From Black's Dissent (With Warren and Douglas) in the Braden Case

"In July 1958 the House Un-American Activities Committee announced its intention to conduct a series of hearings in Atlanta, Georgia. . . . Petitioner, a long-time opponent of the Committee, decided to go to Atlanta for the purpose of lending his support to those who were fighting against the hearings. . . . Within an hour of his registration [in an Atlanta hotel as representative of the Emergency Civil Liberties Committee], petitioner was served with a subpoena. . . When he appeared in response to this subpoena, petitioner was told that he had been subpoenaed because the Committee was informed that 'you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this Committee. . . .'

"In my view, the majority by its decision today [upholding this contempt conviction] places the stamp of constitutional approval upon a practice as clearly inconsistent with the Constitution . . . as any that has ever come before this Court. . . . This case involves nothing more nor less than an attempt by the Un-American Activities Committee to use the contempt power of the House of Representatives as a weapon against those who dare to criticize it. . . .

The Easiest of Accusations

"So far as appears from this record the only information the Committee had with regard to petitioner was the testimony of a paid informant at a previous Committee hearing. The only evidence to the effect that petitioner was in fact a member of the Communist Party that emerges from that testimony is a flat conclusory statement by the informant that it was so. . . . When this fact is considered in conjunction with the fact that petitioner was not accorded the opportunity to cross-examine the informant or the protection of the statute permitting inspection of statements given to the FBI by paid informants, it seems obvious to me that such testimony is almost totally worthless for the purpose of establishing probable cause. For all we know, the informant may have had no basis at all for her conclusion and, indeed, the possibility of prejury cannot, in view of its frequent occurrence in these sorts of cases, be entirely discounted. . . . In the atmosphere existing in this country today, the charge that someone is a Communist is so common that hardly anyone active in public life escapes it. Every member of this Court has, on one occasion or another, been so designated. . . . If the mere fact that someone has been called a Communist is to be permitted to satisfy a requirement of probable cause, I think it plain that such a requirement is without value.

"The other such 'protection' afforded to critics of the Un-American Activities Committee under these decisions is included in the majority's so-called balancing test. . . . The truth of the matter is that the balancing test . . . means that the Committee may engage in *any* inquiry a majority of this Court happens to think could possibly be for a legitimate purpose. . . . And under the tests of legitimacy that are used in this area, any first year law school student worth his salt could construct a rationalization to justify almost any question put to any witness at any time.

"Thus, in my view, the conclusion is inescapable that the only real limitation upon the Committee's power to harass its opponents is the Committee's own self-restraint, a characteristic which probably has not been predominant in the Committee's work over the past few years. The result of all this is that from now on anyone who takes a public position contrary to that being urged by the Un-American Activities Committee should realize that he runs the risk of being subpoenaed to appear at a hearing in some far off place, of being questioned with regard to every minute detail of his past life, of being asked to repeat all the gossip he may have heard about any of his friends and acquaintances, of being accused by the Committee of membership in the Communist Party, of being held up to the public as a subversive and a traitor, of being jailed for contempt if he refuses to cooperate with the Committee in its probe of his mind and associations, and of being branded by his neighbors, employer and erstwhile friends as a menace to society *regardless of the outcome of that hearing.* With such a powerful weapon in its hands, it seems quite likely that the Committee will weather all criticism, even though justifiable, that may be directed toward it. For there are not many people in our society who will have the courage to speak out against such a formidable opponent. If the present trend continues, this already small number will necessarily dwindle as their ranks are thinned by the jails. Government by consent will appear to be replaced by government by intimidation. . . .

"I believe that true Americanism is to be protected, not by committees that persecute unorthodox minorities but by strict adherence to basic principles of freedom that are responsible for this Nation's greatness. . . . The principles of the First Amendment are stated in precise and mandatory terms and unless they are applied in those terms, the freedoms of religion, speech, press, assembly and petition will have no effective protection. Where these freedoms are left to depend upon a balance to be struck by this Court in each particular case, liberty cannot survive. For under such a rule, there are no constitutional rights that cannot be 'balanced' away."

Newspaper Editors Next?

"Can editors be summoned before the Committee and be made to account for their editorials denouncing the Committee, its tactics, its practices, its policies? If petitioner can be questioned concerning his opposition to the Committee, then I see no reason why editors are immune. The list of editors will be long as evident from the editorial protests against the Committee's activities, including its recent film, Operation Abolition."

—Mr. Justice Douglas, with whom the Chief Justice and Mr. Justice Black concur, dissenting in Frank Wilkinson v. U.S.

The Un-Americans Concentrate On Self-Glorification and Smearing Their Critics

"Self-justification dominates much of the Committee's work and, therefore, its expenditures. Two years ago, it produced a document entitled, 'Operation Abolition', which was nothing but a series of dossiers of people who were members of groups seeking the abolition of the Committee. The 1960 Report indulges in more of this paranoid and costly concern . . . and is justified on the principle that if 'you're against us, you're un-American'. Thus, two separate reports on the San Francisco riot incident, which the Committee's own conduct largely precipitated, were deemed necessary. . . . For what other committee do we provide such expensive tax-paid insurance against public misunderstanding? . . . To spend taxpayers' money explaining to them why you are spending it is an act of self-levitation. . . . In the tone and content of its self-glorification work, the Committee becomes a partisan, rather than the impartial monitor it should be. And, as the tone becomes more querulous, more money is spent in the Committee's fight against its critics. . . . [In] the 1960 report, one member of the Committee so far lost his sense of proportion as to claim that the angry students in San Francisco were 'toying with treason'—literally!"

—Rep. Roosevelt (Cal.) testifying Feb. 21 on the budget request of the Un-American Activities Committee.

From Black's Dissent (With Warren and Douglas) in the Wilkinson Case

"The petitioner . . . has for some time been at odds with strong sentiment favoring racial segregation in his home State of Kentucky. A white man himself, the petitioner has nonetheless spoken out strongly. . . . This activity, which once before resulted in his being charged with a serious crime [sedition, after helping a Negro buy a home in a white area], seems also to have been the primary reason for his being called before the Un-American Activities Committee. For the occasion . . . appears to have been the circulation of two letters, both in the nature of petitions to Congress. . . . One . . . signed by petitioner and his wife, asked those who read it to urge their representatives to vote against proposed legislation which would have empowered the States to enact antisedition statutes because . . . those statutes could too readily be used against citizens working for integration. The other petition, bearing the signatures of 200 Southern Negroes, was sent directly to the House of Representatives and requested that body not to allow the Un-American Activities Committee to conduct hearings in the South because, so the petition charged, 'all of its activities in recent years suggests that it is much more interested in harassing and labeling as subversive any citizen who is inclined to be liberal or an independent thinker'. . . .

The Indivisibility of Liberty

"The majority here affirms petitioner's conviction [for contempt in refusing on First amendment grounds to answer questions about his personal beliefs and associations] 'upon the reasoning and authority' of *Barenblatt v. U.S.* . . . the majority might well have, with equal justification, relied upon a much earlier decision of this Court, that in *Beauharnais v. Illinois*. . . . Ironically, the need there asserted by the State of Illinois and accepted by a majority of this Court as sufficiently compelling to warrant abridgement of the right of petition was the need to protect Negroes against what was subsequently labelled 'libel . . . of a racial group'. . . . Thus the decision in *Beauharnais* had all the outward appearance of one which would aid the underprivileged Negro. This decision, however, is a dramatic illustration of the shortsightedness of such an interpretation of that case. For the very constitutional philosophy that gave birth to *Beauharnais* today gives birth to a decision which may well strip the Negro of the aid of many of the white people who have been willing to speak up in his behalf. If the Un-American Activities Committee is to have the power to interrogate everyone who is called a Communist, there is one thing certain beyond the peradventure of a doubt—no legislative committee, state or federal, will have trouble finding cause to subpoena all persons anywhere who take a public stand for or against segregation. The lesson to be learned from these two cases is, to my mind, clear. Liberty to be secure for any, must be secure for all—even for the most miserable merchants of hatred and unpopular ideas.

Both *Barenblatt* and *Beauharnais* are offspring of a constitutional doctrine that is steadily sacrificing individual freedom of religion, speech, press, assembly and petition to government control. . . . For the presently prevailing constitutional doctrine, which treats the First Amendment as a mere admonition, leaves the liberty-giving freedoms which were intended to be protected by that Amendment completely at the mercy of Congress and this Court whenever a majority of this Court concludes, on the basis of any of the several judicially created 'tests' now in vogue, that abridgement of these freedoms is more desirable than freedom itself. . . . The very foundations of a true democracy and the foundation upon which this Nation was built is the fact that government is responsive to the views of its citizens, and no nation can continue to exist on such a foundation unless its citizens are wholly free to speak out fearlessly for or against their officials and their laws. When it begins to send its dissenters, such as Barenblatt, Uphaus, Wilkinson, and now Braden, to jail, the liberties indispensable to its existence must be fast disappearing. . . . Those freedoms are being destroyed by sophistry and dialectics. . . .

"The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation. This weak substitute is, to my mind, totally unacceptable for I believe that Amendment forbids, among other things, any agency of the federal government—be it legislative, executive or judicial—to harass or punish people for their beliefs, or for their speech about, or public criticism of, laws and public officials. The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now. History and the affairs of the present world show that the Founders were right. There are grim reminders all around this world that the distance between individual liberty and firing squads is not always as far as it seems."

Only Need to Call Them Communists

"There is nothing in the record to show that the Southern Conference [Educational Fund] or the Emergency Civil Liberties Committee or the Southern Newsletter had the remotest connection with the Communist Party. There is only the charge of the Committee that there was such a connection. That charge amounts to little more than innuendo. . . . If Watkins and Sweezy decided anything, they decided that before inroads in the First Amendment domain may be made, some demonstrable connection with communism must first be established and the matter be plainly shown to be within the scope of the Committee's authority. Otherwise the Committee may roam at will, requiring any individual to expose his association with any group or with any publication which is unpopular with the Committee and which it can discredit by calling it communistic."

—Mr. Justice Douglas, with whom the Chief Justice, Mr. Justice Black and Mr. Justice Brennan concur, dissenting in Carl Braden v. U.S.

"We Will Not Save Free Speech If We Are Not Prepared to Go to Jail in its Defense"

"I have made this First Amendment challenge of the Un-American Activities Committee as a matter of personal conscience and the responsibility which we all share to defend the Constitution against all enemies.

"It is regrettable that the majority of the Supreme Court today has sanctioned the Un-American Activities Committee's efforts to silence its critics. But free speech, association and the right of petition cannot be long abridged by any branch of our government. It is the very nature of our democracy that efforts to suppress free speech create greater free speech. I am serenely confident that for every voice which asks for abolition of the Un-American Activities Committee and is silenced in jail, a thousand new voices will be raised; and, most significantly, many of these will be the new generation of American students.

"The Un-American Activities Committee attempts to investigate precisely those areas of free speech and association in which the First Amendment forbids Congress to legislate. The Committee will some day be abolished. The First Amendment will be restored to full vigor. The Court's minority will in time become the majority. We will not save free speech if we are not prepared to go to jail in its defense. I am prepared to pay that price."

—Frank Wilkinson, Feb. 27.