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The Enigma of the Watkins and Barenblatt Decisions: The Supreme Court, Congressional investigations and the First Amendment

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THE ENIGMA OF THE WATKINS AND BARENBLATT DECISIONS: THE SUPREME COURT, CONGRESSIONAL INVESTIGATIONS AND THE FIRST AMENDMENT

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ABSTRACT

In 1954 during the height of the investigating fervor which characterized the McCarthy era, union organizer John Watkins and college professor Lloyd Barenblatt appeared before the House Committee on Un-American Activites. Each refused to answer the Committee's questions regarding past Communist associations. Neither relied on the self-incrimination protection of the Fifth Amendment. Both were convicted of contempt of Congress, and both appealed their convictions to the Supreme Court. In 1957 the Court overturned the Watkins conviction, but in 1959 it affirmed that of Barenblatt.

Chief Justice Earl Warren's opinion in the Watkins case, one of four libertarian decisions handed down on the same day in 1957, soundly scolded the United States Congress for permitting its anti-subversion investigations to run slipshod over the private affairs and public reputations of individuals. He indicated that unless the situation was remedied, the Court might be forced to intervene to protect the First Amendment rights of congressional witnesses.

These libertarian decisions generated extreme public criticism that the Court had naively underestimated the seriousness of domestic subversion. Congressional conservatives were particularly outraged. During 1957 and 1958 a myriad of anti-Court legislative proposals were introduced in both the Senate and the House of Representatives.

Although none was ever enacted, they reflected a deep-seated suspicion that the Supreme Court intended to interfere with legislative investigatory prerogatives.

In June 1959 after two years of controversy, the Court upheld Lloyd Barenblatt's conviction. Justice John Marshall Harlan's opinion assured Congress that the Court did not intend to intervene with congressional investigations of domestic Communism. He held that First Amendment guarantees were outbalanced in these circumstances by the legislative need for information.

Contemporary observers explained the inconsistency in the two decisions as a Court retreat in the face of the strident criticism and the threat of remedial legislation. Legal scholars also ascribed the Barenblatt decision to judicial faint-heartedness and criticized as well the ambivalent state of the law which resulted from the two contradictory opinions.

In reconsidering the tension between the two decisions, this thesis examines other possible explanations for the reversal. Ultimately the Court's conservative decision in Barenblatt occurred because of the switch in position of one man, John Marshall Harlan. As a novice justice in 1957, Harlan was searching for his own judicial position on the Court. In 1959 the anti-Court uproar increased his own growing attachment to judicial restraint, pushing him solidly into the conservative wing on the Court. What had seemed judicious and fair to Harlan in 1957 became illogical and impractical by 1959.

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"They also serve, those who stand and wait." To Rick and Scott the waiting must have seemed interminable, although their support never wavered. For this and much more, I thank you.

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Our problem is to defend freedom . . . in such a fashion that we do not ourselves suffocate freedom in its own dwelling place.

---Dwight David Eisenhower
20 October 1950

I
CONGRESSIONAL LOYALTY INVESTIGATIONS: THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES

Are you now or have you ever been a member of the Communist Party?

That was the $64 question - the symbolic query of the post World War II American obsession with the threat of domestic Communism.[1] During the late 1940s and well into the 1950s the question was asked countless times in the hearing rooms of Capitol Hill, before loyalty review boards in the executive departments and by innumerable committees in state legislatures, academia and organized labor.

The unsettled environment of the postwar world led many in the United States to believe that America's failure to achieve and control the peace was directly related to the subversive efforts of domestic Communists tentacled to the Soviet Union. Particularly in the United States Congress, the $64 question represented the presumption that the most effective way to combat the danger was to inventory the conspirators and root them out of American institutions. The search for subversives, however, became an American inquisition, approaching unconscionable and potentially unconstitutional extremes. Guilt by association, the equation of dissent with disloyalty, the enshrinement of orthodoxy and punishment by exposure came to be the hallmarks of this compelling quest for internal security.

The individuals who faced the $64 question before legislative investigating committees were confronted by only unpleasant choices. If they candidly responded to questions about past Communist affiliations, they exposed their own reputations and those of former associates to public vilification. Until 1957 the Fifth Amendment was the only legally viable means by which witnesses could avoid testifying without incurring a citation for contempt of Congress. This procedure, however, left a witness vulnerable to the "Fifth Amendment Communist" designation which was tantamount in the minds of many to a confession of guilt. A number of recalcitrant witnesses did attempt unsuccessfully to defend their silence under the free speech and assembly guarantees of the First Amendment. The position was stated concisely by folksinger Pete Seeger when he appeared before the House Committee on Un-American Activities in 1955: "Look, the Fifth means they can't ask me, the First means they can't ask anybody."[2] The courts, nevertheless, did not look favorably upon this justification for silence.

In 1954 this troublesome predicament descended upon union organizer, John T. Watkins, and unemployed college professor, Lloyd Barenblatt, in separate hearings before the House Committee on Un-American Activities. Each chose to challenge the authority of the Committee to ask questions about political beliefs and affiliations, and each appealed the resultant contempt convictions to the Supreme Court. In 1957 the Court overturned the conviction of Watkins, but in 1959 it affirmed that of Barenblatt. Watkins went free; Barenblatt went to jail. Given the apparent similarities between the two cases, the

inconsistency in their resolution presents an intriguing legal and historical enigma.

The reversal of John Watkins's conviction was one of four libertarian decisions announced by the Supreme Court on "Red Monday", 17 June 1957. The other three opinions also overturned convictions of individuals who had challenged governmental anti-subversion measures.[3] Chief Justice Earl Warren's opinion in Watkins soundly scolded the United States Congress for permitting its anti-subversion investigations to run slipshod over the private affairs and public reputations of individuals. Warren broadly hinted that the House Committee on Un-American Activities was perilously close to infringing on First Amendment guarantees of unfettered political discourse. He indicated that the judiciary might be forced to intervene should Congress decline to remedy this situation.

The Red Monday decisions generated extreme reactions at both ends of the political spectrum. The liberal community found great promise in Warren's rhetoric that the Supreme Court was finally ready to end the great American Red hunt. Conservatives, however, were outraged at the Court for interfering with legislative prerogatives. During 1957 and 1958 this anger manifested itself in a myriad of anti-Court legislative proposals, the most extreme of which would have limited the Court's appellate jurisdiction.

In June 1959, after two turbulent years of controversy, the Court surprised everyone by upholding the conviction of Lloyd Barenblatt. Justice John Marshall Harlan's opinion deferentially assured Congress that the Court would not interfere with the investigation of domestic

Communism. Although Warren's Watkins opinion had implied that congressional investigations were trespassing into constitutionally prohibited areas, Harlan maintained that First Amendment guarantees in such inquiries had to yield to the greater national interest of self-preservation. Little doubt existed in 1959 that this apparent reversal of the Court's position was attributable to the vehemence of the congressional criticism and that the Court had retreated when threatened with remedial legislation.

During the next decade legal scholars arrived at much the same conclusion. Generally critical of the inconsistency in the two opinions, their more detailed analyses also attributed the Court's 1959 decision to faint-heartedness. Not a few compared the Court's action to the judicial retreat of the Hughes Court in 1937 when it was faced with hostile reaction to its anti-New Deal decisions. Daniel Berman expressed the mood well, commenting that "a Court essentially liberal in its orientation has felt obliged to pencil its views on Corrasable Bond instead of engraving them indelibly on the American Constitution."[4]

As the national pre-occupation with Communist subversion waned after the late 1950s, attention faded from the issue of First Amendment restrictions on congressional investigatory procedures. In effect, the law remains at present much as it was in 1959. The last significant case was decided in 1966, and during the period from 1959 until then, the Court alternatively utilized both the Watkins and Barenblatt precedents. With McCarthyism now a historical, rather than political or constitutional concern, the conflict between the two decisions offers an opportunity to re-examine the Supreme Court's posture toward individual

liberties during the era. The two opinions appear to present two irreconcilable approaches to the applicability of the First Amendment in congressional investigations. This thesis purports to reconsider this enigma and to clarify what the Court did and why.

Congressional investigations into subversion and Communism did not begin with the Cold War. Like anti-Communism itself, congressional loyalty investigations surfaced sporadically throughout the twentieth century. As early as 1919 the Senate initiated an inquiry into Soviet proselytization in the United States while in the same year the New York State legislature established the Lusk Committee to inquire into seditious activities. A more concentrated investigation into Communism and subversion began in 1930 with the establishment of the Fish Committee. Amidst allegations that the Soviet Amtorg Trading Corporation was disseminating Communist propaganda, Democrat Hamilton Fish of New York successfully introduced a resolution in the House of Representatives calling for an investigation of Communist Party activities in the United States. Fish, who openly favored the deportation of all Communists, summoned mainly outspoken anti-Communists to testify before his committee.[5] The haphazard hearings led to a report which proposed sweeping restrictions against Communists in the U.S. including the proscription of the Communist Party.[6]

In 1934 New York Democrat Samuel Dickstein introduced another resolution which authorized an investigation into the dissemination of Nazi propaganda in the United States. A Special Committee on

Un-American Activities was subsequently formed under the chairmanship of John McCormack of Massachusetts, with Dickstein as vice chairman. Its 1934-1935 hearings directed attention at both Nazi and Communist activities in the U.S. Under McCormack's conscientious management, the proceedings were dignified and efficient. Care was taken to present witnesses in a logical, coherent order and to avoid the introduction of extraneous names.[7] Dickstein continued to press for additional investigations into subversion and introduced yet another resolution in early 1937 to authorize an inquiry into organizations disseminating "un-American" propaganda; this resolution was voted down, largely because of Dickstein's reputation for indulging in irrational, unsupported charges of fascist infiltration.[8]

Dickstein's campaign against "un-Americanism", however, ultimately produced results in the hands of a young Texas Democrat, Martin Dies. In mid-1937 Dies introduced a resolution similar to the former Dickstein proposal, calling for the formation of a committee to investigate:

> (1) the extent, character and object 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 the Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[9]

During debate in the House, some concern was expressed over the vague wording of the resolution.10 The McCormack Committee, however, had performed competently, and Dies assured his associates that the investigation would be conducted with respect

> for the undisputed right of every citizen of the United States to express his honest convictions and enjoy freedom of speech. . . . Always we must keep in mind that in any legislative attempt to prevent un-American activities we might jeopardize fundamental rights far more important than the objectives we seek. . . .[11]

The measure, backed by the House leadership, was popular and easily gained passage.[12] Approval came in 1938 and the House Committee on Un-American Activities (HUAC) was born.

The Dies Committee, operating under its wide-ranging mandate, set a tone which would characterize HUAC for years to come. Dies's flamboyant style made good news copy, and he managed to keep his committee in the headlines for most of 1938 and 1939 by publicizing the unsupported charges of Communist and Nazi subversion that emanated from his hearings. The Committee tended to let witnesses ramble and indulge in blind accusations with little guidance from the chairman or its members. The proceedings often reflected the nativist and anti-New Deal attitudes of both the witnesses and several HUAC members. The Committee became a sounding board for right wing extremists to slur leftist individuals, direct suspicion at liberal organizations and taint the New Deal as Communist.[13] During the second half of 1938, the committee investigated, among other things, the Federal Writer's Project, the American Civil Liberties Union, Communism in labor and education and Communist espionage.

At the time surprisingly limited concern surfaced over the constitutional propriety of the Committee's inquiries into political beliefs and affiliations.[14] Dies rarely called hostile witnesses and concentrated on the testimony of non-Communists and ex-Communists.

Hence his hearings resulted in no serious legal challenges to congressional authority to investigate propaganda activities. The liberal community, convulsed in 1939 by controversy over the advisability of cooperation with Communists, offered little effective opposition. The American Civil Liberties Union initiated one inquiry into possible First Amendment violations by legislative investigations, but it became entangled in the ACLU's own internal struggle.[15] An ACLU report on the Committee issued in early 1940 contained some pointed criticism of Committee procedures but maintained that investigations into political beliefs and associations were constitutionally valid.[16]

After 1939 the Committee gradually reduced the level of its activity until it became the one-man show of Martin Dies who continued to speak for the Committee on his own accord.[17] When Martin Dies retired from the House in 1944, support for the Committee had waned, and it was generally expected that HUAC would retire with him.

During the opening session of the Seventy-Ninth Congress in 1945, the wily parliamentary tactics of anti-New Deal, anti-Semitic, anti-Black John Rankin (D-MS), resurrected HUAC from the ashes. By attaching the authorizing resolution of the Committee to a proposal calling for readoption of the rules of the preceding Congress, Rankin succeeded in turning HUAC into the first investigating committee with permanent status and providing it with a permanent spot in the history of congressional investigations. "The Committee" would go on to become one of the standard bearers of anti-Communism in the immediate post-World War II decade.

In its first five years of operation as a permanent committee, when it had almost a virtual monopoly over subversion investigations, HUAC defined the manner in which probes in the area would be conducted. After an inauspicious first two years under the chairmanship of Georgia Democrat John S. Wood, the Committee came to life in the Republican-controlled Eightieth Congress under confirmed Red-baiter, J. Parnell Thomas (R-NJ). At its organizational meeting in January of that year, its members adopted an ambitious eight-point program:

> 1. To expose and ferret out the Communists and Communist sympathizers in the Federal Government.
> 2. To spotlight the spectacle of having outright Communists controlling and dominating the most vital unions in American labor.
> 3. To institute a countereducational program against the subversive propaganda which has been hurled at the American people.
> 4. Investigation of those groups and movements which are trying to dissipate our atomic bomb knowledge for the benefit of a foreign power.
> 5. Investigation of Communist influences in Hollywood.
> 6. Investigation of Communist influences in education.
> 7. Organization of the research staff so as to furnish reference service to Members of Congress and to keep them fully informed on all subjects relating to subversive and un-American activities in the United States.
> 8. Continued accumulation of files and records to be placed at the disposal of investigative units of the Government and armed services.18

During 1947 and 1948, as relations between the United States and the Soviet Union deteriorated, the Committee did accomplish most of its objectives and, in the process, became a relentless stalker of domestic Communism. In the course of the Eightieth Congress, HUAC conducted investigations into the extent of Communist activity in the United States, considered legislation to curb the Communist Party and specifically examined Communism in labor. Two other particular

inquiries, however, effectively established HUAC's reputation and illustrated the abuses inherent in the inquiries which the Committee conducted under its wide-ranging and ill-defined authorization.

In October 1947 HUAC embarked upon a highly-publicized set of hearings into Communist infiltration in the motion picture industry. It was evident from the start that the Committee, in particular Thomas and Rankin, were anxious to legitimize pre-conceived opinions that Hollywood was overrun with Communist infiltrators who had achieved marked success in using films to disseminate Communist propaganda.[19] Thomas, zealously anti-New Deal, was eager to trace the pressure for the production of pro-Soviet films back to the Roosevelt White House.[20]

The Committee's approach to the investigation unfolded in two steps. During the first week, "friendly" witnesses were summoned to corroborate the extent of propaganda in motion pictures. Selected to maximize opportunities for publicity, these cooperative witnesses were well-known figures in the industry and included such luminaries as producers Jack Warner, Louis B. Mayer and Walt Disney as well as actors Robert Taylor, Gary Cooper and Adolphe Menjou. Following the pattern set by Martin Dies, the Committee endeavored to elicit confirmation from them that Hollywood was riddled with Communists who peddled their subversive propaganda through the movies. These witnesses were permitted wide latitude in their testimony and allowed to ramble, indulging in expansive speculation and the irresponsible, undocumented introduction of names of alleged Communists.[21] Little convincing evidence surfaced to support HUAC's contentions. The hearings bordered on the ludicrous as Ayn Rand insinuated that the film, Song of Russia was Communist

propaganda because it showed smiling Russian schoolchildren. Gary Cooper testified that he did not favor Communism because, "It isn't on the level."[22]

The second stage of the hearings was devoted to testimony from "hostile" witnesses, i.e. those whom the Committee alleged were Communist infiltrators. Although Chairman Thomas claimed he had the names of seventy-nine confirmed Party adherents, generally drawn from the ranks of screenwriters, only eleven ultimately testified.[23] The calling of actual Communists to testify represented a new strategy in loyalty investigations. It was here that the $64 question was born. Although Dies had advocated exposure of Communism, HUAC now began to direct its efforts to the exposure of Communists. Consequently the Committee's questions became much more individually specific, requiring disclosure of personal beliefs and opinions.

Ten of these witnesses quite accurately reflected their designation as "unfriendly." Contentiously refusing to answer any questions concerning their Communist activities, they argued that First Amendment free speech guarantees prohibited the Committee from inquiring into political affiliations.[24] Although the demeanor of the Hollywood Ten was extremely obstreporous, HUAC's treatment of them illustrated how abusive Committee interrogation could become. The Committee was capricious in allowing the presentation of prepared statements; it denied requests to cross-examine or refute the testimony of friendly witnesses; and it attempted to question witness attorneys regarding advice they had provided their clients.

On November 24, 1947 Congress cited the Ten for contempt of Congress. Their subsequent appeals were denied certiorari by the Supreme Court, and each spent up to a year in prison. Two days after the contempt citations were issued, motion picture executives meeting in New York City voted to suspend the Ten and to deny employment to known subversives.[25] As the Hollywood blacklist was born, it seemed apparent that HUAC had made a major advance toward achieving its new objective of eliminating current and former Communists from the motion picture industry.

The Hollywood investigation provided little information regarding Communist activity. In spite of the exaggerated allegations with which Thomas had opened the hearings, the investigation only established that some Communists were, or had been, active in the business. In turning its focus to individuals, HUAC missed the opportunity to explore the extent of the Communist problem. Its altered objective became to expose and punish rather than to frame legislation. HUAC, in fact, never issued a formal report of its findings.[26] Journalist Walter Goodman's scathing indictment echoes much of the condemnation which HUAC incurred over the hearings:

> The philosophy that flowered under the klieg lights of 1947 would be an inspiration for much of the Committee's later work: a philosophy that held not only that Communism was a subversive doctrine, not only that Communists in sensitive positions were threats to the nation, but that the presence in this land of every individual Communist and fellow traveler and former Communist who would not purge himself was intolerable; that the just fate of every such creature was to be exposed in his community, routed from his job, and driven into exile.[27]

The constitutional significance of the hearings, however, was generally overlooked. For the first time a congressional investigating committee was intruding in First Amendment territory by requiring the disclosure of personal beliefs from specific individuals. The deeper question was whether free speech guarantees applied to holders of unorthodox - even subversive opinions. The Hollywood Ten's tempestuous and ill-conceived performance undoubtedly confirmed the prevailing notion that when Communism was involved, the $64 question was valid. As members of a conspiracy, each was individually and collectively a participant; the question of Communist membership was pertinent to the determination of the extent of the threat. As late as 1958 congressional scholar Carl Beck summarized the general public perception:

> . . . the Committee can be criticized harshly for its behavior. . . But, if it be accepted that Congress has the right, if not the duty, to find out all it can about the activities of those who would change our constitutional system of government by unconstitutional means and that freedom of speech must often bow to the public interest, then there is no doubt that a duly constituted committee of Congress may cite individuals for contempt who refuse to answer questions that are pertinent to the inquiry.[28]

Less than a year later HUAC was back in the headlines with another well-publicized investigation. Beginning in July 1948 the Committee opened hearings into Soviet espionage. During the next six months its attention, and that of the nation, became riveted on the unfolding spy drama of Whittaker Chambers and Alger Hiss. Chambers, a former Time-Life editor, admitted to the Committee that he had passed government documents to the Soviets during the 1930s. He alleged that

the source of his information had been State Department official Alger Hiss. Hiss, an urbane, intellectual New Dealer, steadfastly maintained his innocence in a number of appearances before HUAC. The hearings climaxed in December 1948 when Chambers produced incriminating microfilms of State Department documents in Hiss's handwriting from a pumpkin on his Maryland farm.

The Chambers-Hiss hearings were more restrained and less argumentative than the Hollywood debacle but nevertheless attracted widespread public attention. This search for publicity again brought the Committee to concentrate on individuals rather than problems. HUAC members, who liked to consider themselves a national grand jury, single-mindedly concentrated on the exposure and punishment of one person.[29] The extreme personalization of the investigation, which often appeared to be dangerously close to usurping executive and judicial functions, illustrated another constitutional criticism of Committee activities: the lack of a valid legislative purpose.

Modern judicial review of legislative investigations, although giving broad authority to Congress to probe criminal conduct, has generally required inquiries to have some legitimate legislative objective. In its first opinion on the constitutionality of legislative investigations in 1881, the Supreme Court stipulated that Congress had no "general power of inquiry into the private affairs of citizens."[30] In that decision, which invalidated an investigation because it intruded on judicial authority, the Court required that investigations adhere to a specific legislative purpose.[31] During the twentieth century the courts considerably broadened the permissible limits of legislative

inquiry. In McGrain v. Daugherty (1927) and Sinclair v. United States (1929) the Supreme Court adopted a presumptive doctrine which held that if the subject matter under investigation was one on which Congress could legislate, the Court would presume a legitimate legislative motive.[32] Nevertheless, the increasing personalized focus of HUAC's investigations during the late 1940s, and especially its emphasis on exposure and punishment, engendered concern that the Committee had overstepped constitutional limits.[33]

The subjects of investigation during in the Eighty-First Congress (1949-1950) substantiated much of this criticism. Although the replacement of Chairman Thomas with John Wood resulted in fairer, more restrained proceedings, hearings still tended to focus on specific individuals. During that Congress inquiries targeted persons allegedly involved in passing atomic secrets to the Soviets at Columbia University and the Radiation Laboratory at the University of California. In April 1950 HUAC initiated a series of hearings centered around William Remington who had been named, along with Whittaker Chambers, as a source of restricted information by the "blonde spy queen", Elizabeth Bentley.[34] In August of the same year, the Committee focused on Lee Pressman, who had also been named by Whittaker Chambers. He was subjected to lengthy questioning concerning his Communist Party membership and possible association with Alger Hiss. In September, Max Lowenthal, author of a book critical of the FBI, was grilled by the Committee in a transparent attempt to discredit him.[35]

The personalized focus of HUAC's investigations manifested itself in the Committee's absorption with the accumulation of names of suspected

subversives, both as potential witnesses and as food for HUAC's extensive files of suspect individuals and organizations.[36] Two different approaches were used by the Committee in obtaining the names it needed. Because HUAC did not employ any standard procedure in the questioning of witnesses, it was those on the stand who set the tone for a hearing. If the witness was cooperative, and particularly if he was an ex-Communist, he was permitted to ramble at will, mentioning at his own discretion the names of those who might be "un-American."[37] Such was the practice involved in the first week of the Hollywood hearings, although after 1950 the Committee did regularize its questioning procedures to some extent.[38] The absence of any formal procedure or inclination to allow individuals the privilege of replying to adverse testimony permitted inaccuracies and half-truths to intrude unchallenged in HUAC proceedings.[39]

Hostile witnesses, however, were the most heavily burdened with the responsibility for providing names. The initial inquiry regarding current or past membership in the Communist Party was inevitably followed by requests for confirmation of the membership of other Communist associates. This search for names became so obsessive that eventually the standard by which HUAC evaluated the patriotism or rehabilitation of its witnesses was their willingness to speak about others. Nowhere was the preoccupation with names more evident than when HUAC returned to a second investigation of Hollywood in 1951. In contrast to the 1947 hearings, the Committee eschewed focusing on film content and concentrated instead on the identification of ex-Communists and fellow travelers. A number of performers answered willingly about

their former affiliation with the Communist Party or Communist-sponsored causes but balked at revealing the names of former associates, most of whom were already known to HUAC. To do so would have exposed their friends both to public denunciation as well as to the ever-broadening Hollywood blacklist. The only legally viable defense was to take refuge in the self-incrimination protection of the Fifth Amendment, which by this time generally went unchallenged by the Committee.[40] A number of witnesses attempted to reason with the HUAC, offering to forego a Fifth Amendment plea if the Committee would not press for information on other individuals. Actress Lillian Hellman, in a letter to HUAC before her appearance, eloquently pleaded the case for the "diminished Fifth":

> I am not willing, now or in the future, to bring bad trouble to people who, in my past associations with them, were completely innocent of any talk or any action that was disloyal or subversive. I do not like subversion or disloyalty in any form and if I had ever seen any I would have considered it my duty to have reported it to the proper authorities. But to hurt innocent people whom I knew many years ago in order to save myself is, to me, inhuman and indecent and dishonorable. I cannot and will not cut my conscience to fit this year's fashions. . . .[41]

In the eyes of the Committee, however, only one redemptive alternative was available to witnesses: informing. In the words of one commentator, the hearings became reduced to "degradation ceremonies."[42] The only true measure of the rehabilitation of a former "subversive" was his willingness to name names. If a witness stood behind the Fifth Amendment, he was probably still protecting old comrades; if he told all, he had obviously broken with his disloyal past. Thus, those who testified had only a Hobson's choice: destroy the careers of friends or destroy their own. As with earlier investigations, the purpose of

HUAC's activities in Hollywood was not to collect information on the extent of the Communist threat or to define the problem and offer solutions. The intent had been, and continued to be, exposure.[43]

The opening of the Eighty-Third Congress in January 1953 returned the Republicans to the majority and brought former FBI agent Harold Velde to the chairmanship of the House Committee on Un-American Activities. The country was to be besieged in the next two years by a nationwide investigating furor emanating from both Houses of Congress. Senator Joseph McCarthy (R-WI), having declared war on the liberal establishment, was on the rampage in the Senate. His Permanent Investigations Subcommittee of the Committee on Government Operations waged assaults on the State Department, Government Printing Office, Voice of America, Harvard University and the Pentagon. He would meet his nemesis, the United States Army in 1954, but during the first session of the Eighty-Third Congress, he and his staff successfully attracted wide publicity as they badgered witnesses, broadcast unsubstantiated allegations and reduced congressional hearings to humiliating public trials.

The Senate's Internal Security Subcommittee (SISS), the most restrained of the investigating committees, had been formed in 1951 to profit from the publicity surrounding HUAC. In January 1953 its chairmanship was assumed by ultra-conservative William Jenner (R-IN). Although the SISS focused much attention on the "failure" of U.S. Far Eastern policy, it investigated teachers, unions, youth organizations and the media, as well.

During 1953, HUAC, too, took off in new directions and conducted a large number of hearings. Again, the purpose of the investigations seemed to be the acquisition and disclosure of names.[44] The Committee turned its attention to religion and education, the latter also drawing the interest of McCarthy and the SISS. The HUAC attack on religion was personally centered on the Methodist Bishop for the District of Columbia, G. Bromley Oxnan, an official of the World Council of Churches and also a Committee critic. As a practioner of the social gospel, Oxnan was labeled as being connected with a large number of Communist causes.[45]

The investigation into education was also controversial, intertwined with questions of academic freedom and the professional competence of Communists and Fifth Amendment professors. This foray into colleges and universities graphically illustrated the personal perils of appearing before HUAC. Anti-Communists maintained that Communist professors, obligated by Party discipline to inculcate their subversive convictions in their students, were not unbiased pursuers of truth.[46] Although HUAC did avoid venturing into the area of curricula and course content, its focus on ex-Communist and fellow traveling teachers created pressure on the academic community with regard to the competence of its members. The academic community, in turn, succumbed to the currents of McCarthyism and gave little support to professors who chose not to cooperate with investigating committees. During HUAC's first set of hearings in 1953, Harvard physics professor, Wendell Furry, took refuge in the Fifth Amendment and was subsequently cited by the Harvard Corporation for "misconduct." Philosophy professor William Parry from

the University of Buffalo pleaded the self-incrimination privilege after the Committee turned down his diminished Fifth offer; he was placed on probation for three years by the University. Even more disturbing was the case of Barrows Dunham, the popular and tenured chairman of Temple University's philosophy department who was discharged for taking the Fifth before HUAC. Although Dunham had cooperated fully with the University's own investigating committee, University trustees cited him for deliberate "misuse of the constitutional privilege against self-incrimination, as a means of evading the duty of giving his testimony."[47]

By the end of 1953, HUAC's conduct had raised a number of serious constitutional questions. Its most grevious shortcoming seemed to be the lack of a valid legislative purpose. The Committee, by the personalization of its investigations and through a voracious appetite for names, had become a vehicle of trial and punishment. Far from fulfilling any legitimate legislative function, the Committee was trespassing into both the executive and judicial arenas. HUAC seemed all too often anxious to present its own "indictments" in such a way as to insure conviction by the public jury. Earl Latham refers to this method of social manipulation as "prescriptive publicity." As illustration he quotes from a HUAC report of 27 August 1948 which declared that the Committee considered its function

> to permit American public opinion . . . an opportunity to render a continuing verdict on all of its public officials and to evaluate the merit of many in private life who either openly associate with and assist disloyal groups or covertly cooperate as members or fellow travelers of such organizations.[48]

In spite of the adversarial nature of its proceedings, HUAC provided witnesses few of the legal protections available in judicial hearings. Witnesses were only grudgingly allowed the advice of counsel; no provisions allowed for a witness to cross-examine his accusers; no guarantees were available for the right to reply to adverse testimony; and Fifth Amendment pleas often generated disparaging responses from Committee members and staff. Chairman Parnell Thomas, in an ill-advised statement during the 1948 espionage hearings remarked that, "The rights you have are the rights given you by this committee. We will determine what rights you have and what rights you have not got before the committee."[49] This lack of legal protection insured that the verdict rendered by American public opinion would echo the Committee's own.

CHAPTER I
NOTES

[1]The term, "$64 question," had its origins in a radio quiz program of the same name and was frequently used during the 1940s to denote any crucial consideration. The term was first applied to "Are you now or have you ever been a member of the Communist Party?" by J. Parnell Thomas during his tenure as chairman of the House Committee on Un-American Activities. Thereafter it became the commonplace shorthand for that question, signifying its importance to congressional investigators. (Bernard F. Dick, Radical Innocence: A Critical Study of the Hollywood Ten (Lexington, KY: University of Kentucky Press, 1989), 1.

[2]Quoted in Victor S. Navasky, Naming Names (New York: Penguin Books, 1980), 421,

[3]The other decisions included: Yates v. United States 355 U.S. which overturned 14 Smith Act convictions, Service v. Dulles 354 U.S. 363 which voided a Federal Loyalty-Security program dismissal and Sweezy v. New Hampshire which overturned a state contempt conviction.

[4]Daniel M. Berman, "Constitutional Issues and the Warren Court," American Political Science Review 53 (June 1959): 502.

[5] Earl Latham, The Communist Controversy in Washington: From the New Deal to McCarthy (Cambridge: Harvard University Press, 1966), 29. The one exception in Fish's string of anti-Communist witnesses was William Z. Foster, head of the Communist Party in the United States.

[6]Latham, 34 and Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities (New York: Farrar, Straus and Giroux, 1968), 9.

[7]Latham, 37 and Telford Taylor, Grand Inquest: The Story of Congressional Investigations (New York: Simon and Schuster, 1955), 73.

[8]Goodman, 15-16.

[9]Congress, House, 75th Cong., 3d sess., H.R. 282, Congressional Record vol. 83, pt. 6, (10 May 1938), 6562.

[10]Congress, House, 75th Cong., 3d sess., Congressional Record (26 May 1938), vol. 83, pt. 7, 7579.

[11]Ibid., 7569, 7570.

[12]Richard M. Fried, Nightmare in Red: The McCarthy Era in Perspective (New York: Oxford University Press, 1990), 47.

[13]Taylor, 73; Fried, 48; Edward V. Schneier, "The Politics of Anti-Communism: A Study of the House Committee on Un-American Activities and Its Role in the Political Process," (Ph.D. diss., Claremont Graduate School, 1963), 81-82; Jerold Simmons, Operation Abolition: The Campaign to Abolish the House Un-American Activities Committee, 1938-1975 (New York: Garland Publishing, Inc., 1986), 34.

[14]Simmons, 25.

[15]Samuel Walker, In Defense of American Liberties: A History of the ACLU (New York: Oxford University Press, 1990), 121.

[16]Ibid., 130.

[17]August Raymond Ogden, The Dies Committee: A Study of the Special House Committee for the Investigation of Un-American Activities (Washington, D.C.: The Catholic University of America Press, 1945), 245. Illustrative of the strategy which Dies adopted was a campaign against consumer groups he initiated in late 1938. According to the account of Walter Goodman (pp. 83-85), Dies distributed to the press on December 10 of that year a report authored by reformed ex-Communist, J.B. Matthews, which categorized all consumers groups, with the exception of Consumers Research, as "Communist transmission belts." (Matthews had formerly been that organization's vice president and his wife was still employed there.) Matthews's report alleged that many consumer leaders were Communists and were engaged in a plot "to sabotage and destroy advertising, and through its destruction to undermine and help destroy the capitalist system of free enterprise." Although Communists did enjoy some influence in consumers organizations, most notably the League of Woman Shoppers, the report was "riddled with inaccuracies, straining with incriminating clues, and relying heavily on mere assumption." (Goodman, 84) Further, the report was issued without the knowledge of the other committee members nor with any support of public hearings.

[18]Congress, House, Committee on Un-American Activities, Report of the Committee on Un-American Activities to the House of Representatives, Eightieth Congress, 31 December 1948, 2-3, quoted in Robert K. Carr, The House Committee on Un-American Activities, 1945-1950 (Ithaca, New York: Cornell University Press, 1952), 38.

[19]Carr, 57.

[20]Ibid., 58; Taylor, 77; David Caute, The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower (New York: Simon and Schuster, 1978), 491.

[21]Goodman, 220; Navasky, 79-80.

[22]Congress, House, Committee on Un-American Activities, Hearings Regarding the Communist Infiltration of the Motion Picture Industry, 80th Cong., 1st Sess., 20-24, 27-30 October 1947, 90, 224.

[23]Carr, 69; Caute, 492. The Federal Bureau of Investigation was already heavily involved in supporting HUAC activities and was the probable source of Thomas's list of names. See Kenneth O'Reilly, Hoover and the Un-Americans: The FBI, HUAC and the Red Menace (Philadelphia: Temple University Press, 1983) 92.

[24]The ten recalcitrant witnesses included screenwriters Alvah Bessie, Lester Cole, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Sam Ornitz, Dalton Trumbo, directors Herbert Biberman and Edward Dmytryk and writer-producer Robert Adrian Scott. All were current or former Communist members or sympathizers. The Ten and their lawyers consciously decided not to utilize the Fifth Amendment, which had proven to be generally successful as a means to avoid testifying. They instead collectively mapped out the First Amendment strategy, confident that the courts and public opinion would support their constitutional objection to the Committee's intrusion into free speech guarantees. See Navasky, 82; Fried, 77; Simmons, 55.

[25] Fried, 77-78; Caute, 499.

[26]Carr, 76-78.

[27]Goodman, 236-237.

[28]Carl Beck, Contempt of Congress: A Study of the Prosecutions Intitiated by the Committee on Un-American Activities, 1945-1957, (New Orleans: Hauser Press, 1959), 61.

[29]Congress, House, Committee on Un-American Activities, Hearings Regarding Communist Espionage in the United States Government, 80th Cong., 2nd. Sess., July, August, September, 1948, 537; Carr, 129.

[30]Kilbourn v. Thompson 103 U.S. 168 (1881), 190. In 1876 the House had initiated an investigation into the failure of the Jay Cooke banking firm in which the Secretary of the Navy had deposited public funds. Cooke, in turn, had invested in a "real estate pool", managed by Hallett Kilbourn. Kilbourn was cited for contempt for refusing to answer questions before a House committee organized to investigate the Cooke failure. The Supreme Court upheld Kilbourn's refusal to respond.

[31]M. Nelson McGeary, "Congressional Investigations: Historical Development," University of Chicago Law Review 18 (Spring 1951): 429.

[32]McGrain v. Daugherty 273 U.S. 135 (1927); Sinclair v. United States 279 U.S. 263. Both cases concerned investigations into the Harding Administration scandals.

[33]See for example, Taylor, 89-135 and Carr, 424-426.

[34]Remington was ultimately convicted of perjury.

[35]Carr, 202.

[36]Robert Carr indicates that by 1952 perhaps one million individuals had been catalogued.

[37]Schneier, 92 and Carr, 290.

[38]Schneier, 94.

[39]Carr, 316.

[40]In fact, most critics felt that ultimately the Committee was equally as anxious for a Fifth Amendment response as it was for full and open disclosure. The large number of "Fifth Amendment Communists" who appeared before HUAC gave credence to the Committee's allegation of a society rife with hidden subversives. For a fuller discussion of the controversy over Fifth Amendment responses, see Chapter II, 28-32.

[41]Quoted in Goodman , 321-322.

[42] Navasky, 319.

[43]Ibid., and Goodman, 325. An interesting 1976 study, based on a statistical analysis of HUAC questions, concluded that "The principle end product of the Committee's labors was the placing into the public record of the names of some 16,700 political 'misbehavers'." Hans Zeisel and Rose Stamler, "The Evidence: A Content Analysis of the HUAC Record, "Harvard Civil Rights/Civil Liberties Review 11 (Spring 1976): 297.

[44]Goodman, 341.

[45]Interestingly, Oxnan had been cooperating with the FBI since 1947 in keeping a watchful eye on the radical Methodist clergy and controlling criticism of the Bureau. The FBI, however, had also maintained its own surveillance on Oxnan, who had been a fellow traveller in the 1930's. It has been suggested that the FBI arranged Oxnan's appearance before HUAC, which the Bishop requested to answer Committee charges. O'Reilly, 83-85.

[46]The most outspoken of these critics was philospher and former Marxist Sidney Hook. In particular, see Sidney Hook, "What Shall We Do About Communist Teachers?" Saturday Evening Post 222 (10 September 1949), 33, 164-166.

[47]Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (New York: Oxford University Press, 1986), 211.

[48]Latham, 381.

[49]HUAC, Espionage Hearings, 1310.

II
CONSTITUTIONAL PROTEST: JOHN WATKINS AND LLOYD BARENBLATT

The excesses of the great Red hunt finally came under fire during the first half of 1954. In January McCarthy had taken aim at a formidable adversary, the United States Army, with accusations concerning the promotion of a "Fifth Amendment" Army dentist. The Senator stretched the limits of good taste and good politics in characterizing decorated D-Day hero, Major General Ralph Zwicker, as unfit to wear his uniform. The Army fought back with insinuations that McCarthy's staff had attempted to buy favorable treatment for committee investigator, Army private, G. David Shine. In March, television journalist, Edward R. Murrow, broadcast a one-half hour "See It Now" program which was composed of news clips clearly depicting McCarthy's outrageous, often vicious behavior. Finally, on April 22 in the Senate Caucus Room the imbroglio reached its zenith with the commencement of the nationally- televised Army-McCarthy hearings which would, during the next six weeks, show the Senator at his worst.

One week later on the other side of Capitol Hill, a quieter battle against the excesses of congressional investigations began to unfold in the Caucus Room of the Old House Office Building. On 29 April 1954, the House Committee on Un-American Activities was in the midst of an investigation into Communist activity in the Chicago area. At 11:00 AM that morning, John T. Watkins, an official with the United Auto Workers

(UAW) was summoned to testify about his Communist activities during the 1940s when he had served as an organizer for the Farm Equipment-CIO Union. Watkins was a cooperative witness and freely responded to questions about his collaboration with Communist officials. He admitted that

> . . . from approximately 1942 to 1947 I cooperated with the Communist Party and participated in Communist activities to such a degree that some persons may honestly believe that I was a member of the Party.
>
> I have made contributions upon occasion to Communist causes. I have signed petitions for Communist causes. I attended caucuses at which Communist Party officials were present. . . . I never carried a Communist Party membership card.[1]

In short, Watkins openly acknowledged that he had been a fellow traveler and candidly responded to the Committee's follow-up questions on his own activities.

Towards the end of the session, after a number of denials by Watkins that he had ever collected dues for the Communist Party, Robert L. Kunzig, Committee Counsel, initiated the inevitable line of questioning regarding former associates. Watkins openly identified named individuals until Kunzig asked about the Communist affiliations of those associates. At this point Watkins paused to consult with his attorney and then read the following statement:

> I would like to get one thing perfectly clear, Mr. Chairman. I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past.

> I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.
>
> I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates.[2]

After being directed to answer by Chairman Velde, Watkins restated the above objection when asked about a number of other individuals. The session was concluded very shortly thereafter.

Watkins's principled stance was probably born out of desperation. He was confronted, as so many witnesses before him, with a disagreeable ethical dilemma. He was willing to be a cooperative witness and generally accepted the authority of Congress to inquire into the Communist threat.[3] In that regard he was amenable to discussing his former activities as a Communist sympathizer.[4] He did not, however, wish to inform on past associates whom he knew to be no longer involved in Communism. Watkins was simply not willing to name names.

At the time the legally viable choices available to Watkins in pursuing this course of action were quite limited and generally unpleasant. The only proven successful avenue for avoiding testimony before a congressional committee was under the guarantee against self-incrimination of the Fifth Amendment.[5] The use of the plea by recalcitrant HUAC witnesses had increased slowly since 1945. The Committee, in fact, issued no contempt citations for use of the

privilege prior to 1950.[6] From August of 1950 through 1953, however, HUAC did challenge the procedure, issuing 58 citations. At the time of Watkins's appearance, all but three of these had been acquitted in the federal courts, generally under judicial precedents which broadly interpreted the scope of Fifth Amendment protection.[7]

In the 1950 decision, Blau v. United States the Supreme Court had made the first judicial determination that the privilege against self-incrimination was available to witnesses before congressional investigating committees who refused to acknowledge present or past membership in the Communist Party.[8] Protection of the Fifth Amendment was further expanded in 1951 in Hoffman v. United States when a witness before a grand jury refused to respond to questions about his occupation. The witness's contempt citation had been affirmed by the Third Circuit Court of Appeals on the grounds that the defendant had not provided any information as to why the answer to a seemingly innocuous question would be incriminating. The Supreme Court reversed the conviction, defining the reach of the Fifth Amendment in very expansive terms:

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[9]

The Court explained that the answer to the question concerning occupation might have indicated that the witness was engaged in illegal

activities. Such reasoning illustrated what Justice Hugo Black had expressed in the majority opinion in Blau:

> Whether such admission [of membership in the Communist Party] would support a conviction under a criminal statute is immaterial. Answers to the questions asked by the grand jury would have furnished a link in the chain of evidence.[10]

One very critical crack existed in this armor of protection, however. A witness could feel safe in refusing to respond to all questions posed by an investigating committee, but when he answered one, his Fifth Amendment protection could dissolve. In 1951, the Supreme Court had established a "doctrine of waiver" in Rogers v. United States. The opinion in this case held that once a witness had made some admission regarding Communist activity, further answers could not incriminate him further, and he had essentially waived his Fifth Amendment privilege.[11] The waiver doctrine created a legal quandary for witnesses with regard to which responses would open Pandora's box.[12] More importantly for John Watkins, the Rogers waiver doctrine implied that one could not talk freely about one's personal activities but claim the Fifth Amendment privilege to avoid talking about others.[13]

The broad protection that the courts afforded to witnesses under the Fifth Amendment promoted a virtual explosion in its use. During the Eighty-Third Congress (1953-1954), HUAC conducted more inquiries than any preceding investigating committee every had. The Committee heard from 650 witnesses, 350 of whom refused to testify under Fifth Amendment guarantees.[14] The use of the Fifth Amendment in such a routine fashion certainly increased public suspicion that HUAC's allegations of

subversion probably had some basis in fact. It also set off a wave of extra-legal consequences for those who pleaded the privilege.

Although a number of witnesses apparently used the Fifth Amendment merely as a means to avoid testimony and with little regard for its basis as a guarantee against self-incrimination, public perception of guilt dogged Fifth Amendment witnesses.[15] Senator McCarthy was exceptionally adept at promoting the inference of guilt as illustrated by remarks made to author Dashiell Hammett in 1953:

> Well, now, you have told us that you will not tell us whether you are a member of the Communist Party today or not, on the ground that if you told us the answer might incriminate you. That is normally taken by this committee and the country as a whole to mean that you are a member of the Party, because if you were not you would simply say, "No," and it would not incriminate you. You see the only reason that you have the right to refuse to answer is if you feel a truthful answer would incriminate you. An answer that you were not a Communist, if you were not a Communist could not incriminate you. Therefore, you should know considerable about the Communist movement, I assume.[16]

Many who pleaded the Fifth Amendment were subjected to social ostracism and loss of employment, consequences from which witnesses were not constitutionally protected.[17] Various professional organizations emphasized that Fifth Amendment responses were not acceptable for their members. The American Bar Association declared in 1953 that:

> . . . when a citizen who is an attorney, refuses to testify on the ground that his testimony might tend to incriminate him of undisclosed crimes, then upon his sworn statement, which we must assume is honestly and sincerely asserted, his personal constitutional right must be honored, but in asserting this right he himself has thereby disclosed disqualification for the practice of law.[18]

In the same year the Association of American Universities issued a statement on faculty responsibilities which stressed the duty of professors to testify fully. "The Rights and Responsibilities of Universities and Their Faculties" declared that "invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to re-examine his qualification for membership in its society."[19] In fact, college faculty members were particularly vulnerable to the loss of employment and/or tenure for refusing to cooperate with congressional committees.[20]

John Watkins must have perceived some pressure within his own union not to resort to the Fifth Amendment. Just three days after his testimony, his current employer, the United Auto Workers, issued a policy statement discouraging use of the plea by its members:

> The price of freedom requires that people who are called upon to appear before this type of Congressional committee summon the courage to meet this challenge without use of the Fifth Amendment, in order to avoid giving the Communists a protective umbrella and to deprive the reckless headline hunters of an opportunity to make personal political capital of such action. . . .[21]

Although Watkins's position was apparently based to a great extent on principle, it would also appear that he was subject to pressures which made a Fifth Amendment plea an unsuitable and unattractive choice for him.[22]

John T. Watkins was not the only individual during the spring of 1954 to lodge a constitutional protest against HUAC's interrogations. In June he was joined by an unemployed college professor, Lloyd Barenblatt, who likewise abjured use of the Fifth Amendment in refusing to testify before the Committee.

Barenblatt had been an idealistic graduate student in psychology at the University of Michigan from 1947 to 1950. While at Michigan, he was impressed with Communist resistance to fascism and joined the Party in 1948. In general, his Communist activity involved participation in the Haldane Club, a Marxist discussion group. Barenblatt explained:

> I also saw that the only real resistance to Fascist ideas was the stalwartness among the Communists. They also had the record of <u>being</u> the resistance in Europe during the war. So I decided to join the Communist party. Joining the party was very much like, I imagine, joining the Masons. . . . I could see that the tactic of the Communist party at that time was to put members into what they called mass organizations . . . to the liberal and civil-rights groups and unions; to have their people participate in those organizations. The Communists were the ones who were carrying things forward! They really had political courage and principle. They were the backbone of what I saw as the resistance to the ominous reaction taking place in our country at the time. They were the people that seemed to have the principles, the fortitude, and the courage to dedicate themselves and work in groups like the NAACP and the American Veterans Committee.[23]

Barenblatt left Michigan in 1950, his Ph.D. degree still uncompleted, and assumed a position as instructor in psychology at Sarah Lawrence College in Poughkeepsie, New York. Disillusioned with the Party's tactics during the Smith Act trials, he dissolved his association with Communism in 1952 and turned his attentions to his teaching career. During the spring of 1954 Sarah Lawrence declined to

renew his teaching contract, and Lloyd Barenblatt received a subpoena to appear before HUAC.[24]

HUAC had begun its investigation into education in 1953, joining the other two investigating committees who had discovered the fertile opportunities available in liberal, intellectual academia. McCarthy, as usual, was vengefully pursuing those at the prestigious Eastern universities "who had been born with silver spoons in their mouths."[25] According to HUAC Chairman Harold Velde, however, the other two committees, SISS and HUAC, had "coordinated" their efforts. SISS was looking for Communist activity at the institutional level while HUAC concentrated on individuals.[26]

In 1953 HUAC initiated hearings into Communist activity at the University of Michigan, during which a former Michigan graduate student, Francis J. Crowley, declined to answer questions about past political affiliations on grounds of "conscience" and "courage."[27] Crowley had second thoughts, however, after he was cited for contempt. During the continuation of the investigation in 1954 he purged himself, returning to HUAC as a very cooperative witness on 28 June.[28] Crowley freely identified to the Committee his former colleagues in the Communist Party at the University of Michigan including a former roommate, Lloyd Barenblatt, who sat behind Crowley in the hearing room.[29]

Barenblatt testified before the Committee that same day. Unlike John Watkins, Lloyd Barenblatt was uncooperative and testy. He did answer Kunzig's opening questions concerning name, address, employment and education. When he was asked to admit to being a member of the

Haldane Club, however, he attempted to read a written objection to the Committee's questions. At this point, Representative Clyde Doyle (D-CA) lectured the recalcitrant witness in language which reflected succinctly the Committee's attitude on the redemptive value of candor:

> . . . . wouldn't it be a magnificent thing if you could take the position that if you ever were a member of the Communist Party, that you say so frankly and clean up and get out of that embarrassing situation and then start from there? Wouldn't that do you and the country a lot more good today---[30]

Barenblatt attempted several times to read his statement of objections, but Chairman Velde indicated on each occasion that the witness had not submitted his statement prior to the hearing, as required. Velde then addressed Barenblatt:

> Now, let me ask you one question. If you answer in the affirmative or in the negative, either one, then I believe that the committee would be very willing to let you read this statement.
> Are you now a member of the Communist Party?[31]

This, of course, was the very question to which Barenblatt had objections. He refused to answer; Velde again refused to allow him to read his statement of objections. Velde then asked if the witness's statement of objections was based on the Fifth Amendment. Barenblatt replied:

> I do not invoke the fifth amendment in declining to answer. I decline to answer on the grounds stated in my objections as presented to the members of this committee, which you have not allowed me to read.[32]

The remainder of Barenblatt's testimony before the Committee was but a repetition of these arguments. The Committee posed questions; Barenblatt, disavowing reliance on the Fifth Amendment, asked to reply with his written statement which the Committee refused to allow. Ultimately the witness was allowed to insert his objections into the written record.

Barenblatt's statement of objections, which was almost exclusively based on the First Amendment, had been inspired by Alexander Meiklejohn's treatise, Free Speech and Its Relation to Self-Government. Meiklejohn approached the First Amendment's guarantees with the absolutist's conviction that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from" citizens in a self-governing society; the First Amendment "gives us freedom to believe in and to advocate socialism or communism, just as some of our fellow citizens are advocating capitalism."[33] Barenblatt interpreted Meiklejohn's position to mean that the government could only investigate activities of "action", such as sabotage or espionage and could never suppress the advocacy of ideas.[34] His statement to the Committee consequently declared that Congress had no constitutional authority to investigate private affairs. In particular, he averred, in the matters of speech and press, the First Amendment very closely restricted the permissible area for congressional investigation. Barenblatt also maintained, as had John Watkins, that under the separation of powers, HUAC could investigate only in relation to proposed legislation. By

probing his private affairs in the absence of such legislation, the Committee had intruded into the judicial area.[35]

Barenblatt's claim of protection inherently assumed that as the First Amendment protected him from congressional intrusion into his private affairs, it also conferred upon him the right not to speak about those affairs. This freedom of silence is based to some extent on the common law concept of an individual right to privacy. Writing in 1890, Samuel D. Warren and Louis Brandeis concluded that "the common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others."[36]

A second rationale for this right to political privacy rests on the First Amendment. It is more directly related to the underlying concept of a societal guarantee of the free and open exchange of political ideas. In this regard, forced disclosures of political beliefs and affiliations deter individuals from undertaking political discussion lest private, and perhaps unpopular, ideas be publicized. Justice Robert Jackson eloquently stated the case in West Virginia Board of Education v. Barnette:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein.[37]

Barenblatt was embarking on a particularly hazardous course in using the First Amendment to justify his recusancy before HUAC. The Supreme

Court had assiduously avoided addressing First Amendment issues, and in the lower federal courts such a defense had never proved successful for any witness appearing before a congressional committee investigating subversion. From 1945 through 1953 HUAC had issued thirty-five contempt citations for non-Fifth Amendment refusals to testify or produce documents; thirty-one of the individuals cited relied on the First Amendment as a defense. With one exception, all the convictions were upheld in the federal courts. Three of these decisions constituted the existing judicial precedents in 1954.[38]

In 1947, the Second Circuit Court of Appeals had affirmed the conviction of Leon Josephson who had refused even to be sworn in before HUAC. In 1948, the District of Columbia Court of Appeals likewise had affirmed the conviction of Edward Barsky who had refused to honor a HUAC subpoena to produce documents relating to the activities of the Joint Anti-Fascist Refugee Committee. In both cases the appellate courts generally agreed that Congress had broad power to investigate the threats to the nation posed by the advocacy of the forcible overthrow of its form of government. Such overriding public interest justified the infringement of First Amendment rights.[39] The Supreme Court denied certiorari in both instances. The third case arose out of the highly-publicized refusals of the members of the Hollywood Ten to answer the $64 question before HUAC in 1947. Again the D.C. Circuit Court of Appeals affirmed the conviction and ignored claims that the First Amendment guaranteed any right to silence about political beliefs, and again the Supreme Court denied certiorari.[40] In all three cases the

courts stipulated that the enormity of the Communist threat narrowed First Amendment guarantees.

Lloyd Barenblatt, however, interpreted the First Amendment in much more absolute terms:

> But the word "abridgement" in the First Amendment proscribes any kind of what is now called a "chilling effect" on free debate and discourse among the electorate. So the First Amendment is not primarily a freedom for the individual, it is a safeguard and necessary function of our primary body of government, the electorate.[41]

The only sources of encouragement for his position were contained in the dissenting opinions of Judges Charles E. Clark in Josephson and Henry W. Edgerton in Barksy. Both asserted that HUAC's authorizing resolution was an unconstitutional encroachment on free speech. Clark held that investigations in the area of the First Amendment were limited in the same way as legislation, by the clear and present danger test. HUAC's enabling resolution, which authorized inquiry into "un-American" activities, was so vague as to not sufficiently restrict Committee activity to the investigation of propaganda advocating the forcible overthrow of the government.[42] Edgerton's dissent constituted an even more vigorous rebuke to the Committee, severely criticizing the methods by which it had restricted freedom of speech and asserting that:

> Congressional action that is either intended or likely to restrict expression of opinion that Congress may not prohibit violates the First Amendment. Congressional action in the nature of investigation is no exception. Civil liberties may not be abridged in order to determine whether they should be abridged.[43]

Drawing on Jackson's eloquent statement in Barnette, Edgerton also affirmed the existence of the freedom not to speak:

> Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous consequences. Yet, if they have previously expressed others, they cannot creditably or credibly express those that are approved. If they decline "publicly to profess any statement of belief", they invite punishment for contempt. The privilege of choosing between speech that means ostracism and speech that means perjury is not freedom of speech.[44]

Perhaps the strongest precedent for the assertion of First Amendment rights against a congressional investigating committee, arose from a different committee and a right-wing political action group. Edward Rumely, Executive Secretary of the Committee for Constitutional Government, had been cited for contempt by the Senate Select Committee on Lobbying for his refusal to disclose the names of individuals who had made bulk purchases of the publications of his group. The Supreme Court ultimately overturned his conviction on very narrow grounds; employing a very strict construction of "lobbying," it held that the Senate Committee had exceeded its authorization. The decision, however, was consequential for other reasons.[45]

Rumley was essentially the first instance in which the Court reversed its decades-long judicial practice of non-interference in congressional investigations. Traditionally, the courts had given committees broad authority to conduct inquiries, allowing Congress to set the limits of its own investigations.[46] In Rumley, the Court reasserted judicial oversight of congressional investigations. This time the justices did not automatically assume that the Senate Select Committee on Lobbying had legitimately conducted the inquiry authorized by its parent body. The Court served notice that investigations must be

limited by a clear authorization which sets forth a definite scope of inquiry.

Even more critical, however, was the intimation in Justice Felix Frankfurter's opinion that investigations might be limited by the First Amendment. Frankfurter openly acknowledged that the case had been decided on narrow grounds to avoid this constitutional issue, but he did assert that ". . . the power to inquire into all efforts of private individuals to influence public opinion . . . raises doubts of constitutionality in view of the prohibitions of the First Amendment."[47]

The inferences readily apparent in this opinion should have given some reason for optimism on the part of John Watkins, and particularly, Lloyd Barenblatt. The Court finally seemed to be acknowledging that congressional investigations were ranging too far afield, and if abusive practices continued, the judiciary might be forced to assert its supervisory function. Rumley hinted that the First Amendment did operate as a limit on the congressional power of investigation.[48]

II
NOTES

[1]Congress. House. Committee on Un-American Activities, Investigation of Communist Activities in the Chicago Area - Part 3. 83rd Cong, 2nd Sess., 29 April 1954, 4268.

[2]Ibid., 4275.

[3] Supreme Court, Brief for the Petitioner, Watkins v. United States 354 U.S. 178 (1957) (No. 261), 111-112.

[4]It might be noted that during the period of Watkins's involvement with Communist activity, the Communist Party was an extremely effective organizing agent within the union movement. It seems likely that in his capacity as a union organizer his fellow traveling was at least as much due to the efficiency of the Communist Party in recruitment of union members as to any Communist doctrinal sympathies. Richard M. Fried, Nightmare in Red: The McCarthy Era in Perspective (New York: Oxford University Press, 1990), 12-13.

[5]Carl Beck, Contempt of Congress: A Study of the Prosecutions Intitiated by the Committee on Un-American Activities, 1945-1957 (New Orleans: Hauser Press, 1959), 118.

[6]Ibid., 65.

[7]Ibid., Appendix B, 217-225.

[8]Blau v. United States 340 U.S. 159 (1950).

[9]Hoffman v. United States 341 U.S. 479 (1951), 486-487.

[10]Blau, 161

[11]Rogers v. United States 340 U.S. 367 (1951).

[12]James Hamilton, The Power to Probe : A Study of Congressional Investigations (New York: Random House, 1976), 217. Hamilton describes one of McCarthy's favorite ploys in using the doctrine of waiver. The Senator would ask a witness if he had engaged in Communist espionage. If he answered, and most had no desire to be labelled as a spy, McCarthy would indicate that the witness had waived his Fifth Amendment rights and threaten contempt if the witness became recusant over questions concerning Communist activities.

[13]It might also be argued that Watkins's position was even more tenuous than ex-Communist Party members. The ruling standard of criminality in 1954 issued from the 1951 decision in Dennis v. United States 341 U.S. 494 (1951) which held that Communist Party membership, in and of itself, was evidence of criminal activity under the Smith Act. Although Watkins could have successfully protected himself from contempt

charges through the use of the Fifth Amendment, the fact that he was never an actual Party member may have legally barred him from doing so.

[14]Beck, 100-101. The Committee, however, had realized by this time that it could do little about such recusancy. It initiated contempt citations against only eighteen Fifth Amendment witnesses. Of these only one was convicted of contempt. The others were either unindicted or acquitted in the courts. (See Beck, Appendix B, 225-227.)

[15] Daniel H. Pollitt, "The Fifth Amendment Plea Before Congressional Investigating Committees Investigating Subversion: Motives and Justifiable Presumptions - A Survey of 120 Witnesses," University of Pennsylvania Law Review 106 (May 1958): 1137.

[16]Congress, Senate, Permanent Subcommittee on Investigations of the Committee on Government Operations, State Department Information Program - Information Centers: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Government Operations, 83d Cong., 1st Sess, 24, 25 and 26 March 1953, 84.

[17]Robert K. Carr, "Constitutional Liberty and Statuatory Limitations on Congressional Investigations," Capitol Studies 5 (Fall 1977): 22. The Supreme Court did rule in Slowchower v. Board of Higher Education of New York City 350 U.S. 551 (1956) that the dismissal of a Brooklyn College teacher for taking the Fifth before the SISS was unconstitutional. The opinion, however, was a narrow holding which did not bar dismissing Fifth Amendment witnesses but only stipulated that due process required that the employee was entitled to a hearing.

[18]Quoted in Telford Taylor, Grand Inquest: The Story of Congressional Investigations (New York: Simon and Schuster, 1955), 210.

[19]Quoted in Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (New York: Oxford University Press, 1986), 189.

[20]David Caute, The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower (New York: Simon and Schuster, 1978), 414 and Schrecker, 161-218.

[21]New York Times, 2 May 1954, p. 3.

[22]Although Watkins's objection to the Committee's questions was based on the fact that HUAC's inquiries served no valid legislative purpose, he might have relied on the protections of the First Amendment to avoid naming names. It has been suggested that the exposure of the political beliefs and opinions of other individuals could deter citizens from expressing unorthodox political opinions, resulting in an abridgement of the communication of ideas, as well as private political activity. "Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation," Yale Law Journal 65 (July 1956): 1186-1187.

[23] Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court (New York: The Free Press, 1988), 96. Most of the biographical information on Lloyd Barenblatt, unless otherwise noted, is based on an interview given to Irons and included in the above volume in a chapter titled, "All They Wanted Were Names!" (pp. 93-104); Irons's own account of the progress of Barenblatt's case is contained in a preceding chapter, "This Is Not a Court,"(pp. 83-92).

[24]Barenblatt indicates that the reason for his dismissal was the fact that he had not completed his Ph.D. dissertation. (Irons, 97-98). Irons suggests that Barenblatt was dismissed because he had been called to testify. (Irons, 83.)

[25]The phrase was used by Joseph McCarthy during his speech to the Wheeling, West Virginia Republican Women's Club on 9 February 1950 in which he alleged to have the names of 205 card-carrying Communists still employed by the State Department. It referred to intellectuals of the likes of Alger Hiss who were using their positions for subversive purposes.

[26]Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities (New York: Farrar, Straus and Giroux, 1968), 347.

[27]Congress, House, Committee on Un-American Activities. Communist Methods of Infiltration (Education - Part 8): Hearings before the Committee on Un-American Activities, 83d Cong., 1st and 2nd Sess., 21 April, 8 June 1953; 12 April 1954, 4039.

[28]Congress, House, Committee on Un-American Activities. Communist Methods of Infiltration (Education - Part 9): Hearings Before the Committee on Un-American Activities, 83d Cong., 2nd Sess., 28 and 29 June 1954, 5755-5783. Hereinafter cited as Education Hearings - Part 9.

Crowley's recantation of his contumacy was one of the infrequent instances in which the imposition of legal penalties actually coerced testimony. (Beck, 130.) During the early years of the Republic, Congress dealt with breaches of its authority under common law practice whereby persons who challenged congressional prerogatives were taken into custody and confined until they purged themselves or until the end of the legislative session. The Supreme Court affirmed the process and the coercive contempt power of Congress in Anderson v. Dunn 6 Wheat. 204 (1821). The congressional power to redress its own contempts was augmented by statute in 1857. Concerned over the amount of time which lengthy contempt proceedings could consume and the lack of coercion which accompanied recalcitrancy at the end of a legislative session, Congress provided by law for the punishment of contempt (rather than the coercion of testimony) through the courts. In its contemporary form the pertinent section of the statute provides:

> Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry . . willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months. 2 U.S.C. 192.

[29]Education Hearings,-Part 9, 5755-5783; Irons, 99.

[30]Education Hearings-Part 9, 5803.

[31]Ibid., 5804.

[32]Ibid., 5805.

[33]Alexander Meiklejohn, Free Speech and Its Relationship to Self-Government (New York: Harper and Brothers, 1948), 89-91.

[34]Irons, 88, 100.

[35]Education Hearings- Part 9, 5807-5810.

[36]Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," Harvard Law Review 4 (December 15, 1890): 198.

[37]West Virginia State Board of Education v. Barnette 319 U.S. 628 (1943), 642. The case overturned the conviction of Jehovah Witness children who refused to recite the Pledge of Allegiance in school.

[38]Beck, Appendix B, 217-224. The one exception was Corliss Lamont whom the grand jury refused to indict.

[39]United States v. Josephson 165 F2d. 82 (2nd Cir. 1947) and Barsky v. United States 167 F2d. 241 (D.C. Cir. 1948).

[40]Lawson v, United States 176 F2d. 49 (D.C. Cir. 1949) cert. denied 339 U.S. 934 (1950).

[41]Quoted in Irons, 101.

[42]Josephson, 93-100.

[43]Barsky, 259.

[44]Ibid., 254.

[45]United States v. Rumley 345 U.S. 41 (1953).

[46]In Kilbourn v. Thompson 103 U.S. 168 (1881) the Supreme Court took a very restrictive view of the scope of the congressional investigatory power, implying that it might not even be valid as an aid to law-making. (Also see Chapter I, 14-15.) McGrain v. Daugherty 273 U.S. 135 (1927), which did not specifically overrule Kilbourn, considerably broadened the permissible limits of legislative inquiry. Justice Willis VanDevanter's opinion affirmed that Congress had the power to investigate in aid of legislation. He also asserted that in those cases where the authorizing resolution did not state that specific aim, the Court would presume a proper legislative aim. This decision inaugurated what was to become a general hands-off policy by the courts toward congressional inquiry. It was affirmed in 1929 by Sinclair v. United States 279 U.S. 263 in which the Court acknowledged the existence of one limitation: That in any investigation the questions asked had to be pertinent to the subject under inquiry. See M. Nelson McGeary, "Congressional Investigations: Historical Development," University of Chicago Law Review 18 (Spring 1951): 429.

[47]Rumley, 46.

[48]Robert B. McKay, "Congressional Investigations and the Supreme Court," California Law Review 51 (May 1963): 273.

III
JOHN WATKINS GOES TO COURT

John T. Watkins was cited for contempt of Congress by the House of Representatives on 29 April 1954. The following March he was tried in the federal district court for the District of Columbia. Watkins was represented by noted liberal attorney, Joseph C. Rauh, who had served as his counsel before HUAC. In court Rauh argued that the Committee functioned in pursuit of no valid legislative purpose and that its objective in questioning Watkins had

> the sole purpose of harassing the defendant and exposing him to the contempt of his labor associates by forcing him to inform on past associates and exposing to public contempt through the mouth of the defendant the persons about whom he was questioned.[1]

Judge Joseph C. McGarraghy rejected the defense contentions and sentenced Watkins to a one year suspended jail term and a $500 fine. Upon appeal a three judge panel of the Circuit Court of Appeals for the District of Columbia reversed the conviction by a two-to-three margin. In a rarely used procedure, the conservative majority of the Circuit voted to rehear the case en banc. By a six-to-two majority the full Circuit set aside the ruling of the panel and upheld Watkins's conviction.[2] The full court decision, handed down on 23 April 1956, summarily dispensed with Watkins's exposure argument:

> Congress has the power of exposure if the exposure is incident to the exercise of a legislative function. The fact that . . . an inquiry or investigation may reveal something or "expose" something is incidental and without effect upon the validity of the inquiry.[3]

The circuit court found that the Committee had sufficient legislative authority under its congressional mandate to ascertain the extent of the Communist menace; hence it could legitimately investigate the history and numerical strength of the Communist Party.[4]

Rauh had also argued that the First Amendment protected Watkins from identifying former Communist associates. The circuit court, likewise, dispatched this contention, citing its 1948 decision in Barsky v. United States which asserted that since Congress had the authority to investigate the Communist Party, it had the authority to identify its members: "The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. Personnel is part of the subject."[5] The stage was now set for the drama to move to the nation's highest tribunal which granted certiorari in the case at the opening of its 1957 term.

As this legal challenge to HUAC's authority inched its way through the courts during the mid-1950s, the stridency of the anti-Communist crusade began to show signs of moderating.[6] Cold War tensions had eased in 1953 with the death of Joseph Stalin and the armistice in Korea. In 1955 the first summit of Soviet and Western leaders since Yalta produced a "spirit of Geneva" which seemed to promise a new climate of cooperation between East and West. Even Nikita Khruschev denounced Stalin in a speech in February 1956 to the Twentieth Congress of the

Russian Communist Party. At home, Senator Joseph McCarthy was condemned by his colleagues in December 1954 for conduct unbecoming a member of the Senate. In 1955 following a number of exposes by the press, congressional Democrats launched an investigation of the loyalty-security program which disclosed its ineffectiveness and often abusive implementation . Even more critical was the revelation that Harvey Matusow, one of the government's professional ex-Communist witnesses, had continually lied when providing "expert" testimony to congressional committees. More energetic opposition to extreme anti-Communism also began to surface in the liberal community. After years of somnolence, organizations such as the American Civil Liberties Union renewed support for political offenders, particularly those who had become entangled with HUAC.[7]

Several decisions arising from the increasingly liberal Warren Court also seemed to reflect a more tolerant attitude toward the civil liberties of dissenters. During 1955 the Court had significantly strengthened the mantle of protection provided by the Fifth Amendment in three separate decisions that gave wide latitude to the language needed to assert the privilege. One of these, Quinn v. United States, overturned the contempt conviction of a witness whose refusal to answer HUAC questions had been based on the "Fifth Amendment to the Constitution supplemented by the First." Chief Justice Warren's opinion, which asserted that congressional questioning was limited by the Bill of Rights, noted that the power to investigate "cannot be used to inquire into private affairs unrelated to a valid legislative

purpose. Nor does it extend to an area in which Congress is forbidden to legislate."[8] In addition, in 1956 the Court overturned the dismissal of a New York City school teacher who had been fired for asserting the Fifth Amendment before an investigating committee.[9] Thus, in March 1957, when Joseph Rauh rose to plead his case in the Supreme Court, some measure of optimism seemed warranted.

Rauh's arguments to the Court concentrated heavily on the fact that the House Committee on Un-American Activities operated far beyond the boundaries of any valid legislative function. Judicial precedents favored a broad view of the permissible limits of legislative inquiry and generally left the responsibility with the legislature to ensure its probes were not directed towards judicial or executive ends.[10] Rauh reminded the Court, however, that those previous decisions had never declared that the power to inquire was unlimited. Drawing substantially on Quinn, he suggested that the only valid legislative purpose of an investigation was in preparation of legislation.[11]

Given this restrictive view of the nature of inquiry, Rauh maintained that HUAC's purpose was "the exposure of individuals to public scorn and retribution . . . [which was] beyond constitutional limits."[12] Specifically, the Committee had asked John Watkins only to identify individuals who had been associated with Communism some ten years earlier and whose names were already in its files. The members had shown little interest in information about union cooperation with the Communist Party or about the effects of anti-Communist legislation on the labor movement.[13] It was apparent to Rauh that

> The Committee did not want the benefit of petitioner's experience . . . or informed opinion about Communist operations in the labor field. . . . The Committee demanded only that petitioner point the finger publicly at himself and a group of private persons whom he had known ten years before. . . . The sole purpose . . . was the public exposure of 30 individuals.[14]

Watkins and his attorneys had consistently pleaded the exposure issue throughout the litigation, and Rauh made clear to the Court that they considered that argument most cogent.[15] Nevertheless, as the Court had habitually avoided constitutional rulings on the legislative purpose question, his second contention focused on a statutory issue: the thorny problem of HUAC's vague authorization. He again emphasized the limited nature of the power of inquiry, noting that even the Committee's enabling resolution, Rule XI, only authorized such investigation of un-American propaganda as "would aid Congress in any necessary remedial legislation."[16] He reiterated that the Committee had only asked about individuals. It had ignored Watkins's expertise on Communist propaganda activities within the union which might have been valuable in framing legislation.[17]

Closely related was the issue of pertinency. The statute under which Watkins had been convicted directs that witnesses summoned by Congress are required to answer questions pertinent to the topic of inquiry.[18] The Supreme Court had affirmed the application of pertinency to congressional investigations in 1929.[19] Although ratifying the broad authority of Congress to investigate, that decision had sought to protect witnesses from indiscriminate questioning by stipulating that questions be germane to an authorized topic of investigation. Unfortunately for the witness, the holding also asserted that pertinency

was a matter of law, not fact, and appropriately decided by the courts. When a witness challenged the relevance of a question, therefore, he did so at some peril. If he guessed wrong, he went to jail.

Rauh contended that John Watkins's already tenuous position with regard to pertinency had been exacerbated by the vagueness of Rule XI. First Watkins had had to make a fair guess as to the relevance of questions to the topic under inquiry (Communism in the labor movement); he also had to determine if that topic was germane to the subject of investigation authorized by the House (un-American propaganda activities). In this case the lack of specificity in the enabling resolution made the latter determination impossible.[20] As Rauh explained to the Court,

> Petitioner had to decide for himself if the Committee had authority to require him to state publicly whether 29 individuals had been members of the Communist Party 10 years earlier; he had to decide whether the fact of one-time membership of persons who had "long since removed themselves from the Communist movement" [footnote deleted] was within the scope of an investigation of "un-American" and "subversive" activities . . .. Apparently petitioner believed that present membership might well be deemed un-American or subversive as he not only agreed to, but did name present members. The distinction petitioner apparently drew between present and long past membership can hardly be deemed an unreasonable one. Only by asserting the proposition that any connection with the Communist Party, no matter how long ago and without reference to any illegal or disloyal activities, is un-American and subversive, can one say that these terms have sufficiently clear meaning so that petitioner could have told with reasonable certainty whether he had to answer the questions put to him by the Committee.[21]

Rauh concluded the major arguments on behalf of his client with discussion of the illusive constitutional question regarding the application of the First Amendment to legislative investigations.

Although the issue had been raised unsuccessfully by the Hollywood Ten in 1947, it had received increasing attention in the intervening years as the Committee emphasized more and more the importance of the $64 question. Watkins, in his protest before the Committee, had not stressed this argument. He had been much more concerned with the exposure issue and the Committee's insistence that he name names. He had, in fact, answered the $64 question and willingly discussed his own activities.

Two factors militated against the viability of the Watkins case as a major test of First Amendment restrictions in investigations. Since Watkins had discussed his own activities, he could not claim that his personal free speech guarantees had been violated. Because one cannot claim the constitutional rights of others, it was going to be difficult for Rauh to apply it to Watkins's refusal to name names. Secondly, judicial precedent clearly favored the weighing of national interests against individual rights when First Amendment guarantees appeared violated. Although First Amendment purists objected to the very notion that freedom of speech could be limited for any reason, the Supreme Court had for years favored national security over First Amendment rights in subversion cases.[22]

Rauh's First Amendment arguments were particularly deferential to this latter consideration. Unlike the purists, he accepted the legitimacy of the balancing test in those areas which concerned Communism. What he quarreled with was the weight accorded to the legislature's interest in the process. He disputed that the questions

which were posed to Watkins had relevance to the determination of the extent of the Communist threat. Not only had the Committee asked about Communist activities long before 1954, but it had also required the identification of individuals whose names were already in its files.[23] Rauh concluded:

> Thus, where the infringement on basic liberties is as patent and far-reaching as it is true in the instant case, and the congressional need is remote and fanciful as the need presently asserted, constitutionally-guaranteed freedoms must prevail.[24]

Rauh's arguments begged the question of the applicability of the First Amendment to the $64 question, disappointing First Amendment absolutists.[25] The American Civil Liberties Union, however, supported Rauh's approach in its amicus brief. ACLU attorney, Osmond Fraenkel, readily granted that First Amendment protection had to yield on occasion to greater national interest. He also supported Rauh's contention that in the present case no compelling need existed for disclosure of the information the Committee sought.[26]

Rauh closed his arguments with one last objection which had become, in other cases concerning contempt, a much-used, "last ditch" ploy to secure dismissal of the charges. Like the defense attorneys in Quinn, Bart and Emspak, he suggested that Watkins's initial indictment was flawed because the grand juries contained employees of the federal government who were under the jurisdiction of the federal security program and could not render a biased and impartial judgment.[27]

The government's case against Watkins was prepared by Solicitor General, J. Lee Rankin. It was based largely on the frequent assertions

of HUAC apologists that Communist activity posed a mortal threat to the government of the United States such that Congress had a duty to determine the extent and nature of the peril in order to formulate an appropriate response.

Rankin first addressed the exposure issue. He asserted that HUAC, in its questioning of John Watkins, was properly pursuing a legislative function. The information it had solicited from the witness was necessary to determine the need for limitation of Communist infiltration in labor.[28] Enjoying the benefit of a long list of precedents which supported congressional authority to inventory Communist membership, Rankin maintained that the Committee's questions were perfectly appropriate to its stated intention to determine the extent, not the techniques, of Communist infiltration.[29] The fact that exposure incidentally resulted did not invalidate the investigation.

> No more than a witness at a trial was petitioner free to refuse to respond to otherwise legitimate questions on the ground that they invaded his or others "privacy" or might "expose" them, or bring unfavorable publicity or public disapproval. The public interest in the information outbalances the possible injury to the individual.[30]

Although much of the information about the designated individuals was in its files, he continued, the Committee had been legitimately concerned with eliciting corroboration from Watkins.[31]

The most peculiar and least persuasive aspect of Rankin's treatment of the exposure issue was his contention that Congress legitimately exercised the authority to inform. Whereas Joseph Rauh had suggested that congressional committees were limited to activities in pursuit of

law-making, Rankin attempted to support the broader view that Congress had constitutional authority "to undertake investigations for the sole purpose of publicizing information, at least so long as the matters to be disclosed are related to a substantive congressional power."[32] He supported his contention with a citation from the 1947 report of the President's Committee on Civil Rights, To Secure These Rights:

> The principle of disclosure is . . . the appropriate way to deal with those who would subvert our democracy by revolution or by discouraging disunity and destroying the civil rights of some groups. The federal government . . . ought to provide a source of reference where private citizens and groups may find accurate information about the activities, sponsorship and background of those who are active in the marketplace of opinion.[33]

Rankin's reasoning for the inclusion of this supporting statement seems at best obscure. Aside from the suspect constitutionality of such a proposal, the President's Commission did not refer to the legislature as the agent for disclosure, which was the very crux of Watkins's argument.

It logically followed that the questions addressed to Watkins were pertinent to these valid purposes. Although a number of avenues had been available to the witness to ascertain the objectives of inquiry, Rankin argued that Rule XI, in and of itself, explicitly defined "un-American propaganda" as that "instigated from foreign countries or of a domestic origin which attacks the principle of the form of government as guaranteed by our Constitution."[34] He insisted that:

> It would be unreasonable to demand greater specificity of language in the instrument which constitutes, in effect, the Committee's "charter". By this time, there can be no doubt that these words apply to activities of Communist Party members within various institutions of American life.[35]

Rankin also enjoyed the benefit of judicial precedent in his rebuttal of the defense's First Amendment contentions. Not surprisingly, he noted that Watkins had answered the $64 question and was therefore attempting to vindicate not his rights but those of his former associates.[36] In any case, the Solicitor General maintained the courts had long upheld congressional interest in past Communist associations as reasonable in ascertaining the gravity of the threat to the government.[37] Further, he asserted the First Amendment was designed only to prohibit legal limitations on free speech.

> Inherent in petitioner's argument is the contention that a "right to silence" is protected by the First Amendment. But even if it is accepted that disclosures before the Committee may result in unfavorable publicity and discourage persons from subjecting themselves to the risk of similar unfavorable reactions to their associations and expression of views, it does not follow that the First Amendment is in any way violated. For the sanction growing out of such disclosures is not a legal one, but at most, the sanction of public opinion, against which the First Amendment does not guarantee.[38]

In March of 1957 the Court retired to its chambers to consider the relevance of these arguments to the situation of John Watkins, holding its first conference on the case on 8 March.[39] As it was doing so, undercurrents of change were rippling through the Court's liberal/ conservative alignment. Earl Warren had been appointed to the Chief Justiceship by President Eisenhower in September of 1953 following the death of Chief Justice Fred Vinson. More a politician than a scholar, Warren had maintained a low profile during most of the 1953 and 1954 court terms, apparently searching for his judicial niche and in the meantime generally voting with the conservative majority. Although the

Brown v. Board of Education decision had been hailed as a sweeping reform, the Court had actually been chipping away at racial discrimination for years.[40] Warren's positions during this period were much influenced by an early comradeship with the legally astute Felix Frankfurter, long an advocate of judicial restraint.[41]

During the 1955 term the Court had begun to give some indication of a greater "left-liberal" orientation, particularly with respect to subversion/civil liberties issues. A libertarian block of Warren, Hugo Black, William Douglas and Felix Frankfurter had been variously joined by John Marshall Harlan, Harold Burton and Tom Clark in four separate opinions which favored individual rights. The Slochower case, mentioned previously, reversed the dismissal of a New York City teacher who had taken the Fifth before a state investigating committee.[42] In Communist Party v. Subversive Activities Control Board the Court voided a finding by the SACB that the Communist Party was a Communist- action organization because of the introduction of perjured testimony in the Board's hearing.[43] Cole v. Young restricted employee dismissals under the Federal Loyalty Security Program.[44] Pennsylvania v. Nelson overturned a Pennsylvania sedition law on the grounds that the field had been pre-empted by the federal government.[45]

The Court's emerging libertarian stance was not overwhelmingly applauded by the Congress. Smoldering over the Brown desegregation decision, Southern conservatives found in the security cases the perfect issue with which to attract northern conservatives to their anti-Court position.[46] Senator Karl Mundt (R-SD) drafted legislation to reverse

Cole; Congressman Howard Smith (D-VA) drafted a bill to nullify the Nelson pre-emption rule. None of the proposals was enacted at the time, but these skirmishes presaged a major legislative/judicial confrontation.

At the opening of the 1956 term, following several personnel changes on the Court, Warren made a decisive break with Frankfurter, solidifying an activist wing in the Court along with Black, Douglas and the newly-appointed William Brennan.[47] During that term the Court continued to whittle away at the excesses of the anti-Communist program. Warren, in a strongly worded opinion, vacated five Smith Act convictions obtained with possibly tainted testimony.[48] In May 1957 the Court overturned two denials of bar admission (one in New Mexico and one in California) which had been based on past Communist membership.[49] Late in the term, on 3 June 1957, the Court struck yet another blow at McCarthyism in a Brennan opinion which held that defendants in Communist-affiliation cases had the right to examine confidential FBI reports submitted by informants who testified against them.[50] This decision proved to be extremely controversial, reaping criticism from the President, Congress and, not surprisingly, J. Edgar Hoover.[52] Decision day, 17 June 1957, provided further ammunition to Court critics.

The first decision of that morning, read by Earl Warren, dealt a strong blow at free-wheeling congressional investigating procedures and reversed the contempt conviction of John Watkins. Warren's impassioned, if not legally well-crafted, opinion took Congress to task

for most of the abuses which Rauh had decried in his arguments before the Court. The Chief Justice was joined by Black, Brennan, Douglas and Harlan, with Felix Frankfurter offering a separate concurrence. The lone dissenter was Tom Clark.[52]

Warren's opinion, for the most part a lengthy obiter dicta, traced the legislative history of investigations up to the post-World War II era when, the Chief observed, legislative inquiries had brought "broad scale intrusion into the lives and affairs of private citizens."[53] Citing Rumley v. United States, Warren declared that First Amendment guarantees did apply to congressional investigations. He explained that in cases of potential free speech infringement, a committee's mandate must clearly define the valid legislative purpose which justifies the First Amendment intrusion.[54] Within that framework the Chief Justice observed , "We have no doubt that there is no congressional power to expose for the sake of exposure."[55]

Turning specifically to the House Committee on Un-American Activities, he noted, "It would be difficult to imagine a less explicit authorizing resolution."[56] This vagueness, Warren argued, gives rise to a lack of control by the parent body, allowing the Committee "to define its own authority, to choose the direction and focus of its activities. . . . [This] can lead to ruthless exposure of private lives in order to gather data neither desired by Congress nor useful to it."[57] Broad authorizations, likewise, hinder the courts in striking the balance between individual rights and the congressional need for information.

> It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make it is that the House of Representatives has never made it."[58]

The Court's decision, nevertheless, did not rely on this twenty page lecture to the Congress. The actual holding overturning Watkins's conviction was very narrowly based on the question of pertinency. Closely paralleling Watkins's brief to the Court, Warren struggled to discover a "question under inquiry" that would have provided the witness with some standard by which to judge the relevance of the questions which he was asked. Such information had not been contained in the authorizing resolution, nor could it be found in remarks of the committee members or the nature of the proceedings.[59]

> . . . we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. . . . Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undisputable clarity, 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. . . . 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.
>
> The statement of the Committee Chairman in this case . . . was woefully inadequate. . . .[60]

John Watkins's conviction, therefore, was invalid under the due process provisions of the Fifth Amendment, because he did not have an adequate standard by which to judge the consequences of his refusal to respond.[61]

Warren originally intended to include the First Amendment, as well as pertinency, as grounds for decision, but narrowed the holding in the

last two weeks before it was announced.[62] Justice Frankfurter's cautionary remarks on May 27 may have influenced that choice:

> Watkins is not a First Amendment case as the emphasis of your opinion overwhelmingly demonstrates. This is by no means a technical point. It is very important for us to make clear, as you do make clear, that a witness before a committee may object to questions without having to establish that he is deprived of some right under the First Amendment. . . . I deem the foregoing vital lest witnesses before a congressional committee parrot-like repeat the phrase, "First Amendment, First Amendment, First Amendment." We get into a lot of trouble by talking about the plain and unequivocal language of the First Amendment in its provision about "abridging the freedom of speech." Of course that cannot mean that a man has a right to silence.[63]

Frankfurter eventually voted with the majority but did not join in Warren's lengthy obiter, concurring only with the narrow pertinency holding. John Marshall Harlan, the other "swing" vote joining the Court's liberal bloc, seemed to have no objections to the expansiveness of Warren's language but still encouraged the Chief Justice to rest the decision solely on pertinency.[64]

Frankfurter had serious reservations about the political wisdom of Warren's frontal attack on the investigating procedures of Congress. After reading the draft opinion, he expressed concern over its impact on key members:

> 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 and their kind, but I do mean people who have strong feelings about the powers of Congress. . . [T]heir sensibilities should be taken into account in what we say and in what we leave unsaid.[65]

As was his custom, Frankfurter professorially offered his legal expertise to the Chief, in particular suggesting the addition of a cautionary sentence to the opinion:

> We are wholly mindful of the complexities of modern government and the ample scope that must be left to Congress as the sole depository of legislative power. Equally mindful are we of the indispensable function, in the due exercise of that power, of Congressional investigation.[66]

In spite of the narrowness of its holding, Watkins appeared to signal that the Court was finally prepared to use the First Amendent to limit the slipshod treatment of witnesses by congressional investigating committees. Time magazine reported that, "Warren left no doubt that he and his court majority thought the Un-American Activities Committee . . . had violated Watkins's First Amendment rights."[67] A number of other liberal journals, as well, inferred that the Court was willing in the future to apply First Amendment guarantees to congressional investigations.[68]

Legal scholars, too, although recognizing the narrowness of the actual holding, were convinced that the Court was exhibiting a much greater inclination to constitutionally supervise congressional investigations. The Howard Law Journal noted that, ". . . the individual is now protected from rampant invasions into his private associations and opinions."[69] Hartly Fleishman, writing in the Hastings Law Journal suggested that:

> . . . the case brings closer to decision the various problems of applying limitations to the investigating committee of the Congress when their activities collide with individual rights. The opinion

> of Chief Justice Warren, more impassioned than articulate, suggests that such limitations may be found in the First Amendment . . . and that they may be justified by the obvious and undesirable consequences such investigations have had on the individuals concerned and the body politic. It may be that his words will provoke Congress into self-regulation but in the absence of that, they give good grounds to expect further pronouncements from the Court which will more clearly define the rights of witnesses before committees of Congress.[70]

If any further doubt existed that the Court was willing to apply the First Amendment to legislative investigations, it was dispelled by another decision read on 17 June. In Sweezy v. New Hampshire, the Chief Justice scolded state investigating committees, much as he had chastised Congress in Watkins. For many years New Hampshire's crusading anti-Communist Attorney General, Louis C. Wyman, had conducted one-man investigations of subversive activities for the state legislature. Marxist university professor, Paul Sweezy, had refused to answer questions about his political beliefs or the content of his classroom lectures. Warren condemned the manner in which Wyman's investigations had been undertaken, but specifically invalidated Sweezy's contempt conviction on the narrow grounds that the legislature's authorizing resolution had not adequately limited the inquiry.[71] Warren's majority opinion was joined by Black, Brennan and Douglas; Burton and Clark vigorously dissented.[72] Frankfurter was joined by Harlan in a concurrence which invalidated the conviction on First and Fourteenth Amendment grounds. Frankfurter assailed the state for violating the privacy of Sweezy's political affiliations. He likewise considered the question 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 appears grossly inadequate, Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.[73]

Two other decisions handed down that day heightened the optimism of civil libertarians. The second opinion of the morning, Yates v. United States, authored by John Marshall Harlan, effectively emasculated the Court's 1951 decision, Dennis v. United States.[74] The narrow holding vacated the convictions of fourteen second-string leaders of the U.S. Communist Party and made further prosecutions under the Act virtually impossible.[75] In Service v. Dulles, by an 8-0 vote, the Court joined Harlan again in overturning the security-related dismissal of a Department of State employee. The opinion was also limited, based on agency administrative regulations.[76]

By the end of the 1956 term, and particularly after the "Red Monday" decisions of 17 June 1957, civil libertarians began to believe that the Supreme Court had truly turned to the left. Great hope existed that the Court would continue to control the incursion into civil liberties which had become almost synonymous with anti-Communism. Commonweal waxed eloquently:

> The recent decisions of the Supreme Court of the United States have reaffirmed both the strength and glory of democracy. They were made at a time when many had become prophets of doom, discouraged at the gradual inroads being made on civil liberties and disappointed in the easy relinquishment of personal rights. . . . [W]ith authority and responsibility, the Supreme Court of the land has affirmed the rights of the individual, the importance of civil liberties.[77]

In the conservative community, however, the Court's libertarian thrust forebode disaster. The Court had attacked the major icons of the American right: states' rights (Nelson), the Federal Bureau of Investigation (Jencks), the Smith Act (Yates), the Federal Loyalty-Security Program (Service), state investigating committees (Sweezy) and the House Committee on Un-American Activities (Watkins). The resultant uproar was deafening. David Lawrence headlined his column on the 17 June decisions, "Treason's Greatest Victory."[78] Forrest Davis, writing in the National Review, accused the Court of reaching for total power and:

> Even more frighteningly, the Court on June 17 confirmed the public judgment that in all cases dealing with Communism it hastens to the side of those guilty or accused of bearing a part in the Great Conspiracy fathered in Moscow, which the Executive and the Congress repeatedly have declared to be a "clear and present danger."[79]

The Chicago Tribune speculated that, "The boys in the Kremlin may wonder why they need a 5th column in the United States so long as the Supreme Court is determined to be so helpful."[80] The Cleveland Plain Dealer yet more dramatically railed:

> Well, Comrades, you've finally got what you wanted. The Supreme Court has handed it to you on a platter. From now on you have the right to teach and advocated the forcible overthrow of the Government of the United states, just as long as you speak in general principles and don't plot specific acts of violence. So, Comrades, come and get us.[81]

Even Life accused the Court of displaying "a most lamentable virginity about Communism."[82]

On the Court, Justice Frankfurter could not have been too surprised by the outrage; his earlier apprehensions had been borne out. At the opening of the 1957 term, he directed a memorandum to his colleagues which focused on improving Court procedures in order to avoid such reaction in the future. In particular he suggested that the Court no longer "mass" important cases toward the end of the term. Comments made in his memorandum reflect his own discomfort over the events of post-June 17, not to mention some disparagement of the abilities of the press:

> Massing important adjudications is bad for the Court. . . ; it makes for public indigestion with consequent misinformation and mischievous reaction to decisions. . . .
>
> A massing of important decisions overtaxes the already meagre ability of the press to report our decisions with a fair degree of accuracy. Greater sensationalizing, because of the restricted space for reporting normally follows a "big day" at the Court, and congressional response --- not merely talk but legislative proposals --- is apt to be based on distorted and inadequate reporting of opinions. (The space given by the New York Times only serves to throw into bold relief the inadequate reporting by the press generally and even the New York Times was unable to absorb all the Court decided on June 17 last.)[83]

Nowhere was the outrage against the Supreme Court more virulent than in the halls of Congress. Aside from the fact that the nation's highest tribunal had apparently launched a crusade against the pillars of conservatism, the Watkins reprimand signalled an attack on the institutional prerogatives of Congress itself. It was just the sort of power struggle which Frankfurter had hoped to avoid in his advice to Warren on the construction of the Watkins opinion. To the

conservatives, Warren's expansive dicta appeared to be the gauntlet thrown down in a struggle for legislative/judicial supremacy.

The restiveness which Congress had exhibited over earlier libertarian decisions exploded during the summer and fall of 1957 into a full-blown attack on the Court. Attention was first focused on the Jencks decision. In June bills were introduced in both the House and the Senate which set strict procedures for the defense perusal of FBI reports. The Jencks Act became law on 31 August 1957, although in its final form it was essentially a codification of the Supreme Court's decision. Nevertheless, it was touted by Court critics as a rebuke to the High Court and was generally perceived as such by the public.[84]

The most vociferous attack on the Court was initiated on 26 July by an angry Senator William Jenner (R-IN). Taking the floor of the Senate in the midst of a civil rights debate, Jenner launched into a scathing tirade:

> No conceivable combination of votes in the Congress could have done as much damage to our legislative barriers against communism and subversion as the Supreme Court of the United States has done by its recent opinions. . . .
>
> There was a time when the Supreme Court conceived its function to be the interpretation of the law. For some time now, the Supreme Court has been making law --- substituting its judgment for the judgment of the legislative branch.[85]

The Senator took aim at each of the political defender decisions, claiming specifically that in the Watkins decision "the Supreme Court has dealt . . . [the] committee function a body blow by making it possible for reluctant witnesses to stop an investigation in its tracks."[86]

This diatribe was but a prelude to the introduction of a bill designed to curb the Court through restriction of its appellate jurisdiction. Jenner proposed to remove the Court's authority to hear appeals in five distinct categories of cases: (1) contempt of Congress, (2) the Federal Loyalty-Security Program, (3) state anti-subversion statutes, (4) regulation of employment and subversive activities in the schools, and (5) state bar admissions.[87] After hearings were conducted on the bill during the latter part of 1957 and early 1958, it became obvious that the wide scope of Jenner's proposal made it an unlikely candidate for passage. Subsequently, with amendments offered by John Marshall Butler (R-MD), a modified bill was reported out by the Senate Judiciary Committee. In its final form, S2646 only removed the Court's appellate jurisdiction in state bar admissions cases; other provisions of the bill specifically reversed the Watkins, Nelson and Yates decisions.[88]

Meanwhile the House of Representatives was preparing its own assault on the Supreme Court with the resurrection of a bill to reverse the Nelson pre-emption ruling. Howard Smith had originally introduced the bill in January 1955 in an effort to legislate on the matter before the Court ruled in Nelson.[89] In spite of the delaying tactics of its liberal chairman, Emmanuel Celler (R-NY), the House Judiciary Committee reported out H.R. 3 on 13 June 1958; it was enacted by the full House on 17 July. During July and August, the House also passed four other specific measures to reverse Cole, Mallory and Yates, as well as a bill to deny the use of habeas corpus as an avenue from the state courts into

the federal judicial system.[90] The Senate received all five anti-Court measures from the House during the last month of the Eighty-Fifth Congress in August 1958. Although none was a direct attack on judicial authority, collectively "they were symbols. . . of congressional repudiation of the moral authority of the Warren Court to lead the nation."[91]

Lyndon B. Johnson (D-TX), Senate Majority Leader, reluctantly inherited this spate of anti-Court legislation. For personal and political reasons, Johnson was not favorably inclined toward any of the House measures and was particularly uncomfortable with the Senate's own Jenner-Butler bill. Largely due to Johnson's manipulation of law-makers and his chamber's parliamentary procedures, the Eighty-Fifth Congress adjourned on 24 August 1958 without having passed any of the anti-Court legislation. The congressional attack on the Court had failed.

In the long run, the campaign to curb the Court was probably unsuccessful for reasons other than Lyndon Johnson's shrewd political maneuvering. In an obvious parallel with the Hughes Court fight of 1937, the Supreme Court enjoys a deep-seated respect within the American political tradition; a certain reluctance exists to alter its complexion by other than the time-honored practice of filling judicial vacancies. A crusade led by Southern segregationists with transparent motives and exaggerated charges would have been difficult to realize under such circumstances.[92] Important, too, was the fact that limitations on Court authority in the future might deprive conservative congressmen of their traditional ally against the more frequent intrusions by the executive

into the legislative domain.[93] Finally, the ability of Lyndon Johnson to defeat the anti-Court coalition may also have drawn some strength from a very subtle shift evident in recent Supreme Court decisions.

During its 1957 term, although the High Bench effected no radical departures from the general trend of the previous two terms, two cases in particular did appear to signal some retreat in national security issues. In Beilan v. Board of Education and Lerner v. Casey a realigned majority of Burton, Clark, Frankfurter, Harlan and Whittaker pulled back from the direction set by Slochower in 1956.[94] In the Beilan decision the Court upheld the discharge of a Philadelphia public school teacher who refused to admit to school authorities whether he had been previously active in the Communist Party.[95] In Lerner the same majority refused to overturn the dismissal of a New York subway conductor who had invoked the Fifth Amendment before state authorities investigating Communism.[96] Slowchower had been perceived as a strong statement by the Court against the imposition of penalties for utilizing the Fifth Amendment; the two 1958 decisions gave the appearance that the Court was becoming reluctant to interfere with the social consequences arising in such a situation.[97]

In spite of its failure, the anti-Court battle on Capitol Hill did represent a considerable outpouring of animosity toward the nation's highest tribunal. All the Court-curbing measures had been passed by the House with sizeable margins. The Senate votes which killed the legislation were hard-won, very slim victories.[98] Regardless of the outcome in Congress, antagonism towards the Court continued to surface.

On 23 August 1957, the day before the Eighty-Fifth Congress adjourned, the Conference of State Chief Justices issued a stinging rebuke to the Supreme Court. Its report declared that:

> We believe . . . the Supreme Court too often has tended to adopt the role of policy-maker without judicial restraint. . . . We do not believe that either the framers of the original Constitution or the . . . draftsmen of the Fourteenth Amendment ever contemplated the Supreme Court would or should have the almost unlimited policy-making powers which it now exercises. . . . It is our earnest hope . . . that this great Court exercise to the full its power of judicial restraint by adhering firmly to its tremendous strictly judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers. . . .[99]

Six months later, in a report issued on 24 February 1959 the American Bar Association likewise voiced strident criticism of the Court. The ABA asserted:

> Many cases have been decided in such a manner as to encourage an increase in Communist activity in the United States through invalidation of State sedition statutes, and limitation of State and federal investigating powers in the field of subversion . . . . The paralysis of our internal security grows largely from construction and interpretation centering around technicalities emanating from our judicial process which the Communists seek to destroy, yet use as a refuge to masquerade their diabolical objectives.[100]

In a March 1958 letter to the New York Times, noted constitutional scholar, Edwin S. Corwin joined the chorus:

> There can be no doubt on June 17 last the court went on a virtual binge and thrust its nose into matters beyond its competence, with the result that (in my judgment at least) it should have aforesaid nose well-tweaked.[101]

The anti-Court uproar in Congress certainly had "tweaked" the Supreme Court's nose.

III
NOTES

[1]U.S. Court of Appeals, Appeal from the United States District Court for the District of Columbia, John T. Watkins v. United States of America, 233 F. 2d 681 (1956) (No. 12,797), 58-59.

[2]"Washington Wire," New Republic 136 (18 March 1957): 2.

[3]Watkins v. United States 233 F.2d 681, 687.

[4]Ibid., 684.

[5]Ibid., 686; Barsky v. United States 167 F.2d 241, 246.

[6]In fact, historian William L. O'Neill maintains that McCarthyism had actually collapsed with the election of Dwight D. Eisenhower in 1952. See American High (New York: The Free Press, 1986), 166.

[7]Jerold Simmons, Operation Abolition: The Campaign to Abolish the House Un-American Activities Committee, 1938-1975 (New York: Gardland Publishing, Inc., 1986), 119. Liberal criticism of HUAC had been engendered partially because in 1956 the Committee, under the chairmanship of Francis Walter (D-PA) had questioned and cited for contempt respected liberal playwright Arthur Miller and had investigated the liberal think tank, Fund for the Republic. In September 1956 the American Civil Liberties Union voiced support for Watkins's challenge of the HUAC mandate, and in January 1957 it announced it would file an amicus brief in the case. Civil Liberties, September 1956, 2 and January 1957, 2.

[8]Quinn v. United States 349 U.S. 155 (1955), 161. The other two cases were Emspak v. United States 349 U.S. 190 (1955) and Bart v. United States 349 U.S. 219 (1955).

[9]Slochower v. Board of Higher Education of New York City 350 U.S. 551 (1956).

[10]Both McGrain v. Daugherty 273 U.S. 135 (1927) and Sinclair v. United States 279 U.S. 263 (1929) had inaugurated the judicial practice of allowing Congress very free rein in the conduct of its investigations. The attitude of the court was best expressed in a 1938 decision of the District of Columbia Circuit Court of Appeals, Townsend V. United States 95 F. 2d 352, cert. den. 303 U.S. 664 (1938):

> A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. . . . A legislative inquiry anticipates all possible cases which may arise thereunder and the evidence must be responsive to the scope of the inquiry, which general [sic] is very broad.

[11]Supreme Court, Brief for Petitioner, John T. Watkins v. United States of America 354 178 (1957) (No. 261), 24-28.

[12]Ibid., 29.

[13]Ibid, 60.

[14]Ibid., 64.

[15]Ibid., 76.

[16]Ibid., 79.

[17]Ibid, 84-85.

[18]2 U.S.C. 192.

[19]Sinclair v. United States.

[20]Petitioner's Brief, 119.

[21]Ibid., 123-124.

[22]Barsky v. U.S.; Josephson v. U.S. and Dennis v. United States 341 U.S. 494 (1951). Dennis established a sliding scale formula for determining the allowable margin for free speech restriction.

[23]Ibid., 111-115.

[24]Ibid., 118.

[25]"The Watkins Case Defense Only Undermines the First Amendment," I.F. Stone's Weekly (17 December 1956): 6.

[26]Supreme Court, Brief for the American Civil Liberties Union, Amicus Curiae, John T. Watkins v. United States of American 354 U.S. 178 (1957) (No. 261).

[27]Petitioner's Brief, 125-132.

[28]Supreme Court, Brief for the United States, John T. Watkins v. United States of American 354 U.S. 178 (1957) (No. 261), 33.

[29]Ibid., 69. The judicial precedents involved included Barsky as well as the circuit decision in Lloyd Barenblatt v. United States 240 F.2d 875 (U.S. Court of Appeals, D.C.) 1957.

[30]Ibid., 41.

[31]Ibid., 52.

[32]Ibid., 56.

[33]Ibid., 57.

[34]Ibid., 71-73.

[35]Ibid., 73.

[36]Ibid., 60.

[37]Ibid., 65. Similar reasoning was employed by the American Bar Association which submitted an amicus brief in support of the government's arguments. The ABA advocated a very broad view of the power of inquiry and concluded in true Cold War rhetoric that:

> When it is borne in mind that this treacherous apparatus [the Communist Party] is under the domination of a foreign government and calculatingly directed toward the overthrow of American institutions by force and violence, the exercise of judicial realism becomes imperative in enunciating a legal principle preserving the broadest possible fact-finding powers in Congress to fulfill its legislative duty. Supreme Court, Brief of American Bar Association, Amicus Curiae, John T. Watkins v. United States of America 354 U.S. 178 (1957) (No. 261), 11.

[38]Ibid., 66-68.

[39]Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court - A Judicial Biography (New York: New York University Press, 1983), 146.

[40]Walter Murphy, Congress and the Court: A Case Study in the American Political Process (Chicago: University of Chicago Press, 1962), 80.

[41]Schwartz, 150-151.

[42]Slochower v. Board of Education of the City of New York 350 U.S. 551 (1956).

[43]Communist Party v. Subversive Activities Control Board 351 U.S. 115 (1956).

[44]Cole v. Young 351 U.S. 536 (1956).

[45]Pennsylvania v. Nelson 350 U. S. 497 (1956)

[46]Murphy, 87.

[47]Schwartz, 206. At the opening of the 1956 term, the other members of the Court included conservative Tom Clark, Frankfurter, John Marshall Harlan and Harold Burton. Stanley Reed retired from the Court during the term and was replaced in February 1957 by Charles Whittaker.

Schwartz credits Brennan, who arrived on the Court as an interim appointment just prior to the opening of the 1956 term, with responsibility for Warren's ultimate break with judicial restraint.

[48]Mesarosh v. United States 352 U.S. 1 (1956).

[49]Schware v. New Mexico Bar Examiners 353 U.S. 232 (1957) and Konigsberg v. State Bar of California 353 U.S. 252 (1957).

[50]Jencks v. United States 353 U.S. 657 (1957).

[51]Schwartz, 228.

[52]Burton and Whittaker did not participate.

[53]Watkins v. United States 354 U. S. 178 (1957), 195.

[54]Ibid., 198.

[55]Ibid., 200.

[56]Ibid., 201.

[57]Ibid., 205.

[58]Ibid., 206.

[59]Ibid., 206-214.

[60]Ibid., 214-215.

[61]Ibid.

[62]Earl Warren, draft opinion, circulated 29 May 1957, Box 29, John Marshall Harlan Papers, G. Seeley Mudd Manuscript Library, Princeton University, New Jersey.

[63]Frankfurter to Warren, May 27, 1957, Box 29 John Marshall Harlan Papers. Frankfurter is reputed to have warned the Chief in conference, "Don't begin with the First Amendment. Begin with due process and stay with it." (quoted in Schwartz, 237.)

[64]Harlan to Warren, 31 May 1957, Box 29 John Marshall Harlan Papers. Conference notes in Harlan's handwriting dated 9 March also indicate that Harlan considered only pertinency as appropriate grounds for reversal.(Box 29, John Marshall Harlan Papers). In spite of Harlan's memorandum to Warren of 31 May, Frankfurter, in a similar memorandum of the same date, seems to include Harlan with himself in holding out for a very narrow holding. (Frankfurter to Warren, 31 May 1957, Box 29, John Marshall Harlan Papers.)

[65]Frankfurter to Warren, 31 May 1957, Box 29, John Marshall Harlan Papers.

[66]Quoted in Schwartz, 238. Warren did accept Frankfurter's advice. The sentence appears in Watkins at 215.

[67]"On Congress' Investigations," Time 70 (1 July 1957): 70. The Time article continues: "But just as Warren seemed ready to make a ringing ruling on that basis, he veered back to the Fifth Amendment."

[68]See, for example, Alan Barth, "The Supreme Court's June 17th Opinions," New Republic 137 (1 July 1957): 9; Ephraim S. London, "The Watkins' Decision," Nation 184 (29 June 1957): 558-559; and Eric Sevareid, "Times Change, Men Change," The Reporter 17 (11 July 1957): 24.

[69]"Yates, Watkins, Sweezy, Jencks, Kinsell, and Reid - Gains for Individual Liberties?" Howard Law Journal 4 (January 1958): 82.

[70]Hartly Fleishmann, "Watkins v. United States and Congressional Power of Investigation," Hastings Law Journal 9 (February 1958): 165-166.

[71]Sweezy v. New Hampshire 354 U. S. 234 (1957).

[72]So often would these four join together in libertarian opinions that legal pundits would come to refer to the liberal bloc with the shorthand designation, "B.B.D. and W."

[73]Sweezy, .

[74]Dennis v. United States 341 U. S. 494 (1951).

[75]Yates v. United States 355 U.S. 66 (1957). Only Clark dissented from the opinion.

[76]Service v. Dulles 354 U.S. 363 (1957). Clark did not participate.

[77]"The Supreme Court Decisions," Commonweal 66 (5 July 1957): 339.

[78]U.S. News and World Report 42 (28 June 1957): 152.

[79]Forrest Davis, "The Court Reaches for Total Power," National Review 4 (6 July 1957): 33.

[80]Quoted in Murphy, 113.

[81]Ibid.

[82]"The Supreme Court and Liberty,", Life 43 (1 July 1957): 30.

[83]Felix Frankfurter, "Dear Brethren", 30 September 1957, Box 495, John Marshall Harlan Papers. John Marshall Harlan apparently felt Frankfurter's suggestions had merit and advised Warren they were worth consideration at the next conference. (Harlan to Warren, 3 October 1957, Box 495, John Marshall Harlan Papers.)

[84]Murphy, 153.

[85]Congress, Senate, Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearing before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, 85th Cong., 1st Sess.,7 August 1957, 2.

[86]Ibid., 8.

[87]Congress, Senate, Bill to Limit the Appellate Jurisdiction of the Supreme Court in Certain Cases, 85th Cong., 2d. Sess., S. 2646 Congressional Record, vol. 103, (27 July 1957).

[88]Specifically with regard to Watkins, the bill would have given the appropriate committee chairman the authority to rule on pertinency when the issue was raised by a witness.

[89]Murphy, 91.

[90]Mallory v. United States [354 U. S. 449 (1957)] had been decided on 24 June 1957. The decision had offended the law enforcement community by throwing out the confession of a rapist who had been detained and questioned for ten hours before arraignment.

[91]Murphy, 183.

[92]C. Herman Pritchett, Congress Versus the Supreme Court, 1957-1960, (Minneapolis: University of Minnesota Press, 1961), 92.

[93]Murphy, 260.

[94]In that case the Court had overturned the dismissal of a New York City college professor who had invoked the Fifth Amendment during questioning by a congressional investigating committee.

[95]Bellan v. Board of Education 357 U.S. 399 (1958).

[96]Lerner v. Casey 357 U.S. 468 (1958).

[97]It must be noted, however, that these cases should not be interpreted as a full-blown retreat by the Court in national security concerns. In the most sensational cases of the term, the Court attacked one of the favored weapons of the security conscious by overturning the

Department of State's denial of passports to Rockwell Kent and Weldon Dayton, both of whom had connections with the Communist Party.[Kent v. Dulles 357 U.S. 116 (1958); Dayton v. Dulles 357 U.S. 144 (1958)]

[98]Jenner-Butler failed 49-41; H.R. 3 went down 40-41. Murphy, 208 and 217.

[99]Report of the Committee on Federal-State Relationships, Conference of State Chief Justices, 23 August 1958, reprinted in U.S. News and World Report 45 (3 October 1958): 101-102.

[100]Quoted in "Now Lawyers Speak Out About Supreme Court," U.S. News and World Report 46 (9 March 1959): 49.

[101]Edwin S. Corwin, "Letters to The Times: Limiting the Judiciary," New York Times, 18 March 1958, sec. 4, p. 10.

IV

LLOYD BARENBLATT GOES TO COURT

As the anti-Court battle occupied Congress during 1957 and 1958, the House Committee on Un-American Activities continued with business as usual, seemingly untouched by the controversy.[1] The Committee made no significant procedural changes although it did accord some respect to Watkins with explanations of pertinency which emphasized a specific legislative purpose. It continued to force the contempt issue. During the immediate aftermath of Red Monday, in the summer of 1957, HUAC cited three persons, all of whom justified their recalcitrance on the basis of Watkins. Two of the three attempted to extend the Watkins holding to justify refusal to discuss their own past political associations. The judiciary was in some measure more affected by the Watkins ruling and the federal courts began to apply various interpretations of its holding.[2]

Lloyd Barenblatt, whose lower court appeals had run concurrently with those of Watkins, continued to press his case. Inspired by Alexander Meiklejohn's absolute interpretation of the First Amendment, the young college professor resolved from the very beginning to challenge HUAC's authority to probe his personal political beliefs and affiliations. Given the lack of success of First Amendment appeals, it

was not surprising that he had difficulty securing a lawyer who would support such a strategy.[3] Ultimately he was able to retain Philip Wittenberg who accompanied him to his HUAC appearance. During his testimony, Barenblatt specifically declined to use the Fifth Amendment and refused to answer any questions about his past Communist activities.[4] Not unexpectedly he was cited by HUAC for contempt of Congress.

Lloyd Barenblatt was tried in March 1956 in the federal District Court for the District of Columbia before Judge Alexander Holtzhoff. Wittenberg was reluctant to argue Barenblatt's First Amendment position and managed to persuade his client to accept a defense based on technicalities.[5] Barenblatt's trial consequently became a contumacious affair, fraught with arguments between Wittenberg and Holtzhoff about picayune legal issues.[6] The only mention of the First Amendment was made by Holtzhoff himself who noted in replying to one of Wittenberg's technical challenges that, "The First Amendment grants the privilege of expressing one's views. It grants the privilege of having beliefs, but it does not grant the privilege of refusing to answer questions."[7] Barenblatt was convicted by Holtzhoff and sentenced to six months imprisonment and a $250 fine.[8]

Having obtained, again with difficulty, a new attorney, David Scribner, Barenblatt appealed his conviction to the District of Columbia Circuit Court of Appeals.[9] The case was heard by a three judge panel which unanimously affirmed his conviction. The appellate opinion, handed down on 3 January 1957, was based on judicial precedent. It

relied on the previous court practice of presuming the existence of a valid legislative purpose. With respect to the First Amendment, the panel cited Barsky v. United States which had affirmed congressional authority to inquire into political beliefs and affiliations when the question under inquiry was Communism.[10]

Barenblatt's fortunes coincided with those of John Watkins when the former's case reached the Supreme Court shortly before the 17 June 1957 decisions. Subsequently on 24 June in a per curiam decision, the Court remanded Barenblatt's case to the Circuit Court for further consideration in view of Watkins.[11] The case was reargued in October; the Circuit Court handed down its second opinion on 16 January 1958.

The court, this time sitting en banc, upheld Barenblatt's conviction again by a vote of 5-4. Judge Bastian's opinion clearly reflected the narrowness of the Watkins holding. He emphasized that Chief Justice Warren's opinion, although criticizing the vagueness of HUAC's authorizing resolution, had not invalidated Rule XI but had only used it as background to examine the requirements for pertinency.[12] Had the Court found the resolution lacking, the opinion declared, it would have reversed the conviction rather than remanded it.[13] Warren's ruling had specified that, given the vagueness of the authorization, a witness must have other information in order to ascertain the nature of the question under inquiry. In Barenblatt's circumstances, as distinguished from Watkins's, this information had been provided by a clear statement of purpose on the part of the committee counsel, by the obvious nature of

the proceedings and by the substance of the questions addressed to the witness.[14]

The dissents to the ruling illustrated the confusion brought about by Warren's rambling opinion. Chief Judge Edgerton and Judge Bazelon took exception to the majority's reading of Watkins. Citing Warren's dicta extensively, they held that the Supreme Court had annulled HUAC's authorizing resolution, rendering Barenblatt's conviction invalid.[15] Two other dissenting judges, Fahy and Washington, maintained that the Sweezy decision dictated a reversal, since HUAC could not investigate in the field of education without a more specific mandate.[16]

Meanwhile other federal courts were also applying Watkins. Although many contempt convictions were affirmed, a number of reversals did reflect closer attention by the courts to procedural issues.[17] In seven separate instances pertinency contentions provided a successful avenue to acquittal or reversal. Carl Beck noted, "A passing challenge to pertinency, like the self-incrimination clause, is adequate protection from successful prosecution when the committee does not take the trouble to inform the witness as to the pertinency of the demands made."[18] In one of these cases, a federal district court appeared to expand the Watkins ruling by requiring a demonstration of relevancy for the $64 question, which had previously been considered pertinent in and of itself.[19] The Supreme Court also reaffirmed the Watkins pertinency holding in a case arising out of a Senate Internal Security Committee investigation.[20]

The success of the pertinency defense notwithstanding, confusion still existed as to whether congressional investigating committees had the constitutional right, when properly authorized, to force identification of past political affiliations and associates.[21] Legal scholar Bernard Schwartz critically evaluated the impact of "Watkins in Wonderland" on this major First Amendment issue:

> What the Watkins opinion says on this point can only cause confusion; it is irrelevant to the holding, delivered in vague, general terms and does not itself purport to be more than a half-answer to the difficult questions asked.[22]

With Barenblatt, the stage now seemed set for the Supreme Court to clarify the scope of Watkins and, in the dreams of civil libertarians, to give it the broadest possible interpretation. The American Civil Liberties Union, which had filed an amicus brief in the Watkins case, closely followed Barenblatt's litigation.[23] The ACLU was convinced that the Barenblatt appellate decision had so "boxed in" the Supreme Court that a ruling on the significant issues would be difficult to avoid. Union Staff Counsel, Roland Watts, believed the Court might rule on the constitutionality of HUAC's mandate, "a consummation devoutly to be wished." If it sidestepped that issue, he considered other likely grounds for reversal to be "exposure in general" or the "inapplicability of the mandate to education."[24] Subsequently, in an unusual move, the ACLU agreed to assume full legal responsibility for Barenblatt's appeal to the Supreme Court, assigning its three general counsels as well as Watts to the case.[25]

The ACLU decision to undertake the Barenblatt appeal was a significant signal that civil liberties issues, after years of yielding to anti-Communism, were enjoying greater public support. An internal upheaval in the ACLU during the 1950s over its position on McCarthyism had militated against any significant ACLU role in subversion/civil liberties cases until 1955.[26] In 1951 a number of disgruntled ACLU members had formed an alternative organization, the Emergency Civil Liberties Committee, to undertake such cases as the ACLU seemed reluctant to do. Barenblatt had received some support from the ECLC in the earlier stages of his legal battle but had had difficulty working with that Committee.[27] Nevertheless, by 1958 the ACLU had become active in challenging militant anti-Communism and considered Barenblatt a suitable vehicle to challenge directly the mandate of HUAC.[28]

Internal responsibility for Barenblatt's Supreme Court appeal rested with Staff Counsel Watts. The legal briefs were prepared by associated counsels Edward Ennis and Nanette Dembitz. Barenblatt's own attorney, David Scribner, also remained active in the case.

The ACLU brief, unlike its amicus submission in Watkins, directly attacked HUAC's authority to inquire into political beliefs and affiliations from three different perspectives. Relying heavily on the implications in Watkins and Sweezy, Ennis first challenged the Committee's authorizing resolution. He maintained that its lack of explicitness gave the Committee unlimited power to compel testimony in the areas of thought and expression.[29] Secondly, citing Sweezy the ACLU asserted that HUAC's authorization did not justify any investigation

into the field of education which draws special protection from the First Amendment.[30]

It was the petitioner's third argument, however, which clearly addressed the unanswered question of Watkins: Did the Committee have the power to compel testimony regarding personal Communist beliefs and associations? The ACLU's answer sought to illustrate how the asking of such question was contrary to the First Amendment's guarantee of unfettered public discussion of ideas. Ennis introduced evidence, gleaned largely from the proceedings during which Barenblatt had testified, which illustrated that the purpose of the inquiry had been to probe the intellectual life at the University of Michigan and had not been directed toward investigating the incitement of unlawful acts.[31] Barenblatt's involvement had been exclusively with the Haldane Club, a Marxist discussion group.

Ennis then proceeded to illustrate how an investigation such as this contravened the purpose of the First Amendment. Such investigations, he asserted, inhibit the expression of non-conformist ideas and, quoting Watkins, "exert . . . [another] subtle and immeasurable effect upon those who tend to adhere to the most orthodox and uncontroversial views to avoid a similar fate [of the non-conformists] at some future time."[32] Committee investigations discouraged as well freedom of association. In an eloquent exposition which hit hard at HUAC practices, the ACLU attorney explained:

> The Committee undermines the self-confidence and mutual confidence without which men cannot associate to exchange and express political views. It deters association not only because of fear of being

> exposed and judged in the indefinite future, but also, we suggest, because of reluctance to undergo the moral dilemma of compulsion to participate in such an exposure of others.[33]

His final points in this regard contended that the Committee interposed itself within the free market place of ideas. HUAC's purpose, he underscored, was to enforce a certain conformity of opinion. In doing so, it interfered with the both the individual's right to express his own ideas and his "First Amendment right to reach the minds of willing listeners."[34]

These arguments reflected Barenblatt's position on the absolute application of the First Amendment. They were also likely to appeal to the Court's libertarian bloc, the members of which seemed to subscribe at the very least to the notion of a preferred position for free speech guarantees. The Watkins majority, however, had also included Frankfurter and Harlan. Ennis's next perspective on the First Amendment, which paid some homage to the often used concept of balancing free speech guarantees against the national interest, may have been aimed at these more moderate members of the Court.[35]

At the outset Ennis stated bluntly that he did believe the Committee's investigation had been unconstitutional in and of itself:

> Here the Committee's announced and reiterated purpose was to investigate matters of thought and belief, and association affecting them, of private citizens. We believe this purpose, without more, establishes the invalidity of the investigation. By definition, influences on thought are so far removed from action with which the Government can legitimately be concerned, that there could be no justification for an investigation in this area.[36]

Nevertheless, he continued, if a balancing test were used, it would have to be weighted in Barenblatt's interests. Previous applications of the procedure in subversion cases had compromised an individual's right to free speech in the greater national interest of preserving the government from violent overthrow. Ennis's equation focused precisely on Barenblatt's circumstances and suggested that other alternatives might be weighed. He argued that the government's interest, i.e. HUAC's, had been exposure, not governmental protection, for no relationship existed between Barenblatt's participation in a discussion group and incitement to overthrow the government. He acknowledged that the balance could involve some governmental interests in the protection of its financial investments in research or veterans benefits. These interests, however, were inappropriately related to Barenblatt's position as a teaching fellow in social psychology.[37]

The final ACLU argument, obviously a concession to the narrow pertinency holding of Watkins, disputed the lower court's assessment that Barenblatt had been clearly advised of the relevance of the Committee's questions. The Petitioner's Brief expressed doubts that the statements made during the course of the hearings and the nature of the hearing itself provided Barenblatt with enough information to determine the pertinence of the questions asked. Ennis asserted that the Committee's statements appeared to indicate that the topic under inquiry was nothing more than the background and experiences of Francis Crowley.[38]

The government's response, prepared again under the auspices of Solicitor General J. Lee Rankin, not surprisingly concentrated on justifying Barenblatt's conviction under a very narrow interpretation of Watkins. Reiterating the recent appellate decision, Rankin underscored the fact that had HUAC's authorization been unconstitutional, the Court would have so acknowledged and would have reversed Barenblatt's conviction.[39]

The government's First Amendment rebuttal cited most of the arguments that had surfaced in the past to justify congressional loyalty investigations. Rationalizing such investigations in general, Rankin noted that Congress had a legitimate interest in ascertaining the extent of the Communist threat and its strength in numbers.[40] Turning specifically to the field of education, which distinguished Barenblatt from Watkins, the Solicitor General undertook to balance the competing interests. He noted the substantial federal interest in education and indicated that Congress on several occasions had enacted legislation to protect these interests from Communist infiltration. He maintained that the Committee admittedly had not directed its focus towards the incitement of unlawful activities but was justified in probing the Communist Party's thought control apparatus.[41] In view of this legitimate interest in education

> the particular questions asked petitioner related to membership in the Communist Party, not to beliefs and opinions; and that membership in that Party is and was a proper subject of inquiry because of the Party's nature, structure, and objectives. In these circumstances, any inhibition on political or social expression resulting from compulsion to answer the questions is more than counterbalanced by the greater interest warranting disclosure.[42]

Rankin's brief concluded, as had the ACLU's, with the pertinency issue. He noted that Barenblatt had never categorically objected to the pertinency of the questions he was asked and had obviously intended to refuse to answer any question, pertinent or not.[43] In any case, the nature of the hearings and various statements of Committee members had made it quite clear that the subject under inquiry was Communism in education.[44]

In some ways it was unfortunate that what was perceived as the most significant test of a congressional committee's right to inquire into political beliefs involved education. The traditional high regard accorded to the exercise of academic freedom plainly distinguished Barenblatt from Watkins in ways that could have blunted the impact of a favorable decision. The ACLU was mindful these circumstances and initially expressed reluctance over a request from the American Association of University Professors to file an amicus brief.[45] The AAUP itself had reservations about injecting such additional issues in a major First Amendment test.[46]

The AAUP response to the anti-Communist crusade had to some extent paralleled that of the ACLU. When the academic community had surrendered to McCarthyism during the late 1940s and early 1950s, the AAUP had virtually become immobilized. Beset with an ineffectual general secretary, the organization had provided minimal assistance to professors entangled in either congressional or academic investigations.[47] Apparently, the AAUP, too, understood the importance of re-establishing its own credentials and, in spite of its traditional

practice of not participating in litigation, filed its first amicus brief in the Barenblatt case.[48] The result was a masterful exposition and defense of the principles of academic freedom.

The AAUP brief, prepared under the direction of general counsel Ralph Fuchs, drew extensively on Sweezy and concentrated exclusively on the preferred status which academic freedom must be accorded under the guarantees of the First Amendment.[49] Cognizant that Barenblatt, unlike Sweezy, had not been questioned about his teaching, Fuchs alleged that Barenblatt had been unconstitutionally denied "that academic freedom [which] also belongs to a teacher in his representative capacity as a member of the academic community."[50] He explained:

> To ask a student to defend his participation in a campus organization, to subject this association to current standards of judgment rather than to those contemporary with it, to proceed perhaps to ask for the names of his schoolfellows who were his associates, is to subdue by frightening example any tendency toward nonconformity and the expression of thought through action in the student generation of today.[51]

Addressing the traditional tenet of academic freedom that colleges and universities themselves bear the ultimate responsibility for policing the intellectual integrity of their own faculties, the AAUP concluded that ". . . the proper tool for weeding out the unfit and the unfaithful is the established mechanism of the academic community, not the steamroller of the investigating committee."[52]

The government took issue with a number of the AAUP assumptions, particularly criticizing its consideration of academic freedom en toto as a constitutional issue. Rankin cited the 1953 statement of the

Association of American Universities which had affirmed AAU concern over the existence of an international conspiracy, characterized by an espousal of thought control. The AAU had maintained that "[s]ince present membership in the Communist Party requires acceptance of these principles and methods, such membership extinguishes the right to a university position."[53]

An additional amicus brief was filed on Barenblatt's behalf by the National Lawyers Guild. Couched in leftist rhetoric, the NLG brief was for the most part a diatribe directed against "the unprecedented era of inquisition into thoughts and associations boldly adopted from the Star Chamber and Court of High Commission."[54] The Guild's attorney, Nathan Witt, argued in very absolutist terms that HUAC's authorizing resolution was unconstitutional on its face as an abridgement of the First Amendment. He maintained that the implied power to investigate must be incident to an express congressional power. The Constitution specifically bars legislation on peaceful speech and association. Ergo, Congress cannot investigate in the area.[55]

The oral arguments on 18 November 1958, pitted Edward Ennis against government attorney, Philip Monahan.[56] Ennis did raise the pertinency issue in his presentation but placed greatest emphasis on the First Amendment. Both lawyers approached the issue from opposite extremes. Ennis maintained that any investigation into "what Communists are thinking about, what they're teaching, is plainly unconstitutional."[57] Monahan, invoking traditional Cold War rhetoric, urged the Court to be mindful of the threat posed by the world-wide Communist conspiracy. The

American Communist Party, he warned, was dedicated "to foster in every way possible the political and other ends of the Soviet-based dictatorship to which it bears true allegiance."[58]

Afterwards Ennis was confident that his argument had gone well. He expected, however, that the Court would again duck the constitutional issues.[59] Both he and the ACLU anticipated a favorable decision but on the statutory grounds that HUAC's mandate did not authorize an investigation into education. The ACLU believed that pertinency was another plausible basis for decision, although Ennis considered that the weakest part of Barenblatt's case.[60]

During the interim between the oral arguments and the announcement of decision, Barenblatt returned home to New York City, a victim of the academic blacklist, and secured employment on Madison Avenue in advertising and market research.[61] Meanwhile the ACLU continued its legal challenge to HUAC on another front, having accepted responsibility for litigation involving Frank Wilkinson. Wilkinson, a HUAC abolition activist from California, had demonstrated against the Committee during its hearings into Communism in the South which had been conducted in Atlanta in 1958. In a transparent attempt to discredit his activities, the Committee subpoenaed him after he had arrived in the city. Wilkinson refused on First Amendment grounds to respond to committee questions, was cited for contempt and convicted in federal court in January 1959. The presiding Judge declared that the Atlanta hearings had been conducted pursuant to a valid legislative purpose; he sentenced

Wilkinson to the maximum twelve months incarceration. ACLU petitions for a new trial remained in abeyance pending Barenblatt.[62]

ACLU optimism regarding a favorable decision in Barenblatt's case appeared to be substantiated by developments within the Supreme Court. On 4 October 1958 Potter Stewart had replaced Harold Burton. Since the latter justice had not participated in Watkins, the majority in that decision, Warren, Black, Douglas, Brennan, Harlan and Frankfurter, remained intact. In addition, on 4 May 1959 the Court had reversed the contempt conviction of desegregation activist, David Scull, who had refused to respond to questions of a Virginia state committee investigating his activities on behalf of an integration advocacy organization.[63]

The Supreme Court's decision in the case of Lloyd Barenblatt v. United States was announced on 8 June 1959. Contrary to high expectations, the Court in a 5-4 opinion upheld Barenblatt's conviction.[64] The liberal bloc of Warren, Black, Douglas and Brennan had remained solid, voting to free Barenblatt. Harlan and Frankfurter, however, had switched sides to join Clark, Whittaker and Stewart in voting to affirm. Justice John Marshall Harlan's terse, orderly majority opinion contrasted profoundly with Warren's rambling 1957 essay in Watkins. Harlan categorically addressed all Barenblatt's contentions. Although not specifically reversing Watkins, the opinion did back down from the promises of 1957 and restricted that decision to its narrowest possible impact.

If any doubts existed as to whether Watkins had invalidated the authorizing resolution of the House Committee on Un-American Activities, Harlan very assuredly put them to rest. He allowed that Watkins had indeed criticized Rule XI but asserted that the Court had done so only in its search for clues as to pertinency.[65] Independent of that consideration, Harlan proceeded to rule directly on the constitutionality of the mandate. Granting that it was vague, he explained that the Committee's authorization existed with a "persuasive gloss of legislative history" which unmistakeably specified that HUAC was authorized to investigate domestic Communism.[66] He reviewed the Committee's record, noting the various investigations the Committee had undertaken and the absence of House restrictions on its activities or appropriations.[67] Harlan continued to utilize the gloss of history to demonstrate that the House of Representatives had never intended to exempt education from the Committee's purview. He specifically cited the renewal of the Committee's appropriation after the initiation of the presently contested investigation.[68] The Justice unequivocally declared:

> . . . we must conclude that its legislative authority to conduct the inquiry presently under consideration is unassailable and . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness.[69]

Only two years before Chief Justice Warren had come to the completely opposite conclusion that, "It would be difficult to imagine a less explicit authorizing resolution."[70] Warren, too, had noted the continuous reaffirmations of HUAC's appropriations, but that history had

only confirmed for the Chief Justice that the House had exerted little control over the Committee.[71] Particularly disturbing to him had been the obvious reluctance of the House, in the context of this legislative history, to adequately define HUAC's legislative purpose so as to justify the information it sought.[72] Harlan, however, studied the same history and found that the House of Representatives had progressively added such specificity to HUAC's mandate so as to render it constitutional.

Harlan proceeded to attack Barenblatt's pertinency arguments, taking care to distinguish Barenblatt's circumstances from those of Watkins and, in the process, explaining that Lloyd Barenblatt was well aware of the question under inquiry. Following the very specific road map of Warren's 1957 opinion, Harlan found that the Committee had established the relevance of the questions put to Barenblatt with "undisputable clarity."[73] In spite of the fact that the witness made no overt objection to pertinency at his hearing, he had ample clarification of the question under inquiry from five separate sources: (1) statements of the chairman at the commencement of the series of education hearings in 1953; (2) opening statements on the day the petitioner himself testified; (3) the nature of testimony on the day he testified; (4) the statement of the chairman at the close of the hearings and; (5) the fact that he was asked about his own activities, not those of others.[74]

The last of Harlan's three topics finally addressed the First Amendment constitutional question. Again Warren had left a road map when he had declared in Watkins that,

> . . . not all such inquiries [those intruding on the First Amendment] are barred. . . . The critical element is the existence of and the weight to be ascribed to the interest of the Congress in demanding disclosures from an unwilling witness.[75]

Harlan had only to specify the weights and balance the competing interests.

The government's interest was established through HUAC's valid legislative purpose: the investigation of Communist activity. Harlan stressed that the significance of this endeavor arose from the Communist Party's unique nature which distinguished it from other political associations. Because its tenets advocated the forcible overthrow of the government, HUAC's interests in compelling testimony were heavily weighted by "the ultimate value of any society: the right of self-preservation."[76] Citing Barsky, Harlan maintained that any investigation into the advocacy of overthrow necessarily involves identification of Communist members. The inquiry was no less valid in its focus on the university, for the purpose had been to ascertain the degree of infiltration, not to control what was taught.[77]

Harlan was unwilling to accept Barenblatt's contention that HUAC's true purpose had been exposure. He noted that the Chief Justice had asserted in Watkins, "motives alone would not vitiate an investigation . . . [if] a legislative purpose was being served."[78] It followed that, "[s]o 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."[79] Given these considerations, Harlan found no significant evidence that

the Barenblatt's free speech rights should be weighted more heavily than the government's interest in compelling his testimony.

> We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment are not offended.[80]

The decision, which appeared to be a complete repudiation of Watkins, was one of those occasions when the majority in one case becomes the minority in another. In this instance, deserted by Harlan and Frankfurter, the Watkins majority became the dissenting minority.[81] The dissent, which was authored by Justice Hugo Black and joined by Douglas, Warren and partially by Brennan, garnered almost as much attention as the majority opinion. Black's opinion was a vigorous and lucid defense of the absolute guarantees of the First Amendment. Alexander Meiklejohn, who had so influenced Lloyd Barenblatt, submitted that

> no more significant statement . . . has been made than that in which Justice Black tells us that, primarily, the case for the defense in the Barenblatt case rests not on his private "right to silence" but on the "need of our country" that "democratic institutions" shall be maintained.[82]

Black disagreed with practically every proposition made by Harlan.[83] He objected to defining HUAC's authorization retrospectively, and he asserted that if Congress wanted to investigate education, it needed to so declare.[84] His strongest criticism, however, was directed toward the balancing of an individual's right to the privacy of his political

beliefs against the national interest. Black had long contended that the constitutional prohibition, "Congress shall make no law. . . .", should be interpreted at face value. He maintained that the application of a balancing test was

> to read the First Amendment to say, "Congress shall pass no law abridging freedom of speech, press, assembly and religion, 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."[85]

Black also inveighed at some length against the interests that had been balanced by the majority. It was not Barenblatt's individual right to silence which was at issue but rather

> the interest of the people as a whole in being able to join organizations, advance causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves.[86]

The dissenters' final disagreement with the majority concerned the congressional motives which Harlan had eschewed examining. This time it was Black who used the "persuasive gloss of legislative history" to ascertain that the Committee's motive was, and had been since 1938, exposure.[87] Brennan, in his separate concurrence, agreed with Black's final point, noting that such a purpose was "outside the constitutional pale of congressional inquiry."[88]

Barenblatt was not the only startling opinion read on 8 June 1959. As if to emphasize its intentions to step away from a supervisory role in legislative investigations, the Supreme Court retreated as well from

its Sweezy position on state inquiries. In Uphaus v. Wyman, the Court refused to overturn the contempt conviction of pacifist minister Willard Uphaus who, like Paul Sweezy, had refused to cooperate with New Hampshire Attorney General, Louis Wyman. In Sweezy the Court had castigated the New Hampshire legislature for giving Wyman virtually unlimited authority to inquire into political beliefs and affiliations.[89] In Uphaus the Barenblatt majority joined in an opinion by Justice Tom Clark which upheld Wyman's request for the names of attendees at a summer camp sponsored by Uphaus's organization. Clark noted that many of the speakers at the camp had Communist affiliations. Since the existence of subversive persons within the state posed a serious threat to state security, government interests outweighed "associational privacy."[90] Clark seemingly ignored the fact that Uphaus's interrogation occurred under the same authorization as Sweezy as he balanced away First Amendment guarantees.

Reaction to the Barenblatt decision was mixed and more subdued than that to Watkins. The New York Times editorialized that, in all but the most extreme cases, the judiciary should leave supervision of investigations in the political arena.[91] Time opined that while earlier security decisions had perhaps been justified by the excesses of anti-Communism, in the Uphaus and Barenblatt decisions "the Court steered a truer course between the public interest and the rights of the individual than it had in a long while."[92] Commonweal, which in 1957 had praised the Court for preserving liberty and glorifying democracy, did not draw any specific attention to the Barenblatt ruling.[93] Instead

it noted, "that the decisions of the Court should depart from an inflexible ideological line . . . strikes us as not a bad thing."[94]

Legal scholars had more difficulty accepting the Barenblatt ruling and were generally critical of the opinion.[95] Their objections addressed both its political and legal ramifications. The most often cited criticism was its inconsistency with Watkins, which effectively created two disparate precedents and left the law in a state of confusion.[96] In particular a number of objections were directed toward Harlan's rejection of the Watkins-based "vice of vagueness." Whereas Warren in 1957 had had difficulty imagining a more inexplicit mandate than that of HUAC, Harlan found that for Lloyd Barenblatt, testifying six weeks after Watkins, the authorizing resolution had been historically well-defined. Dean Alfgange, Jr., a particularly harsh critic, found Harlan's reasoning "amazing", noting that, "incredibly in a single sentence in Barenblatt, Justice Harlan swept aside this major part of the Watkins decision . . . without reference to the obvious contradiction."[97]

Harlan's First Amendment balancing act also attracted some strong condemnation. Alfange again reproached the Court for indulging in such an illusory exercise; Warren's "arduous and delicate task" was obviously not such when inquiries involved Communism.[98] Another observer wrote about the "drastic circumscription of first amendment freedoms" and asserted that

> Rarely in the long history of judicial attempts to define the protections of the first amendment has governmental interference

> with what are admittedly first amendment protections been justified with so little finding of public necessity.[99]

Other critics expressed alarm over the probable return to the free-wheeling investigatory procedures of the pre-Watkins era.[100] The Barenblatt decision had so restricted witness options that in investigations involving Communism, the Fifth Amendment remained the only defense against testifying. C. Herman Pritchett regretted that

> the Court again fumbled an opportunity to develop a theory of judicial control which would take account of the need to safeguard both legislative rights to decide what information is needed and private rights against coercion and humiliation.[101]

Alexander Meiklejohn, the grand old man of free speech, agonized over the Barenblatt decision. He felt responsible for the misfortunes of both Lloyd Barenblatt and Frank Wilkinson and considered filing an amicus brief in any Barenblatt rehearing or in Wilkinson's upcoming appeal.[102] Roland Watts advised Meiklejohn that he could provide more valuable service by generating public awareness of the Court's decision.[103] Meiklejohn subsequently published two critiques of Barenblatt, one a textual analysis which quarreled with Harlan's logic; the other attacked the whole concept of balancing First Amendment guarantees. In the first he admonished Harlan for compartmentalizing First Amendment considerations to such an extent that they had no impact on the vagueness of the authorizing resolution or on pertinency. He was particularly concerned that in place of the vague term, "un-American" activities, Harlan had substituted the equally non-definitive,"Communist activities" which was no more valuable in defining pertinency.[104] One

year later Meiklejohn specifically addressed the First Amendment issue in the context of the "persuasive gloss" of Constitutional history. He stated

> Our "whole history" tells us that the "ultimate", though not the only, interest of our Constitution is that of creating and maintaining the political freedom of our citizens. . . . [T]he claim that self-preservation shall be ultimate, shall have an overruling priority over the other interest of the nation, has no constitutional basis whatever.[105]

The American Civil Liberties Union was, of course, devastated by the Barenblatt ruling. The Union had truly expected a favorable outcome in the case.[106] Publicly the ACLU made note of the close vote and placed great emphasis on Black's dissent. It also took some encouragement from Harlan's acknowledgement that the First Amendment did protect the disclosure of associational relationships, even though they had been out-balanced in the present circumstances.[107] At the end of June, the ACLU indicated it would continue to press the issue and petition the Supreme Court to rehear Barenblatt's appeal in the light of reconsidering the exposure issue.[108]

In spite of its public optimism, the ACLU privately considered that future efforts challenging HUAC in the legal arena would be futile.[109] The Union did proceed to file a petition for a rehearing of Barenblatt. The ACLU brief for the rehearing petition accepted the Court's balancing formula but maintained that the public interest could also be construed to include, not only the preservation of the state, but also societal interests in freedom of expression. The brief also asked the Court to re-examine the record of Barenblatt's hearing in light of the exposure

contention and took issue with the Court's validation of HUAC's mandate by historical analysis.[110] As expected, the petition for a rehearing was denied in October 1959, and a subsequent petition for reduction of Barenblatt's sentence was likewise refused by the D.C. District Court. Barenblatt surrendered to authorities on 10 November 1959 to serve his six month sentence.[111]

The ACLU also continued to pursue Frank Wilkinson's court appeals. Because the Barenblatt ruling seemed to have effectively squelched any opportunity for invalidating HUAC's mandate, Roland Watts was forced to defend Wilkinson on other grounds.[112] He concentrated on the fact that Wilkinson had been subpoenaed after his arrival in Atlanta, accusing the Committee of using the subpoena power to discredit and restrain its opponents.113 The Supreme Court put to rest any doubts that Barenblatt was a retreat from judicial supervision of congressional investigations in Wilkinson v. United States and its companion case, Braden v. United States. In both decisions, Justice Potter Stewart, speaking for the Barenblatt majority, declined to examine the motives behind the subpoenaing of witnesses, so long as the Committee was functioning within the confines of a valid legislative inquiry.[114] The summary effect of all three decisions, Barenblatt, Wilkinson and Braden, was the foreclosure of the First Amendment as a reasonable defense against Committee questions and the affirmation that, so long as Communist activity was involved, any question on any topic for any reason was valid.[115]

CHAPTER IV
NOTES

[1]Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities (New York: Farrar, Straus and Giroux, 1968), 380 and Dean Alfange, Jr., "Congressional Investigations and the Fickle Court," University of Cincinnati Law Review 80 (Spring 1961): 149.

[2]Carl Beck, Contempt of Congress: A Study of the Prosecutions Initiated by the Committee on Un-American Activities, 1945-1957 (New Orleans: Hauser Press, 1959), 167-170.

[3]Peter Irons, The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court (New York: The Free Press, 1988), 100-101.

[4]Congress, House, Committee on UnAmerican Activities, Communist Methods of Infiltration, Education-Part 9: Hearings Before the Committee on Un-American Activities, 83d Cong., 2d. Sess., 28 and 29 June 1954, 5805.

[5]Irons, 101.

[6]Supreme Court, Record from U.S.D.C. for the District of Columbia in Case No. 742, October Term 1956, Lloyd Barenblatt v. United States of America 360 U.S. 109 (1959) (No. 35), 8-67.

[7]Ibid., 53. According to Irons, HUAC had no better friend on the federal bench than Alexander Holtzhoff. The judge was a former counsel to J. Edgar Hoover. Irons, 88.

[8]Ibid., 67.

[9]Barenblatt was quite irritated by Wittenberg's strategy during the district court trial. He subsequently first approached a "well-known and respected civil liberties lawyer" who noted that Barenblatt's First Amendment position "was interesting philosphy, but it's not law." Irons, 102.

[10]Barenblatt v. United States 240 F. 2d 875, 881-883.

[11]Barenblatt v. United States 354 U.S. 930.

[12]Barenblatt v. United States 252 F.2d 129, 130.

[13]Ibid., 132.

[14]Ibid., 133. Whether these circumstances were in fact distinguishable was debatable as well as debated by legal observers. In spite of the efforts by the Circuit Court (and eventually the Supreme

Court) to differentiate between the testimonies of the two men, Dean Alfange, Jr. noted that, ". . . it would require a highly qualified hair-splitter to be able to find a difference between the manner in which the committee tried to establish pertinency in the course of Watkins's testimony, and the manner in which it tried to do so in the course of Barenblatt's testimony," p. 160. See also Kent B. Millikan, "Congressional Investigations: Imbroglio in the Courts," William and Mary Law Review 8 (Spring 1967), 413.

[15]Ibid., 137-138.

[16]Ibid., 138.

[17]Alfange, 150.

[18]Beck, 169.

[19]Ibid., 170. The intrinsic pertinency of the $64 question had been affirmed in Lawson v. United States 176 F.2d 49 (1949), the flagship decision for the Hollywood Ten.

[20]Sacher v. United States 356 U.S. 576 (1958). Sacher's appeal had been remanded concurrently with that of Barenblatt and was very quickly decided.

[21]C. Herman Pritchett, The Political Offender and the Warren Court (Boston: Boston University Press, 1958), 46.

[22]Bernard Schwartz, "The Supreme Court - October 1956 Term," New York University Law Review 32 (November 1957): 1213.

[23]ACLU News Release, 7 October 1957, American Civil Liberties Union Papers, 1958, Volume 55, G. Seeley Mudd Manuscript Library, Princeton University, Princeton, New Jersey. Hereinafter cited as ACLU Papers.

[24]Roland Watts, ACLU Staff Counsel to Ennis, Fraenkel and Ten Eyck, General Counsels, 31 January 1958, ACLU Papers, 1958, Volume 55.

[25]ACLU News Release, 18 February 1958, ACLU Papers, 1958, Vol. 55. See also Jerold Simmons, Operation Abolition: The Campaign to Abolish the House Un-American Activities Committee, 1938-1975 (New York: Garland Publishing, Inc., 1986), 157.

Barenblatt seemed to begrudge the ACLU's late entrance into the case. He had received some minimal assistance previously from the American Friends Service Committee as well as the Emergency Civil Liberties Committee but had had continuing difficulty retaining an attorney who would not require money "up front". Alan Howe, American Friends Service Committee, Rights of Conscience Program to Barenblatt, 17 April 1957, ACLU Papers, 1958, Vol. 55; Irons, 101-102.

[26]Samuel Walker, In Defense of American Liberties: A History of the ACLU (New York: Oxford University Press, 1990), 207-210. The anti-Communist stance of the ACLU had been partially responsible for prior Union practice of entering subversion cases only in an amicus capacity at the appellate level. This allowed the ACLU to maintain its libertarian stance while not becoming directly identified with the Communist philosophies of its clients. The acceptance of full legal responsibility for Barenblatt's appeal was a major change in direction. See Mary Sperling McAuliffe, Crisis on the Left: Cold War Politics and American Liberals, 1947-1954 (Amherst, MA: University of Massachusetts Press, 1978), 96.

[27]The ECLC was more committed to a political campaign against the HUAC rather than a legal challenge. Barenblat resented the fact that its help was contingent upon his becoming a publicity "show piece" for ECLC self-aggrandizing purposes. Simmons, 140 and Lloyd Barenblatt to National [ECLC] Council Member, 2 October 1959, National Emergency Civil Liberties Committee Papers, 1952-1965, Box 10, HUAC, Columbia University, New York, New York.

[28]Watts to Affiliates, 18 February 1958; Watts to Philip Nochlin, Vassar Chapter, American Association of University Professors, 23 April 1958, ACLU Papers, 1958, Vol. 55. Civil Liberties, March 1958, 1. Indicative as well of the ACLU's new activism was its decision in the summer of 1958 to take on Frank Wilkinson's case at the trial rather than the appellate level. See Simmons, 161.

[29]Supreme Court, Brief for the Petitioner, Barenblatt v. United States 360 U.S. 109 (1959) (No. 35), 20-25.

[30]Ibid., 25-28.

[31]Ibid., 31-37.

[32]Watkins v. United States 354 U.S. 178, 197-108 quoted in Petitioner's Brief, Barenblatt, 43.

[33]Petitioner's Brief, Barenblatt, 45.

[34]Ibid., 47, quote from Kovaks v. Cooper 336 U.S. 77 (1949), 87.

[35]See for example, Dennis v. United States 341 U.S. 494 (1951).

[36]Petitioner's Brief, Barenblatt, 50.

[37]Ibid., 51-60.

[38]Ibid., 62.

[39]Supreme Court, Brief for the United States, Barenblatt v. United States 360 U.S. 109 (1957) (No. 35), 33.

[40]Ibid., 59.

[41]Ibid., 77.

[42]Ibid., 82.

[43]Ibid., 89.

[44]Ibid., 91-92.

[45]Watts to Philip Nochlin, 23 April 1958, ACLU Papers, 1958, Vol. 55.

[46]Robert Carr to Louis Joughin, AAUP Staff Associate, 14 May 1958, ACLU Papers, 1958, Vol. 55.

[47]Ellen Schrecker, No Ivory Tower: McCarthyism and the Universities (New York: Oxford University Press, 1986), 314-315.

[48]Watts to Nochlin, 23 April 1958 and Joughin to Carr, 14 May 1958, ACLU Papers, 1958, Vol. 55.

[49]Supreme Court, Brief of American Association of University Professors as Amicus Curiae, Barenblatt v. United States, 360 U.S. 109 (1959) (No. 35), 11-12.

[50]Ibid., 13.

51Ibid., 21.

[52]Ibid., 28.

[53]Quoted in Brief for the United States, Barenblatt, 85. The inclusion of the 1953 statement was controversial, and probably ill-advised. The AAU, taking advantage of AAUP lethargy in responding to McCarthyism, had issued the statement just before HUAC initiated its 1953-1954 education investigations, during which Barenblatt had testified. The statement had declared, in part, that professors had a duty to their profession to be candid with the university and with the public; the use of the Fifth Amendment, therefore, cast considerable doubt on fitness to teach. The AAU position was only sporadically contested at the time; the ACLU did not issue any criticism until 1957. (Schrecker, 187-191) By 1959 it appears that the whole matter was an embarrassment to the AAUP which advised Watts: "The 1953 statement continues to be latently the most dangerous and should be laid to rest once and for all."(Joughin to Watts, 16 October 1958, ACLU Papers, 1958, Vol. 55) Although the Reply Brief for the Petitioner did not directly address the AAU statement, it did devote some attention to emphasizing that colleges and universities should be free to make their own determinations regarding the qualifications of faculty, free from governmental interference. The ACLU criticized the special attention given by HUAC to probing the political beliefs and activities of college

professors with the transparent motive of eliminating them from the profession. Supreme Court, Reply Brief for the Petitioner, Barenblatt v. United States 360 U.S. 109 (1959) (No. 35), 16-17.

[54]Supreme Court, Brief of National Lawyers Guild as Amicus Curiae, Barenblatt v. United States 360 U.S. 109 (1959) (No. 35), Uphaus v. Wyman 360 U.S. 72 (1959), 2.

[55]Ibid., 9.

[56]Other cases argued on the same day addressed a number of other aspects of the investigating power. Scull v. Virginia dealt with a state committee investigating civil rights organizations; Flaxer v. United States concerned the authority of the Senate Internal Security Subcommittee. The first case argued that day, however, would ultimately share the spotlight with the Barenblatt decision. Uphaus v. Wyman again challenged the investigating powers of New Hampshire Attorney General, Louis Wyman. Willard Uphaus, director of an organization which sponsored political discussion camps, had testified freely about his own political activities to Wyman, but he had refused to surrender to the Attorney General a list of persons attending his camps.

[57]Quoted in Irons, 90.

[58]Ibid., 90-91. Irons notes that the Chief Justice grew impatient with the time-worn phraseology, asking Monahan if he had to go into "all of that."

[59]Ennis to Patrick Malin, ACLU Executive Director, 19 November 1958, ACLU Papers, 1958, Vol. 55.

[60]Ibid.

[61]Irons, 103. Barenblatt's situation reflected common practice throughout the 1950s. The university community had established, through its "good-old boy" network, a blacklist as pervasive as that of the entertainment industry, though not so well-documented. Virtually every academic who refused to cooperate with subversion investigations was subsequently denied employment. (Schrecker, 265-266)

[62]Civil Liberties (March 1959), 1.

[63]Scull v. Virginia 359 U.S. 344 (1959).

[64]Barenblatt v. United States 360 U.S. 109 (1959).

[65]Ibid., 117.

[66]Ibid., 118.

[67]Ibid.,120.

[68]Ibid., 122.

[69]Ibid., 122-123.

[70]Watkins, 202.

[71]Ibid., 203-204.

[72]Ibid., 205.

[73]Barenblatt, 124.

[74]Ibid., 124-125.

[75]Watkins, 198.

[76]Ibid., 128.

[77]Ibid., 129-130.

[78]Watkins, 200.

[79]Ibid., 132.

[80]Ibid., 134.

[81]Harlan and Frankfurter were joined by Whittaker, Stewart and Clark.

[82]Alexander Meiklejohn, "Dissent in Barenblatt Case," Letter to the Editor, New York Times, 21 June 1959, 8.

[83]He did not challenge the pertinency finding.

[84]Barenblatt, 137-140.

[85]Ibid., 143.

[86]Ibid., 144.

[87]Ibid., 153-162.

[88]Ibid, 166.

[89]Sweezy v. New Hampshire 354 U.S. 234 (1957).

[90]Uphaus v. Wyman 364 U.S. 388 (1959).

[91]New York Times, 11 June 1959, 32.

[92]"The Supreme Court: Truer Course," Time 73 (22 June 1959): 14.

[93]"The Supreme Court Decisions," Commonweal 66 (5 July 1957): 339-340.

[94]"A Changing Court?" Commonweal 70 (17 July 1959): 363.

[95]The major exception was Bernard Schwartz who viewed Barenblatt as a needed corrective to the extreme implications of the Watkins opinion. He explained that, "the possibility of abuse [of the investigatory power] does not justify the courts in setting themselves up as the censors of what is after, all the internal functioning of a co-ordinate branch of government." (Bernard Schwartz, "The Supreme Court - 1958 Term," University of Michigan Law Review, 58 (December 1959): 172.

[96]Alfange,167-168; Miliken, 420; Irwin J. Friedland, "Congressional Committees - Contempt Powers," Marquette Law Review 43 (Winter 1959-1960): 365; Harry Kalven, Jr., "Mr. Alexander Meiklejohn and the Barenblatt Opinion," University of Chicago Law Review 27 (Winter 1960): 321; Michael C. Slotnik, "The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma," University of Miami Law Review 14 (Spring 1960): 409.

[97]Alfange, 157.

[98]Ibid., 166.

[99]Norman Redlich, "Rights of Witnesses Before Congressional Committees," New York University Law Review, 36 (June 1961): 1154.

[100]Beck, 180; Milliken, 419-420; Thomas J. Klitgaard, "Constitutional Law: Power of Legislative Committees to Compel a Witness to Reveal Communist Affiliations," California Law Review, 47 (December 1959): 935.

[101]C. Herman Pritchett, Congress v. the Supreme Court, 1957-1960 (Minneapolis: University of Minnesota Press, 1961), 57.

[102]Meiklejohn to Watts, 11 July 1959, ACLU Papers, 1958, Vol. 55.

[103]Watts to Meiklejohn, 16 July 1959, ACLU Papers, 1958, Vol. 55.

[104]Alexander Meiklejohn, "The Barenblatt Opinion," University of Chicago Law Review, 27 (Winter 1960): 335-337.

[105]Alexander Meiklejohn, "The Balancing of Self-Preservation Against Political Freedom," California Law Review 49 (March 1961): 14. In a unique observation, Meiklejohn also took issue with the inconsistent manner in which the opinion balanced self-preservation. He noted that Harlan had observed, "However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth amendment, do not afford a witness

the right to resist inquiry in all circumstances." (Barenblatt, 126) Meiklejohn concluded:

> In a word, the witness who seeks to avoid his own "self-incrimination" may constitutionally defy the claims of national self-preservation. But a man who, in the same situation, pleads the cause of political freedom for all self-governing citizens is fined and sent to jail.(Mieklejohn, "The Balancing of Self-Preservation," 7.)

[106]ACLU Board of Directors Minutes, 22 June 1959 and Watts to Albert Bendich, 23 June 1959, ACLU Papers, 1958, Vol. 55. Edward Ennis who reported to the Board at the meeting of 22 June indicated that even government attorneys had been surprised by the decision.

[107]ACLU News Release, 9 June 1959, p.2, ACLU Papers, 1958, Vol. 55.

[108]ACLU News Release, 22 June 1955, ACLU Papers, 1958, Vol. 55. In many ways Harlan's refusal to examine HUAC motives, although politically judicious, was a serious weakness in the Barenblatt opinion. Harlan had been more than willing to use the "gloss of legislative history" to add specificity to HUAC's charter but abjured using it to examine the true congressional intent in its investigations. Furthermore, the Uphaus decision had largely been based on motive, Justice Clark noted that the state legislature had a legitimate concern over the existence of subversive persons within the state. Clark extrapolated this interest to mean that the motive for authorizing the investigation had been self-preservation. Clark went on then to balance this motive against Uphaus's associational rights, asserting that the state's interest again outweighed the individual's. See Earl L. Kellett, "Legislative Investigating Committees and the Right to Privacy," South Dakota Law Review 5 (Spring 1960): 102-103.

[109]Watts to Bendich, 23 June 1959, ACLU Papers, 1958, Vol. 55.

[110]ACLU News Release, 16 July 1959, ACLU Papers, 1958, Vol. 55.

[111]Barenblatt served part of his sentence at the District of Columbia workhouse in Occoquan, Virginia and was later transferred to the federal prison in Danbury, Connecticut. After his release he returned to the University of Michigan and completed the work for his doctorate in 1962. He subsequently obtained a position in educational psychology at New York University, where he is still employed. Irons, 103-104.

[112]In the fall-out from the Barenblatt decision, Watts agonized over the Wilkinson brief since, with obviously unwarranted optimism, the record had been focused on the constitutional issues. Over Wilkinson's objections, he had wisely raised some "embryonic" arguments with respect

to pertinency and exposure. Watts to Bendich, 23 June 1959 and Watts to Melkljohn, 16 July 1959, ACLU Papers, 1958, Vol. 55.

[113]Simmons, 237.

[114]Wilkinson v. United States 365 U.S. 399 (1961) and Braden v. United States 365 U.S. 431 (1961). Braden had also been an active critic of the Committee and had cooperated with Wilkinson in organizing the Atlanta opposition to the HUAC hearings there. He was also a desegregation advocate, and some evidence existed that he had been summoned before the Committee in reaction to those activities.

[115]One other case decided in 1961 after Wilkinson and Braden did return to the Watkins precedent, however. Bernard Deutch, a Cornell University professor, had freely responded to HUAC questions about his own activities during 1954 hearings in Albany, New York. He had refused, however, to inform on others, although he had not specifically objected on pertinency grounds. Writing for himself and the Barenblatt minority, Potter Stewart overturned the contempt conviction declaring that the pertinency defense was not waived by failure to raise the issue during the hearing. Deutch v. United States 367 U.S. 456 (1961)

V

WATKINS TO BARENBLATT: A COURT IN RETREAT?

The decisions handed down on 8 June 1959 seemed to signal a new Supreme Court position on the extent of the congressional power of inquiry. Not only did Barenblatt v. United States and Uphaus v. Wyman incorporate findings that were discordant with Watkins v. United States and Sweezy v. United States, but they were also noticeably void of the libertarian tone which had characterized the 1957 decisions. One commentator noted that Barenblatt's "evisceration of Watkins was as total and absolute as could be possible without an explicit repudiation."[1] The new opinions appeared to signify the Court's abandonment of its earlier activism supporting individual liberties and a return to judicial restraint.

Felix Frankfurter, the Court's most vocal advocate of restraint, had long counseled against judicial intrusion in the political processes of government and was particularly wary of interference with the judgment of the legislature. His close friend, John Marshall Harlan, took great care in the Barenblatt opinion to reassure Congress that it had broad power to combat the Communist threat and declined to examine congressional intent in conducting such inquiries.[2] He held that so long as Congress was acting in pursuit of a legitimate legislative

purpose, the courts could not intervene. If flawed motives were involved, the responsibility for remedy lay with the electorate.[3]

Such deferential assurances contrasted distinctly with Chief Justice Earl Warren's biting criticism of Congress in Watkins.[4] Warren had implied that, in the absence of congressional supervision, the judiciary might have to assume the responsibility for accommodating legislative need with the individual's right to privacy.[5]

This shift in the Court's position, as well as the change in the complexion of its opinions, was also reflected in a number of subsequent decisions. Palmero v. United States, decided two weeks after Barenblatt, seemed to countermand Jencks v. United States by allowing broad congressional discretion in the determination of the availability of FBI files to defendants.[6] A second decision in the Konigsberg bar admission controversy during the 1960 Term resulted in a holding opposite to that of 1957. This time the Court held that the state could legitimately request information from the applicant on past associational memberships in determining fitness for the bar.[7] During the same term the Court also upheld the constitutionality of the membership clause of the Smith Act, in spite of its 1957 Yates ruling which had severely restricted prosecutions of Communists under the law's other provisions.[8]

Court observers almost universally perceived the new Court conservatism as a strategic retreat in face of the anti-Court reaction which had erupted after its "Red Monday" decisions. The New York Times noted the propitious timing of the Barenblatt decision as public

criticism of the Court appeared to be again on the increase. It speculated that "the Supreme Court is trimming its sails to ride out a gale."[9] The Nation headlined, "The Supreme Court Sounds Retreat" and attributed the withdrawal in great measure to the critical reports of the Conference of State Chief Justices and the American Bar Association.[10] U.S. News and World Report commented that the Court's new conservative majority was likely to "lead the Court away from the line of congressional fire."[11]

Scholarly assessments, although more complex, still explained Barenblatt in terms of reaction to the congressional assault. The most favorable review came from Bernard Schwartz who praised the Court for its needed correction to Warren's injudicious congressional criticism in Watkins.[12] Walter Murphy placed the Court's reversal in the context of a historical pattern in which the threat of retaliatory legislation often forced the Court to back down from public policy decisions.[13] C. Herman Pritchett's study of the Congress/Court controversy focused on the reasons for the failure of the attack on the Court. Pritchett did observe, however, that Barenblatt and Uphaus "in which the Court markedly deferred to the legislature, suggest that the attacks did in fact take some toll of the Court's will to resist."[14] Legal scholar, Robert McCloskey, expressed it best, noting that if the justices had been tempted "to launch an all-out onslaught against subversive activities laws, a majority of them now rather convincingly mastered the impulse."[15]

Too much can be made, however, of a Court in retreat. In the first instance, the threat of retaliatory legislation had passed before the commencement of the Court's 1958 Term. It was during the closing week of the Eighty-Fifth Congress, from 19 August to 23 August 1958, that Lyndon Johnson successfully engineered the defeat of the Court curbing legislation. Although some anti-Court legislation was reintroduced in the Eighty-Sixth Congress, the support for the new proposals was not characterized by the vehemence and vitriole which had accompanied the resolutions in the Eighty-Fifth. The 1958 elections had resulted in a more liberal Congress, and a number of the Court's more vocal Republican critics had either retired or been defeated.[16] Although the report of the Conference of Chief Justices of August 1958 and the American Bar Association report of February 1959 had kept dissatisfaction with the Court in the public arena, both had been vigorously criticized.[17]

The certiorari vote on Barenblatt, which had been taken on 4 April 1958, as the Senate Judiciary Committee was considering the Jenner-Butler proposal, also tends to refute the capitulation hypothesis. The Court was evenly divided on whether to consider the case with Warren, Black, Douglas and Brennan voting to accept and Frankfurter, Harlan, Clark and Whittaker voting to deny.[18] Given the predilictions of the Court's activist bloc, there can be little doubt that the four liberal justices were anxious to extend the implications of Watkins. In voting to deny certiorari the four remaining justices would have affirmed the Barenblatt appellate decision as the correct

reading of Watkins. It would also, however, have left Warren's strong criticism of Congress undisturbed.

In retrospect the Barenblatt decision should not have been entirely unexpected, for both it and Watkins were generally consistent with the Supreme Court's overall approach to subversion cases. The intensity of the reaction to Watkins, on both the right and on the left, obscured what the Court had actually said in Watkins. The conservative community had been much too quick to assume that the Court was offering the country to the Communists; liberals had too readily surmised that the High Bench was ready to end McCarthyism once and for all. The post-Watkins rhetoric on both sides ignored the fact that the actual holding of the decision was very narrowly based, presumably to attract the votes of Frankfurter and Harlan. With the Court little altered in 1959, realistic expectations should not have assumed a majority for a broader decision.

During the 1950s the Supreme Court had consistently broadened the mantle of protection for non-seditious rights, especially in the areas of racial and criminal justice. In the field of subversive activities, however, the Court had very carefully avoided ruling on the substantive power of the political branches to combat the Communist threat. Instead, it had relied rather on narrow procedural restrictions and statuatory interpretation to moderate the excesses of extreme anti-Communism.[19] Judicial restraint runs as a common thread throughout the subversion cases of the 1955, 1956 and 1957 Terms. This restraint is reflected whether the Court confronted the Congress, the Executive or

state power. Although Slowchower v. Board of Education gave promise that the Court was challenging the right of civil authorities to discharge employees who took refuge in the Fifth Amendment, it was a very limited decision. The Court had not held that the New York City Board of Education could not dismiss an employee on such grounds; it did decide that the dismissal violated due process because the employee had been denied a hearing in which to respond to the charges. It was the prima facie assumption of guilt to which the Court had objected.[20]

Pennsylvania v. Nelson, which had been widely perceived as an attack on state authority to combat sedition, was anchored in a tradition of pre-emption precedent.[21] The Court had long refused to enforce state laws which came into conflict with federal legislation or which existed in an area Congress intended to occupy. It was these concerns to which Warren's Nelson opinion was addressed. His decision interpreted the congressional purpose in the Smith Act as intending to occupy the field; he did not challenge the constitutionality of the Pennsylvania law. He also left room for the states to prosecute for sedition against themselves.[22] The Court was again concerned with blunting the edges of anti-subversion efforts, not overruling them. By keeping subversion prosecutions in the federal courts, the Supreme Court would be better able to supervise them without having to pass on the constitutionality of a myriad of state laws.[23]

The Court likewise attempted to soften the impact of the Federal-Loyalty Security Program without challenging its substance. The Summary Suspension Act of 1950 had authorized dismissal of security

risks outside normal civil service procedures. As enacted, the Act applied to eleven government agencies but contained provisions allowing the President to extend it to others. When Eisenhower broadened its coverage to include all the executive departments, the Supreme Court demurred. Justice Harlan's 1956 opinion in Cole v. Young held that Congress had not intended the Act to apply to non-sensitive positions. Again utilizing statuatory interpretation, the Court did not challenge the validity of the Act but sharply restricted its application.[24]

The Supreme Court decisions of 17 June 1957 fit this pattern as well. Service v. Dulles invalidated the security-based dismissal of a Foreign Service employee on procedural grounds; the Court held that the Secretary of State had not followed the appropriate regulations of his own department in effecting the discharge. The authority of the Secretary to dismiss was not in question, only the method by which he accomplished it.[25]

Yates v. United States provided an extreme example of the lengths to which the Court was willing to go in moderating anti-subversion legislation without directly challenging its constitutionality.[26] In 1951 the Court had upheld the constitutionality of the Smith Act which proscribed teaching advocacy of the violent overthrow of the government. Dennis v. U.S. had essentially maintained that membership in the Communist Party was, in and of itself, evidence of such illegal activities.[27] John Marshall Harlan's Yates decision, however, effectively rewrote, but did not specifically overrule, Dennis. Resorting again to statuatory interpretation, Harlan very narrowly

interpreted the Act's prohibition against "organizing" any group which advocated forcible overthrow of the government. Harlan held that Congress only intended that the law apply to the initial act of organization not to continuing organizing activities. Laborious hair-splitting also resulted in Harlan's other major contention. He asserted that Congress had not intended its prohibition of "advocacy" to encompass advocacy as an abstract doctrine; it applied only to the incitement of specific unlawful acts. Although Yates did not declare the Smith Act unconstitutional, it did deflect most further prosecutions of Communists under its provisions.

Read in the light of this judicial history, Watkins and Sweezy remained well within the parameters of previous Court custom. Sweezy turned on the narrow procedural point that the New Hampshire state legislature had not sufficiently restricted the boundaries of its Attorney General's inquiry. The majority opinion did not repudiate the state's authority to conduct such an investigation.[28]

Watkins, in spite of the Chief Justice's strong rhetoric, was also a very carefully limited holding and quite in line with the Court's previous approach. Warren was undeniably angry with Congress. He did not, however, challenge the congressional power to investigate in the field of internal security. He did insist that such investigations conform to procedural regularities that would allow the witness to be treated according to a certain standard of fairness.[29] Robert McCloskey, writing in 1956, prophesied accurately the Court's attitude toward subversion:

> The judiciary may hesitate to substitute its judgment for that of Congress in deciding whether laws like these should be passed. But it can make sure that no one, Communist or not, is able to say that the laws were enforced unfairly in American courts.[30]

Barenblatt also fit the pattern and was consistent with the Court practice of avoiding direct conflict with substantive congressional power. Harlan's opinion, in fact, was a forthright assertion that the Supreme Court had never disputed the legislature's authority to investigate Communism.[31] He stated that the Court would accept the Congress's own assessment of the scope of HUAC's authority to conduct such investigations and allow Congress a broad measure of self-determination regarding what information was vital for its purposes.[32] In cases which involved the Communist Party, he indicated that the protection of the nation's integrity was a valid enough legislative purpose to permit infringement on First Amendment guarantees.[33]

Harlan's decision was also consistent with another judicial tradition which often weighed free speech guarantees against other societal interests.[34] The balancing test had frequently appeared in cold war decisions to justify restrictions on free expression.[35] It had had import in both the Barsky and Josephson decisions of 1948 and had constituted the rationale of the Watkins and Barenblatt lower court decisions.[36] In all instances, First Amendment rights had had to yield to the greater interest of national security. Perhaps injudiciously, Chief Justice Warren had also introduced the concept of balancing into

his Watkins opinion, although it was not the crucial element in that decision.[37]

Barenblatt did not really constitute a retreat from Watkins in the nature of its holding, for the latter did not challenge the basic authority of Congress to investigate Communism. The basic inconsistency of Barenblatt, when compared with Watkins and other internal security decisions, is that it faced the constitutional and substantive issues without resort to statuatory or procedural manipulation. Harlan ruled directly on the constitutionality of HUAC's authorizing resolution and faced as well the application of the First Amendment to the $64 question. However, Barenblatt's tone and spirit did differ markedly from that of Watkins. The Chief Justice's passionate dicta in the latter case cannot be lightly dismissed; dicta in one case often portend the decision in the next.

The differing circumstances of the two cases partially explain their disharmony in tenor. Watkins had been a cooperative witness. He had freely testified before the Committee concerning his earlier dabbling with Communism. Although he had not been a member of the Communist party, he did respond to the $64 question, openly acknowledging his cooperation with the Communists during the 1940s in conjunction with his duties as a labor organizer. He willingly identified former associates whom he knew to be still active Communists. The point at which he became unable to cooperate was the naming of names of individuals whom he knew had since abandoned their Communist affiliations. He specifically questioned the pertinency of identifying former Communists,

the purpose of which, he held, was to publicly humiliate them through exposure.

Watkins was in an untenable situation. He was under pressure from his union to cooperate with the Committee which he did by discussing his own background. His openness regarding his own fellow travelling, however, precluded use of the Fifth Amendment to justify refusal to answer questions about others. He was forced to take a stand on principle.

The situation of John Watkins depicted with clarity the abusive extremes to which the subversion investigations had gone, and Warren's dicta reflected the his own obvious discomfort with the situation:

> . . . when . . forced 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. . . . Nor does the witness alone suffer the consequences. Those who are identified by witnesses and thereby placed in the same glare of publicity are equally subject to public stigma, scorn and obloquy.[38]

The Chief Justice's opinion unmistakeably held the Congress responsible for the dilemma of individuals like Watkins: "That this impact is partly the result of non-governmental activity by private persons cannot relieve the investigators of their responsibility for initiating the reaction."[39] One legal observer commented that the Chief Justice's heated essay was "the response of a decent man to the dilemma of another decent man to which he is sympathetic so far as his office will permit."[40]

Lloyd Barenblatt testified under very different circumstances. He was also a man of very different ilk. Rather than a fellow traveller,

he had been a card-carrying Communist Party member. His participation in Communism had occurred much later than that of Watkins and had extended until 1952, long after the first Smith Act convictions. Whereas Watkins's involvement with Communism may have been essential to his effectiveness as a labor organizer, Barenblatt had joined the Haldane Club much more purposefully to investigate Marxism as doctrine. Watkins came from the blue collar community; Barenblatt was intellectual and well-educated, coming from the academic community which had long been under suspicion for harboring Communists.

Barenblatt was contumacious and defiant toward the Committee practically from its first question. It was quite apparent that his position had been strategically constructed as a very public denunciation of HUAC. His statement of objections, which he tried futilely to read to the Committee, asserted:

> This Congress and the committees appointed by it can enjoy only the powers expressly granted in the Constitution or necessarily implied therefrom. Congressmen or committee men thereof as officials of the Government do not have, and cannot arrogate to themselves, a power to intrude into the private affairs of the people of the United States. . . The arrogation of power may be curtailed either by an appeal to the courts, or what is to be more hoped for, by the self-discipline of those entrusted with authority. The possibility of petty tyranny is ever present in a democracy unless the body of officialdom is wise and knows that self-limitation is essential to the success of our scheme of government.[41]

It was not just naming names to which Barenblatt objected. He made no specific objections to pertinency but challenged the very existence of the Committee, categorically refusing to discuss even his own activities. His dispute with HUAC was a deliberate protest against its

incursion into the rights of free speech and association. His ultimate aim was a court test of the Committee's authority; it was not a quarrel with specific unethical practices.[42] Lloyd Barenblatt, unlike John Watkins, was not a man caught up in a situation not of his own making.

Warren's dicta, however, was more than just a sympathetic response to the dilemma of a decent man. It was also obviously intended to advise Congress that its abusive practices needed correction.[43] The Chief Justice admonished that, "No inquiry is an end in itself. . . . Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[44] He spoke of the "impressive array of evidence" that Watkins had presented to prove the Committee's sole purpose was exposure.[45] He severely chastised the House of Representatives for exercising little control over HUAC.

> Unquestionably the Committee conceived of its task in the grand view of its name. Un-American Activities were its target, no matter how or where manifested. . . . [T]he House of Representatives repeatedly approved its continuation. . . . [I]t is evident that the preliminary control of the Committee exercised by the House is slight or non-existent. . . . The Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities.[46]

At the conclusion of this diatribe, however, just when it appeared Warren was about declare Rule XI unconstitutional and put HUAC out of business, the Chief Justice backed away and returned the responsibility to Congress.

> It is . . . not the function of this Court to prescribe rigid rules for the Congress to follow in drafting resolutions establishing

> investigating committees. That is a matter peculiarly within the realm of the legislature. . . .[47]

It was, however, at the conclusion of Warren's opinion, after he had severely criticized HUAC's inadequate explanations of pertinency, that the commission to Congress was made indisputably clear:

> That protection [of individual rights] 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 in authorizing the use of compulsory process and by their committees in exercising that power would suffice.[48]

Observers interpreted Warren's opinion in Watkins to mean that the Supreme Court would undertake to ameliorate the abuses of subversion investigations should the House fail to do so. Civil libertarians eagerly anticipated that result in Barenblatt, as HUAC continued seemingly much unaffected by Watkins. Conservatives, of course, recoiled against any potential Court interference with the prerogatives of Congress. What neither side failed to consider was the impracticality of the Court's fulfilling such responsibility.

In faulting Rule XI as hopelessly vague, the Chief Justice had given support to HUAC critics who contended that the Committee's authorizing resolution defined no valid legislative purpose. Had the Court, in Barenblatt, proceeded to invalidate the resolution, it would have essentially invalidated every investigation undertaken under its jursidiction since 1938 which John Marshall Harlan "obviously regarded as a reductio ad absurdum."[49] In 1957 Warren had also obliquely stated that under its vague authorization, the Committee's actual purpose had

been exposure and punishment. It was unrealistic, however, to expect that Barenblatt could have invalidated HUAC's investigation on this point. Had the Court ruled in 1959 that the Committee existed solely to punish and expose, it would have set for itself the virtually impossible task of examining congressional motives in any disputed investigation. Harlan's argument, that motives alone would not invalidate an investigation conducted for otherwise valid purposes, was thoroughly logical and imminently practical.[50]

Even if the libertarian expectations of Watkins had been feasible, the contemporary context of Barenblatt probably militated against their implementation. The Supreme Court's 1957 subversion decisions had reviewed activities which had occurred in 1954 when the anti-Communist hysteria was still very potent. By the time of Watkins the downfall of McCarthy had tarnished much of the political advantage in the issue and had resulted in increasingly vocal support for anti-McCarthy measures.[51] The reaction, of course, may have given the High Bench occasion to think otherwise. Nevertheless, attention quickly faded from the political offender decisions.[52] HUAC, although generally unaffected by Watkins, had substantially reduced its investigations by 1959. Walter Goodman notes that by this time, the Committee had become "a tiresome uncle who insists on telling his old ghost stories in broad daylight to nephews with other things on their minds."[53] In addition, in January 1960 Congressman James Roosevelt (D-CA) had introduced a resolution into the House transferring HUAC's mandate to the Judiciary Committee. Although the resolution quickly attracted critical reaction from HUAC apologists

and was ultimately killed by the House leadership, it was an unusual occurrence for any legislator to suggest an end to HUAC's reign.[54] This slight hint that the political processes had begun to confront investigatory activities, coupled with the decline of interest in anti-Communism, presumably reduced some of the pressure on the Court to interfere. Barenblatt represented in this respect a return to the reticence the Court traditionally preferred, now that its arbitration seemed no longer necessary.

None of these explanations, in and of itself, wholly account for the Court's decision in Barenblatt. The Court's 1959 position on legislative investigations likely resulted from an interplay of all these factors. In the final analysis the United States Supreme Court is a collective body whose members function as nine separate law firms. Felix Frankfurter in a 1939 letter to Stanley Reed explained:

> . . . [T]he Court is an institution, but individuals, with all their diversities of endowment, experience and outlook determine its actions. The history of the Supreme Court is not the history of an abstraction, but the analysis of individuals acting as a Court who make decisions and lay down doctrines.[55]

Any explanation of the Barenblatt reversal has to address the separate personnel of the Court, and in this case, that consideration appears to provide the most cogent interpretation of the Court's actions.

Watkins had been decided by a 6-1 vote. Burton and Whittaker had not participated, and Tom Clark had dissented alone. Declining to join Warren's expansive dicta, Frankfurter had written his own concurrence which focused on the very narrow pertinency holding. The remaining

Justices, Warren, Black, Douglas, Brennan and Harlan formed the five man majority which had signed the Court opinion.

Barenblatt, decided 5-4, claimed a majority of Clark, Whittaker, the newly-appointed Potter Stewart, Frankfurter and Harlan. The liberal bloc composed the dissent. Given Frankfurter's very limited concurrence in Watkins, all the justices were consistent in their positions on the two rulings, except John Marshall Harlan. Presumably, in deciding not to join Frankfurter in his narrow concurrence in Watkins, Harlan had been in agreement with Warren's opinion in 1957. In 1959 he switched sides to join the conservative majority which upheld Barenblatt's contempt conviction.[56]

One legal commentator has noted that Barenblatt went to jail only because his case came to final decision in 1959; had the Court decided his case when it first granted certiorari in 1957, he would have gone free. This observation was based on the assumption that the criticism from Congress had had great impact on Harlan and Frankfurter, causing the former to reverse his position.[57] In conversations with Walter Murphy, Justice William O. Douglas echoed the same observation in describing the Barenblatt conference:

> It was [a] very, almost cryptic discussion of the case because opinions had pretty well jelled between Watkins and the arrival of Barenblatt. And why they had jelled that other way, I just don't know. But that's about all there is to it because it was not a long, debated case. The [case], it was well argued but the views of the majority had crystallized very strongly. . . . And so there was no way of convincing anybody in the majority or anybody in the minority. So I think that the upshot of it was that for some reason or another Watkins was greatly watered down and there was generally a retreat from Watkins.[58]

Neverthless, it is clear that Harlan's shift is the key to understanding the Watkins-Barenblatt enigma. Harlan's position on Barenblatt was remarkably consistent with the judicial philosophy which would characterize most of his years on the High Bench. As a personal friend and intellectual ally of Felix Frankfurter, Harlan consistently applied the tenets of judicial restraint. Both in the fields of federal-state relations and separation of powers, he stoutly adhered to the view that the judiciary should not inject its judgment in political processes. He noted in 1963 that:

> One of the current notions that holds subtle capacity for serious mischief is a view of the judicial function that seems increasingly coming into vogue. This is that all deficiencies in our society which have failed of correction by other means should find a cure in the courts. . . . [S]ome well-meaning people apparently believe that the judicial rather than the political process is more likely to breed better solutions of pressing or thorny problems.[59]

John Marshall Harlan, grandson and namesake of the Great Dissenter of Plessy v. Ferguson, had come to the Supreme Court in 1955 as an accomplished trial lawyer. Most of his career had been spent with a large Wall Street law firm. He had been nominated by President Dwight D. Eisenhower to the Second Circuit Court of Appeals, but after remaining only eleven months in that position, he was selected again by Eisenhower for appointment to the Supreme Court. He took his seat in March 1955.

Harlan was often described as a "lawyer's judge." He was noted for his routine of hard work and close attention to detail, and his legal opinions were regarded as well-constructed and legally precise. During

his sixteen years on the Supreme Court, he generally voted with the conservative camp, and, after Frankfurter's retirement in 1962, became the Court's leading spokesman for judicial restraint. Newsweek once described Harlan as "A Frankfurter without fireworks."[60]

He was not a result-oriented judge but a dedicated proponent of the application of principle to law. One of his former law clerks remarked that, "Throughout his career Harlan saw himself as struggling for a rational analytic, objective jurisprudence. . . . Harlan deplores . . . the man who simply lets his judgment turn on the immediate result."[61] He was strongly committed to stare decisis and continuity in the law.[62]

Harlan's opinion in Barenblatt is quite consistent with this judicial philosophy. In the tradition of judicial restraint, he preferred not to make constitutional determinations. If forced to do so, he would defer if at all possible to the judgment of the Congress. Lloyd Barenblatt's lawyers, in forcing the First Amendment issue, may have left Harlan with no alternative but to side with Frankfurter.

More perplexing is Harlan's vote on Watkins. As a judicial restraintist who was reluctant to directly challenge Congress, it seems logical that he would have joined in Frankfurter's narrow pertinency concurrence. Instead he was the only outsider to the liberal bloc who had signed Warren's wide-ranging opinion. Although he felt more comfortable with the pertinency issue, he nevertheless had agreed to join Warren's opinion even when it still included the First Amendment as the first ground for reversal.[63] It might be postulated that Harlan did

not understand the First Amendment to be the primary basis for decision, since if the HUAC authorizing resolution was deemed unconstitutional for such reason, it would have been unnecessary to have introduced the pertinency issue. Perhaps Warren's rambling opinion confused Harlan as much as it confused the civil liberties community, although given Harlan's incisive intellect, this seems unlikely. Even Frankfurter was unaware at the time that Harlan had joined the Chief Justice. On the same date when Harlan indicated he would sign the majority opinion, Frankfurter advised Warren that if the Chief removed the First Amendment references both he and John could "join your opinion unreservedly."[64] The real explanation of the Barenblatt opinion thus lies in Harlan's vote in Watkins.

One student of John Marshall Harlan's judicial philosophy has concluded that the Justice's votes in Watkins and Barenblatt can be rationalized because the former concerned a fellow traveller and the latter a Communist Party member. In both Watkins and Sweezy, neither of which involved formal Party membership, Harlan upheld individual rights.[65] Harlan's Barenblatt opinion did emphasize the special nature of the Communist Party and declined to consider it within the spectrum of legitimate political organizations.[66] He was also the author of the majority opinion in the 1963 decision, Scales v. United States, upholding the membership clause of the Smith Act. He noted in that opinion that Scales was an "active" and "knowing" member in an organization which advocated the forcible overthrow of the government.[67] The importance which Harlan placed on the special nature of the

Communist Party seems substantiated by a handwritten list of citations which he used in preparing Barenblatt. Without exception, all his noted quotations refer to the Communist Party and its advocacy of violent overthrow.[68] Another undated page of notes on Barenblatt in Harlan's handwriting also comments that "purpose of investigation is ok - CP is not ordinary political party."[69]

Yet, this explanation fails to account for a number of other decisions in which Harlan did vote to sustain individual civil liberties for Communist Party members. Another former Harlan law clerk, civil liberties activist Norman Dorsen, has cautioned that the Justice was not so insensitive to individual claims as has been supposed.[70] Although he was considered "conservative", he was not always predictably so.[71] Thus in his Yates opinion, he overturned the convictions of fourteen Communist Party officials and made further enforcement of a large portion of the Smith Act virtually impossible. A cryptic comment in his handwritten notations on the Barenblatt opinion indicates that the case differed from Watkins because the latter, "simply refused to disclose others."[72] It may well have been that the personal dilemma of John Watkins affected Harlan in much the same way as it had Warren: he too voted the response of a decent man.

Despite such speculation, Harlan's reversal in position can most cogently be accounted for in the context of the development of his jurisprudence. Harlan first took his seat on the Court in March of 1955. Justices generally spend their first terms on the Bench somewhere in the center of the Court's alignment as they carve out their own

judicial niche. An analysis of the civil liberty cases of the Supreme Court during the 1956 and 1957 Terms finds Frankfurter and Harlan dead center in the Court's liberal/conservative spectrum (as illustrated in the Appendix). Of twenty-two cases in the 1956 Term, the most liberal member, Douglas, voted for the individual twenty-one times; the most conservative member, Clark, voted for the individual just once. Frankfurter and Harlan respectively registered sixteen and fourteen votes for individual liberties. Of these twenty-two decisions, only seven were decided 5-4.[73] During the 1957 Term, Frankfurter and Harlan remained again in the center position, but the distance between them and the closest liberal justice, Brennan, dramatically increased. Out of forty-one civil liberties cases, Frankfurter voted for the individual in nineteen instances, Harlan fourteen. Brennan, however, sided with the individual in thirty-two cases. Fourteen of these decisions were 5-4.[74] By the 1958 Term the polarization of the Court in terms of civil liberties was very apparent; Harlan had become much more clearly ensconced with the conservative wing. Although now Whittaker occupied the center position, the distance between him (six votes for individual liberties) and Brennan (twenty-three) is a virtual chasm. Harlan voted for the individual in only three cases. Fifty percent of these cases were decided by a 5-4 vote.[75]

Norman Dorsen, in a 1969 article, considered Harlan's early career as a practicing lawyer very influential in the development of the his judicial philosophy.[76] Perhaps during his early terms on the Court, Harlan's long involvement with individual clients made him more

sympathetic to personal claims of civil liberties. However, it seems more logical that the increasing polarization of the Supreme Court which occurred after its libertarian 1956 Term is the likely explanation for his shift of position.

The liberal/conservative divisions on the Supreme Court deepened from 1956 through 1959. The Chief Justice, after his early attachment to Felix Frankfurter, began, almost concurrently with the appointment of Harlan to the Bench, to feel more comfortable with the Black-Douglas activist position.[77] It was during this period that the Nelson and Slochower cases exemplified the Court's changed outlook in subversion cases. According to Bernard Schwartz, the initial conference vote in Nelson was 4-4 with Harlan undecided. He credits the Chief Justice with managing to swing Harlan and create a libertarian majority.[78] He noted again, with reference to Slochower, that it was the Chief's position which persuaded Harlan to vote for reversal.[79] The arrival of William Brennan on the Bench in October 1956 had a great effect on Warren and effectively solidified his allegiance to the activist approach. Within this changing alignment, John Marshall Harlan, who was also attempting to find his own place on the Court, was apparently not immune to the Chief's considerable powers of persuasion. At the end of the 1956 Term, Harlan's votes on the "Red Monday" decisions, and particularly Watkins, probably reflected the novice Justice's initial indirection and willingness to side with the Chief.

As Harlan began to have some sense of his own jurisprudence during the 1957 Court term, the anti-Court attack erupted in Congress and it

seems likely, given his emerging restraintist position, that he, as well as Frankfurter, regretted the broad implications of the decisions of the previous term.[80] Warren's emotional and rambling treatise in Watkins had polarized the legislative investigation issue to the extent that no middle ground existed.[81] Charles Whittaker, who had not participated in the Watkins decision, was available to vote on Barenblatt, and Potter Stewart had replaced Burton in October 1958. In the context of this expanding conservativism on the Court, Harlan registered his reaction to Watkins.

It was no accident that Felix Frankfurter assigned the opinion to Harlan, for in allowing the swing justice to write the decision, Frankfurter was able to emphasize forcefully that the Court did not intend to challenge Congress's authority to investigate subversion.[82] Much as he had done with Warren in the writing of Watkins, Frankfurter repeatedly offered suggestions to Harlan in shaping the tone and substance of the opinion. As late as 3 June 1959 Frankfurter advised:

> Before the reader gets involved in the details of balancing, and in the necessary preliminaries as to the authority of the Committee, the scope of the Resolution, its overwhelmingly established gloss through successive actions by Congress, he ought to have been made to realize the far-reaching power of Congress which we are asked to censor and curtail. . . .[83]

Harlan incorporated an introduction which Frankfurter had submitted.[84] The first two pages of the Barenblatt opinion, which emphasize the broad congressional power of investigation as well as Congress's authority to interrogate teachers, were Frankfurter's.[85]

The atmosphere of extremism on the Court was evident in the impassioned rhetoric of Hugo Black's dissent in Barenblatt. Just as Harlan's opinion left no doubt as to the fact that First Amendment rights could be outweighed by the threat of Communism, Black's left no room for conjecture as to his view on the absoluteness of free speech guarantees:

> The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be change. . . . On that premise this land was created, and on that premise it has grown to greatness. Our Constitution assumes that the common sense of the people and their attachment to our country will enable them, after free discussion to withstand ideas that are wrong. To say that our patriotism must be protected against false ideas by means other than these is, I think, to make a baseless charge. Unless we can rely on these qualities - if, in short, we begin to punish speech - we cannot honestly proclaim ourselves to be a free Nation and we have lost what the Founders of this land risked their lives and their sacred honor to defend.[86]

In the context of this very polar position, which was joined by Warren and Douglas, it is not particularly surprising that Harlan shifted position.[187]

John Marshall's Harlan's own explanation for his position in Barenblatt may perhaps lie in another shift in jurisprudence he made during his early years on the High Bench. In June 1956 he was with a Court majority which held that wives of servicemen stationed abroad could be tried for criminal activity by military courts.[88] The case was reheard during the next Court term, and a new decision was announced in

June 1957 which overturned the previous ruling and held that military dependents had a right to a civil trial.[89] Harlan was again in the majority, a major reversal of position. Although this case did not involve Communism or subversion, Harlan's response to a question about his shift in opinion may have been prophetic. Life quoted the Justice as saying that, "what had seemed 'reasonable' in June 1956 did not seem reasonable in June 1957."[90] The attack on the Court which arose after June 1957 may well have had a significant impact on what seemed reasonable to John Marshall Harlan in June of 1959.

V
NOTES

[1]Dean Alfange, Jr., "Congressional Investigations and the Fickle Court," University of Cincinnati Law Review 80 (Spring 1961): 170.

[2]Barenblatt v. United States 360 U.S. 109, 127. See also C. Herman Pritchett, Congress Versus the Supreme Court, 1957-1960 (Minneapolis: University of Minnesota Press, 1961), 12.

[3]Ibid., 132-133.

[4]Watkins v. United States 354 U.S. 178, 198-199.

[5]Ibid., 200, 202, 203-204.

[6]Palermo v. United States 360 U.S. 343 (1959), Jencks v. United States 353 U.S. 657 (1957). Palermo involved an income tax prosecution in which the Court held that a summary of a witness's statement which was not approved by him, did not have to be given to a defendant. Frankfurter's opinion based the decision on the new congressional Jencks statute and distinguished it from Jencks by noting that Jencks had been decided, in the the absence of congressional legislation, on federal administrative procedures. The present case, he explained, was governed by the new statute.

[7]Konigsberg v. State Bar 366 U.S. 36 (1961).

[8]Scales v. United States 367 U.S. 203 (1961), Yates v. United States 354 U.S. 298 (1957). The Smith Act membership clause proscribed "knowing"membership in any organization which advocated forcible overthrow of the government. The Court upheld the clause, provided the evidentiary requirements of Yates had been met.

The Court continued to reaffirm these new precedents. Wilkinson v. United States 365 U.S. 399 (1961) and Braden v. United States 365 U.S. 431 (1961) reaffirmed Barenblatt; Nelson and Globe v. Los Angeles 362 U.S. 1 (1960), decided in the 1959 Term, reaffirmed Lerner and Beilan. Los Angeles county employees, Nelson and Globe, had pleaded the Fifth Amendment when questioned by HUAC and had been dismissed. The Court upheld both firings, Nelson's with a split decision and Globe's on the basis that he had actually been fired for insubordination.

Perhaps reflective of some indecision in its ranks, the Court did not entirely abandon concern for civil liberties. It did object to the State Department's denial of passports based on past Communist connections. Kent v. Dulles 357 U.S. 116 (1958) and Dayton v. Dulles 357 U.S. 144 (1958). It also held that denaturalization could not be supported entirely by a defendant's past Communist affiliation. Nowak v. U.S. 356 U.S. 660 (1958) and Maisenberg v. U.S. 356 U.S. 670 (1958).[13] At the end of its 1958 Term the Court also ordered the reinstatement of two federal employees who had been dismissed under the

auspices of the loyalty-security program. Vitarelli v. Seaton 359 U.S. 535 (1958) and Green v. McElroy 360 U.S. 474 (1958). Vitarelli was a procedural decision which had little substantive impact on the Federal Loyalty-Security Program. Greene, although it did not address constitutional issues, did reject standard loyalty hearing procedures which denied employees the opportunity to examine the evidence against them or to confront and reply to hostile witnesses. In two additional legislative investigation cases, the Court did reverse contempt convictions on pertinency grounds. Sacher v. United States 356 U.S. 576 (1958) and Flaxer v. United States 358 U.S. 147 (1958). With the exception of the last two decisions, however, the individual liberty holdings did not involve legislative authority to deal with subversion; in general they were directed at the national security efforts of the executive branch.

[9]New York Times, 14 June 1959, Sec. 4, p. 3.

[10]"The Supreme Court Sounds Retreat," The Nation 188 (20 June 1959): 545-546.

[11]"Is the Supreme Court Changing Its Mind?" U.S. News and World Report 46 (22 June 1959): 48.

[12]Bernard Schwartz, "The Supreme Court - October 1958 Term," Michigan Law Review 58 (December 1959): 171.

[13]Walter F. Murphy, Congress and the Court: A Case Study in the American Political Process (Chicago: University of Chicago Press, 1962), 247.

[14]Pritchett, 12.

[15] Robert McCloskey, The Modern Supreme Court (Cambridge, MA: Harvard University Press, 1972), 222. See also Philip B. Kurland, Politics, the Constitution and the Warren Court (Chicago, University of Chicago Press, 1970), 30; George W. Spicer, The Supreme Court and Fundamental Freedoms, 2nd ed., (New York: Appleton, Century Crofts, 1967), 229. Philip Kurland observed that those two decisions "made it look as though the Court tempered its sails to the prevailing winds." (page 30)

It should be noted, however, that the retreat, "was a tactical withdrawal, not a rout."(Murphy, 246) If the Court did in fact yield to congressional pressure, it did not do so on all fronts. Given the unanimity of its civil rights rulings, there seemed little doubt that the Court was committed to ending racial segregation in all areas of public life. Most analysts who had concluded that the Court had shifted right during the 1958 Term also acknowledged that in the area of race relations it had continued to forge ahead. See, for example, "Is Supreme Court Shifting Its Course?' U.S. News and World Report 52 (26 February 1962): 98, 100; "Ducking the Big Issues," Business Week (8 July 1961): 87; McCloskey, 221; Murphy 246. The attack on the Court had

had its genesis in the Brown decision of 1954, but until 1956 southern segregationists were essentially isolated in their opposition. (Pritchett, 18) It was the civil liberties decisions in the subversion cases which provided allies to wage a more effective battle. The Court, in retreating from its most exposed position on subversion, may have hoped it could weaken the opposition enough to continue its assault on racial discrimination. See William Swindler, The Court and the Constitution in the Twentieth Century: The New Legality, 1932-1969 (Indianapolis: The Bobbs-Merrill Company, 1970), 251.

A scrutiny of the Court's legislative investigation decisions seems to support this supposition. The Court's reticence in protecting the rights of witnesses which was reflected in Barenblatt and Uphaus, is absent from those cases which concerned racial issues. Scull v. Virginia 359 U.S. 344 (1959), decided six weeks before Barenblatt, illustrated the advantage of the pertinency defense in an investigation into integration-action organizations. In June of 1958 the Court overturned a state contempt conviction in a case which concerned the application of First Amendment considerations to an investigation of the NAACP. It had held that Alabama's demand for NAACP membership lists as a requirement for doing business in the state interfered with freedom of association. Justice Harlan's opinion had asserted that freedom of association, whether for advancement of political, economic, religious or cultural beliefs, was inseparable from free speech guarantees. NAACP v. Alabama 357 U.S. 449. In 1963 the Court again affirmed this position in Gibson v. Florida Investigating Committee. 372 U.S. 539. During the course of a state inquiry into Communist infiltration of private organizations, a Miami NAACP official had been ordered to appear and bring with him records of membership and contributors. He refused to produce the records or refer to them when asked if named individuals were members. The Supreme Court overturned the conviction. Justice Arthur Goldberg maintained that since the committee had failed to establish any relationship between the NAACP and Communist subversive activities, no justification existed for interference with First Amendment associational rights.

[16]Murphy, 237-238. Senator William Jenner was among the retirees.

[17]Ibid., 225-227.

[18]Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court - A Judicial Biography (New York; New York University Press, 1983), 326; William O. Douglas, "Transcriptions of Conversations Between William O. Douglas and Walter Murphy," G. Seeley Mudd Manuscript Library, Princeton University, Cassette No. 16, p. 334.

[19]McCloskey, 139; Spicer, 210; Murphy, 258.

[20]Slochower v. Board of Education 350 U.S. 551 (1956).

[21]Pennsylvania v. Nelson 350 U.S. 497 (1956).

[22]Pritchett, 75.

[23]Ibid., 76-77.

[24]351 U.S. 536 (1956).

[25]354 U.S. 363 (1957).

[26]354 U.S. 298 (1957).

[27]341 U.S. 494 (1951).

[28]354 U.S. 234 (1957). The majority in the case, however, was split, and, surprisingly, it was Felix Frankfurter's concurrence which addressed the constitutional question of whether the state's attorney general could pose questions regarding political beliefs and affiliations.

[29]354 U.S. 178 (1957).

[30]McCloskey, 146.

[31]Barenblatt, 127.

[32]Ibid., 122.

[33]Ibid., 127.

[34]Carl Beck, Contempt of Congress: A Study of the Prosecutions Intiated by the Committee on Un-American Activities, 1945-1957 (New Orleans: The Hauser Press, 1959), 177, 179-180.

[35]Alfred H. Kelly, Winifred A. Harbison and Herman Belz, The American Constitution: Its Origins and Development, 6th ed., (New York: W. W. Norton and Company, 1983), 538. See for example American Communications v. Douds 339 U.S. 94 (1950) in which the Court upheld the non-Communist affadavit requirement of the Taft-Hartley Act by weighing First Amendment guarantees against congressional interest in preventing Communist-controlled strikes. Also Dennis v. United States 341 U.S. 494 (1951) which upheld the Smith Act. The Court used a sliding scale to determine whether "the gravity of the evil discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger." It did.

[36]Barsky v. United States 167 F.2d 241 (1948) and United States v. Josephson 165 F.2d 82 (1947); see Chapter II. Watkins v. United States 233 F.2d 581 (1956), see Chapter III. Barenblatt v. United States 252 F.2d 129 (1958), see Chapter IV.

[37]Watkins, 198.

[38]Ibid., 197.

[39]Ibid., 198.

[40]Hartly Fleishmann, "Watkins v. United States and Congressional Power of Investigation," Hastings Law Journal 9 (February 1958): 146. In a 1958 article on the Supreme Court, Life noted that all the justices were in one form or another, "bleeding hearts." Author John Osborne observed that Chief Justice Warren "is described by one of the most eminent attorneys in Supreme Court practice as "a bleeding heart with hemophilia." (John Osborne, "One Supreme Court", Life 44 (16 June 1958): 102.

[41]Congress, House, Committee on Un-American Activities, Communist Methods of Infiltration (Education - Part 9): Hearings Before the Committee on Un-American Activities, 83d Cong., 2nd Sess., 28 June 1954, 5809.

[42]Jerold Simmons, Operation Abolition: The Campaign to Abolish the House Un-American Activities Committee, 1938-1975, (New York: Garland Publishing, Inc., 1986), 210-211; Peter Irons, The Courage of Their Convictions (New York: The Free Press, 1988), 101. Barenblatt subsequently became a member of the Committee of First Amendment Defendants which was organized during the summer of 1959 to coordinate the legal strategies of those who were challenging legislative investigations on free speech grounds and to educate the public about the seriousness of the danger to the Bill of Rights. In addition to Barenblatt, the First Amendment Committee's members included Frank Wilkinson, Carl Braden, Willard Uphaus, Bernard Deutch, Pete Seeger and Edward Yellin, among others. This Committee was never particularly successful in its efforts. (Simmons, 216; Irons, 101.)

[43]Pritchett, 129; Alfange, 145-146; Kent B. Millikan, "Congressional Investigations: Imbroglio in the Courts," William and Mary Law Review 8 (Spring 1967): 417.

[44]Watkins, 187.

[45]Ibid., 199.

[46]Ibid., 203-205.

[47]Ibid., 205.

[48]Ibid., 215.

[49]Harvey Kalven, Jr., "Mr. Alexander Meiklejohn and the Barenblatt Opinion, The University of Chicago Law Review 27 (Winter 1960): 324.

[50]Barenblatt, 133. See Alexander Bickel, "The Passive Virtues" Harvard Law Review 75 (November 1961): 70.

[51]Alan F. Westin, "Also on the Bench?: Dominant Opinion," New York Times Magazine (21 October 1962): 83.

[52]Murphy, 254.

[53]Walter Goodman, The Committee: The Extraordinary Career of the House Committee on Un-American Activities (New York: Farrar, Straus and Giroux, 1968), 430.

[54]Simmons, 170-171.

[55]Quoted in Schwartz, 31.

[56]Robert Frost has been cited as noting that when justices decide 5-4, lots should be drawn to determine which position will be the majority and which will be the dissent, for such a close decision does not provide explication of what the law is, only that there is a deep division within the Court. (Earl Latham, "The Supreme Court's Crusade for Freedom," Commentary 28 (August 1959): 108.

[57]Alfange, 168.

[58]William O. Douglas, 335.

[59]John M. Harlan, "Thoughts at a Dedication: Keeping the Judicial Functions in Balance," American Bar Association Journal 49 (October 1963): 943-944.

[60]"The Warren Court: Fateful Decade," Newsweek 63 (11 May 1964): 27. Frankfurter, in personality, was quite different from Harlan. He was variously described as waspish and argumentative.

[61]J. Harvie Wilkinson III, "Justice John Marshall Harlan and the Values of Federalism," Virginia Law Review 57 (1971): 1185-1186.

[62]Norman Dorsen, "Mr. Justice Black and Mr. Justice Harlan," New York University Law Review 46 (October 1971): 650.

[63]Harlan to Warren, 31 May 1957. Box 29, John Marshall Harlan Papers, G. Seeley Mudd Manuscript Library, Princeton University, Princeton New Jersey.

[64]Frankfurter to Warren, 31 May 1957 and attached undated note, Frankfurter to Harlan, Box 29, John Marshall Harlan Papers.)

[65]Sister Imogene Gosnell, "The Judicial Philosophy of John Marshall Harlan in the Field of Civil Liberties, 1955-1968" (Ph.D. diss., Catholic University of America, 1970), 45.

[66]Barenblatt, 128.

[67]Scales v. United States 367 U. S. 203.

[68]Handwritten list, "Quotes", Box 61, John Marshall Harlan Papers. The list included: Beilan v. Bd. of Education, 357 U.S. 399, 416; Yates v. United States 354 U.S. 298, 392, 330, 331; Adler v. Board of Education 342 U.S. 485, 508, 511; Schneiderman v. U.S. 320 U.S. 118,

157-158; Carlson v. Landon 342 U.S. 524, 536, 544, 565; Joint Anti-Fascist Committee v. McGrath 341 U.S. 123, 195; Dennis v. United States 341 U.S. 494, 509, 519; American Communications Association v. Douds 339 U.S. 382, 389, 393, 394.

[69]"No. 35-Barenblatt", undated, Box 61, John Marshall Harlan Papers.

[70]Norman Dorsen, letter to author, 10 May 1989; Norman Dorsen, "The Second Mr. Justice Harlan," New York University Law Review 46 (April 1969): 268.

[71]New York Times, 30 December 1971, p. 29; Catherine A. Barnes, "Harlan, John Marshall," in Men of the Supreme Court: Profiles of the Justices (New York: Facts on File, Inc., 1978), 96; Potter Stewart, "John Marshall Harlan," memorial delivered at a Special Meeting of the Association of the Bar of the City of New York, 5 April 1972, Box 483, John Marshall Harlan Papers, 5.

In his later years of the Court, in fact, he was often in the "liberal" opposition to Hugo Black on matters of privacy and free speech. He held in Cohen v. California (1971) that free speech protected the wearing of a jacket which obscenely objected to the draft. He also objected to indiscriminate government wiretapping and electronic eavesdropping, although Black could find no prohibition of the practice in the Constitution.

[72]Harlan, "No. 35 - Barenblatt".

[73]Sidney Ulmer, "Supreme Court Behavior and Civil Rights," Western Political Quarterly 13 (June 1960): 297. See Appendix, Figure I.

[74]Ibid., 298-299. See Appendix, Figure II.

[75]Sidney Ulmer, "The Analysis of Behavior Patterns on the United States Supreme Court," The Journal of Politics 22 (November 1960): 649. See Appendix, Figure III.

[76]Norman Dorsen, "The Second Mr. Justice Harlan,"251-252.

[77]Schwartz, 177.

[78]Ibid., 183.

[79]Ibid., 184.

[80]Millikan, 414; Lewis, "New Line-Up on the Supreme Court," 45.

[81]Anthony Lewis, "Earl Warren" in The Justices of the United States Supreme Court, 1789-1978: Their Lives and Opinions, ed. Leon Friedman and Fred L. Israel (New York: Chelsea House, 1980), 2734-2735.

[82]Frankfurter to Harlan, 11 February 1959, Box 61, John Marshall Harlan Papers. Frankfurter's marginal comments on Harlan's draft opinion noted that, "You deal fairly with what was decided in Watkins and Sweezy. . . . In assigning this case to you, my judgment is splendidly vindicated."

[83]Frankfurter to Harlan, 3 June 1959, Box 61 John Marshall Harlan Papers.

[84]Harlan to Frankfurter, 4 June 1959, Box 61, John Marshall Harlan Papers.

[85]Barenblatt, 111-112.

[86]Ibid., 145.

[87]The most interesting aspect of the alignment in Barenblatt is Brennan's position as a "swing" vote. Brennan did not join in Black's ringing defense of the First Amendment, but rather dissented separately only on the grounds that the Committee's purpose was exposure. (Barenblatt, 166) He seemed to represent the middle ground on which neither side, in responding to the extremism of the other, could agree.

[88]Reid v. Covert 351 U.S. 497.

[89]Reid v. Covert 354 U.S. 1

[90]Osborne, 106.

EPILOGUE

In the years after 1959 the Supreme Court continued to have difficulty maintaining a consistent approach to the constitutional issues raised by John Watkins and Lloyd Barenblatt.[1] During 1961 the Court gave credence to those critics of the Barenblatt decision who speculated that the Court had established two disparate precedents with respect to individual rights in congressional investigations.[2] The 1961 opinions in Wilkinson v. United States and Braden v. United States were virtually identical to Barenblatt.[3] Both were decided 5-4 by the Barenblatt majority. In the same year, however, the Barenblatt minority was joined by Potter Stewart in a decision that overturned a contempt conviction on pertinency grounds similar to Watkins. Bernard Deutch, a Cornell University professor, had been questioned by the House Committee on Un-American Activities during the course of an investigation into Communism in the Albany, New York area. Stewart's opinion held that the questions addressed to Deutch regarding Communist activities at Cornell were not pertinent to the announced topic of inquiry. He also asserted that explanations of pertinency must be directed to the witness at the time he raises the objection.[4] It is of more than passing significance that Wilkinson and Braden refused to answer questions about their personal political affiliations. Deutch freely testified about his own activities but balked when asked to identify others.

Personnel changes on the Supreme Court interceded at this point and the fragile Harlan/Frankfurter restraintist majority collapsed. Charles Whittaker retired from the High Bench in April 1962, and President John F. Kennedy filled his first Court vacancy with Deputy Attorney General Byron White. On 6 April 1962, just ten days before White took his seat, Felix Frankfurter collapsed in his chambers. The feisty justice suffered two more heart attacks and after four months of incapacitation formally resigned from the Court in August 1962. Kennedy appointed Arthur Goldberg to fill Frankfurter's seat in October. These changes had a significant impact on the nature of Court decisions. From this point on the Court returned to its pre-Watkins practice of overturning contempt convictions on procedural or statuatory grounds.[5]

Russell v. United States was decided in the second half of the 1961 Term with Frankfurter incapacitated and White not participating. Russell had challenged HUAC on pertinency grounds, had objected to the Federal employees on his grand jury and had claimed that his indictment was defective because it had not specified the question under inquiry during his testimony. Bernard Schwartz noted that the conference in December 1961, before Frankfurter's collapse, was so divided on the substantive issues that the Court decided to reverse Russell's conviction on the indictment contention.[6] The decision was handed down in May 1962. Stewart spoke for a five man majority which also included Warren, Black, Douglas and Brennan.[7]

Goldberg's elevation to the Court was important in the 1963 decision, Yellin v. United States. Edward Yellin, concerned over his

personal reputation, had requested that he be allowed to testify before HUAC in executive session. His request was peremptorily refused by the Committee's general counsel, contrary to regulations which required that it be considered by a majority of the Committee. The Court overturned Yellin's conviction, 5-4, with Goldberg joining the liberal bloc. Warren's opinion maintained that HUAC had violated its own rules in not giving consideration to Yellin's petition.[8]

John Gojack's arduous journey to the Supreme Court finally came to an end in 1966. A union official, he had refused to testify about his political affiliations before HUAC in 1955. His contempt conviction had been reversed by the Supreme Court in 1962 on the basis of Russell because of a faulty indictment. He had been reindicted and convicted again of contempt. The Supreme Court reversed his conviction a second time, also on procedural grounds. Speaking for a unanimous Court, Justice Abe Fortas, who had replaced Goldberg, held that the Committee had not adequately delegated authority to the subcommittee which examined Gojack.[9] HUAC's own rules held that major investigations had to be approved by a majority of the full Committee.

It seems fitting that John Gojack's case, which had spanned the decade during which the Supreme Court was most actively faced with questions of individual liberty and congressional investigations, also closed that decade. The Supreme Court never again upheld any HUAC contempt conviction.[10] His case as well as the other post-Barenblatt rulings clearly reflected that the law pertaining to witness rights remained in an "unsatisfactory state of ambivalence."[11]

The House of Representatives voted its Committee on Un-American Activities out of existence in January 1975.[12] With HUAC's passing, any need to resolve this ambivalence lost its urgency. The Watergate revelations had evoked wide-spread public concern over governmental prying into individual political beliefs.[13] Thus, as the last vestige of McCarthyism died, it was mourned by only a few from the strident Right. The $64 question had long since disappeared and now seemed unlikely to reappear.

Recent scholarship reflects this diminished interest in the legitimacy of congressional probing of political beliefs. The most recent study of the McCarthy era omits any mention of the Barenblatt decision, focusing instead on the Supreme Court's 1957 libertarian rulings. Richard Fried maintains that "if anti-Communism extremism was the Dracula prowling the mid-century darkness of American politics, it was the Supreme Court that drove the fatal stake in its heart."[14] A contemporary constitutional history text characterizes Barenblatt as a "temporary retreat" from the Court's libertarian assault on internal security measures.[15] Neither accurately explains that Barenblatt remains the definitive application of the First Amendment to congressional inquiry into political beliefs and associations. More than a temporary retreat, the Barenblatt decision also illustrates the profound effect which public opinion and political criticism had on one of the "nine separate law firms" of the nation's highest tribunal.

EPILOGUE
NOTES

[1]Watkins v. United States 354 U.S. 178 (1957); Barenblatt v. United States 360 U.S. 109 (1959).

[2]See for example, Harry Kalven, Jr., "Mr. Alexander Meiklejohn and the Barenblatt Opinion," University of Chicago Law Review 27 (Winter 1960): 321-322. Also see Chapter IV.

[3]Wilkinson v. United States 365 U.S. 399 (1961); Braden v. United States 365 U.S. 431 (1961).

[4]Deutch v. United States 367 U.S. 456 (1961).

[5]Kent B. Millikan, "Congressional Investigations: Imbroglio in the Courts," William and Mary Law Review 8 (Spring 1967): 415; Jonathan D. Casper, The Politics of Civil Liberties, (New York: Harper and Row, Publishers, 1972), 81-82.

[6]Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court - A Judicial Biography (New York: New York University Press, 1983), 431.

[7]Russell v. United States 369 U.S. 749 (1962).

[8]Yellin v. United States 374 U.S. 109 (1963).

[9]Gojack v. United States 384 U.S. 702 (1966).

[10]Robert K. Carr, "Constitutional and Statuatory Limitations on Congressional Investigations," Capitol Studies 5 (Fall 1977), 35-36.

[11]Milliken, 418.

[12]In 1969 the House had changed HUAC's name to the House Committee on Internal Security and had reworded its mandate in an effort to alter the Committee's image.

[13]Jerold Simmons, Operation Abolition: The Campaign to Abolish the House Un-American Activities Committee, 1928-1975 (New York: Garland Publishing, Inc., 1986), 300.

[14]Richard Fried, Nightmare in Red: The McCarthy Era in Perspective (New York: Oxford University Press, 1990), 184.

[15]Alfred H. Kelly, Winfred A. Harbison and Herman Belz, The American Constitution: Its Origin and Development, 6th ed. (New York: W.W. Norton and Company, 1983), 598.

APPENDIX

FIGURE 1: CIVIL LIBERTIES CASES - U.S. SUPREME COURT
1956 TERM

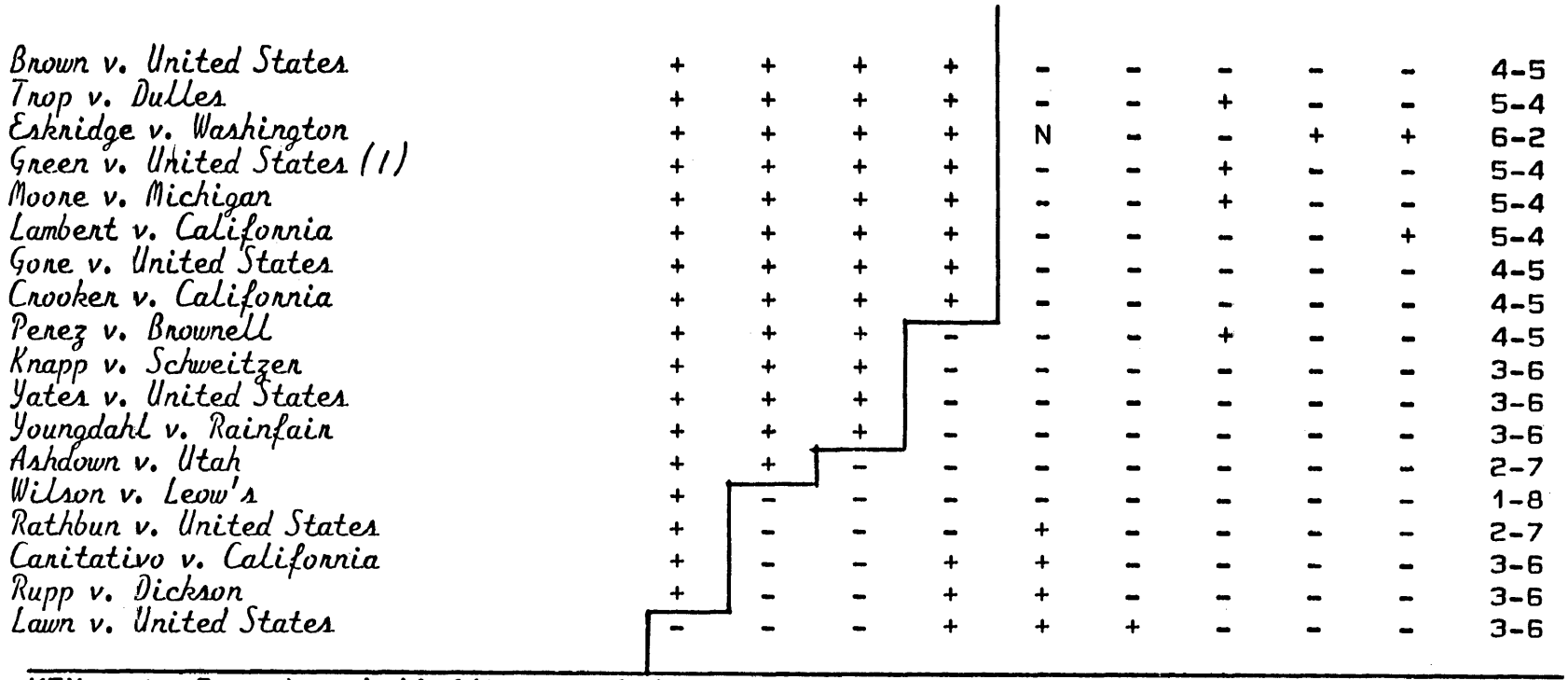
	Douglas	Black	Warren	Brennan	FrankFurter	Harlan	Whittaker	Burton	Clark	Reed	VOTE
Jencks v. United States	+	+	+	+	+	+	N	+	-	N	7-1
Yates v. United States	+	+	+	N	+	+	N	+	-	N	6-1
Schneiderman v. United States	+	+	+	N	+	+	N	+	-	N	6-1
Richmond v. United States	+	+	+	N	+	+	N	+	-	N	6-1
Bovario v. United States	+	N	+	+	+	+	N	+	-	N	6-1
Watkins v. United States	+	+	+	+	+	+	N	N	-	N	6-1
Kremen v. United States	+	+	+	+	+	+	N	-	-	N	6-2
Kinsella v. Krueger	+	+	+	+	+	+	N	-	-	N	6-2
Reid v. Covent	+	+	+	+	+	+	N	-	-	N	6-2
Sweezy v. New Hampshire	+	+	+	+	+	+	N	-	-	N	6-2
Chessman v. Teets	-	+	+	+	+	+	+	-	-	N	6-3
Gold v. United States	+	+	+	+	+	+	N	-	-	-	6-3
Fikes v. Alabama	+	+	+	+	+	-	N	-	+	-	6-3
Paoli v. United States	+	+	-	+	+	-	N	-	-	-	4-5
Konigsberg v. State Bar	+	+	+	+	-	-	N	+	-	N	5-3
Petition of Groban	+	+	+	+	-	-	N	-	-	-	4-5
Kingsley Books v. Brown	+	+	+	+	-	-	-	-	-	N	4-5
Nilva v. United States	+	+	+	+	-	-	N	-	-	-	4-5
Pollard v. United States	+	+	+	+	-	-	N	-	-	-	4-5
Breithaupt v. Alabama	+	+	-	-	-	-	-	-	-	N	2-7
Roth v. United States	+	+	-	-	+	+	-	-	-	N	4-5
Alberts v. United States	+	+	-	-	+	+	-	-	-	N	4-5

KEY: + for the civil liberty claim
- against the civil liberty claim
N nonparticipation

SOURCE: S. Sidney Ulman, "Supreme Court Behavior and Civil Rights," Western Political Quarterly 13 (June 1960): 297.

FIGURE III: CIVIL LIBERTIES CASES - U.S. SUPREME COURT
1958 TERM

	Douglas	Black	Warren	Brennan	Whittaker	FrankFurter	Harlan	Stewart	Clark	VOTE
Marshall v. United States	+	-	+	+	+	+	+	+	+	8-1
Greene v. McElroy	+	+	+	+	+	+	+	+	-	8-1
Ladner v. United States	+	+	+	+	+	+	+	+	-	8-1
Smith v. United States	+	+	+	+	+	+	-	-	-	6-3
Lee v. Madigan	+	+	+	+	+	-	-	+	-	6-3
Burns v. Ohio	+	+	+	+	+	-	-	N	+	6-2
In re Sawyer	+	+	+	+	-	-	-	-	-	4-5
Farmer's Union v. WDAY	+	+	+	+	-	-	-	-	+	5-4
Barr v. Matteo	+	-	+	+	-	-	-	+	-	4-5
Howard v. Lyons	+	-	+	+	-	-	-	-	-	3-6
Brown v. United States	+	+	+	+	-	-	-	-	-	4-5
Bartkus v. Illinois	+	+	+	+	-	-	-	-	-	4-5
Frank v. Maryland	+	+	+	+	-	-	-	-	-	4-5
Irvin v. Dowd	+	+	+	+	-	-	-	+	-	5-4
Beacon Theatres v. Westover	+	+	+	+	-	N	-	-	+	5-3
Vitarelli v. Seaton	+	+	+	+	-	-	+	-	-	5-4
Uphaus v. Wyman	+	+	+	+	-	-	-	-	-	4-5
Barenblatt v. United States	+	+	+	+	-	-	-	-	-	4-5
Harrison v. N.A.A.C.P.	+	-	+	+	-	-	-	-	-	3-6
Raley v. Ohio	+	+	+	+	-	-	-	N	-	4-4
Pittsburgh Glass v. U.S.	+	+	+	+	-	-	-	-	-	4-5
Rosenberg v. United States	+	+	+	+	-	-	-	-	-	4-5
Anon. 6 & 7 v. Baker	+	+	+	+	-	-	-	-	-	4-5



Brown v. United States	+	+	+	+	-	-	-	-	-	4-5
Trop v. Dulles	+	+	+	+	-	-	+	-	-	5-4
Eskridge v. Washington	+	+	+	+	N	-	-	+	+	6-2
Green v. United States (1)	+	+	+	+	-	-	+	-	-	5-4
Moore v. Michigan	+	+	+	+	-	-	+	-	-	5-4
Lambert v. California	+	+	+	+	-	-	-	-	+	5-4
Gore v. United States	+	+	+	+	-	-	-	-	-	4-5
Crooker v. California	+	+	+	+	-	-	-	-	-	4-5
Perez v. Brownell	+	+	+	-	-	-	+	-	-	4-5
Knapp v. Schweitzer	+	+	+	-	-	-	-	-	-	3-6
Yates v. United States	+	+	+	-	-	-	-	-	-	3-6
Youngdahl v. Rainfair	+	+	+	-	-	-	-	-	-	3-6
Ashdown v. Utah	+	+	-	-	-	-	-	-	-	2-7
Wilson v. Loew's	+	-	-	-	-	-	-	-	-	1-8
Rathbun v. United States	+	-	-	-	+	-	-	-	-	2-7
Canitativo v. California	+	-	-	+	+	-	-	-	-	3-6
Rupp v. Dickson	+	-	-	+	+	-	-	-	-	3-6
Lawn v. United States	-	-	-	+	+	+	-	-	-	3-6

KEY: + For the civil liberty claim
- against the civil liberty claim
N nonparticipation

SOURCE: S. Sidney Ulman, "Supreme Court Behavior and Civil Rights," Western Political Quarterly 13 (June 1960): 298-299.

FIGURE II: CIVIL LIBERTIES CASES - U.S. SUPREME COURT
1957 TERM

	Douglas	Black	Warren	Brennan	Frankfurter	Harlan	Whittaker	Burton	Clark	VOTE
First Church v. Los Angeles	+	+	+	+	+	+	+	+	-	8-1
Valley Church v. Los Angeles	+	+	+	+	+	+	+	+	-	8-1
Speiser v. Randall	+	+	+	+	+	+	+	+	-	8-1
Prince v. San Francisco	+	+	+	+	+	+	+	+	-	8-1
Nishikawa v. Dulles	+	+	+	+	+	-	+	+	-	7-2
Harmon v. Brucker	+	+	+	+	+	+	+	+	-	8-1
Abramowitz v. Brucker	+	+	+	+	+	+	+	+	-	8-1
Straub v. City of Baxley	+	+	+	+	-	+	+	+	-	7-2
Jones v. United States	+	+	+	+	+	+	+	-	-	7-2
Miller v. United States	+	+	+	+	+	+	+	-	-	7-2
Payne v. Arkansas	+	+	+	+	+	+	+	-	-	7-2
Sacher v. United States	+	+	+	+	+	+	-	N	-	6-2
Giordenello v. United States	+	+	+	+	+	+	-	-	-	6-3
Yates v. United States	+	+	+	+	+	+	-	-	-	6-3
Kent v. Dulles	+	+	+	+	+	-	-	-	-	5-4
Dayton v. Dulles	+	+	+	+	+	-	-	-	-	5-4
Lerner v. Casey	+	+	+	+	-	-	-	-	-	4-5
Beilan v. Board of Education	+	+	+	+	-	-	-	-	-	4-5
Cicenia v. LaGay	+	+	+	N	-	-	-	-	-	3-5
Thomas v. Arizona	+	+	+	+	-	-	-	-	-	4-5
Ciucci v. Illinois	+	+	+	+	-	-	-	-	-	4-5
Hoag v. New Jersey	+	+	+	N	-	-	-	-	-	3-5
Green v. United States (2)	+	+	+	+	-	-	-	-	-	4-5

Mills v. Louisiana	+	+	+	-	-	-	-	-	-	3-6
Abbate v. United States	+	+	+	-	-	-	-	-	-	3-6
New York v. O'Neill	+	+	-	-	-	-	-	-	-	2-7
Harris v. United States	+	+	-	-	-	-	-	-	-	2-7
Draper v. United States	+	-	N	-	-	N	-	-	-	1-6
Williams v. Oklahoma	+	-	-	-	-	-	-	-	-	1-8

KEY: + for the civil liberty claim
- against the civil liberty claim
N nonparticipation

SOURCE: S. Sidney Ulman, "The Analysis of Behavior Patterns on the United States Supreme Court," The Journal of Politics 22 (November 1960): 649.

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