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The Supreme Court Falters in the Little Rock Crisis

The big disappointment of the Supreme Court's final day of term was its rejection of the appeal for quick action on Little Rock. The crucial weakness of its per curiam order was the failure to indicate that the Eighth circuit ought to hear and decide the appeal on the merits before the next school year. In saying that it did not doubt that the Eighth Circuit would act *"upon the application for a stay or the appeal"* before September, the Court left open the possibility that the lower bench might issue a stay this summer but leave final decision until later in the year. It will be immensely more difficult to keep order in the Little Rock Central High School if it opens with the appeal still pending. The Lemley order rewarded the mob by directing all deliberate speed backward on integration; it opened a new technique for nullification. We have little doubt that the Eighth Circuit—which is non Confederate in its personnel—will ultimately reverse but much harm will be done unless it reverses before school opens. The failure of the Attorney General to intervene amicus curiae weakened the appeal to the Supreme Court. We believe he will not intervene in the lower court unless there is public pressure; he made some kind of deal—overt or implicit—with the Southern Senators on the Judiciary Committee for confirmation. We still hope that a group of eminent lawyers will, as we urged last week, petition the President to direct the Attorney General to intervene and press for final decision this summer.

A Victory for the Right of Association

Disappointment over the Little Rock opinion was leavened by the unanimous decision in which Mr. Justice Harlan reversed the contempt citation and the $100,000 fine imposed on the NAACP for refusing to reveal to Alabama's Attorney General the names and addresses of its members. The decision distinguished the NAACP case from the older cases cited as precedent by Alabama in which the Ku Klux Klan was forced to unmask its membership. The NAACP is an association of citizens formed to advance their lawful rights by lawful means whereas the Klan decisions, as the Court noted, were "based on the particular character of the Klan's activities, involving acts of intimidation and violence." The Court linked the right of lawful association with a right to privacy (see box on this page) in a way which seems to foreshadow two other liberal victories. One would be in the *Flaxer* case, where a union leader was held in contempt for refusing to give a Congressional committee the names of his members. The other may come in the test of the Internal Security Act. The reasoning of the NAACP decision would seem also to outlaw the idea of a Subversive Activities Control Board empowered to blacklist organizations it considers communistic and to force them and their publications to wear the yellow badge of a registration order. The ultimate decision will depend on how the individual Justices feel about the Communist Party, but we doubt that a majority can be mustered to hold that an administrative board can force disclosure of membership purely on the basis of evidence showing that certain organizations express opinions paralleling the party line. This is the heart of the Internal Security Act.

Death-Knell of the SACB, Too?

"This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in American Communications Assn. v. Douds: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

—Mr. Justice Harlan, in NAACP v. Alabama.

More Concerned With Procedure Than Principle

The California loyalty oath tax cases which came down the same day are not quite the liberal victory they appear to be on the surface. This present Supreme Court is more apt to intervene against thought control devices where they offend conservative notions of due process than when they violate fundamental liberal principles. The Chief Justice took no part since he was in some way inolved while in office in California and the decisions were 7 to 1, with only Mr. Justice Clark dissenting. The Court denied the right of California to demand a non-communist oath of churchmen and veterans as condition for the enjoyment of certain tax privileges. (Dr. Stephen Fritchman's First Unitarian of Los Angeles—a little Gibraltar of resistance to the witch hunt—was the best known of the appellants). Black and Douglas concurring would have outlawed the California constitutional provision denying tax exemption to persons or organizations which advocate revolutionary doctrine. But the majority opinion by Mr. Justice Brennan was more circumscribed. Black and Douglas would bar such provisions altogether as constituting "a tax on belief and expression." The majority merely held that California could not require a loyalty oath under this provision and thereby put the burden of proof on the tax applicant. The majority did not pass on the constitutionality of the provision at this time, and left the way

(*Continued on Page Four*)

Douglas and Black Protest the 5th Amendment Discharges of A Teacher and A Subway Conductor

Full Text of A Dissent We Believe Will Become A Libertarian Classic

Mr. Justice Douglas, with Mr. Justice Black, dissenting:

"The holding of the Court that the teacher in the *Beilan* case and the subway conductor in the *Lerner* case could be discharged from their respective jobs because they stood silent when asked about their Communist affiliations cannot, with due deference, be squared with our constitutional principles.

"Among the liberties of the citizens that are guaranteed by the Fourteenth Amendment are those contained in the First Amendment. [Five cases cited.] These include the right to believe what one chooses, the right to differ from his neighbor, the right to pick and choose the political philosophy that he likes best, the right to associate with whomever he chooses, the right to join the groups he prefers, the privilege of selecting his own path to salvation. The Court put the matter succinctly in *Board of Education v. Barnette*, 319 US 624, 641-2:

America Has No Orthodoxies

We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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.

"We deal here only with a matter of belief. We have no evidence in either case that the employee in question ever committed a crime, ever moved in treasonable opposition against this country. The only mark against them—if it can be called such—is a refusal to answer questions concerning Communist Party membership. This is said to give rise to doubts concerning the competence of the teacher in the *Beilan* case and doubts as to the trustworthiness and reliability of the subway conductor in the *Lerner case.*

Parting Radically With Tradition

"Our legal system is premised on the theory that every person is innocent until proven guilty. In this country we have, however, been moving away from that concept. We have been generating the belief that anyone who remains silent when interrogated about his unpopular beliefs or associations is guilty. I would allow no inference of wrongdoing to flow from the invocation of any constitutional right. I would not let that principle bow to popular passions. For all we know we are dealing here with citizens wholly innocent of any wrongful action. That must indeed be our premise. When we make the contrary assumption, we part radically with our tradition.

"If it be said that we deal not with guilt or innocence but with frankness, the answer is the same. There are areas where the governmnt may not probe. Private citizens, private clubs, private groups may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose his beliefs, his philosophy, his associates. But government has no business penalizing a citizen merely for his beliefs or associations. It is government action that we have here. It is government action that the Fourteenth and First Amendments protect against. We emphasized in *NAACP v. Alabama*, decided this day, that freedom to associate is one of those liberties protected against governmental action and that freedom from 'compelled disclosure of affiliation with groups engaged in advocacy' is vital to that constitutional right. We have protested in the *NAACP* case against governmental probing into political activities and associations of one dissident group of people. We should do the same here.

"If we break with tradition and let the government penalize these citizens for their beliefs and associations, the most we can assume from their failure to answer is that they were Communists. Yet, as we said in *Wieman v. Updegraff*, 344 U. S. 183, 190, membership in the Communist Party 'may be innocent.' The member may have thought that the Communist movement would develop in the parliamentary tradition here, or he may not have been aware of any unlawful aim, or knowing it, may have embraced only the socialist philosophy of the group, not any political tactics of violence and terror. Many join associations, societies and fraternities with less than full endorsement of all their aims.

"We compound error in these decisions. We not only impute wrongdoing to those who invoke their constitutional rights. We go further and impute the worst possible motives to them.

"As Judge Fuld said in dissent in the *Lerner* case, 'It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees.'

How to Judge a Teacher's Fitness

"Our initial error (see *Dennis v. U. S.* 341 US 494) was our disregard of the basic principle that government can concern itself only with the actions of men, not with their opinions or beliefs. As Thomas Jefferson said in 1779:

. . . the opinions of men are not the object of civil government, nor under its jurisdiction . . . it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and order.'

"The fitness of a subway conductor for his job depends on his health, his promptness, his record for reliability, not on his politics or philosophy of life. The fitness of a teacher for her job turns on her devotion to that priesthood, her education, and her performance in the library, in the laboratory, and the classroom, not on her political beliefs. Anyone who plots against the government and moves in treasonable opposition to it that can be punished. Government rightly can concern itself with the actions of people. But it's time we called a halt to government penalizing people for their beliefs. To repeat, individuals and private groups can make any judgments they want. But the realm of belief—as opposed to action—is one which the First Amendment places beyond the long arm of government.

Searching for Total Security

"A teacher who is organizing a Communist cell in a schoolhouse or a subway conductor who is preparing the subway system for sabotage would plainly be unfit for his job. But we have no such evidence in the records before us. As my Brother BRENNAN points out, to jump to those conclusions on these records is to short-cut procedural due process.

"In sum, we have here only a bare refusal to testify; and the Court holds that sufficient to show these employees are unfit to hold their public posts. That makes qualification for public employment turn solely on a matter of belief—a notion very much at war with the Bill of Rights.

"When we make the belief of the citizen the basis of governmental action, we move toward the concept of *total security*. Yet *total security* is possible only in a totalitarian regime—the kind of system we profess to combat."

Public Hearings on Right-to-Travel Open in Senate Foreign Relations Committee July 9

Warning: A Restrictive Passport Bill Could Easily Pass At This Session

The Administration as this is written was preparing a bill to restrict the right to travel. The introduction of such a measure at this time increases the possibility that restrictive legislation may be passed before this session of Congress adjourns. The Supreme Court's decision in the Kent, Briehl and Dayton cases has put several new travel bills into the Congressional hopper. Five separate committees now have passport bills, only one of them a liberal measure, H. Con. Res. 153, by Celler. It would guarantee newsmen the right to travel.

Two days of public hearings will be held by the Senate Foreign Relations Committee July 9 and 10. They will deal mainly with S 2770 by Fulbright, the mildest of the restrictive measures so far introduced. It would guarantee "a full and fair hearing," presumably barring faceless informers.

Only Hennings Praised the Court

The Senate Foreign Relations Committee hearings are also supposed to consider S 3344 by Hennings which was exposed by the *Weekly* on its introduction last February as largely identical with HR 12989 by Chairman Walter of the House Un-American Activities Committee. Senator Hennings, the only member of Congress to praise the Supreme Court's right-to-travel decision ("sound American policy and good law") has since let it be known that he has abandoned his old bill as a mistake. A liberal substitute has been promised.

An official analysis put into the Congressional Record June 13 by Fulbright shows (as do the boxes on this page) that the State Department is opposed to any restriction on its passport powers, and to any requirement which would outlaw the use of secret evidence in passport proceedings.

The most sweeping passport bill now before Congress is S 4030, introduced by Eastland (text in the Congressional Record of June 18). It is in Eastland's own Judiciary Committee, from which he can report it out without hearings. A similar situation exists in the House. There Walter has two restrictive measures, HR 12989, in House Judiciary, where it might be bottled up, but the other HR 9937 in the Un-American Activities Committee from which he could report it out. The latter is an omnibus security bill with a sweepingly restrictive right to travel section.

In addition House Foreign Affairs Committee has two bills introduced in the wake of the Supreme Court decision which would authorize unlimited discretion by the State Department. One is HR 13005 by Collier, (R. Ill.), and the other, HR 12983, by Hillings (R. Cal.).

Correcting Mr. Dulles's Memory

"I would like [on the passport decision] to take this occasion to emphasize that the Departmental Regulations in question were not regulations that were introduced by this Administration. They were regulations which this Administration inherited. They had been introduced and put in force under President Truman and Secretary Acheson, and we merely continued them." *—Secretary Dulles, press conference, June 17.*

The regulations restricting travel by suspected subversives were promulgated by Acheson. But the most sweeping restriction was added by Dulles himself in an order signed January 10, 1956. This addition, Section 51.136 of the regulations, permitted the Secretary of State to refuse a passport to anyone—"subversive" or not—"when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States."

Two things need to be stressed. One is Congressional animosity to the Supreme Court which will guarantee a favorable response for any restrictive bill which comes on the floor. The other is that the Supreme Court decision was only 5-to-4, that its basis was statutory not constitutional, that it invited Congress to act, and that one member of the majority, Frankfurter, indicated by his reasoning in *Perez v. Brownell* on March 31 that he might be inclined to uphold some political restriction on the right to travel.

Now Is the Time to Fight

Since public rights in this, as in some many areas, depend on private litigation, passage of a restrictive bill would entail a new round of financial and other sacrifice for people intrepid enough to fight the new regulations. We are all indebted to people like Paul Robeson, Corliss Lamont, Rockwell Kent, Dr. Walter Briehl, and Weldon Bruce Dayton for the fight they put up, to attorneys like Leonard Boudin and Harry Rand, and to organizations like the American Civil Liberties Union and the Emergency Civil Liberties Committee.

Must the agony be repeated? The time to fight is now by letting your representatives hear from you on the right to travel. Passage could still be blocked at this session if enough people acted.

The Extent of the Discretion the State Dept. Would Like to Write Into Law

Senator FULBRIGHT. Do you consider that the Secretary of State has complete discretion as to whether any American citizen may leave the United States.

Mr. [Robert D.] MURPHY, [Under Secretary of State]. Yes, sir; I think he does under our law and regulations.

Senator FULBRIGHT. Then he has complete discretion to prescribe what countries may be visited by an American traveler?

Mr. MURPHY. Yes, sir. . . .

Senator FULBRIGHT. Does the Secretary have complete discretion in prescribing activities which may be engaged in abroad by an American citizen, as a condition to the issuance of his passport?

Mr. MURPHY. Yes, sir. . . .

Senator FULBRIGHT. If he thought the manners of the man were so egregious that they would cast reflection upon us, he could refuse the passport?

Mr. MURPHY. To cast reflections upon us?

Senator FULBRIGHT. To cast reflections upon us, that he would be a poor representative of our country. . . .

Mr. MURPHY. I think in the honest exercise of his discretion, he would have the authority.

—Testimony to Senate Foreign Relations Committee, "Dept. of State Passport Policies," April 2, 1957.

Privilege Against Self-Incrimination Weakened by New Decision

(*Continued from Page One*)

open for further proceedings. If California can muster proof that the appellants advocated revolutionary doctrine, it will get another day in court. At that time California is more apt to lose again on the absence of real proof of advocacy than on the basic issue itself.

Splitting Some Fine Hairs

The *Lerner* and *Beilan* cases indicated the difficulty of obtaining a majority against the witch hunt where sufficient lack of due process could not be shown. Here the liberals, Warren, Brennan, Black and Douglas found themselves in a minority of four. Mr. Justice Frankfurter filed a separate opinion concurring with the majority on the ground that if New York State wanted to fire a subway conductor and Pennsylvania a school teacher for refusing to answer whether or not they were Communists, "the Fourteenth Amendment does not check foolishness or unwisdom in such administration." He insisted, extending his familiar doctrine of judicial abnegation, that the 14th Amendment could not be made "an instrument of general censorship by this Court of state action." The majority opinions, by Burton in *Beilan* and Harlan in *Lerner,* were less candid and rest on a split hair so fine that it defies brief exegesis. Herman A. Beilan, a Philadelphia school teacher of 22 years standing, a gentle person of good reputation, was a victim of the House Un-American Activities Committee. For 13 months after his refusal to tell the Superintendent of Schools at a private hearing whether or not he had been a Communist, Mr. Beilan was retained as a school teacher and twice rated highly by his superiors. But five days after his appearance at a televised House Committee hearing, Mr. Beilan was discharged for "incompetency." The minority insisted that the real grounds for discharge was the invocation of the Fifth before the Committee and called for reversal on the precedent of *Slochower.* The majority would not look behind the subterfuge. Mr. Justice Burton's decision will chiefly be remembered for his plaintive remark, "We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness." In the case of the subway conductor, Max Lerner, Mr. Justice Harlan insisted that he was merely being discharged for lack of candor. The twin cases were made memorable by a Douglas-Black dissent which we believe will live as a classic expression of libertarian principles. We print it in full text on page two.

A group of decisions in criminal law handed down the same day showed the present Court's high devotion to due process. But in the case of *Knapp v. Schweitzer,* a 6-to-3 decision by Mr. Justice Frankfurter, considerably narrowed the privilege against self-incrimination. The New York Court of Appeals had held that a racketeer could be compelled to testify on grant of immunity before a New York grand jury because the same testimony could not, as a matter of law, be used against him in a subsequent Federal prosecution. Mr. Justice Frankfurter held, however, that compulsory testimony may be enforced by the States even though the witness is not safeguarded against Federal prosecution.

Taxation for Thought Control

"The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. . . .

"If the aim of the law is not to apprehend criminals but to penalize advocacy, it likewise must fall. In Murdock v. Pennsylvania, we stated, 'Plainly a community may not suppress, or the state tax, the dissemination of ideas because they are unpopular, annoying or distasteful.' If the government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second class citizenship by withholding tax benefits granted others. . . .

"There is no real freedom of thought if ideas must be suppressed. There can be no freedom of the mind unless ideas can be uttered. I know of no power that enables any government under our Constitution to become the monitor of thought, as this statute would have it become."

—Douglas (and Black) concurring in the California veterans loyalty oath tax cases.

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