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NEWSLETTER

The First Amendment Right of Political Privacy Chapter 1 – The Edgerton Dissent

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The newfound value *The New York Times* ascribes to anonymous speech critical of the President is refreshing. Defending its decision to publish a September 5 op-ed without identifying its author, other than as "a senior administration official," *Times* publisher A.G. Sulzberger stated that the anonymous commentary "added to the public understanding of this administration and the actions and beliefs of the people within it." He continued, "We didn't think there was any way to make that contribution without some guarantee of anonymity." [1]

First Amendment libertarians couldn't articulate the point more convincingly. They have argued, with varying judicial results and limited editorial support, that speech itself is protected by the First Amendment and that forced government disclosure of speakers and supporters of associations necessarily reduces the number and candor of valuable ideas that benefit speakers, listeners, and the democracy as a whole.

The *Times*' protection of this "senior administration official's" anonymity against the government's demand – made by the President himself – to name the author, in the interest of enforcing good and faithful government service, implicates the important question of whether the First Amendment protects anonymous political speech and association. Recent appellate decisions have indicated that it does in some circumstances, while upholding state laws requiring disclosure to the government of the names of nonprofit organizations' major financial contributors. *Americans for Prosperity Foundation v. Becerra*, 2018 WL 4320193 (9th Cir. 2018); *Citizens United v. Schneiderman*, 882 F.3d 374 (2nd Cir. 2018).

Practice Areas

Election Law & Government Ethics

The history of this First Amendment doctrine is long and somewhat wavering in its evolution. The present is the first of several *Election Law News* articles that will explore that history and seek to illuminate the constitutional right to anonymous speech and association and the circumstances under which the right will be protected by the courts.

Although the right to speak and associate anonymously had been asserted by the Ku Klux Klan as a privacy right under the Privileges and Immunities Clause of Article IV of the Constitution and the substantive Due Process Clause of the Fourteenth Amendment as early as the 1920s, the Supreme Court had rejected the existence of such a constitutional right.[2] Twenty years later, however, the right was reasserted under the First Amendment in the context of government efforts, in the 1940s and 1950s, to root out "communists." And that is where this jurisprudential history begins.

Post-War Government Investigations

The "Red Scare" period that commenced in earnest immediately following World War II was complicated. There indeed were disloyal communists in the federal government who passed secrets to the Soviet Union.[3] But caught up in the mix also were ideological communists who, before the onset of the Cold War, conceived of American communism as the next progression of New Deal ideology and a bulwark against Fascism. This latter category included progressives in Hollywood who had no access to government secrets and whose alleged transgression was spreading communistic ideology in popular films.[4] Some indeed were card-carrying members of the Communist Party USA, and they did feature socialist themes in their films seeking to influence American public opinion, sometimes upon orders from the Communist Party.[5] But they were not Soviet spies embedded in the State Department or passing government secrets to the Soviets, and they did not engage in espionage or threaten the operations of government.

Beginning in the late 1940s, Hollywood communists became a focus of investigations by the House Un-American Activities Committee (HUAC) under the leadership of both political parties. Preserving the United States' democracy and its national security against communist ideas was a bipartisan enterprise for almost a decade.

Two common refrains of HUAC questioning delved directly into privacy of individual and associational conscience: "Are you now or have you ever been a communist?" and "Name the names of other communists." Those who refused to answer were prosecuted for contempt crimes and many went to prison, among them the "Hollywood Ten," a group of ten screenwriters, producers, and directors who refused to answer the HUAC's questions about their political associations when subpoenaed to testify in 1947. Ever since, American liberals have vilified this forced government intrusion into the privacy of political conscience, lionized the brave women and men who refused to disclose their political associations, and castigated those who disclosed names of fellow communists.[6]

From this complicated experience began to emerge First Amendment jurisprudence and, significantly, a First Amendment right of political privacy. The right evolved over the period of a decade in fits and starts, born first of a dissenting opinion on the U.S. Court of Appeals for the District of Columbia – the "Edgerton Dissent" –

and eventually blossoming as a consensus principle of the Supreme Court.

The Hollywood Ten Inquisition Case

Nowhere in the country was farther from government secrets and the threat of armed revolution than Hollywood, California. But Hollywood was a haven for liberal, socialist, and even Marxian ideology during the New Deal era. Affluent liberal (*avant-garde*) filmmakers and actors made for dramatic and unsympathetic targets of official suspicion and investigation. They were accused not of supporting the violent overthrow of the government, but of planting collectivist ideas and themes in their movies and thereby negatively influencing public opinion.[7] This effort to steer American public opinion toward communism was cited as justification for a vigorous investigation and triggered denouncements from conservative Hollywood producers and actors.[8]

The HUAC had been established in 1938 to investigate subversive activities in the United States. At that time, pro-German Nazi sympathies were deemed as dangerous as any other foreign influence. But by the mid-1940s, the HUAC focused like a laser beam on communist ideologues and sympathizers within the United States, and America's second Red Scare of the 20th century was launched in the name of protecting national security – from dangerous ideas.[9]

The first major legal test for the right of private political conscience and association arose from the HUAC's subpoenas in 1947 to many individuals, including dozens of Hollywood actors, directors and screenwriters, many of whom had associated with the Communist Party USA, to testify about their political beliefs and activities and to name the names of others who had attended party meetings. These hearings dominated the headlines as one after another well-to-do Hollywood figures were paraded before the HUAC and press cameras and asked questions like "Are you now or have you ever been a member of the Communist Party," and to name the names of their fellow political associates.

Ten prominent screenwriters and directors[10] appeared before the HUAC and each declined to answer the Committee's questions – particularly the request to disclose the names of their political associates.[11] They argued that the First Amendment forbade the government from forcing them to disclose their political associations. For their resistance they were charged and later convicted of contempt of Congress. They were fined and sentenced to prison terms of several months to a year.

Private Economic Punishment Too

On December 3, 1947, the Motion Picture Association of America, under pressure from conservatives in Congress, issued the "Waldorf Statement," which said, in part:[12]

Members of the Association of Motion Picture Producers deplore the action of the 10 Hollywood men who have been cited for contempt by the House of Representatives. We do not desire to prejudge their legal rights, but their actions have been a disservice to their employers and have impaired their usefulness to the industry.

We will forthwith discharge or suspend without compensation those in our employ, and we will not re-employ any of the 10 until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist.

The Waldorf Statement went on to announce that the major Hollywood studios would not employ communists or other "subversives" in the future.

The First Amendment Issue Is Joined (1947 – 1949)

The Hollywood Ten appealed their convictions, hopeful that a federal appellate court or the Supreme Court would protect their political privacy under the First Amendment. The HUAC defended its right to inform itself of communist activities and partisans in the United States.

In March 1948, before the Hollywood Ten appeals were heard, the U.S. Court of Appeals for the District of Columbia issued its ruling in *Barsky v. United States*,[13] which upheld the convictions of representatives of "the Joint Anti-Fascist Refugee Committee" for failure to produce documents subpoenaed by the HUAC.[14] That inquiry did not concern movies. The targeted committee "was a private voluntary association engaged in the collection of funds from the public in this country upon representations that such funds were to be used for relief purposes abroad."[15] The inquiry arose from "complaints that the funds collected by appellants' organization were being used for political propaganda and not for relief."[16]

The appellants contended that the subpoenas issued to them were invalid unless the House resolution authorizing the HUAC's inquiries itself was completely within the lawful authority of the House. In response, the court evaluated the full resolution, including the authorities not directly related to the subpoenas and upheld the resolution in its entirety. Judge E. Barrett Prettyman, joined in the majority by Judge Bennett Clark, observed that: [17]

[T]he governmental ideology described as Communism and held by the Communist Party is antithetical to the principles which underlie the form of government incorporated in the Federal Constitution and guaranteed by it to the States, is explicit in the basic documents of the two systems; and the view that the former is a potential menace to the latter is held by sufficiently respectable authorities, both judicial and lay, to justify Congressional inquiry into the subject.

"If Congress has power to inquire into the subjects of Communism and the Communist Party," the majority reasoned, "it has power to identify the individuals who believe in Communism and those who belong to the party."[18] From there Judge Prettyman's opinion discussed vague distinctions between "belief and activity,"[19] which analysis was of no significance given the holding that "Congress has the power to make an inquiry of an individual which may elicit the answer that the witness is a believer in Communism or a member of the Communist Party."[20] The majority also invoked the "public necessities" that outweighed any "private rights."[21] Although not clearly articulated as such, the opinion adopted a vague scrutiny standard, weighing "the relative necessity of the public interest as against the private right."[22] Based on this balancing, the majority concluded that "unless democratic government ... can protect itself by means commensurate with danger, it is doomed."[23]

But what did the opinion make of the asserted "private rights"? Judge Prettyman's opinion did not rate them very highly. It also struggled even to classify the right. The government argued that "freedom of speech does not encompass freedom to remain silent."[24] The court's opinion observed "[t]here is justification for the contention that the latter is a freedom of privacy, different in characteristics and governed by different considerations from the constitutionally protected freedom of speech."[25] Ultimately, the majority said it would "assume, without deciding, for purposes of this case, that compulsion to answer the question asked by the Congressional Committee would impinge upon speech and not merely invade privacy."[26]

The majority also belittled the burden placed upon the claimed rights by the HUAC's investigation, calling them the "private rights of the timid" and concluding that although public revelation of communist beliefs and affiliation "would result in embarrassment and damage" to the individuals, "[t]his result would not occur because of the Congressional act itself," rather the "result would flow from the current unpopularity of the revealed belief and activity."[27] Congress was not punishing the belief, just exposing it to public view. Based on this reasoning, the criminal convictions were affirmed.

The Edgerton Dissent

Judge Henry Edgerton, dissenting, saw the case very differently. The dissenting opinion was articulate – with more clarity, purpose, and record citations than the majority opinion – in laying bare the ideological war afoot as well as the First Amendment rights at stake. Judge Edgerton started succinctly: "In my opinion the House Committee's investigation abridges freedom of speech and inflicts punishment without trial."[28] He elaborated on both the free speech rights and the HUAC's impingement upon them:[29]

The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.

The investigation also restricts freedom of speech by forcing people to express views. Freedom of speech is freedom in respect to speech includes freedom not to speak....

That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak.

As to the court's dismissive characterization of the "private rights of the timid," Judge Edgerton responded:[30]

There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. But nothing turns on this question of fact. The views of timid people are not necessarily worthless to society. No one needs self-expression more. The Constitution protects them as it protects others.

The Edgerton Dissent then candidly assessed and documented with extensive record evidence the real politic afoot – that government officials were waging an ideological war against ideological opponents against whom they would be proscribed from legislating. "The Committee and its members have repeatedly said in terms or in effect that its main purpose is to do by exposure and publicity what it believes may not validly be done by legislation. This is as much as to say that its purpose is to punish or burden propaganda. The Committee has embarked upon a systemic campaign to suppress freedom of political and economic opinion."[31] He continued, "What Congress may not restrain, Congress may not restrain by exposure and obloquy.... The First Amendment forbids Congress purposely to burden forms of expression that it may not punish."[32]

Finally, engaging the court on the balance between First Amendment rights versus the government's need to invade those rights, Judge Edgerton relied upon the obvious fact that "[t]here is no evidence in the record that propaganda has created danger, clear and present or obscure and remote, that the government of the United States or any government in the United States will be overthrown by force or violence."[33] The exercise of freedoms of belief and expression, Edgerton concluded, "does not support the conclusion that Congress may compel men to disclose their personal opinions, to a committee and also to the world, on topics ranging from communism, however remotely and peaceably achieved, to the American system of checks and balances, the British Empire, and the Franco government of Spain."[34]

Hollywood Ten Appeals

When the appeals from the Hollywood Ten convictions reached the D.C. Circuit, *Barsky* had been decided. Understanding the critical significance of *Barsky* to their own fates, the Hollywood Ten filed an *amicus* brief urging the Supreme Court to grant certiorari.[35] Invoking the Edgerton Dissent, they pleaded with the Supreme Court to end the "governmental inquisition" into the "area of conscience and belief."[36] Public "exposure" of personal political beliefs and association, they argued, was "more effective than a Gestapo" at censoring speech, belief, and associations.[37] But the U.S. Supreme Court denied review, and the Prettyman decision stood as law.[38]

Therefore, it was perhaps a *fait accompli* when, in *Lawson v. United States,*[39] two of the Hollywood Ten convictions were affirmed. The opinion, written by Judge Clark (of the *Barsky* majority) was joined by Circuit Judge Wilbur K. Miller and District Judge George C. Sweeney (sitting by designation). Judge Edgerton did not participate. Each of the appellants, John Howard Larson and Dalton Trumbo, had been convicted for refusing to answer during October 1947 testimony "whether or not he was or had ever been a member of the Communist Party."[40]

Judge Clark's opinion ruled that the appellants' argument that they were protected by the Constitution "from being compelled to disclose their private beliefs and associations" had been decided in *Barsky* and "expressly decided contrary to the contention" raised by Lawson and Trumbo.[41] The court found that "holding controlling here."[42] That doomed the appeals, but Judge Clark elaborated that the general principle of compelled disclosure was necessary because "the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world."[43] Given that the motion picture industry plays a critical "role in the molding of public opinion:"[44]

[I]t is absurd to argue, as these appellants do, that questions asked men who, by their authorship of the scripts, vitally influence the ultimate production of motion pictures seen by millions, which questions require disclosure of whether or not they are or ever have been Communists, are not pertinent questions.

Lawson and Trumbo petitioned the Supreme Court for certiorari in hopes that it would come to their protection. Alas, however, the Supreme Court, in 1950, with the exceptions of Justices Hugo Black and William O. Douglas, who would have taken review, was not prepared to wade into the Red Scare. The Supreme Court denied certiorari on May 29, 1950.[45] This sealed the fate of all of the Hollywood Ten defendants, as the remaining eight cases had been held in abeyance in the trial court pending determination of the Lawson and Trumbo appeals. All of the Hollywood Ten were imprisoned, some for months, some up to a full year.[46]

Aftermath

The Hollywood Ten case and its impact on the people involved has been the subject of at least a dozen books and movies. The latest was the film *Trumbo* (2015), starring Bryan Cranston as the crotchety award-winning screenwriter who went to prison, lost his career and home, moved to Mexico, and wrote movies under pseudonyms to make a living until the Red Scare had passed. Among them were *Roman Holiday* (1953) and *The Brave One* (1956), both of which won Academy Awards for best screenplay and best story, respectively – awards Trumbo was unable to accept. He reemerged in his own name as the screenwriter of *Exodus* and *Spartacus* (starring Burt Lancaster) in 1960. His story was one of the more successful endurances, although his life was never the same.

The Hollywood Ten case also permanently disrupted First Amendment jurisprudence, although it would take years, and changes in the Justices, for the legal issues joined in the Prettyman and Edgerton opinions to be decided definitively by the Supreme Court. Significantly, the Edgerton Dissent would live to fight another day. Stay tuned for the next article in this *Election Law News* series.

ENDNOTES

[1]Paul J. Weber, "New York Times' publisher defends op-ed in meeting of US news leaders," *Associated Press*, Sept. 11, 2018.

[2]*New York v. Zimmerman*, 278 U.S. 63, 71-72 (1928) ("There are various privileges and immunities which under our dual system of government belong to citizens of the United States solely by reason of such citizenship.... But no such privilege or immunity is in question here. If to be and remain a member of a secret, oath-bound

association within a state be a privilege arising out of citizenship at all, it is an incident of state rather than United States citizenship; and such protection as is thrown about it by the Constitution is in no wise affected by its possessor being a citizen of the United States. Thus there is no basis here for invoking the privilege and immunity clause. The relator's contention under the due process clause is that the statute deprives him of liberty in that it prevents him from exercising his right of membership in the association. But his liberty in this regard, like most other personal rights, must yield to the rightful exertion of the police power.").

[3]M. Stanton Evans, *Blacklisted by History: The Untold Story of Senator Joe McCarthy and His Fight Against America's Enemies* (Three Rivers Press 2007); Herbert Romerstein, *The Venona Secrets* (Regnery History 2000).

[4]The House Un-American Activities Committee detected "un-American" propaganda inserted into motion pictures among other things by "innuendos and double meanings," "slanted lines," "by a look, by an inflection, by a change in the voice," as well as by references to "crooked" or dishonest members of Congress, a minister shown as the tool of his richest parishioner, and to avaricious bankers. *See* Brief of Herbert Biberman, Alvah Bessie, Lester Dole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott and Dalton Trumbo as Amicus Curiae in *Eisler v. United States* (Appeal No. 255, October Term 1948) (Mar. 2, 1949) at 12-13 (*citing* U.S. House Committee on Un-American Activities Report on Un-American Activities, Hollywood Hearings 44 at pp. 15, 17, 50-52, 61, 94, 95, 114, 122-126, 225, 231-232, 234).

[5]Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).

[6]Victor S. Navasky, *Naming Names* (Viking 1980).

[7]Barbara Branden, *The Passion of Ayn Rand* (Anchor Books 1986) at p. 199 ("The purpose of the Communists in Hollywood is *not* the production of political movies openly advocating Communism. Their purpose is *to corrupt our moral premises by corrupting non-political movies* — by introducing small, casual bits of propaganda into innocent stories — thus making people absorb the basic principles of Collectivism *by indirection and implication*.").

[8]Conservative Hollywood figures such as Walt Disney, John Wayne, Ronald Reagan, Cecil B. DeMille, Gary Cooper, Ginger Rogers, Clark Gable, Barbara Stanwyck, Ayn Rand, and others formed the Motion Picture Alliance for the Preservation of American Ideals to counter communist ideological influence in the film industry. In 1947, in testimony before the HUAC, Ronald Reagan sounded a civil libertarian chord when asked if the Congress should outlaw the Communist Party: "As a citizen I would hesitate, or not like, to see any political party outlawed on the basis of its political ideology. We have spent 170 years in this country on the basis that democracy is strong enough to stand up and fight against the inroads of any ideology.... I detest, I abhor their philosophy, but I detest more than that their tactics, which are those of the fifth column, and are dishonest, but at the same time I never as a citizen want to see our country become urged, by either fear or resentment of this group, that we ever compromise with any of our democratic principles through that fear or resentment. I still think that democracy can do it." See Transcript at http://historymatters.gmu.edu/d/6458/.

[9]The first Red Scare occurred during World War I and focused on radical labor unions, agricultural organizations, and anarchists.

[10]The 1947 Hollywood Ten were Alvah Bessie, Herbert Biberman, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott, and Dalton Trumbo. The list of suspected Hollywood Communists, including screenwriters, directors, playwriters, actors, musicians, poets, and other artists, would grow over time to nearly 200.

[11]One of them, Edward Dmytryk, after being imprisoned, would later cooperate with the HUAC and name names of political associates. Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).

[12]The Waldorf Statement was a two-page press release issued by the association's president following a closed-door meeting of motion picture company executives at the Waldorf-Astoria Hotel in New York City. https://en.wikipedia.org/wiki/Waldorf_ Statement.

[13]167 F.2d 241 (D.C. Cir. 1948).

[14]*Id.* at 243.

[15]*Id.*

[16]*Id.*

[17]*Id.* at 247.

[18]*Id.* at 246.

[19]*Id.* at 248 ("Activity is different from thought.") & 249.

[20]*Id.* at 250.

[21]*Id.* at 249.

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.*

[26]*Id.* at 250.

[27]*Id.* at 249.

[28]*Id.* at 252 (Edgerton dissenting).

[29]*Id.* at 254-255 (Edgerton dissenting).

[30]*Id.* at 255 (Edgerton dissenting).

[31]*Id.* at 256 (Edgerton dissenting) (internal quotations and citations omitted).

[32]*Id.*

[33]*Id.* at 258 (Edgerton dissenting).

[34]*Id.* at 259 (Edgerton dissenting).

[35]*See* Motion for Leave to File Brief as Amici Curiae and Brief in *Barsky v. United States* (Appeal No. 766, October Term 1947) (May 26, 1948).

[36]*Id.* at 2-3.

[37]*Id.* at 10-11.

[38]*Barsky v. United States*, 334 U.S. 843 (1948).

[39]176 F.2d 4 (D.C. Cir. 1950).

[40]*Id.* at 50-51.

[41]*Id.* at 51.

[42]*Id.* at 52.

[43]*Id.* at 53.

[44]*Id.*

[45]339 U.S. 934 (1950).

[46]In his memoir, written 50 years later, Hollywood director Edward Dmytryk recounts the near five months that he spent in a federal work camp in the mountains of West Virginia. Edward Dmytryk, *Odd Man Out: A Memoir of the Hollywood Ten* (Southern Illinois University Press 1996).