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NEWSLETTER

The First Amendment Right to Political Privacy Chapter 3 - Red Monday, Paul Sweezy, and the Frankfurter Concurrence

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Chapter 1 recounted the plight of the "Hollywood Ten" communists, who went to prison and lost their careers rather than disclose the names of fellow communists to the House Committee on Un-American Activities (HUAC) in 1947. Their fate was decided by the U.S. Court of Appeals for the District of Columbia, and the Supreme Court was unwilling to wade into the Red Scare. Chapter 2 covered the First Amendment protection the U.S. Court of Appeals for the District of Columbia and the Supreme Court afforded, a few years later, to the conservative Committee on Constitutional Government and its political efforts to thwart the New Deal. This Chapter 3 recounts how the Supreme Court slowly began to intervene in the Red Scare, culminating with a significant concurring opinion by Justice Felix Frankfurter in the case of Marxist political activist Paul Sweezy one decade after the Hollywood Ten appeared before the HUAC.

No Judicial Relief from the Red Scare – In Calmer Times?

By 1950, the Red Scare was in full bloom and enjoyed general public favor. Many of the Hollywood Ten were serving prison sentences. Both houses of Congress, the Executive branch, and states were actively investigating former or current communists in various settings, exposing them, and punishing them. The First Amendment was deemed a weak defense in light of the Hollywood Ten outcome. Some subpoena recipients invoked their Fifth Amendment rights to avoid inquiry, but that entailed implicating oneself in a criminal act, so it was imperfect. Many just named names and cooperated in order to avoid punishment.

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Dozens of court cases were underway challenging the various governmental actions. Judicial conservatives on the Supreme Court were not impressed by the constitutional claims and either denied certiorari or affirmed lower court decisions, ruling against communists in various contexts.[1]The prevailing view was that the government had a right of self-preservation and Congress was pursuing the national security interest justly by rooting out communists. In the words of one communist defense attorney of the day, "The courts were of no help whatsoever."[2]

Congress had enacted the Smith Act in 1940, which made it a crime to advocate the overthrow of the U.S. government by force or violence.[3] Over a hundred American citizens were indicted for alleged violations of the Smith Act.[4] In 1948, the conviction of Eugene Dennis, General Secretary of the Communist Party USA, was affirmed by the U.S. Court of Appeals for the Second Circuit.[5] The Supreme Court granted certiorari for the purpose of deciding if the Smith Act violated the First Amendment.

In a 6-2 opinion, issued in 1951, the Supreme Court unremarkably affirmed the convictions and found no First Amendment violation.[6] Majority opinions ranged from the important governmental interest in self-preservation to relatively carte blanche deference to the Legislative branch. As in the Hollywood Ten case, two Justices dissented, William O. Douglas and Hugo Black, the former Senator and KKK member who was an absolutist defender of First Amendment rights. Both Justices recognized the First Amendment right of communists to associate and advocate their ideas short of organizing overthrow of the government. Justice Douglas observed simply that the party leaders taught communist economic ideology, but never did anything to incite actual armed overthrow of the government. In one of the more pertinent observations of the time, Justice Black prophesized:

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.[7]

Calmer Times Ahead – First Amendment Jurisprudence Evolves

By the early 1950s, the HUAC had resumed its investigations into communists soon after the Supreme Court denied certiorari in the Hollywood Ten case in 1950, under the leadership of Georgia Democrat John Stephens Wood. Meanwhile, in the Senate, a first-term Senator from Wisconsin named Joseph McCarthy focused investigations on Soviet spies in the State Department and the Defense Department from his perch as chairman of the Senate Permanent Subcommittee on Investigations. The nation was gripped by televised hearings and headlines about communist spies and other subversives.

Gradually, however, public and political support for communist hunting waned. McCarthy had taken on powerful institutional opponents in two Presidents, Truman and Eisenhower, neither of whom appreciated his embarrassing charges that their administrations did too little to root out Soviet spies. Increasingly, his Senate colleagues seized on reckless tactics to discredit valid claims and marginalize the Senator. In June 1954, McCarthy had perhaps bitten off more than he could chew in taking on the U.S. Army's recalcitrant measures to remove disloyal spies and fix lax security at the Army base in Monmouth, New Jersey – culminating in

ethics counter-charges and a sharp exchange with Army attorney Joseph Welch who famously turned an audience against McCarthy with the line "Until this moment, Senator, I think I never really gauged your cruelty or your recklessness," and after further verbal jousting, "Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency?" Some historians have credited that televised retort as the end of Joe McCarthy's career, regardless of the merits of his charges.

Shortly thereafter, on December 2, 1954, the Senate voted to "condemn" McCarthy for abusive conduct by a vote of 67-22.[8] After Democrats took over the Senate, McCarthy no longer held a committee chairmanship as a platform for his investigations. In May 1957, McCarthy died at the age of 48. Ever since, his political legacy – often referred to as "McCarthyism" – has been painted by American liberals, as well as some conservatives, as the ruin of reputations, livelihoods, and progressive causes through unfair intrusions into private realms of political belief and associations, public disclosure, and ridicule.[9]

Something else was happening in the mid-1950s. Four new Justices were appointed to the Supreme Court between 1950, when the Court denied certiorari to the Hollywood Ten, and 1957. The departing Justices were judicial conservatives Stanley Reed, Robert Jackson, Fred Vinson, and Sherman Minton. The new Justices were Earl Warren, William Brennan, Charles Whittaker, and John Harlan. They joined the two First Amendment libertarians – Hugo Black and William O. Douglas – along with Felix Frankfurter, Harold Burton, and Tom Clark.

This was the situation in 1957 when the Supreme Court finally took up several challenges to Red Scare investigations at various levels of government.

The Case of Paul Sweezy

Investigations of communists were not limited to the federal government and Congress. Many states decided they too had a role to play in protecting the United States from communist subversion. States adopted a variety of policies to purify state governments, public schools, and universities, state bars, and society at large from communists.

New Hampshire was such a state. It had adopted a law in 1951 authorizing the state attorney general to investigate, with subpoena power, any citizen suspected of being a "subversive person" – defined to mean any person who so much as attempted or encouraged "any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of New Hampshire, or any political subdivision of either of them, by force, or violence."[10] The statute declared "subversive persons" to be ineligible for employment by the state government and required all public employees to make sworn statements they were not "subversive persons." The law declared "subversive organizations" to be unlawful and dissolved.

In January 1954, as Senator McCarthy was preparing to launch public hearings into security leaks at the Army's facility in Monmouth, the New Hampshire attorney general, Louis Wyman, issued subpoenas to Marxist economist Paul Sweezy as a suspected "subversive person."

Paul Marlor Sweezy (1910-2004) was a committed Marxist economist. According to one biographer, "Paul M. Sweezy, referred to by *The Wall Street Journal* in 1972 as 'the 'dean' of radical economists,' was, in the words of John Kenneth Galbraith, 'the most noted American Marxist scholar' of the second half of the twentieth century."[11] The son of a prominent New York banker, he was educated at Exeter and Harvard, ultimately receiving his Ph.D. in economics. He had been an avid New Dealer, working in various posts in the Roosevelt Administration. He later served in the U.S. Army during World War II as an officer in the Army's Office of Strategic Services, where he studied the European economy. After the war, he settled in Wilton, New Hampshire, and married Nancy Adams and had three children. He was an active writer and lecturer. He was politically active too, supporting the presidential candidacy of Progressive Party nominee Henry Wallace (former Vice President of the United States from 1941-1945) in 1948 and founding the Progressive Party of New Hampshire. The Progressive Party was a meeting point for many American communists. In addition to writing several books and monographs on Marxist economic theory,[12] Sweezy founded the Marxian economic journal *Monthly Review* in 1949, a journal still published today.[13]

Sweezy must have appeared to the New Hampshire attorney general to be a shiny object in an otherwise sleepy state. At a time when socialist economic thought was equated in broad brushes with communist overthrow of the American democratic system, Attorney General Wyman bore down on Sweezy as the embodiment of a "subversive person." Wyman subpoenaed Sweezy to testify on two separate occasions, and Sweezy complied and testified at length for two full days, January 5, 1954 and June 3, 1954.

However, before he testified, Sweezy prefaced his first sitting with a statement of principle. He defended the right of political conscience against government inquiry:

[T]here are those who are not Communists and do not believe they are in danger of being prosecuted, but who yet deeply disapprove of the purposes and methods of these investigations.... Our reasons for opposing these investigations are not captious or trivial. They have deep roots in principle and conscience.... Whatever their official purpose, these investigations always end up by inquiring into the politics, ideas, and beliefs of people who hold what are, for the time being, unpopular views.[14]

Seeking to eliminate the Attorney General's statutory predicate for intruding into his political beliefs, he denied ever advocating the overthrow of the United States government by force or violence, or knowing anyone else who ever had:

I have studied the subversive activities act of 1951 with care, and I am glad to volunteer the information that I have absolutely no knowledge of any violations of any of its provisions; further, that I have no knowledge of subversive persons presently located within the state.[15]

Having inoculated himself, and having laid a foundation for his subsequent constitutional challenge to contempt proceedings, Sweezy qualified the extent of his intended cooperation:

I shall respectfully decline to answer questions concerning ideas, beliefs, and associations which could not possibly be pertinent to the matter here under inquiry and/or which seem to me to invade the freedoms guaranteed by the First Amendment to the United States Constitution.[16]

Sweezy then appeared and testified for two full days of questioning. He answered questions about his own political activities, his military service, his ideology (which was fully public in numerous writings), which he characterized as "classical Marxist," and he denied that he had ever been a member of the Communist Party.[17]

Critically, however, Sweezy declined to answer several targeted questions. First, he declined to disclose the names of other members of the Progressive Party or a predecessor organization, Progressive Citizens of America, both considered congregating places for American communists.[18]Second, he declined to answer the question "Do you believe in Communism?"[19] And third, Sweezy refused to discuss the substance of a lecture he delivered at the University of New Hampshire.[20]

For his refusals to answer these questions, Attorney General Wyman filed a petition in state court seeking to compel Sweezy to answer. The state court ruled the questions pertinent to the Attorney General's statutory charge and inquiry, and propounded the questions directly to Sweezy. When Sweezy persisted in refusing to answer, the state court ruled Sweezy to be in contempt and ordered him to be confined in jail until he purged himself of contempt.[21]

Sweezy appealed, first to the New Hampshire Supreme Court, which upheld Sweezy's conviction for refusing to disclose members of the Progressive Party.[22] Sweezy then appealed to the U.S. Supreme Court. The Supreme Court, which had denied certiorari to the Hollywood Ten a decade earlier, granted review to Sweezy.[23]

"Red Monday" – June 17, 1957

Monday, June 17, 1957, marked a turning point in the Red Scare. That day, the Supreme Court issued four decisions curtailing government efforts to root out communists.

In *Yates v. United States*,[24] the Court overturned the conviction of Oleta O'Connor Yates, a Communist Party leader in California for many years, under the Smith Act on the narrow basis of confusing and inadequate jury instructions.

In *Service v. Dulles*,[25] the Court unanimously ruled that the State Department improperly terminated John Service, widely considered to be a pro-communist foreign service officer who shared agency secrets with pro-communist publications, from employment on technical procedural grounds.

Two decisions significantly curtailed government interrogations of communists. In *Watkins v. United States*,[26] the Court clipped the wings of the House Un-American Activities Committee (HUAC), ruling that Congress' authorizing resolution was overly vague and the committee's explanation to labor leader John Watkins was "woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under

inquiry."[27] In a significant concurring opinion, Justice Frankfurter, a judicial conservative, opined that the HUAC's subpoena failed to provide Watkins "awareness of the pertinency of the information that he has denied to Congress."[28] Watkins, unlike the Hollywood Ten a decade earlier, had answered almost all of the HUAC's questions about himself, but, like Sweezy, had declined to "answer any questions with respect to others with whom I associated in the past."[29] He continued, "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.... [U]ntil and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates."[30]

Finally, in *Sweezy v. New Hampshire*, the Court overturned Paul Sweezy's contempt conviction on the grounds that the Attorney General of New Hampshire exceeded his authority under the New Hampshire Subservice Activities Act of 1951 – as well as First Amendment grounds.[31]

1. Edgar Hoover was incensed. According to legal scholar Arthur Sabin, Hoover prided himself in protecting the nation from those he considered dangerous political dissenters. "Then came June 17, 1957, a day he called 'Red Monday' – not because of the red-hot weather, but because, as he saw it, that day the United States Supreme Court handed down four decisions favoring the 'Reds.'"[32]Hoover publicly denounced the Warren Court for weakening the United States' defenses to foreign influence and subversion.

***Sweezy v. New Hampshire* – The Supreme Court Weighs In**

Sweezy was the most important decision for First Amendment jurisprudence. The vote was 6-2 for reversal. Chief Justice Warren, writing for the four-Justice majority, observed that the New Hampshire Attorney General's subpoenas encroached upon constitutional rights:

There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community.[33]

The Court continued:

Merely to summon a witness and compel him, against his will, to disclose the nature of his past expressions and associations is a measure of governmental interference in these matters. These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.[34]

Yet, after further elaborating on the "political freedom of the individual" and the concomitant rights of associations of adherents, as well as the right of dissent (perhaps ideas insisted upon by Justices Black and Douglas), the majority opinion held that the New Hampshire Attorney General acted ultra vires, beyond the scope of the authority clearly prescribed in the New Hampshire legislature's authorizing statute. "As a result," the Court observed, "neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry."[35] The Court went on to reason that without a clear writ, the Court could not adequately assess the state interest. The Court concluded that the "lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from [Sweezy] must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."[36]

Thus, in the final analysis, the majority holding was narrow and limited in scope, similar to the *Watkins* decision on pertinence. The First Amendment rights were implicated but not decisively violated.

The Frankfurter Concurrence – The First Amendment Protects Political Privacy

Justice Frankfurter, joined by Justice Harlan, had difficulty joining Chief Justice Warren's broad attack at state legislative and prosecutorial authority.[37] Frankfurter reasoned that the New Hampshire Supreme Court definitively had decided that the Attorney General acted well within the legislative authority granted to him by state statute, so the United States Supreme Court was in no position to second-guess the state court or the Attorney General's authority. Therefore, Frankfurter addressed the First Amendment (as applied to the state through the Fourteenth Amendment) challenge head-on. He concluded that the Attorney General's inquisition, and specifically the questions requiring Sweezy to disclose the names of Progressive Party members, violated the First Amendment right of "political privacy." Based solely upon the First Amendment, he decided to reverse Sweezy's contempt conviction. The language written by Frankfurter was particularly declarative of the right to "political privacy" against government inquisition:

[T]he inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in [Sweezy's] relations to these. In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority.[38]

Frankfurter opined that "the right of a citizen to political privacy" wholly outweighed New Hampshire's interest in "self-protection."[39] This was the clearest statement yet on the Supreme Court that the First Amendment protects political privacy against the government's demand for disclosure of political associations.

Ironically, it was Justice Frankfurter, the conscientious judicial conservative, who carefully avoided a head-on First Amendment ruling in *United States v. Rumely* five years earlier, providing the full-throated First Amendment rebuke to communist inquisition, while First Amendment libertarians Justice Black and Justice

Douglas, who issued a broad First Amendment concurrence in *Rumely*, joined the more restrained main holding authored by Chief Justice Warren. But significantly, Frankfurter and Harlan had now signed on fully to the First Amendment right of all citizens to political privacy.

Aftermath

The Red Monday decisions marked a critical point of political and law enforcement inflection. According to legal scholar Sabin:

In sum, the Justice Department and the FBI recognized the Red Monday decisions of June 17, 1957 as confirmation of a changed majority position on the Supreme Court on Red Scare issues. The *Yates* decision of Red Monday meant that further Smith Act prosecutions of communists would be a waste of time, money, and effort.... What had begun in 1948 with the indictment of the top eleven Communist Party members pragmatically ended in 1957. The Supreme Court gave a green light to criminal charges under the Smith Act with the *Dennis* decision in 1951; in 1957, the light turned red.[40]

Although Smith Act prosecutions would be curtailed after Red Monday, the Supreme Court would nevertheless later retreat, in subsequent cases, from its defense of communists under government investigation generally.[41] The Court's retreat, and particularly Frankfurter's reticence, came in response to withering political attack from J. Edgar Hoover, Congress, and the general public. So the long-term indications for the Court's protection for communists was limited.

But the First Amendment implications of *Sweezy*, though subtle at the time, were more profound and lasting jurisprudentially. *Sweezy*'s significance in First Amendment doctrine cannot be gainsaid. What started as a cogently articulated but losing idea in the Edgerton Dissent in the late 1940s had blossomed in the Douglas Concurrence in *Rumely* in 1952, and now had expanded into the thinking of the traditional judicial conservative Justice Frankfurter in *Sweezy*. The Court was developing a majority for the principle. Frankfurter did not waver. Liberals Warren and Brennan were soon to join. It surely represented an emerging majority position for the kind of constitutional protection of political association and privacy that the Hollywood Ten had hoped for. A decade later, the First Amendment doctrine of political privacy had reached its tipping point. And it would tip into consensus Supreme Court jurisprudence the following year in the famous case of *NAACP v. Alabama*, to be treated in the next chapter.

[1] Robert M. Lichtman, *The Supreme Court and McCarthy Era Repression: One Hundred Decisions*(University of Illinois Press 2012) (collecting cases).

[2] Victor Rabinowitz, *Unrepentant Leftist: A Lawyer's Memoir* (University of Illinois Press 1996) at p. 130.

[3] 18 U.S.C. § 2385.

[4] Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (University of Pennsylvania Press 1999), at p. 11 ("Following the *Dennis* decision in 1951, fifteen groups of multiple defendants (second-string state Party leaders) were indicted and prosecuted between 1951 and 1953; the lower courts, using *Dennis* as

precedent, affirmed convictions in all but one Smith Act case.") & at p. 12 ("Between 1948 and 1957, 129 indictments were obtained against alleged CPUSA members. Convictions were secured and sustained by federal appellate courts, including the Supreme Court, in almost every case until June 17, 1957.").

[5] *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950)

[6] *Dennis v. United States*, 341 U.S. 494 (1951).

[7] *Id.* at 581 (Black, dissenting).

[8] United States Senate, *The Censure Case of Joseph McCarthy of Wisconsin* (1954) (https://www.senate.gov/artandhistory/history/common/censure_cases/133Joseph_McCarthy.htm). For a point-by-point defense of McCarthy and his investigations *see* M. Stanton Evans, *Blacklisted by History: The Untold Story of Senator Joe McCarthy and His Fight Against America's Enemies* (Crown Publishing 2007).

[9] Victor S. Navasky, *Naming Names* (The Viking Press 1980).

[10] N.H. Rev. Stat. Ann. 1955, c. 588, § 1 (1955).

[11] John Bellamy Foster, "The Commitment of an Intellectual: Paul M. Sweezy (1910-2004)," Monthly Review (Oct. 1, 2004), *citing* "The Unorthodox Ideas of Radical Economists Win a Wider Hearing," *Wall Street Journal* (Feb. 11, 1972); John Kenneth Galbraith, *Economics in Perspective* (Boston: Houghton Mifflin, 1987) at p. 189.

[12] *See, e.g.,* Paul Marlor Sweezy, *The Theory of Capitalist Development* (Monthly Review Press 1942); Paul M. Sweezy, *Theory of Capitalist Development* (Dennis Dobson Ltd. 1946); Paul M. Sweezy, *Socialism* (McGraw Hill Books 1949); Paul M. Sweezy (editor), *Lenin Today: Eight Essays on the Hundredth Anniversary of Lenin's Birth* (Monthly Review Press 1971); Paul M. Sweezy, *Four Lectures on Marxism* (Monthly Review Press 1981).

[13] Available at www.MonthlyReview.org.

[14] Sweezy's full statement is reprinted at footnote 6 of *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

[15] *Id.*

[16] *Id.*

[17] *Sweezy v. New Hampshire*, 354 U.S. 234, 238 (1957).

[18] *Id.* at 241-242.

[19] *Id.* at 244.

[20] *Id.* at 243-244. Sweezy's refusal to answer questions about his lecture at the University of New Hampshire gave rise to an entirely distinct First Amendment jurisprudential principle of *academic freedom*, which is often touted by faculty on college campuses today. That subject is beyond the scope of this article on the First

Amendment right of political privacy.

[21] *Id.* at 244-245.

[22] *Wyman v. Sweezy*, 100 N.H. 103, 121 A.2d 783 (1956).

[23] *Sweezy v. New Hampshire*, 352 U.S. 812 (1956)

[24] 354 U.S. 298 (1957).

[25] 354 U.S. 363 (1957).

[26] 354 U.S. 178 (1957).

[27] *Id.* at 215.

[28] *Id.* at 217 (Frankfurter, concurring).

[29] *Id.* at 185.

[30] *Id.*

[31] 354 U.S. 234 (1957).

[32] Arthur J. Sabin, *In Calmer Times: The Supreme Court and Red Monday* (University of Pennsylvania Press 1999) at p. 1.

[33] 354 U.S. at 245.

[34] *Id.* at 250.

[35] *Id.* at 254.

[36] *Id.* at 254-255.

[37] Sabin at p. 157-158.

[38] 354 U.S. at 265.

[39] *Id.* at 266-267.

[40] Sabin at p. 11.

[41] *See, e.g., Barenblatt v. United States*, 360 U.S. 109 (1959); *Uphaus v. Wyman*, 360 U.S. 72 (1959).