Majority Would Prefer to Stand on Barenblatt and Reject New Witch Hunt Appeals

Frankfurter and Harlan Dislike Facing Up to Freedom of Press Issue

In the six First Amendment contempt cases just argued before the Supreme Court, four from Senate Internal Security, two from House Un-American, Justices Frankfurter and Harlan showed by the content and asperity of their questions that they regarded the issues as settled by *Barenblatt* and resented having to hear them at all. Since it only takes four votes to grant a hearing, it looks as if the four dissenters in *Barenblatt* voted to review these new convictions in order to make the majority face up to the unpleasant implications of the earlier ruling.

The new cases are embarrassing, especially for Mr. Justice Frankfurter, sensitive as he is to reproaches from the liberals. The Internal Security cases raised the question of whether a committee of Congress could put the press in the pillory. The Eastland hearings from which these four contempt convictions derive led the Justice's old friend, Walter Lippmann, to protest, "Once it is the accepted principle that Congress has power to set up standards of newspaper employment, the inner spirit of the First Amendment will be deeply impaired."

Eastland's Main Target

The government argued that the decisions in *Barenblatt, Braden* and *Wilkinson* had already decided the issue. The first held that education, though like the press a "legtimate and protected activity," could be investigated. The other two upheld investigation of "communist propaganda." Ergo Eastland had a right to launch an inquiry into the press in 1955-56 with America's foremost paper, *The New York Times,* as his main target. Now the consequences of this paranoiac progression uncomfortably confront the majority.

During argument of the Shelton case, Mr. Justice Frankfurter asserted that it was within the power of Congress "to conduct investigations that result in damage to perfectly innocent citizens for which there is no judicial remedy." But here the harm transcends the individual. Can Congress despite the First Amendment use the investigatory power as a means of harrassing and inhibiting the press? This is the question raised by the appeals of Robert Shelton, Alden Whitman, Wm. A. Price and Herman Liveright, all of whom acquitted themselves with honor. Defense counsel by arguing lesser points such as probable cause and pertinency confessed their despairing recognition that *Barenblatt* had foreclosed the freedom of the press issue. But the majority may dislike being forced to say so explicitly.

Of the other two cases, the Court may easily brush one under the rug; another poor teacher ruined for having been a Young Communist years before. But the other, the Gojack case, was all too clearly a deliberate campaign to use the Un-American committee to influence a union election and smear men it disliked. There could not be a clearer case of exposure for exposure's sake. Here the Committee was demonstrably acting for no legislative purpose whatsoever, but carrying on a vendetta. Can it do as it pleases so long as its excuse is hurting Reds?

First Victory for the Sit-Ins

The first decision by the Supreme Court in the sit-in cases may easily be circumvented. Louisiana has already passed a criminal trespass statute which, without so much as mentioning segregation, would give the police a new weapon against sit-ins. The Baton Rouge cases on which the Court passed last Monday, agreeing unanimously on reversal of convictions for disturbing the peace, are only the first to reach our highest tribunal. Sooner or later it will have to abandon the subterfuges recommended by the Department of Justice and rule squarely that the police may not be used to enforce segregation.

Mr. Justice Douglas, concurring, alone pointed the way to creative adjudication. He would have the Court rule that restaurants, though privately owned, are in the venerable formula of Munn v. Illinois (1870) "affected with a public interest", subject as such to many forms of public regulation, and cannot awfully impose a racial discrimination contrary to public policy. Some such formula will have to be adopted by the Court to deal with Southern nullification. We congratulate the sit-in youngsters on their victory and respectfully salute the historic changes this handful of brave youth has been bringing about in an incredibly short time.

Court Unanimously Orders Reinstatement of Florida Teacher in Loyalty Oath Case

"This provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid', or 'support', or 'advice', or 'counsel', or 'influence' to the Communist Party. What do these phrases mean? In the not too distant past Communist Party candidates appeared regulary and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?

"The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. . . . While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose."

—Mr. Justice Stewart for a unanimous court ordering the reinstatement of a Florida school teacher, David Walton Cramp, Jr., for refusing to obey a state law requiring an oath that he had never lent "aid, support, advice, counsel or influence to the Communist Party."

The Logic of Outlawry Leads to Degeneration in Standards of Proof and Justice

Court Allows CP Membership to Be Proven By Inference From Opinions

When a badly split Supreme Court 12 years ago upheld the non-Communist oath provisions of the Taft-Hartley Act, it salved its conscience by establishing strict standards of proof as to membership in and affiliation with the Communist Party. Mr. Justice Frankfurter in particular objected in his concurring opinion to allowing any mode of proof which could rest on "some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party."

But last Monday in the Killian case a majority of five including Mr. Justice Frankfurter allowed those safeguards to be swept away. In passing on the conviction of a labor leader for false statement on a Taft-Hartley oath, the majority upheld instructions to the jury which permitted membership to be inferred from views paralleling those of the Communists.

Even Walter Objected

The instructions embodied most of the notorious criteria for determining membership which a panicky bloc of Senate liberals led by Humphrey and Morse write into the Internal Security Act of 1954. These were criticized at the time by papers as diverse as the *Wall Street Journal* and the *New York Post* for making conviction possible on the basis of parallelism of opinion. Even Congressman Walter objected to these criteria in the House hearings that year, declaring, "If I should advocate public housing—which is the Communist Party line at this moment—that would make me guilty under this bill." But a majority of the Court now accepts them in Taft-Hartley oath cases, though Mr. Justice Whittaker was careful to say that the Court was not deciding whether these membership criteria could constitutionally be applied in a criminal prosecution under the Internal Security Act.

The shift in the Court reflects the degeneration of standards made inevitable by the logic of outlawry. Normally membership in an organization is proven by tangible direct evidence; the act of joining, a membership card, the payment of dues can all be attested. But once you declare an organization partly or wholly outside the law, you assume that many of its members will go underground, that they will not carry membership cards, that there will be no record kept of dues.

In this case Mr. Justice Whittaker admits that there was no evidence that Killian had ever formally joined the Communist Party. The FBI paid informers on whom the government relied never did establish that the accused labor leader was a member on the date when he took the oath. But the Communists in the labor movement having been driven underground, the Court says that since the organization is presumed to be "operating secretly" membership necessarily becomes something which can only be proven in "subjective" terms. Maybe Killian was a Communist hiding his activities. Maybe he was a non-Communist who agreed with the Communists on certain issues. In allowing conviction by inference from parallelism, the standards of proof and of justice are lowered. Where proof of party membership can be "subjective" no one left of centre is safe if the pendulum swings far enough.

He Even Informed on His Wife

"The prosecution's case at trial rested primarily upon the testimony of a single witness, Ondrejka, who testified that he had been a paid informer for the FBI for the period 1949-54 during which time he had been a member of the Communist Party. . . . Ondrejka testified under oath that while employed by the FBI he had courted and married his wife who had borne him three children in this period. At all times during their courtship and marriage Ondrejka had reported his wife's activities as a member of the Communist Party to the FBI. He had never informed his wife that she was under surveillance."

—Petition for Certiorari to the Supreme Court in Killian v. U. S. decided Dec. 11.

Dissenters On The Danger of Defining Communist Party Membership As A State of Mind

"It is evident that the five Justices who sustained the membership clause [of the Taft-Hartley non-Communist oath in ACA v. Douds 12 years ago] considered membership to involve an externally manifested act or acts of association and admission, understood as such by the Party and by the member. . . . Accordingly, since the Court today authorizes an instruction which permits a jury to convict of false swearing as to membership, conceived as a purely subjective phenomenon . . . it goes beyond Douds and repudiates a critical assumption of that decision. . . .

"Douds was decided on May 8, 1950. Two and one-half years later, on Dec. 11, 1952, Killian swore that he was not a member of the Communist Party. Why he should have supposed that he was disavowing anything except objectively manifested Douds sense membership—the most natural meaning to impute to the oath, and the one explicitly assumed by the Court in upholding the constitutionality of its exaction—I cannot imagine. To convict him of perjury now, on the assumption that membership may exist without externalized application to and acceptance into the organization, is to trap petitioner in the backlash of an unpredictable shift in construction."

—Mr. Justice Brennan dissenting in Killian v. U.S.

"Beliefs are as much in issue here as they were in the Douds case. If that case means anything, it means that one who was a member only to promote a lawful cause of the party should not be subjected to the legal odium that attaches to full-fledged members. The fact that one believes in peace, disarmament, a ban on nuclear testing, or the disbandment of NATO may put him out of step with the majority. But unless we toss to the winds the tolerance which a Free Society shows for unorthodox, as well as orthodox views, the fact that a person embraces lawful views of the party should not establish that he is a 'member' of the party within the meaning of the Act. Membership, as that word is used in the Act, should be proved by facts which tie the accused to the illegal aims of the party. If beliefs are used to condemn the individual, we have ourselves gone a long way down the totalitarian path."

—Mr. Justice Douglas dissenting with Chief Justice Warren and Mr. Justice Black in Killian v. U.S.

"I think the Constitution absolutely prohibits the Government from sending people to jail for 'crimes' that arise out of, and indeed are manufactured out of, the imposition of test oaths that invade the democratically indispensable freedoms of belief and association."

—Mr. Justice Black dissenting with Mr. Justice Douglas in Killian v. U.S.