Ibid.*, 129-30.

¹⁷ For an excellent explanation of the history of American passport statutes, as well as the careers of Mrs. Ruth Shipley and her successor, Frances G. Knight, who combined ran the American Passport Office for approximately fifty years, see Stanley Kutler: The American Inquisition: Justice and Injustice in the Cold War (New York: Hill & Wang), 89-117.

¹⁸ Kent, 125-26.

closing, Douglas warned that “Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.”²⁰

Clark, joined in dissent by Burton, Harlan, and Whittaker, deemed the 1952 I & N Act’s delegation of absolute discretion to the Secretary of State quite clear. Moreover, Clark believed the 1926 Passport law irrelevant in determining the Congressional intent behind the 1952 Act’s passport provisions. The Court instead should review the State Department’s administrative practice that Congress ratified with the 1952 Act. From 1926-1952, the Secretary of State often denied passports to Communist Party members.²¹ Congress was aware of these administrative practices and incorporated them into the 1952 Act.²²

Dayton v. Dulles

Physicist Weldon Dayton applied for a passport and submitted an affidavit in which he denied belonging to or supporting the Communist Party. The Department of State, relying on confidential information, rejected Dayton's application.²³ Dayton requested that the Department disclose the confidential information to him, but it denied his request.

¹⁹ Ibid., 129.

²⁰ Ibid.

²¹ Clark denied Douglas’s claim that the practice of denying Communists had “jelled” in 1926. Further, after the Subversive Activities Control Act passed in 1950, the Secretary of State denied them to all Communists.

²² The SACA prohibited the State Department from issuing passports to Communists. However, the government was enjoined from enforcing the SACA's passport provisions. The State Department, relying on the 1926 Passport statute and the 1952 I & N Act, continued to deny passports to Communists.

²³ The Department of State did disclose some of the information it reviewed, including Dayton’s ties to the Rosenberg spy ring and close connections to the Communist Party. However, it would not reveal additional details or the names of witnesses. Dayton, 150-154.

Douglas believed that he had the requisite votes for an opinion holding that the Due Process Clause prevented the Department of State from using confidential information to deny Dayton's passport. Douglas proposed the following opinion:

The law is prejudiced against administrative action based on undisclosed facts.

The court [has spoken] of the prime requirement of fairness in hearings concerning property rights. No less is required by due process where the liberty of the citizen is involved.²⁴

Later, Douglas added:

One prime requirement for a fair hearing seems to us to be an appropriately full disclosure of the facts upon which the administrative action is taken with an opportunity of the citizen to explain or rebut them. The Decisions and Findings of the Secretary disclose on their face no grounds for denying this citizen a passport. So far as the record shows, he is condemned for associations which may have been wholly innocent. People of questionable character, some with criminal records, march through the episodes described in the findings. But there is not a shred of evidence attributing their unlawful or criminal projects to petitioner. He stands neither convicted nor accused of any crime. Congress has not made association with evil people or shady characters the basis for denial of a passport.

What the full record would disclose we do not know...if the secretary has a valid and lawful reason why petitioner should not receive a passport, the facts should be adequately disclosed to him. Perhaps they could be explained away. Perhaps they reflect untruths based on old grudges or prejudices. Perhaps they reflect errors in memory, faulty identifications and the like. Perhaps they would dissolve upon explanation. It is the essence of a fair hearing that the citizen be given the right to be apprised of the evidence used to deny him his constitutional rights and to rebut it if he can. No hearing where he is denied that opportunity can be considered a fair one in the constitutional sense.²⁵

Borrowing Brennan's Jencks reasoning, Douglas conceded that the disclosure of confidential information might harm national security. The government's choice was simple: either disclose the confidential information when denying the passport or keep the information confidential and grant the passport.

²⁴ William O. Douglas, draft opinion, May 9, 1958, Box A-72, Folder 3, Tom Clark Papers.

²⁵ Ibid.

Jencks concerned a criminal prosecution, while Dayton concerned an administrative proceeding. Regardless, Jencks was relevant because

it states the controlling principle governing hearings on passport applications. Whatever may be the power of the Secretary of State to deny passports, there can be no denial without a hearing; and no hearing is fair where the decision rests on facts which are undisclosed, and which the citizen has not been given an opportunity to challenge in the accepted ways...²⁶

Clark attacked the majority for discussing the constitutional issues in Dayton that it has avoided in Kent. In an opinion reminiscent of Justice Jackson's philosophy, Clark charged that obsession with civil liberties would endanger the nation:

I am aware that implicit in my position is the necessity of relying on the good faith of the Secretary to speak the truth when he determines that disclosure may injure national security or foreign relations. This, until today, we have always done. And I am sure the concept of due process is such as to permit it. There are those who are equally sure that faith in any authority is the certain end of freedom. Yet what is the freedom for which we strive? Surely not the freedom of one to endanger the liberty of all. Such "freedom" sounds wondrously like the pitch of tyranny to me. I have been far too long in the conflicting, adjusting, necessarily accommodating world of men, to contribute to the sort of Pyrrhic achievement reached by the court today.²⁷

Douglas was not able to issue his opinion. Whittaker decided to dissent, and Frankfurter refused to join Douglas's opinion, leaving him one vote short of a Court opinion.²⁸ To secure enough votes for an opinion, Douglas agreed to decide Dayton on the same basis as Kent.

Kent and Dayton presented the political branches with a nearly insurmountable barrier. After Peters, Cole, and Yates, Congress and the President knew that the Warren Court was inclined to interpret statutes and orders in a manner that avoided traditional

²⁶ Ibid.

²⁷ Tom Clark, draft opinion, Dayton v. Dulles, undated, Box A-72, Folder 3, Tom Clark Papers.

²⁸ Schwartz, Super Chief, 310

due process or free speech questions. But how could the President, or in this case, Congress, know that it must expressly declare that it intended to infringe a right, when that right had never before existed? The answer, of course, was that they could not. Kent and Dayton seemed to indicate that the Court could always find a way to nullify the government's anti-subversion efforts.

The Court also avoided addressing the crucial constitutional issues raised by both Kent and Dayton. For example, does the government ever have the constitutional power to use secret evidence to deny Passports to alleged subversives? Do passport hearings require the same procedural protections as do criminal trials? These unanswered questions were not the fault of the civil libertarians; they were willing to hold the constitutional right to travel free from executive or legislative infringement. Frankfurter was the one who split the baby in two. He wanted to discourage secret hearings and prohibitions on international travel, but did not want the judicial branch to have to declare the actions of the political branches unconstitutional. Unfortunately, this avoidance of important constitutional issues did not clarify the scope of the government's powers.

SPEISER v. RANDALL²⁹

The Court shifted its focus from the federal government to state governments in three cases issued the last day of the 1957 Term. The first case, Speiser, concerned a state's power to withhold benefits from alleged Communists. California's Constitution granted a property tax exemption to all honorably discharged World War II veterans who filed the following oath: "I do not advocate the overthrow of the Government of the

²⁹ Speiser v. Randall, 357 U.S. 513 (1958). First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958), decided the same day, concerned substantially similar issues: In order for the church to receive a property tax exemption, church personnel had to file an oath stating that a church was used exclusively as a house of worship. The Court, relying on Speiser, declared the requirement to violate the Constitution.

United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities.”³⁰ California denied the tax exemption to two veterans who refused to file the oath.

Brennan, for the Court, reversed California’s denial of the exemption.³¹

California, Brennan insisted, did not consider the oath *prima facie* evidence of a veteran’s non-advocacy of the violent overthrow of the government. Instead, the local tax assessor could reject the oath and shift the burden of proving non-advocacy to the veteran.

Veterans, fearing the loss of the tax exemption, would avoid engaging in even permissible speech. To Brennan, the “deterrent effect [of the loss of the tax exemption] is the same as if the state were to fine them for such speech.”³²

California argued that because California could punish individuals who advocated the violent overthrow of the government, it could certainly withhold exemptions on the same basis. Brennan did not address the merits of that argument, but claimed that California had not asked the relevant question, which was: regardless of whether the state could punish such speech, did California’s tax exemption procedures comport with due process? Said Brennan, “When the state undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights.”³³

³⁰ Speiser, 515.

³¹ Burton concurred in the result. Warren, California’s former Governor, did not participate. Black and Douglas filed concurring opinions.

³² Speiser, 518.

³³ *Ibid.*, 520-21.

The Court usually analyzed tax collection procedures through the “rational basis” test. The Court would ask: Did the state have some rational basis for enacting the statute or regulation? The Court almost always answered in the affirmative. Brennan rejected the deferential rational basis test and instead employed the more demanding “strict scrutiny” test: In this case, did the “allocation of the burden of proof, on an issue concerning freedom of speech,” fall short of the requirements of due process? Brennan answered his question with an unequivocal yes. California, relying on the oath and its own investigation, made a factual determination regarding whether the veteran believed in the violent overthrow of the government. That, according to Brennan, opened the door to mischief and mistake:

There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—the margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact-finder of his guilt. When the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.³⁴

Brennan’s argument seemed to ignore numerous Communist cases, such as Garner, Gerende, and Douds, in which the Court sustained anti-Communist oaths.

Brennan disagreed, noting that in those cases,

there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest within the sphere of government concern. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the positions might be misused to the detriment of the public.³⁵

³⁴ Ibid., 526.

³⁵ Ibid., 527.

Said Brennan in conclusion:

[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. Thus, [the California property tax law] is unconstitutional in its enforcement, which place burden of proof on taxpayer.³⁶

Clark, in dissent, strenuously disagreed with Brennan. Filing an oath with the tax assessor differed substantially from a criminal proceeding, and thus merited a lower level of due process protection. Moreover, the oath did not deter speech; the government did not prevent veterans from expressing political views, but merely withdrew tax exemptions from those who advocated the violent overthrow of the government. Said Clark:

The majority...would require that California bear the burden of proof under the circumstances of this case because 'the transcendent value of speech is involved.' This is a wholly novel doctrine, unsupported by any precedent, and so far as I can see, inapposite to several other decisions of this court [Garner, Adler, and Gerende] upholding the application of similar oaths to municipal employees.³⁷

Clark also wondered why California could prosecute, but not withhold a tax subsidy from, a person who advocated the violent overthrow of the government. Even if the property tax affidavit infringed the right of speech, California's interest in guaranteeing, "that those who benefit by tax exemption do not bite the hand that feeds it"—justified the infringement.³⁸

³⁶ Ibid., 529.

³⁷ Ibid., 541.

³⁸ Ibid., 543. Clark asserted that the Court had misconstrued California's tax collection procedures. The tax assessor accepted the veteran's oath as filed and did not conduct an independent investigation. Indeed, California law made such filing conclusive evidence of compliance. If the Court was in doubt about the

Speiser is relevant to this paper for several reasons. First, it represented another blow to the privilege doctrine. The Court had limited the scope of that doctrine in employment (Wieman and Garner) and licensing (Konigsberg and Schware) cases. With Speiser, the Court limited the state's discretion to dispense property tax exemptions.

Second, Speiser demonstrated the incredible nimbleness of Brennan's mind. As stated earlier, Warren's Communist case opinions were often devoid of legal reasoning; Douglas's opinions were often diatribes against governmental injustice; and Black's arguments—at least his First Amendment arguments—did not recognize the possibility of governmental infringement of speech. Brennan's Speiser opinion avoided these predictable discourses. Rather than discuss the government's substantive power to withhold benefits from alleged subversives, he focused on the government's procedures for making that determination, and the subsequent deterrence of legitimate speech.³⁹

Moreover, Brennan had taken a property tax case and transformed it into an epochal First Amendment case. Specifically, Speiser drew a line separating protected speech from unprotected speech, rather than drawing a line separating speech from action.⁴⁰ This was the beginning of the concept of the “chilling effect” on speech—the proposition that statutes or policies may not, by themselves, violate the First Amendment, but have the effect of deterring speech—that was to broaden the concept of free speech in American jurisprudence.

requirements of California law, said Clark, it should construe California's requirements in a manner that sustained the oath's constitutionality, as it had in Garner and Gerende. Ibid., 540.

³⁹ McCloskey, The Modern Supreme Court, 210.

⁴⁰ Powe, The Warren Court, 136

LERNER v. CASEY

BEILAN v. PHILADELPHIA BOARD OF EDUCATION⁴¹

Since the 1955 Term, the Court had consistently limited the power of states to combat subversion. In Nelson, Slochower, Sweezy and other cases, the Court stripped states of the ability to question or terminate subversives, prosecute subversion against the United States, and bar former Communists from the professions. Thus, it was surprising that the same day the Court issued Speiser, it issued two decisions—Lerner v Casey and Beilan v Philadelphia Board of Education—that upheld a state's authority to terminate allegedly subversive employees who asserted their Fifth Amendment self-incrimination rights. Unfortunately, the Court failed to adequately explain when states, in terminating employees, were acting pursuant to their constitutional power and when they were acting in contravention of Slochower.

Lerner v Casey

The New York Security Risk Law permitted the New York Civil Service Commission (Commission) to designate as a "security agency" any state or municipal agency that performed defense or security functions. The Commission defined the New York Transit Authority as a security agency in November 1953. The law also authorized the Commission to suspend or dismiss an employee if, after an investigation, it "found reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person...[by the security agency] would endanger the security and defense of the nation and the state."⁴² "Reasonable grounds" included the employee's

⁴¹ Lerner v. Casey, 357 U.S. 468 (1958); Beilan v. Philadelphia Board of Education, 357 U.S. 399 (1958).

⁴² Lerner, 470.

conduct and membership in organizations the Commission defined as subversive. The Commission listed the Communist Party as a subversive organization in March 1954.

Investigators in September 1954 asked Lerner, a subway conductor, whether he belonged to the Communist Party. Lerner, citing his Fifth Amendment privilege against self-incrimination, refused to answer. The Commission suspended Lerner without pay, contending that his refusal to answer questions regarding his Communist Party membership and his invocation of the Fifth Amendment created a reasonable doubt as to his reliability. The Commission terminated Lerner after he declined his opportunity to show good cause for his reinstatement.

Harlan, for a 5-4 Court, sustained Lerner's termination.⁴³ Lerner had challenged the Commission's interpretation of the Security Risk Law, contending that a public emergency did not exist in 1954. Harlan disagreed, holding that New York did not need to demonstrate an emergency to enact laws guarding its public workforce from security risks. Lerner also contended that the Security Risk Law could not apply to a mere subway conductor. Harlan disagreed, finding New York's broad application of the Security Risk Law not "so irrational as to make it constitutionally impermissible."⁴⁴

Turning to his constitutional arguments, Lerner contended that both Slochower and the Fourteenth Amendment's Due Process Clause prohibited New York from inferring Communist Party membership from his Fifth Amendment invocation. Harlan disagreed; New York terminated Lerner because he refused to answer questions relevant to his employment, not because it inferred Communist Party membership from his

⁴³ Only four justices joined the opinion; Frankfurter concurred and joined the Court's judgment.

⁴⁴ Lerner, 470.

invocation of the Fifth Amendment. His lack of candor toward the Commission led it to doubt his loyalty and reliability, and justified his termination.

Slochower, according to Harlan, presented a different set of facts than Lerner. New York terminated Slochower because he invoked the Fifth Amendment, not because it questioned his candor. Moreover, when Slochower invoked the Fifth Amendment, he was responding to a Congressional committee's questions concerning matters unrelated to his employment. Lerner, in contrast, was responding to the state's inquiries on a matter related to his employment.

Beilan v. Board of Education

The Philadelphia School Superintendent summoned veteran teacher Herman Beilan to his office in 1952. The superintendent twice asked Beilan—in June and October 1952—if he had served as the Communist Political Association's Press Director, and warned him that his refusal to answer might lead to dismissal. Beilan, after consulting his attorney, refused to answer the superintendent's questions. The Philadelphia School System did not then punish Beilan for his stance.

HUAC subpoenaed Beilan in November 1953. Beilan, in response to HUAC's inquiries regarding his prior Communist associations, invoked the Fifth Amendment. The Philadelphia Board of Education commenced dismissal proceedings against Beilan one week later, claiming that his refusal to answer the superintendent's questions in 1952 constituted incompetence. The Board discharged him pursuant to Pennsylvania Public School Code § 122 in January 1954.⁴⁵

⁴⁵ Beilan argued that because the dismissal was due to questions regarding his loyalty, his discharge should have proceeded pursuant to the Pennsylvania Loyalty Act. The Pennsylvania Supreme Court disagreed and upheld the discharge. The Supreme Court was bound by the Pennsylvania Court's interpretation of its own statute and did not disturb that holding. Beilan, 404.

Burton, for the Court, sustained the discharge. Citing Adler and Garner, Burton opined that Beilan owed frankness, candor, and cooperation in any school district investigation relevant to an employee's "fitness and suitability for public service."⁴⁶ The superintendent's questions were relevant to Beilan's fitness, and his refusal to answer those questions blocked the superintendent's inquiry into the nature and extent of his Communist activities. The Philadelphia School System dismissed Beilan because of his refusal to discuss his Communist associations, not the associations themselves.

Philadelphia had charged Beilan with incompetence, not disloyalty. How could the Court construe Beilan's alleged early 1940's Communist ties as incompetence? Said Burton:

We find no requirement in the constitution that a teacher's classroom conduct be the sole basis for determining his fitness. The Pennsylvania courts have interpreted incompetency broadly—to include conduct unbecoming a teacher. In the instant case, the Pennsylvania Supreme Court has held it to mean 'deliberate and insubordinate refusal to answer questions of an administrative superior on a vitally important matter pertaining to his fitness.'⁴⁷

Finally, Burton distinguished Beilan from Slochower and Konigsberg. In the latter two cases, the states impermissibly inferred a witness's Communist Party membership from his invocation of the Fifth Amendment (Slochower) or refusal to answer questions (Konigsberg). The Philadelphia School system, in contrast, did not terminate Beilan because he had belonged to the Communist Party, but because he refused to cooperate with an investigation relevant to his employment.

Frankfurter, concurring in both cases, denied that New York or Philadelphia had decreed Lerner or Beilan disloyal employees. For the Court to assume differently and

⁴⁶ Ibid., 405.

⁴⁷ Ibid., 406.

overturn the terminations would lead to "a curbing of the State through the Fourteenth Amendment" and make that Amendment "an instrument of general censorship...of state action."⁴⁸ The states and their electorate—not the federal courts—were responsible for administering the Philadelphia School System and the New York Transportation Authority.

Federalism may not have been Frankfurter's sole reason for sustaining the states. The Supreme Court, which was sitting in judgment of various state and federal anti-Communist programs, required its own employees to disclose Communist Party membership. This prompted Frankfurter to opine to Whittaker:

It appears that even the most menial employee in our building is asked whether he is or ever was a member of the Communist Party or a Communist organization. I was not contradicted by anyone when I stated at conference that I took for granted that refusal to answer that question would bar employment here or retention in employment even if such refusal were based on a claim of the Fifth Amendment. I cannot believe that what is exacted of our employees is constitutionally denied to New York, and if New York, through its highest court, finds in such denial "evidence" of insecurity about a state employee, it is, to me, inconceivable that the Due Process Clause denies to the State of New York the weight of "evidence" to such denial.⁴⁹

Brennan's dissent stands out among the three dissents filed by the four civil libertarians. Brennan accused New York and Pennsylvania of declaring Lerner and Beilan "disloyal Americans" without granting them due process of law. New York discharged Lerner pursuant to its Security Risk Law, but the record did not contain any evidence proving that he was a security risk. Philadelphia declared Beilan "incompetent" only after he refused to answer HUAC's questions; it did not fire him when he refused to

⁴⁸ Ibid., 410-411.

⁴⁹ Felix Frankfurter to Charles Whittaker, March 10, 1958, Box B-48, Folder 2, Tom Clark Papers.

answer the superintendent's questions. If the Board truly believed Beilan was incompetent, it would have fired him in 1952.⁵⁰

How could the Court reconcile Beilan and Lerner with Slochower? The Court could have reversed Slochower, but that would have required Clark (the opinion's author) and Frankfurter to admit that they had made a major mistake in interpreting the Fourteenth Amendment. Instead, the Court chose to distinguish Slochower.

Perhaps, as Harlan explained, Slochower and Lerner were distinguishable. Slochower did concern a federal investigation, while Lerner concerned a state investigation. The state, according to Slochower, had assumed that the witness was a Communist, while perhaps it did not make that assumption in Lerner. But Slochower concluded that New York treated the witness's invocation of the Fifth Amendment as a confession, a conclusive presumption of guilt. Lerner treated the witness's Fifth Amendment invocation—in response to questions asked pursuant to a state anti-subversion law—as demonstrating lack of candor. How could a state, or a potential witness, possibly distinguish between the two situations? The Court's Lerner reasoning is not difficult to follow, but it is nearly impossible to reconcile that reasoning with Slochower.

Beilan is also difficult to reconcile with precedent. Burton distinguished Beilan from Slochower and Konigsberg by explaining that Beilan concerned the failure to answer questions—which allegedly constituted incompetence—while the latter two cases concerned a state's impermissible inference of subversion from a person's failure to answer questions.

⁵⁰ Beilan, 417-423.

Again, these distinctions are difficult to grasp. California denied Konigsberg's bar application because his refusal to answer questions made it impossible for the California Board to certify that he had good moral character and was not a Communist; Beilan's refusal to answer the Philadelphia Superintendent's questions concerning his Communist associations led to his dismissal for incompetence. How did the two situations substantially differ?

Moreover, Philadelphia terminated Beilan shortly after he invoked the Fifth Amendment before HUAC. New York terminated Slochower immediately after he invoked the Fifth Amendment before the SISS. The two situations appeared remarkably similar, yet the Court promulgated two different results.

Beilan and Lerner, viewed from the perspective of June 30, 1958, were an aberration from the Court's recent record of deciding against the government in Communist cases. In fact, they signaled the beginning of a shift toward a pro-government position in Communist cases. Unfortunately, while these pro-government Communist case decisions often decided constitutional issues, they were often bereft of legal logic and failed to adequately distinguish previous Communist cases.

Conclusion

The Court, continuing its practice of the last several terms, left the government's anti-Communist programs in constitutional limbo. While most of the 1957 Term's results paralleled those of the 1956 Term, the cases differ in three important respects.⁵¹

⁵¹ The Court decided two other Communist cases of note during the 1957 Term. In Heikkinen v. United States, 355 U.S. 273 (1958), the Court reversed the verdict against a Communist Finnish alien convicted of willfully failing to depart from the United States within six months of a deportation order. Whittaker, for the Court, held that the government failed to prove that any country would actually take Heikkinen.

First, with Kent, the Court expanded on its Peters precedent of avoiding constitutional issues while deciding the case on statutory grounds. In Peters, the Court assumed that the President did not intend to infringe Peters' Fifth Amendment due process rights. Kent posed a new wrinkle; what if the government infringed a previously un-recognized constitutional right? The Court's answer: recognize the new right, one that Congress did not envision. Then, cite Peters for the proposition that the government could not infringe that right absent explicit language to the contrary.

Second, after avoiding constitutional questions for several terms (Peters), or discussing, but not deciding such questions (Yates), or deciding constitutional questions that were, at best, tangential to the case (Watkins, Konigsberg), the Warren Court finally addressed the constitutionality of a statute in Speiser. The Court's opinion not only appeared to put the final nail in the coffin of the privilege doctrine, but also originated the "chilling effect" doctrine, which was to profoundly influence future free speech jurisprudence.

Finally, in Beilan and Lerner, the civil libertarians' numerical limitations were exposed. Throughout the 1955, 1956, and most of the 1957 Terms, the civil libertarians—usually joined by Frankfurter and Harlan or Burton—blocked the government's anti-Communist programs. However, Konigsberg, Sweezy, and Watkins exposed some the alliance's fissures; the Dayton notes indicate that Frankfurter's crucial fifth vote was all that stopped the civil libertarians from expressly curbing the

In Sacher v. United States, 356 U.S. 576 (1958), the Court was again forced to confront the fallout from Dennis. Dennis attorney Harry Sacher was convicted of contempt of Congress after refusing to provide testimony to the Senate Internal Security Subcommittee (SISS). In a per curiam opinion authored by Frankfurter, the Court, citing Watkins, held that the SISS's questions were not clearly pertinent to the investigation and held that Watkins contempt conviction could not stand.

government's power to combat subversion. Beilan and Lerner began Harlan and Frankfurter's shift to a new, five-justice anti-Communist coalition that opposed the civil libertarians.

CONGRESSIONAL AND PUBLIC REACTION

The Court's leftward tilt and the hostile rhetoric it deployed in condemning the nation's anti-Communist programs appalled Congress, the states, and many legal institutions. Congress's reaction to the Warren Court's leftward tilt manifested itself in three bills: 1) S. 2377, in reaction to Jencks; 2) H.R. 3, which sought to reverse Nelson by prohibiting the preemption of state statutes absent clear language to the contrary; and 3) S. 2646, the so-called Jenner-Butler Bill.

S. 2377

Brennan's Jencks opinion caused confusion among both prosecutors and federal courts. The Attorney General's office received dozens of telegrams from law enforcement officials seeking guidance. Some attorneys did not bother seeking the Justice Department's guidance, but instead contacted Brennan directly.⁵² Regardless of what Jencks actually required, the perception among many government officials, including J. Edgar Hoover, was that it had hamstrung the FBI. New York Republican Representative Kenneth Keating stated: "If this decision stands and nothing is done by the legislative branch it may well result, as Justice Clark has indicated in his minority opinion, in our investigative agencies having to close up shop... The Attorney General's Office received dozens of telegrams of serious problems and requesting advice on how to

⁵² Judge Richard Hartshorne to William Brennan, June 10, 1957, Box 3, Folder 5, William Brennan Papers, Manuscript Division, Library of Congress

proceed.”⁵³ Other legislators were not as restrained in their rhetoric; said Rep. James C. David of Georgia: The Supreme Court has “in great measure destroyed the effectiveness of the Federal Bureau of Investigation.”⁵⁴

S. 2377 both limited and codified Jencks. The Bill allowed the trial judge to inspect certain reports and statements in-camera before delivering it to the defendant; it also prohibited sharing a witness statement or report with a defendant unless that witness had testified.

S. 2377 passed overwhelmingly (74-2 in the Senate, 315-0 in the House) and Eisenhower signed it in August 1957. According to Court scholar Walter Murphy, the Court’s defenders claimed victory, asserting that S. 2377 essentially codified Jencks, while the Court’s critics claimed to have rebuked the Court.⁵⁵ Regardless, the Jencks Bill merely foreshadowed the much larger Congressional attack on the Court.

S. 2646

Red Monday prompted Congress to attack the Court for its perceived pro-Communist excesses. Said Senator William Jenner, Republican of Indiana:

The Supreme Court has dealt a succession of blows at key points of the legislative structure erected by Congress for the protection of the internal security of the United States...The Court has become, for all practical purposes, a legislative arm of the government; and many of its feats are subject to no review.⁵⁶

⁵³ Walter Murphy, Congress & The Court: A Study in The American Political Process (Chicago: University of Chicago Press, 1962), 130.

⁵⁴ Ibid.

⁵⁵ Ibid., 152-53.

⁵⁶ Ibid., 154.

Senator Jenner introduced SB 2646 in 1957. The bill, as originally introduced, would have removed the Supreme Court's jurisdiction to review, either by appeal, writ of certiorari, or otherwise, any case which drew into question the validity of:

1. Any function, practice of, or question of jurisdiction of any committee or subcommittee of the United States Congress, or any action against a witness charged with contempt of Congress;
2. Any Action by any Executive branch officer or agency for the removal of federal employees whose retention may impair the security of the United States Government;
3. Any state statute or regulation concerning subversive activities within such a state;
4. Any school board rule, bylaw, or regulation concerning subversive activities in its teaching body;
5. Any state or board of bar examiners law, rule, or regulation, or any action taken pursuant to such rule, law or regulation pertaining to the admission of a person to the state bar.⁵⁷

Several witnesses offered testimony regarding S. 2646 at a February 1958 hearing. Although few attorneys supported the bill at the hearing—witnesses included South Carolina Senator Strom Thurmond, National Review Editor L. Brent Bozell, and representatives of various patriotic societies—one noted legal authority joined the chorus: Princeton Professor Emeritus Edward S. Corwin, one of the nation's leading constitutional scholars. Corwin did not endorse S. 2646, but sympathized with it. In a letter to the New York Times, Corwin wrote: "There can be no doubt that [on Red Monday] the Court went on a virtual binge and thrust its nose into matters beyond its

⁵⁷ S. 2646, 85th Congress, 1st Session; Box 725, Legislation: Bills & Correspondence 53-60, Earl Warren Papers.

competence...the country needs protection against the aggressive tendency of the Court.”⁵⁸

The S. 2646 opponents were a virtual "who's who" of the legal establishment. They included Attorney General William Rogers; Former Solicitor General Whitney North Seymour; Roscoe Pound, Dean Emeritus of the Harvard Law School; and Jefferson Fordham, Dean of the University of Pennsylvania Law School. Several prominent organizations, including the ACLU, the NAACP, the AFL-CIO, and the Americans for Democratic Action, joined them in opposition to the bill.⁵⁹

Jenner, working with Maryland Republican Senator John Marshall Butler, introduced a compromise bill that permitted legislative committees to determine the pertinency of their own questions (in response to Watkins); removed the Court's jurisdiction to hear state bar cases (in response to Schware and Konigsberg); permitted states to prosecute subversion against the United States (in response to Nelson); and amended the Smith Act's "organize" and "advocacy" sections (in response to Yates). The amended bill passed the committee by a 10-5 vote.

H.R. 3

While the Senate debated S. 2646, Virginia Democratic Representative Howard Smith (sponsor of the Smith Act) introduced his own anti-Communist bill. H.R. 3, introduced in response to Nelson, decreed that Congressional acts did not "occupy the field" in which they operated, unless the acts employed express language to the contrary.

⁵⁸ Murphy, Congress & The Court 161.

⁵⁹ Ibid.

Despite the strong opposition of the S. 2646 opponents, H.R. 3 passed the House by a 241-155 vote on July 17, 1958.⁶⁰

The Defeat of S. 2646 and H.R. 3

Congress did not succeed in curbing the Warren Court. The Senate tabled the Jenner-Butler Bill on a 49-41 vote, and defeated H.R. 3 by a 41-40 vote.⁶¹ What is amazing is that both bills came so close to passing. The Attorney General, several powerful organizations, and most legal scholars actively opposed both bills; President Eisenhower did not take a public position on either bill, but given Rogers' vocal opposition, the strong possibility of a veto loomed; Senate Majority Leader Lyndon Johnson, the master tactician and parliamentarian, opposed both bills. Finally, the Court still enjoyed great national prestige (except in the South) for its civil rights decisions. That the Senate came so close to rebuking the Court is an indication of the enmity engendered by the Court's Communist case decisions.

Other attacks on the Court

Congress was not the only institution that attacked the Warren Court for its Communist case decisions. Several American Bar Association (ABA) Committees roundly condemned the Court. For example, the ABA's House of Delegates approved the recommendations of the ABA's Committee on Communist Strategy, Tactics, and Objectives, which decreed that the Court's decisions "encourage[d] an increase in Communist activities in the United States," called for a reversal of Nelson, and,

⁶⁰ Ibid., 182.

⁶¹ Ibid., 212-218.

responding to Yates, and advocated changing the Smith Act.⁶² Moreover, Chief Justice Warren, attending the ABA's annual meeting in London in 1957, was subject to a blistering attack by the ABA's standing Committee on Communism. After the ABA's House of Delegates accepted the Committee's report without comment, Warren resigned from the organization.⁶³

In August 1958, the Conference of Chief Justices, by a 36-8 vote, adopted its "Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions." The Report savaged the Court:

We believe that in the fields with which we are concerned, as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint.

It has long been an American boast that we have a Government of laws and not of men. We believe that any study of the recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast....⁶⁴

Even the venerable Learned Hand, perhaps America's most esteemed Judge, lambasted the Court. In his Holmes Lectures delivered to Harvard Law School in February 1958, Hand called the Warren Court "a third legislative chamber" and characterized the civil libertarians on the court as "Platonic Guardians."⁶⁵

The attack on the Court and its aftermath is important for a number of reasons. While not as memorable as Roosevelt's 1937 Court-packing plot, it still represented one

⁶² American Bar Association, Resolution of the Special Committee on Communist Tactics, Strategy and Objectives, Adopted February 25, 1959; Conveyed by the American Bar Association to Earl Warren February 27, 1959, Box 755, ABA Resignation—1959, Earl Warren Papers.

⁶³ Thinking that was the end of the matter, Warren ceased paying dues to the ABA after he resigned. He was shocked to discover two years later that the ABA had not accepted his September 1957 resignation. Instead, the ABA had kept Warren on the membership rolls and expelled him in 1959 for non-payment of dues. Various Correspondence, Box 754, ABA Resignation 57-72, Earl Warren Papers.

⁶⁴ "Resolutions Adopted at the Tenth Annual Meeting of the Conference of Chief Justices," August 23, 1958, Box B-252, Folder 1, Tom Clark Papers

⁶⁵ Powe, The Warren Court, 129-30.

of the most significant assaults on the Court in American History. Indeed, unlike Roosevelt's plan, Congress actually voted on the anti-Warren Court bills and both came close to passing. Had the Court enjoyed less moral standing from its civil rights cases; had Eisenhower supported either bill, or the Department of Justice remained neutral; or had a Senate Majority Leader other than Lyndon Johnson led the opposition, HR 3, and possibly S. 2646, would probably have become law.

Professor Corwin's comments were telling. He was neither a segregationist nor a McCarthyite. Yet he expressed a sentiment widely held by many legislators, the state chief justices, and Learned Hand: that the Court had far exceeded its authority to interpret statutes and opine on constitutional issues, and instead had usurped the functions of the executive and the legislative branches. If the Court had followed Frankfurter's suggestion and employed less inflammatory rhetoric in its Watkins and Sweezy opinions, or been more sensitive to state concerns in Nelson and Konigsberg, Congress would not have been so eager to rebuke it.

1958 TERM

The 1958 Congressional elections, which produced a Democratic landslide, appeared to protect the Court from further Congressional attacks. Despite the Court's new-found safety, it built upon its Lerner and Beilan decisions from the 1957 Term and continued its apparent retreat from its anti-government position in Communist cases.

This section contains two parts. The first reviews the 1958 Term's major Communist cases. The second analyzes the emergence of the new five-justice anti-civil libertarian majority—comprised of Clark, Whittaker, Frankfurter, Harlan, and new

Justice Potter Stewart—which sustained the government in two of the aforementioned cases.

The Court decided only three major cases during the 1958 Term. In Uphaus v. Wyman, the Court seemed to ignore Sweezy by sustaining the contempt conviction of a witness who refused to cooperate with New Hampshire Attorney General Louis Wyman's investigation into subversion in New Hampshire. In Barenblatt v. United States, the Court seemed to ignore Watkins by sustaining the contempt conviction of a witness who refused to cooperate with HUAC's investigation into Communism and higher education. This rightward tilt had its limits; in Greene v. McElroy, the Court, following its Kent precedent, created a new right—the right to practice one's profession free from governmental interference—and declared that neither the legislative nor executive branches could infringe this right by using secret evidence.

THE APPOINTMENT OF POTTER STEWART

Justice Burton, a victim of Parkinson's disease, retired from the Court in October 1958. Eisenhower replaced him with another Ohio Republican, Potter Stewart. Stewart, a graduate of Yale Law School, had served two terms on the Cincinnati City Council while maintaining a prosperous law practice. Eisenhower had appointed Stewart to the Sixth Circuit Court of Appeals in 1954, before elevating him to the Supreme Court—as a recess appointment—in October 1958.

The Court's alignment did not shift markedly with Stewart's appointment. Stewart's record in Communist cases, like Burton's, defied easy categorization. In some cases, such as the 1958 Term's Greene v. McElroy, he joined Warren and the other civil

libertarians in deciding against the government. However, like Burton, he usually joined the Court's anti-Communist faction.

Stewart earned a reputation as a genial, but undistinguished, justice. He is best remembered for his line in Jacobellis v. Ohio regarding obscenity: He did not know how to define the term, but he said, "I know it when I see it." Stewart served on the Court until 1981, retiring at the relatively young age of sixty-six, and died in 1985.

UPHAUS v. WYMAN⁶⁶

As described in Chapter Five's Sweezy explanation, the New Hampshire legislature in 1953 created a one-man legislative committee—comprised solely of Attorney General Louis Wyman—to investigate subversive activities in the state. Wyman subpoenaed Willard Uphaus, Executive Director of World Fellowship Inc., and demanded that he appear before his committee and produce a list of all of the Fellowship's 1954 and 1955 summer camp attendees.⁶⁷ Uphaus agreed to answer some of Wyman's questions, but refused to surrender the camp's list.⁶⁸ A New Hampshire trial court held Uphaus in contempt and ordered him jailed until he produced the list.

Clark, for a 5-4 Court, upheld the contempt sentence. In Sweezy, Clark had assailed Warren for ignoring Nelson's implicit reservation of power to the states to prevent subversive activities against the state. With Uphaus, Clark had his revenge, concluding that Nelson permitted states to fight subversion against the state:

The basis of Nelson thus rejects the notion that it stripped the states of the right to protect themselves. All the opinion proscribed was a race between federal and

⁶⁶ Uphaus v. Wyman, 360 U.S. 72 (1959).

⁶⁷ New Hampshire required that all hotels, tourist camps, and public lodges to make their guest lists available for police inspection.

⁶⁸ Wyman also subpoenaed a list of the camp's non-professional employees and Uphaus's correspondence with all persons who spoke at the camp. The New Hampshire Supreme Court dismissed these demands.

state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecution for sedition against the state itself.⁶⁹

Having squared Uphaus with Nelson, he turned to Sweezy. First, he did not waste any time with Warren's "separation of power from responsibility" argument. The New Hampshire Supreme Court determined that the legislature wanted the Fellowship's guest list. That determination was a question of state law, one that the Court was required to accept. Further, the academic and political freedoms at issue in Sweezy did not apply to World Fellowship, Inc., which was neither a university nor a political party.

After dispatching with Nelson and Sweezy, Clark sustained Uphaus's contempt conviction. He focused his opinion on the state's power and not Uphaus's First Amendment associational interests. Harlan refused to join Clark's opinion until he incorporated a more thorough discussion of the balancing test. Said Harlan,

I am very much bothered by the absence of any "balancing" treatment in your opinion of the vital issues. In other words, I think the opinion should show clearly why the constitutional rights asserted by the petitioner are overcome by a superior state interest in the production of the two items in question. See FF's concurring opinion in Sweezy, in which I joined.

For me this is the vital consideration in the case, and I am afraid I would not be able to join your opinion in its present form."⁷⁰

Clark, needing Harlan's vote for a Court opinion, tailored his opinion accordingly. New Hampshire had an interest in determining whether any subversive persons resided in the state, and Wyman's demand for the guest list related to that interest. Moreover, Wyman had reason to believe that the guests who visited the Fellowship's camp in 1954 and 1955 might be "subversive persons." Finally, said Clark, "Although the evidence as

⁶⁹ Uphaus, 76. Moreover, noted Clark, neither Nelson nor the Smith Act discussed the state's authority to compel a corporation—World Fellowship was a corporation—to produce papers.

⁷⁰ John Marshall Harlan to Tom Clark, December 4, 1958, Box A-78, Folder 6, Tom Clark Papers.

to the nexus between World Fellowship and subversive activities may not be conclusive, we believe it sufficiently relevant to support the Attorney General's action."⁷¹

Clark then analyzed the evidence that established the nexus between the World Fellowship and subversion. Uphaus had participated in Communist-front activities, and many of the World Fellowship's speakers belonged to the Communist Party or other organizations deemed subversive by the U.S. Attorney General. Could New Hampshire use the Attorney General's list to investigate subversives? Yes, said Clark, if it did not use that list to prosecute them. Said Clark,

While the Attorney General's list is designed for the limited purpose of determining federal employment (Wieman), and guilt by association remains a thoroughly discredited doctrine, it is with a legislative investigation—not a criminal prosecution—that we deal here. Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings.⁷²

After establishing proper nexus, Clark continued with his balancing test. New Hampshire conducted the investigation in the interest of self-preservation, which Dennis had deemed “the ultimate value of any society.” The state interest in self-preservation outweighed Uphaus's individual rights in associational privacy. Clark conceded that surrendering the list would “expose” the camp's guests, but that exposure was “an inescapable incident of an investigation into the presence of subversive persons within a State.”⁷³ With that, Clark upheld Uphaus's contempt sentence under the Fourteenth Amendment's Due Process Clause.

⁷¹ Uphaus, 79.

⁷² Ibid.

⁷³ Ibid., 81.

Frankfurter, after reading Brennan's dissent, explained why he could not join the civil libertarians:

[W]e weigh differently the respect to be accorded to the determination of a State under the Fourteenth Amendment—for it is the State as a whole that you are denying the power—in exercising a judgment regarding the purposes for which a legislative investigation is conducted...I cannot find it within what I deem my allowable scope of judicial review to conclude that the Legislature of New Hampshire must first prove that an enterprise that is in effect run as an inn is [communist affiliated] before it can make the inquiry now before us.

Yet even as Frankfurter began distancing himself from the civil libertarians, he still made clear that he was not a McCarthyite:

Need I add another word, namely, that there isn't a man on the Court who personally disapproves more that I do of the activities of all the un-American Committees, of all the Smith prosecutions, of the Attorney General's list, etc., etc.⁷⁴

Frankfurter's explanation did not deter Brennan, who filed a dissent joined by the three other civil libertarians.⁷⁵ He, too, employed the balancing test, but arranged the scales much differently than did Clark. Brennan acknowledged that New Hampshire had an interest in self-preservation, but it sought Uphaus's list for the sole purpose of exposing alleged subversives. Further, once he had the list, Wyman would paint the camp's attendees as guilty of subversion, which was not a valid legislative purpose. Brennan, who in Speiser had required the state to provide criminal trial-type protections in administrative actions that implicated constitutional rights, sought to expand those protections to state legislative investigations:

If an investigation or trial, conducted by any organ of the state, which is aimed at the application of sanctions to individual behavior is to be upheld, it must meet

⁷⁴ Felix Frankfurter to William Brennan, January 7, 1959, Box 19, Folder 3, William Brennan Papers.

⁷⁵ While Black and Douglas joined the dissent, they still did not accept the use of the balancing test.

the traditional standards that the common law in this country has established for the application of sanctions to the individual.⁷⁶

The Court did not convincingly explain why Wyman's demand for information from Sweezy violated the Due Process Clause while his demand for Uphaus's information did not. The problem was not the civil libertarians; by the 1958 Term, it was clear that they would oppose any state inquiry into subversive activities. The problem was the apparent change of attitude by Harlan and Frankfurter, who opposed Wyman's actions in Sweezy but not in Uphaus.

Technically, this did not constitute a reversal. Just as the majority in Lerner and Beilan distinguished those cases from Slochower, so Harlan and Frankfurter could distinguish Sweezy from Uphaus. In the former case, those two justices held that Sweezy's interests in academic freedom and associational freedom (in a non-Communist political party) outweighed the state's interest in preventing subversion. In the latter case, they determined that Uphaus's associational interests as executive director of a corporation were not sufficient to overcome the state's interest in discovering and preventing subversion. Corporations were not academic institutions and that the Progressive Party was not the Communist Party.

Perhaps these differences distinguish the two cases. If so, the differences seem so minor that a reasonable person could not have reasonably foreseen that the two justices would switch their votes to favor New Hampshire. For example, why were Sweezy's Progressive Party activities immune from Wyman's inquiries, but not the activities of World Fellowship's guests?

⁷⁶ Uphaus, 102.

Clark's Uphaus opinion and its interpretation of Nelson—an opinion he joined—is at once enlightening and absurd. Nelson indicated that Congress intended to stop states from interfering with federal efforts to combat subversion against the United States; it did not prevent states from investigating and prosecuting subversion directed at state and local governments. However, Clark was incorrect in stating that, "[Nelson] made clear that a state could proceed with prosecution for sedition against the state itself"; the opinion's absence of a prohibition did not constitute express authority for states to bring prosecution.

However, assuming that Clark was correct that states did have the authority to prosecute subversion against the state, it begs the question: Did the government of New Hampshire face a threat of subversion from the World Fellowship camp's guests? If so, did that threat actually create a sufficient state interest, one that would justify infringement of due process rights? Under the traditional concept of federalism, only the states could answer that question, and the Court's majority respected New Hampshire's answer. However, New Hampshire's answer required a suspension of disbelief.

BARENBLATT v. UNITED STATES ⁷⁷

The Court claimed to distinguish Slochower in Beilan and Lerner; claimed to distinguish Sweezy in Uphaus; and would claim to distinguish Watkins in Barenblatt. HUAC, which was investigating subversion in higher education, subpoenaed Vassar College instructor Lloyd Barenblatt in June 1954. Barenblatt, citing the First, Ninth, and Tenth Amendments—but expressly rejecting the Fifth Amendment—refused to answer several of HUAC's questions, including those regarding his Communist Party

⁷⁷ Barenblatt v. United States, 360 U.S. 109 (1959). Barenblatt had come before the Court in the previous term. The Court remanded it for reconsideration in light of Watkins.

membership.⁷⁸ A court convicted him of contempt of Congress, sentenced him to six months imprisonment, and fined him \$250.

Harlan, for a 5-4 Court, sustained the conviction. Harlan reiterated Congress's broad power to investigate in a wide array of fields, including education. But hadn't Harlan and Frankfurter given special protection to academic freedom in their Sweezy opinion? Harlan seemed to concede as much in the following quote:

Of course, broadly viewed, inquiries cannot be made into teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary, learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.⁷⁹

Yet academic freedom did not confer immunity upon anyone associated with the academy and did not prohibit Congress from questioning a professor. The academy was not a "constitutional sanctuary" from legitimate legislative inquiries.⁸⁰ Harlan, having dispatched with any academic freedom arguments, turned to Barenblatt's three-part attack on his contempt conviction:

1. HUAC did not have authority to compel Barenblatt's testimony

Barenblatt asserted that Watkins had held HUAC's charter—Rule XI—so vague as to prohibit it from questioning witnesses regarding their alleged Communist associations. Harlan disagreed. The Watkins dicta indicated that HUAC's charter failed to enlighten the witness (Watkins) regarding the pertinence of the subject matter under review (Communists in the labor movement) in that particular hearing. Watkins did not

⁷⁸ Barenblatt made many of his legal arguments via a memorandum that he submitted to HUAC.

⁷⁹ Barenblatt, 112.

⁸⁰ Ibid.

hold that HUAC's charter prevented it from ever seeking testimony regarding Communist activities.

Barenblatt also argued that, independent of Watkins, HUAC's charter was too vague to permit it to compel his testimony in this hearing. Harlan again disagreed, noting that if Barenblatt was correct, HUAC could never compel witness testimony with its existing charter. In an apparent reversal of his Watkins position, Harlan paid great deference to the practices and customs of Congress:

Just as legislation is often given meaning by the gloss of legislative reports, administrative interpretation, and long usage, so the proper meaning of an authorization to a congressional committee is not to be derived alone from its abstract terms unrelated to the definite content furnished them by the course of congressional actions.⁸¹

The House of Representatives, Harlan noted, had continuously approved HUAC's investigations into Communist activities, including Communist espionage, Communist infiltration of the labor movement, and Communist influence in Hollywood; it had consistently appropriated funds to HUAC; and it had never narrowed HUAC's investigatory authority. Clearly, HUAC had acted within its charter when it investigated Communism in education.

2. HUAC's questions were not pertinent

Barenblatt, returning to Watkins, argued that HUAC's questions were not pertinent to the subject under inquiry. Harlan disagreed. Watkins, unlike Barenblatt, had objected to the pertinency of HUAC's questions at the time of the hearing. Further, during Barenblatt's hearing, HUAC had stated the pertinency of the questions with "undisputable clarity"—HUAC's chair had announced that the committee was

⁸¹ Ibid., 117.

investigating Communist infiltration of higher education—and Barenblatt was sufficiently apprised of the subject under inquiry.

3. HUAC's actions violated Barenblatt's constitutional rights

Finally, Barenblatt asserted that HUAC had violated his First Amendment rights. Harlan noted that the First Amendment, unlike the Fifth Amendment, did not always permit a witness to resist the government's inquiries. Instead, the Court had to balance the competing interests at stake in each circumstance.

Harlan asked: Did HUAC's investigation relate to a valid legislative purpose? Harlan concluded that HUAC's purpose in investigating Barenblatt's Communist ties was national self-preservation from the threat posed by the Communist Party. Was that purpose justified? Yes, said Harlan, because of the unique threat posed by the Communist Party. The Court had refused to view the Communist Party as an ordinary political party, and in several cases—including Dennis, Douds, and Galvan—had sustained legislation that would be constitutionally suspect in other circumstances.⁸²

HUAC, then, did not violate Barenblatt's First Amendment rights when it asked him about his Communist Party activities. Clearly, HUAC's inquiries related to a subject in which Congress had a compelling legislative interest—national self-preservation—and Barenblatt was thought to belong to the organization—the Communist Party—that threatened that interest. When balanced against Barenblatt's First Amendment interests, the government had the more compelling interest. Not surprisingly, Harlan rejected Barenblatt's First Amendment challenge.⁸³

⁸² Harlan also denied that Sweezy compelled a different result; Sweezy was not a Communist Party member, but a member of the Progressive Party. *Ibid.*, 129.

Finally, Harlan not only denied that HUAC exposed Barenblatt purely for the sake of exposure; he denied that the Court could even make that determination: “So long as Congress acts in pursuance of its constitutional power, the judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power.”⁸⁴

Black, in a dissent joined by Warren and Douglas, alleged that HUAC’s charter did not sufficiently inform Barenblatt regarding HUAC’s interest in interrogating him.⁸⁵ Because the vague charter did not sufficiently inform Barenblatt of the government’s interest, he could not determine whether HUAC’s questions were pertinent, or whether he would be compelled to answer them.⁸⁶ Yet, even if Barenblatt could discern HUAC’s interest, Rule XI was still insufficient. When Congressional actions touch First Amendment rights, “more is required of legislatures than a vague delegation to be filled in later by mute acquiescence.” Congress must “expressly and unequivocally” grant HUAC the power to investigate men’s ideas.⁸⁷

Black next turned to his real target, Harlan’s First Amendment balancing test. Black believed there were no interests to balance; the First Amendment, which included the right to silence, was absolute, not subject to being whittled away by a balancing test.

⁸³ Barenblatt asserted that HUAC’s investigation sought to curb the “theoretical classroom discussion of Communism,” which was protected by Harlan’s Yates opinion. Harlan disagreed; Congressional investigations were not tantamount to a Smith Act prosecution, and Yates’ evidentiary requirement that the government to prove incitement was not applicable to legislative hearings.

⁸⁴ *Ibid.*, 132, citing Arizona v. California, 283 U.S. 423 (1931). The limitation applied to both legislation and congressional investigations regarding the need for legislation.

⁸⁵ Brennan filed a separate dissent; he believed that HUAC conducted its investigation merely to expose alleged subversives.

⁸⁶ Putting it more succinctly, Black stated: “Yet it is knowledge of this need—what is wanted from him and why it is wanted—that a witness must have if he is to be in a position to comply with the Court’s rule that he balance individual rights against the requirements of the state.” Barenblatt, 139.

⁸⁷ *Ibid.*, 140.

The Court could apply a balancing test to laws regulating conduct that might have an incidental effect on speech, but not to laws directly effecting speech. Said Black:

To apply Majority's balancing test is to read the first amendment to say Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised. This is clearly akin to the notion that neither the First Amendment nor any provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.⁸⁸

Harlan's opinion balanced the government's right of preservation itself against Barenblatt's right to keep silent regarding his Communist affiliations, but his test weighed the wrong factors. Harlan did not weigh

the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation.⁸⁹

Black also criticized Harlan for the weight he assigned to the government's interest in the balancing test. If the Court determined that the government's interest was the right to self-preservation, the government would always win. The asserted interest on the other side of the scale could never trump the right to self-preservation. In these cases, the balancing test was but a legal fiction that assured the suppression of First Amendment rights.

Barenblatt was among the most important Communist cases of the Warren Court. Nearly all of the Warren Court's cases that went against the government rested on non-constitutional grounds. Those few cases favoring the government—Lerner, Beilan, and Uphaus—concerned the exercise of state power under the Fourteenth Amendment.

⁸⁸ Ibid., 143.

⁸⁹ Ibid., 144.

Barenblatt finally addressed the First Amendment issues the Court had avoided for several terms. By limiting the First Amendment's reach in Congressional hearings, the Court gave HUAC near-*carte blanche* authority to publicly question suspected subversives about their Communist ties.

The Watkins dicta strongly implied that the Court would embrace a challenge to contempt of Congress convictions based on the vagueness of HUAC's charter; Congress's lack of authorization for HUAC to investigate Communism; the lack of pertinence of HUAC's questions; and the witness's First Amendment right to refrain from answering HUAC's questions.

Harlan, of course, rejected all of these arguments. Perhaps the HUAC chair's opening comments in the Watkins hearing were distinguishable from those in the Barenblatt hearings, thereby allowing the witness in the former, but not the latter, to realize the subject matter under inquiry. Yet if the "course of Congressional actions" could not supply sufficient clarity to an otherwise vague HUAC charter in Watkins, why could it do so in Barenblatt? How could the Court in Watkins dismiss HUAC's charter—"it would be difficult to imagine a less explicit authorizing resolution"—but, in Barenblatt, ascribe great weight to Congress's long acquiescence to HUAC's activities? It seems impossible that Harlan could have joined Watkins and written Barenblatt two years later.

Further, the Watkins dicta had granted the Congressional witness First Amendment rights. The opinion did not define those rights in detail, but that did not matter; after Harlan's Barenblatt opinion, any First Amendment rights conferred by Watkins were illusory. Under the Barenblatt analysis, the Court would balance the

government's interest in self-preservation against the witness's First Amendment rights. This, as noted by Black, was not a balancing test at all, for the government would always prevail.

GREENE v. MCELROY⁹⁰

Greene v. McElroy reminded Court observers that the civil libertarian coalition, despite its recent setbacks, needed only one additional vote to prevail in Communist cases. Bailey and Peters concerned the government's use of confidential information to deny suspected subversives employment. Greene, in contrast, concerned the government sought to use confidential information to deny non-governmental personnel—specifically, military contractors—access to classified information. Greene avoided deciding the constitutional question of whether the government could use confidential information in deciding whether to grant or deny security clearances. However, in rendering its opinion, the Court discovered a new constitutional right (as it had in Kent) and discussed in great detail the constitutional issues it ostensibly sought to avoid (as it had in Watkins).

William Greene served as Vice President of a contractor that supplied military goods for the United States Armed Forces. The United States Government required all persons working on certain defense projects to have a security clearance. Greene had his clearance suspended in 1951, only to have it restored after a hearing.⁹¹

⁹⁰ Greene v. McElroy, 360 U.S. 474 (1959)

⁹¹ A hearing revealed that in the 1940's, Greene had belonged to several Communist-front groups; attended numerous events at the Soviet Embassy; hosted Soviet Military and Diplomatic personnel at his home; and associated with several Communists. Most important, in 1946-47 he maintained a "close and sympathetic association" with Gregory Silvermaster and William Ludwig Ullmann (See Chapter Four, Ullmann v. United States), both of whom engaged in espionage. *Ibid.*, 484-85.

The Government revised its industrial-security procedures in 1953. The Secretary of the Navy ordered Greene's employer to remove him from classified Navy projects and terminate his access to classified information. Greene's loss of access to such projects and information would make him virtually unemployable as a military contractor, so he requested and received a second hearing. The hearing panel, relying on confidential information, affirmed the Secretary of the Navy's order. The panel also denied Greene's request to review the confidential information that it had consulted.

Warren, writing for the three other civil libertarians and Potter Stewart, reversed the hearing panel. Warren's initial draft opinion held that the panel must grant Greene due process before it could deprive him of his security clearance. Justice Stewart did not believe that the opinion should decide the constitutional issue; in fact, he argued to Warren,

[I] think that a very good argument can be made that the petitioner was not entitled to the protections of procedural due process. Even though the government has interfered with petitioner's 'liberty' or 'property,' it does not necessarily follow that he is entitled to constitutional protection.

This was not a licensing case, but a case where government interference on his profession 'a consequential effect of the exercise by the government of ...its unquestionable power to protect the integrity of its secret military information.'⁹²

Without Stewart, Warren did not have the requisite five votes for a Court opinion. Warren thus followed Douglas's Kent strategy: create a hitherto unknown right; claim that neither the legislative nor the executive branch had indicated any desire to disregard that right; and then construe a statute or regulation in a manner that avoided infringing that right. In this case, the new right was the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference,"

⁹² Quoted in relevant part. Potter Stewart to Earl Warren, June 16, 1959, Greene v. McElroy, Opinions—Chief Justice, 1952-69, Box 585, Earl Warren Papers.

which Warren decreed protected by the Fifth Amendment Due Process Clause's Liberty and Property Provisions. Warren's concessions brought Stewart aboard.

Warren declared certain principles “relatively immutable,” such as when governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.... We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.⁹³

After declaring this “relatively immutable” principle, Warren then sought to determine whether the President or Congress delegated to the Department of Defense the authority to ignore these

traditional and well-recognized safeguards in an industrial security clearance program which can operate to injure individuals substantially by denying to them the opportunity to follow certain chosen private professions.⁹⁴

Warren reviewed the Executive Orders that the Government contended showed the Presidential delegation. Executive Order 10290 stated: “No person shall be entitled to knowledge or possession of, or access to, classified security information solely by virtue of his office or position.”⁹⁵ Executive Order 10501 stated: “Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency.”⁹⁶

Said Warren of these orders:

Clearly, neither of these orders empowers any executive agency to fashion security programs whereby persons are deprived of their present civilian

⁹³ Greene, 496.

⁹⁴ Ibid., 500.

⁹⁵ Exec. Order No. 10290, 16 Fed. Reg. 9795.

⁹⁶ Exec. Order No. 10501, 16 Fed. Reg. 7049.

employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination must rest.⁹⁷

Warren next turned to Congress. Congress had authorized a security clearance program with the National Security Act of 1947, but did not authorize a program devoid of the right to confrontation and cross-examination. Nor, had Congress ratified the Department of Defense's security clearance program by funding it. Unless an executive order or statute contained clear language to the contrary, the Court would assume that the executive or legislative branches authorized a security clearance program with full procedural rights. Said Warren:

Thus, even in the absence of specific delegation, we have no difficulty in finding, as we do, that the Department of Defense has been authorized to fashion and apply an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination.

[The delegation] must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized...but also explicit action, especially in areas of doubtful constitutionality, requiring careful and purposeful consideration by those responsible for enacting and implementing our laws.⁹⁸

Frankfurter, Harlan, and Whittaker concurred with the judgment, but on narrower grounds: The government had failed to demonstrate that either the President or Congress had authorized the Department of Defense's use of secret evidence. The concurring opinion chided the majority for discussing the constitutional validity of the procedures, and did not recognize the new right to hold specific private employment.⁹⁹

⁹⁷ Greene, 502.

⁹⁸ Ibid., 507.

⁹⁹ Harlan, in a special concurrence, criticized Warren's opinion for its discussion of Constitutional issues—the very issues he disclaimed deciding. Citing Peters, Harlan warned that the Court should avoid discussing constitutional issues until either Congress or the Executive clearly authorized a security clearance program devoid of traditional procedural safeguards. Harlan also chided Clark for

Frankfurter, in a note to Warren, chastised him for emphasizing constitutional issues too heavily:

While you in terms state that you do not decide constitutional questions, the fact of the matter is that the opinion is, for me, too heavily charges atmospherically with such constitutional commitments.

I suspect that you feel so clearly about these constitutional questions that the opinion, even on statutory grounds, is inevitably infused too strongly with your feelings about the constitutional questions. I, on the other hand, have grave doubt, as you know, on some of the constitutional matters and I do not want to appear to show an inclination regarding them when at present I am not called upon to do so.¹⁰⁰

Warren, as he was by then apt to do, ignored Frankfurter's advice.

Clark's dissent attacked Warren's opinion on several fronts. Clark believed that Congress, through the National Security Act, had authorized the Department of Defense to use secret evidence. He also criticized the Court for elevating the protections granted in administrative proceedings—cross-examination and confrontation—with those required in criminal trials. More important, the Court's tone did not fool Clark:

Even if the Cabinet officers are given the specific direction, the opinion today, by dealing so copiously with the constitutional issues, puts a cloud over both the Employee Loyalty Program and the one here under attack. Neither requires that hearings afford confrontation or cross-examination. While the Court disclaims deciding the constitutional question, no one reading the opinion will doubt that the explicit language of its broad sweep speaks in prophecy. Let us hope that the winds may change. If they do not the present temporary debacle will turn into a rout of our internal security.¹⁰¹

Warren's Greene opinion rested on a narrow holding: Neither the President nor Congress had authorized the Department of Defense to interfere with Greene's right to

his bombastic language, saying that the Court's opinion did not guarantee Greene's access to classified material.

¹⁰⁰ Felix Frankfurter to Earl Warren, 6-17-59, Box 585, *Greene v. McElroy*, Earl Warren Papers.

¹⁰¹ Greene, 524.

employment opportunities without granting him the right to a fair hearing. The concurrence rested on a similar, yet distinct, ground: neither Congress nor the President had authorized the Department of Defense hearing panels to rely on secret evidence.

While the two opinions were similar in their narrow holding, they were miles apart in tone and their use of dicta. In many ways, the case was a repeat of Watkins: Warren engaged in bombastic rhetoric, discovered previously unknown constitutional rights, and, by his tone, made clear that he believed the use of secret evidence unconstitutional. Warren had no qualms about asserting the constitutional right to pursue a chosen profession; of equating the rights of a contract employee with a government employee; and implying, if not deciding, that the government must grant an employee all of the procedural protections of a criminal trial.

The New Warren Court

Did Congress's attacks on the Warren Court lead it to alter its Communist case opinions? The attacks certainly did not intimidate the civil libertarians in any way. Neither Warren, nor his civil libertarian brethren, changed their voting patterns or toned down their rhetoric in any Communist case during or after the Congressional attacks. If anything, the tone of the civil libertarians—for example, Brennan accusing New Hampshire of exposing subversives for the sake of exposure in Uphaus, Black conferring upon a HUAC witness a First Amendment absolute right to silence in Barenblatt—seemed even more strident than in previous terms. The civil libertarians exhibited the fortitude the founders had contemplated when they granted federal judges lifetime tenure.

The more perplexing question is whether the Congressional attacks led to the new, five-justice anti-civil libertarian coalition. The coalition first revealed itself in the

1957 Term's Lerner and Beilan cases. In the 1958 Term, the coalition—with Potter Stewart having replaced Burton—sustained the government in two of the Court's three major Communist cases. Elements of this realignment are easily explainable. Clark had long since abandoned the civil libertarians. Whittaker and Burton did not seem to have a firm philosophy in Communist cases, and thus did not actually abandon the civil libertarians. Stewart, of course, was new to the Court.

Harlan had generally either dismissed the government's arguments on non-constitutional grounds or supported the government in Communist cases. However, in 1956, he veered left, joining or concurring in Jencks, Watkins, Yates, and Sweezy. Barenblatt and Uphaus seemed to reverse or ignore those opinions. (Because Harlan had dissented in Slochower, he could not have reversed himself in Beilan and Lerner.) Perhaps the reason for this apparent reversal was Harlan's general willingness to follow Frankfurter's lead, and when Frankfurter abandoned Warren, Harlan joined him. Further, Harlan appeared worried that Congress would react negatively to the Court's left-leaning decisions.¹⁰²

What of Frankfurter's apparent reversal? Frankfurter had a mixed voting pattern in Communist cases during the Vinson Court. While he often joined Black and Douglas

¹⁰² For example, Harlan appeared worried about Congress's reaction to Frankfurter's proposed per curium opinion in Sacher v United States. (See Chapter Six, n. 53) and made the following suggestions:

1. May I submit three comments about your per curium in this case, stemming from what is going on in Congress: I suggest the desirability of expanding the opinion somewhat so that it will stand on its own bottom. This is not a good time to highlight Watkins, although it is a controlling authority.
2. I suggest that it would be better to state the "pertinency" issue not in terms of the scope of the committee's authorization, but whether in the context of what the witness could reasonably have understood as the pertinency of the question he was asked. Cf. Quinn v US. [Harlan's attempt to assuage Congress by emphasizing the witness's confusion, rather than HUAC's lack of authority.]
3. Should we not consider holding up announcement of the decision pending the present flurry in Congress?

John Marshall Harlan to Felix Frankfurter, April 23, 1958, Set 2, Reel 33, Felix Frankfurter Papers.

in seeking to block the government's anti-Communist programs, he also voted to sustain the government in Douds, Dennis, and Harisiades. Yet by 1955, Frankfurter almost always joined the civil libertarians—in result, if not opinion—in Communist cases. That changed with Beilan and Lerner. With those cases—in other words, when the legislative attacks intensified—Frankfurter began to sustain the government in Communist cases.

Did Frankfurter switch because he had grown disgusted with the approach of Warren and the civil libertarians? Or, did Frankfurter believe that he had to play the role of Justice Owen Roberts, who strategically relinquished his anti-New Deal positions after congressional opposition to the Court gained steam in 1937? Professor Lucas Powe subscribes to the latter interpretation:

The anti-Court bills caused Frankfurter to get religion again...Frankfurter interpreted the 85th Congress as having questioned whether an independent judiciary might be too high a price to pay when the cost was eradication of the loyalty-security program. Thus, one of the two would have to give way either voluntarily or involuntarily. Frankfurter was ready to save the Court; prudence dictated the Court yield in this area. His dalliance with the four liberals, as shown in Watkins, Sweezy, Yates, [and] Slochower...was over.¹⁰³

Walter Murphy, called the Frankfurter (and Harlan) switch in Communist cases a “tactical withdrawal, not a rout.” These two justices bent their Communist case decisions in order to appease Congress, but neither explicitly repudiated their previous Communist case decisions nor retreated in other controversial areas, such as civil rights. Moreover, even the tactical withdrawal was not absolute; the Court still voted against the government in certain loyalty-security cases, such as Greene v. McElroy. To Murphy, the Warren Court's actions followed an historical pattern: First, the Court issued a decision affecting an important area of public policy. Severe public criticism of the

¹⁰³ Powe, The Warren Court, 142

Court followed, and then threats of remedial legislation. Finally, the Court would withdraw from its controversial position.¹⁰⁴

A third explanation was that Frankfurter and Harlan did not retreat or change their votes; in fact, their post-Congressional attack decisions were perfectly consistent with their pre-attack decisions. For example, Frankfurter could argue that the facts of Beilan and Lerner differed from those of Slochower. Despite the pages and pages of extraneous discussion, Watkins rested on the very narrow question of pertinency; thus, Watkins did not support Barenblatt's arguments. Frankfurter could correctly assert that he never joined Warren's Watkins opinion.

Regardless of the reason, a new pro-government, anti-civil libertarian coalition had emerged in Communist cases. That coalition first appeared in Beilan and Lerner; proved its staying power in Uphaus and Barenblatt; and, in the 1959 and 1960 Terms, it was to carry the day against the civil libertarians in almost every Communist case.¹⁰⁵ Unfortunately, this new pro-government coalition failed to produce clear holdings in

¹⁰⁴ Murphy, Congress & the Court, 247.

¹⁰⁵ Other cases from the 1958 Term included Vitarelli v Seaton, 359 U.S. 535 (1959). The Department of Interior suspended Vitarelli in March 1954 because of his Communist associations. The Department informed Vitarelli in September 1954 that he was being terminated "in the interests of national security." Vitarelli filed suit in District Court in 1956. The Government sent him a new termination notice, retroactively dated Sept. 21, 1954, that omitted any reference to the reason for his discharge.

Harlan for a 5-4 Court, agreed that the Department could terminate an at-will employee for any reason. However, once the Department cited national security as the basis for the discharge, it had to follow its national security dismissal procedures, which included providing a hearing, and the second notice did not cure the invalid dismissal.

In In Re Sawyer, 360 U.S. 623 (1959), the Court revisited the issue of disbarment. Sawyer, the attorney for several Smith Act defendants, was alleged to have impugned the fairness and integrity of the trial judge. The Hawaiian Territorial Supreme Court ordered her disbarred. Brennan, for a 5-4 Court, reversed the Hawaiian Court, holding that the record did not support the charges and findings against Sawyer.

Communist cases, leaving everyone confused regarding where the Court stood in these cases.

CONCLUSION

The 1957 Term initially appeared to follow the pattern of the 1955 Term. The Court decided against the government on narrow statutory grounds, and avoided lengthy discussion of constitutional issues. While the Court did discover a new right in Kent, it used statutory interpretation to decide the term's first four cases. Further, the Court did not employ the inflammatory rhetoric it had used in Watkins and Sweezy.

The Court issued three significant Communist cases on the last day of the term. The first, Speiser, nullified California's property tax law that discriminated between subversive and non-subversive veterans. More important, in Beilan and Lerner, the Court sustained a state's ability to dismiss alleged subversive employees who invoked the Fifth Amendment. These cases not only appeared to reverse Slochower; they represented the government's first victory in a major Communist case since the 1953 Term.

Throughout the spring and summer of 1958—prior to the beginning of the 1958 Court Term—Congress sought to curb the power of the Court. Other institutions, such as the Conference of Chief Justices and various American Bar Association Committees, joined the attack. These efforts did not succeed, but certainly represented a significant threat to the Court.

Perhaps because of the anti-Court hostility, the Court—or at least Frankfurter and Harlan—veered right in the 1958 Term. The Court seemed to repudiate Sweezy with Uphaus and seemed to repudiate Watkins with Barenblatt. In Greene, however, the coalition suffered a setback when new Justice Potter Stewart joined the civil libertarians

in an opinion that discussed the very constitutional issues the Court denied deciding.

Greene would serve as a reminder over the next few sessions that the civil libertarians needed only one vote to have the majority.

CHAPTER SEVEN: 1959-60 TERMS

The Court continued its rightward drift in Communist cases throughout the 1959 and 1960 Terms. The anti-civil libertarian coalition of Clark, Harlan, Frankfurter, Stewart, and Whittaker sustained the government, in substantial part, in every major Communist case the Court heard in those two terms.

The Court's pro-government position was not attributable to outside pressures. Before the 1958 Term, the Court had to contend with a strong legislative assault on its powers, as well as attacks by various committees of the American Bar Association and the Conference of Chief Justices. Those threats subsided considerably, although not entirely, by the 1959 and 1960 Terms. The anti-Court faction was now a clear minority in Congress, and some of the ABA's sections applauded the Warren Court for its work in Communist cases. Further, during the 1960 election, neither Nixon nor Kennedy made an issue of the Court's Communist case decisions. The John Birch Society and ardent segregationists were now the Court's most vociferous critics.

The Court had generally avoided disposing of Communist cases on constitutional grounds during the early years of the Warren Court. That began to change during 1957 and 1958 Terms, when the Court decided five of its ten major Communist cases on constitutional grounds. In disposing of these cases on constitutional grounds, however, the Court seemed to ignore its holdings—or at least its dicta—in Slochower and Watkins. Rather than reverse these cases, the Court let them stand, leaving the government and alleged subversives to guess as to their value as precedent.

As the Court began deciding more cases on their constitutional merits, it also began deciding more cases in favor of the government. By the end of the 1957 Term, the

Court pulled back from its civil libertarian position and began siding with the government. With the exception of Greene, this pattern continued during the 1958 Term. The Court accelerated that trend during the 1959 and 1960 Terms, deciding almost all major Communist cases on constitutional grounds and in favor of the government. Some of the Court's cases—notably McPhaul, Braden, and Wilkinson—provided very clear rules regarding HUAC's powers. Unfortunately, in most of 1959-60's Communist cases, the Court failed to provide anything approaching a coherent legal rationale. Most of the Court's other Communist case opinions contradicted established precedent, avoided important constitutional issues, and interpreted statutes in ways that ignored Congressional intent.

1959 CASES¹

In 1959's Nelson v. Los Angeles, the Court sustained the discharge of an at-will employee who invoked the Fifth Amendment in response to HUAC's inquiries. In sustaining the discharge, the Court continued to distinguish Slochower, thereby confusing

¹ The Court reviewed the Fifth Amendment's applicability to deportation cases in Kimm v Rosenberg, 363 U.S. 405 (1959). Kimm, a Korean alien, was ordered deported because his student visa had expired. When asked by an INS hearing officer whether he was a Communist, Kimm cited the Fifth Amendment's self-incrimination clause and refused to answer. The Court upheld the deportation by a 5-4 vote. The SACA required the deportation of aliens who joined, or were affiliated with, the Communist Party. The SACA's regulations placed the burden of proof on the alien. If Kimm wanted administrative grace, said the Court, he had to divulge his Communist affiliations.

The Court revisited the deportation issue in Niukkanen v McAlexander, 362 U.S. 390 (1960). The INS ordered Niukkanen, who had joined the Communist Party after entering the United States, deported pursuant to SACA § 22. The Court posed the critical question of the case: Must Niukkanen be deported pursuant to Galvan, or was he saved from deportation under Rowoldt? The trial judge concluded that Niukkanen perjured himself by denying Communist Party membership and ordered Niukkanen deported, and a 5-4 Court agreed.

Flemming v Nestor, 363 U.S. 603 (1960) concerned a subversive resident alien deported pursuant to the Immigration and Nationality Act of 1952. Was he entitled to collect social security benefits? A 5-4 Court held that because social security was not an accrued property right, depriving a deportee of benefits did not violate the Due Process Clause.

state government as to when they could discharge employees who refused to cooperate with red-hunting committees.

NELSON v. COUNTY OF LOS ANGELES²

HUAC subpoenaed two Los Angeles County employees—Nelson, a civil servant, and Globe, a temporary employee—in April 1956. The Los Angeles Board of County Supervisors had issued an order requiring all employees to answer questions from legislative committees regarding subversive activities. The order (later codified as California Government Code § 1028.1) stated that failure to cooperate with a legislative committee constituted insubordination and grounds for discharge. Both Globe and Nelson ignored §1028.1's dictates, refused to testify before HUAC, and were discharged for insubordination.

The U.S. Court of Appeals sustained Nelson's discharge. The Supreme Court split 4-4, did not issue an opinion, and left the appellate court's decision intact.³

The Court had a much more difficult time addressing Globe's situation. Globe, the at-will employee, alleged that California discharged him, in violation of the Fourteenth Amendment's Due Process Clause, because he invoked his First and Fifth Amendment rights. Clark, for the Court, disagreed. In his initial draft, he distinguished Globe's situation from Slochower's; Globe was an at-will (non-tenured) employee, while Slochower was a tenured professor. Globe, as a non-tenured employee, was not entitled to any procedural protections. Harlan refused to join Clark's draft opinion, claiming:

If I thought that Slochower (which now binds me, though I was originally in dissent) applied, I should have to vote to reverse this case. The essence of Slochower, as I understand it, was (1) the drawing of a conclusive presumption of

² Nelson v. County of Los Angeles, 362 U.S. 1 (1960).

³ Warren, as the former Governor of California, did not vote.

guilt from a Fifth Amendment claim; without (2) any opportunity to explain the claim; and (3) the fact that the federal investigation in which the claim was made had nothing to do with the qualifications of state teachers.

Yet, as he had in Lerner and Beilan, Harlan could distinguish away Slochower:

However, I do not believe that Slochower applies since, as you point out in your opinion, Globe was fired for insubordination, and not because of any inference drawn from his Fifth Amendment claims. That is what the state court held, and that is the way in which we should view the case. Moreover, this vital factor is buttressed by the fact that the California statute, unlike N.Y. § 903, does not have what might be considered as a sort of “built in” inference of guilt derived from a Fifth Amendment claim. The California statute covers refusal to answer “on any ground whatsoever,” defines such conduct as “insubordination,” and makes that the basis of discharge; whereas § 903 bases discharge solely on claims of privilege and refusals to waive immunity, without more.

In short, I think this case is controlled by Beilan and Lerner, and not Slochower. The fact that a federal investigation was involved here, but not there, does not seem to me to be constitutionally significant, especially in light of the fact that both the Board’s order and the state statute expressly required Globe to answer questions before this federal committee.⁴

Clark, to secure Harlan’s vote, made the suggested changes the basis of his opinion. In fact, Clark's opinion was nothing more than a rehash of Harlan's suggested changes. Clark distinguished Globe’s situation from Slochower’s: New York, in Slochower, treated the invocation of the Fifth Amendment as a confession of guilt, leading to an automatic discharge. Los Angeles, in contrast, discharged Globe because he failed to answer HUAC’s questions, not because he invoked the Fifth Amendment. California did not infer guilt from Globe’s refusal to answer, but discharged him for insubordination, in accordance with Garner and Adler. Finally, the Los Angeles County Board of Supervisors, unlike the Regents in Slochower, specifically ordered Globe to answer HUAC’s questions. Thus, Beilan and Lerner, not Slochower, controlled the case.

⁴ John Marshall Harlan to Tom Clark, February 6, 1960, Box A-98, Folder 3, Tom Clark Papers.

Black, joined in dissent by Douglas, argued that Globe lost his job because he invoked the Fifth Amendment. He conceded that California may have had a valid reason for discharging Globe under its state law, but under the Constitution's Supremacy Clause, the Fifth Amendment trumped state law and rendered the discharge illegal.

Brennan, in dissent, thought the case on all fours with Slochower. For Globe and other temporary employees, §1028.1 acted as a *de facto* automatic discharge. The City had not granted Globe, unlike the civil servant Nelson, an administrative hearing to explain his actions. Thus, Globe's Fifth Amendment invocation served to discharge him automatically from his employment, contrary to Slochower. Said Brennan:

[T]here is presented here the very same arbitrary action—the drawing of an inference of unfitness for employment from exercise of the privilege before another body, without opportunity to explain on the part of the employee, or duty on the part of the employing body to attempt to relate the employee's conduct specifically to his fitness for employment—as was involved in Slochower.⁵

Clark's opinion, and the negotiations that led to it, illustrated two important dynamics. The first is the ease with which the Justices could discard a previous opinion merely by distinguishing it. Clark wrote Slochower, and could not bring himself to denounce his opinion. Harlan was correct; nothing in Slochower turned on whether the witness had tenure, and to justify Globe's termination on those grounds would have been disingenuous. Unfortunately, Harlan then invoked another, and even more specious, basis for distinguishing Slochower.

However, Harlan's proposed solution, which formed the basis of Clark's opinion, was hardly better. Both Slochower and Globe had invoked the Fifth Amendment before a federal committee and terminated immediately thereafter. But, according to the Court, New York terminated Slochower because it improperly inferred guilt from his Fifth

⁵ Nelson, 14.

Amendment invocation; Los Angeles terminated Globe it determined he was insubordinate. The Court should have either reversed Slochower or held Los Angeles's termination of Globe unconstitutional.

The opinion's second noteworthy feature was that any one member of the five-justice coalition had effective veto power over the other members. If Clark ignored Harlan, then the Court could not have produced a Nelson opinion. If he ignored Whittaker or Stewart, he might send them into the hands of the civil libertarians on either a temporary or a permanent basis. Frankfurter, while alienated from the civil libertarians, might join them in a concurring opinion. These different personalities and divergent interests made the ant-civil libertarian coalition very unstable, and assured that each member's concerns received serious consideration.

1960 CASES⁶

⁶ The civil libertarians secured one of their few victories of the term in Chaunt v. United States, 364 U.S. 350 (1960). The United States sought to denaturalize Chaunt pursuant to § 340 (a) of the Immigration & Nationality Act of 1952, alleging that he had willfully misrepresented or concealed a material fact to procure his citizenship. Chaunt, a Communist of Hungarian origin, denied that he had ever been "arrested or charged with violation of any law of the United States of State or any city ordinance or traffic regulation." In fact, he had been arrested three times for disturbing the peace at political demonstrations.

Douglas, for a 6-3 Court, reiterated Schneiderman's evidentiary standard in denaturalization cases: the evidence must be clear, unequivocal, and convincing. The lower court had found the evidence against Chaunt to meet the Schneiderman standard. Douglas, breaking with Court practice in denaturalization cases, rejected the lower court's findings because the underlying issues were "so important to the liberty of the citizen."

Douglas dismissed Chaunt's arrests as minor and not reflective of his character. Chaunt was arrested several years prior to his application for citizenship and the arrests involved neither moral turpitude nor fraudulent conduct. The arrests did not constitute the "clear, unequivocal, and convincing" evidence required in denaturalization proceedings.

Polites v. United States, 364 U.S. 426 (1960), in contrast, was decided in favor of the government. The government ordered the Greek immigrant Polites denaturalized pursuant to the Nationality Act of 1940 after it discovered that he had been a Communist Party officer within ten years of his naturalization. Polites sued, but eventually stipulated to the dismissal of his appeal, with prejudice. He sought to reopen his case after the Court's Nowak and Maisenberg decisions. Stewart, for a 5-4 Court, denied his request. The government's proceedings against Nowak and Maisenberg were conducted pursuant to the Immigration Act of 1906, which required a showing of lack of attachment to the U.S. Constitution. Polites

The Court's 1960 cases can be broken down in two categories. The first category is comprised of three HUAC cases. In these 5-4 decisions, the Court provided very clear guidance in delineating the power of Congressional committees. In McPhaul v. United States, the Court sustained the conviction of a witness who refused to provide evidence to HUAC. In sustaining the conviction, the Court promulgated a *prima facie* rule for a witness's obligations in responding to Congressional record requests. Wilkinson v. United States and Braden v. United States concerned HUAC's efforts to interrogate members of the Emergency Civil Liberties Committee, an organization that sought to abolish HUAC. The Court, citing Barenblatt, not only sustained the witness's contempt convictions, but also declined to review HUAC's motives for interrogating witnesses.

The Court was far less clear in its other 1960 Term Communist cases. While each case resulted in at least a tactical victory for the government, these victories often came at the expense of clarity. In Communist Party v. Subversive Activities Control Board, the Court finally reheard the challenge to the Subversive Activities Control Act's registration requirements. The Court produced a narrow holding sustaining the Act's registration requirements under the First Amendment, but failed to decide whether the Fifth Amendment might protect an organization's officers from having to register under the Act. Konigsberg v. California Bar Association saw the Court revisit the case it had remanded in the 1956 Term. The Court sustained California, but only by making questionable assumptions and ignoring the 1957 Term's Speiser decision. In In re Anastaplo, the exception in this latter category of cases, the Court enunciated a clear standard for states to use in bar licensing cases. Finally, in Scales v. United States,

was denaturalized pursuant to the Nationality Act of 1940, which required a showing that an applicant belonged to an organization that advocated the violent overthrow of the government, such as the Communist Party.

Harlan, employing his Yates strategy, saved portions of the Smith Act from constitutional attack by ignoring the clear language of the statute.

MCPHAUL v. UNITED STATES⁷

HUAC subpoenaed Arthur McPhaul, the alleged Executive Secretary of the Civil Rights Congress (CRC), and ordered him to testify and produce the CRC's records. McPhaul, invoking the Fifth Amendment's Self-Incrimination Clause, refused to produce, or admit whether he possessed, the CRC's records, and was convicted of contempt of Congress.

McPhaul argued that because HUAC could prove neither that he possessed the CRC's records nor that the records even existed, Congress could not hold him in contempt for failing to produce them. Whittaker, for a 5-4 Court, rejected McPhaul's argument. McPhaul should have informed HUAC during the hearings that he did not have the records, but instead chose to invoke the Fifth Amendment. Further, because McPhaul held the records in a representative, rather than personal, capacity he could not rely on the Fifth Amendment's privilege against self-incrimination to avoid releasing them.

McPhaul's importance lay in its *prima facie* rule for congressional record requests. The government proved a *prima facie* case that a witness possessed records if the Congressional committee had a reasonable belief that a witness possessed the requested records, it subpoenaed the witness to produce the records, and the witness

⁷ McPhaul v. United States, 364 U.S. 372 (1960).

failed to deny that he possessed the records. The burden shifted to the witness once the government proved these three elements.⁸

WILKINSON v. UNITED STATES

BRADEN v. UNITED STATES⁹

In 1958, HUAC traveled the American South, ostensibly to investigate Communist propaganda techniques and infiltration of Southern industries. While in Atlanta, HUAC called Frank Wilkinson, an Emergency Civil Liberties Committee (ECLU) official. The ECLU was then conducting “Operation Abolition,” its campaign to eliminate HUAC. Wilkinson refused to cooperate with HUAC. When HUAC asked Wilkinson if he belonged to the Communist Party, he replied:

[T]he United States Supreme Court has held that...the Congress cannot investigate into an area where it cannot legislate, and this committee tends, by its mandate and by its practices, to investigate precisely the areas of free speech, religion, peaceful association and assembly, and the press, wherein it cannot legislate and therefore it cannot investigate.¹⁰

Wilkinson was convicted of contempt of Congress and sentenced to twelve months in prison.

Stewart, for a 5-4 Court, sustained Wilkinson’s conviction, noting that Barenblatt had answered all of Wilkinson’s challenges. HUAC, following the Court-provided roadmap of Barenblatt had made the subject matter under inquiry—Communist propaganda and infiltration of Southern industries—very clear. Barenblatt had

⁸ Douglas’s dissent, joined by the other three civil libertarians, deemed the Court’s *prima facie* test to destroy the presumption of innocence. The government had proved neither that McPhaul possessed the records nor that he was a CRC officer. Instead, the Court treated his silence as a confession of guilt.

⁹Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). For a discussion of both Wilkinson and Braden, see Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities, pp. 441-45.

¹⁰ Wilkinson, 406.

established that HUAC had a valid legislative purpose in conducting these hearings; Communism posed a serious threat to the national security, and Congress had a right to national self-preservation.

Wilkinson contended that HUAC was not interested in national security, but sought only to punish him for criticizing the committee. Stewart refused to question HUAC's motives:

[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As we said in Watkins 'A solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legal purpose is being served.'¹¹

Finally, Wilkinson sought to distinguish his case from Barenblatt, noting that the activities prompting HUAC to summon him—his efforts to abolish HUAC—were entirely lawful. Stewart rejected the argument:

As the Barenblatt opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the government's overbalancing interest. To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that party were just an ordinary political party from the standpoint of national security is to ask this Court to blind itself to would affairs which have determined the whole course of our national policy since the close of WWII.¹²

Black, in dissent, agreed that Barenblatt probably was controlling; he would simply overrule that case.¹³ The Court, by declining to review HUAC's motives—"a

¹¹ *Ibid.*, 412.

¹² *Ibid.*, 414.

¹³ Douglas, in a separate dissent joined by Warren and Black, held that HUAC's Rule XI did not permit it to investigate those who criticized HUAC. Rule XI allowed HUAC to investigate Un-American activities, and "If it is 'un-American' to criticize, impeach, and berate the committee and to seek to have it abolished, then the committee acted within the scope of its authority." *Ibid.*, 425.

sweeping abdication of judicial power"—had given HUAC subcommittees the ability "to harass its opponents with absolute impunity so long as the 'protections' of Barenblatt are observed."¹⁴

Black equated Wilkinson's appearance before HUAC with a criminal trial. For example, "So far as appears in the record," when HUAC subpoenaed Wilkinson, its only evidence of his Communist Party activity was an informant's testimony. However, Wilkinson did not have an opportunity to cross-examine the informant. Said Black, "[I]t seems obvious to me that such testimony is almost totally worthless for establishing probable cause. For all we know, the informant may have had no basis at all for her conclusion and, indeed, the possibility of perjury cannot.... be entirely discounted."¹⁵

Black concluded with his usual bleak assessment of the state of political freedom:

If the present trend continues, this already small number [of HUAC's critics] will necessarily dwindle as their ranks are thinned by the jails. Government by consent will disappear to be replaced by government by intimidation ...because some people are afraid that this country cannot survive unless Congress has the power to set aside the freedom of the First Amendment at will.¹⁶

Braden v United States

Braden, the companion case to Wilkinson, arose from the same 1958 HUAC hearing and concerned substantially similar legal issues. Carl Braden, an ECLU member and the Southern Conference Educational Fund's (SCEF's) Field Secretary, refused to answer HUAC's questions regarding his Communist affiliations. He declared to HUAC,

Brennan, joined by Douglas, dissented on a curious ground. Wilkinson refused to answer HUAC's questions when it summoned him in 1956. Thus HUAC, knowing that Wilkinson would not cooperate, could not claim to be informing itself in 1958. Instead, it was simply engaging in harassment.

¹⁴ Ibid., 417.

¹⁵ Ibid., 419.

¹⁶ Ibid., 421.

“I am standing on the Watkins, Sweezy, Konigsberg, and other decisions of the United States Supreme Court which protect my right, and the Constitution as they interpret the Constitution of the United States, protecting my right to private belief and association.”¹⁷

Because he believed that the aforementioned cases shielded him from having to answer HUAC’s questions, Braden argued, he was not subject to contempt. Stewart, for a 5-4 Court, disagreed. Sinclair v. United States—a case arising from the Teapot Dome scandals—had considered, and rejected, the “good faith belief” argument.¹⁸ Congress, through the Walsh Committee, had investigated the circumstances surrounding the lease of government land to oil mogul Harry F. Sinclair. Sinclair's attorney advised him that he did not have to answer the Walsh Committee's questions. That advice did not help Sinclair, who was subsequently convicted of contempt of Congress. The Court sustained the conviction, opining that a witness's good-faith belief regarding his obligations to answer a committee's questions were irrelevant. The contempt of Congress statute merely required that the witness refuse to answer a question that was pertinent to the subject matter under inquiry. Stewart, using the Sinclair standard, had little trouble sustaining Braden’s contempt conviction.

Douglas, in dissent, argued that the Court should permit Braden to rely on Watkins and Sweezy.¹⁹ The Court had not decided Barenblatt when HUAC questioned Braden in 1958. While Sinclair held that mistaken interpretations of the law were not a defense to a contempt charge, that case did not concern the First Amendment. Douglas

¹⁷ Braden, 437.

¹⁸ Sinclair v. United States, 279 U.S. 263 (1929).

¹⁹ Black, Warren, and Brennan joined the dissent. Black, joined by Warren and Douglas, also filed a separate dissent.

believed that when the First Amendment was involved, “the propriety of the question in terms of pertinency should be narrowly resolved.”²⁰ In Watkins,

[W]e emphasized the need, when First Amendment rights were implicated, to lay a foundation before probing that area. The authority of the Committee must then 'be clearly revealed in its charter.' The 'specific legislative need' must be disclosed. The pertinency of the questions and the subject matter under inquiry must be made known 'with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense.'²¹

Douglas argued that Braden was entitled to rely on Watkins' propositions for protection of his First Amendment rights, and in this case, HUAC's questions did not meet the Watkins requirements. Further, HUAC had alleged, but not proved, that the ECLU was connected to the Communist Party. Said Douglas:

One would be wholly warranted in saying, I think, in light of the Watkins and Sweezy decisions that a Committee's undisclosed information or unsupported surmise would not justify an investigation into matters that on their face seemed well within the First Amendment. If [the cases] decided anything, they decided that before inroads in the First Amendment domain may be made, some demonstrable connection with Communism must first be established and the matter plainly shown to be within the scope of the Committee's authority. Otherwise the Committee may roam at will, requiring any individual to disclose his association with any group or with any publication which is unpopular with the Committee and which it can discredit by calling it communistic.²²

Both Braden and Wilkinson could thank those justices—including Harlan—who joined Watkins for their predicament. Both witnesses could plausibly argue that they had followed both the spirit and the dicta of that case in refusing to answer HUAC's questions. Even if Watkins' holding did not technically support their legal position, most observers would assume that the same justices that earlier assailed HUAC's practices in

²⁰ Braden, 449.

²¹ Ibid., 450.

²² Ibid., 457.

Watkins would not sustain their contempt convictions. Such are the dangers created by justices who bury bones for future litigants entreated to rely on them.

The Court in Barenblatt had recognized the government's overriding interest in self-preservation. Rightly or wrongly, all future HUAC witnesses would have their First Amendment interests balanced against this overriding interest. The practical effect of the Court ascribing such great weight to the government's interest was that a witness's First Amendment interest could never outweigh the government's interest. Further, that case rejected any notion that the Court would review Congress's motives in calling and questioning witnesses.²³ Wilkinson and Braden indicated that Barenblatt was not an aberration; the Court—or at least the anti-civil libertarian coalition—was not going to repeat the mistakes of Watkins by impugning Congress's motives, or questioning Congress's interest, in investigating subversive activities. These cases, even if harsh, provided the clarity that the Warren Court had generally avoided in its Communist case opinions.

KONIGSBERG v. STATE BAR OF CALIFORNIA²⁴

Konigsberg prohibited California from treating a bar applicant's refusal to discuss his alleged Communist Party affiliations as evidence of either lack of good moral character or belief in the violent overthrow of the government. The Court remanded the case back to California for proceedings "not inconsistent" with that opinion. After remand, Konigsberg again requested admission to the California Bar. He introduced

²³ While the Court affirmed HUAC's power to question alleged subversives, it still insisted that HUAC's questions be pertinent to the subject under inquiry. In Deutsch v. United States, 367 U.S. 456 (1961), a 7-2 Court reversed the contempt conviction of a witness who had not been properly instructed regarding the matter under inquiry.

²⁴ Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

evidence of his good moral character and denied believing in the violent overthrow of the government, but still refused to answer questions regarding his possible Communist Party affiliations. The California State Board of Bar Examiners (Board) again refused to certify him, this time asserting that Konigsberg's refusal to discuss his possible Communist Party affiliations obstructed its investigation of his qualifications.

Harlan, for a 5-4 Court, sustained California's rejection of Konigsberg's bar application from Fourteenth Amendment attack.²⁵ The first Konigsberg (hereafter Konigsberg I) holding was limited to whether the record contained sufficient evidence to allow the Board to conclude that Konigsberg either lacked good moral character or advocated the violent overthrow of the government; the Court did not decide whether the Board could exclude Konigsberg from the Bar for his refusal to answer the Board's questions.

Harlan, in the second Konigsberg (hereafter Konigsberg II), answered that question in the positive. The Board's questions related to Konigsberg's fitness to practice law, and it had warned him of the consequences for failing to answer its questions. The Board's inquiry did not necessarily end once Konigsberg had made a *prima facie* case that he was qualified to practice law. If the Board possessed information indicating that Konigsberg had belonged to or was affiliated with the Communist Party, it could cross-

²⁵Black and Brennan filed dissents, joined by the other justices. Black, the author of Konigsberg I, insisted that California rejected Konigsberg's bar application because it suspected he was a Communist; this was unconstitutional, "unless one subscribes to the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of the court thinks that the state has sufficient interest." *Ibid.*, 61. Moreover, he believed the Court had ignored Konigsberg I. "Our former decision, which I still regard as resting on what is basically just good common sense, was that a man does not have to tell all about his previous beliefs and associations on order to establish his good character and loyalty." *Ibid.*, 72. Brennan believed that Speiser controlled the case. Speiser held that "When the conditional right to speak is sought to be deterred by a state's general taxing program, due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibitions." *Ibid.*, 75. In this case, California had not justified its encumbrance of Konigsberg's free speech.

examine him and rebut his claim that he did not advocate the violent overthrow of the government. Konigsberg's refusal to answer questions regarding his Communist Party affiliations denied the Board of that opportunity, and justified its decision to disqualify him from the Bar.

Harlan also rejected Konigsberg's contention that the Board's inquiries impinged on his freedoms of speech and association. Those rights were not absolute; general regulatory statutes aimed at conduct but touching the content of speech, were sustainable under the First and Fourteenth Amendments when the government had a sufficiently compelling interest in enacting the statute. Harlan turned to the familiar balancing test. California had a compelling interest in knowing whether its attorneys advocated the violent overthrow of government or belonged to the Communist Party, and those interests outweighed any incidental burdens on speech. In Beilan and Garner, the Court permitted state and local governments to question employees about their Communist Party membership. The Court determined that the state's interest in determining the employee's fitness for a job outweighed the deterrent effects on speech and association. Said Harlan,

With respect to these same question of Communist Party membership, we regard the state's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.²⁶

What of Konigsberg's associational rights? Harlan's 1958 opinion NAACP v. Alabama prohibited Alabama from requiring that the NAACP surrender its membership list, finding the state's interest insufficient to justify the potential harm private parties

²⁶ Ibid., 52.

would impose upon NAACP members.²⁷ Harlan dismissed the relevance of that case; any infringement upon Konigsberg's associational rights was likely to be minimal, "for bar committee interrogations such as this are conducted in private." Nor could California impose "undetectable arbitrary consequences" upon those rights, for the Board's decision to exclude an applicant from the Bar because of his Communist Party membership was subject to judicial review.²⁸

Harlan still had to distinguish another important precedent. Speiser concerned California's requirement that veterans, to qualify for a tax exemption, submit an affidavit denying their belief in the violent overthrow of the government. The Court reasoned that veterans, fearing the loss of a tax exemption, would refrain from legitimate political discussion and activities. The Court declared the affidavit requirement unconstitutional because it had a chilling effect on legitimate political activity and speech. California's bar application procedures appeared to pose a similar situation. Aspiring attorneys, aware that the Board may inquire regarding (and possibly exclude them due to) their political affiliations, would also avoid legitimate political activities and speech. Harlan resolved this dilemma by interpreting Speiser to reached cases where the government intended to penalize political beliefs. In Speiser, Brennan had said:

In [Garner, Gerende, Douds]...there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern...The principle aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.²⁹

²⁷ NAACP v. Alabama, 357 U.S. 499 (1958).

²⁸ *Ibid.*, 53.

²⁹ *Ibid.*, 54, quoting Speiser, 527.

Harlan noted that in this case, unlike Speiser, California merely sought to protect the integrity of the legal profession, not penalize an applicant for his political beliefs. Further, California's bar admission standards did not have a chilling effect on the speech of bar applicants. These applicants, unlike the veterans in Speiser, did not bear the burden of proving their non-belief in, or non-advocacy of, the violent overthrow of the government; that burden rested with the Board.³⁰ Konigsberg's refusal to answer questions regarding his beliefs and associations, however, prevented the Bar from ever meeting that burden of proof.

Two major problems are immediately apparent in Harlan's opinion. First, the Court faced a dilemma. It had protected civil rights organizations from state-mandated exposure in NAACP v. Alabama; how, then, could it permit the exposure of Communists? Harlan could have expressly stated that the Communist Party, unlike the NAACP, posed a significant danger to the integrity of the California State Bar. Rather than discussing its reasoning for treating the two organizations differently, the Court engaged in a canard. Harlan opined that the alleged subversive bar applicant need not fear exposure, because the Board hearings were conducted in private. Could Harlan have been serious? Would the findings of an administrative board, convened to determine a person's subversive associations and beliefs, actually remain confidential? The mere idea seems preposterous.

Harlan also promised judicial review to any person suffering arbitrary state action because of his Communist Party associations. That promise begs the question: How

³⁰ More specifically, Harlan stated, "there is no unequivocal indication" that the bar applicant bore the burden of proof regarding his beliefs in the violent overthrow of the government on the bar applicant.

could an applicant simultaneously remain anonymous and seek judicial vindication of his rights?

Second, Harlan denied that California penalized Konigsberg for his political beliefs, but merely denied his bar admission because he failed to cooperate with the Board's statutorily-required inquiry into his moral character and beliefs regarding the violent overthrow of government. Yet that reasoning assumes the constitutionality of California's bar admission statute. If California's statute requiring the Board to certify only those applicants with "acceptable" political beliefs was unconstitutional, then logically, the witness could obstruct an inquiry into such beliefs.

Speiser seemed to control this question. The Speiser statute prevented veterans who believed in or advocated the violent overthrow of the government from receiving tax relief. The Konigsberg statute prohibited the Board from admitting to the California Bar any person who believed in, or advocated, the violent overthrow of the government. The Court deemed the Speiser statute to have a chilling effect on speech, but not the Konigsberg statute. Why? If anything, the latter statute would deter law students from speaking out in class or joining a controversial organization. Sadly, Harlan did not address the deterrent effects on speech caused by the California Bar admission procedures. Instead, he cited the apparent differences in the allocation of the burden of proof between the Speiser and Konigsberg statutes, and that the latter statute, unlike the former, did not seek to penalize beliefs. Neither argument was plausible.

If the Court would not, or could not, distinguish Speiser from Konigsberg, it should have either overturned Speiser—a case which Frankfurter, Harlan, and Whittaker had joined—or struck down California's Bar admission law. Instead, the Court attempted

to save both statutes, leaving the state of the law in this area a subject of great confusion. In terms of legal consistency, the Court failed miserably. The new anti-civil libertarian coalition began to look as unprincipled, if not more so, as did the Warren Court from the 1955-1957 Terms. This is not surprising, for Frankfurter and Harlan were the two main enablers in both coalitions.

IN RE ANASTAPLO³¹

The justices split 5-4 in another bar case, In Re Anastaplo. George Anastaplo, a University of Chicago Law School graduate, passed the Illinois Bar Examination in 1954. The Illinois Supreme Court rejected his bar admission, citing Anastaplo's refusal to answer questions regarding possible Communist Party membership.

The Illinois Bar application asked applicants to state the principles underlying the United States Constitution. Anastaplo, borrowing heavily from the Declaration of Independence, replied: "[W]henever the particular government in power becomes destructive of [the ends of liberty], it is the right of the people to alter or to abolish it thereupon to establish a new government."³² Anastaplo also defended the right of revolution and refused to answer any of the Illinois Bar Association's questions regarding his possible Communist Party membership.

The Bar Association denied Anastaplo's admission, claiming that his refusal to admit or deny Communist Party membership obstructed its inquiry. The committee also issued the following statement:

We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive

³¹ In Re Anastaplo, 366 U.S. 82 (1961).

³² *Ibid.*, 86.

affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government...³³

Harlan, for a 5-4 Court, believed that Konigsberg II had answered all relevant legal questions except one: Could the state inquire into an applicant's Communist Party membership without evidence that the applicant belonged to the Party? Harlan answered in the affirmative. A state bar committee did not possess independent investigatory authority, and may need to ask an applicant about subversive associations before it certified him. The committee did not need a reason to make the inquiry; it could have independent information regarding an applicant's affiliations, or could simply have a "good faith belief" that it needed to ask the questions.

Harlan concluded with a statement indicating his distaste for the whole matter:

We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the state's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its bar offends the Federal Constitution.³⁴

Black's dissent, joined by the other three civil libertarians, focused on Anastaplo's moral obligation to remain silent. Anastaplo believed that:

he had a duty, both to society and to the legal profession, not to submit to the demands of the Committee because he believed that the questions had been asked solely for the purpose of harassing him because he had expressed agreement with the assertion of the right of revolution against an evil government set out in the Declaration of Independence.³⁵

³³ Ibid.

³⁴ Ibid., 97.

³⁵ Ibid., 104. Black initially did not plan to write a dissent, saying that Anastaplo "was too stubborn for his own good. The whole thing is a little silly on his part." That changed, and Black became so emotionally involved with the case that tears flowed down his cheek when he read Anastaplo's reply to the Illinois Bar Committee. Black continued to correspond with Anastaplo throughout the 1960's, praising him for his courageous stand. Newman, Hugo Black, 504-506.

Anastaplo was not a Communist, but a true maverick unwilling to make even minor compromises that offended his sense of justice. After the Court announced its decision, he wrote the individual justices and thanked them for the attention they devoted to his case.³⁶

COMMUNIST PARTY v. SUBVERSIVE ACTIVITIES CONTROL BOARD³⁷

The Court first heard the Communist Party's challenge to the Subversive Activities Control Act of 1950 (SACA) in the 1955 Term. The Court, concluding that the Subversive Activities Control Board (SACB) may have relied on the testimony of three potentially tainted witnesses in its determination that the Communist Party was a Communist action organization, declined to opine on the SACA's constitutionality and instead remanded the case back to the SACB. Finally, in the 1960 Term—nearly ten years after Congress passed the SACA—the Court heard the case again.

This time, Frankfurter, writing for a 5-4 Court, sustained the SACA's registration requirements from First Amendment challenge. This was a Pyrrhic victory for the government. The Court refused to decide whether the SACA's registration requirements violated the Fifth Amendment's Self-Incrimination Clause, leaving both the government and the Communist Party's leadership to wonder whether the SACA's registration requirements were enforceable.

Frankfurter, in a 115-page opinion, first affirmed the Court of Appeals' finding that the Communist Party was directed, dominated, or controlled by the Soviet Union, thereby bringing it within SACA § 3(3)'s definition of a "Communist action

³⁶ George Anastaplo to Justices, Oct. 30, 1961, Box A-109, Folder 58, Tom Clark Papers.

³⁷ Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961)

organization.”³⁸ Frankfurter rejected the Communist Party’s argument that the First Amendment required the government to prove that the Party sought the violent overthrow of the government; the establishment of a Communist dictatorship; and subservience to the Soviet Union. Instead, he adopted the Court of Appeals’ standard of proof: that the evidence “demonstrate the Communist Party’s objective to overthrow the government of the United States by force and violence if necessary.” Because the SACA was a regulatory, not a prohibitory statute—it did not outlaw membership in, or pursuit of the objectives of, the Communist Party—the First Amendment did not require a more strict interpretation of §3(3).³⁹

SACA § 7 required Communist action organizations to register with the SACB. The Communist Party contended that this registration requirement constituted a Bill of Attainder. Frankfurter disagreed; Congress did not aim the SACA at the Communist Party, but rather at particular conduct. A statute did not constitute a Bill of Attainder if an organization, by altering its conduct, could escape consequences. The Communist Party merely had to alter its behavior so that it no longer constituted a Communist action organization, and then petition the SACB to remove its name from the registration list.

More important, Frankfurter found the SACA’s registration requirements consistent with the First Amendment. Frankfurter acknowledged that compulsory registration may infringe free speech, and the compulsory disclosure of an organization’s

³⁸ SACA § 3(3) defined a “Communist action organization” as an organization “substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement.”

³⁹ The Communist Party argued that the government must prove that a foreign government—in this case, the Soviet Union—possessed “an enforceable, coercive power to exact compliance with its demands.” The Court rejected that interpretation and affirmed the Court of Appeals standard—“Substantial direction, domination, or control of one entity by another may exist without the latter’s having power, in the event of non-compliance, effectively to enforce obedience to its will.” Subversive Activities Control Board, 54-55.

membership list may infringe its rights of association. He resorted to the familiar balancing test by weighing the government's interest in the regulation against the potential infringement of an individual's or group's rights.

However, before conducting the balancing test, Frankfurter had to discuss the Court's recent civil rights jurisprudence. The Court, in several late 1950's cases—NAACP v. Alabama, Bates v. Little Rock, and Shelton v. Tucker—had halted state efforts to require the disclosure of individual and associational information from civil rights organizations. For example, in NAACP, the Alabama Attorney General sought the NAACP's membership list pursuant to the state's foreign corporation registration statute. In Bates, the Court examined a municipal ordinance that required local branches of the NAACP to file a list of the organization's contributors. Shelton required Arkansas teachers to disclose their organizational membership. The Court struck down the statute or ordinance in each case, finding the governmental interests in each instance insufficient to subordinate individual or group associational freedoms.⁴⁰

While the Court had recently begun siding with the civil rights organizations in registration cases, precedent had not always favored associational privacy. The Court had upheld several federal statutes that mandated the disclosure of secret activity believed threatening to the Republic, such as the Federal Corrupt Practices Act and the Federal Regulation of Lobbying Act.⁴¹ The Court had sustained a New York law, designed to curb the Ku Klux Klan, which required organizations to file membership list and oaths.⁴²

⁴⁰ NAACP v. Alabama, 357 U.S. 499 (1958); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

⁴¹ Burroughs v. United States, 290 U.S. 534 (1934); United States v. Harriss, 347 U.S. 612 (1954).

⁴² New York ex rel. Bryan v. Zimmerman, 278 US 63 (1928).

The crucial test, then, was the nature of the organizations regulated, the governmental interest the registrations and disclosure provisions sought to protect, and the pertinence of those provisions to the governmental interest. Congress, in SACA § 2, had expressed that interest as "Protection of the United States from the dangers of Communism." Said Frankfurter,

It is not for the courts to re-examine the validity of these legislative findings and reject them. They are the product of extensive investigations by committees of Congress over more than a decade and a half. We certainly cannot dismiss them as unfounded or irrational imaginingsMeans for effective resistance against foreign incursion...may not be denied to [Congress.]⁴³

Frankfurter acknowledged that registration of the Communist Party might lead to exposure, and consequently negative public feeling, against some of its members.

However, negative public opinion does not,

as such and without more, incapacitate government to require publicity demanded by rational interests high in the scale of national concern. Where the mask of anonymity which an organization's members wear serves the double purpose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the support of persons who would not, if the truth were revealed, lend their support...it would be a distortion of the First Amendment to hold that it prohibits Congress from removing the mask.⁴⁴

Frankfurter, unlike Harlan in Konigsberg II, provided a thorough explanation of the Communist Party's rights of association. Unfortunately, he refused to discuss the Communist Party's Fifth Amendment self-incrimination claims, holding them not ripe for adjudication.⁴⁵ The Party had asserted that the SACB's registration order would force its

⁴³ Subversive Activities Control Board, 95-96.

⁴⁴ *Ibid.*, 102-103.

⁴⁵ The Court also rejected the Communist Party's due process challenge to § 7. The Party argued that Congress had already determined that it was a Communist action organization and the SACB could not avoid that conclusion without contradicting Congress. The Court rejected that argument, holding that the

officers to sign registration forms, an action tantamount to a confession of Communist Party membership, and expose them to criminal charges under the Smith Act's membership section. Frankfurter dodged this important constitutional question, contending that the Communist Party may or may not register with the SACB, and the Party's officers may or may not claim the Fifth Amendment. Regardless, the Party had not then refused an order to register with the SACB, and until it did, the Court would not rule on its Fifth Amendment objections.

Each of the civil libertarians filed dissents, but Douglas's is the most noteworthy.⁴⁶ Douglas's dissent presented a curious departure from his usual hostility toward anti-Communist legislation. Congress had determined that the Soviet Union controlled the Communist Party, which was engaged in a conspiracy to overthrow the United States Government. Douglas did not disagree. While generally the Court should weigh evidence independently of Congress, in this case “we should not prolong the administrative hearings which already have extended a decade.”⁴⁷

Further, the threat posed by the Communist Party justified the government's efforts to compel its disclosure. Said Douglas, “If lobbyists can be required to register, if political parties can be required to make disclosure of the sources of their funds, if the

SACB merely determined whether the organization operated primarily to advance the overthrow of the government.

⁴⁶ Warren would have required the SACB to apply the *Yates* standard—requiring the government to prove the Communist Party's “advocacy of violent action”—before it could deem the Party a Communist action organization. He also agreed with Brennan that the provisions violated the Fifth Amendment. Black argued that the SACA violated the First Amendment. The publicity surrounding the Communist Party's registration would insure that exposed Party members would be subject to “all the civil disabilities, criminal prosecutions, and public harassments that have become common in recent years.” *Subversive Activities Control Board*, 143. Brennan agreed with Douglas that the registration requirements did not violate the First Amendment but did violate the Fifth Amendment.

⁴⁷ *Ibid.*, 170.

owners of newspapers and periodicals must disclose their affiliates, so may a group operating under the control of a foreign power.”⁴⁸

While SACA § 7 did not violate the First Amendment, said Douglas, it did violate the Fifth Amendment. Congress could not compel Communist Party members to sign the registration statements, because Party members were subject to prosecution under the Smith Act’s membership section. While Congress could compel the Party itself to register, it could not compel any person acting on the Party’s behalf to register.

The Court’s Communist Party v Subversive Activities Control Board opinion demonstrated great deference to Congress in structuring national security programs. The Court did not avoid the underlying First Amendment question, as it had in Yates, but instead accepted the purported governmental interest—as described in SACA § 2—behind the registration scheme. The Court claimed a greater willingness to accept Congress’s justification when Congress sought to regulate, rather than ban, Communist-action organizations; but, in doing this, the Court essentially delegated the balancing test to Congress.

Subversive Activities Control Board also allowed the Justices to be both Cold Warriors on subversion issues and progressives on civil rights issues. Frankfurter attempted to distinguish between justifiable disclosure requirements—those related to the Communist Party—and invidious requirements—those related to civil rights organizations. Frankfurter’s analysis called for the Court to scrutinize the purported governmental interest in requiring disclosure, but it is difficult to avoid the conclusion that Frankfurter was merely expressing a policy preference in the guise of legal analysis.

⁴⁸ Ibid., 174.

Regardless, the Court—over the objections of the civil libertarians—had distinguished Communist cases from civil rights cases.

While the Court should be credited for finally addressing the First Amendment implications of SACA § 7, it was derelict in its duty to opine whether the government's comprehensive Communist Party registration scheme passed muster under the Fifth Amendment's Self-Incrimination Clause. Frankfurter's ostensible reason for avoiding this crucial issue was ripeness; the Communist Party had not yet failed to obey an order to register with the SACB. Yet the Party had been under order to register for with the Board for years. Did it actually have to disobey the Board's order—and violate the law—before the Court would issue an opinion?

Regardless of the theoretical merit of Frankfurter's ripeness argument, both the government and the Party had waited eleven years for a constitutional ruling on the SACA's registration requirements. The Court, by dodging the Party's Fifth Amendment challenge, assured that neither the government nor the Party would know whether SACA's registration requirements were enforceable for several more years. The day of constitutional reckoning for the SACA—passed in 1950—would have to wait until another term. That delay by the Court, more than the outcome of the decision, was a travesty of justice.

SCALES v. UNITED STATES⁴⁹

Junius Scales, a Communist union organizer from North Carolina, was convicted of violating the Smith Act's membership section and was sentenced to six years in prison. Scales challenged his conviction, arguing that the SACA § 4(f) constituted a *pro tanto*

⁴⁹ Scales v. United States, 367 U.S. 203 (1961).

repeal of the Smith Act's membership clause.⁵⁰ SACA § 4(f) provided that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of...any other criminal statute." Scales contended that Congress intended SACA § 4(f) to immunize Communist Party members from prosecution under other statutes, including the Smith Act.

Scales' argument went like this: the SACA required Communist Party officers to register with the SACB if, or once, that board determined that the Party was a Communist action organization. Congress realized that a Communist Party member required to register with the SACB would invoke the Fifth Amendment's Self-Incrimination Clause and refuse to register. Otherwise, the Party member, by registering, would admit that he belonged to the Communist Party. Further, the government would use this admission to prosecute the Communist for violating the Smith Act's membership clause. To avoid this problem, Congress decriminalized mere Communist Party membership.

Scales appeared to have a sound statutory argument. But Harlan, the author of Yates, did not see the argument as an "either/or" proposition. Writing for a 5-4 Court, Harlan concluded that Congress intended to create two different categories of Communist Party membership, "nominal" and "active." Said Harlan:

We decline to attribute to Congress a purpose to punish nominal membership, even though accompanied by "knowledge" and "intent," not merely because of the close constitutional questions that such a purpose would raise, but also [because]... it is not to be lightly inferred that Congress intended to visit upon mere passive members the penalties imposed by the Smith Act.⁵¹

⁵⁰ The Smith Act's membership clause prohibited membership in an organization that advocated the violent overthrow of the government.

⁵¹ *Ibid.*, 222.

Under Harlan's interpretation, a prosecution under the Smith Act's membership clause required the government to prove both "active" Party membership and knowledge of the Party's illegal aims. Communist Party members who did not meet these thresholds were nominal members, who Congress did not seek to punish. With that, Harlan had no difficulty dismissing Scales argument that ISA § 4(f) constituted a *pro tanto* repeal of the membership clause.

Harlan then turned to Scales' Fifth Amendment Due Process attack on the Smith Act's membership clause. Harlan acknowledged that defining mere organizational membership as a criminal offense might raise due process concerns, but that problem disappeared when the Court interpreted the Smith Act's membership clause to apply only to "active" Communist Party membership. Said Harlan,

[W]e can perceive no reason why one who actively and knowingly works in the ranks of the organization, intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of a substantive criminal act.⁵²

Harlan also dispatched Scales' First Amendment attack against the membership clause. Because the clause, as construed by Harlan, required clear proof that a Communist Party member intended to use violent means to achieve the Party's aims, it did not have a chilling effect on speech. The Smith Act's membership clause did not apply to a person who joined the Communist Party to further its "legitimate" aims and policies. Said Harlan, "Thus the member for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he

⁵² Ibid., 227.

lacks the requisite specific intent 'to bring about the overthrow of the government as speedily as circumstances would permit.'" ⁵³

All four civil libertarians dissented. Brennan, joined by Douglas and Warren, essentially adopted Scales' argument that Congress, in passing the SACA, intended to confer immunity from the Smith Act's membership clause. Black's dissent, besides criticizing Harlan's "freedom-destroying" balancing test, attacked the crucial weakness in Harlan's opinion: to bring the Smith Act's membership clause within the constitutional safe zone of Dennis and Yates, Harlan had rewritten the statute by adding "active member" and "specific intent" requirements.⁵⁴ These changes to the statute made it both unconstitutionally vague and an ex-post facto law. The Court had narrowed the membership clause's reach, but that did not help Scales; he was entitled to a constitutional ruling on the Smith Act's membership clause as written.

Scales represented the worst decision produced by the anti-civil libertarian coalition. Perhaps Congress, by passing the SACA, meant to confer immunity from Smith Act membership clause prosecutions; perhaps not. What is clear is that Congress did not limit the Smith Act's membership clause provisions solely to "active" Communists and those who agreed with the Party's illegal aims. Black was correct; Harlan had completely rewritten the statute, and the Court sustained a conviction under a

⁵³ Ibid., 236. Finally, Harlan, citing his Yates test, held the evidence sufficient to prove that the Communist Party was engaged in the "advocacy of action" for the accomplishment of the violent overthrow of the government, either immediately or as soon as circumstances would permit.

⁵⁴ Brennan, joined in dissent by Warren and Douglas, contended that § 4(f) did not repeal, but instead conferred immunity from, the Smith Act's membership clause. Granting immunity to Communists was the only way Congress could get them to register; otherwise, the Communist would invoke the Fifth Amendment and refuse to register. Brennan predicted that the SACA, as interpreted by the Court, would be vulnerable to a Fifth Amendment self-incrimination attack. The law says that "membership shall not constitute per se" a violation; it did not say "membership per se shall not constitute a violation." Ibid., 287.

statute that Congress had not written. Both the government and Scales were entitled to know whether the membership clause that Congress had enacted—not the one that Harlan enacted—was constitutionally sustainable.

Scales may have been a tactical victory for the government in the short term. It did, after all, partially sustain a lengthy conviction of a Communist and preserve a modified version of the Smith Act's Membership Clause. But the anti-civil libertarian coalition had actually handed the government a strategic loss. The Court had now created two categories of Communist Party members—the innocent member, who was either unaware, or did not ascribe to, the Communist Party's violent political objectives; and the "knowing" Communist, who shared the Party's goal of the violent overthrow of the government.

Harlan put this problem succinctly in Noto v. United States, Scales' companion case. Harlan noted that the government could prosecute individual members of the Communist Party under some circumstances, but

there is danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.⁵⁵

This dichotomy presented a major problem for the government: How would it prove that a Communist Party member, or even an officer, shared the Communist Party's belief in the objective of violent overthrow of the government? The government had employed an informant to testify regarding some of Scales' statements regarding the

⁵⁵ Noto v. United States, 367 U.S. 290 (1961), decided the same day as Scales, reversed a conviction under the Smith Act's membership clause. Unlike Scales, but like Yates, the government presented minimal evidence to show that the Party presently advocated violent overthrow of the government, using language reasonably calculated to bring it about now or in the future.

violent overthrow of the government. Presumably, some Communists may have produced written material calling for violent action. But, with rare exception, the government could not prove that any particular Communist shared the Party's violent objectives.

There was another major problem with Harlan's creation of the "innocent" Communist Party member. While Scales and Noto involved criminal prosecutions under the Smith Act, Harlan's did not expressly limit his protection of the "innocent" Communist to criminal cases. Instead, he discussed the dangers of punishing the innocent Communist, or that the Court would not lightly assume that Congress intended to punish nominal Party membership. Harlan had unwittingly played into the civil libertarians hands. Once the civil libertarians established a majority, they would cite Scales for the proposition that the government could not punish innocent Communist Party members. Harlan had had seven years to realize that the civil libertarians believed that any adverse action—whether criminal or civil—against a person because of his or her beliefs or associations constituted punishment. In future terms, the Warren Court—by then comprised of five civil libertarians—would use Harlan's knowing-innocent dichotomy to smash the government's remaining domestic subversion programs.

CONCLUSION

The anti-civil libertarian coalition decided nearly every major Communist case in favor of the government during the 1959 and 1960 Terms. These cases can be broken down into two categories. The first category is the HUAC cases. In these cases—McPhaul, Wilkinson, and Braden—the Court enunciated very clear standards regarding the power of congressional committees to investigate Communism. The Court decreed

that HUAC had virtually unchecked power to investigate Communism, and witnesses were required to appear and answer any question pertinent to HUAC's matter under inquiry.

The second set of cases were often contradictory, incomplete, muddled, and, at times, incoherent. Nelson seemed to ignore Slochower, while Konigsberg seemed to ignore Speiser. Communist Party v. Subversive Activities Control Board saved the SACA's registration requirements from First Amendment attack, but missed the constitutional elephant in the room by ignoring the Communist Party's Fifth Amendment challenge. Scales ignored congressional intent by re-writing the Smith Act's membership Section, thereby creating a distinction between the "innocent" and "knowing" Communist Party members. In future terms, the Court would cite Scales as its basis for gutting the government's domestic security program.

The 1959-60 Terms marked the end of an aberration in the Warren Court's long-term trend in Communist cases. The Court, from the 1954 Term until the end of the 1957 Term, consistently decided against the government in Communist cases. The Court usually did not decide these cases on constitutional grounds, but employed rhetoric warning that the government's interpretation of a statute or order raised serious constitutional concerns. The Court employed poor legal reasoning and failed to address important constitutional questions in most of its Communist case decisions during these Terms.

Thanks to the formation of a new anti-civil libertarian coalition, the Court began changing this approach at the very end of the 1957 Term and throughout the 1958 Term. During the 1959 and 1960 Terms, the Court decided every major Communist case in

favor of the government. Unfortunately, the anti-civil libertarian coalition's Communist case opinions were as muddled as those from the earlier Warren Court. The Court ignored both the language and tone, if not the exact holding, of earlier Communist cases. Worse, it missed its opportunity to decide the constitutionality of important components of the government's anti-Communist programs, such as whether the SACA's registration requirements, which had been on the books for eleven years, violated the Fifth Amendment's Self-Incrimination Clause.

The problems posed by the ambiguity and illogic of the Warren Court's Communist cases jurisprudence through the 1960 Term would soon change. The Court would not consider any major Communist cases during the 1961 Term. By the end of that Term, Whittaker resigned from the Court and Frankfurter suffered a serious stroke, which would force him to resign several months later. Whittaker's replacement, Byron "Whizzer" White, generally sided with the Court's anti-Communist faction. Frankfurter's successor, Secretary of Labor Arthur Goldberg, proved an ardent civil libertarian who may have been to the political left of Warren. This gave the civil libertarians their crucial fifth vote, and the Warren Court would again sustain the government in a challenge to its anti-Communist programs. For a summary of the Warren Court's Communist cases during the 1961-1967 Terms, see the appendix.

CHAPTER EIGHT: CONCLUSION

The Red Scare presented the Court with one of the greatest challenges in its history. The Court had never had to weigh the country's national security needs against the rights of individuals during a time of ostensible peace. The Court had balanced national security against individual rights during the Civil War, World War I, and World War II in limited degrees. Further, shortly after World War I, it began using the clear and present danger test to determine when the government could infringe a person's First Amendment rights. These experiences and constitutional tests did not prepare the Court for either the threat of Communist subversion or the government's response to that threat.

Whether the Vinson and Warren Courts consistently made the correct choices in maintaining the delicate balance between individual rights and national security is beyond the scope of this paper. Indeed, any analysis of the Court's Communist case jurisprudence that praises the outcome of a certain case as "good" or "bad" merely because it validated an anti-Communist program or supported the rights of an alleged subversive may predict political party registration, but does not constitute valid historical scholarship.

Instead of using ideology as a proxy for historical analysis, this paper has analyzed whether the Court addressed the important constitutional issues raised by the government's anti-subversion programs. The government, responding to the Communist threat, passed the Taft-Hartley Act, the Subversive Activities Control Act, and began enforcing the Smith Act. It imposed loyalty requirements on public employees, compiled lists of subversive organizations, and deported alleged Communists. Nearly all of these practices infringed constitutional rights, whether a long-recognized right, such as the

Fifth Amendment right against self-incrimination, or a newly established right, such as the right to travel. Both the government and alleged subversives were entitled to know—indeed, needed to know—whether these statutes and programs violated the Constitution, and the Court's reasoning behind that decision.

The Supreme Court's record of providing clear constitutional decisions in Communist cases during the 1949-1960 Terms was disappointing. Of course, the 1949 Supreme Court was not the 1954 or 1960 Supreme Court, and it is not surprising that the Vinson Court's Communist case jurisprudence differed significantly from that of the Warren Court. Indeed, the Warren Court's Communist case jurisprudence during the 1953-1957 Terms was much different from that of the 1958-1960 Terms.

The Vinson Court generally addressed the important constitutional issues raised by Communist cases, but faced several major obstacles. The first, and most important, was the lack of precedent to guide the Court in responding to the Red Scare. The Vinson Court, in drawing the line between national security and individual rights, had to create its own precedent, often with suspect results. For example, it sometimes misapplied court-created doctrines, such as the clear and present danger test, in cases such as Douglas and Dennis.

Second, the Vinson Court was sharply divided both ideologically and intellectually in its Communist cases. Vinson joined Minton and Reed to form the Court's staunch anti-Communist block. These three justices tended to sustain nearly every federal, and most state, anti-Communist measures, but did not display profound legal reasoning. Black and Douglas, contrarily, not only sought to void every anti-Communist measure the Court reviewed, but carved out a significant and lasting civil

libertarian position on the Court. Jackson and, to a much more limited extent, Frankfurter—probably the Court's two most intellectually gifted justices—often supported the government's anti-Communist programs as long as suspected subversives were given procedural due process. However, both Justices were reluctant, for ideological or intellectual reasons, to join any opinion authored by Reed, Minton, or Vinson. Harold Burton did not have a firm ideological commitment to any position in Communist cases, and Tom Clark, the former Attorney General, had to recuse himself from many of the Vinson Court's Communist cases.

These internal divisions often meant that the Court was unable to produce an opinion. Indeed, in some of the Vinson Court's most important Communist cases, such as Douds and Dennis, the Chief Justice could not get four additional justices to join his opinion. Thus, while the Court sustained the Taft-Hartley Act's anti-Communist provisions and the government's Smith Act prosecutions, it could not produce an opinion in either case.

The Court at least produced a judgment in Douds and Dennis. Unfortunately, the Court's sharp divisions prevented it from even rendering a judgment in many important cases. For example, in Bailey v. Richardson, the Court split 4-4 on the question of whether the government could use secret evidence in employee loyalty hearings. Other times, the Court could produce a judgment, but only one of incredible inconsequence. In Joint Anti-Fascist Refugee Committee v. McGrath, its judgment was limited to whether Executive order 9835 authorized the Attorney General to furnish a list of charitable, non-subversive organizations to the Loyalty Review Board. The Court did not decide whether

the Attorney General could create a list of subversive organizations or what procedural protections, if any, allegedly subversive organizations may have.

Despite these major limitations, the Vinson Court did a credible job in addressing the constitutional questions raised by the government's anti-Communist program. As explained previously, it produced judgments, but not opinions, sustaining the Taft-Hartley Act's non-Communist affidavit provision in Douds and the Smith Act's conspiracy section in Dennis. It unequivocally sustained Congress's power to deport Communist aliens in Harisiades and to exclude them in Mezei. The Court's decisions were not limited to questions of federal power. In Garner, the Court affirmed California's power to terminate employees who refused to sign a loyalty oath, while in Adler the Court sustained New York's Feinberg Law. The Court drew a reasonably clear line in these cases that allowed the government and alleged subversives to understand the scope of governmental power in confronting the threat of subversion.

The Vinson Court's Communist case jurisprudence did not always favor the government. In Blau, the Court expanded the Fifth Amendment's reach to protect witnesses from having to answer grand jury questions regarding their Communist associations. In Stack, it prevented the Courts from setting unreasonably high bail for Communists. Garner, although decided in favor of the government, warned state governments that their loyalty oaths had to comport with due process, while Wieman indicated that the Court would enforce that warning.

In summary, while the Vinson Court was often ineloquent, and failed to issue Court opinions (and sometimes judgments) in some major Communist cases, it did a

reasonably good job in delineating both the government's constitutional powers to confront the Red Scare and the alleged subversive's rights to resist the government.

The Warren Court, in contrast to the Vinson Court, possessed several advantages in confronting the constitutional issues raised by Communist cases. First, the Warren Court was not as divided as was the Vinson Court. Much of this had to do with Warren himself. Warren, a highly successful politician who had worked with both Democrats and Republicans in California, was often able to build a legal consensus among his fellow justices. Warren demonstrated this skill in Brown v. Board of Education, when he produced a 9-0 Court opinion rejecting Jim Crow in public education. Moreover, as the anti-Communists Jackson, Reed, and Minton left the Court, Eisenhower replaced them with liberal or moderate justices such as Harlan, Brennan, and Whittaker. Finally, Frankfurter was initially able to find common ground with Warren, meaning that the Court was more likely to issue a Court opinion.

The Warren Court's second major advantage was its ability to consult the Vinson Court's Communist case jurisprudence. Not necessarily accept; the Warren Court could have rejected, or at least modified, either the reasoning or the results of the Vinson Court's Communist cases. Regardless, the Warren Court, unlike the Vinson Court, had the luxury of consulting another Court's set of Communist cases.

Despite these advantages, the Warren Court generally failed to address the constitutional issues raised by the government's anti-Communist programs. Rather than invalidate the government's anti-subversion programs, or endorse them with or without limitations, the Court—following its Rumely precedent—avoided deciding constitutional

issues, thereby leaving both the government and alleged subversives confused regarding the legality of the government's anti-subversion programs.

The early Warren Court refused to interpret anti-Communist statutes (Peters) and executive orders (Cole) as written, but declared that it would interpret them in a manner that ostensibly avoided constitutional questions, which had the effect of limiting the government's ability to terminate subversives. In Pennsylvania v. Nelson, the Court, without any apparent statutory or constitutional basis, severely curtailed state-based prosecutions against subversives, while in Communist Party v. Subversive Activities Control Board, it used specious grounds to avoid ruling on the constitutionality of the keystone of the government's anti-subversion program, the Subversive Activities Control Act.

Through the 1955 Term, the Court had merely avoided important constitutional questions. This changed in the 1956 Term, when the Court introduced several new wrinkles to its Communist case opinions. The first was a shrill attack on the government. Rather than simply declaring a particular statute or practice unconstitutional, the Court seemed to go out of its way to impugn the motives of the political branches. For example, in Watkins, the Court attacked the motives of HUAC and implied that they engaged in the "ruthless exposure of private lives."

Second, the Court discussed constitutional issues at great length, but then disposed of cases on seemingly technical grounds. In Sweezy, the plurality opinion strongly implied that the Constitution prohibited the New Hampshire Attorney General from ever asking a college professor about his academic lectures or his political associations. The opinion, after referencing these important issues, disposed of the case

on the specious grounds that the Court could not determine whether the New Hampshire state legislature had not authorized the investigation.

Finally, in an attempt to avoid important constitutional questions, the Court often ignored the plain language of anti-subversion statutes. For example, the Smith Act prohibited a person from advocating the violent overthrow of the government. The Court, in Yates, ignored Congress's use of the word "advocacy" and instead required that the government prove incitement, a much more difficult legal hurdle. If the Smith Act's advocacy requirement was illegal, the Court should have so decreed; Congress was entitled to a ruling on the statute it had written, not one the Court wished to interpret.

The Court cut back on the shrill rhetoric after the 1956 Term, but continued creating new ways to avoid addressing the constitutional issues raised by the government's anti-subversion programs. For example, rather than declare that the Passport Office's refusal to provide a passport to a Communist violated the Fifth Amendment's Due Process Clause in Kent, the Court decreed that Congress had not authorized the executive branch to violate the constitutional right to travel by its refusal to issue passports to Communists. In Greene, the Court decreed that neither Congress nor the President had expressly delegated the authority to violate the "right to hold specific private employment and to follow a chosen profession free from governmental interference" to loyalty review panels. The government was not aware that these rights even existed, and the Court's opinion begged the question: If Congress had expressly authorized the Passport Office to withhold passports from Communists, or had authorized loyalty review board to interfere with private employment, would it have made the slightest difference to the Court?

On the last day of the 1957 Term, the Court issued two decisions—Beilan and Lerner—that seemed to reject, but not reverse, the 1955 Term's Slochower decision. These two opinions marked the emergence of a five-justice anti-civil libertarian coalition that began pushing the Court's Communist case jurisprudence back to the right.

This new coalition interpreted many Communist cases in favor of the government, but exhibited many of the same characteristics displayed by the earlier Warren Court: it disregarded precedent, avoided major constitutional issues, rewrote statutes, and employed highly suspect legal reasoning. For example, the Court avoided settling the question of whether the SACA's registration requirement violated the Fifth Amendment's Self-Incrimination Clause in Communist Party v. Subversive Activities Control Board; and, in Scales, imposed a "knowing/innocent" distinction to the Smith Act's membership clause, one that Congress clearly did not intend.

Whether one analyzes the Warren Court from approximately 1953-1957, when it decided most cases against the government, or from 1958-1960, when it decided most cases in favor of the government, the conclusion is the same: The Court failed to interpret the Constitution in a manner that allowed either the government or alleged subversives to know what speech and conduct was subject to infringement in the name of national security.

The Government responded to the post-World War II Communist threat by enacting numerous anti-subversion statutes, creating loyalty review boards, and deporting Communist aliens. Indeed, the Red Scare was not so much a study in national hysteria—that would imply widespread vigilantism and indiscriminate government-sponsored violence—but a study in a comprehensive legal response to a perceived threat to national

security. The fact that the Subversive Activities Control Act required the Subversive Activities Control Board to determine that the Communist Party was, in fact, a Communist-action organization should give pause to those who would dismiss the thoroughness and deliberateness of the government's political branches. However, whether the government acted pursuant to law did not answer whether it acted in accordance with the Constitution.

The government is now in its fifth year of what may be a long struggle against radical Islam. Policymakers may look to the Red Scare for guidance in formulating policies to combat any domestic threat posed by radical Islam. The Red Scare may provide valuable lessons in which policies were effective in combating domestic Communism and, which were not. Studying the Red Scare may teach policymakers when the human costs of anti-subversion programs was simply too high, and when those costs were a sad consequence of national security. One lesson the Red Scare will not teach policymakers is whether the government's anti-subversion program comported with the Constitution. That is a lesson both the government and future litigants will have to learn in the future.

APPENDIX: 1961-1967 TERMS

This paper focuses on the Supreme Court's Communist cases from the 1949-1960 Terms. This appendix briefly summarizes the Court's Communist cases during the 1961-67 Terms.¹ This appendix is offered for several reasons. First, the history of the Court's Communist case jurisprudence is not complete without some discussion of the cases from this period. The Red Scare was but a distant memory by the mid 1960's. Indeed, fighting domestic subversion had not only become unfashionable, it became disreputable.

According to Historian Richard Gid Powers, "Outspoken anticommunism was now identified as extremist in the public mind. Americans who had earlier proudly proclaimed their anticommunism—indeed had defined themselves by their

¹ Other cases Communist cases of note the Court decided during these years include Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278 (1961). Florida required each government employees to file an oath swearing that he or she had not lent "aid, support, advice, counsel, or influence" to the Communist Party. The Court held the oath unconstitutionally vague and a violation of the Fourteenth Amendment's Due Process Clause.

Yellin v. United States, 374 U.S. 109 (1963) overturned a contempt conviction arising from a HUAC hearing. Warren, for a 5-4 Court, held that HUAC did not follow its own committee rules regarding Yellin's request to testify in executive, rather than open, session.

Baggett v. Bullitt, 377 U.S. 360 (1964) struck down a state of Washington requirement that each state and university employee file an oath swearing that they were not a subversive person. The court, citing Cramp, deemed the oath too vague.

Lamont v. Postmaster General, 381 U.S. 301 (1965) nullified a federal law that prohibited the delivery of foreign-produced Communist propaganda, unless the intended recipient filed a card with the Post Office indicating that he or she wished to receive such material.

DeGregory v. New Hampshire, 383 U.S. 825 (1966) limited the reach of the state to inquire about a person's past subversive activities. The New Hampshire Attorney General, acting pursuant to a 1957 state statute, quizzed DeGregory about his Communist activities and associations. DeGregory denied having any post-1957 Party associations. However, DeGregory, citing the First Amendment, would not discuss his pre-1957 activities, and was jailed for contempt. Douglas, for the Court, reversed, holding that such information was stale and would only serve to expose the witness without producing any relevant information to the state.

Elfbrandt v. Russell, 348 U.S. 11 (1966) overturned an Arizona requirement that each state employee swear that that he or she did not knowingly belong to the Communist Party or any other organization that had as one of its purposes the overthrow of Arizona Government. Douglas, for a 5-4 Court, struck down the oath. Citing Scales, Douglas noted that some individuals who join the Communist Party may not believe in the violent overthrow of the government.

anticommunism—now began to edge away from an ideology that might link them to groups, like [the John Birch Society], that were outside the pale of respectability."² Yet although the Red Scare had peaked in the mid-1950's, many anti-Communist statutes passed in the 1940's and 1950's were still on the books. To conclude the story with the 1960 Term would present an inaccurate picture regarding the ultimate fate of the government's anti-subversion programs.

Second, the 1961-67 Term cases demonstrate the reasoning of the new civil libertarian majority. Previously, the civil libertarians had to dissent (Barenblatt, Uphaus, and several other cases), join only a plurality opinion (Sweezy, in which the Court did not produce an opinion), or interject their views via dicta while deciding the case on technical or statutory grounds (Kent, Watkins). Beginning with the 1962 Term, the civil libertarians did not have to bargain with other justices to obtain a crucial fifth vote, and could finally issue Court opinions that repudiated the government's anti-subversion programs.

Finally, the Warren Court provided clear, unequivocal answers to the constitutional questions raised by the Communist cases it heard during the 1961-67 Terms. Indeed, the Court's Communist case decisions during this period were even clearer than the Vinson Court's decisions. The legal reasoning of these later Warren Court Communist case decisions was certainly open to question, but their clarity was not.

Demise of the anti-civil libertarian coalition

The Court's anti-civil libertarians needed the votes of all five justices to sustain the government's loyalty-security program in the face of the civil libertarian's determined

² Richard Gid Powers, Not Without Honor: The History of American Anticommunism (New York: Free Press, 1995), 296.

opposition. The anti-civil libertarian coalition first emerged at the end of the 1957 Term, built strength in the 1958 Term, and sustained the government in all major Communist cases during the 1959 and 1960 Terms. That coalition began to fray by the end of the 1961 Term, when two coalition members resigned.

Whittaker was the first anti-civil libertarian coalition member to resign. He had never adjusted to the demands of the Court—in fact, he suffered several breakdowns—and announced his resignation effective April 1, 1962. President Kennedy replaced him with Deputy Attorney General Byron Raymond "Whizzer" White. White, a Rhodes Scholar, former professional football player, and Yale Law School graduate, had clerked for Chief Justice Fred Vinson. He later returned to his home state, Colorado, practiced corporate law, and served as Chairman of Citizens for Kennedy. Because White generally sided with the Court's anti-civil libertarian faction, his appointment did not drastically alter the Court's ideological balance in Communist cases. He served on the Court until 1993.

Frankfurter's departure, more than Whittaker's, changed the Court's ideological balance. Frankfurter suffered a stroke on April 5, 1962 and sent his letter of resignation to Kennedy on August 28, 1962. Kennedy replaced him with one of the most liberal justices in the Court's history, Arthur Joseph Goldberg. That Kennedy, a cold warrior, nominated the staunch leftist Goldberg indicated that the issue of domestic subversion had become a non-issue by 1962.³

Goldberg graduated valedictorian from Northwestern Law School. He served as general counsel to the United Steelworkers and the AFL-CIO before Kennedy appointed

³ Senator Strom Thurmond cast the only dissenting vote against Goldberg's nomination.

him Secretary of Labor in 1961. Goldberg served on the Court for three terms before President Johnson appointed him Ambassador to the United Nations.

Goldberg, a judicial activist, rejected Frankfurter's judicial restraint doctrine. Said Court historian Bernard Schwarz of Goldberg: "If anything, the new Justice even went beyond [Warren] in his willingness to expand the frontier of constitutional law."⁴

Goldberg did not disappoint the civil libertarians; after Goldberg's appointment in 1962, the Court never again sustained the government in a Communist case.

1961-1967 COMMUNIST CASES

GIBSON v. FLORIDA LEGISLATIVE COMMITTEE (1962 Term)⁵

Gibson v. Florida Legislative Committee was the newly configured Court's first major Communist case. The Court originally heard Gibson during the 1961 Term—and voted 5-4 to sustain Florida—but decided to rehear it after Frankfurter's stroke. This time, the Court decided against Florida.

In 1959, the Florida Legislative Investigation Committee (Committee) subpoenaed the Miami NAACP President Theodore Gibson to appear before it with a copy of the NAACP's membership list. The committee planned to name suspected Communists and expected Gibson to examine the membership list to determine if the suspected Communist belonged to the NAACP.⁶ Gibson agreed to testify from memory, but refused to bring the list. The committee gave him the names, or presented

⁴ Schwarz, Super Chief, 446

⁵ Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963).

⁶ In 1957, a Florida Legislative Committee subpoenaed the membership records of the Miami NAACP. The NAACP refused to surrender the records. The Florida Supreme Court agreed that the NAACP did not need to provide its membership lists, but required the custodian of the records to bring them and refer to them in response to committee questions regarding specifically identified individuals suspected of being Communists were NAACP members.

photographs, of fourteen alleged Communists or Communist sympathizers, and Gibson denied their NAACP affiliation. Gibson was convicted of contempt for failure to produce the list.

Goldberg, for a 5-4 Court, overturned the conviction. Goldberg rejected Florida's contention that Barenblatt, Wilkinson, and Braden supported the contempt conviction. Those cases concerned only a witness's refusal to answer questions regarding his or her own Communist Party membership, while Gibson refused to testify regarding another's Communist Party membership. Moreover, Congress's authority to utilize its contempt power against alleged Communist witnesses was premised on the Court's conclusion that the Communist Party was not an ordinary or legitimate political party. But Florida was interrogating an NAACP member, not a Communist Party member, and the NAACP was not a Communist or Communist-front organization; in fact, noted Goldberg, the NAACP had adopted resolutions barring Communists from membership. Florida had not demonstrated that the substantial connection between the Communist Party and the NAACP's Miami Branch necessary to violate the latter's associational rights.

Goldberg summed up the evidence thusly:

This summary of the evidence discloses the utter failure to demonstrate the existence of any substantial relationship between the NAACP and subversive or Communist activities. In essence, there is here merely indirect, less than unequivocal, and mostly hearsay testimony that in years past some 14 people who were asserted to be, or to have been, Communists or members of Communist front or 'affiliated organizations' attended occasional meetings of the Miami branch of the NAACP 'and/or' were members of the branch, which had a total membership of about 1,000.⁷

Gibson threw a nearly insurmountable obstacle before legislative committees.

Before the committee could discover whether Communists had infiltrated an allegedly

⁷ Ibid., 555.

non-subversive organization, it first had to demonstrate that the organization itself was subversive. Goldberg did not indicate how the government could lay such an evidentiary foundation. Indeed, as the dissent noted, Communists may have infiltrated universities, unions, and government agencies, but that did not make these institutions Communist-dominated. Goldberg's test required investigative committees—or at least state investigative committees—to prove the very facts that they sought to discover.

APTHEKER v. SECRETARY OF STATE (1963 Term)⁸

Aptheker v. Secretary of State finally answered the question the Court had avoided in Kent: Was SACA's passport provision (§ 6) unconstitutional? SACA § 6 prohibited members of Communist-action organization to renew, use, or apply for a passport.⁹

The United States Passport Office, acting pursuant to SACA § 6, determined that Herbert Aptheker (editor of the Communist Party publication Political Affairs) was a Communist and revoked his passport.¹⁰ Aptheker sued, contending that § 6 offended the Fifth Amendment's Due Process Clause by unconstitutionally depriving him of his right to travel abroad. The government asserted that SACA § 6 constituted a reasonable regulation of Aptheker's right to travel.¹¹

Goldberg, for a 5-4 Court, rejected the government's arguments. Goldberg conceded that the government could reasonably regulate the right to travel, but noted the

⁸ Aptheker v. Secretary of State, 378 U.S. 500 (1964).

⁹ More accurately, the SACA applied to organizations, such as the Communist Party, that had been ordered to register. Further, the SACA's criminal penalties applied only if the applicant's knew that their organization was under order to register with the SACB.

¹⁰ Communist Party Chair Elizabeth Gurley Flynn joined Aptheker's suit.

¹¹ The government contended, Aptheker could avoid § 6's restrictions by quitting the Communist Party. The Court rejected this argument, contending that it would interfere with Aptheker's associational rights.

dearth of case law on the subject. Goldberg turned to NAACP v. Alabama, which concerned the government's regulation of the right of association: “[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”¹²

Goldberg, in applying the NAACP test, noted that § 6 applied to all Communist Party members, regardless of their level of commitment or belief in the Party's political aims. Further, § 6 did not permit the Passport Office to consider the Party member's purpose in applying for a passport. Did the applicant wish to travel to visit a sick relative? Seek medical care? Read rare manuscripts at Oxford University? The statute did not allow the government to make these distinctions, but instead banned any Communist Party member from even applying for a passport. This ban was so overbroad that it unconstitutionally burdened the Fifth Amendment's right to travel. Goldberg, citing Scales, noted:

In determining whether there has been an abridgement of the Fifth Amendment's guarantee of liberty, this Court must recognize the danger of punishing a member of a Communist organization 'for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share.'¹³

The Government asserted that even if § 6 was facially overbroad, the Court should narrowly interpret it to apply to Aptheker and other top-ranking Communist Party members. Goldberg disagreed, stating, “This court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from

¹² Aptheker, 508, citing NAACP, 307.

¹³ Aptheker, 512, citing Scales, 229.

constitutional defects.”¹⁴ The government's interpretation would make § 6's scope and application vague and uncertain, which "would not be proper, or desirable, in dealing with a section which so severely curtails personal liberty.”¹⁵

Harlan, joined by Clark and White, filed a dissent. The dissent is noteworthy for its attempt to explain Scales:

It is true that in Scales v. United States, the Court found that the intention of Congress in the Smith Act was to reach only 'active' members having a guilty knowledge and intent. But that was a criminal prosecution under the Smith Act which, of course, carried stricter standards. And, in addition, this requirement, as laid down in Scales, was not held to be a constitutional mandate.¹⁶

Harlan's post-hoc interpretation of Scales was both laughable and pathetic. Harlan, not Congress, had distinguished between those Communists who shared the Party's violent objectives and those who did not. Harlan, in Scales, opined that enforcing the Smith Act's membership clause as written would raise grave constitutional concerns, while in his Aptheker dissent, he claimed this interpretation was not a constitutional mandate. Harlan may have intended that Scales' innocent-knowing dichotomy to apply only in criminal prosecutions; however, his Scales opinion did not limit the dichotomy to criminal prosecutions, but instead to "punishment." Harlan could hardly claim surprise when the civil libertarians took him at his word and applied the Scales innocent-knowing dichotomy to their version of punishment.

Aptheker confirmed that Gibson was not an aberration. Moreover, the Court signaled that it would take a meat cleaver, rather than a scalpel, to the government's anti-Communist programs. Previous Warren Court decisions had declared certain state

¹⁴ Aptheker, 515.

¹⁵ *Ibid.*, 516.

¹⁶ *Ibid.*, 529.

statutes or practices unconstitutional (Sweezy and Speiser) or had declared that certain congressional procedures violated the Fifth Amendment's Due Process Clause (Quinn and Watkins) but had never declared substantive provision of federal anti-Communist legislation unconstitutional. The Court had shed its Frankfurter-era inhibitions—it no longer referenced Rumely—and was prepared to gut Congress's anti-Communist programs.

UNITED STATES v. BROWN (1964 Term)¹⁷

The Court sustained the constitutionality of the Taft-Hartley Act's non-Communist affidavit requirement in the 1949 Term's Douds. That provision prohibited Communist Party members from serving as labor union officers or employees. Congress had incorporated that provision in § 504 of the Labor-Management Reporting and Disclosure Act of 1959 (The Landrum-Griffin Act). Longshoreman and Communist Party member Archie Brown was convicted of violating § 504, and challenged his conviction on constitutional grounds.

Warren, for a 5-4 Court, held § 504 to constitute a Bill of Attainder. Warren acknowledged that the Constitution permitted Congress to enact legislation to protect interstate commerce from political strikes, but § 504 exceeded that power. Congress could prohibit a person who had committed certain acts, or possessed certain characteristics, from holding union office. Yet once Congress passed such legislation, courts and juries—not Congress—would determine whether a particular person possessed the feared characteristics or had committed the specific acts. Congress, in enacting §

¹⁷ United States v. Brown, 381 U.S. 437 (1965)

504, bypassed the constitutional role of the judiciary by making Communist Party membership synonymous with these feared characteristics and acts.

In Douds, the Court had cited Board of Governors v. Agnew as precedent for upholding Taft-Hartley's non-Communist affidavit requirement. Agnew sustained § 32 of the Banking Act of 1933, which prohibited persons employed in the securities industry from serving as a bank officers, directors, or employees. The Agnew Court had determined that Congress could conclude that a person employed in or associated with both the securities and banking industries would have conflicting interests. The government argued, as it had in Douds, that Congress could also determine—indeed, had determined—that a Communist union official or employee would always be tempted to put the interests Communist Party ahead of the interests of the union by ordering political strikes.

Warren rejected Agnew's value as precedent. Congress, by enacting Banking Act § 32, sought to prevent an individual from serving in a capacity where his conflicting loyalties might damage consumer welfare. In contrast, Congress, in enacting § 504, did not seek to regulate the actions of individuals, but sought to prevent anyone associated with the Communist Party from serving in a capacity where his conflicting loyalties might damage the nation. Warren added, “We of course take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. The point we make is rather that the Constitution forbids Congress from making such determinations.”¹⁸

¹⁸ Ibid., 449, n. 24.

Finally, the Government argued that Douds had concluded that if a law did not seek retribution for past acts, it did not impose punishment and did not constitute a Bill of Attainder. Warren agreed that Douds had said as much, but rejected that case's definition of punishment. Said Warren, "It would be archaic to limit the definition of punishment to retribution. Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."¹⁹ With that, Warren dismissed the relevance of Douds, declared § 504 to constitute punishment, and held it unconstitutional.

Warren's Brown opinion was significant because it prevented Congress from using Communist Party membership as shorthand for "national security risk." This conclusion was the logical outgrowth of Scales (which Warren did not cite) and Aptheker (which he did cite). All guilt was personal, and the government could not assume that a Communist Party member presented a danger to the Republic.

Brown also represented the first time the Court explicitly repudiated one of its Communist cases. The anti-civil libertarian coalition had gone to great lengths to distinguish Beilan and Lerner from Slochower and Barenblatt from Watkins. Warren and the civil libertarians did not play that game. They did not need to do so, for they had the requisite five votes to invalidate any anti-Communist statute they reviewed.

GOLDBERG'S DEPARTURE; FORTAS'S ARRIVAL²⁰

¹⁹ Ibid., 458.

²⁰ The Court's commitment to civil liberties was called into question shortly before the beginning of the 1966 Term. Brennan had extended a clerkship offer to California-Berkeley graduate Michael Tigar, the class valedictorian and editor-in-chief of The California Law Review. Tigar was an outspoken radical; when Tigar's clerkship with Brennan became an issue in the 1966 California Gubernatorial campaign,

Goldberg left the Court in summer 1965 to become Ambassador to the United Nations. President Johnson replaced him with the equally liberal Abe Fortas, who had argued several Communist cases before the Court. Fortas, a Yale Law School graduate, worked for several New Deal-era government agencies and later represented Lyndon Johnson in his disputed 1948 Senate contest against Coke Stevenson. By the 1950's, Fortas was one Washington's most successful—and wealthiest—attorneys. Fortas, like Goldberg, sided with the civil libertarians in every Communist case.

ALBERTSON v. SUBVERSIVE ACTIVITIES CONTROL BOARD (1965 Term)²¹

The Court sustained SACA's registration requirements (§ 7) from First Amendment attack in Communist Party v. Subversive Activities Control Board, but expressly avoided deciding whether those requirements violated the Fifth Amendment's Self-Incrimination Clause. The SACB subsequently ordered the Communist Party to register with it. When it refused, the SACB, following SACA's mandate, ordered Communist Party leaders to register with it.

Brennan, for a unanimous Court, held SACA's registration requirements to violate the Fifth Amendment's Self-Incrimination Clause.²² SACB's registration forms required Communist Party leaders to note their use of aliases and admit their membership in the Party and other organizations. The Government could use this information to initiate Smith Act prosecutions against Party members, or to provide investigatory leads into persons not otherwise suspected as subversive. Blau had held that “mere association with

Warren and Fortas lobbied Brennan to withdraw the clerkship offer, which he did. Powe, The Warren Court, 328.

²¹ Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

²² Clark concurred in the judgment.

the Communist Party presents sufficient threat of prosecution to support a claim of [Fifth Amendment] privilege;" the same principle applied to this case.²³

The Government argued that the SACB had already found that the registrants were members of the Communist Party, thus making the admission non-incriminatory. Brennan disagreed, noting that whether something was "incriminatory" was not dependent on whether the government already had the information.

Approximately sixteen years after Congress had enacted the SACA, the Court finally ruled its registration requirements unconstitutional. Brennan's major point—that an individual registrant's disclosure of his Communist Party membership could subject them to a Smith Act prosecution—was valid. The Court, in Scales, had declined to read the SACA's registration requirement as a *pro tanto* repeal of the Smith Act's membership clause. Instead, the Court created a distinction between knowing and innocent Communists, and sustained Scales' conviction as a member of the former group. If the Court was going to allow the government to prosecute Communists under a modified Smith Act membership clause, it did not seem to have any choice but to protect Party members from the forced disclosure of that information.

KEYISHIAN v. NEW YORK BOARD OF REGENTS (1966 Term)²⁴

The Court struck down another Vinson-era precedent in Keyishian v. New York Board of Regents. Several SUNY-Buffalo faculty members refused to sign contracts

²³ Albertson, 77, citing Blau, 159. Brennan also relied on Counselman v. Hitchcock, 142 U.S. 547 (1892), which held that only a grant of absolute immunity could withstand Fifth Amendment challenge. The SACA did not provide this immunity, and did not stop the government from using the registration information as evidence in a criminal trial or as an investigatory lead.

²⁴ Keyishian v. New York Board of Regents, 385 U.S. 589 (1967).

containing provisions of the Feinberg Law, which prohibited membership in subversive organizations and “treasonable or seditious utterances or acts.” The Vinson Court's 1951 Term Adler decision had sustained the Feinberg Law from First and Fourteenth Amendment challenge. Brennan, for a 5-4 Court, rejected Adler and declared the contract provisions unconstitutional on two grounds.

First, Adler sustained the Feinberg Law on free speech and procedural due process grounds, but did not determine whether the law was unconstitutionally vague. Brennan, glad to oblige, found the law too vague. For example, the Feinberg Law did not define “treasonable or seditious acts or utterances.” Said Brennan, “Our experience under the Sedition Act of 1798 taught us that dangers fatal to the First Amendment inhere in the word 'seditious.' And the word ‘treasonable,’ if left undefined, is no less uncertain.”²⁵ A professor could not distinguish seditious from non-seditious actions or statements; even teaching the Declaration of Independence might constitute seditious activity.

Second, recent Warren Court Communist case jurisprudence rejected Adler's validation of the Feinberg Law's treatment of Communist Party membership as *prima facie* evidence of employment disqualification. To Brennan, Adler required a public employee to surrender his constitutional rights in return for his job, a trade-off that the Court had rejected in Scales and Aptheke. Those cases held that “legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional standards.”²⁶

²⁵ Keyishian, 598.

²⁶ Ibid., 606.

Thus, any public contract provision that punished a person for mere membership in the Party, without more, was constitutionally invalid.

UNITED STATES v. ROBEL (1967 Term)²⁷

The Court invalidated SACA's passport provisions in Aptheker and its registration requirements in Albertson. It demolished another SACA requirement in United States v. Robel. SACA § 5(a)(1)(D) prohibited Communist-action organization members from working at a defense facility, as designated by the Secretary of Defense. Communist Party member Eugene Frank Robel worked at the Todd Shipyard, which the Secretary of Defense had designated a defense facility in 1962. The Justice Department indicted Robel in 1963 for working at the facility “unlawfully and willfully”.

Warren, citing Aptheker (which had cited Scales), deemed § 5(a)(1)(D) an unconstitutional abridgment of the First Amendment’s right of association. § 5 “sweeps [so] indiscriminately across all types of association with Communist action groups, without regard to the quality or degree of their membership, that it runs afoul of the First Amendment.”²⁸

Traditionally, the Court deferred to Congress on national defense issues. "However," said Warren, "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."²⁹ The war power, too, must protect civil liberties. To Warren, the two were synonymous:

²⁷ United States v. Robel, 389 U.S. 258 (1967).

²⁸ Robel, 262.

²⁹ Ibid., 263.

Implicit in the term national defense is the notion of defending those values and ideals which set the Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of the national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of this nation worthwhile.³⁰

Warren conceded that the government had an interest in preventing sabotage and espionage in its defense facilities, but the means chosen to protect this interest violated Robel's right of association. § (5)(a)(1)(d) was overbroad and established guilt by association. It applied to both active and inactive Communists, both those who agreed and those who disagreed with the Party's aims, and to both individuals who held sensitive employment positions and those who did not hold such positions.

The government noted that Congress had considered a national defense production facilities screening program, to separate employees who were security risks from those who were not, but rejected the proposal as unfeasible. Warren did not care that Congress had considered, and rejected, this possibility:

It is not our function to consider the validity of that congressional judgment. Neither is it our function to determine whether an industrial security-screening program exhausts the possible alternatives to the statute under review. We are concerned solely with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake. The task of writing legislation that will stay within these bounds has been committed to Congress.³¹

Warren also expressly rejected the First Amendment balancing test previously employed by the Court in Communist cases. Instead of balancing interests, he decreed that Congress must narrow its restrictions to avoid conflicting with Robel's rights.

Warren saw nothing revolutionary about this analysis, but part of the Court's mission.

³⁰ Ibid., 264.

³¹ Ibid., 267.

Warren's opinion carried only three other votes. Brennan, perhaps leery of joining so radical an opinion, concurred only with the result.³² Even if Robel fell one vote short of Court opinion status, it is significant for its radical sweep and its clarity. The Court had finally brought Scales full circle. What had begun earlier in the decade as a means to sustain a Smith Act conviction now was used to provide job security to Communists employed at national defense facilities. Whether the government could feasibly distinguish "good" from "bad" Communists was irrelevant to Warren. More important, Warren rejected the balancing test. Taken to its logical conclusion, Warren's opinion seemed to indicate that the government could not ever justify an infringement of a Communist's First Amendment rights.

CONCLUSION

The Court's anti-civil libertarian coalition could not sustain itself after Frankfurter's resignation. Frankfurter's replacement, Justice Arthur Goldberg, was both an ardent civil libertarian and a judicial activist who joined with Warren, Black, Brennan and Douglas to dismantle the government's anti-subversion programs.

The Court's 1961-67 Term Communist case jurisprudence is notable in several ways. The first is the infrequency with which the Court heard Communist cases. While the Warren Court once heard seven or eight major Communist cases a term, now it heard one or two such cases. The Communist Party's decline to virtual insignificance, coupled with the disappearance of domestic subversion as a political issue, probably explain the dearth of Communist cases more than any deliberate Court policy.

³² Brennan admitted that the government might have a legitimate interest in preventing Communists from working at defense facilities. However, Congress could not delegate to the Secretary of Defense the authority to name a facility as a "defense facility" if criminal sanctions were involved. Brennan implied that with higher standards and better procedural protections, the government could probably have such a program.

The second reason is the absolute triumph of the civil libertarians. The Court did not decide in favor of the government even once after Goldberg's arrival. Whether the Court reviewed provisions of the Subversive Activities Control Act, non-Communist affidavit requirements for union officers, or state anti-subversion practices, the answer seemed foreordained: the government was violating the constitutional rights of the alleged subversive.

Finally, the new civil libertarian majority did not shrink from addressing the constitutionality of the government's anti-subversion program. Indeed, the Warren Court's Communist case jurisprudence during the 1961-67 Terms was clearer than that of the Vinson Court. Perhaps future Courts, faced with a national security crisis, would reject the significance of these 1961-67 Communist cases. After all, the 1960's Warren Court was the most liberal Court in American History, and it issued these decisions at a time when the nation worry about Communist subversion had fallen into disrepute. Regardless, the Court was very clear in drawing its bright line separating the constitutional from the unconstitutional in the government's anti-Communist programs.

SOURCES CONSULTED

- Abraham, Henry J. Justices, Presidents & Senators: A History of The U.S. Supreme Court Appointments from Washington to Clinton. Lanham: Rowman & Littlefield, 1999.
- Albright, Joseph & Marcia Kunstel. Bombshell: The Secret Story of America's Unknown Atomic Spy Conspiracy. New York: Random House, 1997.
- Belknap, Michal R. Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties. Westport: Greenwood Press, 1977.
- Broadwater, Jeff. Eisenhower and The Anti-Communist Crusade. Chapel Hill: University of North Carolina Press, 1992.
- Caute, David. The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower. New York: Simon & Schuster, 1978.
- Clark, Hunter. Justice Brennan: The Great Conciliator. New York: Birch Lane Press, 1995.
- Coben, Stanley. A. Mitchell Palmer: Politician. New York: Columbia University Press, 1963.
- Cray, Ed. Chief Justice: A Biography of Earl Warren. New York: Simon & Schuster, 1997.
- Eisler, Kim Isaac. A Justice For All: William J. Brennan, Jr., and The Decisions That Transformed America. New York: Simon & Schuster, 1993.
- Fassett, John D. New Deal Justice: The Life of Stanley Reed of Kentucky. New York: Vantage Press, 1994.
- Goodman, Walter. The Committee: The Extraordinary Career of The House Committee on Un-American Activities. New York: Farrar, Straus & Giroux, 1968.
- Hall, Kermit L. (ed.). The Oxford Companion To The Supreme Court of The United States. New York: Oxford University Press, 1992.
- Haynes, John Earl & Harvey Klehr. Venona: Decoding Soviet Espionage in America. New Haven: Yale University Press, 1999.
- Klehr, Harvey & Ronald Radosh. The Amerasia Spy Case: Prelude to McCarthyism. Chapel Hill: University of North Carolina Press, 1996.

- Kurland, Phillip. Politics, The Constitution, and The Warren Court. Chicago: University of Chicago Press, 1970.
- Kutler, Stanley. The American Inquisition: Justice and Injustice in The Cold War. New York: Hill & Wang, 1982.
- Leuchtenburg, William E. The Supreme Court Reborn: The Constitutional Revolution in The Age of Roosevelt. New York: Oxford University Press, 1995.
- Lichtman, Robert M. & Ronald D. Cohen. Deadly Farce: Harvey Matusow & The Informer System in The McCarthy Era. Urbana: University of Illinois Press, 2004.
- McCloskey, Robert G. The Modern Supreme Court. Cambridge: Harvard University Press, 1972.
- McCullough, David. Truman. New York: Simon & Schuster, 1992.
- Morgan, Ted. Reds: McCarthyism in Twentieth-Century America. New York: Random House, 2003.
- Murphy, Bruce Allen. Wild Bill: The Legend & Life of William O. Douglas, America's Most Controversial Supreme Court Justice. New York, Random House, 2003.
- Murphy, Walter. Congress & The Court: A Study in The American Political Process. Chicago: University of Chicago Press, 1962.
- Murray, Robert K. Red Scare: A Study in National Hysteria, 1919-20. Minneapolis, University of Minnesota Press, 1955.
- Newman, Roger K. Hugo Black: A Biography. New York: Pantheon Books, 1994.
- Powe, Lucas A. The Warren Court and American Politics. Cambridge: Belknap Press, 2000.
- Powers, Richard Gid. Not Without Honor: The History of American Anti-Communism. New York: Free Press, 1995.
- Preston, William. Aliens & Dissenters: Federal Suppression of Radicals, 1903-1933. Urbana: University of Illinois Press, 1963.
- Pritchett, C. Herman. Congress Versus The Supreme Court 1957-1960. Minneapolis: University of Minnesota Press, 1961.
- Pritchett, C. Herman. Civil Liberties and the Vinson Court. Chicago: University of Chicago Press, 1954.

- Romerstein, Herbert & Eric Breindel. The Venona Secrets: Exposing Soviet Espionage & America's Traitors. Washington, D.C.: Regnery Publishing, 2000.
- Rudko, Frances Howell. Truman's Court: A Study in Judicial Restraint. Westport: Greenwood Press, 1988.
- Sabin, Arthur. In Calmer Times: The Supreme Court and Red Monday. Philadelphia: University of Pennsylvania Press, 1999.
- Schrecker, Ellen. Many Are The Crimes: McCarthyism in America. Boston: Little, Brown & Co., 1998.
- Schrecker, Ellen. No Ivory Tower: McCarthyism and The Universities. New York: Oxford Press, 1986.
- Schwartz, Bernard. Super Chief: Earl Warren and His Supreme Court: A Judicial Biography. New York: New York University Press, 1983.
- Simon, James F. Independent Journey: The Life of William O. Douglas. New York: Harper & Row, 1980.
- Simon, James F. The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America. New York: Simon & Schuster, 1989.
- Steamer, Robert J. The Supreme Court in Crisis: A History of Conflict. Amherst: University of Massachusetts Press, 1971.
- Steinberg, Peter L. The Great "Red Menace": United States Prosecution of American Communists, 1947-52. Westport: Greenwood Press, 1984.
- St. Clair, James & Linda Gugin. Chief Justice Fred M. Vinson of Kentucky: A Political Biography. Lexington: University Press of Kentucky, 2002.
- St. Clair, James and Linda Gugin. Sherman Minton: New Deal Senator, Cold War Justice. Indianapolis: Indiana Historical Society, 1997.
- Tushnet, Mark (ed.). The Warren Court in Historical and Political Perspective. Charlottesville: University of Virginia Press, 1993.
- Vestal, Theodore M. The Eisenhower Court and Civil Liberties. Westport: Praeger Publishing, 2002.
- White, G. Edward. Earl Warren: A Public Life. New York: Oxford University Press, 1982.

Yarbrough, Tinsley E. John Marshall Harlan: Great Dissenter of The Warren Court. New York: Oxford University Press, 1992.

LAW JOURNALS

Black, Hugo. "The Bill of Rights." New York University Law Review 35 (April 1960).

Jackson, Robert. "Democracy Under Fire." 9 Law Society Journal 301. (Retrieved from www.robertjackson.org, the website of the Robert Jackson Center.)

PRIMARY SOURCES

William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C.

Harold H. Burton Papers, Manuscript Division, Library of Congress, Washington, D.C.

Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin

Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.
(Microfilm Version)

Robert Houghwout Jackson Papers, Manuscript Division, Library of Congress, Washington, D.C.

Earl Warren Papers, Manuscript Division, Library of Congress, Washington, D.C.

CASES CONSULTED & CITED

Abrams v. United States, 250 U.S. 616 (1919)

Adamson v. California, 332 U.S. 46 (1947)

Adler v. Board of Education of the City of New York, 342 U.S. 524

Albertson v. Attorney General, 345 Mich. 519 (1956)

Albertson v. Millard, 345 U.S. 242 (1953)

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965)

Amalgamated Meat Cutters v. National Labor Relations Board, 352 U.S. 153 (1956)

American Communications Association v. Douds, 339 U.S. 382 (1950)

Aptheker v. Secretary of State, 378 U.S. 500 (1964)

Baggett v. Bullitt, 377 U.S. 360 (1964)

Bailey v. Richardson, 341 U.S. 918 (1951)

Barenblatt v. United States, 360 U.S. 109 (1959)

Barsky v. New York Board of regents, 347 U.S. 422 (1954)

Bart v. United States, 349 U.S. 219 (1955)

Bates v. Little Rock, 361 U.S. 561 (1960)

Baumgartner v. United States, 322 U.S. 665 (1944)

Beilan v. Philadelphia Board of Education, 357 U.S. 399 (1958)

Black v. Cutter Labs, 351 U.S. 292 (1956)
Blau v. United States, 340 U.S. 159 (1951)
Blau v. United States, 340 U.S. 332 (1951)
Board of Governors of Federal Reserve System v. Agnew, 329 U.S. 441 (1947)
Bonetti v. Rogers, 356 U.S. 691 (1956)
Braden v. United States, 365 U.S. 431 (1961)
Bridges v. United States, 346 U.S. 209 (1953)
Bridges v. Wixon, 326 U.S. 135 (1945)
Brown v. Topeka Board of Education, 347 U.S. 483 (1954)

Carlson v. Landon, 342 U.S. 524 (1952)
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)
Chaunt v. United States, 364 U.S. 350 (1960)
Christoffel v. United States, 338 U.S. 84 (1948)
Cole v. Young, 351 U.S. 536 (1956)
Communist Party v. Subversive Activities Control Board, 351 U.S. 115 (1956)
Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961)
Cramp v. Board of Public Instruction of Orange County, 368 U.S. 278 (1961)

Davis v. California, 328 U.S. 582 (1946)
Dayton v. Dulles, 357 U.S. 144 (1958)
Debs v. United States, 249 U.S. 211 (1919)
DeGregory v. New Hampshire, 383 U.S. 825 (1966)
Dennis v. United States, 339 U.S. 162 (1950)
Deutsch v. United States, 367 U.S. 456 (1961)

Elfrandt v. Russell, 348 U.S. 11 (1966)
Emspak v. United States, 349 U.S. 190 (1955)
Ex Parte Merryman, 17 Fed. Cases 114 (1861)
Ex Parte Milligan, 71 U.S. 2 (1866)
Ex Parte Quirin, 317 U.S. 1 (1942)
Ex Parte Young, 209 U.S. 183 (1908)

First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 545 (1958)
Flemming v. Nestor, 363 U.S. 603 (1960)

Fox v. Washington, 236 U.S. 273 (1915)
Frazier v. United States, 335 U.S. 497 (1949)
Frohwerk v. United States, 249 U.S. 204 (1919)

Galvan v. Press, 347 U.S. 522 (1954)
Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951)
Gerende v. Board of Supervisors of Elections of Baltimore, 341 U.S. 56 (1951)
Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963)
Gitlow v. United States, 268 U.S. 652 (1925)
Greene v. McElroy, 360 U.S. 474 (1959)

Harisiades v. Shaughnessy, 342 U.S. 580 (1952)
Hartzel v. United States, 322 U.S. 680 (1944)
Heikkinen v. United States, 355 U.S. 273 (1958)
Herndon v. Lowry, 301 U.S. 242 (1937)
Hirabayashi v. United States, 320 U.S. 81 (1943)

In Re Anastaplo, 366 U.S. 82 (1961)
In Re Isserman, 345 U.S. 286 (1953)
In Re Sawyer, 360 U.S. 623 (1959)

Jay v. Boyd, 351 U.S. 345 (1956)
Jencks v. United States, 353 U.S. 657 (1957)
Jencks v. United States, 353 U.S. 657 (1957)
Jewell Ridge Coal Corporation v. United Mine Workers of America, 325 U.S. 897 (1945)
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123

Keegan v. United States, 325 U.S. 478 (1945)
Kent v. Dulles, 357 U.S. 116 (1958)
Kessler v. Strecker, 307 U.S. 22 (1939)
Keyishian v. New York Board of regents, 385 U.S. 589 (1967)
Kimm v. Rosenberg, 363 U.S. 405 (1960)
Knauff v. Shaughnessy, 338 U.S. 537 (1950)
Konigsberg v. State Bar of California, 353 U.S. 252 (1957)
Konigsberg v. State Bar of California, 366 U.S. 36 (1961)
Korematsu v. United States, 323 U.S. 214 (1944)
Kremen v. United States, 353 U.S. 346 (1957)

Lamont v. Postmaster General, 381 U.S. 301 (1965)
Leedom v. International Union of Mine, Mill & Smelter Workers, 352 U.S. 145 (1956)
Lerner v. Casey, 357 U.S. 468 (1958)

Maisenberg v. United States, 356 U.S. 670 (1958)
McPhaul v. United States, 364 U.S. 372 (1960)
Mesarosh v. United States, 352 U.S. 1 (1956)
Morford v. United States, 339 U.S. 258 (1950)

NAACP v. Alabama, 357 U.S. 499 (1958)
Nelson v. City of Los Angeles, 362 U.S. 1 (1960)
Niukkanen v. McAlexander, 362 U.S. 390 (1960)
Noto v. United States, 367 U.S. 290 (1961)
Nowak v. United States, 356 U.S. 660 (1958)

Oklahoma Operating Co. v. Love, 252 U.S. 331 (1920)
Orloff v. Willoughby, 345 U.S. 83 (1953)

Patterson v. Colorado, 205 U.S. 454 (1907)
Pennsylvania v. Nelson, 350 U.S. 497 (1956)
Peters v. Hobby, 349 U.S. 331 (1955)
Polites v. United States, 364 U.S. 426 (1960)
The Prize Cases 67 U.S. 635 (1863)

Quinn v. United States, 349 U.S. 155 (1955)

Reynolds v. Sims, 377 U.S. 533 (1964)
Rogers v. United States, 340 U.S. 367 (1951)
Rosenberg v. United States, 346 U.S. 273 (1953)
Rowoldt v. Perfetto, 335 U.S. 115 (1958)

Sacher v. New York, 347 U.S. 388 (1954)
Sacher v. United States, 356 U.S. 576 (1958)
Scales v. United States, 367 U.S. 203 (1961)
Schenck v. United States, 249 U.S. 47 (1919)
Schneiderman v. United States, 320 U.S. 118 (1943)
Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 252 (1957)
Service v. Dulles, 354 U.S. 363 (1957)
Shaughnessy v. Mezei, 345 U.S. 206 (1953)
Shelton v. Tucker, 364 U.S. 479 (1960)
Sinclair v. United States, 279 U.S. 263 (1929)
Slochower v. Board of Education of the City of New York, 350 U.S. 551 (1956)
Speiser v. Randall, 357 U.S. 513 (1958)
Stack v. Boyle, 342 U.S. 1 (1951)
Sweezy v. New Hampshire, 354 U.S. 234 (1957)

Tenney v. Brandhove, 341 U.S. 367 (1951)
Terminiello v. Chicago, 337 U.S. 1 (1949)

Ullmann v. United States, 350 U.S. 422 (1955)
United Mine Workers of America v. United States, 330 U.S. 258 (1947)
United States v. Brown, 381 U.S. 438 (1965)
United States v. Bryan, 339 U.S. 323 (1950)
United States v. Dennis, 341 U.S. 495 (1951)
United States v. Fleischman, 339 U.S. 349 (1950)
United States v. Flynn, 216 F.2d 354 (1954)
United States v. Lovett, 328 U.S. 303 (1946)
United States v. Robel, 329 U.S. 258 (1967)
United States v. Rumely, 345 U.S. 41 (1953)
United States v. Witkovich, 353 U.S. 194 (1957)
Uphaus v. Wyman, 360 U.S. 72 (1959)

Vitarelli v. Seaton, 359 U.S. 535 (1959)

Watkins v. United States, 354 U.S. 178 (1957)
Wickard v. Filburn, 317 U.S. 111 (1942)
Wieman v. Updegraff, 344 U.S. 183 (1952)
Wilkinson v. United States, 365 U.S. 399 (1961)

Yates v. United States, 354 U.S. 298 (1957)
Yellin v. United States, 374 U.S. 109 (1963)
Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952)

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