

1-1-2014

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### Recommended Citation

Elias, Elizabeth J. (2014) "Red Monday and Its Aftermath: The Supreme Court's Flip-Flop Over Communism in the Late 1950s," *Hofstra Law Review*: Vol. 43: Iss. 1, Article 16.  
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol43/iss1/16>

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## RED MONDAY AND ITS AFTERMATH: THE SUPREME COURT'S FLIP-FLOP OVER COMMUNISM IN THE LATE 1950s

*Elizabeth J. Elias\**

### I. INTRODUCTION

On October 14, 1949, after what was then the longest federal criminal trial in the history of the United States,<sup>1</sup> a New York jury convicted eleven top officials of the American Communist Party of violating the Smith Act,<sup>2</sup> a statute that made it a criminal offense to advocate or teach the forcible or violent overthrow of the U.S. government.<sup>3</sup> The U.S. Court of Appeals for the Second Circuit, with an opinion penned by Judge Learned Hand, affirmed the convictions, stating that Americans “must not close [their] eyes” to what the country’s position was at the time the eleven Communist Party leaders were indicted.<sup>4</sup> In the context of world events in the summer of 1948, a little more than a year after President Harry S. Truman instituted the first general loyalty program to begin rooting out Communism in the United States,<sup>5</sup> the activities of the eleven leaders constituted a clear and present

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1. ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 52 (1999).

2. Smith Act, 18 U.S.C. § 2385 (2006).

3. *Id.* The Smith Act also made it a crime to distribute material promoting the overthrow of the U.S. government, and to be a member of a group having the purpose of overthrowing the U.S. government. *Id.* By charging these officials with violations of the Smith Act, the government essentially set out to challenge the legality of the Communist Party. Gilbert Millstein, *The Communist Trial: The Cases Summed Up*, N.Y. TIMES, Oct. 9, 1949, at E7.

4. *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951).

5. President Truman signed United States Executive Order 9835 on March 21, 1947 with the aim of ridding the government of Communist infiltrators. *See* Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947) (“[M]aximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government . . .”). A number

danger—one that the government was legally allowed to suppress under the Smith Act.<sup>6</sup>

Nearly two years after the conviction—after the general consensus of the public demonstrated satisfaction with the outcome of *United States v. Dennis*<sup>7</sup> and its appeal<sup>8</sup>—the Supreme Court of the United States granted certiorari to hear the case.<sup>9</sup> The Court limited the issues to whether the Smith Act, inherently or as construed and applied in *Dennis*, violated the First Amendment or other provisions of the Bill of Rights, and whether the Smith Act violated the First Amendment due to indefiniteness.<sup>10</sup> Essentially, the Court was to consider the following questions: “[W]as it a crime in America to believe and advocate as the Communist Party leadership did? Would a statute making belief and advocacy—without more than writing, speaking, meeting and teaching—a crime that would pass constitutional muster?”<sup>11</sup>

In an opinion authored by Chief Justice Fred M. Vinson, the Court held that the Smith Act was constitutional.<sup>12</sup> According to the Court, there was no question as to whether Congress had the power to protect the U.S. government from armed rebellion.<sup>13</sup> The question of concern, however, was whether the means employed by Congress—suppression of “armed rebellion” through the use of the Smith Act—could pass constitutional muster as a method of protecting the government.<sup>14</sup> The Court answered in the affirmative, using the clear and present danger test to conclude that the gravity of Communism’s “evil,” discounted by the improbability that Communism would threaten the U.S. government, “justifie[d] such invasion of free speech as is necessary to avoid the danger.”<sup>15</sup>

Justice Felix Frankfurter concurred with the Court’s decision, finding that the Communists’ rights to free speech should bow to the

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of scholars believe that the founding of the loyalty program in 1947 marked the beginning of the second Red Scare. See, e.g., SABIN, *supra* note 1, at 26 (asserting that the “usual answer” to the question of when the second Red Scare began is “when the Truman administration instituted its loyalty program in 1947, reacting to attacks on the administration as ‘soft on communism’”).

6. *Dennis*, 183 F.2d at 213 (“Nothing short of a revived doctrine of *laissez faire* . . . can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression. We hold that it is a danger ‘clear and present.’”).

7. 183 F.2d 201 (2d Cir. 1950).

8. SABIN, *supra* note 1, at 52.

9. See *Dennis v. United States*, 341 U.S. 494 (1950).

10. *Id.* at 496.

11. SABIN, *supra* note 1, at 77.

12. *Dennis*, 341 U.S. at 516-17.

13. *Id.* at 501.

14. *Id.*

15. *Id.* at 510.

government's right to protect itself against national security threats from "the menace of Communism."<sup>16</sup> Justice Robert H. Jackson, also concurring, would have affirmed the conviction of the eleven officials, even without the presence of a clear and present danger.<sup>17</sup> In his opinion, the act of conspiracy—of which the eleven officials were guilty—was itself a crime.<sup>18</sup>

Justices William O. Douglas and Hugo Black disagreed with the Court's decision, both opining that no clear and present danger existed in the case.<sup>19</sup> Justice Black wrote:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.<sup>20</sup>

The so-called "calmer times" that Justice Black referred to came on Monday, June 17, 1957, when the Supreme Court handed down four decisions dealing with Communist subversive activities in the United States, ruling against the government in each case.<sup>21</sup> Public reaction to the decisions was mixed. Some were satisfied that the Court had curbed what they deemed a tiresome witch-hunt conducted by the House Un-American Activities Committee ("Committee" or "Un-American Activities Committee"), which was established in 1938 to investigate disloyal and subversive activities of organizations suspected to have Communist ties.<sup>22</sup> Others criticized the Court's decisions as protecting Communist subversion and threatening national security.<sup>23</sup>

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16. *Id.* at 553-54 (Frankfurter, J., concurring).

17. *Id.* at 569-70 (Jackson, J., concurring).

18. *Id.* at 570-71.

19. *See id.* at 579-81 (Black, J. & Douglas, J., dissenting) ("If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President . . . the planting of bombs, the art of street warfare, and the like, I would have no doubts.").

20. *Id.* at 581.

21. *See Service v. Dulles*, 354 U.S. 363, 365, 388-89 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); *Watkins v. United States*, 354 U.S. 178, 215-16 (1957); *Yates v. United States*, 354 U.S. 298, 338 (1957).

22. 2 *ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES* 494 (Otis H. Stephens, Jr. et al. eds., 2006); *see, e.g., A Day for Freedom*, N.Y. TIMES, June 18, 1957, at 32 ("[T]he court ruled in favor of freedom of thought and belief by overturning lower court judgments where it would have been easier to ride along with the natural and popular sentiment against anyone who had participated in any way in Communist and pro-Communist activity.").

23. *See, e.g., David Lawrence, Treason's Biggest Victory*, U.S. NEWS & WORLD REP., June 28, 1957, at 150-52.

Congressional reaction to “Red Monday”—the name given by J. Edgar Hoover to the day when the Supreme Court handed down those four decisions favoring the “Reds”<sup>24</sup>—was even more outspoken.<sup>25</sup> In fact, in response to the Court’s decisions, Congress came “dangerously close” to passing legislation that would limit the Court’s jurisdiction.<sup>26</sup> The legislation failed, however, partly due to the Supreme Court’s retreat from the position that it took on Red Monday.<sup>27</sup> On June 8, 1959—in *Barenblatt v. United States*<sup>28</sup> and *Uphaus v. Wyman*<sup>29</sup>—the Court reverted to its pre-Red Monday position, siding with the government in affirming the convictions of those petitioners who were suspected of having connections to the Communist Party.<sup>30</sup>

The retreat to a pre-Red Monday position seemed to be a departure from the Warren Court’s trajectory of “promoting an expansive conception of the democratic way of life” by involving itself in protecting civil rights and civil liberties.<sup>31</sup> The Warren Court “ruled in favor of America’s underdogs (such as African Americans, criminal defendants, and the poor) with great regularity.”<sup>32</sup> The Court’s decisions in *Barenblatt* and *Uphaus* therefore seemed anomalous—especially given the fact that, according to historian Arthur J. Sabin, *Barenblatt* and *Uphaus* “did not pragmatically reverse the impact of Red Monday and related decisions.”<sup>33</sup>

Historians and legal scholars have tried to explore the possible causes of this “flip-flop.” Were the Court’s decisions in *Barenblatt* and *Uphaus* indicative of what is described by legal historian Walter F. Murphy as the “well-worn pattern” of “judicial retreat,” brought about by the legislative-judicial conflict caused by the Red Monday decisions?<sup>34</sup> Was the retreat a strategic move used to circumvent threats from Congress? Was the Court simply trying to gauge and follow public

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24. SABIN, *supra* note 1, at 1.

25. *See id.* at 196; Kent B. Millikan, Note, *Congressional Investigations: Imbroglia in the Court*, 8 WM. & MARY L. REV. 400, 412 (1967).

26. CHIEF JUSTICE EARL WARREN, *THE MEMOIRS OF EARL WARREN* 313 (1977).

27. *See* SABIN, *supra* note 1, at 197, 208; Millikan, *supra* note 25, at 413.

28. 360 U.S. 109 (1959).

29. 360 U.S. 72 (1959).

30. *Id.* at 79, 81-82; *Barenblatt*, 360 U.S. at 113, 133-34.

31. *See* MICHAL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953-1969*, at 279 (Herbert A. Johnson ed., 2005).

32. *Id.*

33. SABIN, *supra* note 1, at 208.

34. WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* 246-47 (1962).

opinion on the matter? Or did the change in position illustrate Justice Frankfurter's "bossy" treatment of his colleagues on the bench?<sup>35</sup>

This Article will argue that the Court's "flip-flop" was, for the most part, brought about by Justice Frankfurter's change in position.<sup>36</sup> By distinguishing the facts of *Barenblatt* and *Uphaus* from the facts in the Red Monday cases, Justice Frankfurter was able to shirk congressional criticism of the Court's Red Monday position, and avoid "a potential constitutional crisis" because of that backlash.<sup>37</sup> Moreover, Justice Frankfurter's support in *Barenblatt* and *Uphaus* of the power of state and federal governments to investigate subversive activities was consistent with his philosophy of judicial restraint and respect for Congress's authority.<sup>38</sup>

Part II of this Article will describe the Warren Court's position in its 1956-1957 Term on the power of Congress and state legislatures to investigate subversive Communist activities.<sup>39</sup> Part II will focus primarily on the facts and outcomes of the four Red Monday cases.<sup>40</sup> Next, Part III will describe the aftermath of Red Monday, including the public's reaction, Congress's response to the Supreme Court's decisions, and actions taken by the Court—in *Barenblatt* and *Uphaus*—to deal with the consequences of its Red Monday decisions.<sup>41</sup> Part IV will explore the possible reasons why the Court's decisions in *Barenblatt* and *Uphaus* ran contrary to the Court's protection of the First Amendment in the Red Monday cases—including the possibility that Justice Frankfurter ruled for the government in order to prevent a potential constitutional crisis.<sup>42</sup> Part V will conclude the Article.<sup>43</sup>

## II. THE RED MONDAY DECISIONS

The rift between the Soviet Union and the West in the aftermath of World War II led to the Cold War and a renewed fear of domestic subversion within the United States.<sup>44</sup> The United States responded to this fear by founding federal employee loyalty programs, operating what some would call an "anti-communist witch hunt," and establishing the

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35. JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 235-37 (1989).

36. *See infra* Part IV.A.

37. SIMON, *supra* note 35, at 241.

38. *See infra* text accompanying notes 170-73.

39. *See infra* Part II.

40. *See infra* Part II.

41. *See infra* Part III.

42. *See infra* Part IV.

43. *See infra* Part V.

44. SABIN, *supra* note 1, at 21.

Un-American Activities Committee.<sup>45</sup> As the second Red Scare unfolded, the Supreme Court consistently tackled cases dealing with the conflict between “the right to dissent and the power of government to criminalize dissenting views and acts.”<sup>46</sup> While the Court’s decisions in the early- to mid-1950s often favored the government’s power over the right to dissent, the following four decisions demonstrated that the Court “no longer endorsed the unqualified use of the court system to further the aims of the Red Scare.”<sup>47</sup>

#### A. *Watkins v. United States*<sup>48</sup>

The Supreme Court’s decision in *Watkins* was one that moved the Court into an exceedingly controversial area of Red Scare issues.<sup>49</sup> Chief Justice Earl Warren noted in the introduction of the *Watkins* majority opinion that the Court would approach the case “with conscious awareness of the far-reaching ramifications that can follow from a decision of this nature.”<sup>50</sup> What made the case so controversial was the question that the Court faced: What was the extent of a congressional investigating committee’s powers?<sup>51</sup> Specifically, how much authority did the Un-American Activities Committee have in investigating subversive activities of private citizens, government employees, and organizations suspected of having Communist ties?<sup>52</sup>

This case involved petitioner John T. Watkins, a labor organizer for the United Automobile Workers union, who was subpoenaed to appear before the Committee in 1954 regarding an investigation of Communist activities in the Chicago area.<sup>53</sup> During his appearance, Watkins was willing to respond to inquiries that the Committee posed concerning him and his past activities, showing a great sense of candor.<sup>54</sup> He even went so far as to testify that, because of his past cooperation with the

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45. See *id.* at 26-27; William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375, 398-404. The states also conducted investigations with the hopes of rooting out Communist subversive activities. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 253-55 (1957) (examining the New Hampshire attorney general’s power to conduct investigations).

46. SABIN, *supra* note 1, at 21.

47. *Id.* at 208.

48. 354 U.S. 178 (1957).

49. SABIN, *supra* note 1, at 153.

50. *Watkins*, 354 U.S. at 182.

51. *Id.*

52. SABIN, *supra* note 1, at 153.

53. *Investigation of Communist Activities in the Chicago Area—Part 3: Hearing Before the Comm. on Un-Am. Activities H.R.*, 83d Cong. 4265-67 (1954) (statement of John T. Watkins) [hereinafter *Investigation of Communist Activities*].

54. See Brief for Respondent at 22, *Watkins v. United States*, 354 U.S. 178 (1957) (No. 261).

Communist Party, he understood why the Committee's informants mistakenly believed he was a member of the party.<sup>55</sup> Nevertheless, after counsel for the Committee began to read Watkins a list of names, seeking to identify Watkins's past associates as members of the Communist Party, Watkins drew the line, stating:

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.<sup>56</sup>

Watkins argued that inquiring about the political activities of his past associates was outside the scope of the Committee's power.<sup>57</sup> As a result, he was indicted for contempt of Congress, convicted, and fined \$100.<sup>58</sup> Although Watkins was also sentenced to one year in prison, he was placed on probation instead, mostly due to the well-mannered way in which he and his attorney handled themselves before the Un-American Activities Committee.<sup>59</sup> On appeal, the question before the Supreme Court was whether Congress had overstepped its constitutional authority to conduct investigations as an adjunct to the legislative process.<sup>60</sup> In an opinion by Chief Justice Warren, the Court held that Congress's power in conducting investigations was not unlimited, and that there was no authority in this case for Congress to expose an individual's private affairs.<sup>61</sup>

Much of Chief Justice Warren's opinion focused on the explosion of contempt cases during the Cold War as a result of various investigations into the threat of Communist subversion in the United States.<sup>62</sup> The Chief Justice stated that "the emphasis [of the Court]

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55. *Investigation of Communist Activities*, *supra* note 53, at 4268.

56. *Id.* at 4275.

57. *Id.*

58. *Watkins*, 354 U.S. 186.

59. SABIN, *supra* note 1, at 154.

60. Brief for Respondent, *supra* note 54, at 2.

61. *Watkins*, 354 U.S. at 187, 215-16.

62. *Id.* at 195.



shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals.”<sup>63</sup> In the context of the *Watkins* case, the Court had to determine whether there existed a specific legislative need that justified probing into private affairs and encroaching upon an individual’s First Amendment rights.<sup>64</sup>

The Court, avoiding a First Amendment ruling in the case,<sup>65</sup> instead based its decision on the grounds of vagueness.<sup>66</sup> Because the resolution defining the authority and investigatory power of the Un-American Activities Committee had been too vague,<sup>67</sup> and because the Committee’s chairman had not reasonably defined what the inquiry was about,<sup>68</sup> *Watkins* had the right to refuse to answer.<sup>69</sup> According to the Court, “[f]undamental fairness demands that no witness be compelled to make [a determination of whether he is within his rights in refusing to answer] with so little guidance.”<sup>70</sup> The Court would not allow the Committee to wield the power to expose an individual’s private affairs “for the sake of exposure.”<sup>71</sup>

Justice Frankfurter wrote a short concurrence in *Watkins*.<sup>72</sup> While the Justice was “the leading proponent of judicial restraint, sensitivity, and deference with respect to the powers of Congress and the limited

63. *Id.*

64. *See id.* at 199-206.

65. *Id.* at 215; SABIN, *supra* note 1, at 155.

66. *Watkins*, 354 U.S. at 201.

67. The Committee’s charter stated that the Committee was authorized to make, from time to time, investigations of:

(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

*Communist Methods of Infiltration (Education—Part 9): Hearings Before the Committee on Un-American Activities, H.R. 5, 83d Cong. vi (1954) (enacted) [hereinafter *Communist Methods of Infiltration*]. The *Watkins* Court could define neither “un-American” nor “the principle of the form of government as guaranteed by our Constitution.” *Watkins*, 354 U.S. at 202. The *Watkins* opinion stated: “An excessively broad charter . . . places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference.” *Id.* at 205-06.*

68. The chairman of the Committee announced that the purpose of the Committee’s inquiry was to investigate “subversion and subversive propaganda.” *Watkins*, 354 U.S. at 214. According to the Court, investigation of subversion and subversive propaganda “is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so.” *Id.*

69. *Id.* at 214-15.

70. *Id.* at 214.

71. *Id.* at 200.

72. *Id.* at 216-17 (Frankfurter, J., concurring).

role of the Court,”<sup>73</sup> he opined that the Committee’s scope of inquiry and the relevance of its questions were too “cloudy” to compel Watkins to answer.<sup>74</sup> According to Justice Frankfurter, the witness under inquiry must have had an “awareness of the pertinency of the information that he has denied to Congress.”<sup>75</sup> Together with the majority opinion, Justice Frankfurter’s concurrence reflected the Court’s new stance on Red Scare cases.<sup>76</sup> *Watkins* was the first expression of the constitutional principles that limited Congress’s investigatory powers.<sup>77</sup> Such limitation would be reversed in two years, following the Supreme Court’s decision in *Barenblatt*.<sup>78</sup>

### B. *Sweezy v. New Hampshire*<sup>79</sup>

*Sweezy*—the second reported Red Monday case—involved a university professor who had been the subject of an investigation into subversive activities occurring and subversive persons found in New Hampshire.<sup>80</sup> The state’s attorney general, Louis Wyman, conducted the investigation.<sup>81</sup> After being subpoenaed to appear before Wyman, Paul Sweezy answered questions about his life, denying he had been a member of the Communist Party, but admitting that he referred to himself as a “classical Marxist.”<sup>82</sup> Similar to Watkins, Sweezy was willing to respond to all inquiries, but drew the line when questioned about past acquaintances.<sup>83</sup>

Three years later, after Sweezy was again called to testify before Wyman, Sweezy dodged more questions about his ex-wife’s political activities and about the political associations of his acquaintances.<sup>84</sup> He also refused to disclose the content of a teaching lecture he had given at the University of New Hampshire.<sup>85</sup> After arguing that the First Amendment protected his beliefs and the content of his lecture, Sweezy was charged with, and convicted of, contempt.<sup>86</sup>

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73. SABIN, *supra* note 1, at 155.

74. *Watkins*, 354 U.S. at 217.

75. *Id.*

76. SABIN, *supra* note 1, at 155.

77. *Id.* at 156.

78. *See Barenblatt v. United States*, 360 U.S. 109, 129-34 (1959).

79. 354 U.S. 234 (1957).

80. *Id.* at 236; J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 289, 292 (1989).

81. *Sweezy*, 354 U.S. at 248.

82. *Id.* at 238, 243.

83. *See id.* at 238-42, 242 n.6; *Watkins v. United States*, 354 U.S. 178, 185 (1957).

84. *Sweezy*, 354 U.S. at 242-43.

85. *Id.* at 243-44.

86. *Id.* at 244-45.

The question before the Supreme Court was whether the State's power to compel disclosure of information and Wyman's investigation deprived Sweezy of his Fourteenth Amendment due process rights.<sup>87</sup> With another opinion authored by Chief Justice Warren, the Court reversed Sweezy's contempt convictions.<sup>88</sup> The Chief Justice concluded that New Hampshire's investigation amounted to an invasion of Sweezy's "liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."<sup>89</sup>

Justice Frankfurter, joined by Justice John Marshall Harlan, concurred in the result.<sup>90</sup> While Justice Frankfurter agreed that Sweezy's contempt convictions should be reversed because Sweezy's First Amendment rights—applicable to the states via the Fourteenth Amendment's Due Process Clause—had been violated,<sup>91</sup> he found that Chief Justice Warren's majority opinion imposed too broad a restraint on state legislatures.<sup>92</sup> Justice Frankfurter's concurring opinion reflected his view of "[the Court's] very limited function of review over state action."<sup>93</sup> Although the justices used dissimilar reasoning to approach the same result, *Sweezy* reflected the Justices' desire "to strike at McCarthyism's insidious assault on academic freedom."<sup>94</sup> The Court's crackdown on the effects of the Red Scare continued in the next two cases.<sup>95</sup>

### C. *Yates v. United States*<sup>96</sup>

*Yates* involved fourteen Communist leaders who were charged with, and found guilty of, violating the Smith Act.<sup>97</sup> Justice Harlan, joined by Chief Justice Warren and Justice Frankfurter, wrote the majority opinion, exonerating five defendants and allowing the government the right to retry the other nine.<sup>98</sup> Focusing on the Smith Act's use of the term "organize," Justice Harlan applied the petitioners'

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87. *Id.* at 235.

88. *Id.* at 235, 254-55.

89. *Id.* at 250.

90. *Id.* at 255 (Frankfurter, J. & Harlan, J., concurring).

91. *See id.* at 255-56, 261, 265-67; SABIN, *supra* note 1, at 158.

92. *See Sweezy*, 354 U.S. at 256; SABIN, *supra* note 1, at 157-58.

93. SABIN, *supra* note 1, at 158 (alterations in original).

94. *Id.* at 159 (quoting BERNARD SCHWARTZ & STEPHAN LESHER, *INSIDE THE WARREN COURT* 120 (1983)).

95. *See infra* Part II.C-D.

96. 354 U.S. 298 (1957).

97. *Id.* at 300.

98. *Id.* at 328-29.

narrow definition of the word—it meant “establish,” “found,” or “bring into existence.”<sup>99</sup> Justice Harlan agreed with the petitioners that the Communist Party was “organized” in 1945, at the latest.<sup>100</sup> Therefore, since the Smith Act had a three-year statute of limitations period,<sup>101</sup> and because the petitioners were indicted for a violation of the Smith Act in 1951, the petitioners’ indictment was time-barred.<sup>102</sup>

Justice Harlan could have ended his opinion there. Nevertheless, he continued by examining “whether the Smith Act prohibits advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent.”<sup>103</sup> The Supreme Court rejected the abstract interpretation of forcible overthrow, instead requiring the government to prove advocacy of *action* to overthrow the government in order to convict under the Smith Act.<sup>104</sup> Evidence of mere discussion or advocacy of the idea to forcibly overthrow the government would not suffice to prove a Smith Act violation.<sup>105</sup> The Court’s ruling in *Yates*, while not explicitly overruling its decision in *Dennis*, severely weakened the FBI’s role of investigating suspected Communist Party members.<sup>106</sup> It essentially prevented further prosecutions under the Smith Act.<sup>107</sup>

#### D. Service v. Dulles<sup>108</sup>

John Stewart Service, a State Department Foreign Service officer, was charged with violating the Espionage Act of 1917<sup>109</sup> for furnishing Foreign Service reports to the editor of *Amerasia* magazine.<sup>110</sup> Although the grand jury refused to indict him, Service was subjected to years of loyalty investigations, each time cleared as a non-security risk.<sup>111</sup> Nonetheless, in December 1951, the Loyalty Review Board of the Civil Service Commission, expressing reasonable doubt as to Service’s loyalty, advised the Secretary of State, Dean Acheson, to terminate

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99. *Id.* at 304.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 318.

104. *Id.* at 318-20.

105. *Id.* at 320.

106. STEPHEN M. ENGEL, *AMERICAN POLITICIANS CONFRONT THE COURT: OPPOSITION POLITICS AND CHANGING RESPONSES TO JUDICIAL POWER* 294-95 (2011); SABIN, *supra* note 1, at 170.

107. ENGEL, *supra* note 106, at 295; SABIN, *supra* note 1, at 169-70.

108. 354 U.S. 363 (1957).

109. 18 U.S.C.A. §§ 791-794 (2012).

110. *Service*, 354 U.S. at 365.

111. *Id.* at 365-66.

Service's employment.<sup>112</sup> Acheson discharged Service under the authority of the McCarran Rider, which gave the Secretary of State absolute discretion in terminating the employment of any Foreign Service officer whenever the termination was deemed necessary or advisable in the interests of the United States.<sup>113</sup>

The questions before the Supreme Court included whether regulations governing loyalty and security cases were applicable to an employee discharged under the McCarran Rider and, if so, whether those regulations were violated by Service's discharge from employment.<sup>114</sup> Justice Harlan, writing for a unanimous Court, reasoned that the regulations governing loyalty and security cases had been written to protect employees from "unfounded accusations of disloyalty."<sup>115</sup> Therefore, the Court not only found that the regulations applied to discharges under the McCarran Rider, but also held that Service was wrongfully dismissed from employment.<sup>116</sup>

### III. POST-RED MONDAY REACTIONS

While many liberals hailed the Red Monday decisions as "a victory for all Americans" and "a step toward fundamental solution of many problems in [the United States],"<sup>117</sup> conservatives criticized the Court and questioned the wisdom of its rulings.<sup>118</sup> For example, reacting to the Court's decisions, a columnist for a South Carolina conservative newspaper wrote: "Maybe the United States needs an American Supreme Court."<sup>119</sup> Many characterized the Red Monday decisions as the ultimate threat to national security, and as a triumph for domestic subversion. Congress was just as forthright in its distaste of the position the Court took on Red Monday.<sup>120</sup>

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112. *Id.* at 366-68.

113. *Id.* at 368-70.

114. *Id.* at 373.

115. *Id.* at 374.

116. *Id.* at 373, 382-83.

117. *See California Reds Hail Court Vote as Victory for All*, BUS. GLOBE, June 18, 1957, at 9; *see also* SABIN, *supra* note 1, at 189 ("Those who reacted against the Court's work typically characterized the decisions as victories for communists and did not engage in analysis of the implications in any broader sense.").

118. *See, e.g.*, SABIN, *supra* note 1, at 189-90; *see also infra* notes 119-20 and accompanying text.

119. George E. Sokolsky, *Supreme Court Rulings Give Breaks to Criminal Types*, NEWS & COURIER, June 24, 1957, at 12.

120. *See infra* Part III.A.

### A. Congressional Reactions

Although both houses of Congress called for “calmness and proper respect for the role of the Court,” an anti-Court coalition emerged in response to Red Monday, demanding immediate remedial legislation.<sup>121</sup> Copies of newspaper articles attacking the decisions often appeared in the *Congressional Record*.<sup>122</sup> Many Republicans,<sup>123</sup> as well as Democrats,<sup>124</sup> called for Congress to correct the decisions, recommended the impeachment of the Justices, and prescribed new methods for suggesting candidates to the president for Supreme Court appointment.<sup>125</sup> But, no response to Red Monday was as threatening to the power and position of the Court as the legislation introduced by Republican U.S. Senator William E. Jenner.<sup>126</sup>

Senate Bill 2646, commonly known as the “Jenner bill,” was designed to strip the Supreme Court of appellate jurisdiction to hear cases involving: (1) the validity of congressional committee action; (2) security measures taken by the executive, including its federal employee loyalty program; (3) state anti-subversive activities programs and statutes; (4) regulations on subversive employees and teaching in schools; and (5) regulations on state bar admissions.<sup>127</sup> The legislation “represent[ed] a retaliatory approach of the same general character as the Court packing plan proposed in 1937.”<sup>128</sup> The efforts of Senator Jenner and Congress’s anti-Court coalition soon grew into a serious fundamental challenge to judicial power.<sup>129</sup> According to Chief Justice Warren, Congress “came dangerously close to passing” the legislation.<sup>130</sup>

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121. SABIN, *supra* note 1, at 193-95.

122. *Id.* at 193.

123. For example, Republican U.S. Representative Donald L. Jackson from California stated: Monday, June 17, was truly black Monday for the American people. That day culminated in the Supreme Court [nullifying and vitiating efforts of Congress] to seek out American agents of the conspiracy and to legislate on findings for and on behalf of the people of the United States and our security against the acts of traitors.

*Id.* at 194.

124. *Id.* Democratic U.S. Representative George W. Andrews from Alabama stated: “Mr. Speaker and Members of the House, let me appeal to you to take action before the Supreme Court destroys this nation.” *Id.*

125. *Id.*

126. See *infra* text accompanying notes 127-31.

127. S. 2646, 85th Cong. (2d Sess. 1957).

128. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 264 (2000).

129. See SABIN, *supra* note 1, at 196.

130. WARREN, *supra* note 26, at 313.

However, the bills were narrowly defeated, due, in part, to the position the Supreme Court took in decisions like *Barenblatt*.<sup>131</sup>

### B. *The Supreme Court's Position Change*

On June 8, 1959—nearly two years after the Supreme Court handed down its Red Monday decisions—the Court decided two cases that essentially returned to Congress and state legislatures the power to investigate the private affairs of its witnesses and “expose for the sake of exposure.”<sup>132</sup> In the first case, *Barenblatt*, the Court upheld a contempt-of-Congress sentence for Lloyd Barenblatt, a witness called to testify before the Un-American Activities Committee.<sup>133</sup> Barenblatt, a young college professor, had been asked by the Committee to disclose whether he or his acquaintances were currently or ever had been members of the Communist Party.<sup>134</sup> Barenblatt immediately refused to answer any question about him and his friends, relying on the First Amendment to argue that the Committee had no jurisdiction to ask him those questions.<sup>135</sup>

Following his general objection to the Committee's authority to investigate his private affairs, Barenblatt was convicted of contempt, fined, and sentenced to six months in prison.<sup>136</sup> A majority of the Supreme Court, including Justices Harlan and Frankfurter, affirmed Barenblatt's conviction.<sup>137</sup> Rejecting Barenblatt's reliance upon the Court's earlier decision in *Watkins*, Justice Harlan found that the questions the Committee asked Barenblatt were pertinent to its investigation.<sup>138</sup> Moreover, Justice Harlan used a balancing-of-interests approach to demonstrate that Congress's interest in protecting the nation from Communist subversion (via the Un-American Activities Committee's investigation) outweighed Barenblatt's individual interests<sup>139</sup>—that is, his right under the First Amendment to

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131. SIMON, *supra* note 35, at 241; *see also* ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 352 (1997) (stating that the Senate voted forty-nine to forty-one to shelve the Jenner-Butler bill, a softened version of the original Jenner bill).

132. *Barenblatt v. United States*, 360 U.S. 109, 133 (1959); *see Uphaus v. Wyman*, 360 U.S. 72, 82 (1959) (Brennan, J., dissenting).

133. *Barenblatt*, 360 U.S. at 113, 134.

134. *Id.* at 113-14.

135. *Id.* at 114 & n.2, 116.

136. *Id.* at 114 & n.2, 115.

137. *Id.* at 111, 134.

138. *Id.* at 123-25.

139. *Id.* at 126-29.

refuse to answer Committee questions regarding his religious and political beliefs.<sup>140</sup>

The second case decided on June 8, 1959 that ran contrary to the Red Monday decisions involved a man named Willard Uphaus, who was called before New Hampshire Attorney General Wyman in 1954.<sup>141</sup> Wyman was conducting an investigation into subversive activities in New Hampshire.<sup>142</sup> He demanded that Uphaus, executive director of World Fellowship, Inc., turn over names of all those who attended a summer camp run by that corporation, as well as names of the camp's employees and persons who visited the camp as guest speakers.<sup>143</sup> Uphaus refused to produce this information, claiming that the state had no authority to investigate subversive activities and that the enforcement of subpoenas to produce the information would violate his First Amendment rights.<sup>144</sup> At trial, Wyman offered evidence showing that speakers at the summer camp were Communist Party members.<sup>145</sup> Uphaus was held in contempt of court for continuing to refuse to disclose names.<sup>146</sup>

Rejecting Uphaus's reliance on *Sweezy*, the Supreme Court affirmed his contempt conviction.<sup>147</sup> In an opinion by Justice Tom C. Clark, the majority found that New Hampshire's interest in self-preservation, and protecting itself by identifying subversive persons who had attended the camp, outweighed the individuals' rights to associational privacy.<sup>148</sup> In his dissent, Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the forced disclosure of the camp attendees amounted to "[e]xposure purely for the sake of exposure," an activity that was explicitly proscribed by the Court's decision in *Watkins*.<sup>149</sup>

#### IV. THE FLIP-FLOP EXPLAINED

The Supreme Court's decisions in *Barenblatt* and *Uphaus* had little impact upon the overall effect of the Court's Red Monday decisions.<sup>150</sup> The Court's message after Red Monday was clear: "[It] would no longer

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140. *Id.* at 134.

141. *Uphaus v. Wyman*, 360 U.S. 72, 74 (1959).

142. *Id.*

143. *Id.*

144. *Id.* at 74-75.

145. *Id.* at 79.

146. *Id.* at 75.

147. *Id.* at 73-74, 82.

148. *Id.* at 73, 81.

149. *Id.* at 82 (Brennan, J., dissenting).

150. *See* SABIN, *supra* note 1, at 208.



endorse[] the unqualified use of the court system to further the aims of the Red Scare.”<sup>151</sup> Then why did the Warren Court revert to its pre-Red Monday position in *Barenblatt* and *Uphaus*? What was the point in departing from its otherwise growing involvement in protecting civil liberties? Professor Neal Devins argues that the Court’s backing away from its pro-civil liberties decisions was simply demonstrative of “divergent preferences on an incoherent Court.”<sup>152</sup> Sabin attributes the change to popular demand, reflecting the “ebb and flow of popular anxieties about national security.”<sup>153</sup>

Contrary to these arguments, it is likely that the Court’s decisions in *Barenblatt* and *Uphaus* reflected Justice Frankfurter’s (and to a lesser extent, Justice Harlan’s) strategic move to avoid a “potential constitutional crisis.”<sup>154</sup> Trying to dodge the wrath of legislation that threatened to strip the Court of its appellate jurisdiction, Justice Frankfurter distinguished the facts in *Barenblatt* and *Uphaus* from those facts in the Red Monday cases.<sup>155</sup> This allowed the Justice to give a modicum of deference to congressional authority in order to evade the passage of statutes that would threaten the Court’s power.<sup>156</sup>

#### A. *The Role of Justice Felix Frankfurter*

Many legal historians attribute the Court’s retreat in *Barenblatt* and *Uphaus* to Justice Frankfurter, his change of opinion, and his dissimilar philosophical and personal views from those of the other Justices on the Court.<sup>157</sup> As stated by Sabin:

[*Barenblatt* and *Uphaus*] demonstrated the shift in the balance taking place in the Court, realigning majority and minority status on Red Scare issues among the justices. In both decisions the four liberals [Warren, Brennan, Black, and Douglas] held together. While Harlan

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151. *Id.*

152. Neal Devins, *Ideological Cohesion and Precedent (or Why the Court Only Cares About Precedent When Most Justices Agree with Each Other)*, 86 N.C. L. REV. 1399, 1416-21 (2008).

153. See Richard W. Steele, *Arthur J. Sabin’s In Calmer Times: The Supreme Court and Red Monday*, 44 AM. J. LEGAL HIST. 466, 466-67 (2000) (book review).

154. SIMON, *supra* note 35, at 241.

155. See SABIN, *supra* note 1, at 206-07; SIMON, *supra* note 35, at 241-42; Devins, *supra* note 152, at 1416-20.

156. See SABIN, *supra* note 1, at 206-07.

157. See, e.g., Phillip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 430-35, 440-42 (2005); Paul A. Porter, *The Supreme Court and Individual Liberties Since 1952*, 48 KY. L.J. 48, 49, 58-62 (1959); Bernard Schwartz, *The Supreme Court—October 1958 Term*, 58 MICH. L. REV. 165, 205-08 (1959).

moved farther from the four liberals, it was the desertion by Frankfurter that most effected the change.<sup>158</sup>

Justice Frankfurter might have also effected the change by influencing the majority opinion in *Barenblatt*, penned by Justice Harlan. In that opinion, Justice Harlan adopted a balancing-of-interests approach to hold that Congress's interest in national security outweighed Barenblatt's individual interest in protecting his religious and political beliefs.<sup>159</sup> In using such a test, "Harlan was apparently following the lead of Frankfurter."<sup>160</sup>

Not only was Justice Frankfurter crucial to the Court's position shift in *Barenblatt* and *Uphaus*,<sup>161</sup> but he also seemed to be a great influence on the Red Monday *Watkins* decision. In fact, found within Justice Frankfurter's papers was a draft of Chief Justice Warren's *Watkins* opinion, "extensively corrected in Frankfurter's handwriting."<sup>162</sup> Justice Frankfurter returned his edited version of the *Watkins* opinion to Chief Justice Warren, who then sent back a handwritten note: "Many thanks for the thought and attention you gave to *Watkins* over the weekend. I will study your suggestions and discuss them with you later if you have the time to do so."<sup>163</sup>

Chief Justice Warren's words were not mere courtesy; his *Watkins* opinion virtually reflected all of Justice Frankfurter's suggested changes.<sup>164</sup> The changes, for the most part, narrowed the scope of Chief Justice Warren's original language, "particularly in removing unqualified references to First Amendment restrictions on congressional investigatory power."<sup>165</sup> Justice Frankfurter wrote to Chief Justice Warren that he deleted those references "because we ought to assert limits on unjustifiable inquiries even tho [sic] some of us may not find an infringement on the First Amendment."<sup>166</sup>

How can Justice Frankfurter's seemingly drastic shift in position from *Watkins* to *Barenblatt* be explained? In the words of Victor Rabinowitz, "[l]ike most Supreme Court cases, and in fact like most cases of any kind, there are extralegal political and philosophical

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158. SABIN, *supra* note 1, at 206.

159. See *supra* text accompanying notes 140-41.

160. SABIN, *supra* note 1, at 206.

161. *Id.*

162. Bernard Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115, 119-20.

163. *Id.* at 120 (quoting Letter from Earl Warren, Chief Justice, U.S. Supreme Court, to Felix Frankfurter, Justice, U.S. Supreme Court (May 27, 1957) (on file with the *Hofstra Law Review*)).

164. See *id.*

165. *Id.*

166. *Id.*

considerations that motivate judges; that was true to an extraordinary extent in the case of Frankfurter.”<sup>167</sup> Justice Frankfurter deeply believed in the philosophy of judicial restraint.<sup>168</sup> His commitment to “legislative constitutional democracy” often came into conflict with his concern for the protection of individual rights and civil liberties.<sup>169</sup>

Such a conflict arose in the aftermath of the pro-civil liberties Red Monday decisions. As a jurist who was committed to showing deference to the power of the other branches of government, Justice Frankfurter likely found it difficult to stand by his Red Monday position in light of negative congressional reaction to Red Monday, the introduction of legislation like the Jenner bill, and the opinions of the anti-Court coalition in Congress.<sup>170</sup> Therefore, while Justice Frankfurter admitted in a letter to Justice Brennan that “there isn’t a man on the Court who personally disapproves more than I do of the activities of all the un-American Committees, of all the Smith [Act] prosecutions, of the Attorney General’s list, etc. etc.,” he abandoned his Red Monday position and, in *Barenblatt* and *Uphaus*, voted “in support of the state and federal government, its agencies and committees.”<sup>171</sup>

### B. *The Role of the Facts*

The existence of facts in *Barenblatt* and *Uphaus* that were distinguishable from the facts in the Red Monday cases made it possible for Justice Frankfurter to respond to “congressional opprobrium” and retreat from the Court’s initial pro-civil liberties rulings.<sup>172</sup> Since the later opinions were in close conversation with some of the Red Monday opinions (for example, *Barenblatt* with *Watkins*, and *Uphaus* with *Sweezy*), Justice Frankfurter was aware of the cases’ similarities and differences.<sup>173</sup> A major difference between *Barenblatt* and *Watkins* that might have influenced Justice Frankfurter’s change in position was the manner in which the defendants in those cases conducted themselves when called before the Un-American Activities Committee.

According to Chief Justice Warren:

[*Watkins* was] not the case of a truculent or contumacious witness who refuse[d] to answer all questions or who, by boisterous or discourteous

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167. VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYER’S MEMOIR 125 (1996).

168. See NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR 39, 93 (2004).

169. *Id.* at 96.

170. See SABIN, *supra* note 1, at 195-97, 207.

171. *Id.* at 207.

172. Devins, *supra* note 152, at 1416; see RABINOWITZ, *supra* note 167, at 125.

173. See RABINOWITZ, *supra* note 167, at 125.

conduct, disturb[ed] the decorum of the committee room. [Watkins] was prosecuted for refusing to make certain disclosures which he asserted to be beyond the authority of the committee to demand.<sup>174</sup>

Watkins allowed the Un-American Activities Committee to ask questions about him, his past activities, and even his connections to the Communist Party.<sup>175</sup> He only refused to answer questions regarding the political activities of past associates.<sup>176</sup> As indicated by the government's brief in *Watkins*, the witness:

[F]ully and candidly disclosed his own past associations with the Communist Party. He was also willing to identify those of his past Communist associates who to his "best knowledge and belief" were still Party members, and he did in fact identify one of his former associates about whom he was questioned.<sup>177</sup>

Later in its brief, the government even admitted that "[a] more complete and candid statement of [Watkins's] past political associations and activities . . . can hardly be imagined. [Watkins] certainly was not attempting to conceal or withhold from the Committee his own past political associations, predilections, and preferences."<sup>178</sup>

In stark contrast, Barenblatt refused to answer *any* inquiry concerning his political beliefs.<sup>179</sup> In response to an early question of whether he knew a Mr. Francis Crowley, Barenblatt's immediate response was: "I would like here to state my objections to the power and jurisdiction of this committee to inquire into my political beliefs, my religious beliefs, and any other personal and private affairs . . ."<sup>180</sup> Thereafter, Barenblatt rebuffed all of the Committee's questions as to whether he was currently, or ever had been, a member of the Communist Party.<sup>181</sup> The government's brief in *Barenblatt* pointed out additional questions that the witness refused to answer, one of which was whether Barenblatt had known, as a Communist Party, member a man who had already openly disclosed that he was a member.<sup>182</sup> Whereas Watkins was able to read his objections to the Committee's inquiries into the record, Barenblatt's patent unwillingness to cooperate might have compelled

174. *Watkins v. United States*, 354 U.S. 178, 182 (1957).

175. *Id.* at 184.

176. *See supra* text accompanying notes 56-57.

177. Brief for Respondent, *supra* note 54, at 22 (emphasis added).

178. *Id.* at 59.

179. *See supra* text accompanying notes 134-36.

180. *Communist Methods of Infiltration*, *supra* note 67, at 5802 (statement of Lloyd Barenblatt).

181. *See id.* at 5803-10.

182. Brief for Respondent at 30, *Barenblatt v. United States*, 360 U.S. 109 (1959) (No. 35).

U.S. Representative Harold H. Velde, a member of the Committee, to respond to Barenblatt's requests in the following manner:

*Mr. Barenblatt:* . . . I will not answer any of those questions on the grounds of my objections in this statement which I again respectfully request that I be able to read at this point to get into the record the objections so that we can proceed from that point.

*Mr. Velde:* We will spare you a lot of time.<sup>183</sup>

According to Rabinowitz, Justice Frankfurter "could identify easily with Watkins, but not with Barenblatt."<sup>184</sup> Although Rabinowitz does not further develop this claim, the differences in the *Barenblatt* and *Watkins* cases might elucidate the statement's meaning: Watkins—with his moderate cooperation with the Committee, and his willingness to make some disclosures while refusing to make certain others—represented to Justice Frankfurter a balance between deference to Congress and the protection of civil liberties.<sup>185</sup> On the other hand, Barenblatt—with his general objections to the authority of the Committee, and his refusal to answer any question posed to him—represented broad protection of civil liberties and little deference to the power of Congress.<sup>186</sup> Taking into consideration his advocacy of judicial restraint and the negative congressional reaction to Red Monday, Justice Frankfurter's decision to rule against the government in *Watkins*, but rule for it in *Barenblatt* is an understandable one.

## V. CONCLUSION

During the period of the second Red Scare, the Supreme Court regularly tackled cases involving the conflict between civil liberties and the power of Congress to protect the nation from domestic subversion.<sup>187</sup> The Court's position in *Dennis* not only demonstrated willingness to sacrifice the rights of suspected Communists for the sake of national security, but also "endorsed the unqualified use of the court system to further the aims of the Red Scare."<sup>188</sup> Six years later, in its four Red Monday decisions, the Court curbed the power of Congress and began to restore protections of civil liberties, effectively rendering Red Scare practices, such as prosecutions under the Smith Act, useless.<sup>189</sup> But, the

183. *Communist Methods of Infiltration*, *supra* note 67, at 5806.

184. *See* RABINOWITZ, *supra* note 167, at 125.

185. *See* SABIN, *supra* note 1, at 206-07; SIMON, *supra* note 35, at 236-37.

186. *See* SABIN, *supra* note 1, at 205-07; SIMON, *supra* note 35, at 241-42.

187. *See supra* text accompanying notes 33-36.

188. SABIN, *supra* note 1, at 208; *see supra* Part I.

189. *See supra* Part II.A-D.

victory for civil liberties seemed short-lived; only two years later, the Court revisited its Red Monday decisions when, in *Barenblatt* and *Uphaus*, the Court ruled in favor of the government's power to investigate subversive activities.<sup>190</sup> In hindsight, the *Barenblatt* and *Uphaus* decisions seemed out of place in the context of the Warren Court's growing involvement in protecting civil rights and civil liberties.<sup>191</sup>

Justice Frankfurter's desertion of the position taken by the Supreme Court's liberal Justices was the main reason for the Court's "flip-flop" from Red Monday to *Barenblatt* and *Uphaus*.<sup>192</sup> An advocate of judicial restraint, Justice Frankfurter reined in the expansion of civil liberties protections, and showed deference to the power of Congress in order to dodge legislation introduced by anti-Communist legislators that would have stripped the Court of its appellate jurisdiction.<sup>193</sup> In the wake of the Red Scare, even when the Court reasserted itself on behalf of civil liberties, Justice Frankfurter "remained dominant as the Justice who carefully weighed the individual liberty at stake against the legitimate claims of the government in combating subversion."<sup>194</sup>

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190. See *supra* Part III.B.

191. See *supra* text accompanying notes 24-33.

192. See *supra* Part IV.A.

193. See *supra* Part IV.A-B.

194. SIMON, *supra* note 35, at 236.

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