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## Hugo Black's Vision of the Lawyer, the First Amendment, and the Duty of the Judiciary: The Bar Applicant Cases in a National Security State

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**HUGO BLACK’S VISION OF THE LAWYER, THE FIRST  
AMENDMENT, AND THE DUTY OF THE JUDICIARY: THE BAR  
APPLICANT CASES IN A NATIONAL SECURITY STATE**

Joshua E. Kastenberg\*

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INTRODUCTION

Between 1957 and 1961, the Supreme Court issued four attorney licensure decisions involving three separate petitioners and three state bar admissions processes. The decisions, *Konigsberg v. State Bar of California (Konigsberg I)*,<sup>1</sup> *Schware v.*

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<sup>1</sup> 353 U.S. 252 (1957). *Konigsberg I* was argued on January 14, 1957 and decided on May 6, 1957. *Id.*

*Board of Bar Examiners*,<sup>2</sup> *Konigsberg v. State Bar of California (Konigsberg II)*,<sup>3</sup> and role of attorneys in a democratic society. Decided at the height of the Cold War—when *In re Anastaplo*,<sup>4</sup> evidenced how the Justices on the Warren Court viewed the fears of Communist espionage, subversion, and the potential for atomic warfare were keenly felt in the three branches of government and society as a whole—the Justices sought to influence the ability of the legal profession to determine who was eligible for bar admission, and, therefore, what might be the role of the zealous advocate. In particular, state bar associations had begun to restrict admission of people who had been affiliated with the Communist Party of the United States (CPUSA),<sup>5</sup> but the CPUSA was not the only political entity targeted for bar exclusion.<sup>6</sup>

Within the Court, two opposing camps led by Justice Hugo Black and Justice John Harlan sparred over the ability of state judicial branches to determine bar admission based on political affiliation and loyalty oaths.<sup>7</sup> One recent study characterized *In re Anastaplo* as “exemplif[y]ing the conflict between those who, like Justice Black, placed *absolute* faith in the First Amendment, and others who, like Justice John Harlan, felt that its freedoms had to be *balanced* against societal needs.”<sup>8</sup> The same could be said for all four decisions. Harlan’s belief in the necessity of balance was not wholly original. He was guided and coached by Justice Felix Frankfurter,<sup>9</sup> and his approach was a continuation of Justice Robert Jackson’s jurisprudence.<sup>10</sup> In the first two cases decided in 1957, Black appeared to prevail.<sup>11</sup> But Harlan’s ideology formed the majority, and, therefore, the law in the second two cases, which were also decided together.<sup>12</sup> Although Black was an absolutist in First Amendment jurisprudence, he believed

<sup>2</sup> 353 U.S. 232 (1957). *Schwartz* was argued on January 14 and 15, 1957 and decided on May 6, 1957, the same date as *Konigsberg I*. *Id.*

<sup>3</sup> 366 U.S. 36 (1961). *Konigsberg II* was argued on December 14, 1960 and decided on April 24, 1961. *Id.*

<sup>4</sup> 366 U.S. 82 (1961). *In re Anastaplo* was argued on December 14, 1960 and decided on April 24, 1961, the same dates as *Konigsberg II*. *Id.*

<sup>5</sup> See *In re Anastaplo*, 366 U.S. at 83–84; *Konigsberg I*, 353 U.S. at 270; *Schwartz*, 353 U.S. at 234 (“connection with subversive organizations”).

<sup>6</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 4–5 (1971) (“or any organization ‘that advocates over-throw of the United States Government by force or violence’”).

<sup>7</sup> See RONALD K.L. COLLINS AND SAM CHALTAIN, *WE MUST NOT BE AFRAID TO BE FREE: STORIES OF FREE EXPRESSION IN AMERICA* 5 (2011).

<sup>8</sup> *Id.*

<sup>9</sup> See Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 CONST. COMMENT. 425, 429–30 (1985) (stating that Harlan appeared to have been strongly influenced by Justice Frankfurter).

<sup>10</sup> See Patrick Schmidt, “*The Dilemma to a Free People*”: Justice Robert Jackson, Walter Bagehot, and the Creation of a Conservative Jurisprudence, 20 LAW & HIST. REV. 517, 523–24 (2002) (describing Justice Jackson’s jurisprudence).

<sup>11</sup> *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232 (1957); *Konigsberg I*, 353 U.S. 252 (1957).

<sup>12</sup> *Konigsberg II*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961).

the four attorneys' admission decisions represented more than the Amendment.<sup>13</sup> He argued that the independent bar was the guardian of the Bill of Rights, and judicially imposed restraints on bar admission based on political belief was a tenuous path to the erosion of those rights.<sup>14</sup>

Centered on Justice Black, this Article is a legal history of the decisional processes, political influences, and jurisprudential ideologies involved in these four cases. It also provides a window into what the Justices saw as the role of the legal profession in the criminal justice system, as well as in national security. That said, although Black failed to build a sustained majority, his ideology ultimately prevailed over time through other decisions and independent acts of state bars, which, in turn, significantly modified Harlan's jurisprudential ideology. There were two changes on the Court between the first two decisions and the second two. In 1957, the Court consisted of Chief Justice Earl Warren and Justices Hugo Lafayette Black, Stanley Forman Reed, Felix Frankfurter, William Orville Douglas, Harold Hitz Burton, Tom Campbell Clark, John Marshall Harlan, and William J. Brennan, Jr.<sup>15</sup> By 1960, Reed and Burton had left the Court and were replaced by Justices Charles Evans Whittaker and Potter Stewart.<sup>16</sup> However, neither Whittaker nor Stewart played a dispositive role in the decisions; though, in a contempt decision, Stewart's concurrence effectively deflated Frankfurter's and Harlan's dissents.<sup>17</sup>

A brief note on this Article's legal history methodology is important. Lawrence M. Friedman, one of the late twentieth-century's prominent legal historians, aptly observed that legal history is far more than the passage and enforcement of laws; it is also about the people on both ends of the process.<sup>18</sup> This Article is written with Friedman's view of legal history. Likewise, Bernard Schwartz, another of the twentieth century's leading legal historians, noted in his study on the Burger Court that because much of the important work of the Court is done in private, studying the correspondences from the conference sessions after the cases have been argued are critical to assessing how the majority, concurring, and dissenting opinions were formulated and what the Justices intended, in addition to the consensus opinions.<sup>19</sup> The same could be said for the preceding Warren Court, and where possible, this Article relies on original documents such as conference memorandum and personal correspondences, rather than secondary

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<sup>13</sup> For more on Black's jurisprudence see HOWARD BALL, *HUGO L. BLACK: COLD STEEL WARRIOR* 28 (1996).

<sup>14</sup> *Id.* at 115; *see also* ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 412–13 (1994).

<sup>15</sup> MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Mar. 15, 2012).

<sup>16</sup> *Id.*

<sup>17</sup> *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring and Frankfurter, Clark, Harlan, and Whittaker, JJ., dissenting).

<sup>18</sup> LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 4 (2002).

<sup>19</sup> BERNARD SCHWARTZ, *THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION* 11 (1990).

sources.<sup>20</sup> This Article does not conclude, as some recent scholarship has done, with the claim that since September 11, 2001, *Konigsberg II* and *Anastaplo* have been given new life, or that the government is pursuing an agenda similar to the Cold War attempts to limit the bar.<sup>21</sup> On the contrary, the bar is far freer today than in most of its history to defend notorious cases despite the wishes of some government officials.<sup>22</sup> To the extent this Article advocates any cause, it is that of historical accuracy. On that point, it is essential from the beginning of this Article to acknowledge that the CPUSA's leadership did attempt to undermine the government, enable the spread of Communism, and encourage espionage of the nation's classified defense program, thus endangering national security.<sup>23</sup> But the CPUSA's leadership and the attorneys who represented them were not necessarily the same people.

From 1868 to World War II, with the exceptions of one decision on the exclusion of former Confederate officers<sup>24</sup> and one decision involving the exclusion of women from the bar,<sup>25</sup> the Court had not spoken on an issue challenging attorney licensing. Dating to Jacksonian America, if not before, the bar was considered open to all white males.<sup>26</sup> The regulation of attorneys typically occurred within the ambit of individual

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<sup>20</sup> The primary source documents, with the exception of the Felix Frankfurter Papers, which reside at Harvard University, are located at the Library of Congress, Manuscripts Division. The primary sources used are the papers of: Hugo Lafayette Black; Harry A. Blackmun; Harlan Fiske Stone; William J. Brennan, Jr.; William O. Douglas; Robert Houghwit Jackson; Earl Warren; Felix Frankfurter; John Paul Frank; and Elliot Richardson.

<sup>21</sup> See, e.g., Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1881 (2009); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173 (2003); James E. Moliterno, *Politically Motivated Bar Discipline* 83 WASH. U. L. Q. 725, 752–71 (2005) (placing the discipline of Jesselyn Radack on a continuum with the Cold War jurisprudence embodied in the four licensure cases); Alissa Clare, Note, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 661–62 (2005); Theresa Keeley, Comment, *Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level*, 6 U. PA. J. CONST. L. 844, 847 (2004). Note: This Author does not disagree, as explained in the Conclusion, that vigilance against diminishing the independence of the bar is essential. However, historic accuracy is a fundamental aspect of constructing arguments to maintain the bar's independence. This Article provides an explanation of why Justice Black zealously advocated for an open bar, and why his advocacy succeeded.

<sup>22</sup> See generally, e.g., *In re Sawyer*, 360 U.S. 622 (1959) (requiring government to provide evidence supporting disbarment).

<sup>23</sup> See WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953*, at 537–39 (7 THE OLIVER WENDELL HOLMES DEVISE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 2006).

<sup>24</sup> *Ex parte Garland*, 71 U.S. 333 (1866).

<sup>25</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

<sup>26</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 237 (3d. ed. 2005).

criminal contempt and disbarment cases.<sup>27</sup> Then, as now, criminal contempt and disbarment hearings were judicial proceedings, unique and apart from criminal convictions.<sup>28</sup> Trial and appellate judges, more than prosecutors and legislators, are entrusted with the governance and discipline of attorneys through the contempt power.<sup>29</sup> Yet a finding of contempt may carry with it penalties similar to a criminal conviction, including incarceration and fines, in addition to a temporary or even a lifetime disbarment.<sup>30</sup> Contempt and disbarment are at one end of a spectrum of attorney regulation. At the other end of this spectrum is the admission of persons to practice law in the first place. All state legal systems have an interest in admitting individuals with worthy reputations, generally captioned as “good moral character.”<sup>31</sup> Both ends of the attorney governance spectrum are related in the sense that the prevention of admitting undesirable persons—people without “good moral character”—to the bar, in theory, reduces the number of contempt and disbarment hearings, thereby protecting the integrity of the judicial system.

The use of contempt and disbarment decisions has relevance to bar admission decisions in the sense that the contempt and disbarment decisions articulate why the courts require supervisory authority over attorneys. For instance, in *Nye v. United States*, the Court examined the judicial contempt authority in the context of an attorney taking advantage of an illiterate and feeble bodied man.<sup>32</sup> A federal judge issued a

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<sup>27</sup> See, e.g., Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 10–15 (2007).

<sup>28</sup> *Id.* at 10–15, 17–20.

<sup>29</sup> Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

<sup>30</sup> See, e.g., *Cammer v. United States*, 350 U.S. 399 (1956); *Nye v. United States*, 313 U.S. 33, 42 (1941) (“[P]articulate acts do not always readily lend themselves to classification as civil or criminal contempts . . .”). In *Cammer*, a contempt case authored by Black, the Court reversed a contempt conviction of an attorney who had sent a questionnaire to grand jurors employed by the federal government to ensure that they would be fair and impartial. 350 U.S. at 400–01. However, the attorney did so without the express permission of the judge for the particular case, even though the judge had permitted similar questions earlier. *Id.* The level of due process afforded in these proceedings was unsettled. For instance, in 1959, in *In re Crow*, Black and Douglas believed that a full hearing with the right to confront witnesses was required. 359 U.S. 1007, 1007–08 (1959). The disbarment arose from a divorce proceeding, a non-political issue. *Id.* But neither Justice could persuade Brennan and Warren to vote to grant *certiorari*. Brennan believed that Crow had failed to state a claim and therefore the Court had to disbar John Crow as a matter of comity to the state decision. Letter from Justice William J. Brennan, Jr. to Justice William O. Douglas (May 25, 1959) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1212). “My difficulty with *Crow* is that his return, as I read it, makes no such charge of unfairness in the Ohio proceedings, but only that the witnesses against him were biased or perjured themselves or that the evidence was insufficient to prove guilt.” *Id.*

<sup>31</sup> See, e.g., Basile, *supra* note 21; Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1205–07 (2008).

<sup>32</sup> 313 U.S. at 39–40.

contempt and disbarment order against the attorney.<sup>33</sup> Authored by Justice Douglas, the decision attempted to distinguish between civil and criminal contempt.<sup>34</sup> The Court did not address the constitutionality of the contempt power, however, instead basing the decision on statutory interpretation.<sup>35</sup> The decision, however, did provide a useful historical background for why the courts have limited contempt power and it delineated the basic concept that for behavior to be punished through the summary contempt authority—rather than through a criminal trial in which a defendant would be afforded full due process—the behavior had to occur “in the ‘presence’ of the court or ‘near thereto’.”<sup>36</sup> In other words, the attorney’s misconduct would have to affect the integrity of the proceedings, or at least have the intent to accomplish this end.

Contempt proceedings and challenges to disbarment were, and are, based on the conduct of individual attorneys, and not attorneys who happen to be part of a class of citizens generally protected by the First Amendment, such as religion or political affiliation. From the nation’s founding, there was no national theory that a class of citizens would inherently degrade the integrity of the judiciary.<sup>37</sup> The only exception to this rule was, in 1872, the Court’s upholding of Illinois’s exclusion of women, or at least married women, from bar admission.<sup>38</sup> However, at that time women were not thought to be a class for the purpose of First Amendment class protection.<sup>39</sup>

This model of judicial governance, based on individual conduct, has deep roots in American legal history. It was crafted by John Marshall, Roger Taney, William Taft, and, most notably, Stephen J. Field, among others.<sup>40</sup> During the Cold War, as a result of state and federal government activities, and the departure from over one hundred

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 42–43.

<sup>35</sup> *Id.* at 50. Initially Douglas’s draft leaned toward a constitutional analysis, but Frankfurter dissuaded him by pointing Douglas to his article, *Power of Congress Over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, which was later incorporated into the decision. See Memorandum from Justice Felix Frankfurter to the Conference (Mar. 27, 1941) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 60). Frankfurter urged “[i]t is, of course, one thing to argue, . . . that the power of the courts to punish for contempt may be curtailed by legislation, and quite another to suggest that the historic power which existed at the time of the Constitution and has persisted since offends the Constitution.” *Id.*

<sup>36</sup> *Nye*, 313 U.S. at 52. In 1831, Congress curtailed the contempt power in response to a Federal Judge in Missouri, James Hawkins Peck, who ordered an attorney to prison after the attorney criticized one of his decisions in a newspaper. See Eleanore Bushnell, *The Impeachment and Trial of James H. Peck*, 74 MO. HIS. REV. 137, 137–65 (1988). Peck then faced impeachment in the Senate and was barely able to retain his position. *Id.*

<sup>37</sup> See, e.g., *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1873).

<sup>38</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

<sup>39</sup> HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDREARING, AND DEATH* 44 (2002).

<sup>40</sup> See *infra* Part I.

and fifty years of Supreme Court precedent, the judicial model of adjudging attorney fitness on individual conduct was upended.<sup>41</sup> Conservative Justices in the aftermath of World War II relied on the contempt and disbarment cases in upholding extraordinary departures from the historic model.<sup>42</sup> Although other Justices, such as William O. Douglas, Earl Warren, and William J. Brennan, Jr. sought to maintain the historic model of attorney governance, it was Black who consistently spearheaded, and ultimately succeeded, in its return.<sup>43</sup>

This Article is divided into four Parts. Part I provides a precedential background for judicial authority over attorney governance. Part II briefly provides the social and political conditions of the Cold War, including the significant anticommunist legislation, and judicial conduct in disciplining attorneys. This Part also analyzes two Court decisions, *American Communications Ass'n, v. Douds*,<sup>44</sup> and *Dennis v. United States*.<sup>45</sup> While neither decision is directly related to attorney governance, the decisions were influential in the attorney licensure cases. Two other decisions, *Sacher v. United States*,<sup>46</sup> and *In re Isserman*<sup>47</sup> originated in *Dennis* and directly influenced both the state bars and the Court in attorney licensure cases. In each of these decisions, Justice Black's conception of the unhindered attorney becomes apparent, even though his conception does not prevail.<sup>48</sup> Part II also contains an analysis of relevant public employment law decisions from 1944 to 1957. These decisions were incorporated into the licensure decisions at both the state and federal appellate levels. Part III analyzes the four decisions noted at the beginning of this Article, as well as a 1959 contempt decision involving a CPUSA affiliated attorney, which arose from a Hawaiian territorial court.<sup>49</sup> The Article concludes with an assessment of how Black's ideology ultimately succeeded, even though it did not do so in the Court in 1961,<sup>50</sup> and where Harlan's ideology now stands.<sup>51</sup> This is an important issue. In the aftermath of September 11, 2001, some scholars attempted to compare the present legal environment with the conditions of the Cold War.<sup>52</sup> Most of these comparisons involved inaccurate exaggerations, though the Conclusion of this Article does detail two troubling aspects of the present environment.

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<sup>41</sup> See *infra* Part II.

<sup>42</sup> See *supra* notes 1–4.

<sup>43</sup> See *infra* Part II.

<sup>44</sup> 339 U.S. 382 (1950).

<sup>45</sup> 341 U.S. 494 (1951).

<sup>46</sup> 343 U.S. 1 (1952).

<sup>47</sup> 345 U.S. 286 (1953).

<sup>48</sup> *In re Isserman*, 345 U.S. at 290–94; *Sacher*, 343 U.S. at 14–23.

<sup>49</sup> *In re Sawyer*, 360 U.S. 622 (1959).

<sup>50</sup> See *In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg II*, 366 U.S. 36 (1961).

<sup>51</sup> See *infra* Conclusion.

<sup>52</sup> See *supra* note 21.



## I. THE COURT AND ATTORNEY GOVERNANCE

Historically, the Court undertook a significant role in the regulation of attorneys, particularly in determining fitness to serve as officers of the court through the contempt and disbarment power.<sup>53</sup> Case law precedent established that since attorneys are “officers of the court,” it is within the judicial, rather than the legislative, authority to discipline attorneys for misconduct arising from their legal obligations and performance.<sup>54</sup> Despite creating parameters for attorney fitness determinations, with the exception of the Civil War,<sup>55</sup> and the singular issue of the admission of women,<sup>56</sup> nowhere prior to 1945 did the federal judiciary ever provide guidance on the exclusion of persons from the various bars based on political affiliation or some other class encompassed in the First Amendment.

In 1789, Congress, in legislating the Judiciary Act, placed within the federal judiciary the sole authority to adjudicate contempts against the courts.<sup>57</sup> From that point onward, the Court took the primary role in attorney regulation, including disbarment proceedings, and, in matters of loyalty, determining who could be denied admission to practice before the bar.<sup>58</sup> For instance, in 1829, in *Tillinghast v. Conkling*, an unpublished decision which was uniquely incorporated authoritatively into subsequent decisions involving attorney regulation, the Court upheld a federal district court judge’s suspension of an attorney from practice after determining that the attorney undermined the efficacy of the court.<sup>59</sup> However, one year later Chief Justice John Marshall authored a published opinion that reversed course and readmitted Tillinghast to practice before the Court.<sup>60</sup> In the opinion, Marshall set a precedent informing judges that since the power to summarily convict an attorney of contempt was unique to American jurisprudence, in that it was essentially a trial without the procedural safeguards of jury trials, the punishment should be the least severe required.<sup>61</sup>

In 1856 in *Ex parte Secombe*,<sup>62</sup> Chief Justice Roger B. Taney stressed that the federal judiciary possessed exclusive authority to determine who was qualified to serve as an attorney in the federal courts on the premise that attorneys were officers of the

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<sup>53</sup> See *supra* notes 24–30 and accompanying text.

<sup>54</sup> See *infra* note 63.

<sup>55</sup> See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

<sup>56</sup> See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

<sup>57</sup> Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789). For its origins, see generally RONALD L. GOLDFARB, *THE CONTEMPT POWER* (1963), and Paul Taylor, *Congress’s Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today’s Congress and Courts*, 37 PEPP. L. REV. 847 (2010).

<sup>58</sup> See FRIEDMAN, *supra* note 26, at 236.

<sup>59</sup> For information on *Tillinghast*, see *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856).

<sup>60</sup> See *Ex parte Tillinghast*, 29 U.S. (4 Pet.) 108 (1830).

<sup>61</sup> See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821). *Dunn* is a case arising from the power of Congress to punish a citizen for contempt. However, the opinion authored by Justice Johnson compared the congressional power to that of the courts. *Id.* at 227–28.

<sup>62</sup> 60 U.S. (19 How.) 9 (1856).

courts.<sup>63</sup> However, this case arose from a disbarment challenge.<sup>64</sup> Taney warned against arbitrary authority in attorney regulation and cautioned that the determination of who was unqualified to serve had to be free from “passion, prejudice, or personal hostility.”<sup>65</sup>

Taney’s decision never answered the question as to whether the federal judiciary could bar an attorney based on anything other than the individual misconduct of the attorney, though the case may have had a political veneer to it. The facts in *Secombe* are instructive on this point.<sup>66</sup> The case arose in the Minnesota territory on the eve of statehood.<sup>67</sup> David A. Secombe, a local attorney who served as mayor *pro tem* of Saint Anthony, but who also had a reputation for dishonesty and incompetence,<sup>68</sup> engaged in actions that offended the federally appointed territorial judges, who in turn barred him from the courts after finding him guilty of contempt.<sup>69</sup> The territorial court’s disbarment decision may have been politically motivated, but this is absent from the judicial record and Secombe challenged the disbarment through a writ of mandamus based on the authority of the territorial court.<sup>70</sup> Taney determined that, because disbarment constituted a judicial act rather than an appealable conviction, and was satisfied that the decision was free from a taint of arbitrariness, the Court would not overturn the territorial court.<sup>71</sup>

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<sup>63</sup> *Id.* at 13.

<sup>64</sup> *Id.* at 9.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> *Id.*

<sup>67</sup> *See, e.g.*, 1 WILLIAM WATTS FOLWELL, A HISTORY OF MINNESOTA 351–53, 388 (1956).

<sup>68</sup> LUCIUS HUBBARD & RETURN I. HOLCOMBE, 3 MINNESOTA IN THREE CENTURIES 38 (1908); JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP 59–60 (2009); 1 PROCEEDINGS AND REPORT OF THE ANNUAL MEETING OF THE MINNESOTA TERRITORY PIONEERS 151 (Harrison & Smith Printers, 1899).

<sup>69</sup> *Secombe*, 60 U.S. at 15.

<sup>70</sup> *Id.* For the possible political motivation underlying the disbarment, see KASTENBERG, *supra* note 68, at 56. Secombe was a Republican who pushed for Black voting rights in the state constitution. PROCEEDINGS AND REPORT OF THE ANNUAL MEETING OF THE MINNESOTA TERRITORY PIONEERS, *supra* note 68, at 151; *see also* *Secombe v. Steele*, 61 U.S. (20 How.) 94 (1857). Frederick Steele, the mayor of Minneapolis and a leading Republican Party figure in territorial politics, had instituted a suit against Secombe and several other citizens attempting to enjoin them from claims against his property in Saint Anthony’s Falls, then an independent township but today subsumed into greater Minneapolis. *Id.*

<sup>71</sup> *Secombe*, 60 U.S. at 15. Taney apparently agreed with the Territorial Court finding:

The statute of Minnesota, under which the court acted, directs that the proceedings to remove an attorney or counselor must be taken by the court, on its own motion, for matter within its knowledge; or may be taken on the information of another. And, in the latter case, it requires that the information should be in writing, and notice be given to the party, and a day given to him to answer and deny the sufficiency of the accusation, or deny its truth.

In this case, it appears that the offences charged were committed in open court, and the proceedings to remove the relator were taken by the court

In 1866, the Court, in *Ex parte Garland*, held that the judicial branch maintained the authority to determine who was entitled to practice before the federal courts based on political affiliation.<sup>72</sup> Unlike Secombe, Augustus Garland was a highly respected attorney and former United States Senator from Arkansas who joined the Confederate government.<sup>73</sup> However, he was blocked from practicing before the federal courts since a recent law prohibited former members of the Confederate government from serving in federal offices, and congressional Republicans argued that the law stretched to attorneys.<sup>74</sup> Complicating the issue was the fact that President Andrew Johnson had pardoned Garland, and the parties to the challenge spent much of their arguments on the presidential pardoning power.<sup>75</sup> This was an unnecessary argument to the Court, even though the Justices gave it some attention.<sup>76</sup> In a decision authored by Justice Field, the majority reaffirmed that attorneys were not government officers, but rather “officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character.”<sup>77</sup> Moreover, Field held that the loyalty requirement constituted a bill of attainder, or an unconstitutional means for punishing a class of individuals without trial.<sup>78</sup> As a result of Field’s decision, the

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upon its own motion. And it appears by his affidavit that he had no notice that the court intended to proceed against him; had no opportunity of being heard in his defence, and did not know that he was dismissed from the bar until the term was closed, and the court had adjourned to the next term.

*Id.*

However, Secombe did not challenge the disbarment on the basis that the territorial judges denied him the opportunity to defend himself. Had he made this challenge, Taney may have authored the decision differently. Secombe, apparently, regained his standing to practice law after statehood. *See* REV. EDWARD D. NEILL, HISTORY OF HENNEPIN COUNTY AND THE CITY OF MINNEAPOLIS: INCLUDING THE EXPLORERS AND PIONEERS OF MINNESOTA 186 (Minneapolis, North Star Publ’g Co., 1881) (listing county officers in Minnesota).

<sup>72</sup> 71 U.S. (4 Wall.) 333, 378–79 (1866). *Garland* was decided alongside a companion case, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). However, Cummings was a Catholic Priest who was convicted for teaching and performing religious duties without having taken an oath of loyalty as required by the Missouri Constitution. *Id.* at 281–82. Justice Field authored the majority opinion in *Cummings*, in which he and the majority determined that the test oath required by the state constitution was an unconstitutional bill of attainder which legislatively punished an individual without a trial. *Id.*; *see* BRIAN MCGINTY, LINCOLN AND THE COURT 252, 254 & 256 (2008).

<sup>73</sup> In addition to the facts articulated in *Garland*, *see* MCGINTY, *supra* note 72, at 252–61, and 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1856–1918, at 172–74 (Beard Books, 1999) (1922).

<sup>74</sup> WARREN, THE SUPREME COURT, *supra* note 73, at 172–74. The Court had fashioned a similar rule, but rescinded it during the *Garland* decision. *Ex parte Garland*, 71 U.S. at 378.

<sup>75</sup> *See* WARREN, *supra* note 73, at 172–74.

<sup>76</sup> *Ex parte Garland*, 71 U.S. at 380.

<sup>77</sup> *Id.* at 378.

<sup>78</sup> *Id.* at 377.

determination as to who could practice before the federal judiciary was outside of the direct reach of Congress.<sup>79</sup> This aspect of the decision was more clearly articulated in Justice Samuel Freeman Miller's dissent in which he argued that since attorneys were "essential to the very existence of government," the decision robbed both the state and federal legislatures of the authority to determine fitness to practice.<sup>80</sup>

In contrast to Miller's arguments, Field and the majority did not directly address whether the decision reached state governance of attorneys. In a companion case involving a Catholic priest, the Court struck down a provision of a state constitution on the same basis that it ruled in *Ex parte Garland*.<sup>81</sup> Yet, the licensure of attorneys was thought then, as now, to be a wholly state function and what *Garland* accomplished was a prohibition against excluding former Confederate officers from federal, but not necessarily state courts.<sup>82</sup> The most important aspect of *Garland* was its holding regarding political affiliation.<sup>83</sup> Clearly, service as a military or government officer in the Confederate States of America constituted a political affiliation with a design of undermining the Union. After four years of war, which resulted in 620,000 deaths, such service cannot have been characterized as anything else. This is an essential fact in analyzing the Court's conduct in the Cold War attorney licensure cases where CPUSA membership was thought to be a danger to the national security.<sup>84</sup>

Two years after *Garland*, Justice Field again wrote an opinion confirming that the admission and removal of attorneys were judicial acts.<sup>85</sup> In *Randall v. Brigham*, the Court appears to have given form to the definition of "good moral character" in terms of attorney fitness.<sup>86</sup> The decision originated during the Civil War when Samuel H. Randall, an attorney for a defendant in a criminal trial, petitioned the state trial court to dismiss larceny charges if the defendant would enlist in the Navy as a substitute for another person.<sup>87</sup> As part of the Civil War practice of hiring substitutes, the defendant

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<sup>79</sup> *Id.* at 378–79.

<sup>80</sup> *Id.* at 382 (Miller, J., dissenting). Joined by Chief Justice Salmon Chase and Justices Noah Swayne and David Davis, Miller argued:

But the question involved, relating, as it does, to the right of the legislatures of the nation, and of the state, to exclude from offices and places of high public trust, the administration of whose functions are essential to the very existence of the government, those among its own citizens who have been engaged in a recent effort to destroy that government by force, can never cease to be one of profound interest.

*Id.*

<sup>81</sup> *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

<sup>82</sup> FRIEDMAN, *supra* note 26, at 238.

<sup>83</sup> *Ex parte Garland*, 71 U.S. at 378.

<sup>84</sup> *See In re Anastaplo*, 366 U.S. 82 (1961); *Konigsberg II*, 366 U.S. 36 (1961).

<sup>85</sup> *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868).

<sup>86</sup> *Id.* at 535–41.

<sup>87</sup> *Randall*, 93 Mass. (11 Allen) 473 (1865).

was entitled to four hundred dollars, but Randall retained the monies even though the defendant had already paid him for his services.<sup>88</sup> Randall essentially committed larceny against his client and the Superior Court of Massachusetts revoked his attorney standing in the state; under the now accepted doctrine that removal or disbarment was a purely judicial act, Randall was not entitled to the same procedural or evidentiary strictures as a criminal trial.<sup>89</sup>

Justice Field agreed with the Massachusetts court, first finding that the state court was a judicial office created by state statute and cloaked with the authority “to admit and to remove attorneys-at-law.”<sup>90</sup> Although Randall was afforded a chance to refute the allegations against his character, Justice Field determined that even that was not constitutionally required.<sup>91</sup> “The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation,” he concluded.<sup>92</sup> *Randall* has not often been cited, but it is clear that “good moral character,” as assessed by Justice Field and the rest of the Court, included the bad acts of singular persons and not associations with a particular group.<sup>93</sup>

In the same session the Court issued *Randall*, it also decided *Ex parte Bradley*, a case arising from another act of attorney misconduct.<sup>94</sup> Unlike *Randall*, Joseph H. Bradley’s misconduct occurred in a federal court—the United States District Court for the District of Columbia.<sup>95</sup> Bradley was also a well-known Washington attorney, who had successfully defended John Surratt, Mary Surratt’s son, against charges that he conspired to assassinate Abraham Lincoln.<sup>96</sup> In another matter, Bradley uttered

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<sup>88</sup> *Id.* at 474. The Superior Court cited the British case, *Ex parte Brounshall*, in which Lord Mansfield said, “To strike an attorney from the roll” is not in the nature of a punishment, it is done “because he is an unfit person to practise as an attorney; the court exercise their discretion whether a man, whom they formerly admitted to the bar, is a proper person to be continued on the roll.”

*Id.* at 480 (quoting *Ex parte Brounshall*, 2 Cowp. 829 (1778)).

<sup>89</sup> For an apt judicial description of the problems associated with the purchase of substitutes, see *Beckwith v. Bean*, 98 U.S. 266 (1878). For the use of paid substitutes, see JOSHUA E. KASTENBERG, *LAW IN WAR, WAR AS LAW: BRIGADIER GENERAL JOSEPH HOLT AND THE JUDGE ADVOCATE GENERAL’S DEPARTMENT IN THE CIVIL WAR AND EARLY RECONSTRUCTION, 1861–1865*, at 238–39 (2011) and JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 431 (1988).

<sup>90</sup> *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 539 (1868).

<sup>91</sup> *Id.* at 540.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 74 U.S. (7 Wall.) 364, 365 (1868).

<sup>95</sup> *Id.*

<sup>96</sup> *Joseph H. Bradley Seriously Ill*, N.Y. TIMES, Mar. 9, 1887, at 5. However, Bradley had a reputation as an intemperate attorney. For instance, in 1847, a Polish military exile and attorney named Major G. Tochman was incensed at Bradley and challenged him to a duel. G. TOCHMAN, *AN EXPOSÉ OF THE CONDUCT OF JOSEPH H. BRADLEY OF WASHINGTON, D.C.*,

contemptuous language against a judge outside of a criminal trial and in response, the Supreme Court for the District of Columbia disbarred him.<sup>97</sup> Bradley appealed to the Supreme Court under a writ of mandamus claiming that as part of the unique structure of courts in the District, the disbarment was done without jurisdictional authority.<sup>98</sup> In an opinion authored by Justice Samuel Nelson, the majority of the Court agreed.<sup>99</sup> From this decision, it is clear that the Court set jurisdictional parameters for disbarments in the federal judiciary.<sup>100</sup> Justice Nelson's decision also determined that an attorney who committed contempt in open court was subject to contempt proceedings in that court with no notice; but, when the contempt occurred outside of the trial, however, greater procedural safeguards were required.<sup>101</sup>

More than his contemporaries, Justice Field appears to have taken a keen interest in the governance of attorney conduct. In 1873, he authored the majority opinion in

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COUNSELLOR "EMPLOYED BY THE IMPERIAL RUSSIAN LEGATION," TOWARDS MAJOR G. TOCHMAN, OF NEW YORK, COUNSELLOR RETAINED BY THE NEXT OF KIN AND HEIRS AT LAW OF GEN. THADEUS KOSCIUSKO 3-4 (1847).

<sup>97</sup> *Ex parte Bradley*, 74 U.S. at 370. The Supreme Court for the District of Columbia was renamed the United States District Court for the District of Columbia in 1936. MINUTES OF THE MARCH MEETING OF THE BAR ASSOCIATION, 16 J. B. ASS'N D.C. 183, 185 (1949).

<sup>98</sup> *Ex parte Bradley*, 74 U.S. at 368-69.

<sup>99</sup> *Id.* at 370. Nelson determined:

It is plain, therefore, that, according to a true construction of the act of 1863, reorganizing the courts of this district, the Supreme Court not only possesses no jurisdiction in criminal cases, except in an appellate form, but that there is established a separate and independent court, invested with all the criminal jurisdiction, to hear and punish crimes and offences within the district. And, hence, one of the grounds, if not the principal one, upon which the return places the right and power to disbar the relator, fails; for we do not understand the judges of the court below as contending that, if Judge Fisher, at the time of the conduct and words spoken by the relator before him, or in his presence, was not holding the Supreme Court of the district, but was holding a court distinct from the Supreme Court, that they possessed any power or jurisdiction over the subject of this contempt as complained of, otherwise the case would present the anomalous proceeding of one court taking cognizance of an alleged contempt committed before and against another court, which possessed ample powers itself to take care of its own dignity and punish the offender.

*Id.* at 371-72.

<sup>100</sup> *See id.*

<sup>101</sup> *Id.* at 373. Nelson penned:

It is true, where a contempt is committed in the presence of the court, no other notice is usually necessary; but a proceeding to punish an attorney generally for misbehavior in his office, or for any particular instance of misbehavior, stands on very different ground.

*Id.* Bradley's disbarment and the Court's proceedings were well reported in the newspapers. *See The Case of Joseph H. Bradley*, N.Y. TIMES, Jan. 26, 1869, at 5.

*Ex parte Robinson*,<sup>102</sup> which reversed a federal judge's disbarment order against an attorney after it was discovered that the attorney may have assisted a subpoenaed witness in avoiding testifying.<sup>103</sup> The evidence against the attorney was slight and, in the majority's opinion, did not justify the disbarment.<sup>104</sup> Justice Field separated the power to hold an attorney in contempt from the disbarment power. Invoking the British and common American practice, Field noted:

Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defence. This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property.<sup>105</sup>

In 1883, in *Ex parte Wall*, the Court upheld the removal of an attorney after a district court determined that the attorney encouraged a lynch mob to seize and kill a prisoner.<sup>106</sup> In his appeal to the Court, the aggrieved attorney claimed that, even if true, the conduct alleged occurred outside of the courtroom and the district court judge did not first consider whether he would be indicted by a grand jury (which did not occur at any rate).<sup>107</sup> Authored by Justice Joseph Bradley, the majority concluded:

[I]t is apparent, that whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll for an indictable offence, committed by him when not acting in his character of an attorney, yet that the rule is not an inflexible one.<sup>108</sup>

Bradley also noted that requiring a judge to wait until an indictment or conviction "would result in allowing persons to practice as attorneys, who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice."<sup>109</sup> Thus, a judge may, in certain circumstances, act without waiting for the prosecutor to seek an indictment, or even register a charge, against an individual before holding the individual in contempt.

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<sup>102</sup> 86 U.S. (19 Wall.) 505 (1873).

<sup>103</sup> *Id.* at 506.

<sup>104</sup> *Id.* at 511.

<sup>105</sup> *Id.* at 512.

<sup>106</sup> 107 U.S. 265, 265 (1883).

<sup>107</sup> *Id.* at 267.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

Five years after *Ex parte Wall*, the Court issued *Ex parte Terry*,<sup>110</sup> a case that originated in a habeas, rather than a mandamus, writ.<sup>111</sup> On September 3, 1888, a woman named Althea Terry engaged in disorderly conduct in the United States District Court for California.<sup>112</sup> In response, the presiding judge ordered a United States marshal to restrain Ms. Terry, who in turn assaulted the marshal.<sup>113</sup> Her husband, an attorney named David Terry, also assaulted the marshal.<sup>114</sup> The presiding judge then found David Terry guilty of contempt, sentencing him to six months confinement.<sup>115</sup> Problematic to the issue was that Stephen Field was the presiding judge, acting in his capacity as a circuit judge rather than as a Justice of the Supreme Court, and it was Field who sentenced Terry to six months confinement.<sup>116</sup> In his circuit decision, Justice Field noted that Terry had also brought a knife into the courtroom in violation of the law.<sup>117</sup> Also problematic to the decision was the fact that David Terry had been the Chief Justice of the state supreme court prior to Field serving on that court, and the two men knew each other and were antagonists.<sup>118</sup>

Justice John Harlan authored the majority opinion in which he recognized the inherent authority of the federal circuit courts to punish contempts to its authority.<sup>119</sup> Justice Harlan next applied a jurisdictional test to determine whether the Court could issue the writ.<sup>120</sup> That is, Harlan framed the issue as to whether the circuit judge had the authority to order Terry's imprisonment, and not whether the term of six months was reasonable.<sup>121</sup> Represented by Samuel Shellabarger, a two-time Republican congressman, ambassador to Portugal, and accomplished attorney, Terry argued that the contempt order was made in his absence, that the court never provided him notice, and that he was not given the opportunity to defend himself.<sup>122</sup> Justice Field had issued the contempt order after Terry was arrested but before he was brought back into the courtroom.<sup>123</sup> However, in this instance, Harlan denied the habeas writ on the basis

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<sup>110</sup> 128 U.S. 289 (1888).

<sup>111</sup> *Id.* at 290.

<sup>112</sup> *Id.* at 297–98.

<sup>113</sup> *Id.* at 298 (“And whereas, said court thereupon duly and lawfully ordered the United States marshal, J.C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room . . .”) (internal citation omitted).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 297.

<sup>117</sup> *In re Terry*, 36 F. 419 (C.C.N.D. Cal. 1888).

<sup>118</sup> DAVID SCHULTZ, *ENCYCLOPEDIA OF THE SUPREME COURT* 222 (2005). Ultimately, Terry attempted to assassinate Field, but was killed by Field's protecting United States marshal before accomplishing the act. *In re Neagle*, 135 U.S. 1, 5 (1890).

<sup>119</sup> *Ex parte Terry*, 128 U.S. at 302.

<sup>120</sup> *Id.* at 304.

<sup>121</sup> *Id.* at 306.

<sup>122</sup> *Id.* at 291. For a biography of Shellabarger, see WILLIAM A. KINNISON, *HON. SAMUEL SHELLABARGER (1817–1896): LAWYER, JURIST, LEGISLATOR* (1966).

<sup>123</sup> *Ex parte Terry*, 128 U.S. at 310–11.



that in issuing the contempt determination and sentence, “[t]he judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment.”<sup>124</sup>

In 1917, the Court in *Selling v. Radford* addressed the issue of comity between the action of a state supreme court and the federal judiciary.<sup>125</sup> The Michigan Supreme Court had previously upheld the disbarment of George Radford, an attorney practicing probate law who had defrauded several estates.<sup>126</sup> In a decision authored by Chief Justice Edward White, the Court determined that as long as the state courts acted in conformance with their own procedures, the federal judiciary would respect the disbarment decision.<sup>127</sup> This decision did not establish complete comity between the federal judiciary and state courts, but it is clear that the Court intended that the federal judiciary respect state judicial contempt and disbarment decisions in all but the most unusual cases.

In 1925, Chief Justice William H. Taft authored *Cooke v. United States*, a unanimous decision that delineated conduct outside of the traditional definition of contempt, such as disruptive courtroom behavior or lying to the judge.<sup>128</sup> During a civil trial, Cooke, an attorney, became convinced of a federal judge’s bias.<sup>129</sup> After an adverse verdict was rendered, the attorney filed an affidavit with the court, requesting the

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<sup>124</sup> *Id.* at 312.

<sup>125</sup> 243 U.S. 46, 50 (1917).

<sup>126</sup> *In re Radford*, 134 N.W. 472, 474 (Mich. 1912).

<sup>127</sup> *Selling*, 243 U.S. at 50–51. White concluded:

In coming to solve that question three things are patent: (a) That we have no authority to re-examine or reverse as a reviewing court the action of the Supreme Court of Michigan in disbaring a member of the Bar of the courts of that State for personal and professional misconduct; (b) that the order of disbarment is not binding upon us as the thing adjudged in a technical sense; and (c) that, albeit this is the case, yet as we have previously shown, the necessary effect of the action of the Supreme Court of Michigan as long as it stands unreversed, unless for some reason it is found that it ought not to be accepted or given effect to, has been to absolutely destroy the condition of fair private and professional character, without the possession of which there could be no possible right to continue to be a member of this Bar.

*Id.* at 50.

A more recent analysis on this point can be found in *In re Ruffalo*, 390 U.S. 544 (1968). In 1964, the Court denied certiorari with only Black and Douglas voting to grant direct review of a state disbarment. *See* Conference Notes by Justice William O. Douglas to the Conference (Oct. 9, 1967) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1417). However, in 1967, the Court granted review of the United States Court of Appeals for the Sixth Circuit’s extension of comity over the disbarment. *In re Ruffalo*, 390 U.S. at 544.

<sup>128</sup> 267 U.S. 517, 521, 532 (1925).

<sup>129</sup> *Id.* at 519.

judge recuse himself from future companion cases.<sup>130</sup> The rules of the court required the judge to accede to the request, but the judge believed the affidavit was insolent and summarily found Cooke in contempt.<sup>131</sup> Taft distinguished *Cooke* from *Ex parte Terry* in that Cooke's conduct occurred outside of the trial, though he noted Cooke's conduct was calculated to offend the judge.<sup>132</sup> To this end, he determined that Cooke was entitled to mount a defense with the assistance of counsel, as though the contempt proceeding was a criminal trial.<sup>133</sup> Taft found it reprehensible that the trial judge denied Cooke these procedural safeguards, yet found the time to consult with an outside counsel as a friend of the court and had the United States attorney participate in the hearing.<sup>134</sup> Taft concluded the decision with a reminder to trial judges that where a counsel's conduct is designed to inflame the judge, the judge has the responsibility to recuse himself from determining whether contempt occurred and assessing a penalty for the contempt.<sup>135</sup>

Like the Civil War, World War II was a watershed in terms of the Court upholding extraordinary grants of executive authority.<sup>136</sup> United States citizens of Japanese descent were sent into internment camps and in three decisions, the Court upheld this action, albeit with forceful dissents.<sup>137</sup> Moreover, the Court upheld congressional delegation of lawmaking to an administrative agency in setting criminal laws.<sup>138</sup> It also determined that the President could prosecute unlawful enemy combatants on United

<sup>130</sup> *Id.* at 533–34.

<sup>131</sup> *Id.* at 532–34.

<sup>132</sup> *Id.* at 535.

<sup>133</sup> *Id.* at 537. Taft determined:

Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

*Id.*

<sup>134</sup> *Id.* at 537–38.

<sup>135</sup> *Id.* at 539. On this point, Taft remarked:

This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible.

*Id.*

<sup>136</sup> See *infra* notes 137–39 and accompanying text.

<sup>137</sup> See *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>138</sup> *Yakus v. United States*, 321 U.S. 414 (1944) (upholding the control of commodity prices during war).

States soil in military trials.<sup>139</sup> It is not surprising that some state judicial branches would follow suit in departing from the normal model of attorney regulation.

In 1943, the Illinois Supreme Court required affirmation of willingness to serve in the state militia or federal military in times of emergency for admission to the bar.<sup>140</sup> On its face, the requirement would have excluded Jehovah's Witnesses, Mennonites, and Quakers, among other religions. In the closing days of World War II, Clyde Wilson Summers, a devout Methodist, appealed a state decision to prevent his bar admission on the grounds that, owing to his sincere religious convictions, he had obtained conscientious objector status and was therefore excludable from admission to the bar.<sup>141</sup> In ruling adversely to Summers, the Illinois Supreme Court did not publish an opinion.<sup>142</sup> As part of the unique judicial function in the state, the state supreme court ordered the Illinois Attorney General to argue the State's position to the Supreme Court.<sup>143</sup> In his

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<sup>139</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>140</sup> *In re Summers*, 325 U.S. 561, 565 (1945). In Illinois, attorney admissions were a judicial, rather than legislative, function. See *In re Day*, 54 N.E. 646, 653 (Ill. 1899). There the court held:

The function of determining whether one who seeks to become an officer of the courts, and to conduct causes therein, is sufficiently acquainted with the rules established by the legislature and the courts, governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court, so that a correct conclusion may be reached.

*Id.*

<sup>141</sup> Brief for Petitioner at 2, *In re Summers*, 325 U.S. 561 (1945) (No. 205). For a background on Summers's life, faith, and reasons for conscientious objection to military service, see Lea Vandervelde, *A Singular Conscience: In re Summers*, 14 EMP. RTS. & EMP. POL'Y J. 153, 160–61 (2010). Summers later was admitted to the bar and became a prominent labor lawyer and professor. *Id.* at 153, 184.

Several distinguished attorneys represented Summers on his appeal including Julien Cornell, Francis Heisler, and Arthur Garfield Hays. Brief for Petitioner *supra* at 1. Cornell represented several conscientious objector cases as well as the poet Ezra Pound. See *Julien Cornell*, 83, *The Defense Lawyer in Ezra Pound Case*, N.Y. TIMES, Dec. 7, 1994, at D21. Pound resided in Italy during World War II and broadcast pro-Axis statements over the radio, but was adjudged insane and avoided incarceration. See *id.*

Heisler was a decorated World War I veteran who defended conscientious objectors in World War II and during the Cold War. See MICHAEL F. TIGAR, *FIGHTING INJUSTICE* 103 (2002); *Francis Heisler*, N.Y. TIMES, July 7, 1984, at 14. Hays was a prior general counsel to the American Civil Liberties Union. THE ARTHUR GARFIELD HAYS CIVIL LIBERTY PROGRAM: HISTORY, N.Y.U. LAW SCH. (2011), [http://www.law.nyu.edu/academics/fellowships/hays\\_program/History/index.htm](http://www.law.nyu.edu/academics/fellowships/hays_program/History/index.htm) (last visited Mar. 15, 2012). Along with Clarence Darrow, Hays defended John Scopes in the Scopes Monkey Trial and the Scottsboro trial defendants. See SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 63, 73 (2d ed. 1999).

<sup>142</sup> *In re Summers*, 325 U.S. at 563–64.

<sup>143</sup> Brief for Respondents at 1, *In re Summers*, 325 U.S. 561 (No. 205).

brief, Summers argued that he was denied admission to the bar based on his religious beliefs and his legal status as a conscientious objector in violation of the Fourteenth Amendment.<sup>144</sup> The Illinois Attorney General's response was threefold. First, that the Court did not have jurisdiction to review the case, because the decision of the state supreme court did not consist of "a case or controversy."<sup>145</sup> Second, the state urged that there was no right to become a member of the bar and that admission to practice is a privilege outside of the Fourteenth Amendment's protections.<sup>146</sup> Third, that the state had an interest in ensuring that its judicial officers would uphold the entirety of the state constitution and its laws, and a citizen who could not do so could also be excluded from becoming an officer of the court.<sup>147</sup>

In *In re Summers*, a decision authored by Justice Reed, the Court's majority determined that "a case or controversy" did exist to confer jurisdiction.<sup>148</sup> However, the Court agreed that the state supreme court had not trampled on Summers's First and Fourteenth Amendment rights to freedom of religion.<sup>149</sup> Reed and the majority concluded that since the United States could exclude aliens from citizenship who refused to take up arms in the defense of the nation, a state could deny a citizen admission to the bar for the same reason.<sup>150</sup> This meant that the consequence of Summers's Christian beliefs prevented him from becoming an Illinois licensed attorney. Interestingly, during oral arguments Justice Jackson appeared to sympathize with Summers, stating, "I suppose that a few literal Christians would not be a bad thing for the bar."<sup>151</sup> Nonetheless, Jackson voted with the majority.<sup>152</sup>

Black disagreed and wrote a forceful dissent, with Douglas, Murphy, and Rutledge joining, arguing that Illinois had discriminated against Summers on the basis of his religious beliefs.<sup>153</sup> He reasoned that since Summers had satisfied every other requirement for admission to the bar, the only logical conclusion was that the state used Summers's faith to prevent his becoming a lawyer.<sup>154</sup> Black also pointed out two absurdities in the

<sup>144</sup> Brief for Petitioner, *supra* note 141, at 10.

<sup>145</sup> Brief for Respondents, *supra* note 143, at 18.

<sup>146</sup> *Id.* at 6.

<sup>147</sup> *Id.* at 5, 8.

<sup>148</sup> 325 U.S. 561, 568 (1945).

<sup>149</sup> *Id.* at 573.

<sup>150</sup> *Id.* *United States v. Schwimmer*, 279 U.S. 644 (1929), and *United States v. Macintosh*, 283 U.S. 605 (1931), are the two decisions referenced by the *In re Summers* majority for the proposition that, because the exclusion of aliens based on a refusal to bear arms in the nation's defense is lawful, so too is the exclusion of a citizen from the practice of law.

<sup>151</sup> Vandervelde, *supra* note 141, at 190 (quoting Letter from Julien Cornell to Zechariah Chaffee, Jr. (May 1, 1945) (on file in the Julien Cornell Papers (DG 010), Swarthmore College Peace Collection) (internal quotation marks omitted)).

<sup>152</sup> *In re Summers*, 325 U.S. at 573, 578.

<sup>153</sup> *Id.* at 578 (Black, J., dissenting).

<sup>154</sup> *Id.* at 575. Black penned:

I cannot believe that a state statute would be consistent with our constitutional guarantee of freedom of religion if it specifically denied the right

Illinois position. First, he stated that “a lawyer is no more subject to the call for military duty than a plumber, a highway worker, a Secretary of State, or a prison chaplain.”<sup>155</sup> Second, he pointed out that Illinois had not drafted any citizen since 1864 and, moreover, its constitution “prohibit[ed] the draft of conscientious objectors except in time of war.”<sup>156</sup>

Black received considerable assistance from Justice Rutledge in formulating his dissent.<sup>157</sup> Initially, Black was satisfied with a dissent that focused on accusing the state judiciary of trammeling religious liberty.<sup>158</sup> Rutledge encouraged him to add that the punishment of conscientious objectors, who in World War II were almost wholly punished on religious grounds, constituted a bill of attainder, much as had been the case in *Garland*, in violation of the Constitution.<sup>159</sup> “I think those strengthen the opinion,” Rutledge urged Black.<sup>160</sup> Black also received editing assistance from Harold Evans, an attorney who wrote an amicus brief on behalf of the Religious Society of Friends, a Quaker organization.<sup>161</sup> The original draft dissent appeared to state that under Illinois’s scheme, a Quaker had a choice of serving in the military to retain bar membership or being thrown out of the Society.<sup>162</sup> Evans pointed out that this was not the case, and Black deleted the language.<sup>163</sup> Notably, a number of religious and international

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to practice law to all members of one of our great religious groups, Protestant, Catholic, or Jewish. Yet the Quakers have had a long and honorable part in the growth of our nation, and an amicus curiae brief filed in their behalf informs us that under the test applied to this petitioner, not one of them if true to the tenets of their faith could qualify for the bar in Illinois.

*Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 577.

<sup>157</sup> Letter from Justice Wiley Rutledge to Justice Hugo L. Black (June 1, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277).

<sup>158</sup> Draft *In re Summers* Opinion by Justice Hugo L. Black (undated) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277).

<sup>159</sup> Letter from Justice Wiley Rutledge to Justice Hugo L. Black, *supra* note 157.

<sup>160</sup> *Id.*

<sup>161</sup> Brief on Behalf of the American Friends Service Committee as Friends of the Court, *In re Summers*, 325 U.S. 561 (No. 205).

<sup>162</sup> Letter from Harold Evans to Justice Hugo L. Black (June 13, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277).

<sup>163</sup> *Id.* Evans wrote:

[T]here are a considerable number of members who do not [“carry out the testimony of the Society against all war as inconsistent with their interpretation of Christianity.”] . . . This is borne out by the fact that a number of Quakers are serving in the armed forces. It is not the general practice of the Religious Society of Friends to disown those who violate its peace testimony, though that testimony remains unchanged.

*Id.*

Black sought clarifying language from Evans and Evans provided an alternate statement on the Quakers which is contained in the published dissent. *See* Letter from Harold Evans

organizations supported Black's dissent, including the Women's International League for Peace and Freedom, the Post War World Council, the United Methodist Church, and the Congregational Church.<sup>164</sup>

Justices Black, Douglas, Murphy, and Rutledge would, in another dissent, soon after *In re Summers*, spar with Justice Reed in *Fisher v. Pace*,<sup>165</sup> a contempt decision in which the dissenting Justices argued that because the overuse of the contempt authority could result in judicial tyranny, it should only be used sparingly, and not in that particular case.<sup>166</sup> In *Fisher*, a state judge's contempt finding resulted in the imprisonment of an attorney who deviated from a state judge's expectation of orderly administration of justice in a workmen's compensation trial.<sup>167</sup> The record presented by the Court, including in Reed's majority opinion, evidences a frustrated judge who likely worsened the matter.<sup>168</sup> In conference, Reed took exception to Rutledge's draft dissent,

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to Justice Hugo L. Black (July 18, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277); Letter from Justice Hugo L. Black to Harold Evans (July 10, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277).

<sup>164</sup> Letter from Women's International League for Peace and Freedom to Justice Hugo L. Black (July 24, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277). Its Legislative Chairman, Sophia H. Dulles, who was later accused of being a Communist, but was in reality a devout Quaker who believed in world disarmament and by all records was faithful to the United States, wrote Black, "[a]ny curtailment of our personal freedoms is today doubly dangerous because of the marked world drift toward authoritarian government." *Id.*; see also, e.g., ELIZABETH KIRKPATRICK DILLING, *THE RED NETWORK* 212 (1977) (noting Dulles's membership in the Pennsylvania Committee for Total Disarmament); EDWARD THOMAS, *QUAKER ADVENTURES, EXPERIENCES OF TWENTY THREE ADVENTURES IN INTERNATIONAL UNDERSTANDING* 146–55 (2005) (discussing Dulles's post-war reconstruction work). For more information on the League, see CARRIE A. FOSTER, *THE WOMEN AND THE WARRIORS: THE U.S. SECTION OF THE WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, 1915–1946* (1995).

Norman Thomas and Oswald Garrison Villard, who had both championed the NAACP and had campaigned against what they believed was the nation's imperialist expansion, founded the Post War World Council. NEIL A. HAMILTON, *AMERICAN SOCIAL LEADERS AND ACTIVISTS* 367, 380 (2002). Thomas wrote to Black, "You have put the country, and all lovers of true liberty and true freedom, in your debt." Letter from Norman Thomas to Justice Hugo L. Black (June 18, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277). The Grace Methodist Church's leadership council informed Black that they "rejoice[d] for your judgment in the matter." Letter from Robert H. Hamill of Grace Methodist Church to Justice Hugo L. Black (June 13, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277). As to the Congregational Church, see Letter from Merrill F. Clarke of Congregational Church to Justice Hugo L. Black (June 15, 1945) (on file with Library of Congress, Manuscript Division, Papers of Hugo Lafayette Black, Box 277).

<sup>165</sup> 336 U.S. 155 (1949).

<sup>166</sup> *Id.* at 163 (Douglas, J., dissenting).

<sup>167</sup> *Id.* at 156 (majority opinion).

<sup>168</sup> See *id.* at 157–59. Within a brief exchange, the trial judge sentenced Fisher first to a

which included the language: “whatever the provocation, there can be no due process in trial in the absence of calm judgment and action, untinged with anger, from the bench.”<sup>169</sup> Reed threatened to add to the majority opinion that judges could not always be expected to preserve “an unruffled calm during trial,” alluding to the Court’s increasingly stormy conference sessions, where “the only safe place for brother jurists is under the table.”<sup>170</sup> To this Rutledge replied, “[a]lthough there are those who believe in the administration of justice from under the table, I am of the opinion that this should be restricted to the conference room.”<sup>171</sup> However, Black and Reed did not include these in their final opinions and prevented any airing of the Court’s increasingly acidic divisions.<sup>172</sup>

*In re Summers* was a radical departure from the historic model of judicial governance of attorneys. For the first time in the nation’s history, a class of citizens ordinarily protected by the First Amendment could be excluded from the practice of law.<sup>173</sup> There is no evidence that the Justices in the majority opinion viewed the decision as a means to exclude persons from admission to practice on the basis of political affiliation, but *Summers* became a vehicle to accomplish just that.<sup>174</sup> Indeed, the decision was broadly used to enable the exclusion of CPUSA members and fellow travelers from union leadership positions, as well as the exclusion of persons from admission to practice law.<sup>175</sup> Likewise, *Fisher* later provided a federal judge latitude to provoke counsel representing CPUSA members in a decision discussed below.<sup>176</sup>

## II. THE COURT, THE COLD WAR, AND CHALLENGES TO THE HISTORIC MODEL OF ATTORNEY GOVERNANCE

There are three lines of post–World War II decisions, each of which enabled state bars to deny admission to applicants based on CPUSA ties or other so-called subversive organizations. The first line of these decisions involved the federal regulation of commerce considered vital to the national economy and the partial criminalization

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fine of twenty-five dollars, then fifty dollars, then three days in jail, followed by one hundred dollars. *Id.* at 158. Fisher insulted the judge with the comment “you know you have all the advantage by you being on the bench,” before the last fine. *Id.*

<sup>169</sup> Memorandum from Justice Stanley F. Reed to the Conference (Feb. 5, 1949) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 182).

<sup>170</sup> *Id.*

<sup>171</sup> Memorandum from Justice Wiley Rutledge to the Conference (Feb. 5, 1949) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 182) (response to Justice Stanley F. Reed).

<sup>172</sup> *In re Summers*, 325 U.S. 561, 573 (1945).

<sup>173</sup> *See id.* at 573 (Black, J., dissenting).

<sup>174</sup> *See infra* Part II.

<sup>175</sup> *See infra* Part II.

<sup>176</sup> *See infra* Part II.

of free speech and association.<sup>177</sup> The second category of decisions encompassed disbarment and contempt cases that originated from the previous category.<sup>178</sup> Of importance to this line of cases, in 1941, Congress amended the Federal Rules of Criminal Procedure to extend the Court's authority to include establishing rules for criminal contempt proceedings.<sup>179</sup> The third and final line of decisions involved state loyalty programs affecting public employment.<sup>180</sup> However, a brief analysis of Justices Black's, Douglas's, and Frankfurter's varying views on domestic Communism, as summarized in a single World War II opinion, *Schneiderman v. United States*,<sup>181</sup> is helpful in understanding the interplay between the three lines of decisions, as well as the ultimate holdings for the three bar applicants, even though the decision predated Justice Harlan's service on the Court.<sup>182</sup>

William Schneiderman was a CPUSA member who immigrated to the United States in 1908 at age three and gained citizenship in 1927.<sup>183</sup> In 1932, he ran for the Minnesota governorship on the CPUSA platform, evidencing his belief that Communism could become the dominant political force through the electoral process, rather than through the violent overthrow of the government.<sup>184</sup> In 1939, the Justice Department was determined to strip Schneiderman of his citizenship, despite his having no criminal record and despite a lack of evidence pointing to engagement in seditious activity.<sup>185</sup> The Justice Department's reasoning had to do with Schneiderman's Communist activities, which predated his naturalization, though this was a specious basis because he had never hidden his activities from the government.<sup>186</sup> Somewhat ironically, Wendell

<sup>177</sup> See *infra* Part II.B–C.

<sup>178</sup> See *infra* Part II.D–G.

<sup>179</sup> Act of November 21, 1941, 55 Stat. 779 (codified as amended at 18 U.S.C. §§ 3771–3772) (FED. R. CRIM. P. 42 (1994)).

<sup>180</sup> See *infra* Part II.H.

<sup>181</sup> 320 U.S. 118 (1943). Robert Jackson disqualified himself from the case because he acted as Attorney General during the District Court and Circuit Court of Appeals stages. *Id.* at 207. He also wrote in a similar independent statement to Frank Murphy:

I take no part in this decision. This case was instituted in June of 1939 and tried in December of that year. In January 1940, I became Attorney General of the United States and succeeded to official responsibility for it. That is the sole cause of my disqualification, and I desire the reason to be a matter of record.

Letter from Justice Robert H. Jackson to Frank Murphy (June 19, 1943) (on file with Library of Congress, Manuscript Division, Papers of Harlan F. Stone, Box 69).

<sup>182</sup> MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 15 (Justice Harlan joined the bench Mar. 28, 1955).

<sup>183</sup> MELVIN I. UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953, at 52 (1997).

<sup>184</sup> *Id.*; JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 240 (2004).

<sup>185</sup> *Id.*; PETER G. RENSTROM, THE STONE COURT: JUSTICES, RULINGS, AND LEGACY 126 (2001).

<sup>186</sup> RENSTROM, *supra* note 185, at 126.



Willkie, who had run as the Republican presidential candidate in 1940, represented Schneiderman against an Executive Branch accused of socialist sympathies.<sup>187</sup>

Justices Murphy, Douglas, Black, Reed and Rutledge believed that the government had overreached in its zeal to contain subversive ideologies.<sup>188</sup> However, Douglas and Rutledge separately concurred.<sup>189</sup> Writing for the majority, Murphy, with Black and Reed joining, noted that there was a difference between advocating abstract principles and a call to violent action.<sup>190</sup> Douglas believed that Congress could legislate that a Communist affiliation was a basis for denying citizenship, but had not done so, and therefore Schneiderman had not broken any laws.<sup>191</sup> Rutledge took a harder line on the rights of citizenship than the other three Justices, concluding that denaturalization should only occur if an individual receives citizenship by fraud.<sup>192</sup>

In his dissent, Chief Justice Stone recited Karl Marx's admonition that an evolution to Communism could only be achieved by violent ends.<sup>193</sup> "The fountainhead of Communist principles, the Communist Manifesto, published by Marx and Engels in 1848, had openly proclaimed that Communist ends could be attained 'only by the forcible overthrow of all existing social conditions,'" Stone wrote in his dissent.<sup>194</sup> "After 1920 these teachings were revived and restated in Party publications which, in the period we are now considering, were used in the Communist educational program that petitioner was directing."<sup>195</sup> Frankfurter agreed with Stone, though he also urged the

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<sup>187</sup> WIECEK, *supra* note 23, at 295. On Republicans accusing Roosevelt of harboring Communists, see 3 ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 622 (1960).

<sup>188</sup> UROFSKY, *supra* note 183, at 53–54; *see also infra* notes 189–93 and accompanying text.

<sup>189</sup> *Schneiderman v. United States*, 320 U.S. 118, 161, 165 (1943).

<sup>190</sup> *Id.* at 157–58. Murphy specifically held:

There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason.

*Id.*

<sup>191</sup> *Id.* at 163 (Douglas, J., concurring). Douglas urged:

If an anarchist is naturalized, the United States may bring an action under § 15 to set aside the certificate on the grounds of illegality. Since Congress by § 7 of the Act forbids the naturalization of anarchists, the alien anarchist who obtains the certificate has procured it illegally whatever the naturalization court might find. The same would be true of communists if Congress declared they should be ineligible for citizenship.

*Id.*

<sup>192</sup> *Id.* at 166, 169–70 (Rutledge, J., concurring).

<sup>193</sup> *Id.* at 191 (Stone, C.J., dissenting).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

Chief Justice to moderate the dissent with the statement that absent acts and public statements, membership in the CPUSA alone does not “disprove[ ] attachment to the Constitution.”<sup>196</sup> But Stone did not include this line.<sup>197</sup> For his part, Frankfurter displayed anger at being in the dissent, accusing the majority of not wanting to offend the Soviet Union because of the wartime alliance.<sup>198</sup> To Stone, he wrote that “political considerations” were “the driving force behind the result of this case,” and that if Schneiderman were a “Bundist” (a term for American Nazi Party members) the opposite result would have been reached.<sup>199</sup> “For me the essence of this case is the very simple vindication of the old truth that one cannot serve, in thought and feeling and action, two independent masters at the same time,” he concluded.<sup>200</sup>

In the summary of the discussion during the conference, Frankfurter noted that while he could not “understand why the government did not confess error in this particular case and let it go at that,” he would not vote to overturn the government either.<sup>201</sup> He added that he had “known the Schneidermans and a good many of them well since my college days,” and he admired “their devotion to their ideals.”<sup>202</sup> Yet, because their devotion was “to a wholly different scheme of things from that to which this country, through its Constitution, is committed,” he believed that Schneiderman could lose his citizenship without having first committed a crime.<sup>203</sup> This statement was Frankfurter’s judicial deference philosophy in a nutshell. He believed the government was in error, but not constitutionally so, and therefore would not vote to overturn the case.<sup>204</sup> Also evident in Frankfurter’s notes is a further expansion on his accusation that the majority was politically motivated by its desire not to damage United States-Soviet relations.<sup>205</sup> He claimed that Black and Reed both wanted to hold the case over until after the war.<sup>206</sup>

#### A. Anticommunist Legislation

With the conclusion of World War II, fears of Communist conspiracies to undermine the United States government resulted in state and federal loyalty programs of

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<sup>196</sup> *See id.*

<sup>197</sup> Letter from Justice Felix Frankfurter to Justice Harlan F. Stone (June 13, 1943) (on file with Library of Congress, Manuscript Division, Papers of Harlan F. Stone, Box 69).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> Letter from Justice Felix Frankfurter to Justice Harlan F. Stone (May 31, 1943) (on file with Library of Congress, Manuscript Division, Papers of Harlan F. Stone, Box 69).

<sup>201</sup> Summary of Conference Discussion by Justice Felix Frankfurter (Dec. 5, 1942), *microformed on Felix Frankfurter Papers, Reel 7, Series I* (Harvard Law Sch.).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See supra* note 201 and accompanying text.

<sup>205</sup> Summary of Conference Discussion by Justice Felix Frankfurter, *supra* note 201.

<sup>206</sup> *Id.*

a nature never before seen.<sup>207</sup> While state judicial branches remained the determinant of good moral character for attorney admissions, the federal judiciary was positioned to play a greater role in the oversight of attorney conduct for several reasons, two of which are essential in explaining *Konigsberg I and II*, *Schwartz*, and *In re Anastaplo*.<sup>208</sup> First, in 1941, the Court struck down state anti-syndicalism laws on the basis that the federal laws in security matters preempted those of the fifty states.<sup>209</sup> To be sure, state governments could possess their own loyalty programs and prosecute citizens for perjury and obstruction of justice, but at the same time, could not criminalize membership in the CPUSA or any other organization.<sup>210</sup> Second, the political and judicial environment of the 1930s through the Cold War created conditions where attorneys defending both CPUSA members, as well as those advocating civil rights, were judicially accused of subverting the government.<sup>211</sup>

In 1938, Congressman Martin Dies was named chairman of the newly formed House Special Committee on Un-American Activities.<sup>212</sup> Shortly after its formation, Dies's committee claimed that the Executive Branch was infested with Communists, radicals, and other dangerous persons.<sup>213</sup> The following year, Congress passed an amendment to the Hatch Act that prohibited Communists from federal employment.<sup>214</sup> In 1940, Congress passed the Alien Registration Act, more commonly known as the Smith Act.<sup>215</sup> During World War II, the Justice Department prosecuted only a few persons under these laws, but following the Japanese surrender, the political climate changed and national security, coupled with anticommunist sentiment, became the leading political, and to an extent social, issue in the nation.<sup>216</sup>

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<sup>207</sup> See, e.g., ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 26–29 (1999) (discussing the Truman Administration's loyalty program created to combat accusations that the administration is "soft on Communism").

<sup>208</sup> Keeley, *supra* note 21, at 846–47.

<sup>209</sup> *Hines v. Davidowitz*, 312 U.S. 52 (1941). Justice Harlan Stone, soon to become Chief Justice, dissented in this decision and argued that a state could augment the federal government with its own internal security laws. *Id.* at 74–75 (Stone, J., dissenting); MEMBERS OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 15 (Justice Stone was promoted to Chief Justice July 3, 1941).

<sup>210</sup> *Hines*, 312 U.S. at 74 (Stone, J., dissenting) (noting states may exercise their powers expressly or by necessary implication prohibited by "some authority delegated to the United States").

<sup>211</sup> UROFSKY, *supra* note 183, at 159, 175 (discussing how attorneys representing Communists were convicted of contempt); see *Sacher v. United States*, 343 U.S. 1, 3, 5–11 (1952).

<sup>212</sup> GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 354 (2004); see also 2 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 733 (2d ed. 2002).

<sup>213</sup> UROFSKY & FINKELMAN, *supra* note 212, at 733–34; see also TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 187 (2003).

<sup>214</sup> UROFSKY & FINKELMAN, *supra* note 212, at 734.

<sup>215</sup> *Id.*

<sup>216</sup> UROFSKY, *supra* note 183, at 159–61.

In 1945, the House of Representatives made the Dies Committee permanent and, from that point until its termination in 1975, it was known as the House Un-American Activities Committee (HUAC).<sup>217</sup> In 1947, the Republican-led Congress passed the Taft-Hartley Act, which imposed limitations on the right to strike, particularly prohibiting secondary strikes and boycotts.<sup>218</sup> Although the law was primarily a rollback against pro-labor New Deal legislation, Section 9 of the law prohibited CPUSA members from serving in union leadership positions.<sup>219</sup>

In 1947, Truman issued Executive Order 9835, which set up a comprehensive loyalty program for vetting federal employees.<sup>220</sup> It also enabled the Attorney General to list subversive organizations.<sup>221</sup> The Attorney General, Thomas C. Clark, who later became a Supreme Court Justice, listed eighty-two organizations as subversive.<sup>222</sup> The list was successfully challenged in the Court, and Justice Clark recused himself from several decisions because of his role in creating the list.<sup>223</sup>

The loyalty programs and statutes were problematic for several reasons, but, in particular, because their overuse trammelled on individual rights.<sup>224</sup> Moreover, opportunists, such as Senator Joseph McCarthy, were enabled to accrue power through accusations and inquests.<sup>225</sup> In regard to the attorney applicant issues, there was a further complicating issue.

Anticommunist ideologues not only targeted CPUSA members, but also the larger group of so-called “fellow-travelers.”<sup>226</sup> This latter group consisted of intellectual elites and others who believed in Communism, but not through the suppression of freedoms as had happened in the Soviet Union and China.<sup>227</sup> There was little consensus as to what members in this category believed.<sup>228</sup> Indeed, some espoused compatibility between Christianity and Communism, an idea which was antithetical to the teachings of Karl Marx.<sup>229</sup> Thus, one could accept certain tenets of Communism, but refuse to participate in the means of achieving the tenets.<sup>230</sup> The statutes and executive order did not

<sup>217</sup> MORGAN, *supra* note 213, at 187.

<sup>218</sup> UROFSKY, *supra* note 183, at 159–61.

<sup>219</sup> *Id.*

<sup>220</sup> WIECEK, *supra* note 23, at 431 (describing Executive Order 9835).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> UROFSKY & FINKELMAN, *supra* note 212, at 757.

<sup>225</sup> *Id.* at 765.

<sup>226</sup> DAVID CAUTE, *THE FELLOW-TRAVELERS: INTELLECTUAL FRIENDS OF COMMUNISM* 289 (1988) (noting Vice President Nixon’s announcement, “We’re kicking the communists and the fellow-travelers . . . out of the Government . . .”).

<sup>227</sup> *Id.* at 5–6.

<sup>228</sup> *Id.* at 6 (noting “we can understand fellow-travelling only in terms of disillusionment”).

<sup>229</sup> CAUTE, *supra* note 226, at 259 (noting similarities in Christian and Communist ethics).

<sup>230</sup> *Id.* at 4 (noting that “fellow-travelling involves commitment at a *distance*”).

effectively distinguish between CPUSA members and “fellow-travelers” or other persons who merely believed that some of the CPUSA’s tenets were laudable.<sup>231</sup>

*B. Federal Law on Economic Regulation and the Criminalization of Speech*

In *American Communications Ass’n v. Douds*, the Court, with only six Justices sitting, determined that Section 9 of the Taft-Hartley Act, requiring organized labor union leaders take an anticommunist oath or have their union divested of the National Labor Relations Act’s protections did not violate the First Amendment.<sup>232</sup> Justices Douglas, Clark, and Minton took no part in the decision.<sup>233</sup> Section 9 was designed to prevent politically motivated strikes that could weaken national security.<sup>234</sup> The CPUSA and other Communist organizations had attempted to strike at war industries’ factories prior to World War II, and, in one case, during the war.<sup>235</sup> Labor organizations protested the law on the basis that it contravened the First Amendment right to freedom of association by limiting who was entitled to run for an essentially private office.<sup>236</sup> Authored by Chief Justice Fred Vinson, the Court’s majority opinion looked to congressional authority to regulate commerce, and then adopted a statement which would later prove influential in *Konigsberg I and II*, *Schwartz*, and *In re Anastaplo*:

Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts.<sup>237</sup>

While Vinson cited to several precedential authorities, he relied on *In re Summers* for the proposition that the government could legislate on the basis of a status, which would ordinarily be outside of the scope of laws and regulations.<sup>238</sup> He later cited *In*

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<sup>231</sup> *Id.* at 288 (noting both CPUSA members and “fellow-travelers” were subject to persecution).

<sup>232</sup> 339 U.S. 382, 411–13, 415 (1950).

<sup>233</sup> *Id.* at 415. “Douglas was recovering from a serious injury.” WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 49 (6th ed. 2007). Minton had been nominated but not yet confirmed by the Senate. *Id.* And, Clark recused himself from the decision since, as Attorney General he had advised President Truman on the matter. *Id.*

<sup>234</sup> *Douds*, 339 U.S. at 396, 400.

<sup>235</sup> *Id.* at 430 (Jackson, J., concurring in part, dissenting in part).

<sup>236</sup> *Id.* at 389 (majority opinion).

<sup>237</sup> *Id.* at 394.

<sup>238</sup> *Id.* at 391. The majority specifically held, “The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible

*re Summers* as proof that if the government's interest in the moral character of attorneys could prevent a class of individuals from admission to the bar, it could certainly protect industrial peace.<sup>239</sup> Vinson turned to *In re Summers* a third time for a redundant argument that because the perceived legitimate security needs of a state government could prevent a class of individuals from admission to the bar, the federal government could similarly act in barring disloyal persons from leadership positions in unions.<sup>240</sup> In other words, to Vinson, there were instances of such gravity where the civil, non-criminal laws could single out a group that would ordinarily be afforded protection under the First Amendment.

Frankfurter concurred in the majority's decision with the caveat that certain provisions of the Act would run afoul of the Constitution if used in the criminal courts under a charge of perjury.<sup>241</sup> He worried that an individual who disavowed CPUSA membership or sympathy for Communism might still share in some of the goals of the party and then be prosecuted for perjury.<sup>242</sup> Likewise Jackson concurred, but with a significant exception.<sup>243</sup> He recognized the CPUSA's unique features which set it apart from other movements.<sup>244</sup> Almost reiterating the dissent in *Schneiderman*, he stated "[t]he Communist Party alone among American parties past or present is dominated and controlled by a foreign government. It is a satrap party which, to the threat of civil disorder, adds the threat of betrayal into alien hands."<sup>245</sup> Jackson clarified that Section 9 did not outlaw the CPUSA or prohibit its members from running for public office, but

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subjects of government action, does not lead to the conclusion that such circumstances are never relevant." *Id.*

<sup>239</sup> *Id.* at 398.

<sup>240</sup> *Id.* at 405. The majority noted:

[I]n *In re Summers*, . . . we upheld the refusal of a state supreme court to admit to membership of its bar an otherwise qualified person on the sole ground that he had conscientious scruples against war and would not use force to prevent wrong under any circumstances. Since he could not, so the justices of the state court found, swear in good faith to uphold the state constitution, which requires service in the militia in time of war, we held that refusal to permit him to practice law did not violate the First Amendment, as its commands are incorporated in the Due Process Clause of the Fourteenth Amendment. Again, the relation between the obligations of membership in the bar and service required by the state in time of war, the limited effect of the state's holding upon speech and assembly, and the strong interest which every state court has in the persons who become officers of the court were thought sufficient to justify the state action.

*Id.*

<sup>241</sup> *Id.* at 420 (Frankfurter, J., concurring in part).

<sup>242</sup> *Id.* at 418–19.

<sup>243</sup> *Id.* at 422 (Jackson, J., concurring in part, dissenting in part).

<sup>244</sup> *Id.* at 422–24.

<sup>245</sup> *Id.* at 427.

rather was a legitimate congressional limitation of union activities.<sup>246</sup> However, he believed the requirement that union officers take an oath disavowing a belief in the overthrow of the government by violence or other unlawful means was unconstitutional.<sup>247</sup> Jackson urged, that without an overt act, the requirement to disavow a belief violated the First Amendment.<sup>248</sup> “While the Governments, State and Federal, have expansive powers to curtail action, and some small powers to curtail speech or writing, I think neither has any power, on any pretext, directly or indirectly to attempt foreclosure of any line of thought,” he concluded.<sup>249</sup>

Unsurprisingly, Black dissented, arguing that the Act was passed to exclude certain beliefs from the economic arena.<sup>250</sup> He compared the act to the prosecutions of Protestants in France during the sixteenth and seventeenth centuries, as well as the then-contemporaneous English prosecutions of Catholics, Quakers, and Baptists.<sup>251</sup> Citing to his dissent in *In re Summers*, Black concluded that required oaths were an abomination to liberty.<sup>252</sup>

Problematic to *Doubs* and Truman’s loyalty program was that when, on March 21, 1947, Truman issued Executive Order 9835, he empowered the Attorney General to compile a list of organizations deemed subversive.<sup>253</sup> The Attorney General, in turn, established the Loyalty Review Board.<sup>254</sup> Ostensibly, the Board’s members would examine information provided by the Federal Bureau of Investigation (FBI) and congressional inquiries, and then determine whether the organization would be listed as subversive.<sup>255</sup> Members, or supporters, of the organization would then find themselves labeled as subversive and the risk of denial of public employment or blacklisting from private organizations, unions, or political processes would be very real.<sup>256</sup>

In *Joint Anti-Fascist Committee v. McGrath*, the Court granted a declaratory judgment on behalf of three listed organizations.<sup>257</sup> The organization named in the decision had supported anti-Franco forces during the Spanish Revolution.<sup>258</sup> A second organization, the National Council of American-Soviet Friendship, sought to lessen friction between the two nations by distributing Soviet educational materials in the United States, much of which were materials about the United States.<sup>259</sup> The third

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<sup>246</sup> *Id.* at 429.

<sup>247</sup> *Id.* at 422, 445.

<sup>248</sup> *Id.* at 445.

<sup>249</sup> *Id.* 442.

<sup>250</sup> *Id.* at 446–47 (Black, J., dissenting).

<sup>251</sup> *Id.* at 447.

<sup>252</sup> *Id.* at 447–48 (citations omitted).

<sup>253</sup> *See, e.g.*, WIECEK, *supra* note 23, at 431.

<sup>254</sup> *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125 (1951).

<sup>255</sup> *See id.* at 138 n.11.

<sup>256</sup> *See id.* at 142 (Black, J., concurring).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 130–31 (majority opinion).

<sup>259</sup> *Id.* at 132–33.

organization was a fraternal benefit society incorporated under New York's Insurance Law.<sup>260</sup> Each of the organizations were able to prove that they did not fall into the definition of "subversive" and that the Attorney General had ignored these facts.<sup>261</sup> Rather than find Executive Order 9835, or simply the Loyalty Board, unconstitutional, the Court determined the Attorney General's act of placing the organizations on the subversive list was arbitrary and outside of the authority conferred by the Executive Order. They thus required the executive branch to provide an avenue for groups to challenge their placement on the list.<sup>262</sup>

### C. Dennis v. United States

If the public believed that *Joint Anti-Fascist Committee* signaled that the Court was limiting loyalty programs, it was mistaken. On July 20, 1948, the Justice Department secured indictments against twelve CPUSA leaders, including Eugene Dennis, for organizing and assembling "persons who teach and advocate the overthrow . . . of the Government of the United States by force and violence," and "knowingly and willfully" advocating the same.<sup>263</sup> The trial lasted nine months and by contemporary standards failed due process.<sup>264</sup> The FBI eavesdropped on the defendants' lawyers, who in turn, contributed to eroding the efficacy of the trial. The defense counsel was not alone in this erosion. Judge Harold Medina's conduct during the trial included publicly berating defense counsel.<sup>265</sup> At the end of the trial, Medina found the defense attorneys in contempt.<sup>266</sup> The contempt hearings are analyzed further below, but it is worth noting here that the media reported the trial as "the Battle of Foley Square," and it became known as such in the public eye.<sup>267</sup> Indeed, the trial was extensively covered by the media, mostly favorable to the prosecution.<sup>268</sup>

Ironically, during World War II, Medina, then serving as a defense counsel, represented a naturalized citizen named Anthony Cramer, who was convicted of treason after assisting German saboteurs who were ultimately prosecuted and sentenced to death.<sup>269</sup> This point is instructive for both assessing Medina's conduct in the trial, as

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<sup>260</sup> *Id.* at 134.

<sup>261</sup> *Id.* at 137.

<sup>262</sup> *Id.* at 137–38. For more information, see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 17 (2000) (noting "that the Attorney General's List would continue to be a blackballing mechanism" and that "known membership in a listed group meant the end of government employment").

<sup>263</sup> *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 497.

<sup>264</sup> *See, e.g.*, UROFSKY & FINKELMAN, *supra* note 212, at 758–59.

<sup>265</sup> *Id.* at 759.

<sup>266</sup> UROFSKY, *supra* note 183, at 175.

<sup>267</sup> *See* NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 340; *see also* UROFSKY, *supra* note 183, at 175.

<sup>268</sup> *Communist Trial Ends With 11 Guilty*, LIFE, Oct. 24, 1949, at 31–35.

<sup>269</sup> SABIN, *supra* note 207, at 42–43. The decision is *Cramer v. United States*, 325 U.S. 1 (1945). Jackson authored the majority with Frankfurter joining. *Id.* Frankfurter realized that



well as the Court's approach to *Dennis*. In *Ex parte Quirin*, a decision arising out of the German saboteurs military trial, the Court upheld the executive branch's authority to conduct military trials over captured enemy combatants.<sup>270</sup> The Court hinted that, although due process might apply to those trials, this issue would be saved for another day.<sup>271</sup> Cramer, who was prosecuted and convicted in a United States district court, saw his conviction overturned by the Supreme Court on the basis that the quantum of evidence required to prove treason, a crime singularly enumerated in the Constitution, required an overt act, and the act had to be done with the intent of being treasonous.<sup>272</sup> In other words, proof of treason required more than making public speeches.

The *Dennis* defendants were not, however, convicted of treason, but rather of violating a statute, and the issue was rooted in the First Amendment rather than in the text of a constitutional article.<sup>273</sup> The United States Court of Appeals for the Second Circuit upheld the convictions in a decision authored by Judge Learned Hand.<sup>274</sup> In doing so, the appellate court modified the "clear and present danger" test, to "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>275</sup> Because the defendants raised the issue of judicial misconduct, Hand felt compelled to comment:

The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, who, if at times he did not conduct himself with the imperturbability of a Rhadamanthus, showed considerably greater self-control and forbearance than it is given to most judges to possess.<sup>276</sup>

The Court, in a plurality opinion, upheld the convictions and adopted Hand's reasoning, but it had to address Medina's conduct, as well as the status of the defense

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the decision would set a citizen free who had aided the German saboteurs but wrote Jackson on this point:

I myself am not troubled by the fear that "A traitor could not be convicted of treason in a case like *Cramer*." In the first place that assumes . . . he is a traitor, and in the second place it disregards the readiness of the Constitution to let some traitors escape in order to make it more difficult to manufacture evidence against people who are not traitors.

Letter from Justice Felix Frankfurter to Justice Robert H. Jackson (Mar. 24, 1944) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 131).

<sup>270</sup> 317 U.S. 1 (1942).

<sup>271</sup> UROFSKY & FINKELMAN, *supra* note 212, at 727.

<sup>272</sup> *Cramer*, 325 U.S. at 47.

<sup>273</sup> *Dennis v. United States* 341 U.S. 494, 495–96 (1951).

<sup>274</sup> *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950) (Judge Hand was joined by Thomas Swan and Harrie Brigham Chase concurred.).

<sup>275</sup> *Id.* at 212.

<sup>276</sup> *Id.* at 226.

counsel.<sup>277</sup> It granted certiorari on October 23, 1950, and set the date for oral arguments for December 4, of the same year.<sup>278</sup> The *Dennis* defendants retained Harry Sacher,<sup>279</sup> Richard Gladstein,<sup>280</sup> George W. Crockett<sup>281</sup> and Abraham Isserman<sup>282</sup> as counsel. Judge Medina had held each of these attorneys in contempt, and soon the United States Court of Appeals for the Second Circuit was to review the contempt findings in a split decision, analyzed further below.<sup>283</sup> While that contempt finding traversed the federal courts, the attorneys argued for a brief delay,<sup>284</sup> in all likelihood hoping for a published statement on their pending contempt cases.

The vehicle for getting the Court to publish a decision on the delay request was to petition Chief Justice Vinson to grant an additional month of preparation so that a noted British barrister could argue in their place should the need arise.<sup>285</sup> To prove the necessity of obtaining foreign counsel, Sacher informed Vinson that “twenty-four American lawyers” were invited to participate in the case, but had declined to do so.<sup>286</sup> On learning of the delay request, Vinson informed the Justices and accused the attorneys of failing “to state a substantial ground for the relief requested, and the aura of dilatory tactics pervading it.”<sup>287</sup> On November 24, 1950, Vinson circulated a more formal conference memorandum that he intended to publish into a decision, acknowledging that the attorneys had requested twenty-four of the nation’s most prominent counsel, and each of the twenty-four had “declined to associate” with the appeal.<sup>288</sup> But, he dismissed

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<sup>277</sup> Sacher v. United States, 341 U.S. 1, 13–14 (1951).

<sup>278</sup> Dennis v. United States, 340 U.S. 863 (1950).

<sup>279</sup> Sacher was a long-time CPUSA member. See *Harry Sacher, Lawyer, Dead; Red's Counsel Defied Senators*, N.Y. TIMES, May 23, 1963, § 11 (Magazine), at 35.

<sup>280</sup> Gladstein was a labor lawyer based in San Francisco. See H.R. REP. NO. 8-41, at 20. His clients included Harry Bridges, and John Caughlan, a Washington state lawyer indicted for perjury in denying he had been a CPUSA member. REGISTER OF THE RICHARD GLADSTEIN PAPERS, 1930–1969, ONLINE ARCHIVE OF CALIFORNIA (2009), <http://www.oac.cdlib.org/findaid/ark:/13030/tf9489p0fn?query=register> (last visited Mar. 15, 2012).

<sup>281</sup> George Crockett was a New Deal lawyer employed in the Department of Labor from 1939 to 1943. Comm. on House Admin. of the U.S. House of Representatives, *George William Crockett, Jr.* (1909–1997), in BLACK AMERICANS IN CONGRESS, 1870–2007, at 506 (2008). A 1934 graduate of the University of Michigan Law School, Crockett was one of the first African Americans to practice law in Florida. *Id.* After his government service, he represented the United Auto Workers. *Id.* While he was not a CPUSA member, he was openly critical of McCarthy and the House Un-American Activities Committee. See *id.*; *George W. Crockett, Jr.*, CROCKETTACADEMY.COM (2011), [http://www.crockettacademy.com/uploads/4/3/9/7/4397552/george\\_crockett\\_bio.pdf](http://www.crockettacademy.com/uploads/4/3/9/7/4397552/george_crockett_bio.pdf) (last visited Mar. 15, 2012).

<sup>282</sup> For information on Abraham Isserman, see H.R. REP. NO. 8-41, at 8.

<sup>283</sup> See *infra* notes 335–44 and accompanying text.

<sup>284</sup> Dennis v. United States, 340 U.S. 887, 887 (1950) (Frankfurter, J., individual statement).

<sup>285</sup> *Id.*

<sup>286</sup> Memorandum from Chief Justice Fred M. Vinson to the Conference (Nov. 22, 1950) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

<sup>287</sup> *Id.*

<sup>288</sup> Memorandum from Chief Justice Fred M. Vinson to the Conference (Nov. 24, 1950) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

the argument that since twenty-four eminent attorneys had refused to represent Dennis and that their American attorneys worked under a contempt sentence, only a noted foreign counsel could salvage the fairness required by the Due Process Clause.<sup>289</sup> Moreover, Vinson opined that the twenty-four counsel refused to join the defense because they would not have control over “tactics which they would disapprove.”<sup>290</sup>

Vinson also added that he was not opposed to permitting the British attorney to join the defense team, but opposed a delay for this purpose.<sup>291</sup> The attorneys had claimed that the British attorney required an additional month because he was involved in a trial in India.<sup>292</sup> On this point, the Chief Justice added the delay was unnecessary because Sacher and Isserman, in particular, were, “innately familiar with the case, from the details of the record to the broad constitutional questions presented. In their appearance both here and in the court of appeals they have made able, concise and lawyerly arguments.”<sup>293</sup>

Black opposed publishing a response, writing that it was “inappropriate for the Court to adopt the extraordinary procedure of writing a formal opinion to defend its action.”<sup>294</sup> He also accused Vinson of gratuitously defending the twenty-four attorneys who refused to join in the *Dennis* appeal.<sup>295</sup> As to Isserman, Sacher, and the others, he concluded “whatever their legal skills, the District Court has held these same lawyers guilty of contempt of court for the manner in which they tried these very cases.”<sup>296</sup>

More than Black, Douglas expressed his offense at Vinson’s draft, claiming that it left him with the impression that the denial of postponing oral argument occurred because the counsel were Communists representing Communists.<sup>297</sup> He threatened to publish a dissent from the denial of delay, which would include that, while he did not know the reasons for twenty-three of the twenty-four attorneys who refused to participate, he did know the reasons of one.<sup>298</sup> “[H]e did so not on the grounds advanced in the [Chief’s] opinion but because he would lose clients if he accepted the retainer.”<sup>299</sup>

Although Frankfurter did not oppose a published denial of the delay, and drafted a proposed decision, he was appalled at Vinson’s memorandum for two reasons.<sup>300</sup>

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Draft *Dennis* Concurrence and Dissent by Justice Hugo L. Black (Nov. 24, 1950) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> Memorandum from Justice William O. Douglas to the Conference (Nov. 24, 1950) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 206).

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> Memorandum from Justice Felix Frankfurter to the Conference (Nov. 24, 1950) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 126).

First, he believed Vinson was dishonest in claiming that the appellants were well represented by “unshackled lawyers,” pointing out that the government had already committed misconduct against the *Dennis* defendants on the very issue their lawyers raised.<sup>301</sup> Namely, Herbert Vere Evatt, an Australian jurist who had been the Commonwealth’s attorney general in World War II, President of the United Nations General Assembly, and one of the Universal Declaration of Human Rights principal architects, had offered to serve as lead counsel.<sup>302</sup> But, the American embassy in Sydney refused to admit him into the United States for this purpose, falsely claiming that a non-American could not argue before the Court.<sup>303</sup> Second, Frankfurter urged that Vinson’s proposed response would provide the CPUSA a source for propaganda:

To charge these lawyers with dilatory tactics—always bearing in mind that propaganda is to be attributed to them—is to lay ourselves open to righteous indignation on their part that they are embarrassed in the fair presentation of their cause by manifestations of prejudice on the part of this Court.<sup>304</sup>

In the end, no unified published reason for refusing the delay was issued. Frankfurter’s proposal included a statement lauding the qualifications of the *Dennis* defense attorneys, which might have convinced the appellate court considering the contempt findings to reverse.<sup>305</sup> Jackson believed this would occur and opposed Frankfurter’s draft.<sup>306</sup> Black did not necessarily disagree with Frankfurter, but he clearly wanted to avoid any comment because he supported the delay. Vinson and Minton, who would write the majority decision in *Dennis*, would not accept Frankfurter’s version.<sup>307</sup> Thus, no reason for the denial was ever published. Yet, the *Dennis* defense attorneys had raised a valid argument to the Court, which Black found compelling.<sup>308</sup> If, because

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<sup>301</sup> *Id.*

<sup>302</sup> See generally KYLIE TENNANT, *EVATT: POLITICS AND JUSTICE* (1970).

<sup>303</sup> Memorandum from Justice Felix Frankfurter to the Conference, *supra* note 300. On Herbert Vere Evatt, see TENNANT, *supra* note 302. Evatt had also served as a Justice on Australia’s High Court, and, having published in the *Harvard Law Review*, was familiar with some of the United States’ legal processes. See *id.*; H.V. Evatt, *The Judges and the Teachers of Public Law*, 53 HARV. L. REV. 1145 (1940). Additionally, he corresponded with Frankfurter and Louis Brandeis in the 1930s and 1940s, mainly about Zionism and the potential formation of the state of Israel. TENNANT, *supra* note 302.

<sup>304</sup> Memorandum from Justice Felix Frankfurter to the Conference, *supra* note 300.

<sup>305</sup> *Id.* Frankfurter published a brief version of his proposal. *Dennis v. United States*, 340 U.S. 887 (1950).

<sup>306</sup> Memorandum from Justice Felix Frankfurter to the Conference, *supra* note 300.

<sup>307</sup> *Dennis*, 340 U.S. at 887; Memorandum from Chief Justice Fred M. Vinson to the Conference (Nov. 24, 1950) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

<sup>308</sup> William O. Douglas, *The Black Silence of Fear*, N.Y. TIMES, Jan. 13, 1952 (Magazine), at 37–38.

of the government's conduct, the independent bar was frightened from defending notorious persons, how could a fair trial be had?

One other note on Frankfurter's conduct is important. In *Dennis*, he was inconsistent with his published decision.<sup>309</sup> Although he admired Judge Learned Hand and had once lobbied Roosevelt to place Hand on the Supreme Court,<sup>310</sup> he also believed Hand had exaggerated the threat of internal Communism.<sup>311</sup> To his clerk, and future Attorney General, Elliot Richardson, he wrote that Hand had abandoned "Holmes' 'clear and present danger test,'" and expanded the "probability of future danger" to an evidentiary proof "big enough to outweigh the 'mischief' of suppressing speech."<sup>312</sup> More troubling to Frankfurter, Hand "derive[d] this probability from the success of Communists in capturing some other countries, not from an examination of where they [were] in our own country, which [was] about the lowest ebb of their fortunes."<sup>313</sup> Finally, Frankfurter cautioned that Hand had ignored the possible misuse of the newer test in suppressing free speech.<sup>314</sup>

Richardson himself was a talented attorney. Prior to clerking for Frankfurter, he clerked for Hand.<sup>315</sup> Richardson lauded Hand's extension of the clear and present danger test in *Dennis*, penning to the Judge, "I have frequent occasion to return to your *Dennis* opinion and I come away from it each time with increased admiration. . . . I knew it was a great opinion when I first read it—now I really *know* it."<sup>316</sup> He also praised Vinson's opinion in *American Communications Association v. Douds*.<sup>317</sup> "Someone, I think, deserves great credit for the Chief's opinion in *C.I.O. v. Douds*. It seems to me a very able analysis of the relevant issues," he wrote to Frankfurter.<sup>318</sup> Although Frankfurter disagreed with his former clerk's assessment,<sup>319</sup> this did not prevent the Justice from consulting Richardson in future cases.<sup>320</sup>

<sup>309</sup> Compare *Dennis*, 340 U.S. at 888 (1950) (Frankfurter, J., individual statement), with *Dennis v. United States*, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring in affirmance).

<sup>310</sup> JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 216 (2004).

<sup>311</sup> See *infra* note 313 and accompanying text.

<sup>312</sup> Letter from Justice Felix Frankfurter to Elliot Richardson (Nov. 17, 1950) (on file with Library of Congress, Manuscript Division, Papers of Elliot Richardson, Box 50).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> See Neil A. Lewis, *Elliot Richardson Dies at 79; Stood Up to Nixon and Resigned in 'Saturday Night Massacre'*, N.Y. TIMES, Jan. 1, 2000, at B7.

<sup>316</sup> Letter from Elliot Richardson to Judge Learned Hand (Aug. 9, 1951) (on file with Library of Congress, Manuscript Division, Papers of Elliot Richardson, Box 51).

<sup>317</sup> Letter from Elliot Richardson to Justice Felix Frankfurter (May 20, 1950) (on file with Library of Congress, Manuscript Division, Papers of Elliot Richardson, Box 50).

<sup>318</sup> *Id.*

<sup>319</sup> See *supra* notes 311–14 and accompanying text.

<sup>320</sup> See generally Correspondence from Elliot Richardson to Justice Felix Frankfurter (on file with Library of Congress, Manuscript Division, Papers of Elliot Richardson, Boxes 50–51).

*D. The Court Under Attack*

Between the *Dennis* decision and the attorney contempt challenges, a potentially serious matter affecting judicial conduct came before the Court. In 1948, HUAC accused Alger Hiss, a prominent former government officer and Roosevelt lawyer who had served as the Secretary General of the United Nations Conference on International Organization, which formulated the United Nations Charter, of spying for the Soviet Union.<sup>321</sup> Although Hiss was never prosecuted for espionage, he was twice prosecuted for perjury in 1949 and 1950 respectively.<sup>322</sup> Hiss had also been a Frankfurter protégé in law school,<sup>323</sup> and both Frankfurter and Reed testified in his defense as character witnesses,<sup>324</sup> though Hiss's conviction evidenced the testimony was not helpful.<sup>325</sup>

In 1951, Congressman Joseph R. Bryson of South Carolina introduced a bill in the House of Representatives prohibiting Supreme Court Justices from testifying in future cases.<sup>326</sup> Bryson provided a copy of the draft bill to Vinson, hoping for the Chief Justice's quiet approval.<sup>327</sup> Vinson sought Black's opinion as to whether he should respond to Bryson at all.<sup>328</sup> Black urged Vinson not to comment on the proposed bill for two reasons: first, Black believed the bill was unconstitutional because it deprived defendants of their right to present a full defense; and second, the Court had no business advising Congress on how to perfect any law.<sup>329</sup> Vinson agreed with Black's assessment that the bill was a retreat from the Bill of Rights, and that it was aimed against Frankfurter.<sup>330</sup> Nonetheless, Vinson did not appear to consider that the pending House bill was also related to the attorney discipline cases then percolating through the judiciary, while Black believed that since some of the attorneys found guilty of contempt were known to the Court, the proposed bill was an attempt to stifle full consideration of the matter.<sup>331</sup>

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<sup>321</sup> See LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789–2008*, at 233 (2009); G. EDWARD WHITE, *ALGER HISS'S LOOKING-GLASS WARS: THE COVERT LIFE OF A SOVIET SPY* 52–60 (2004).

<sup>322</sup> WHITE, *supra* note 321, at 68, 74, 81.

<sup>323</sup> See *id.* at 12–13.

<sup>324</sup> *Id.* at 68.

<sup>325</sup> See *id.* at 81. Hiss was Justice Oliver Wendell Holmes, Jr.'s clerk for the 1929 Term. G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 464 (1993).

<sup>326</sup> Letter from Chief Justice Fred M. Vinson to Justice Hugo L. Black (June 15, 1951) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Letter from Justice Hugo L. Black to Chief Justice Fred M. Vinson (June 19, 1951) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 306).

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

One year earlier, journalist Westbrook Pegler accused Frankfurter of Communist loyalties through his defense of Alger Hiss.<sup>332</sup> In response, Congressman Bryson publicly considered subpoenaing the Justice, and Black took notice.<sup>333</sup> “There are ominous signs that Justice Frankfurter is about to be made the target of powerful forces gathering strength from the present national hysteria,” he warned his former clerk and now Yale professor John Paul Frank.<sup>334</sup>

#### E. *United States v. Sacher*

As previously noted, the attorneys who defended the *Dennis* defendants became defendants in contempt proceedings after Judge Medina concluded that they had conspired to subvert the trial proceedings through disrespect of the court and disruption of its proceedings.<sup>335</sup> In the first paragraph of his contempt ruling, Medina stated that he would have overlooked the conduct of the defense counsel, but could not do so because the conduct was the result of a conspiracy to cause delay and confusion, provoke a mistrial, and impair the judge’s health.<sup>336</sup> To this end, he found Sacher, Gladstein, Crockett, Isserman, Dennis (who defended himself), and McCabe guilty of over twenty-five contemptuous acts, and sentenced each to between one and six months in confinement and subject each to fines.<sup>337</sup>

On April 5, 1950, a three judge panel of the United States Court of Appeals for the Second Circuit modified Judge Medina’s contempt finding in *Sacher*.<sup>338</sup> The modification occurred as a result of a three-way split amongst Judges Augustus Hand, Jerome Frank, and Charles Clark.<sup>339</sup> Writing for the majority and without the detailed legal analysis that he was noted for, Hand wanted to uphold Medina’s decision in its entirety.<sup>340</sup> Frank found that the evidence to prove contempt was clear, but not proof of conspiracy to commit contempt.<sup>341</sup> He also conceded that Medina may have been intemperate and issued reversible rulings, but this was not an excuse for counsel’s

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<sup>332</sup> See Westbrook Pegler, *Acheson, Frankfurter and Hiss*, MILWAUKEE SENTINEL, Jan. 12, 1949, at 10.

<sup>333</sup> Letter from Justice Hugo L. Black to John Paul Frank (Feb. 28, 1950) (on file with Library of Congress, Manuscript Division, Papers of John Paul Frank, Box 1).

<sup>334</sup> *Id.*

<sup>335</sup> See *United States v. Sacher*, 9 F.R.D. 394, 394 (S.D.N.Y. 1950).

<sup>336</sup> *Id.* at 395.

<sup>337</sup> *United States v. Sacher*, 182 F.2d 416, 418 (2d Cir. 1950).

<sup>338</sup> *Id.* at 417. Of interest, Irving Saypol, the lead prosecutor in the trial of Ethel and Julius Rosenberg, argued for the government to the Second Circuit in *Sacher*. *Id.*; see also Douglas Linder, *The Rosenbergs Trial*, JURIST LEGAL NEWS & RESEARCH: U. PITT SCH. OF LAW (2000), available at <http://jurist.law.pitt.edu/famousrials/rosenbergs.php> (last visited Mar. 15, 2012).

<sup>339</sup> *Sacher*, 182 F.2d at 418, 453, 463.

<sup>340</sup> *Id.* at 421. On Hand’s judicial reputation see Mark A. Fulks, *Hand, Augustus Noble*, in 1 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA, 311, 311–17 (John R. Vile ed. 2003), and Charles E. Clark, *Augustus Noble Hand*, 68 HARV. L. REV. 1113–15 (1955).

<sup>341</sup> *Sacher*, 182 F.2d at 455 (Frank, J., concurring).

conduct.<sup>342</sup> Indeed, Medina's contribution to the disorder during trial undermined the claim of a conspiracy.<sup>343</sup> Proof of conspiracy requires evidence of an agreement, and Frank pointed out that if any agreement existed, it was not formulated in Medina's presence.<sup>344</sup> Implicit in this finding was that Medina's conduct stoked the defense counsels' outrageous conduct.<sup>345</sup> Therefore, Frank thought that Medina should have asked for another judge to hold the contempt hearing, and permitted the defense counsel time to provide a full defense.<sup>346</sup> But, since the conspiracy basis for the contempt conviction was overturned,<sup>347</sup> Frank was unwilling to dissent from Hand's decision.<sup>348</sup> In his dissent, Clark did not urge that the evidence failed to support Medina's findings, but, rather, he argued that the counsel had the right to a full hearing before a different judge.<sup>349</sup> As a result of this split, it was likely that the Court would grant certiorari. However, it did not initially do so. On June 4, 1951, with Black, Douglas, and Frankfurter in opposition, the Court denied certiorari.<sup>350</sup> Frankfurter, however, lobbied Jackson to reconsider his opposition to a review based on the American Bar Association's (ABA) conduct.<sup>351</sup>

Shortly before the Court denied certiorari, the conservative American Bar Association's House of Delegates passed a resolution condemning the conduct of the attorneys and calling for lifetime disbarment.<sup>352</sup> At almost the same time, the

<sup>342</sup> *Id.* at 454.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 455.

<sup>345</sup> *Id.* at 454.

<sup>346</sup> *Id.* at 455.

<sup>347</sup> *Sacher*, 182 F.2d at 420 (majority opinion).

<sup>348</sup> *Id.* at 455 (Frank, J., concurring).

<sup>349</sup> *Id.* at 464–66 (Clark, J., dissenting).

<sup>350</sup> 341 U.S. 952 (1951).

<sup>351</sup> See *infra* notes 354–78 and accompanying text.

<sup>352</sup> See *Proceedings of the House of Delegates*, 75 ANN. REP. A.B.A. 102, 148–49 (1950).

The ABA declared that every attorney should:

[W]ithin a reasonable time and periodically thereafter, to file an affidavit stating whether he is or ever has been a member of the Communist party, or affiliated therewith, and stating also whether he is or ever has been a member or supporter of any organization that espouses the overthrow, by force or by any illegal or unconstitutional means, of the United States Government, or the government of any of the states or territories of the United States; and in the event such affidavit reveals that he is or ever has been a member of said Communist Party, or of any such organization, that the appropriate authority promptly and thoroughly investigate the activities and conduct of said member of the Bar to determine his fitness for continuance as an attorney.

*Id.*

In 1951, the ABA recommended expulsion of all CPUSA members from state bars. See *Proceedings of the House of Delegates: February 26–27, Chicago*, 37 A.B.A. J. 309, 312 (1951). However, not all of the delegates supported this policy. See *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy*, 37 A.B.A. J. 123, 123 (1951).



CPUSA threatened public protests if the lawyers were not cleared.<sup>353</sup> Both groups infuriated Frankfurter. He wrote to the conference:

It is one thing to be disdainful of personal attacks, no matter how untrue and malevolent that may be . . . . It is quite another thing to disregard efforts broadcast throughout the land to have either the Communist Party or the American Bar Association displace this Court in the discharge of its constitutional duty of deciding cases properly before it, or at least creating serious public sentiment in relation to adjudications not yet rendered.<sup>354</sup>

He then claimed he was inclined to issue an order to the American Bar Association's leadership "to show cause why an attachment for contempt should not issue against the American Bar Association, who should certainly know better . . . ."<sup>355</sup>

Alone, this was not enough to sway Jackson, but Frankfurter, knowing that the acrimony between Black and Jackson precluded Black's success in lobbying Jackson, continued to try.<sup>356</sup> He dangled the possibility that neither he nor Black would criticize Judge Medina in a dissent.<sup>357</sup> Jackson had, in fact, worried that Frankfurter, Douglas, and Black would attack Medina in their decisions, and he expressed reservations about publishing a decision in which he had to defend Medina, who he also believed had conducted himself poorly.<sup>358</sup> Frankfurter promised Jackson:

A final word about the *Sacher* case. I go bail that Hugo and I will accept anything that you may write in judgment upon Medina's conduct and not say anything on our own account. As to that, if we draw any legal conclusion different from the way in which you will characterize the conduct of the trial it will be as legal propositions, quietly stated.<sup>359</sup>

To this entreaty, Jackson responded that he did not oppose Frankfurter or Black criticizing Medina in a dissent.<sup>360</sup> "Under no circumstances would I want either Hugo

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<sup>353</sup> Memorandum from Justice Felix Frankfurter to the Conference (Feb. 27, 1951) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 312).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> Letter from Justice Felix Frankfurter to Justice Robert H. Jackson (Oct. 8, 1951) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>357</sup> Letter from Justice Felix Frankfurter to Justice Robert H. Jackson (Oct. 4, 1951) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> Letter from Justice Robert H. Jackson to Justice Felix Frankfurter (Oct. 6, 1951) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

or you to forego the expression of your own opinions on any phase of the case. My problem is whether a grant of a rehearing would serve any purpose," he answered Frankfurter.<sup>361</sup> Yet, he agreed that the Court, at some point, should "make a clear statement of the duty of the bar," to include the representation of unpopular persons.<sup>362</sup> However, having retreated from a concern over the Court disparaging Medina,<sup>363</sup> Jackson saw one of two undesirable outcomes from a decision.<sup>364</sup> Because Clark was likely to recuse himself, the Court would divide four against four resulting in the contempt charges remaining intact.<sup>365</sup> "That would do no good to the defendants, no good to the profession, no good to the law, and none to the Court," he concluded.<sup>366</sup> And, even if Clark did not recuse himself, the Court would be split five-to-four with the contempt charges intact, but giving Black a platform to claim that the majority enabled the further erosion of freedom of speech.<sup>367</sup>

Frankfurter responded to Jackson, agreeing that Jackson's perceived outcomes were likely.<sup>368</sup> He also joined Jackson in criticizing Black and Douglas as undermining the efficacy of trial judges.<sup>369</sup> On the other hand, he urged Jackson that the Court had to make a statement "as [to] the obligations of an independent bar in a democratic society."<sup>370</sup> To this end, Frankfurter wanted Jackson to write the majority opinion, knowing that it would be in opposition to his dissent, because he worried about a Vinson, Minton, or Reed opinion providing propaganda for the CPUSA.<sup>371</sup> Frankfurter, moreover, sought a balance between maintaining a trial judge's contempt authority, but, at the same time, putting the ABA on notice that the Court was displeased with its conduct.<sup>372</sup> This was not all Frankfurter shared.<sup>373</sup> There was one point, in particular, involving Roosevelt's second Vice President that he brought to Jackson's attention.<sup>374</sup>

Let me refer you to a new bit of evidence of the fear that is at present holding our profession. Henry Wallace is to appear shortly before the McCarran Committee, in connection with the China

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* Jackson concluded, "Others, unless they have changed their views, would announce and probably amplify the doctrine of 'free speech in the courtroom,' which I think is a vicious doctrine that would do more harm to the judicial process than affirmation." *Id.*

<sup>368</sup> Letter from Justice Felix Frankfurter to Justice Robert H. Jackson, *supra* note 356.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

post-mortem. It is hard to believe but it is a fact that at least half a dozen reputable lawyers have refused to appear with him. Some of them gave silly excuses but a few of them had at least the candor to say they do not want to get mixed up in this Communist business.<sup>375</sup>

Frankfurter went on to urge Jackson with the understatement that “the general atmosphere that has been created is very unhealthy.”<sup>376</sup>

On the same day he lobbied Jackson, Frankfurter also drafted a memorandum to the entire conference arguing for reconsideration in the *Sacher* case.<sup>377</sup> Although he criticized Black and Douglas, who threatened to publish a dissent from the denial of *certiorari*—Frankfurter called it “a recent innovation resorted to only by some of the Justices”—he also urged that the Court issue a statement to allay fears against representing CPUSA members or other persons deemed as subversive.<sup>378</sup>

On October 9, 1951, Jackson circulated a memorandum explaining that he had reconsidered his earlier vote and wanted to have a new vote on whether to grant *certiorari*.<sup>379</sup> Jackson notified the conference that “[e]vents have magnified the importance of issues involved in this case since the Court, with my concurrence, denied petition for review.”<sup>380</sup> Also, before listing his reasons for urging reconsideration of denial, Jackson placed the blame squarely on the government, arguing that it had “instituted a program which threatens to put in the courts in different parts of the country many prosecutions of Communists.”<sup>381</sup> Because fair trials were a constitutional right, Jackson now reasoned that some statement had to be made to the independent bar.<sup>382</sup> He conceded to the conservative majority that his concern was not about the particular attorneys Medina found in contempt, but rather the perception of fairness on the whole.<sup>383</sup> To Frankfurter, and presumably Black and Douglas, he also acknowledged

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<sup>375</sup> *Id.* Frankfurter also alluded to Brandeis’s view on the role of the Court. *Id.* Brandeis said that the most important function of this Court is that of a national educator. I repeat, because I believe so strongly, that an opinion by you in this case would be a powerful lifter of fear, a dissipater of a good deal of nonsense, and an instiller of traditional manliness in our profession.

*Id.*

<sup>376</sup> *Id.*

<sup>377</sup> Memorandum from Justice Felix Frankfurter to the Conference (Oct. 8, 1951) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>378</sup> *Id.*

<sup>379</sup> Memorandum from Justice Robert H. Jackson to the Conference (Oct. 9, 1951) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *See id.*; U.S. CONST. amend VI.

<sup>383</sup> *See* Memorandum from Justice Robert H. Jackson to the Conference, *supra* note 379.

that since Medina's ruling, Communists found themselves unable to secure zealous counsel, unless the counsel was affiliated with the CPUSA.<sup>384</sup>

On the other hand, Jackson hinted that he would vote to uphold the Second Circuit's decision against the attorneys writing, "I had no belief in the claim that no recognized leaders of the bar could be induced to take the *Dennis* case. It admittedly involved one of the important constitutional questions of our day and was certain to reach the highest court."<sup>385</sup> But he insisted that, instead of selecting such a counsel, the defendants selected counsel who protected the "interests of the Communist party," instead of their client, the defendants.<sup>386</sup>

Jackson criticized Medina as well, attributing to him an "unnecessary" charge of conspiracy, that the appellate court, in his opinion, rightly overturned.<sup>387</sup> Jackson conceded that neither Medina's conduct, as modified by the appellate court, nor the broader question of the independent bar presented a means for certiorari.<sup>388</sup> However, he noted that since the Court had never addressed whether Federal Rule of Criminal Procedure 42(a)<sup>389</sup>—the contempt rule—permitted a summary contempt hearing after the conclusion of trial, this would be the singular issue as to which he would agree to grant certiorari.<sup>390</sup>

With Black, Douglas, Frankfurter, and now Jackson, enough votes were achieved to grant certiorari, and the Court did so on October 22.<sup>391</sup> However, Jackson would not join with the dissenters, and, indeed, to Frankfurter's relief, Vinson assigned him to write for the majority.<sup>392</sup> On January 9, 1952, Paul L. Ross argued on behalf of the petitioner attorneys to the Court.<sup>393</sup> In 1949, *Life Magazine* listed Ross as a "dupe" of the CPUSA.<sup>394</sup> Two years earlier, Ross had run for mayor of New York City on the American Labor Party (or Socialist) ticket.<sup>395</sup> Joining Ross on the appeal were Martin Popper of the National Lawyers Guild, Earl B. Dickerson, a prominent African American civil rights attorney, and Robert W. Kenny, who was a former California Attorney General and president of the Los Angeles chapter of

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<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> See FED. R. CRIM. P. 42(a).

<sup>390</sup> Memorandum from Justice Robert H. Jackson to the Conference, *supra* note 379.

<sup>391</sup> *Sacher v. United States*, 342 U.S. 858 (1951).

<sup>392</sup> *Sacher v. United States*, 343 U.S. 1, 3 (1952).

<sup>393</sup> Memorandum from Justice Robert H. Jackson to the Conference, *supra* note 379.

<sup>394</sup> *Red Visitors Cause Rumpus: The Russians Get a Big Hand from US Friends*, LIFE, Apr. 4, 1949, at 39, 42. Life Magazine listed Ross alongside of Adam Clayton Powell and Albert Einstein as having given support to Communism. *Id.*

<sup>395</sup> See VOTE FOR MAYOR, NEW YORK CITY, 1950–1953, THE WORLD ALMANAC AND BOOK OF FACTS FOR 1957, at 299 (Harry Hansen ed., 1957).

the National Lawyers Guild.<sup>396</sup> In 1942, Kenny, along with Wendell Willkie, defended William Schniederman.<sup>397</sup>

Although it was clear from the conference that Jackson would vote to sustain the contempt findings and the sentences,<sup>398</sup> he shared his drafts with Frankfurter, who in retrospect appears to have guided the majority opinion even though he was a dissenter.<sup>399</sup> Initially Jackson's draft opinion noted that in two decisions, *Dennis* and *Sacher*, six "judges with trial and appellate experience almost unparalleled in length and variety, had occasion to consider the contempt charges."<sup>400</sup> Frankfurter agreed that Jackson had fairly characterized the attorneys' conduct,<sup>401</sup> but he took exception that Jackson cited to *Dennis*.<sup>402</sup> "[W]hat L. Hand, with the concurrence of Swan and Chase, said about this conduct in the *Dennis* case is no more relevant to judgment on the procedure in dealing with that conduct than is my equally condemnatory conduct of them controlling with what I think the proper procedure should have been," Frankfurter urged.<sup>403</sup> Moreover, he disagreed with Jackson's complimentary tone toward Clark and Frank penning, "I think Clark and Frank stick enough feathers in their own heads without having you further adorning them."<sup>404</sup> To this, Jackson responded that the aggregate experience of Judges Augustus Hand and his cousin Learned Hand, as well as Swan, Chase, Frank, and Clark, exceeded the longevity of the six most senior Justices on the Court.<sup>405</sup> Frankfurter prevailed, however, in convincing Jackson to delete compliments to Frank and Clark.<sup>406</sup> "They are, neither, exemplars as judges and you ought not contribute needlessly to their already unbridled vanity," he concluded.<sup>407</sup>

In *Sacher v. United States*, Jackson, writing the majority opinion, concluded that Medina's authority to sit in judgment of the contempt proceedings remained intact,

<sup>396</sup> *Sacher*, 343 U.S. at 3. On Dickerson, see generally ROBERT J. BLAKELY, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY (2006). On Robert E. Kenny, see ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 171–73 (1997). On Martin Popper, see 81 H.R. REP. NO. 3123, at 18 (1950).

<sup>397</sup> See REGISTER OF THE ROBERT W. KENNY PAPERS, 1823–1975, 3 ONLINE ARCHIVE OF CALIFORNIA, [cdn.calisphere.org/data/13030/b1/tf3199n661/files/tf3199n6b1.pdf](http://cdn.calisphere.org/data/13030/b1/tf3199n661/files/tf3199n6b1.pdf).

<sup>398</sup> See Memorandum from Justice Robert H. Jackson to the Conference, *supra* note 379.

<sup>399</sup> See Letter from Justice Felix Frankfurter to Justice Robert H. Jackson (Jan. 26, 1952) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>400</sup> Draft *Sacher* Opinion by Justice Robert H. Jackson (undated) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>401</sup> See Letter from Justice Felix Frankfurter to Justice Robert H. Jackson, *supra* note 399 ("Count me in . . . as to the 'views of these men's conduct'").

<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> See *id.*

<sup>406</sup> Letter from Justice Felix Frankfurter to Justice Robert H. Jackson (Jan. 27, 1952) (on file with Library of Congress, Manuscript Division, Papers of Robert H. Jackson, Box 168).

<sup>407</sup> *Id.*

even though he was the victim of the contempt.<sup>408</sup> Among other claims, the attorneys argued that because Medina had not immediately acted against them, Due Process required another presumably neutral judge determine whether contempt had actually occurred.<sup>409</sup> On one hand, Jackson recognized that the defense counsel shared much of the ideology of their clients and believed that the attorneys had defended more than the eleven defendants, namely their ideology.<sup>410</sup> On the other hand he acknowledged that the overuse of the contempt power could intimidate the legal profession from defending persons who “are [the] objects of hostility of those in power.”<sup>411</sup> This was the very point that Rutledge and Black dissented on in 1949 in *Fisher v. Pace*.<sup>412</sup> To counter this threat Jackson, made clear that the Court would intervene to protect lawyers.<sup>413</sup> But, Jackson also cautioned that the Court would not “equate contempt with courage or insults with independence.”<sup>414</sup>

Black, Douglas, and Frankfurter separately dissented,<sup>415</sup> though Black and Douglas joined in Frankfurter's more technical dissent.<sup>416</sup> Black reviewed the record to show that Medina had frequently baited the defense counsel, who unfortunately acted contemptuously in turn.<sup>417</sup> To this point, he urged that Medina had ascribed the clients' causes to the counsel:

Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. Yet from the very parts of the record which Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients.<sup>418</sup>

It also disturbed Black that Medina had called the defense counsel “liars” on the record.<sup>419</sup> Black argued, “Liar ordinarily is a fighting word spoken in anger to express

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<sup>408</sup> 343 U.S. 1, 11 (1952). The United States Court of Appeals for the Second Circuit provided a more detailed review of the attorneys' conduct, and concluded that Judge Medina had acted patiently until he could no longer do so without the loss of control over the courtroom. *See United States v. Sacher*, 182 F.2d 416, 423–28 (2d Cir. 1950).

<sup>409</sup> *Sacher*, 343 U.S. at 7.

<sup>410</sup> *See* Letter from Justice Felix Frankfurter to Justice Robert H. Jackson, *supra* note 399.

<sup>411</sup> *Sacher*, 343 U.S. at 11 (internal quotation marks omitted).

<sup>412</sup> 336 U.S. 155, 163, 168 (1949).

<sup>413</sup> *Sacher*, 343 U.S. at 13.

<sup>414</sup> *Id.* at 14 (Black, J., dissenting).

<sup>415</sup> *Id.*; *id.* at 23 (Frankfurter, J., dissenting); *id.* at 89 (Douglas, J., dissenting).

<sup>416</sup> *Id.* at 19 (Black, J., dissenting); *id.* at 89 (Douglas, J., dissenting).

<sup>417</sup> *Id.* at 15–17 (Black, J., dissenting).

<sup>418</sup> *Id.* at 19.

<sup>419</sup> *Id.* at 17.

bitter personal hostility against another. I can think of no other reason for its use here, particularly since the Judge's charge was baseless."<sup>420</sup> As a result of Medina's conduct, Black pressed that Medina had become unfit to serve as judge during the contempt proceedings.<sup>421</sup>

In his dissent, Frankfurter accused Medina of arbitrarily administering the court's contempt power against the defendants.<sup>422</sup> He argued that although the appellate court had reversed the conspiracy charge, the fact that Medina believed a conspiracy existed made his failure to recuse himself inexcusable.<sup>423</sup> It has been alleged that Frankfurter already had slight regard for Medina.<sup>424</sup> This may be why he appended several pages to his opinion detailing Medina's poor conduct from the bench.<sup>425</sup> Yet, Frankfurter partially excused Medina for his judicial conduct when he explained:

But precisely because a judge is human, and in common frailty or manliness would interpret such conduct of lawyers as an attack on himself personally, he should not subsequently sit in judgment on his assailants, barring only instances where such extraordinary procedure is compellingly necessary in order that the trial may proceed and not be aborted.<sup>426</sup>

Douglas's dissent was simply a two paragraph agreement with Frankfurter and Black.<sup>427</sup> It began:

[O]ne who reads this record will have difficulty in determining whether members of the bar conspired to drive a judge from the bench or whether the judge used the authority of the bench to whipsaw the lawyers, to taunt and tempt them, and to create for himself the role of the persecuted.<sup>428</sup>

However, in his draft dissent, he included that Medina was "garrulous, egocentric, [and] publicity minded."<sup>429</sup> Black successfully lobbied Douglas to take this description out, though he admitted he too believed it accurate.<sup>430</sup>

<sup>420</sup> *Id.* at 16.

<sup>421</sup> *Id.* at 17.

<sup>422</sup> *Id.* at 36–39 (Frankfurter, J., dissenting).

<sup>423</sup> *Id.* at 28.

<sup>424</sup> WIECEK, *supra* note 23, at 576.

<sup>425</sup> *Id.*; *Sacher*, 343 U.S. at 42–89.

<sup>426</sup> *Sacher*, 343 U.S. at 35.

<sup>427</sup> *Id.* at 89 (Douglas, J., dissenting).

<sup>428</sup> *Id.*

<sup>429</sup> Draft *Sacher* Dissent by Justice William O. Douglas (Mar. 1952) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 312).

<sup>430</sup> *Sacher*, 343 U.S. at 89; Letter from Justice Hugo L. Black to Justice William O. Douglas (Mar. 1952) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 312).

As a footnote, the United States Senate Subcommittee on Internal Security of the Senate Judiciary Committee subpoenaed Sacher, demanding he testify on April 19, 1955, and answer whether he was ever a CPUSA member, or within the party's legal section.<sup>431</sup> After Sacher refused to answer questions to the subcommittee's satisfaction, he was indicted, convicted, and sentenced to six months imprisonment and fined \$1,000.<sup>432</sup> He appealed to the United States Circuit Court of Appeals for the District of Columbia, but the three judge panel consisting of future Chief Justice Warren Burger, Walter Bastian, and George Thomas Washington, did not provide him relief.<sup>433</sup> In a per curiam decision, the Court remanded the issue to the appellate court for consideration in light of *Watkins v. United States*,<sup>434</sup> a recent decision that curtailed the contempt power of Congress to inquiries which afforded individuals a fair opportunity to ascertain whether they are within their right to answer.<sup>435</sup> *Watkins* was another decision that pitted Black's First Amendment jurisprudence against Frankfurter's belief that the decision rested on statutory grounds, even though the result in each line of argument was to overturn the conviction.<sup>436</sup>

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<sup>431</sup> Sacher v. United States, 240 F.2d 46, 48 (D.C. Cir. 1957).

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at 46, 48. While Sacher was unwilling to answer whether he was ever a CPUSA member, he stated that he had never belonged to an organization which advocated the violent overthrow of the government. *Id.* at 51. In the decision authored by future Chief Justice Burger, the appellate court found Sacher's statements as evidence of contempt. *Id.* at 51–52. In the opinion of the Author, Burger's reasoning was flawed because Sacher believed he was privileged against divulging his political affiliation, not his individual beliefs.

<sup>434</sup> Sacher v. United States, 354 U.S. 930, 930 (1958) (citing *Watkins v. United States*, 354 U.S. 178 (1957)). Authored by Chief Justice Warren, the Court's majority in *Watkins* criticized the operative statute under which HUAC was created:

It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of "un-American"? What is that single, solitary "principle of the form of government as guaranteed by our Constitution"? There is no need to dwell upon the language, however. At one time, perhaps, the resolution might have been read narrowly to confine the Committee to the subject of propaganda. The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date.

*Watkins*, 354 U.S. at 202 (citation omitted).

<sup>435</sup> *Watkins*, 354 U.S. at 215–16.

<sup>436</sup> Frankfurter argued to Warren that *Watkins* was not a First Amendment case. Letter from Justice Felix Frankfurter to Chief Justice Earl Warren (May 27, 1957), *microformed on Felix Frankfurter Papers*, Reel 27, Series II (Harvard Law Sch.). "This on its face is not a First Amendment case . . ." he wrote in the margins of Warren's draft. Draft *Watkins* opinion from Chief Justice Earl Warren to Justice Felix Frankfurter, (May 21, 1957), *microformed on Felix Frankfurter Papers*, Reel 27, Series II (Harvard Law Sch.). In his correspondence to Warren, Frankfurter wrote:

*Watkins* is not a First Amendment case as the emphasis of your opinion overwhelmingly demonstrates. This is by no means a technical point. It



In an *en banc* decision, with four dissenting judges, the appellate court sustained the contempt charge against Sacher.<sup>437</sup> Troubling to Warren, Black, Douglas, Brennan, and Frankfurter, was the purpose behind HUAC's original reason for forcing Sacher to testify; a proposed bill barring CPUSA members from admission to any federal bar. To Black, this decision was yet another example of the government permitting the diminution of the Bill of Rights.<sup>438</sup> Thus, the Court outright reversed itself after its review of the lower court's second decision.<sup>439</sup>

#### F. In re Isserman

*Sacher* was not the only attorney regulation case to arise from *Dennis*. In 1952 the New Jersey Supreme Court upheld a lifetime disbarment of Abraham Isserman, based on the contempt conviction from Judge Medina.<sup>440</sup> Isserman was well known to the Court.<sup>441</sup> He had filed amicus briefs supporting the Jehovah's Witnesses petitioners in *West Virginia Board of Education v. Barnette*, challenging the constitutionality of mandatory flag saluting in the schools.<sup>442</sup> More recently, he successfully represented a petitioner in *Joint Anti-Fascist Refugee Committee v. McGrath*.<sup>443</sup> In issuing its disbarment opinion, the state court found that since the Court had upheld the contempt convictions in *Sacher* and Isserman was included in this decision, the state Ethics Committee had acted reasonably in disciplining Isserman.<sup>444</sup> However, there was an added element to Isserman's disbarment. In 1925, Isserman was convicted of statutory rape, and suspended from practice for six months.<sup>445</sup>

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is very important for us to make clear, as you do make clear, that a witness before a committee may object to questions without having to establish that he is deprived of some right under the First Amendment. . . . I deem the foregoing vital lest witnesses before a congressional committee parrot-like repeat the phrase, "First Amendment, First Amendment, First Amendment." We get into a lot of trouble by talking about the plain and unequivocal language of the First Amendment in its provision about "abridging the freedom of speech."

Letter from Justice Felix Frankfurter to Chief Justice Earl Warren, (May 27, 1957), *microformed on Felix Frankfurter Papers*, Reel 27, Series II (Harvard Law Sch.).

Frankfurter concluded that earlier investigations such as Teapot Dome would have been hampered had Black's First Amendment jurisprudence been accepted. *Id.*

<sup>437</sup> *Sacher v. United States*, 252 F.2d 828 (D.C. Cir. 1958).

<sup>438</sup> See UROFSKY, *supra* note 183, at 177.

<sup>439</sup> *Sacher v. United States*, 356 U.S. 576, 577–78 (1958).

<sup>440</sup> *In re Isserman*, 87 A.2d 903, 904 (N.J. 1952).

<sup>441</sup> Isserman had previously argued before the Court on behalf of defendants affiliated with CPUSA. See COLLINS & CHALTAİN, *supra* note 7, at 118–19.

<sup>442</sup> 319 U.S. 624, 624, 629 (1943).

<sup>443</sup> 341 U.S. 123 (1951).

<sup>444</sup> *In re Isserman*, 87 A.2d at 904–05.

<sup>445</sup> *Id.* at 907.

In *In re Isserman*, the Court, in a decision authored by Chief Justice Vinson, concluded that New Jersey's disbarment of Isserman was lawful.<sup>446</sup> Yet, the issue before the Court was not whether the New Jersey court decided against Isserman in error, but rather whether Isserman should be disbarred for life from practicing before the Supreme Court and, by implication, the federal judiciary.<sup>447</sup> Vinson conceded that under the rule established in *Selling v. Radford*,<sup>448</sup> the federal judiciary was not forced to automatically respect the New Jersey Supreme Court.<sup>449</sup> Having recognized this rule, he did not take exception to any of the State's findings.<sup>450</sup> Instead, Vinson focused on why the Court had the authority to disbar attorneys in the first place, stating that when the Court protects itself, it protects society.<sup>451</sup> He also added that while the New Jersey Supreme Court barely recognized Isserman's 1925 statutory rape conviction, he found it notable that Isserman had never disclosed the conviction when applying to practice before the Court in 1930.<sup>452</sup>

An unusual alliance of Black, Douglas, Frankfurter, and Jackson formed a dissent, which Jackson authored.<sup>453</sup> All four Justices agreed that as a result of *Sacher*, the proceedings against Isserman in the District Court for the Southern District of New York could not be rechallenged.<sup>454</sup> However, that court had simply disbarred Isserman and the others for two years, not life, and the Justices found this reasonable because the attorneys had ultimately not been found guilty of a conspiracy to bring disrepute to the court.<sup>455</sup> The four Justices also took exception to Vinson's commentary regarding Isserman's failure to disclose the 1925 conviction, because the court did not require a disclosure when Isserman applied for admission in 1930.<sup>456</sup>

Relying on the 1830 published *Tillinghast* decision, the dissenters noted that Chief Justice Marshall's decision never held that a conviction for contempt required disbarment.<sup>457</sup> Indeed, historically that had not been the case.<sup>458</sup> The dissent pointed out that in the late nineteenth-century criminal trial of William M. Tweed, attorneys Willard Bartlett, Elihu Root, and David Dudley Field had been held in contempt, but their careers went unhindered after being admonished.<sup>459</sup> Tweed's trial presents an

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<sup>446</sup> 345 U.S. 286, 290 (1953).

<sup>447</sup> *Id.* at 287.

<sup>448</sup> 243 U.S. 46 (1917).

<sup>449</sup> *In re Isserman*, 345 U.S. at 288.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 289.

<sup>452</sup> *Id.* at 290.

<sup>453</sup> *Id.* at 290 (Jackson, J., dissenting).

<sup>454</sup> *Id.* at 290–91.

<sup>455</sup> *Id.* at 291.

<sup>456</sup> *Id.* at 292.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *Id.* at 293. For information on the Tweed trial, see WARREN ZIMMERMAN, *FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER* 129–31 (2002).

interesting analogy. The leader of New York's Democratic Party machine known as Tammany Hall, Tweed controlled much of New York City's corrupt governance, including control over the city's contracts.<sup>460</sup> Tweed was not, however, a member of a political party seeking to alter the United States government. To the dissenters, although Isserman's conduct was intemperate, he was "performing a legitimate function of the legal profession, which is under a duty to leave no man without a defender when he is charged with [a] crime."<sup>461</sup> Moreover, they recognized that on prior instances before the Court, Isserman had conducted himself in a professional manner.<sup>462</sup>

The unified dissent was, in fact, a melding of four separate and very distinct draft dissents, with the four Justices setting aside their differences to make a stronger statement.<sup>463</sup> But this occurred as a result of a compromise.<sup>464</sup> Black believed that Isserman had been denied due process under the Fourteenth Amendment.<sup>465</sup> He found it important that the state ethics committee had passed on a recommendation to the state supreme court before it held a full hearing, and the court adopted the recommendation without ordering a full hearing.<sup>466</sup> Black penned:

The full record persuades me that he was denied an adequate opportunity to confront witnesses against him and to offer evidence in his behalf. Instead of hearing evidence and making its own findings, it adopted those made by a federal district court judge who had summarily convicted [Isserman] of contempt without a hearing.<sup>467</sup>

Jackson's contribution to the published dissent was the clear articulation that Isserman's conduct was spontaneous and not borne from a conspiracy, and therefore

<sup>460</sup> See KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* 2–8 (2005).

<sup>461</sup> *In re Isserman*, 345 U.S. at 293–94 (Jackson, J., dissenting).

<sup>462</sup> *Id.* at 294. The dissenters noted, "On the occasions when Isserman has been before this Court, or before an individual Justice, his conduct has been unexceptionable and his professional ability considerable." *Id.*

<sup>463</sup> See *infra* notes 465–76 and accompanying text.

<sup>464</sup> *Id.*

<sup>465</sup> Draft *In re Isserman* Dissent by Justice Hugo L. Black (undated) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 315).

<sup>466</sup> *Id.* Black wrote on this point:

The challenge to the New Jersey disbarment raises such serious questions that I am unable to dismiss them as lightly as the Court does. I am unable to see from the record in that case where Isserman was afforded the kind of hearing that is a prerequisite of the due process clause [sic] of the Fourteenth Amendment.

*Id.*

<sup>467</sup> *Id.*

a lifetime disbarment was too extreme a sanction.<sup>468</sup> Douglas once more unsuccessfully attempted to provide the dissent with harsher criticism of Medina, writing, “[a] reading of the record in *Dennis v. United States* . . . gave me the distinct impression that neither Judge Medina nor the defense attorneys were without responsibility for the deterioration of the atmosphere of the trial.”<sup>469</sup> In this draft, which he did not show to anyone but Black, Douglas had gone so far as to argue, “Isserman was in my view unjustly convicted of contempt and unjustly sentenced to jail. But even if his conviction was deserved, disbarment need not necessarily follow.”<sup>470</sup> In the end, Black agreed to remove his Fourteenth Amendment argument and Douglas agreed to remove his criticism of Judge Medina in order to form the singular dissent.<sup>471</sup>

Isserman applied to the Court for a rehearing shortly after the decision, based on the rule that the Court could not disbar an attorney without a majority of the Justices participating.<sup>472</sup> As Clark had not participated, he had a valid argument, because *In re Isserman* was decided by a four-to-four vote, but the Court ultimately denied the petition for rehearing.<sup>473</sup> On September 8, 1953, Vinson died after suffering from cardiac arrest.<sup>474</sup> One month later, Black, in his capacity as acting Chief Justice, circulated a reinstatement order to the Court.<sup>475</sup> Reed, Minton, and Burton dissented based on their *In re Isserman* and *Sacher* votes.<sup>476</sup> Black, Jackson, Frankfurter, and Douglas, the four dissenters now constituted a majority, and Isserman was reinstated to the bar in a per curiam decision on October 11, 1954.<sup>477</sup> Although not in the formal record, it was Black who authored the brief per curiam.<sup>478</sup> Contemporaneous with the Court’s reinstatement of Isserman, it issued a per curiam decision holding that New York’s disbarment of Sacher for life was also excessive.<sup>479</sup>

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<sup>468</sup> Draft *In re Isserman* Dissent by Justice Robert H. Jackson (Dec. 17, 1952) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 315).

<sup>469</sup> Draft *In re Isserman* Dissent by Justice William O. Douglas (Mar. 1953) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 315). On April 6, 1953, Douglas dropped his dissent and joined with Black, Jackson, and Frankfurter. See *In re Isserman*, 345 U.S. 286, 290 (1953) (Black, J., dissenting).

<sup>470</sup> Draft *In re Isserman* Dissent by Justice William O. Douglas, *supra* note 469. Douglas also argued that “[a] judge has a duty to prevent misconduct in the courtroom. He has an even greater obligation to refrain from encouraging by his own conduct intemperate behavior on the part of counsel.” *Id.* This language was not included in the final unified dissent. *In re Isserman*, 345 U.S. at 290.

<sup>471</sup> See *In re Isserman*, 345 U.S. at 290.

<sup>472</sup> *In re Isserman*, 348 U.S. 1 (1954) (petition for rehearing).

<sup>473</sup> *Id.* at 1–2.

<sup>474</sup> JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 336 (2002).

<sup>475</sup> Draft *In re Isserman* per curiam Opinion by Justice Hugo L. Black (Oct. 8, 1954) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 315).

<sup>476</sup> *Id.*

<sup>477</sup> *In re Isserman*, 348 U.S. 1 (1954).

<sup>478</sup> Draft *In re Isserman* per curiam Opinion by Justice Hugo L. Black, *supra* note 475.

<sup>479</sup> *Sacher v. Ass’n of the Bar of N.Y.*, 347 U.S. 388, 389 (1954).

*G. Other Prosecutions: Black's Fears of a Double Standard*

In addition to *Sacher* and *In re Isserman*, there were other instances where attorney conduct and trials of CPUSA and other communist sympathizers came to the Court's attention.<sup>480</sup> Two of the more important issues, the Rosenberg trial and another contempt finding, are briefly noted below.<sup>481</sup> Yet, in disbarment decisions not involving the Smith Act or espionage trials, the Court appeared to provide reasoned guidance for disbarment. For instance, in 1957, in *Theard v. United States*, the Court, in a decision authored by Frankfurter, acknowledged that disbarment was "always painful."<sup>482</sup> In that case, the petitioner attorney had been charged with forgery in 1935, but was committed to an insane asylum and not released until 1948, and therefore not prosecuted.<sup>483</sup> On his release, Louisiana unsuccessfully attempted to reinstate the prosecution.<sup>484</sup> In 1950, the state bar association, with the concurrence with the state supreme court, disbarred him.<sup>485</sup> The Court, citing to *Selling*, recognized that normally the federal judiciary honored state decisions, but it would not do so in this instance, stating, "[w]e do not think that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after he had uttered a forgery when concededly he 'was suffering under an exceedingly abnormal mental condition, some degree of insanity.'"<sup>486</sup>

Although *Theard* appeared as a unified decision, Black and Warren concurred without publishing their reasons for not completely agreeing with the majority.<sup>487</sup> Black, along with the Chief Justice and initially Clark, believed that as written, *Theard* would enable state bars to exclude applicants on the basis of political affiliation without due process.<sup>488</sup> Frankfurter circulated his majority draft on June 6, 1957.<sup>489</sup> The following day, Black informed the conference that he was troubled by the majority's reference to *In re Rouss*,<sup>490</sup> a 1917 New York appellate decision authored by future Justice Benjamin Cardozo, for the proposition that admission to the bar "is

<sup>480</sup> See, e.g., *Cammer v. United States*, 350 U.S. 399 (1956).

<sup>481</sup> See *infra* Part II.G.1.

<sup>482</sup> 354 U.S. 278, 279 (1957).

<sup>483</sup> *Id.* at 279, 281–82. *Theard* was argued on December 13, 1956 and decided on June 17, 1957, one month after *Konigsberg I* and *Schware*. *Id.* at 278, 281. In authoring the decision, Frankfurter made clear that the Court was not overturning the state disbarment judgment, and it was without authority to do so. *Id.* at 281. Instead, the Court was deciding whether the federal judiciary had to honor the state disbarment. *Id.* at 281–82.

<sup>484</sup> *Id.* at 279.

<sup>485</sup> *Id.* at 279–80.

<sup>486</sup> *Id.* at 282.

<sup>487</sup> *Id.* at 283 (Warren, C.J., joined by Black, J., concurring in the judgment).

<sup>488</sup> See *infra* notes 490–95 and accompanying text.

<sup>489</sup> Draft *Theard* Majority Opinion by Justice Felix Frankfurter (June 6, 1957), *microformed on Felix Frankfurter Papers*, Reel 26, Series II (Harvard Law Sch.).

<sup>490</sup> 116 N.E. 782 (1917).

a privilege, tolerated at the pleasure of the courts.”<sup>491</sup> One month earlier, the Court decided *Konigsberg I* and *Schware*, and Black worried that *Theard* undermined those decisions.<sup>492</sup> Frankfurter convinced Clark that *Theard* did not weaken the prior decisions, and Clark opted to join the majority opinion.<sup>493</sup> Only Warren shared Black’s concern over the decision—even Brennan and Douglas did not share in Black’s view of the majority opinion.<sup>494</sup> Black eventually opted not to include a published concurrence.<sup>495</sup>

### 1. Rosenberg Trial

One significant matter that troubled Black in the *Sacher* and *In re Isserman* contempt cases was that the judiciary was enabling a double standard.<sup>496</sup> In *United States v. Rosenberg*, a trial that resulted in the death penalty and ultimately the execution of two pro-Communists for espionage of classified atomic data, the conduct of prosecutor Irving Saypol deplorably failed the canons of professional ethics.<sup>497</sup> During the trial, Saypol provided information to the press that the prosecution would call a witness named William Perl who would corroborate the Rosenbergs’ guilt.<sup>498</sup> Saypol never called Perl to the stand because he too had been indicted.<sup>499</sup> The indictment was unsealed before Perl would testify, and, in turn, Perl recanted and asserted his right

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<sup>491</sup> Draft *Theard* Concurrence by Justice Hugo L. Black (June 7, 1957), *microformed on Felix Frankfurter Papers*, Reel 2, Series II (Harvard Law Sch.), (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330).

<sup>492</sup> *Id.*

<sup>493</sup> Letter from Justice Tom C. Clark to Justice Felix Frankfurter (June 6, 1957), *microformed on Felix Frankfurter Papers*, Reel 26, Series II (Harvard Law Sch.).

<sup>494</sup> See Letter from Justice Felix Frankfurter to Justice Hugo L. Black (June 7, 1957), *microformed on Felix Frankfurter Papers*, Reel 26, Series II (Harvard Law Sch.), (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330). Frankfurter informed Black:

I called up Bill Brennan and put to him in detail, and I am confident that I can say with accuracy, the point you raised about the quotation from Cardozo in my *Theard* opinion. He said he would think about it and call me back. He has called me back with the statement, “I am all for your opinion, including the quotation from Cardozo, and I really don’t see Hugo’s point about it.” I then repeated to him the problem that it raised in your mind and he said he understood that was your problem, but he sees no difficulty.

*Id.*

<sup>495</sup> See *Theard v. United States*, 354 U.S. 278, 283 (1957) (Warren, C.J. and Black, J., concurring in the result).

<sup>496</sup> See *infra* notes 497–505 and accompanying text.

<sup>497</sup> See JOSEPH SHARLITT, *FATAL ERROR: THE MISCARRIAGE OF JUSTICE THAT SEALED THE ROSENBERGS’ FATE* 15 (1989).

<sup>498</sup> *United States v. Rosenberg*, 200 F.2d 666, 669 (2d Cir. 1952); see also SHARLITT, *supra* note 497, at 15.

<sup>499</sup> See SHARLITT, *supra* note 497, at 15.

against self-incrimination.<sup>500</sup> This enabled Saypol to present to the jury that a viable witness existed who refused to testify.<sup>501</sup> Some jurors heard or read about Saypol's comment, but the Rosenbergs' attorney did not motion for a mistrial and the Federal District Judge Irving Kaufman made no comment on Saypol's conduct.<sup>502</sup> On appeal, in *United States v. Rosenberg*, a three-judge panel consisting of Thomas Swan, Jerome Frank, and Harrie Chase concluded that Saypol's conduct was "wholly reprehensible," though they also determined that the conduct did not affect the outcome of the trial.<sup>503</sup> To Black, a double standard was evident here.<sup>504</sup> The Rosenberg trial occurred in New York City before a federal judge, in the same region where *Dennis* occurred, but the prosecutor, Saypol, was never disciplined in any manner.<sup>505</sup>

## 2. *Cammer v. United States*

In *Cammer v. United States*, Black was able to convince a majority of Justices to reverse a lower court's contempt finding which arose from another Smith Act trial.<sup>506</sup> A District of Columbia grand jury, composed of a majority of federal employees, indicted a prominent union leader, Benjamin Gold, who had also been a CPUSA member, for filing a "false non-Communist affidavit."<sup>507</sup> Gold's attorney, Harold Cammer, also defended two of Gold's associates.<sup>508</sup> Concerned with the idea of an inquest composed of federal employees who had sworn a loyalty oath, Cammer sent out a questionnaire to the grand jury to determine "the effect of the government's loyalty program," on the jurors.<sup>509</sup> Gold never denied sending the questionnaire, and it had been permitted on prior occasions,<sup>510</sup> but not in this particular instance.<sup>511</sup> Moreover, on two prior occasions, a federal grand jury of nonfederal employees in New York had twice refused to indict Gold.<sup>512</sup> Harlan did not participate in the decision,<sup>513</sup> and the decision itself did not cause a great deal of discussion in comparison to the Rosenberg trial, or the *In re Isserman* and *Sacher* decisions.<sup>514</sup>

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<sup>500</sup> *Id.*

<sup>501</sup> *Rosenberg*, 200 F.2d at 669–70.

<sup>502</sup> *Id.* at 670.

<sup>503</sup> *Id.* at 667, 670.

<sup>504</sup> See SHARLITT, *supra* note 497, at 31–32.

<sup>505</sup> *Id.*

<sup>506</sup> 350 U.S. 399 (1956) (majority opinion by Justice Hugo L. Black).

<sup>507</sup> *Id.* at 400. Gold himself was convicted in a criminal trial but the Court reversed the conviction. *Gold v. United States*, 352 U.S. 985 (1957).

<sup>508</sup> *Cammer*, 350 U.S. at 400.

<sup>509</sup> *Id.* at 401.

<sup>510</sup> *Id.* at 402–03.

<sup>511</sup> *Id.* at 400–01.

<sup>512</sup> *Id.* at 401.

<sup>513</sup> *Id.* at 408 (Harlan, J. not participating).

<sup>514</sup> The only discussion appearing in the correspondences of the Justices is a simple note from Burton to Black stating, "I agree and compliment you on the clear way you have presented the

*H. State Loyalty Programs Affecting Public Employment*

The Court's record on loyalty oaths and public employment between 1950 and 1961 was mixed. The starting point of these cases, though not a loyalty oath issue, occurred in 1946 in *United States v. Lovett*.<sup>515</sup> There, the Court determined that a federal law that precluded payments to thirty-nine named government employees that the Dies Committee had deemed "radical bureaucrats" and "affiliates of Communist front organizations" was unconstitutional.<sup>516</sup> With no dissenting Justices and a singular concurrence by Frankfurter with Reed joining, Black authored the majority opinion.<sup>517</sup> Citing to *Garland*, Black determined that since Dies had singled out the thirty-nine employees and referred to his committee's findings as indictments, the law constituted a bill of attainder.<sup>518</sup> He also noted that both the Senate and President Roosevelt acquiesced to the law because Dies and the House had threatened to cut off war funding if they failed to approve the law.<sup>519</sup>

In 1951, in *Garner v. Board of Public Works of Los Angeles*, the Court upheld the termination of seventeen city employees who refused to comply with California's loyalty oath requirements for public servants.<sup>520</sup> The decision, authored by Clark, distinguished the issue from *Ex parte Garland* in finding that the oath requirement did not constitute a bill of attainder.<sup>521</sup> The normally conservative Burton dissented because the law used to terminate the employment of the seventeen petitioners enabled a similar fate for persons who had been members of the CPUSA when the party was transparently legal.<sup>522</sup> Likewise, both Black and Douglas dissented.<sup>523</sup> Douglas conceded that

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issue." Letter from Justice Harold H. Burton to Justice Hugo L. Black (Mar. 5, 1956) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 325).

<sup>515</sup> 328 U.S. 303 (1946).

<sup>516</sup> *Id.* at 308–09 (internal quotation marks omitted).

<sup>517</sup> *Id.* at 304, 318.

<sup>518</sup> *Id.* at 315–16 (citing *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866)). Frankfurter concurred but argued that the law was not a bill of attainder, but rather an invalid withholding of pay. *Id.* at 330 (Frankfurter, J., concurring).

<sup>519</sup> *Id.* at 312–13. For his part, President Roosevelt denounced Dies's actions as an unconstitutional bill of attainder. See UROFSKY & FINKELMAN, *supra* note 212, at 810.

<sup>520</sup> 341 U.S. 716, 721, 724 (1951).

<sup>521</sup> *Id.* at 723.

<sup>522</sup> *Id.* at 729 (Burton, J., dissenting and concurring, each in part). Burton argued:

The oath is so framed as to operate retrospectively as a perpetual bar to those employees who held certain views at any time since a date five years preceding *the effective date of the ordinance*. It leaves no room for a change of heart. It calls for more than a profession of present loyalty or promise of future attachment. It is not limited in retrospect to any period measured by reasonable relation to the present. In time this ordinance will amount to the requirement of an oath that the affiant has *never* done any of the proscribed acts.

*Id.*

<sup>523</sup> *Id.* at 730–31 (Douglas, J., joined by Black, J., dissenting).



in *Ex parte Garland* the petitioner was an attorney, and this constituted admission into a profession of private employment, and, in *Garner*, the petitioners were municipal employees.<sup>524</sup> Nonetheless, because the termination of employment occurred as a result of prior, rather than present, political beliefs, the required oath constituted a bill of attainder.<sup>525</sup>

In 1952, in *Adler v. Board of Education of New York*, the Court upheld New York's loyalty oath requirement to teach at public schools.<sup>526</sup> Unlike in other employment cases, no teacher had been fired, but a class of teachers sued, claiming that the requirement was unconstitutional.<sup>527</sup> Writing for the majority, Minton conceded that individuals have the right to "assemble, speak, think and believe as they will" but then he followed with "they have no right to work for the State in the school system on their own terms."<sup>528</sup> Frankfurter dissented on the basis of a lack of standing to sue.<sup>529</sup> Douglas dissented with Black joining him, arguing that an employee does not forfeit their civil rights, including those rights protected under the First and Fourteenth Amendments.<sup>530</sup> Particularly troubling to both Justices was the element of guilt by association, in which an organization is deemed subversive by the Justice Department without a chance to defend itself, and then an individual citizen is at risk for losing municipal employment by having been a member of the organization.<sup>531</sup> The time-honored standard of showing proof of guilt through evidence of overt acts was abandoned under this legal construct.<sup>532</sup> Although he joined with Douglas, Black also separately dissented, adding that the state statute would mold people into a singular intellect.<sup>533</sup> "Quite a different governmental policy rests on the belief that government should leave the mind and spirit of man absolutely free," he pointed out, alluding to the First Amendment.<sup>534</sup>

The year following *Adler*, the Court decided *Wieman v. Updegraff*,<sup>535</sup> reversing the Oklahoma Supreme Court and finding unconstitutional a state law that prohibited

<sup>524</sup> *Id.*

<sup>525</sup> *Id.* at 731, 736.

<sup>526</sup> 342 U.S. 485, 496 (1952).

<sup>527</sup> *Id.* at 486–87.

<sup>528</sup> *Id.* at 492.

<sup>529</sup> *Id.* at 498 (Frankfurter, J., dissenting).

<sup>530</sup> *Id.* at 508 (Douglas, J., dissenting).

<sup>531</sup> *Id.* at 508–09.

<sup>532</sup> *Id.* at 509–10. On this point, Douglas argued:

What happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts. A pall is cast over the classrooms. There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. Supineness and dogmatism take the place of inquiry.

*Id.* at 510.

<sup>533</sup> *Id.* at 497 (Black, J., dissenting).

<sup>534</sup> *Id.*

<sup>535</sup> 344 U.S. 183 (1952).

public employment to anyone who failed to swear that they were not a member of an organization on the Attorney General's list.<sup>536</sup> Writing for the majority, Clark reasoned that membership in a subversive organization could be innocent, in the sense that a person could be a member of an organization but not know of the leadership's unlawful designs.<sup>537</sup> Additionally, a person could join an organization at a time when the organization was lawful, only to terminate the relationship when the organization ceased being so.<sup>538</sup> However, the majority sidestepped the First Amendment questions Black found critical to this line of cases.<sup>539</sup> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory[.]" the majority concluded.<sup>540</sup> Black filed a concurrence, joined by Douglas, in which he reminded the majority that the First Amendment was what was at stake in these decisions.<sup>541</sup> Historian Melvin I. Urofsky points out that Clark intended to make clear that "[m]ere membership in [a subversive] organization was not enough to prove that a person was a subversive."<sup>542</sup> If so, Clark's intent was lost on the state bar committees and state supreme courts, as well as Harlan's dissent in *Konigsberg I*,<sup>543</sup> the majority in *Konigsberg II*,<sup>544</sup> and *In re Anastaplo*.<sup>545</sup> Moreover, Black would not have, in all likelihood, shared Urofsky's belief in the majority's intention in *Wieman*. To Irving Dillard, a *Saint Louis Post-Dispatch* journalist, Black explained his concurrence as:

It may be significant that many of those who are supposed to be the strongest for First Amendment liberties go no further than did these Federalists of the alien and sedition laws period. An opposite view then was that the United States was without power to pass laws that abridged [sic] discussion of public questions at all. That view prevailed when Jefferson was elected. No group seems to be advocating such a view today.<sup>546</sup>

In *Beilan v. Board of Education*,<sup>547</sup> the Court upheld Pennsylvania's termination of a public school teacher for refusing to answer before HUAC on whether he had ever

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<sup>536</sup> *Id.* at 184–86, 192.

<sup>537</sup> *Id.* at 189–90.

<sup>538</sup> *Id.* at 190.

<sup>539</sup> *Id.* at 192.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.* at 192–94 (Black, J., concurring).

<sup>542</sup> UROFSKY, *supra* note 183, at 163.

<sup>543</sup> 353 U.S. 252 (1957) (Harlan, J., dissenting).

<sup>544</sup> 366 U.S. 36 (1961).

<sup>545</sup> 366 U.S. 82 (1961).

<sup>546</sup> Letter from Justice Hugo L. Black to Irving Dillard (Jan. 7, 1953) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 317).

<sup>547</sup> 357 U.S. 399 (1958).

been an officer in a Communist organization.<sup>548</sup> However, in this particular instance, the school superintendent responsible for terminating Beilan's employment had specifically warned Beilan that under state law the failure to answer would automatically result in the loss of employment.<sup>549</sup> Black and Douglas dissented, again, partly on the basis that the termination constituted a finding of guilt and partly on the basis of a First Amendment right.<sup>550</sup> Warren dissented on the basis that a Fifth Amendment right to refuse to answer a question in a congressional hearing could not form the basis for employment termination.<sup>551</sup>

In 1958, in *Lerner v. Casey*,<sup>552</sup> the Court, in an opinion authored by Harlan, upheld New York's public security law in the context of the employment termination of a subway conductor who had refused to answer whether he was a CPUSA member.<sup>553</sup> Lerner raised a unique issue claiming that not only did the Fourteenth Amendment protect his refusal to answer inquiries into his political affiliations, but also because New York was essentially acting as an agent of the federal government in supporting national security, the Fifth Amendment right against self-incrimination applied as well.<sup>554</sup> Harlan and a majority, however, found no merit to either contention, and, not surprisingly, Black, Warren, Douglas, and Brennan dissented.<sup>555</sup>

*Garner, Adler, Beilan, Wieman, and Lerner* are simply a snapshot of decisions involving the Court's analysis of the relevancy of membership in subversive organizations to municipal employment. Although admission to the bar is a different issue than the rights of public employees, the Court cited to this line of state employment cases in the bar admissions cases.<sup>556</sup> The state employment decisions, moreover, evidence the continued divide between Harlan and Black over the extent to which civil rights, and particularly the First and Fourteenth Amendments, protected citizens.

### III. THREE PETITIONERS, FOUR DECISIONS: THE COURT DETERMINES ITS ROLE IN ATTORNEY LICENSING AND BLACK DEFINES THE IMPORTANCE OF ATTORNEYS IN PRESERVING DEMOCRACY

Between the *Sacher* and *In re Isserman* contempt decisions and the four licensure cases, a dramatic change occurred on the Court. Chief Justice Vinson, a man that

<sup>548</sup> *Id.* at 400–03.

<sup>549</sup> *Id.* at 408.

<sup>550</sup> *Id.* at 412–14 (Black, J., dissenting).

<sup>551</sup> *Id.* at 411–12 (Warren, C.J., dissenting).

<sup>552</sup> 357 U.S. 468 (1958).

<sup>553</sup> *Id.* at 470–71.

<sup>554</sup> *Id.* at 478–79.

<sup>555</sup> *Id.* For Douglas's and Black's dissent, see *Beilan*, 357 U.S. at 412. For Warren's dissent, see *id.* at 411. For Brennan's dissent, see *id.* at 417.

<sup>556</sup> See *In re Anastaplo*, 366 U.S. 82, 90, 93 (1961) (citing *Ex parte Garner, Beilan* and *Lerner*); *Konigsberg II*, 366 U.S. 36, 45, 52–54, 76 (1961) (citing *Beilan, Ex parte Garner* and *Wieman*); *Konigsberg I*, 353 U.S. 252, 256, 262, 267, 310 (1957) (citing *Wieman* and *Ex parte Garner*); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238–39, 246 (1957) (citing *Wieman*).

Truman had hoped would be his presidential successor, died on September 8, 1953, and was replaced by Earl Warren on October 5 of the same year.<sup>557</sup> Warren's ascension to the chief justiceship ushered in a period of an active Court that no longer gave staunch deference to the legislative and executive branches,<sup>558</sup> nor deferred to state governments where it believed individual rights had been encroached upon.<sup>559</sup> One year after Warren became Chief Justice, Robert Jackson died and Eisenhower nominated John Marshall Harlan in his place.<sup>560</sup> The Senate easily confirmed Harlan, and once on the Court, he largely continued Jackson's jurisprudence.<sup>561</sup> However, Harlan and Black developed a friendship, and the two men did not become bitter enemies over jurisprudential differences.<sup>562</sup> Two years later, Minton retired and was replaced by Brennan, who would agree with Black on the attorney licensure cases,<sup>563</sup> and become a reliable liberal.<sup>564</sup>

In addition to the changed composition of the Court, there were several other near contemporaneous decisions which provided context to the four licensure decisions. On June 17, 1957, in what became known as "Red Monday," the Court issued several decisions which appeared to weaken the Smith Act.<sup>565</sup> In *Service v. Dulles*,<sup>566</sup> the Court, in an opinion authored by Harlan, determined that an agency was bound by the letter of its internal rules, and reversed the job termination of a State Department employee accused of sympathy for China's Communist Party.<sup>567</sup> Harlan did not view the issue

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<sup>557</sup> For more on Eisenhower's selection of Warren, see POWE, *supra* note 262, at 24. Warren was not confirmed until March 1, 1954. Cray, *supra* note 396, at 259–60. On Truman's hope that Vinson would run for the presidency in 1952, see ST. CLAIR & GUGIN, *supra* note 474, at 195.

<sup>558</sup> See MICHAEL R. BELKNAP, *THE SUPREME COURT UNDER EARL WARREN, 1953–1964*, at 20–21 (2005).

<sup>559</sup> *Id.* at 2–3; CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 39–40 (1998) (discussing the Warren Court's state-centered approach to criminal procedure).

<sup>560</sup> TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* 86–87 (1992).

<sup>561</sup> *Id.* at 111–13, 116–26 (discussing Harlan's confirmation and the molding of Harlan's jurisprudential opinions that were somewhat in the vein of Justice Frankfurter and like Justice Robert H. Jackson, but against Justice Black).

<sup>562</sup> *Id.* at 138. Although Harlan was considered a conservative, he followed Frankfurter's judicial ideology deference, and newer conservatives such as Rehnquist's supporters derisively considered him a "squishie." JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 18 (2007).

<sup>563</sup> See *In re Anastaplo*, 366 U.S. 82, 97 (1961) (Black, J., dissenting); *Konigsberg II*, 366 U.S. 36, 80 (1961) (Brennan, J., dissenting). Black authored the majority in *Konigsberg I* and *Schwartz*, and Brennan did not dissent in *Konigsberg I*. See *Konigsberg I*, 353 U.S. 252, 252–53, 276 (1957); *Schwartz v. Bd. of Bar Exam'rs*, 353 U.S. 232, 233 (1957).

<sup>564</sup> POWE, *supra* note 262, at 89–90; see also BALL, *supra* note 13, at 157.

<sup>565</sup> See BELKNAP, *supra* note 558, at 63–65.

<sup>566</sup> 354 U.S. 363 (1957).

<sup>567</sup> See generally *id.*

as constitutional,<sup>568</sup> but rather one in which, although the law permitted the Secretary of State to terminate the employment of a foreign service officer for national security reasons, the agency itself had created more restrictive rules and was therefore bound by them.<sup>569</sup> In *Yates v. United States*,<sup>570</sup> another decision authored by Harlan, the Court seemingly narrowed *Dennis* and the Smith Act to speech that incites the overthrow of government rather than articulating abstract principles.<sup>571</sup> In essence, urging people to do something could be illegal,<sup>572</sup> but urging people to believe in something was protected by the First Amendment.<sup>573</sup> Additionally, the Court limited the Act's provision regarding "organizing" to persons who organized a movement, rather than joined an existing movement.<sup>574</sup> Because the CPUSA already existed, a CPUSA member could be charged for incitement, but not organizing.<sup>575</sup>

*Watkins*, addressed previously, and *Sweezy v. New Hampshire*, a decision that more or less applied *Watkins* to state governments,<sup>576</sup> also contributed to reassessing the balance between the First Amendment and claims of national security.<sup>577</sup> It is notable that Harlan did not dissent from any of the "Red Monday" cases, and, indeed, authored two of them.<sup>578</sup> In *Sweezy*, he joined Frankfurter's concurrence, which defended academic freedom against legislative intrusion.<sup>579</sup> Likewise, in *Jencks v. United States*,<sup>580</sup> a decision issued two weeks prior to "Red Monday,"<sup>581</sup> Harlan sided with the majority in reversing a conviction of a union leader where the government and trial court had suppressed statements made by FBI informants.<sup>582</sup> *Jencks* was not a First Amendment case, however, but rather a decision involving the Sixth Amendment's right to a fair

<sup>568</sup> *Id.* at 372 (citing *Peters v. Hobby*, 349 U.S. 332, 342–43 (1955)) (declining to reach the equal protection issue raised in *Peters*).

<sup>569</sup> *Id.* at 387–89.

<sup>570</sup> 354 U.S. 298 (1957).

<sup>571</sup> *Id.* at 324–27 (distinguishing between abstract principles and advocacy of action in regards to the trial court's holding and the government's argument).

<sup>572</sup> *Id.* at 326–27.

<sup>573</sup> *Id.* at 318–24. For a detailed discussion, see POWE, *supra* note 262, at 94–95.

<sup>574</sup> *Id.* at 303.

<sup>575</sup> *Id.* at 303–12.

<sup>576</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 235 (1957) (citing *Watkins v. United States*, 354 U.S. 178 (1957)).

<sup>577</sup> *See id.* at 235; *id.* at 265 (Frankfurter, J., concurring); *Watkins*, 354 U.S. at 182. For a discussion of these cases, see BELKNAP, *supra* note 558, at 64–65.

<sup>578</sup> For a discussion of Harlan's views on the "Red Monday" cases, see YARBROUGH, *supra* note 560, at 190–91. Harlan authored *Service v. Dulles* and *Yates v. United States*. *See Dulles*, 354 U.S. 363, 365 (1957); *Yates*, 354 U.S. 298, 300 (1957). Harlan joined Justice Frankfurter's concurrence in *Sweezy*. *See Sweezy*, 354 U.S. at 255 (Frankfurter, J., concurring). He did not join Justice Clark's dissent in *Watkins*. *See Watkins*, 353 U.S. at 217.

<sup>579</sup> *Sweezy*, 354 U.S. at 255, 266 (Frankfurter, J., concurring). For a discussion of Frankfurter's concurrence, see BELKNAP, *supra* note 558, at 65.

<sup>580</sup> 353 U.S. 657 (1957).

<sup>581</sup> POWE, *supra* note 262, at 93.

<sup>582</sup> *Jencks*, 353 U.S. at 666–67.

trial.<sup>583</sup> On the other hand, *Jencks* arose in New Mexico and involved suspected CPUSA activities in that state,<sup>584</sup> and this certainly colored Harlan's approach to *Schware*, discussed below.<sup>585</sup>

Prior to examining the decisions, a generic note has to be made about the three petitioners. There were similarities between Raphael Konigsberg, Rudolph Schware, and George Anastaplo. All three of these men were born to immigrant parents who could be fairly characterized as "working class." None of them, as described below, enjoyed a privileged background.<sup>586</sup> Each was a veteran of the United States Armed Forces, who had honorably served in World War II.<sup>587</sup> Each was a graduate from an accredited law school and by any measure was qualified for bar admission.<sup>588</sup> However, their political backgrounds diverged. A discredited California legislative investigation included information from a singular questionable witness accusing Konigsberg of being a CPUSA member.<sup>589</sup> Schware admitted to once being a CPUSA member, but prior to World War II when membership in the party was unquestionably legal and the party was listed on various state and federal election ballots.<sup>590</sup> No evidence was ever produced that Anastaplo was a CPUSA member or had any affiliation or shared belief with that party or any other organization on the Attorney General's list.<sup>591</sup> Ironically, of the three, only Anastaplo would never be admitted to a state bar.<sup>592</sup>

Because the three petitioners were combat veterans who had risked their lives,<sup>593</sup> in retrospect, one has to wonder whether a challenge to their loyalty was even valid. Black believed this to be the case.<sup>594</sup> He had already developed a sense that veterans were owed a special status in society, and he often sided with them. This ranged from

<sup>583</sup> *Id.* at 659.

<sup>584</sup> *Id.* at 661–65 (describing the investigation in New Mexico).

<sup>585</sup> See *Schware*, 354 U.S. at 250–51 (Frankfurter, J., concurring); *infra* notes 744–55 and accompanying text (discussing Justice Frankfurter's concurrence that was joined by Harlan).

<sup>586</sup> See *In re Anastaplo*, 366 U.S. 82, 98 (1961) (Black, J., dissenting); *Konigsberg I*, 353 U.S. 252, 265 (1957); *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 237–38 (1957).

<sup>587</sup> See *In re Anastaplo*, 366 U.S. at 98 (Black, J., dissenting); *Konigsberg I*, 353 U.S. at 266; *Schware*, 353 U.S. at 237–38.

<sup>588</sup> See *In re Anastaplo*, 366 U.S. at 98; *Konigsberg I*, 353 U.S. at 266; *Schware*, 353 U.S. at 238.

<sup>589</sup> *Konigsberg I*, 353 U.S. at 266–68.

<sup>590</sup> *Schware*, 353 U.S. at 244.

<sup>591</sup> *In re Anastaplo*, 366 U.S. at 85–86.

<sup>592</sup> See Ed Buckner, *A Review of George Anastaplo, The Constitutionalist: Notes on the First Amendment*, 32 CRIM. JUST. REV. 173–74 (2007) (reviewing GEORGE ANASTAPLO, *THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT (EXPANDED)* (2005)). Konigsberg was admitted to the bar in 1978. Burt A. Folkart, *Raphael Konigsberg; Politics Delayed Admission to State Bar*, L.A. TIMES, June 12, 1991, [http://articles.latimes.com/1991-06-12/news/mn-539\\_1\\_california\\_state\\_bar](http://articles.latimes.com/1991-06-12/news/mn-539_1_california_state_bar).

<sup>593</sup> See *supra* note 587 and accompanying text.

<sup>594</sup> See *In re Anastaplo*, 366 U.S. at 106–07; *Konigsberg I*, 353 U.S. at 260–61; *Schware*, 353 U.S. at 244–45.

dissenting from the denial of citizenship for veterans<sup>595</sup> and war brides,<sup>596</sup> and even protecting servicemen accused of CPUSA membership, where the military had failed, similarly to *Service v. Dulles*, to follow regulations.<sup>597</sup> Black's support of veterans was not necessarily unique,<sup>598</sup> but he found the fact that the three attorney applicant petitioners had fought in World War II evidenced that the states had minimized military service as a factor in assessing fitness for admission to the state bars particularly galling, and one in which he believed strengthened his First Amendment claims.<sup>599</sup>

#### A. Konigsberg I

In 1953, Raphael Konigsberg, a World War II veteran and graduate of the University of Southern California Law School, took and passed the California Bar Examination.<sup>600</sup> However, the State Committee of Bar Examiners (SCBE), the organization charged with determining fitness for admission to the bar,<sup>601</sup> refused to certify him for practice after deciding he could not prove his moral character, or that he did not advocate overthrowing the federal or state government.<sup>602</sup> The SCBE granted Konigsberg a hearing to refute allegations he belonged to a subversive organization or sympathized with Communist goals, but Konigsberg was unable to convince the organization's members of his loyalty.<sup>603</sup>

In large measure, his inability to disprove association with the CPUSA or a subversive group dedicated to the overthrow of the government occurred because of his refusal to answer inquiries into whether he had been a member of such a group, or associated with such a group.<sup>604</sup> His reasons for refusing became clear in the SCBE's

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<sup>595</sup> See *Tak Shan Fong v. United States*, 359 U.S. 102, 107 (1959). The Court, in an opinion authored by Brennan, upheld the denial of citizenship to a foreign national who served honorably in the Korean War in the Army. *Id.* Black dissented, but did so without publishing. *Id.* Yet he authored a draft dissent which said: "He did serve honorably, not merely for 90 days, but for two years. It is an obvious inference that the Immigration authorities held up the proceedings to have petitioner serve two years in the Army during the war in Korea." Draft *Tak Shan Fong* dissent by Justice Hugo L. Black (1959) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 338). Black concluded the two page dissent by stating he would reverse the conviction for illegal entry into the country and order the government to naturalize (provide citizenship) to Tak Shan Fong. *Id.*

<sup>596</sup> See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 546-47, 550 (1950).

<sup>597</sup> See *Harmon v. Brucker*, 355 U.S. 579, 580, 582-83 (1958).

<sup>598</sup> Justice Brennan, for example, supported veterans in his majority opinion in *Spieser v. Randall*. 357 U.S. 513, 528 (1957) ("The State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran.")

<sup>599</sup> See *supra* notes 587, 593-97 and accompanying text.

<sup>600</sup> *Konigsberg I*, 353 U.S. 252, 253, 266 (1957).

<sup>601</sup> See *Konigsberg v. State Bar*, 344 P.2d 777, 778 (Cal. 1959) (describing the SCBE's authority).

<sup>602</sup> *Konigsberg I*, 353 U.S. at 253.

<sup>603</sup> *Id.* at 253-54.

<sup>604</sup> *Id.* at 258.

transcript, later appended by Harlan to his dissent.<sup>605</sup> The California legislature had established a committee that roughly, but less effectively, mirrored HUAC.<sup>606</sup> Known as the Tenney Committee,<sup>607</sup> the state legislature subpoenaed hundreds of citizens, including newspapermen, professors, and even William Schneiderman.<sup>608</sup> In any sense, Tenney's committee tarnished the reputations of citizens with little regard to individual rights.<sup>609</sup> In 1951, the Court in *Tenney v. Brandhove*<sup>610</sup> upheld the principle of legislative immunity under the Civil Rights Acts for the actions of legislators arising out of the lawful investigative committees.<sup>611</sup> Nonetheless, Black in his concurrence, likened Tenney's committee to Argentina's dictatorship which had suppressed free press.<sup>612</sup>

An ambitious politician and former union leader who began as a liberal but ultimately supported Senator Joseph McCarthy, Jack Tenney himself had once been accused of being a Communist by HUAC in 1943.<sup>613</sup> Konigsberg feared that if he honestly disavowed ties to Communist organizations, the Tenney committee would release its files on him, even though those files contained unreliable information, opening him to a charge of perjury.<sup>614</sup>

Konigsberg appealed to the California Supreme Court, but that court denied his petition for review.<sup>615</sup> Notably three judges, including Roger Traynor, who was perhaps the most distinguished state judge in the twentieth century,<sup>616</sup> dissented from the denial but did not leave a published opinion as to why.<sup>617</sup>

<sup>605</sup> *Id.* at 286 (Harlan, J., dissenting).

<sup>606</sup> See KEVIN STARR, *EMBATTLED DREAMS: CALIFORNIA IN WAR AND PEACE, 1940–1950*, at 303 (2002).

<sup>607</sup> *Id.* (noting the committee was headed by state senator Jack Tenney).

<sup>608</sup> *Id.* at 303, 305 (noting that William Schneiderman was secretary of the Communist Party of California).

<sup>609</sup> *Id.* at 307.

<sup>610</sup> 341 U.S. 367 (1951). Frankfurter, who authored the majority opinion, *id.* at 369, wanted to deny certiorari. See Memorandum from Justice Felix Frankfurter to the Conference (Apr. 30, 1951) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 207). Tenney used his committee to harass a journalist and private citizen, William Brandhove. *Tenney*, 341 U.S. at 369–71. Brandhove sued Tenney under the Civil Rights Act and Fourteenth Amendment alleging that the committee (which consisted of more than two individuals) conspired to deprive him of his civil rights. *Id.*

<sup>611</sup> *Id.* at 379.

<sup>612</sup> *Id.* at 380–81 (Black, J., concurring).

<sup>613</sup> STARR, *supra* note 606, at 302–03, 311 (describing HUAC's investigation of Tenney, Tenney's subsequent shift to the right and Tenney's support of McCarthy's tactics).

<sup>614</sup> *Konigsberg I*, 353 U.S. 252, 284–86 (1957) (Harlan, J., dissenting).

<sup>615</sup> *Id.* at 253–54 (majority opinion).

<sup>616</sup> On Roger Traynor, see Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, in HARRY N. SCHEIBER, *EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW*, 98 (2007); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 243–66 (3d ed., 2007); Warren E. Burger, *A Tribute*, 71 CALIF. L. REV. 1037, 1037–38 (1983).

<sup>617</sup> See *Konigsberg I*, 353 U.S. at 254, 258. Traynor did, however, author a dissent on remand. See *Konigsberg v. State Bar*, 344 P.2d 777, 780–83 (1959).



Warren recognized Black's interest in the issue and assigned him to write for the majority.<sup>618</sup> Indeed, in conference, Black pushed for granting certiorari, writing that Konigsberg's military service alone proved his loyalty to the United States, and he accused the Tenney Committee of undermining "the basic liberties of the people."<sup>619</sup> Warren, likewise, despised Tenney and Tenney's ally on the state committee, the future Los Angeles Mayor, Sam Yorty.<sup>620</sup> Although Tenney and Yorty had supported Warren's state loyalty program in 1950 when Warren was the governor of California,<sup>621</sup> by the time Konigsberg's case came before the Court, Warren viewed their excessive investigations as a threat to individual liberty.<sup>622</sup> After the conference, Warren provided Black with newspaper clippings detailing that in Hungary, the Communist government had disbarred over 800 attorneys, and called over 3,000 attorneys to testify as to their loyalty to the central government.<sup>623</sup> In 1956, Hungarian citizenry revolted against the Soviet-backed government, but the Soviet military crushed the revolt by the end of the year.<sup>624</sup>

Prior to the grant of *certiorari*, Frankfurter, along with Harlan, signaled he would oppose reversing the state supreme court.<sup>625</sup> On May 4, 1956, Frankfurter drafted a grant of certiorari inviting counsel to consider additional questions not raised in their briefs.<sup>626</sup> This is a permissible judicial function,<sup>627</sup> but it is only done in a minority of cases before the Court.<sup>628</sup> Frankfurter posed two considerations. First, did the state supreme court's denial of a petition constitute a disposition "in the nature of a review" or merely a refusal of that court to exercise its discretionary jurisdiction?<sup>629</sup> Second, if

<sup>618</sup> *Konigsberg I*, 353 U.S. at 253.

<sup>619</sup> Memorandum from Justice Hugo L. Black to the Conference (Jan. 11, 1957) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 329). Black noted that the SCBE's evidence against Konigsberg had all come from Tenney's Committee. *Id.* "It seems a little odd that a man with such a background should be rejected without some authentic, reliable evidence," Black concluded. *Id.*

<sup>620</sup> CRAY, *supra* note 394, at 202.

<sup>621</sup> JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 227 (2006).

<sup>622</sup> M.J. HEALE, *MCCARTHY'S AMERICANS: RED SCARE POLITICS IN STATE AND NATION, 1935-1965*, at 44 (1998); *see also* CRAY, *supra* note 394, at 200-05 (describing Warren's view of loyalty oaths and personal liberty); NEWTON, *supra* note 621, at 217-19 (discussing the political climate in California before the Konigsberg decision).

<sup>623</sup> Letter from Justice Earl Warren to Justice Hugo L. Black (Sept. 15, 1956) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 329).

<sup>624</sup> *See, e.g.*, CHARLES GATI, *FAILED ILLUSIONS: MOSCOW, WASHINGTON, BUDAPEST, AND THE 1956 HUNGARIAN REVOLT* 1-2 (2006).

<sup>625</sup> Draft Grant of Certiorari in *Konigsberg I* by Justice Felix Frankfurter (1956), *microformed on Felix Frankfurter Papers, Reel 22, Series II* (Harvard Law Sch.).

<sup>626</sup> *Id.*

<sup>627</sup> *See, e.g.*, U.S. SUP. CT. R. 25.6; *Pa. R. Co. v. St. Louis, A. & T.H.R. Co.*, 116 U.S. 472 (1886).

<sup>628</sup> *See, e.g.*, 14 CYC. OF FED. PROC. § 66:9 (3d ed.) (review is confined to question in brief unless by special leave or court's motion).

<sup>629</sup> Draft Grant of Certiorari in *Konigsberg I* by Justice Felix Frankfurter (1956), *microformed on Felix Frankfurter Papers, Reel 22, Series II* (Harvard Law Sch.) (citation omitted).

the state supreme court's denial was, in fact, a review, was it also a rejection of a claim arising under the Fourteenth Amendment?<sup>630</sup> Initially, Frankfurter shared his draft only with Harlan, who replied that it "would sharpen the thrust of the doctrinal question."<sup>631</sup> After further work on the draft certiorari grant, on May 15, 1956, Frankfurter raised a third question as to whether *Konigsberg* had even raised, in plain language, a Fourteenth Amendment claim to the state supreme court.<sup>632</sup> Clearly Frankfurter suspected *Konigsberg* had not raised such a claim, and this set up his dissent in which he would argue that the Court was not the proper place to raise a claim of first instance.<sup>633</sup>

The California attorney general, with the state supreme court's concurrence, hired Frank B. Belcher to represent the state bar before the Court.<sup>634</sup> Belcher was a member of the state Republican Party and a delegate to the 1952 Republican Convention, where he backed Richard M. Nixon for the vice presidency.<sup>635</sup> He was also a one-time president of the Los Angeles Bar Association and the state bar association.<sup>636</sup> A 1914 graduate of the University of California's law school, Belcher's list of clients included actor John Wayne, who in 1952 starred in a movie titled *Big Jim McLain*, in which Wayne's character worked for HUAC investigating Communists in Hawaiian labor unions.<sup>637</sup> Belcher was Wayne's agent at the time of this film, and he had also represented the state bar in disbarment hearings.<sup>638</sup> *Konigsberg* was represented by Edward Mosk, whose brother, Stanley Mosk, had been state attorney general and later a justice on the state supreme court.<sup>639</sup> Mosk too had Hollywood clients, albeit those under

<sup>630</sup> *Id.*

<sup>631</sup> *Id.* Harlan penciled these comments in the draft. *Id.*

<sup>632</sup> Draft Grant of Certiorari in *Konigsberg I* by Justice Felix Frankfurter (May 11, 1956), *microformed on* Felix Frankfurter Papers, Reel 22, Series II (Harvard Law Sch.) (circulated copy); Memorandum from Justice Felix Frankfurter to the Conference (May 15, 1956), *microformed on* Felix Frankfurter Papers, Reel 22, Series II (Harvard Law Sch.). Justice Burton agreed with including Frankfurter's questions, writing that the draft "suits me," even though he ultimately did not agree with Frankfurter's dissent. Letter from Justice Harold H. Burton to Justice Felix Frankfurter (May 15, 1956), *microformed on* Felix Frankfurter Papers, Reel 22, Series II (Harvard Law Sch.).

<sup>633</sup> *Konigsberg I*, 353 U.S. 253, 276 (1957) (Frankfurter, J., dissenting); *see also* BELKNAP, *supra* note 558, at 62.

<sup>634</sup> *See Konigsberg I*, 353 U.S. at 253 (majority opinion).

<sup>635</sup> *California Delegation to the 1952 Republican National Convention*, POLITICAL GRAVEYARD.COM (July 1, 1996), <http://politicalgraveyard.com/parties/R/1952/CA.html>.

<sup>636</sup> BAR ASSOCIATION NEWS, 29 A.B.A. J. 676 (1993) (announcing, a year later, Russell O'Hara as Belcher's successor); BAR ASSOCIATION NEWS, 28 A.B.A. J. 853 (1942) (announcing Belcher as State Bar Association President); Myrna Oliver, *Nancy Watson, 77; Judge Presided Over Trial of Alphabet Bomber*, L.A. TIMES, Feb. 12, 2004, <http://articles.latimes.com/2004/feb/12/local/me-watson12>.

<sup>637</sup> DONALD SHEPHERD ET. AL., *DUKE: THE LIFE AND TIMES OF JOHN WAYNE* 176, 179, 246-47, 350 (1985).

<sup>638</sup> *Id.*; *see also, e.g., In re Craig*, 82 P.2d 442, 443 (1938).

<sup>639</sup> Interview by Germaine LaBerge with the Honorable Stanley Mosk, Justice of the California Supreme Court (ret.), Editor of the University of California at Berkeley State

suspicion of Communist leanings.<sup>640</sup> He had supported Upton Sinclair's 1934 "End Poverty in California" campaign for governor, as well as Henry Wallace's 1948 quest for the presidency.<sup>641</sup> Likewise, the American Civil Liberties Union and the National Lawyers Guild filed amicus briefs.<sup>642</sup>

Black's first draft opinion, dated March 27, 1957, differed little from his fourth and final draft, which he circulated to the Court on May, 6, 1957.<sup>643</sup> Echoing the Illinois Attorney General's arguments in *In re Summers*,<sup>644</sup> Belcher initially argued that the Court lacked jurisdiction over Konigsberg's claims since he had not succinctly raised the claims in an identical manner before the state court.<sup>645</sup> Black dismissed this argument because the state court possessed original jurisdiction over Konigsberg's claims and had the opportunity to expand on the original claim.<sup>646</sup> Black also bypassed a question of whether a refusal to answer questions could result in denial of admission to practice law, because neither the state bar nor Konigsberg, argued this point.<sup>647</sup> This point became important in *Konigsberg II* and *In re Anastaplo*, where the Court would decide adversely to both petitioners, holding that refusal to answer the bar could result in denial of admission.<sup>648</sup>

Black then focused on whether Konigsberg had proven he possessed the "good moral character" required for bar admission.<sup>649</sup> He found it overwhelming that forty-two persons attested to Konigsberg's fitness including religious leaders, law professors, and

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Archives State Government Oral History Program, in Berkeley, Cal. (Feb. 18, 1998), ii, 1, available at <http://www.sos.ca.gov/archives/oral-history/pdf/mosk.pdf>.

<sup>640</sup> EDWARD DMYTRYK, *ODD MAN OUT: A MEMOIR OF THE HOLLYWOOD TEN* 183 (1996).

<sup>641</sup> Mosk was a freshman at UCLA and was present at a play when Sinclair announced his candidacy. See Fay M. Blake & H. Morton Newman, *Upton Sinclair's EPIC Campaign*, 63 CALIF. HIST. 305, 307 (1984). He was "thrilled" to hear the announcement. *Id.* The Southern California Library for Social Studies and Research has a collection of Mosk's writings on politics and support of Sinclair and Wallace. For an index of these documents, see REGISTER OF THE EDWARD MOSK PAPERS, 1934-1961, available at <http://cdn.calisphere.org/data/13030/vj/kt3r29r7vj/files/kt3r29r7vj.pdf>.

<sup>642</sup> *Konigsberg I*, 353 U.S. 252, 253 (1957). For the ACLU's brief, see Respondent's Brief, *Konigsberg I*, 353 U.S. 252 (No. 244). For the National Lawyers Guild's Brief, see Brief Amicus Curiae in Support of Appellant, *Konigsberg I*, 353 U.S. 252 (No. 5).

<sup>643</sup> See generally Draft *Konigsberg I* Opinions (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 329). His writing even impressed the normally conservative Harold Burton. Letter from Justice Harold H. Burton to Justice Hugo L. Black (Apr. 24, 1957) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 329). On April 24, 1957, Burton informed Black that neither Frankfurter, who he usually aligned with, nor Harlan had swayed him away from Black's opinion. *Id.*

<sup>644</sup> 325 U.S. 561 (1945).

<sup>645</sup> See Respondent's Brief, *supra* note 642, at 37-38 (citing *In re Summers*, 325 U.S. at 561, 570-71).

<sup>646</sup> *Konigsberg I*, 353 U.S. at 257.

<sup>647</sup> *Id.* at 260-62.

<sup>648</sup> See *In re Anastaplo*, 366 U.S. 82, 94 (1961); *Konigsberg II*, 366 U.S. 36, 44 (1961).

<sup>649</sup> *Konigsberg I*, 353 U.S. at 262.

lawyers.<sup>650</sup> Black also presented a brief biographical sketch of Konigsberg including his Austrian birth (an origin he shared with Frankfurter),<sup>651</sup> graduation from Ohio State University in 1931, and previous employment as a high school history teacher and social worker.<sup>652</sup> Most important to Black was Konigsberg's war record, which included service in North Africa, Italy, France, and Germany, as well as ending the war as a captain.<sup>653</sup> After the war, Konigsberg unsuccessfully ran for the Los Angeles Board of Public Education.<sup>654</sup> At the age of thirty-nine, he enrolled in law school in search of a new career.<sup>655</sup> Against Konigsberg was the word of a single ex-Communist witness who could not accurately describe to the SCBE how she knew Konigsberg.<sup>656</sup> Even had the witness been more clear, Black convinced the Court to note in the majority opinion that the CPUSA was a legal entity in 1941, and membership in it prior to World War II could not be used as a means to deny a member bar admission.<sup>657</sup>

As to the other criteria that the state considered, namely Konigsberg's criticism of certain public officials, Black found it amusing that the state's rationale in denying Konigsberg admission included criticism of the *Dennis* decision, informing the conference that if the SCBE applied their current standard to the Court, it would preclude Douglas and himself from the practice of law in California.<sup>658</sup> In his conclusion, Black recognized that the states were entitled to set standards for bar admission, but to do so in an arbitrary manner that ignored basic freedoms would ultimately intimidate society.<sup>659</sup> His closing sentence reminded the state bars that:

[T]he mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.<sup>660</sup>

The majority reversed the state supreme court's denial of Konigsberg's application based on his alleged past political affiliation,<sup>661</sup> but it did not order the lower

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<sup>650</sup> *Id.* at 264–65.

<sup>651</sup> *See* BELKNAP, *supra* note 558, at 9.

<sup>652</sup> *Konigsberg I*, 353 U.S. at 262.

<sup>653</sup> *Id.* at 266.

<sup>654</sup> *See* Folkart, *supra* note 592.

<sup>655</sup> *Konigsberg I*, 353 U.S. at 266.

<sup>656</sup> *Id.* at 266–67.

<sup>657</sup> *Id.* at 268.

<sup>658</sup> Memorandum from Justice Hugo L. Black to the Conference (Jan. 11, 1957) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 329).

<sup>659</sup> *Konigsberg I*, 353 U.S. at 273.

<sup>660</sup> *Id.* at 273–74.

<sup>661</sup> *Id.* at 262, 273–74.

court to admit *Konigsberg* to the bar.<sup>662</sup> This was a point made clear in Frankfurter's dissent,<sup>663</sup> and one that would enable the state to exclude *Konigsberg* on a slightly different matter.

Frankfurter dissented on purely technical grounds.<sup>664</sup> Like Black, his draft dissent differed little from the published version.<sup>665</sup> He argued that the Court had intruded into the state supreme court's province because that tribunal had not yet considered *Konigsberg's* arguments now raised before the nation's highest court.<sup>666</sup> That is, he claimed that Black and the majority had erred in their Fourteenth Amendment analysis, because there was no evidence that the California Supreme Court had considered whether that amendment protected *Konigsberg* against denial of admission to practice law.<sup>667</sup> For his adherence to a technical mandate, he refused to join in Harlan's dissent because he believed that the exclusion might violate the Fourteenth Amendment.<sup>668</sup> Frankfurter simply wanted that decision to come from the California Supreme Court, or in the event that the state supreme court found it could prevent admission to the bar based on a prior political affiliation, then the Supreme Court could overturn.<sup>669</sup> "The record is too disturbing for me to deny the petition for certiorari. On the other hand, the record is in too clouded a condition for bringing up the issues which I see in it," he noted to the conference before concluding that the state should have the opportunity "to clarify what is now left debatable."<sup>670</sup> There is a troubling aspect to Frankfurter's decision based on his research of the state supreme court. John T. Fey, the clerk of the court, after consulting with his counterpart on the state supreme court, informed Frankfurter that the state's highest court reviewed all bar matters.<sup>671</sup> Thus, in instances where that court did not render a published decision, it could not be said that the court

<sup>662</sup> *Id.* at 274.

<sup>663</sup> *Id.* at 276–82 (Harlan, J., dissenting).

<sup>664</sup> *Konigsberg I*, 353 U.S. at 274–76 (Frankfurter, J., dissenting).

<sup>665</sup> *Compare id.*, with Draft *Konigsberg I* Dissent by Justice Felix Frankfurter (May 1956) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 430).

<sup>666</sup> *Konigsberg I*, 353 U.S. at 274–76. Frankfurter specifically argued:

Before this Court can find that a State—and the judgment of the Supreme Court of California expresses “the power of the State as a whole,” *Riphey v. Texas*, 193 U.S. 504, 509; *Skiriotes v. Florida*, 313 U.S. 69, 79—has violated the Constitution, it must be clear from the record that the state court has in fact passed on a federal question. As a safeguard against intrusion upon state power, it has been our practice when a fair doubt is raised whether a state court has in fact adjudicated a properly presented federal claim not to assume or presume that it has done so.

*Id.* at 275.

<sup>667</sup> *Id.* at 275–76.

<sup>668</sup> *Konigsberg I*, 353 U.S. at 276 (Frankfurter, J., dissenting).

<sup>669</sup> *Id.* at 274–76.

<sup>670</sup> Memorandum from Justice Felix Frankfurter to the Conference (May 15, 1956) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 430).

<sup>671</sup> Memorandum from John T. Fey to Justice Felix Frankfurter (Mar. 29, 1957), *microformed on Felix Frankfurter Papers*, Reel 22, Series II (Harvard Law Sch.).

did not consider the facts, and, therefore, a non-opinion constituted a fully reviewed affirmation of the SCBE.<sup>672</sup>

Harlan's dissent, with Clark joining, not only illustrated the divide between his belief of how the bar should function and Black's,<sup>673</sup> it also—like Frankfurter's—distinguished what the majority had not determined.<sup>674</sup> Namely, he pointed that the Court did not explicitly rule that the First or Fourteenth Amendments prevented a state from inquiring into an individual's past political affiliations.<sup>675</sup> Nor, he argued, did either amendment prohibit a state from excluding a citizen who advocated the use of force or violence to overthrow the government,<sup>676</sup> or placing the burden on the prospective bar applicant to prove good moral character.<sup>677</sup> Most importantly, Harlan wrote that the Court did not rule that the First or Fourteenth Amendment protected an applicant's refusal to answer questions of a political nature on his or her personal background.<sup>678</sup> He also appended a large portion of the SCBE's questioning of Konigsberg, as well as the statement of the singular witness who claimed to have knowledge of Konigsberg's past ties to the CPUSA.<sup>679</sup>

Harlan's dissent proved to be a successful avenue for state bars to exclude applicants suspected of having ties to subversive organizations. Indeed, he narrowed Black's opinion to a reversal based on factual insufficiency.<sup>680</sup> Harlan also argued that the Court had intruded into the state's authority to govern a profession.<sup>681</sup> In this case, he believed that the state bar had the right to inquire into Konigsberg's past relations with the CPUSA, because such an inquiry would test the sincerity of Konigsberg's "unequivocal disavowal of advocacy of the overthrow of the Government by force or violence."<sup>682</sup>

#### B. *Schware v. Board of Bar Examiners*

Rudolph Schware was born to immigrant parents and raised in poverty in New York City.<sup>683</sup> His father, as the New Mexico Supreme Court would point out, was "a

<sup>672</sup> *Id.*

<sup>673</sup> *Konigsberg I*, 353 U.S. at 273, 279–82 (Harlan, J., dissenting).

<sup>674</sup> *Id.* at 278.

<sup>675</sup> *Id.* at 311. Harlan also joined with Frankfurter and when Frankfurter issued his draft dissent, Harlan noted, "I am indebted to you for your 'statement of the issue' in *Konigsberg*. I cannot improve on it, so will take the liberty of using it as written." Letter from Justice John M. Harlan to Justice Felix Frankfurter (Apr. 25, 1957), *microformed on Felix Frankfurter Papers*, Reel 22, Series II (Harvard Law Sch.).

<sup>676</sup> *Konigsberg I*, 353 U.S. at 278.

<sup>677</sup> *Id.*

<sup>678</sup> *Id.* at 278.

<sup>679</sup> *Id.* at 284–309.

<sup>680</sup> *Id.* at 279.

<sup>681</sup> *Id.* at 276–77.

<sup>682</sup> *Id.* at 277.

<sup>683</sup> *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 236 (1957).

needles [sic] trade worker, an immigrant, a poor man and a socialist.”<sup>684</sup> During the period known as the Great Depression, Schware worked in New York City, Chicago, Detroit, and Los Angeles in a variety of jobs ranging from making pocketbooks to being a longshoreman.<sup>685</sup> On occasion, he used an Italian alias to gain employment in the hopes of thwarting anti-Semitism.<sup>686</sup> He also joined the CPUSA as a youth, but claimed to have divested his membership by 1940.<sup>687</sup> In the 1930s he was arrested several times during pro-labor demonstrations, but never charged or prosecuted for violating any laws.<sup>688</sup> Additionally, he assisted in recruiting American citizens to travel to Spain to fight alongside the Republicans against General Francisco Franco’s regime.<sup>689</sup> The Soviet Union and CPUSA supported the Republicans against Franco, while President Roosevelt proclaimed neutrality.<sup>690</sup> The Board of Bar Examiners and the state supreme court would place significant weight on this fact in determining that violating the Neutrality Act constituted a crime, and therefore was proof of bad character.<sup>691</sup> However, from 1944 to 1946 Schware also served honorably in the United States Army, and took part in combat in New Guinea against the Japanese Army.<sup>692</sup> He attended the University of New Mexico’s law school in his late thirties and successfully completed his coursework.<sup>693</sup> Prior to taking the bar examination, the Board of Bar Examiners, partly relying on confidential information, determined Schware did not possess the requisite good moral character for bar admission and denied him the opportunity to take the exam.<sup>694</sup> After this denial, he successfully appealed for a personal appearance with the board and provided its members with substantially the same information he had written in his application.<sup>695</sup> However, the personal appearance did not change the Board of Bar Examiners’ adverse decision and he appealed to the

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<sup>684</sup> *Schware v. Bd. of Bar Exam’rs*, 291 P.2d 607, 610 (N.M. 1955).

<sup>685</sup> *Id.* at 611, 613–14, 619.

<sup>686</sup> *Schware*, 353 U.S. at 236–37.

<sup>687</sup> *Schware*, 291 P.2d at 610–13.

<sup>688</sup> *Id.* at 628.

<sup>689</sup> *Id.* at 613, 630. Known as the “Abraham Lincoln Battalion,” approximately 2,600 Americans fought on the side of the Republicans against Franco who was supported by Hitler and Mussolini. GUERNICA—THE SPANISH CIVIL WAR, PBS.org, [http://www.pbs.org/treasuresoftheworld/a\\_nav/guernica\\_nav/gnav\\_level\\_1/1acivil\\_war\\_guerfrm.html](http://www.pbs.org/treasuresoftheworld/a_nav/guernica_nav/gnav_level_1/1acivil_war_guerfrm.html) (last visited Mar. 15, 2012); see DOMINIC TIERNEY, *FDR AND THE SPANISH CIVIL WAR: NEUTRALITY AND COMMITMENT IN THE STRUGGLE THAT DIVIDED AMERICA*, 64 (2007). However, FDR directed the Justice Department not to prosecute Americans who fought against Franco for violations of the Neutrality Act. *Id.* at 66.

<sup>690</sup> TIERNEY, *supra* note 689, at 64, 66. See also JOAN MARIA THOMAS, *ROOSEVELT AND FRANCO DURING THE SECOND WORLD WAR: FROM THE SPANISH CIVIL WAR TO PEARL HARBOR* 13–16 (2008).

<sup>691</sup> *Schware*, 291 P.2d at 630.

<sup>692</sup> *Schware*, 353 U.S. 232, 237–38 (1957).

<sup>693</sup> *Id.* at 250.

<sup>694</sup> *Id.* at 235 n. 2.

<sup>695</sup> *Id.* at 234.

state supreme court.<sup>696</sup> The state court decision came in four parts: the majority ruled adversely to Schware, followed by a single dissent, followed by the majority response, ending with a final word from the dissent.<sup>697</sup>

The New Mexico Supreme Court possessed plenary authority to review the Board of Bar Examiners' decisions, and was under no requirement to adopt the board's determinations.<sup>698</sup> Like *Konigsberg I*, where the entire state supreme court considered the issue,<sup>699</sup> all five justices on the New Mexico Supreme Court sat in review of Schware's claims.<sup>700</sup> Justice James C. McGhee, who was elected to the state court in 1947, and reelected in 1954, authored the majority decision.<sup>701</sup> In his first year on the state supreme court, McGhee lambasted the Supreme Court's decision in *Williams v. Georgia*,<sup>702</sup> a decision in which the Court found that the exclusion of African Americans from a jury required a remand to the state supreme court to fashion a remedy in a death penalty case.<sup>703</sup> In response, the Georgia Supreme Court indignantly upheld its prior decision, with the implicit criticism that the Court had intruded into its state jurisdictional sphere.<sup>704</sup> Although the Court did not overturn the conviction,<sup>705</sup> McGhee wrote to his counterpart on the Georgia Supreme Court, "I rejoice that the members of a state supreme court have had the courage to refuse to honor the continued usurpation of the powers, prerogatives and privileges of the various state courts in the administration of their local laws."<sup>706</sup>

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<sup>696</sup> *Schware*, 291 P.2d at 608.

<sup>697</sup> *See generally id.*

<sup>698</sup> *Id.* at 608.

<sup>699</sup> *Konigsberg I*, 353 U.S. at 254.

<sup>700</sup> *Schware*, 291 P.2d at 607.

<sup>701</sup> *See Supreme Court Justices of the State of New Mexico Since Statehood*, NEW MEXICO SUPREME COURT, [http://nmsupremecourt.nmcourts.gov/justices/justices\\_since\\_statehood.pdf](http://nmsupremecourt.nmcourts.gov/justices/justices_since_statehood.pdf) (last updated Apr. 7, 2010); *see also Schware*, 291 P.2d at 607.

<sup>702</sup> YARBROUGH, *supra* note 560, at 158.

<sup>703</sup> 349 U.S. 375, 377, 391 (1955).

<sup>704</sup> *Williams v. State*, 88 S.E.2d 376 (Ga. 1955). The Georgia Supreme Court replied to the remand by stating:

Not in recognition of any jurisdiction of the Supreme Court to influence or in any manner to interfere with the functioning of this court on strictly State questions, but solely for the purpose of completing the record in this court in a case that was first decided by us in 1953, and to avoid further delay, we state that our opinion in *Williams v. State*, 210 Ga. 665, 82 S.E.2d 217, is supported by sound and unchallenged law, conforms with the State and Federal Constitutions, and stands as the judgment of all seven of the Justices of this Court.

*Id.* at 377.

<sup>705</sup> *Id.* at 373–77.

<sup>706</sup> Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 YALE L.J. 1423, 1469 (1994); *see also* YARBROUGH, *supra* note 560, at 158.



Justices James C. Compton, Eugene Lujan, and Daniel K. Sadler joined McGhee in the majority.<sup>707</sup> The judicial biographical record on the New Mexico judges, in comparison to those on the California<sup>708</sup> and Illinois Supreme Courts,<sup>709</sup> is sparse; there are no biographical treatises on any of these men, but given the tenor of McGhee's support for the Georgia Supreme Court, it is clear that he believed the Warren Court had unnecessarily intruded into domains reserved to the states.

McGhee cited to several state jurisdictions in upholding New Mexico's standards for excluding Communists and fellow-travelers from admission to the Bar on the basis of failure to show good character.<sup>710</sup> However, before reviewing more current state decisions, McGhee turned to *In re Rouss*, the 1917 New York appellate decision authored by then Judge Cardozo, for the proposition that character and fitness to practice law were related.<sup>711</sup> In authoring *In re Rouss*, Cardozo wrote "[m]embership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards."<sup>712</sup> But, *In re Rouss* involved an attorney representing a corrupt police officer, where the attorney participated in a fraud as an equal partner to his client and then testified against his client.<sup>713</sup> The case was a challenge to a disbarment of an already admitted attorney, and did not involve political affiliations.<sup>714</sup> The other state cases cited by McGhee were not on point with the matter of political affiliations either.<sup>715</sup> For instance, a 1926 North Carolina decision that McGhee placed particular reliance on involved a justice of the peace who had converted seized assets for his own personal use and collected fees for the service of legal summons without delivering the summons.<sup>716</sup>

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<sup>707</sup> *Schware*, 291 P.2d at 607, 618; see also *Supreme Court Justices of the State of New Mexico Since Statehood*, *supra* note 701.

<sup>708</sup> *Past and Present Justices*, CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <http://www.courts.ca.gov/12523.htm> (last visited Mar. 15, 2012).

<sup>709</sup> *Justices of the Illinois Supreme Court: 1818–1850*, THE THIRD BRANCH—A CHRONICLE OF THE ILLINOIS SUPREME COURT, <http://www.state.il.us/court/SupremeCourt/Historical/JusticeTL.asp> (last visited Mar. 15, 2012).

<sup>710</sup> *Schware*, 291 P.2d at 608–09.

<sup>711</sup> *Id.* (citing *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

<sup>712</sup> *Id.* at 608 (citation omitted).

<sup>713</sup> *In re Rouss*, 116 N.E. 782.

<sup>714</sup> *Id.*

<sup>715</sup> See *Spears v. State Bar of Cal.*, 294 P. 697, 697–700 (Cal. 1930) (finding false statements about past criminal convictions a ground for denial to bar admission); *In re Wells*, 163 P. 657 (Cal. 1917) (finding concealment of past criminal frauds a basis for exclusion from admission to practice); *Rosencranz v. Tidrington*, 141 N.E. 58, 59 (Ind. 1923) (holding that acts of a criminal nature such as the unlicensed sale of alcohol and the seduction of a minor proof of bad moral character); *In re Weinstein*, 42 P.2d 744, 745, 747 (Ore. 1935) (finding egregious conduct as a collection agent grounds for preventing admission to the bar).

<sup>716</sup> *In re Farmer*, 131 S.E. 661, 662 (N.C. 1926). The applicant had made disparaging remarks about the United States Supreme Court. *Id.* Additionally, the applicant absconded with

McGhee also turned to *Douds* in two instances. The first was to minimize Schware's contention that when he was a member of the CPUSA, the party itself was a legal political affiliation with no criminality affixed to it.<sup>717</sup> The second time McGhee cited to *Douds*, he incorporated Jackson's concurrence to articulate why the "communist theology" was different from any other political affiliation.<sup>718</sup> Included in McGhee's reasoning was that the CPUSA was controlled by a foreign government and espoused "[v]iolent and undemocratic means" to effectuate change.<sup>719</sup> Because of Schware's past CPUSA associations, the New Mexico Court concluded that the Board of Bar Examiners reasonably determined that he could not support the United States or New Mexico Constitutions.<sup>720</sup>

Justice Henry Alexander Kiker dissented from the majority, pointing out that Schware's character references included a respected rabbi, the secretary to the dean of the state's law school, and a practicing attorney.<sup>721</sup> He also found it dispositive that Schware had left the CPUSA in 1940, severing ties to its members, and served honorably in the Army during World War II.<sup>722</sup> As for Schware's use of pseudonyms, Kiker

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funds belonging to the Ku Klux Klan. *Id.* A sizeable population of the county involved successfully protested the justice of the peace's admission to practice law in the state. *Id.* at 662–63. The second applicant was successfully sued by a former wife for infidelity. *Id.* at 665.

<sup>717</sup> *Schware*, 291 P.2d at 609. McGhee specifically articulated:

The legal status of the Communist Party in the United States is far different today from that which obtained during the years of the Depression and following, when petitioner was a member of it. He calls our attention to the fact that as late as 1948 the Communist Party was a recognized political party and had candidates for the Presidency of the United States every four years up to and including 1948. We do not overlook the fact that during the years petitioner was a member of the Young Communist League and the Communist Party, from 1932 to 1940, such membership was not unlawful. But that fact does not restrain us from examining his former associations and actions, including his arrests and his use of aliases, and his present attitude toward those matters, as contained in his statements to the board, in order to arrive at a conclusion as to his character.

*Id.*

<sup>718</sup> *Id.* at 617.

<sup>719</sup> *Id.*

<sup>720</sup> *Id.* at 617–18.

<sup>721</sup> *Id.* at 618 (Kiker, J., dissenting).

<sup>722</sup> *Id.* at 631. Kiker elaborated that Schware's divorce from the CPUSA was not evidence of untrustworthiness:

It strikes me that applicant in this case at the time he left the Communist party was thinking along the same straight lines, and that his rebirth to the principles of democracy is no more strange than his passing from disbelief in God to faithful adherence to the religion of his birth.

*Id.* at 624.

pointed out that prior to his judicial service he assisted a businessman of Polish ancestry in changing his name, even though the name the businessman sought to change had already been used for several years prior to the request.<sup>723</sup> Name changes were not uncommon in American history, and Kiker drew an analogy with the noted author Samuel Clemens who most Americans knew by the pseudonym Mark Twain, as well as Paul the Apostle's true identity of Saul of Tarsus.<sup>724</sup> Perhaps in the hope of the Court granting certiorari, Kiker turned to Black's dissents in *Douds* and *In re Summers* for the purpose of criticizing test oaths.<sup>725</sup> He also noted that the United States District Court for the Southern District of Texas had previously denied another prospective applicant standing to practice in federal court based on allegations of CPUSA membership and while the United States Court of Appeals for the Fifth Circuit had upheld the lower court, the Supreme Court issued a per curiam decision remanding the case, because the lower courts had failed to create a sufficient record for their determinations.<sup>726</sup> Finally, Kiker protested that the majority decision appeared to permanently foreclose bar admission against Schware.<sup>727</sup>

During the conference, Warren assigned Black to write for the majority.<sup>728</sup> Initially it appeared that Frankfurter, Clark, and Harlan would vote to uphold the New Mexico Supreme Court,<sup>729</sup> though this did not occur.<sup>730</sup> Black was willing to forgo a full Fourteenth Amendment analysis to Frankfurter's satisfaction.<sup>731</sup> Indeed, one of Schware's leading arguments was that the Board of Bar Examiners had relied on confidential information in deciding to deny him the opportunity to take the bar examination.<sup>732</sup> Although the state supreme court had not reviewed the confidential information, it relied on the Board's determination, and Black initially urged that refusing Schware access to the classified information constituted a denial of due process.<sup>733</sup> Black could have made a stronger case by pointing out that the state supreme court violated the 1873 decision *Ex parte Robinson*, which required a judge to provide all evidence to

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<sup>723</sup> *Id.* at 621.

<sup>724</sup> *Id.*

<sup>725</sup> *Id.* at 624–25 (citations omitted).

<sup>726</sup> *Id.* at 626–27 (citing *Application of Levy*, 214 F.2d 331 (Ca. 1954), *rev'd sub nom. In re Levy*, 348 U.S. 978 (1955)).

<sup>727</sup> *Id.* at 631–32.

<sup>728</sup> See *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 232–33 (1957); Conference Notes by Justice Hugo L. Black (undated) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330).

<sup>729</sup> Draft *Schware* Opinion by Justice Hugo L. Black (undated) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330) (handwritten notes).

<sup>730</sup> See *Schware*, 353 U.S. at 247; Draft *Schware* Opinion by Justice Hugo L. Black, *supra* note 729.

<sup>731</sup> *Schware*, 353 U.S. at 247.

<sup>732</sup> *Id.*

<sup>733</sup> Draft *Schware* Opinion by Justice Hugo L. Black, *supra* note 729.

a lawyer charged with contempt.<sup>734</sup> Also, unlike the state supreme court, Black highlighted Schware's military service during World War II, and he also pointed out the law school dean had full knowledge of Schware's background and encouraged him to finish law school.<sup>735</sup>

Where Black brought the Fourteenth Amendment into play was in his articulation of the general principle that a state could not exclude a person from a profession based on political beliefs any more than it could based on race.<sup>736</sup> This was an important point because by the time Schware's case came before the Court, disgruntled southern segregationists had allied with northern anticommunist leaders in attacking the Court.<sup>737</sup> Black also found it dispositive that even the state supreme court recognized Schware enjoyed a good reputation with the law school's faculty and in the local community.<sup>738</sup> He found the use of aliases to circumvent bigotry understandable,<sup>739</sup> and noted that as to Schware's pre-World War II arrests, none resulted in a conviction.<sup>740</sup> Indeed, the arrests that occurred in California resulted in charges under the state's anti-syndicalism laws, which Black referred to as "broad and vague."<sup>741</sup> As to the Neutrality Act violation, Black also equated support for Spain's anti-Franco forces with Americans who volunteered in the British Royal Air Force to fight Nazi Germany prior to the United States entry in World War II.<sup>742</sup> Black's opinion importantly undermined *Douds*, and, in referencing the New Mexico Supreme Court's citing of Jackson's concurring opinion, the Court noted that it "did not purport to be a factual finding," and could not "be used as a substitute for evidence" against Schware.<sup>743</sup>

Frankfurter authored a concurring opinion in which Harlan and Clark joined.<sup>744</sup> Clark initially had determined to dissent,<sup>745</sup> then was willing to join in Black's opinion,<sup>746</sup> but ultimately went over to Frankfurter's concurrence.<sup>747</sup> "Some time ago I sent you my agreement to your opinion. My restudy of *Konigsberg* leads me to the conclusion that my original vote here was correct—probably," Clark penned Black.<sup>748</sup>

<sup>734</sup> *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 506, 512–13 (1873).

<sup>735</sup> *Schware*, 353 U.S. at 237–38.

<sup>736</sup> *Id.* at 238–39, 244.

<sup>737</sup> BELKNAP, *supra* note 558, at 66–67.

<sup>738</sup> *Schware*, 353 U.S. at 239–41.

<sup>739</sup> *Id.* at 240–41.

<sup>740</sup> *Id.* at 241.

<sup>741</sup> *Id.* at 241–42.

<sup>742</sup> *Id.* at 242–43; *see also* Draft *Schware* Opinion by Justice Hugo L. Black, *supra* note 729.

<sup>743</sup> *Schware*, 353 U.S. at 244.

<sup>744</sup> *Id.* at 247.

<sup>745</sup> Letter from Justice Tom C. Clark to Justice Hugo L. Black (May 2, 1957) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330).

<sup>746</sup> *Id.*

<sup>747</sup> *Schware*, 353 U.S. at 247.

<sup>748</sup> Letter from Justice Tom C. Clark to Justice Hugo L. Black, *supra* note 745.

“However, I have decided rather than being the sole dissenter on such a close question that I will join Frankfurter, J.”<sup>749</sup> Frankfurter’s concurrence stressed that the Court was not an overseer of bar admissions.<sup>750</sup> He agreed with Black’s concept that attorneys had a critical role in ensuring justice, but he would not agree that political affiliation could not be used to deny admission to the bar.<sup>751</sup> Yet, he too found a Fourteenth Amendment due process violation, because New Mexico had accorded far too much weight to Schware’s youthful affiliation with the CPUSA.<sup>752</sup> “History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality,” Frankfurter concluded.<sup>753</sup> In this respect, Frankfurter’s concurrence was consistent with his stance in *Schneiderman*, fifteen years earlier in which he distinguished CPUSA membership from leadership in the organization.<sup>754</sup>

### C. *Interregnum*: In re Sawyer

In between 1957 and 1960, the Court decided another disbarment case involving an attorney with CPUSA ties.<sup>755</sup> Harriet Bouslog Sawyer, a Hawaii lawyer who had been admitted to the territorial Bar since 1941, along with Richard Gladstein who had served his contempt sentence from *Sacher*, but had not been disbarred for life,<sup>756</sup> defended five citizens accused of violating the Smith Act in the United States District Court.<sup>757</sup> During the trial, Sawyer publicly spoke to an assembly, denouncing the Smith Act.<sup>758</sup> This speech occurred 182 miles from the site of the trial.<sup>759</sup> Judge Jon Wiig, the

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<sup>749</sup> *Id.* Had Clark dissented, the case would have appeared more fractured. Harlan did not plan on dissenting, as he had in *Konigsberg I*. Letter from Justice John M. Harlan to Justice Hugo L. Black (Mar. 28, 1957) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 330). Prior to reading Frankfurter’s concurrence, he informed Black that he simply wanted to be on record as concurring without publishing a written concurrence. *Id.*

<sup>750</sup> *Schware*, 353 U.S. at 248 (Frankfurter, J., concurring).

<sup>751</sup> *Id.* at 247, 250–51.

<sup>752</sup> *Id.* at 250–51.

<sup>753</sup> *Id.* at 251.

<sup>754</sup> *Schneiderman v. United States*, 320 U.S. 118, 183, 185, 196–97 (1943).

<sup>755</sup> *In re Sawyer*, 360 U.S. 622 (1959).

<sup>756</sup> *Id.* at 623; *Sacher v. United States*, 343 U.S. 1, 3, 14, 42 (1951).

<sup>757</sup> *See Sawyer*, 360 U.S. at 623. The trial is found at *United States v. Fujimoto*, 107 F. Supp. 865 (Haw. 1952). Before the trial, Sawyer unsuccessfully motioned Judge J. Frank McLaughlin to recuse himself because he had opposed the University of Hawaii, honoring the scientist, Linus Pauling. *See United States v. Fujimoto*, 101 F. Supp. 293, 297 (Haw. 1951). In 1954, Pauling was awarded the Nobel Prize in Chemistry. *The Nobel Prize in Chemistry 1954: Linus Pauling*, NOBELPRIZE.ORG, [http://www.nobelprize.org/nobel\\_prizes/chemistry/laureates/1954/](http://www.nobelprize.org/nobel_prizes/chemistry/laureates/1954/) (last visited Mar. 15, 2012).

<sup>758</sup> *Sawyer*, 360 U.S. at 628–30.

<sup>759</sup> *Id.* at 623.

federal territorial judge, after reading extracts of the speech in a newspaper, questioned Sawyer and ordered the United States Attorney to investigate her conduct.<sup>760</sup> After the trial, Sawyer interviewed a juror in the hopes of discovering grounds for appeal.<sup>761</sup> In response, Wiig requested the Hawaii Bar Association investigate Sawyer's conduct, as well.<sup>762</sup> Remembering Medina's conduct, however, he did not summarily hold a contempt hearing.<sup>763</sup> Both of these acts resulted in the Hawaii Bar Association preferring the ethics allegations to the Territorial Supreme Court, which in turn referred the charges to the territorial Bar Association's Legal Ethics Committee.<sup>764</sup> The Committee determined that Sawyer's speech impugned the integrity of the trial judge, Jon Wiig, and found the interview of the juror improper.<sup>765</sup> The Territorial Supreme Court then suspended Sawyer for one year.<sup>766</sup> Sawyer appealed to the United States Court of Appeals for the Ninth Circuit, but that court did not grant relief.<sup>767</sup>

The Ninth Circuit's decision primarily focused on its jurisdiction, writing, "[i]f we have jurisdiction it hangs by the narrowest thread."<sup>768</sup> Turning to *Schwartz* and *Konigsberg I*, the appellate court found that it had jurisdiction only if Sawyer's claim was that she had been deprived of due process under the Fifth Amendment—the right against self-incrimination—regarding her First Amendment rights.<sup>769</sup> In other words, the court would have jurisdiction to consider a matter if Sawyer had refused to answer questions about her association with a political group. But that was not the case in her suspension from practice, and, therefore, the court determined that it did not have jurisdiction.<sup>770</sup> Nonetheless, the court criticized Sawyer's conduct throughout the decision, and, indeed, it noted that she had failed to show contrition to the state bar.<sup>771</sup>

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<sup>760</sup> *In re Sawyer*, 260 F.2d 189, 191 (9th Cir. 1958).

<sup>761</sup> *Id.* at 192–96.

<sup>762</sup> *Id.* at 192.

<sup>763</sup> *Id.* at 191–92, 199, 225.

<sup>764</sup> *Id.*

<sup>765</sup> *In re Sawyer*, 360 U.S. 622, 624–25, 636–37 (1959).

<sup>766</sup> *In re Sawyer*, 260 F.2d at 196.

<sup>767</sup> *Id.* at 190. The Ninth Circuit sitting en banc characterized the meeting as, "it would be fair to characterize the gathering as some kind of an old fashioned 'indignation meeting.'" *Id.* at 191. The appellate court also noted that the speech was well publicized throughout the Islands. *Id.* The Ninth Circuit's en banc decision rejected Sawyer's defenses including that the canons of ethics did not specifically prohibit public speeches. *Id.* at 200, 203–04.

<sup>768</sup> *Id.* at 201.

<sup>769</sup> *Id.*

<sup>770</sup> *Id.*

<sup>771</sup> *Id.* at 202. The court penned:

But so long as she conceives that she has a right to litigate a given case by day and castigate by night (or at recess) the very court, the honored place in which she is working, berating the conduct of the trial which she will resume on the morrow, she does not deserve to practice law.

*Id.*

After the conference, Warren assigned Brennan, rather than Black, to write the majority opinion.<sup>772</sup> Brennan included excerpts of Sawyer's speech in the opinion, including commenting that "horrible and shocking things" occurred during the Smith Act trials in Hawaii and accusing the government of union busting.<sup>773</sup> To this issue, Brennan noted that lawyers are free to criticize the state of the law.<sup>774</sup> Moreover, he pointed out that Sawyer's criticisms against the government and the Smith Act were not an attack on the judiciary.<sup>775</sup> As to the juror interview, Sawyer had discovered that the juror was mentally unstable and even the territorial court did not find the juror interview alone would merit suspension.<sup>776</sup> Thus, the Court reversed the lower courts and with it, the suspension.<sup>777</sup> In a conference memorandum, Brennan informed the Justices that he was not inclined to focus on due process, and his "opinion simply detail[ed] at length the reasons supporting the conclusion that the charge that Mrs. Sawyer in the speech impugned the integrity of Judge Wiig's conduct of the Smith Act trial was not proved."<sup>778</sup>

Black concurred in the result.<sup>779</sup> However, he disagreed that Hawaiian law permitted the suspension in the first place, and, more importantly, that Hawaii had provided a disbarment proceeding which comported with due process.<sup>780</sup> Thus, where Brennan and the majority determined that the quantum of evidence was not of a magnitude to support disbarment, Black's opinion was that the disbarment proceeding failed to provide basic rights required in federal hearings.<sup>781</sup> Stewart concurred as well, but on the basis that the legal profession could not exist without the full protection of freedom of speech.<sup>782</sup> He conceded that there were limitations to his general statement.<sup>783</sup> For instance, Stewart noted that, because client confidentiality is paramount to the profession, an attorney could not use the First Amendment as an excuse for divulging client communications.<sup>784</sup> Stewart's concurrence was in response to

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<sup>772</sup> *In re Sayer*, 360 U.S. 622 (1959).

<sup>773</sup> *Id.* at 628–31, 645 (internal quotation marks omitted).

<sup>774</sup> *Id.* at 631.

<sup>775</sup> *Id.* at 632–33. Later in the opinion, Brennan explained, "[e]ven if some passages can be found which go so far as to imply that Judge Wiig was taking an erroneous view of the law . . . it is no matter; appellate courts and law reviews say that of judges daily." *Id.* at 635.

<sup>776</sup> *Id.* at 636–37.

<sup>777</sup> *Id.* at 638.

<sup>778</sup> Memorandum from Justice William J. Brennan, Jr. to the Conference (undated) (on file with Library of Congress, Manuscripts Division, Papers of William J. Brennan, Jr., Box I:25).

<sup>779</sup> *Sawyer*, 360 U.S. at 646 (Black, J., concurring).

<sup>780</sup> *Id.*

<sup>781</sup> *Id.*

<sup>782</sup> *Id.* at 646–47 (Stewart, J., concurring).

<sup>783</sup> *Id.*

<sup>784</sup> *Id.* at 646.

Frankfurter's dissent, which suggested that the majority would enable a free speech defense for a violation of ethics rules.<sup>785</sup>

Frankfurter authored the dissent, with Clark, Harlan, and Whittaker joining.<sup>786</sup> He argued that, since the Bar association and the territorial and appellate courts had reasonably concluded that the suspension was justified, the Court was not empowered to set aside the order.<sup>787</sup> As in *Watkins*<sup>788</sup> and the two admissions decisions,<sup>789</sup> he refused to concede that the First Amendment was implicated in Sawyer's case.<sup>790</sup> He also accused Brennan of parsing through Sawyer's speech to arrive at the conclusion that Judge Wiig was not personally attacked, while in truth, the attack on Judge Wiig "was direct and clear," and the record of her conduct "replete with evidence to support the conclusion that virtually the entire speech constituted a direct attack on the judicial conduct of the trial."<sup>791</sup> To Frankfurter, in turn, this "impugned" the integrity of the judge.<sup>792</sup> Finally, Frankfurter injected into his dissent a comment that appeared directed more at Black and his concern over a double standard toward defense counsel than in opposition to Brennan. Frankfurter noted that the United States Court of Appeals for the Second Circuit had recently admonished a United States Attorney for giving a public lecture on the ills of organized crime during a criminal trial of reputed mob men.<sup>793</sup> However, a public reprimand and disbarment are two different levels of discipline, and if anything Frankfurter's notice strengthened Black's position that a double standard existed.<sup>794</sup>

In a correspondence to Brennan, Whittaker summed up the judicial divide on the relationship of attorney regulation and political affiliation between Black, Brennan, Douglas, and Warren on the one side and Frankfurter, Clark, and Harlan on the other.<sup>795</sup> Whittaker wrote that, "I have studied as carefully as I am able your opinion and Felix' [sic] dissenting opinion in this case, both of which are strong. However, you and Felix appear to be talking about different cases."<sup>796</sup>

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<sup>785</sup> *Id.* at 646–47.

<sup>786</sup> *Id.* at 647 (Frankfurter, J., dissenting).

<sup>787</sup> *Id.* at 648.

<sup>788</sup> *Watkins v. United States*, 354 U.S. 178 (1957).

<sup>789</sup> *Sacher v. United States*, 354 U.S. 930 (1958); *In re Isserman* 345 U.S. 286 (1953).

<sup>790</sup> *Sawyer*, 360 U.S. at 666–67 (Frankfurter, J., dissenting).

<sup>791</sup> *Id.* at 661, 664. Frankfurter conceded that the speech was not an act of obstruction of justice. *Id.* at 661–62.

<sup>792</sup> *Id.* at 662.

<sup>793</sup> *Id.* at 667 (citing *United States v. Stromberg*, 268 F.2d 256, 270–72 (2d Cir. 1959)). Indeed, the appellate court did not find the prosecutor's misconduct rose to the level of a reversible error. *Id.*

<sup>794</sup> *See supra* Part II.G.

<sup>795</sup> Letter from Justice Charles E. Whittaker to Justice William J. Brennan, Jr., Copy: Justice Felix Frankfurter (June 24, 1959), *microformed on Felix Frankfurter Papers*, Reel 38, Series II (Harvard Law Sch.).

<sup>796</sup> *Id.*



#### D. Konigsberg II

Following the Court's remand in *Konigsberg I*, the California Supreme Court ordered the SCBE to reopen its inquiry and provide Konigsberg another opportunity to answer whether he had ever been a member of the CPUSA (or other organization listed as subversive by the Attorney General).<sup>797</sup> The SCBE renewed its line of questioning, and Konigsberg steadfastly refused to answer the Committee's inquiry.<sup>798</sup> Once more, the Committee found that Konigsberg failed to establish his "good moral character" and "that he did not advocate [the] forceful overthrow of the government."<sup>799</sup> Konigsberg appealed to the state supreme court, challenging the finding on the same basis as before.<sup>800</sup> This time the court issued a published *per curiam* decision adverse to Konigsberg,<sup>801</sup> but with two justices dissenting.<sup>802</sup>

Justices Homer Spence, B. Rey Schauer, Marshall McComb, and John W. Shenk, the Court's conservative justices, determined to uphold the SCBE's determination.<sup>803</sup> In 1948, Shenk, Schauer, and Spence dissented against a decision which invalidated California's antimiscegenation law.<sup>804</sup> In that decision, Traynor, in writing for the majority, determined that the state could not constitutionally perpetuate racism by prohibiting interracial marriage.<sup>805</sup> Citing to Black's majority decision in *Konigsberg I*, in Konigsberg's second review, the state supreme court held that the refusal to answer the SCBE's questions remained a viable avenue for excluding him and others similarly

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<sup>797</sup> *Konigsberg v. State Bar of Cal.*, 344 P.2d 777, 778 (Cal. 1959) (*per curiam*), *aff'd* 366 U.S. 36 (1961).

<sup>798</sup> *Id.* at 779.

<sup>799</sup> *Id.* at 778–79. Shenk served on the State Supreme Court from 1925 to 1959. GUIDE TO THE JOHN W. SHENK PAPERS, 1900–1935, OAC.ORG (2009), available at <http://www.oac.cdlib.org/findaid/ark:/13030/tf029000wk?query=John> (last visited Mar. 15, 2012).

<sup>800</sup> *Konigsberg*, 344 P.2d at 778.

<sup>801</sup> *Id.* at 777.

<sup>802</sup> *Id.* at 777, 778 (Traynor, Acting C.J., joined by Peters, J., dissenting).

<sup>803</sup> *Id.* at 780. On McComb, see *The Law: Zzzz*, TIME MAG., Nov. 15, 1976. In 1972, he dissented in *People v. Anderson*, 493 P.2d 880, 889 (Cal. 1972) (en banc), which held that the death penalty was unconstitutional. He became so angry at the majority that he stormed out of the courtroom when the decision was publicly announced. *Id.* On the Court's composition, see generally 2 J. EDWARD JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA, 1900–1950 (1966).

<sup>804</sup> *Perez v. Lippold*, 198 P.2d 17, 35, 47 (Cal. 1948). Recently, comparative analysis regarding California's attempted prohibition of same-sex marriage has brought Shenk out of complete obscurity and has characterized him as a racist. See William N. Eskridge, *Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1820 (2009). Eskridge writes, "[a]lmost any judge would prefer to be remembered as Roger Traynor, who wrote the plurality opinion in *Perez*, rather than John W. Shenk, who wrote a shrill dissenting opinion that many today would view as racist." *Id.*

<sup>805</sup> *Perez*, 198 P.2d at 25–27.

situated who refused to answer inquiries into prior political activities, even though the prior activities themselves might not be a basis for denying admission.<sup>806</sup> Other than citing to *Konigsberg I*, the per curiam decision cited to just two other United States Supreme Court decisions, *Beilan* and *Lerner*.<sup>807</sup>

Traynor dissented once more, conceding that while *Konigsberg I* did not preclude the SCBE's denial of admission based on Konigsberg's refusal to answer questions, a more recent decision, *Speiser v. Randall*, did.<sup>808</sup> He also accepted that present CPUSA membership could adversely reflect on character.<sup>809</sup> In *Speiser*, the Court struck down a California tax exemption for veterans, except those unwilling to take a loyalty oath or those who belonged to an organization on the Attorney General's list.<sup>810</sup> The Court's majority held that the exclusion of individuals on the basis of a loyalty oath was an unconstitutional use of the state's authority to tax because it was designed to deter the right to free speech.<sup>811</sup> In striking down the tax code provision, the Court also reversed the state supreme court, which held, in a decision authored by Shenk, that the tax code limited the freedom to act which is a narrower freedom than the freedom of speech.<sup>812</sup> Traynor dissented from the majority in that decision, as well, urging that "a restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment."<sup>813</sup> Now in *Konigsberg*, Traynor dissented on the basis that the court had already established Konigsberg's moral character, as well as on the basis of ensuring an independent bar.<sup>814</sup>

The court's newest Justice, Raymond Peters, also dissented.<sup>815</sup> A 1927 graduate of Boalt Hall,<sup>816</sup> and classmate of Traynor's,<sup>817</sup> Peters became known as the second liberal justice after Traynor.<sup>818</sup> His dissent accused the majority of misconstruing *Konigsberg I*, where the Court took notice of Konigsberg's good character.<sup>819</sup> "[I]f the record before the high court established [Konigsberg's good moral character] as

<sup>806</sup> *Konigsberg*, 344 P.2d at 780.

<sup>807</sup> *Id.* (citing *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399 (1958) and *Lerner v. Casey*, 357 U.S. 468 (1958)).

<sup>808</sup> *Id.* at 782 (Traynor, C.J., dissenting) (citing *Speiser v. Randall*, 357 U.S. 513 (1958)).

<sup>809</sup> *Id.* at 781–82.

<sup>810</sup> 357 U.S. 513 (1958).

<sup>811</sup> *Id.* at 528–29.

<sup>812</sup> *First Unitarian Church of L.A. v. Cnty. of L.A.*, 311 P.2d 508 (1957), *rev'd*, 357 U.S. 545 (1958).

<sup>813</sup> *Id.* at 523 (Traynor, C.J., dissenting).

<sup>814</sup> *Konigsberg*, 344 P.2d at 783 (Traynor, C.J., dissenting).

<sup>815</sup> *Id.* at 783 (Peters, J., dissenting).

<sup>816</sup> Roger J. Traynor, *Justice Raymond E. Peters*, 57 CALIF. L. REV. 559, 559 (1969).

<sup>817</sup> Louis Farrell, Jr., *It's Great to Have Former Students Like This*, 57 A.B.A. J. 823 (1971).

<sup>818</sup> See, e.g., JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 54 (1989); ROGER K. NEWMAN, THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 545 (2009).

<sup>819</sup> *Konigsberg*, 344 P.2d at 787–88 (Peters, J., dissenting).

a matter of law, the record now before this court also, necessarily shows these facts as a matter of law," he concluded.<sup>820</sup>

Warren knew that Black remained steadfast in his determination to see *Konigsberg* and others similarly situated admitted to their respective state bars, because to permit exclusion would not only undermine the First Amendment, but also erode a critical check against tyranny, the independent bar.<sup>821</sup> But Black's coalition numbered only Warren, Douglas with Brennan filing a separate dissenting opinion.<sup>822</sup> Harlan, had Frankfurter, Clark, Whittaker, and Stewart to build on his original dissent in which he determined that the original decision only held that *Konigsberg* had established a *prima facie* case of good character.<sup>823</sup>

Frankfurter provided Harlan considerable input in the decision, encouraging him to ensure *Doubs* remained controlling precedent.<sup>824</sup> Frankfurter's clerk also reminded him and Harlan that if Black were to prevail a second time, it "would require a reexamination of the premises of *In re Summers*."<sup>825</sup> Frankfurter agreed with this assessment and conveyed it to Harlan.<sup>826</sup> In contrast to Traynor's dissent, Harlan made clear that the Court, in *Konigsberg I*, had not mandated that *Konigsberg* possess the requisite moral character for admission to the bar because such a mandate exceeded the Court's jurisdiction.<sup>827</sup> He also sought to return the determination of bar admission solely to the individual states.<sup>828</sup>

Harlan also challenged Black's belief that the Fourteenth Amendment prevented a state from denying admission based on an applicant's refusal to provide otherwise privileged answers.<sup>829</sup> In part, his analysis rested on *Adamson v. California*,<sup>830</sup> in which

<sup>820</sup> *Id.* at 788.

<sup>821</sup> See Conference Notes by Justice Earl Warren (undated) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 473).

<sup>822</sup> *Konigsberg II*, 366 U.S. 36, 56–80 (1961) (Black, J., dissenting). Brennan filed a separate dissenting opinion. See *id.* at 80–81 (Brennan, J., dissenting).

<sup>823</sup> *Id.* at 42–43 (majority opinion).

<sup>824</sup> Memorandum from Justice Felix Frankfurter to Justice John M. Harlan (undated), *microformed on Felix Frankfurter Papers*, Reel 63, Series II (Harvard Law Sch.).

<sup>825</sup> Memorandum from Clerk T.A. to Justice Felix Frankfurter (undated), *microformed on Felix Frankfurter Papers*, Reel 63, Series II (Harvard Law Sch.).

<sup>826</sup> Memorandum from Justice Felix Frankfurter to Justice John M. Harlan (undated), *microformed on Felix Frankfurter Papers*, Reel 63, Series II (Harvard Law Sch.).

<sup>827</sup> *Konigsberg II*, 366 U.S. at 43.

<sup>828</sup> *Id.* at 44. Harlan cited to several decisions on this point including *Palko v. Connecticut*, 302 U.S. 319 (1937), which enabled a state to place a defendant in double jeopardy, but the doctrine of deference on this matter, was overturned in *Benton v. Maryland*, 395 U.S. 784 (1969). *Konigsberg II*, 366 U.S. at 44. Black voted with the majority in each decision. *Benton*, 395 U.S. at 798; *Palko*, 302 U.S. at 329. Harlan would dissent in *Benton*, arguing that *Palko* remained sound. *Benton*, 395 U.S. at 808 (Harlan, J., dissenting).

<sup>829</sup> *Id.* at 44–45, 49–51 (relying in part on *Dennis v. United States*, 341 U.S. 494 (1951), and *Yates v. United States*, 354 U.S. 298 (1957)).

<sup>830</sup> 332 U.S. 46 (1947).

the Court earlier upheld the California's criminal trial rules to permit a prosecutor to comment on a defendant's failure to take the stand in his own defense.<sup>831</sup> In federal criminal trials such an act would have been considered plain error in violation of the Fifth Amendment,<sup>832</sup> but, in *Adamson*, the Court decided that the states were free to ignore this rule so long as the argument did not shift the burden of guilt on to the defendant.<sup>833</sup> By analogy, Harlan concluded that since in an administrative investigation, the burden of evidence was already on the petitioner—unlike a defendant in a criminal trial—the refusal to provide an answer was open for consideration.<sup>834</sup>

It was of no importance to Harlan that the requirement to answer the SCBE was based on the judiciary's supervisory authority.<sup>835</sup> By implication, it was also irrelevant that *Konigsberg*, and others similarly situated, who denied—even truthfully denied—association with a subversive organization might then face a criminal charge of perjury, because of the slovenliness and outright vindictiveness inherent in the contemporaneous legislative investigations such as the Dies and Tenney Committees.<sup>836</sup> In ignoring this aspect of *Konigsberg's* claim, Harlan minimized the efforts Black had undertaken to diminish the weight given to CPUSA membership.<sup>837</sup> Finally, Harlan distinguished that *Speiser* overturned a rule designed to coerce, if not penalize, beliefs and it applied to taxpayers rather than occupations.<sup>838</sup>

Harlan's opinion was unlikely to impress Black who had dissented in *Adamson v. California*,<sup>839</sup> regretted his *Palko v. Connecticut* affirmance,<sup>840</sup> and vehemently believed that the Fourteenth Amendment wholly applied to state action.<sup>841</sup> Joined by Warren and Douglas, Black dissented, accusing the SCBE, the California Supreme Court and Harlan's majority of ignoring *Konigsberg I*.<sup>842</sup> To Black, California's primary argument—that the refusal to answer questions formed the basis for denial of admission—was untenable.<sup>843</sup> He pointed out that no law or judicial announcement applicable to all applicants existed which barred applicants who made similar refusals.<sup>844</sup> Secondly, he argued that CPUSA membership had never been declared a disqualifier from admission, and, if the state determined that membership was a disqualifier, the

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<sup>831</sup> *Id.* at 57–58.

<sup>832</sup> *Id.* at 55.

<sup>833</sup> *Id.* at 58.

<sup>834</sup> *Konigsberg II*, 366 U.S. at 55–56.

<sup>835</sup> *Id.* at 52–53.

<sup>836</sup> See generally Lawrence A. Harper, *Legislative Investigation of Un-American Activities Exhibit A: The Tenney Committee*, 39 CALIF. L. REV. 502 (1951).

<sup>837</sup> See *Konigsberg II*, 366 U.S. at 44–45.

<sup>838</sup> *Id.* at 53–55.

<sup>839</sup> 332 U.S. 46, 68 (1947) (Black, J., dissenting); see also BALL, *supra* note 13, at 214–18.

<sup>840</sup> See BALL, *supra* note 13, at 212.

<sup>841</sup> *Id.* at 211.

<sup>842</sup> *Konigsberg II*, 366 U.S. at 56–57 (Black, J., dissenting).

<sup>843</sup> *Id.* at 57–59.

<sup>844</sup> *Id.* at 58.

declaration would violate the prohibition against bills of attainder.<sup>845</sup> After articulating why the majority diminished the importance of the First Amendment, Black warned that the majority's decision could easily extend into blacklisting civil rights advocates from practicing law.<sup>846</sup> Black finalized his dissent with the observation that, "the fact that Communists practice repression of these freedoms is, in my judgment, the last reason in the world that we should do so."<sup>847</sup> Brennan separately dissented as well,<sup>848</sup> with Warren joining him, on the basis that *Speiser* protected Konigsberg from being denied admission to the bar.<sup>849</sup>

#### E. *In re Anastaplo*

No decision showed Black's conception of the status of lawyers greater than *In re Anastaplo*.<sup>850</sup> The decision originated from an appeal of a denial of bar admission by the Illinois Committee on Character and Fitness (ICCF).<sup>851</sup> In 1950, George Anastaplo, a University of Chicago Law School graduate,<sup>852</sup> passed the Illinois Bar examination but could not gain admission to the bar because he refused to answer inquiries as to whether he had any affiliation with organizations listed on the Subversive Organizations List, or had been a member of the Communist Party.<sup>853</sup> The ICCF's decision was not unanimous, and the one dissenting member, Stephen Love, would side with Anastaplo throughout the judicial process.<sup>854</sup>

Like Konigsberg and Schwere, Anastaplo was a World War II veteran.<sup>855</sup> At the age of eighteen he enlisted and then served as an Army Air Forces navigator serving

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<sup>845</sup> *Id.* at 59–60.

<sup>846</sup> *Id.* at 73–74. Here Black argued:

[I]n the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial. In addition, it seems equally clear that anyone who had already associated himself with an organization active in favor of civil liberties before he developed an interest in the law, would, after this case, be discouraged from spending the large amounts of time and money necessary to obtain a legal education in the hope that he could practice law in California.

*Id.* at 74.

<sup>847</sup> *Id.* at 79.

<sup>848</sup> *Id.* at 80 (Brennan, J., dissenting).

<sup>849</sup> *Id.* at 80–81.

<sup>850</sup> 366 U.S. 82, 115 (1961) (Black, J., dissenting).

<sup>851</sup> *In re Anastaplo*, 121 N.E.2d 826, 827–28 (Ill. 1954), *cert. denied*, 348 U.S. 946 (1955), *reheard*, 163 N.E.2d 429 (Ill. 1959), *aff'd*, 366 U.S. 82 (1961).

<sup>852</sup> *In re Anastaplo*, 366 U.S. at 98 (Black, J., dissenting).

<sup>853</sup> *Id.* at 83–86 (majority opinion).

<sup>854</sup> *In re Anastaplo*, 121 N.E.2d at 828.

<sup>855</sup> *In re Anastaplo*, 366 U.S. at 98 (Black, J., dissenting).

in both the Pacific and European theaters of operations.<sup>856</sup> Born to an immigrant Greek parents,<sup>857</sup> who settled in the rural part of the state,<sup>858</sup> Anastaplo possessed an academic aptitude.<sup>859</sup> After his military service he attended the University of Chicago<sup>860</sup> and earned bachelor and doctoral degrees in philosophy and then earned a juris doctor, graduating at the top of his class.<sup>861</sup> Unlike the other two petitioners, the state bar had no evidence that Anastaplo had ever been a member of the CPUSA or even harbored sympathy for that party's aims.<sup>862</sup> On the other hand, he believed that the inquiry into his political beliefs intruded into his rights.<sup>863</sup>

In 1951, rather than appealing to the ICCF, Anastaplo appealed to the Illinois Supreme Court, challenging the ICCF's decision.<sup>864</sup> Anastaplo was determined to represent himself pro se.<sup>865</sup> However, the American Civil Liberties Union filed an amicus brief signed by Leon Despres,<sup>866</sup> a future Chicago alderman,<sup>867</sup> Abner Mikva, a future congressman and judge on the Court of Appeals for the District of Columbia,<sup>868</sup> Alexander Polikoff, who championed integrated fair public housing<sup>869</sup> and Bernard Weisberg, a future federal magistrate.<sup>870</sup> Likewise, the National Lawyers Guild filed an amicus brief.<sup>871</sup>

The Illinois Supreme Court, in an opinion authored by Justice Joseph E. Dailey, decided the appeal without dissent against Anastaplo.<sup>872</sup> In addition to Dailey, the court consisted of Justices Walter V. Schaefer, George W. Bristow, Ralph L. Maxwell, William J. Fulton, Harry B. Hershey and Ray I. Klingbiel.<sup>873</sup> Schaefer was a noted

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<sup>856</sup> *Id.* at 98.

<sup>857</sup> COLLINS & CHALTAİN, *supra* note 7, at 5.

<sup>858</sup> *In re Anastaplo*, 366 U.S. at 98.

<sup>859</sup> COLLINS & CHALTAİN, *supra* note 7, at 6.

<sup>860</sup> *Id.*

<sup>861</sup> *Id.*

<sup>862</sup> *Id.* at 7; *see also In re Anastaplo*, 366 U.S. at 86–87.

<sup>863</sup> COLLINS & CHALTAİN, *supra* note 7, at 6–7.

<sup>864</sup> *In re Anastaplo*, 121 N.E.2d 826, 827–28 (Ill. 1954).

<sup>865</sup> *Id.* at 827.

<sup>866</sup> *Id.*

<sup>867</sup> Hannah Fine, *Leon Despres, Chicago Alderman and Civil Rights Activist with University Ties, Dead at 101*, CHI. MAROON, May 12, 2009, available at <http://chicagomaroon.com/2009/05/12/leon-despres-chicago-alderman-and-civil-rights-activist-with-university-ties-dead-at-101/>.

<sup>868</sup> *Abner Mikva*, OFFICE OF CONGRESSIONAL ETHICS, <http://oce.house.gov/abner-mikva.html> (last updated Jan. 25, 2012).

<sup>869</sup> *See* ALEXANDER POLIKOFF, *WAITING FOR GATREAU: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO* 6–7 (2006).

<sup>870</sup> Kenan Heise, *Obituary, Magistrate Bernard Weisberg*, CHI. TRIB., Jan. 18, 1994 at 7.

<sup>871</sup> *In re Anastaplo*, 121 N.E.2d at 827.

<sup>872</sup> *Id.*

<sup>873</sup> *Justices of the Illinois Supreme Court, THE THIRD BRANCH—A CHRONICLE OF THE ILLINOIS SUPREME COURT*, <http://www.state.il.us/court/supremecourt/historical/justiceTL3.asp> (last visited Mar. 15, 2012).

legal scholar who authored and edited several treatises and his work has since been cited by several federal and state courts.<sup>874</sup> At one point President Lyndon Johnson, on the advice of Abe Fortas, considered nominating Schaefer to the Supreme Court, but did not do so, ultimately nominating Abe Fortas instead.<sup>875</sup> Fulton was lesser known, but had assisted in writing uniform rules for disbarment proceedings prior to World War II.<sup>876</sup> In 1969, Klingbiel became the subject of an investigation after a citizen uncovered that he purchased stock in a corporation while an officer of the corporation had a criminal conviction on appeal pending before the court, and had not recused himself from the case.<sup>877</sup> Klingbiel did not publicly report his purchase and voted to reverse the conviction.<sup>878</sup> He resigned rather than face impeachment, though in an interesting decision authored by Schaefer, the court held that absent clear legislation, the impeachment of judges was a judicial, rather than legislative, function.<sup>879</sup>

Daily noted that ordinarily the state judiciary would not review an appeal from the ICCF's decisions, but since Anastaplo claimed an abuse of discretion they would do so.<sup>880</sup> The Illinois court briefly summarized Anastaplo's performance before the ICCF as stating that a Communist Party member who is otherwise qualified should be admitted to the bar, and that he personally would "embrace" the overthrow of the government "by force of arms" if "he could not agree with the existing government, or found

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<sup>874</sup> In *United States v. Cronin*, 466 U.S. 648, 654 n.10 (1983), the Court cited Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956): "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." In 2003, the New Jersey Superior Court cited to the same article for the proposition that, although a due process rule might invalidate a confession to murder setting a potentially guilty defendant free, "[t]he quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." *State v. Patton*, 826 A.2d 483, 804 (N.J. Super. Ct. App. Div. 2003) (citing Schaefer, *supra*, at 26). For Schaefer's other works, see, for example, WALTER V. SCHAEFER, STANDARDS RELATING TO PLEAS OF GUILTY (1967). See also ILLINOIS CIVIL PRACTICE ACT ANNOTATED, WITH FORMS: UNDER DIRECTION OF ILLINOIS STATE BAR ASSOCIATION (1933); WALTER V. SCHAEFER, COURTS AND THE COMMONPLACES OF FEDERALISM (1959); WALTER V. SCHAEFER, THE CONTROL OF "SUNBURSTS": TECHNIQUES OF PROSPECTIVE OVERRULING (1967); WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY; CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES (1967).

<sup>875</sup> See BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 177 (1988). See generally William J. Brennan, Jr., *In Memoriam: Walter V. Schaefer*, 80 NW. U. L. REV. 1141, 1145-46 (1986).

<sup>876</sup> See Charles S. Potts, *Disbarment Procedure*, 24 TEX. L. REV. 161, 181 (1946).

<sup>877</sup> Jerome B. Meites & Steven F. Pflaum, *Justice James D. Heiple: Impeachment and the Assault on Judicial Independence*, 29 LOY. U. CHI. L.J. 741, 755 (1998). One general history on the scandal has been published. See KENNETH A. MANASTER, ILLINOIS JUSTICE: THE SCANDAL OF 1969 AND THE RISE OF JOHN PAUL STEVENS 3-4 (2001).

<sup>878</sup> Meites & Pflaum, *supra* note 877, at 755.

<sup>879</sup> *Id.* at 756-57; see also *Cusack v. Howlett*, 254 N.E.2d 506, 511-12 (Ill. 1969).

<sup>880</sup> *In re Anastaplo*, 121 N.E.2d 826, 828 (Ill. 1954).

it unsatisfactory.”<sup>881</sup> None of his answers indicated that he was a member of the CPUSA or even a “Fellow Traveler.”<sup>882</sup> Anastaplo’s theory of government mirrored more of a Jeffersonian and Madisonian view than it did a Marxist belief. As a result, the Illinois Supreme Court focused its decision as to whether Anastaplo’s refusal to answer whether he was a CPUSA member or a member of another subversive organization masking as a Communist front could be a basis for denial of admission.<sup>883</sup>

The state supreme court began its analysis with the related principles that the right to practice law is a privilege, and the conferring of a license enables a person to practice law.<sup>884</sup> This construct was governed by state statute, and, moreover, as the state had an interest in ensuring lawyers would adhere to the rules of fairness, the requirement of good moral character is a reasonable requirement.<sup>885</sup> Additionally, the state supreme court found that the oath to support both the United States Constitution, and the Illinois Constitution was relevant to the public’s confidence in the state and federal judicial systems.<sup>886</sup> Until this point, few legal scholars or attorneys would have likely refuted the state supreme court’s logic. Indeed, the state court intertwined the line of public employment cases in finding that lawyers hold a unique position of public trust.<sup>887</sup>

The state supreme court, however, next analyzed Communism as a political force, as well as the CPUSA’s goals.<sup>888</sup> Its analysis came almost solely from *Dennis* and Jackson’s concurrence in *Douds*.<sup>889</sup> From *Dennis*, the Illinois Court quoted: “[t]heir conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a ‘clear and present danger’ of an attempt to overthrow the Government by force and violence.”<sup>890</sup> From Jackson’s *Douds* concurrence, the state supreme court quoted “the Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law.”<sup>891</sup> Finally, the state supreme court found it relevant that the state appellate courts of California,<sup>892</sup>

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<sup>881</sup> *Id.* at 828–29.

<sup>882</sup> *Id.*; see also *supra* notes 227–28 and accompanying text.

<sup>883</sup> *In re Anastaplo*, 121 N.E.2d at 830–31.

<sup>884</sup> *Id.* at 829.

<sup>885</sup> *Id.*

<sup>886</sup> *Id.*

<sup>887</sup> *Id.* at 830–31.

<sup>888</sup> *Id.* at 829–30.

<sup>889</sup> *Id.*

<sup>890</sup> *Id.* (citing *Dennis v. United States*, 341 U.S. 494, 516–517 (1950)).

<sup>891</sup> *Id.* at 830 (citing *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382, 424 (1958) (internal quotation marks omitted)).

<sup>892</sup> See *Bd. of Educ. of City of L.A. v. Wilkinson*, 270 P.2d 82 (Cal. Ct. App. 1954). Notably, the California intermediate appellate court held:

In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more



Massachusetts,<sup>893</sup> and New York<sup>894</sup> had similarly found that the CPUSA was a subversive, continuing conspiracy against the government.<sup>895</sup> However, each of these three cases involved public teachers rather than lawyers, and while a teacher possesses public stature, there was, and is, a different requirement to become a teacher than a lawyer.<sup>896</sup> Interestingly, the Illinois Supreme Court also found it compelling that a Canadian appellate court had upheld a prohibition against communists becoming admitted to the bar.<sup>897</sup>

The state supreme court conceded that it had never determined whether CPUSA membership was a disqualifier from bar admission, but it now did so, holding that because “[t]he relation of the court and its attorneys to the people is one of high responsibility, involving on the one hand complete trust and confidence and on the other absolute fidelity and integrity,” membership in the CPUSA was an automatic barrier to bar admission.<sup>898</sup> This aspect of the decision was problematic from the standpoint of notice. Prior to the state court ruling, no CPUSA member was on notice that this affiliation could serve as a prohibition against admission.<sup>899</sup>

Finally, the state supreme court briefly addressed Anastaplo’s contention that the ICCF had infringed on his right of free speech.<sup>900</sup> The court held that since admission to the bar is a privilege rather than a right,<sup>901</sup> the reasonable regulation of the First Amendment was lawful since Anastaplo could “retain his beliefs and go elsewhere.”<sup>902</sup> In support of this position the state court pointed to its opinion in *In re Summers*.<sup>903</sup> Anastaplo petitioned the Court for a grant of certiorari, but only Black

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and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, . . . “to bite the hand that feeds it.” The men and women of America who pay their salaries have a right to know whether or not any of their employees are communists.

*Id.* at 86.

<sup>893</sup> *Faxon v. Sch. Comm. of Boston*, 120 N.E.2d 772 (Mass. App. Ct. 1954).

<sup>894</sup> *Daniman v. Bd. of Educ. of N.Y.*, 119 N.E.2d 373 (N.Y. 1954).

<sup>895</sup> *In re Anastaplo*, 121 N.E.2d 826, 830 (Ill. 1954).

<sup>896</sup> *Id.* at 831.

<sup>897</sup> *Id.* at 830 (citing *Martin v. Law Soc’y of B.C.*, [1950] 3 D.L.R. 173). The Canadian court provided that, “[t]he Marxist philosophy of law and government in its essence is so inimical in theory and practice to our constitutional system and free society that a person professing them is *io ipso* not a fit and proper person to practice law.” *Id.*

<sup>898</sup> *Id.* at 831 (internal quotation marks omitted).

<sup>899</sup> *But see id.* at 832–33 (arguing that applicants are aware of character and fitness requirements and are thus on notice that they must respond to inquiries).

<sup>900</sup> *Id.* at 831.

<sup>901</sup> *Id.* at 832.

<sup>902</sup> *Id.*

<sup>903</sup> *Id.*

and Douglas voted in favor of the grant.<sup>904</sup> However, he would ultimately prevail in obtaining a grant.<sup>905</sup>

After the Supreme Court issued *Schwartz* and *Konigsberg I*, Anastaplo succeeded in petitioning the ICCF to reconsider its earlier decision to block him from entry into the bar.<sup>906</sup> Between February 28 and May 19, 1958, the ICCF held hearings, generating over four hundred pages of transcripts.<sup>907</sup> During their questioning of Anastaplo, one of the ICCF members queried him on his religious beliefs.<sup>908</sup> The ICCF itself determined the questions on applicants religion were improper and this issue would not escape the Court's attention.<sup>909</sup> Several University of Chicago faculty members, as well as licensed attorneys, testified as to Anastaplo's fitness for admission.<sup>910</sup> Nonetheless, because Anastaplo did not renounce the abstract possibility of supporting the overthrow of the state or federal government, the ICCF, by a vote of eleven to six, continued to refuse him admission into the bar.<sup>911</sup> His refusal to renounce the overthrow of the government was not the central reason for denial of admission, partly because he did, in the hearings, state emphatically that he would never advise or encourage a client to this course of action and comply with the canons of attorney ethics.<sup>912</sup> The principal reason for the Committee's refusal was that he declined to answer whether he was a CPUSA member.<sup>913</sup>

Interestingly, the state supreme court had recently decided another bar admission case, in which the applicant, Ira Latimer, had admitted to being a CPUSA member, until that party's leaders refused to work alongside of socialists and other political groups.<sup>914</sup> Also, unlike Anastaplo, Latimer had a poor academic record, having been removed from DePaul University's law school as well as the Chicago- Kent Law School.<sup>915</sup> As part of his challenge, Latimer castigated the individual members of the ICCF.<sup>916</sup> He also failed to list numerous lawsuits he was involved in despite being

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<sup>904</sup> *In re Anastaplo*, 348 U.S. 946 (1955) (Black, J. and Douglas, J., dissenting).

<sup>905</sup> *In re Anastaplo*, 366 U.S. 82 (1961), *cert. granted*, 362 U.S. 968 (1960).

<sup>906</sup> *In re Anastaplo*, 163 N.E.2d 429, 431 (Ill. 1960).

<sup>907</sup> *Id.*

<sup>908</sup> *In re Anastaplo*, 366 U.S. at 83, 102 (Black, J., dissenting); *In re Anastaplo*, 163 N.E.2d at 441 (Bristow, J., dissenting).

<sup>909</sup> *In re Anastaplo*, 366 U.S. at 85.

<sup>910</sup> *In re Anastaplo*, 163 N.E.2d at 442-43.

<sup>911</sup> *In re Anastaplo*, 366 U.S. at 86-87 (majority opinion); *id.* at 100 (Black, J., dissenting).

<sup>912</sup> *In re Anastaplo*, 163 N.E.2d at 432-33.

<sup>913</sup> *In re Anastaplo*, 366 U.S. at 86-87.

<sup>914</sup> *In re Latimer*, 143 N.E.2d 20, 23 (Ill. 1957).

<sup>915</sup> *Id.* at 22. Latimer had a colorful past. He was the mayor of Minneapolis's illegitimate son. See *People*, TIME MAG., July 8, 1935, at 56. It is said that he accosted his father in public. *Id.*

<sup>916</sup> *Latimer*, 143 N.E.2d at 23-24.

questioned on his personal litigation.<sup>917</sup> Not surprisingly the state supreme court upheld the denial of admission.<sup>918</sup>

Although the state supreme court granted review, it did not provide Anastaplo with any relief.<sup>919</sup> For one, the author of the first decision, Joseph Daily,<sup>920</sup> joined in the second decision issued per curiam.<sup>921</sup> Justice Maxwell died in office in 1956 and was replaced by Byron O. House, and Charles H. Davis succeeded William Fulton who had retired.<sup>922</sup> This time Daily and the majority stated that CPUSA membership could be a complete bar to admission to practice law.<sup>923</sup> Daily also relied on *Orloff v. Willoughby*<sup>924</sup> a national security decision, to support the denial of admission to CPUSA members.<sup>925</sup> Moreover, he also determined that the importance of assuring good character was related to proof that an applicant could, “in good conscience take the attorney’s oath to support and defend the constitutions of the United States and the State of Illinois.”<sup>926</sup> Citing to *In re Isserman, Dennis, and Sacher*, he hinted that a CPUSA member or individual who shared the party’s aims could not provide the oath in good conscience.<sup>927</sup>

This time Bristow, who sided with the denial of admission in the first decision, dissented on the basis of *Konigsberg I* and *Schware*.<sup>928</sup> He called the majority’s characterization of Anastaplo “distorted,” and accused the per curiam of trying “to create

<sup>917</sup> *Id.* at 25.

<sup>918</sup> *Id.* Unlike Anastaplo, Latimer eventually became a lawyer. *See Ira Latimer; Battled for Civil Rights*, CHI. TRIB., Feb. 17, 1985, [http://articles.chicagotribune.com/1985-02-17/news/8501090867\\_1\\_small-business-civil-rights-public-utility-companies](http://articles.chicagotribune.com/1985-02-17/news/8501090867_1_small-business-civil-rights-public-utility-companies).

<sup>919</sup> *In re Anastaplo*, 163 N.E.2d 429 (Ill. 1959), *cert. granted*, 366 U.S. 82 (1961).

<sup>920</sup> *In re Anastaplo*, 121 N.E.2d 826, 827 (Ill. 1954) (Daily, J., dissenting) *cert. denied*, 348 U.S. 946 (1955).

<sup>921</sup> *In re Anastaplo*, 163 N.E.2d at 429.

<sup>922</sup> *See* Illinois Office of the Secretary of State, BLUEBOOK OF THE STATE OF ILLINOIS 148 (1961); MANASTER, *supra* note 877, at 88; *Charles H. Davis: Previous Illinois Supreme Court Justice*, THE THIRD BRANCH—A CHRONICLE OF THE ILLINOIS SUPREME COURT, <http://www.state.il.us/court> (last visited Mar. 15, 2012).

<sup>923</sup> *In re Anastaplo*, 163 N.E.2d at 439 (arguing that, because CPUSA supports the overthrow of the government, failing to answer questions shows that the applicant does not recognize the higher state interest of protecting the integrity of the legal profession, and, therefore, fails to demonstrate proper character).

<sup>924</sup> *Orloff v. Willoughby*, 345 U.S. 83 (1953). In *Orloff*, a medical doctor had successfully sought a commission in the Air Force, but, after military officials discovered he had been a member of a listed subversive organization, his commission was revoked. *Id.* at 89. The Army then drafted the medical doctor as an enlisted man. *Id.*

<sup>925</sup> *In re Anastaplo*, 163 N.E.2d at 434.

<sup>926</sup> *Id.* at 439.

<sup>927</sup> *Id.* at 438 (citing *In re Isserman*, 345 U.S. 286 (1953), *Sacher v. United States*, 343 U.S. 1 (1952), and *Dennis v. United States*, 341 U.S. 494 (1951)).

<sup>928</sup> *Id.* at 439 (citing *Konigsberg I*, 353 U.S. 252 (1957), and *Schware v. Bd. of Bar Exam’rs*, 291 P.2d 607 (N.M. 1955)).

the taint that [Anastaplo] believes in a subversive political philosophy by quoting isolated statements out of context from the 1951 record . . . .”<sup>929</sup> Bristow argued that the per curiam opinion had also ignored the weight of support leaders of the bar had given Anastaplo that reflected he possessed the scholarly ability to become a leader of the bar.<sup>930</sup> Although Bristow could not have known that the Court itself would shortly undermine *Konigsberg I*, he protested the per curiam’s “ineffective” efforts “to whittle it away and to avoid it as precedent.”<sup>931</sup> In particular, Bristow found it offensive that the per curiam simply viewed *Konigsberg I* as a reflection of California’s failure to adequately warn an applicant that his refusal to answer questions involving political beliefs violated fairness.<sup>932</sup>

Schaefer and Davis also dissented, but were unable to add their dissents to the immediate published opinion.<sup>933</sup> Both justices urged that the issue was more complex than Anastaplo’s failure to answer questions the committee deemed relevant, particularly because there simply was no evidence that he was ever a CPUSA member or even had any sympathy for the goals of that, or any other subversive, party.<sup>934</sup> To this end, both justices argued that Anastaplo had proven, by a wide margin, that he possessed the requisite character for admission.<sup>935</sup>

As in the case of *Konigsberg II*, Warren found himself with Black, Douglas, and Brennan in the dissent.<sup>936</sup> Frankfurter then assigned Harlan to write for the majority.<sup>937</sup> Again, Frankfurter provided considerable input to Harlan, encouraging him to minimize the ICCF’s inquiry into Anastaplo’s religious faith, calling it “an ugly incident,”

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<sup>929</sup> *Id.* at 440 (Bristow, J., dissenting).

<sup>930</sup> *Id.* at 442–43.

<sup>931</sup> *Id.* at 446.

<sup>932</sup> *Id.* at 447.

<sup>933</sup> *Id.* at 451.

<sup>934</sup> *Id.* at 928–29 (Schaefer and Davis, JJ., dissenting).

<sup>935</sup> *Id.* at 929. Particularly instructive on this point is Schaefer’s statement:

We think that it is unnecessary and inappropriate to decide this matter as though it called for an exercise of the ultimate limits of State power with respect to admission to the legal profession. What is involved is no more than an appraisal of the applicant’s moral character and his fitness to practice law. His views upon the right of revolution were fully expounded before the Committee. Those views are incompatible with membership in the Communist Party, or with anything resembling subversion. It is hard to understand the logic of a position that permits the applicant to expound at length upon his views as to the right of revolution but prevents him from answering questions as to Communist Party membership. But we cannot say that what seems to us to be a logical inconsistency is a reflection upon his character

*Id.* at 928–29.

<sup>936</sup> *In re Anastaplo*, 366 U.S. 82, 97 (1960).

<sup>937</sup> *Id.* at 83.

but insisting “its occurrence cannot be said to have deprived Anastaplo of due warning as to the consequences of failing to answer the question regarding Communist Party membership.”<sup>938</sup>

In the opinion, Harlan discussed the lengthy ICCF inquiry in which “Anastaplo undertook to expound and defend, on historical and ideological premises, his abstract belief in the ‘right of revolution,’ and to resist, on grounds of asserted constitutional right and scruple, Committee questions which he deemed improper.”<sup>939</sup> Harlan conceded that the ICCF had uncontroverted evidence of Anastaplo’s good character.<sup>940</sup> However, citing to *Konigsberg I*, he reiterated that the state’s interest in enforcing a rule against non-disclosure of questions involving subversive organizations outweighed Anastaplo’s free speech rights.<sup>941</sup> Ironically, Harlan distinguished Anastaplo’s case from *Konigsberg II* by stating that while *Konigsberg* was confronted by “some, though weak, independent evidence,” of a tie to the CPUSA, no evidence existed against Anastaplo.<sup>942</sup> However, Harlan also noted that Anastaplo had clearer warning than *Konigsberg* that his refusal to answer an inquiry into ties to subversive organizations would preclude him from bar admission.<sup>943</sup> Perhaps because Harlan believed he provided ample constitutional analysis in *Konigsberg I*, he concluded with a non-answer to the issue raised by stating there was “nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands.”<sup>944</sup>

Joined by Warren, Douglas, and Brennan, Black coupled his *Konigsberg II* dissent to *In re Anastaplo*.<sup>945</sup> He emphasized that no evidence to tie Anastaplo to any subversive organization existed and that Anastaplo’s statements on the right of rebellion came straight from the Declaration of Independence, hardly a communist document.<sup>946</sup> That the ICCF sent agents to Anastaplo’s childhood residence and still found nothing was particularly galling to Black.<sup>947</sup> He derided Harlan’s balancing test as “any State may

<sup>938</sup> Memorandum from Justice Felix Frankfurter for Justice John M. Harlan (undated), *microformed on Felix Frankfurter Papers*, Reel 63, Series II (Harvard Law Sch.).

<sup>939</sup> *In re Anastaplo*, 366 U.S. at 85.

<sup>940</sup> *Id.* at 85.

<sup>941</sup> *Id.* at 89.

<sup>942</sup> *Id.* at 89–90 (noting that while the cases are technically distinguishable, there is “no valid constitutional distinction” to be made between them).

<sup>943</sup> *Id.* at 90–91. Harlan noted, “[o]n the part of Anastaplo, he stands in the unusual position of one who had already been clearly so warned as a result of his earlier exclusion from the bar for refusal to answer the very question which was again put to him on rehearing.” *Id.* at 91.

<sup>944</sup> *Id.* at 97. Harlan also concluded that the Court would not go so far to intrude into the state’s own rules on attorney admissions in this instance. *Id.*

<sup>945</sup> *Id.* (Black, J., dissenting).

<sup>946</sup> *Id.* at 103–04.

<sup>947</sup> *Id.* at 106–07.

now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and his means of livelihood in defense of the freedoms of the First Amendment."<sup>948</sup> But Black was not finished, and, in his conclusion, he provided his views on the necessity of the independent bar and the duties of lawyers to defend individuals considered noxious to American ideals, even when the attorneys found their defendant's beliefs abhorrent to democracy.<sup>949</sup> To do so, he listed historic examples of preeminent attorneys who held political beliefs across the spectrum from the conservative former Chief Justice Charles Evans Hughes, Sr. to Clarence Darrow.<sup>950</sup> Finally, Black ended with the admonition that "[w]e must not be afraid to be free."<sup>951</sup>

When Black circulated his draft dissent on March 30, 1961, only Douglas recommended stylistic changes.<sup>952</sup> By April 19, 1961, Douglas, Warren, and Brennan had joined,<sup>953</sup> though Brennan added his own minor dissent which essentially mirrored his dissent in *Konigsberg II*.<sup>954</sup> Both Brennan and Warren voiced concerns to Black regarding the concluding "sweep of history," at the end of the dissent but went along with Black at any rate.<sup>955</sup>

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<sup>948</sup> *Id.* at 112.

<sup>949</sup> *Id.* at 115–16.

<sup>950</sup> *Id.* at 115. Here Black argued:

It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the fanatical leaders of the Revolutionary government of France—men like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed superpatriots—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.

*Id.* at 114–16 (citation omitted).

<sup>951</sup> *Id.* at 116.

<sup>952</sup> Draft *Konigsberg II* Dissent by Justice Hugo L. Black (Mar. 30, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 468).

<sup>953</sup> Draft *Konigsberg II* Dissent by Justice Hugo L. Black (Apr. 19, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 468).

<sup>954</sup> Draft *Konigsberg II* Dissent by Justice William J. Brennan, Jr. (Apr. 10, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 468).

<sup>955</sup> NEWMAN, *supra* note 14, at 507. However, Warren's reticence is not contained in Black's correspondence in which Warren simply asked to join in the dissent. *See* Letter from

There is another aspect to Black's *In re Anastaplo* dissent that differed from his relations with the other two petitioners. Black developed a personal relationship with Anastaplo,<sup>956</sup> and he found it humorous that, in 1960, as the decision was pending before the Court, Anastaplo traveled across Europe with his family and while in the Soviet Union was arrested, prosecuted, and expelled from the country under its political subversion laws.<sup>957</sup> Anastaplo became a noted professor and author.<sup>958</sup> In 1965, he asked Black to write a preface for one of his books, but Black apologetically declined stating that he had adopted "a practice against writing prefaces and book reviews."<sup>959</sup> In 1969, Anastaplo wrote to Black, explaining that his reason for not pursuing admission to the bar, even after the political conditions had changed was to pursue other scholarship.<sup>960</sup> Black responded,

Maybe there is no need for me to do so, but I take great pride in the course you have followed since your case in Illinois and at this Court. You have acted with great dignity and have, in my judgment, established the fact that you are not destined to be the great extremist which some people thought you were sure to become.<sup>961</sup>

#### CONCLUSION

In a 1996 *Drake Law Review* article Justice Ruth Bader Ginsburg penned:

In a series of divided opinions running from 1957 until 1971—decisions less than crystalline in quality—the Court dealt with denial of bar membership based on refusal to respond to inquiries

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Justice Earl Warren to Justice Hugo L. Black (Apr. 3, 1961) (on file with Library of Congress, Manuscript Division, Papers of Earl Warren, Box 468).

<sup>956</sup> See generally Correspondence of Justice Hugo L. Black and George Anastaplo (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 345).

<sup>957</sup> Letter from George Anastaplo to Justice Hugo L. Black (Aug. 28, 1969) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 345); see also, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 252–53 (1976).

<sup>958</sup> See George Anastaplo, *George Anastaplo: An Autobiographical Bibliography (1947–2001)*, 20 N. ILL. U. L. REV. 581, 581 (2000) (outlining the work of George Anastaplo).

<sup>959</sup> Letter from Justice Hugo L. Black to George Anastaplo (June 1, 1965) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 345).

<sup>960</sup> Letter from George Anastaplo to Justice Hugo L. Black, *supra* note 957. Anastaplo penned Black, "In the event, I decided that the best 'argument' I could make on behalf of the position I stood for was to forget about the bar and provide the minority that had supported me a record of decent work by me in the classics, political philosophy and constitutional law." *Id.*

<sup>961</sup> Letter from Justice Hugo L. Black to George Anastaplo (Sept. 2, 1969) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 345).

concerning Communist Party membership. The Court held it improper to close the profession to persons based solely on party affiliation, but allowed inquiry designed to determine whether an applicant had joined an organization intending to further unlawful ends. Developments in First and Fifth Amendment law coinciding with the wind down and end of the Cold War era may render this wavering line of decisions slim in precedential value.<sup>962</sup>

In a broader context, Cold War historian David Caute assessed the judiciary's role during the age of McCarthyism as: "[s]hamefully as the American judiciary bowed and bent to the *Realpolitik* of the 'American Century,' it never completely abdicated its independence and was soon able to stage an admirable recovery of nerve, restoring sap to the Bill of Rights, vitality to the Constitution . . . ."<sup>963</sup>

The latter two licensure cases, however, have never been overturned, and Justice Ginsburg's observations and Caute's broader statement, though perhaps correct, are only so in the respect that it is exceedingly rare that a prospective attorney is denied admission based on a belief, and in such instances the denial is based on individual beliefs, such as the refusal to provide legal services on the basis of race or gender, rather than political associations.<sup>964</sup> However, there is a difference between precedential value and historic importance, the former being a narrower category than the latter. And, the last two licensure decisions have been utilized and incorporated in both quiet and not so quiet ways.

While the Court deliberated on the second two licensure cases, it also decided *Cohen v. Hurley*, which arose from a New York disbarment proceeding.<sup>965</sup> On its face, the facts had nothing to do with the zealous representation of persons accused of subversion,<sup>966</sup> or attorney applicants who claimed a privilege against divulging political associations.<sup>967</sup> The disbarment occurred after an attorney asserted a privilege against self-incrimination and refused to answer questions regarding his legal practice during a judicial inquiry into fee splitting in what was then termed as the

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<sup>962</sup> Ruth Bader Ginsberg, *Supreme Court Discourse on the Good Behavior of Lawyers: Leeway Within Limits*, 44 DRAKE L. REV. 183, 189 (1996) (citation omitted).

<sup>963</sup> DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 17 (1978).

<sup>964</sup> See, e.g., *In re Hale*, 723 N.E.2d 206 (Ill. 1999) (Heiple, J., dissenting). After the Illinois Supreme Court upheld the decision of its appointed board, the United States Supreme Court denied certiorari without comment. *Hale v. Comm. on Character & Fitness of the Ill. Bar*, 530 U.S. 1261 (2000). Finally, for Hale's second and unsuccessful attack against the state bar in the federal judiciary see, *Hale v. Comm. on Character & Fitness for the State of Ill.*, 335 F.3d 678 (2003).

<sup>965</sup> 366 U.S. 117, 117 (1961).

<sup>966</sup> *Id.* at 120–21.

<sup>967</sup> *Id.*



“Brooklyn ‘ambulance chasing’ Judicial Inquiry.”<sup>968</sup> Clearly, the discipline of attorneys who violated ethics rules was essential to the integrity of the profession, and, on this point, both Black and Harlan agreed.<sup>969</sup> However, Harlan cited to *Konigsberg II* and *In re Anastaplo* for the proposition that the refusal to answer inquiries could result in denial of practice.<sup>970</sup> Harlan also pointed out that the Fourteenth Amendment did not protect the petitioner, even if the assertion of the privilege was made in good faith.<sup>971</sup>

Not surprisingly, Black dissented, but this time only Warren and Douglas joined.<sup>972</sup> In his dissent, Black provided perhaps his most eloquent exposition of the importance of attorneys in preserving freedom.<sup>973</sup> After accusing the majority of permitting discrimination against attorneys by allowing a state to penalize an individual for the assertion of a privilege, he stated:

I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment.<sup>974</sup>

As Black concluded, he admonished the majority for pursuing a legal theory found in *Dred Scott v. Sandford* and *Plessy v. Ferguson*,<sup>975</sup> and then exposed what he felt was the true danger in the majority’s decision—the risk to the First Amendment.<sup>976</sup> He reminded the majority that the *Dennis* attorneys were unjustly imprisoned and disbarred,<sup>977</sup> Harriet Sawyer’s career was barely saved by a five-to-four vote,<sup>978</sup> and

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<sup>968</sup> *Id.* at 119.

<sup>969</sup> *Id.* at 122–24 (majority opinion); *id.* at 138 (Black, J., dissenting).

<sup>970</sup> *Id.* at 122–23 (majority opinion).

<sup>971</sup> *Id.* at 125.

<sup>972</sup> *Id.* at 131 (Black, J., dissenting).

<sup>973</sup> *See generally id.* at 131–45.

<sup>974</sup> *Id.* at 138.

<sup>975</sup> *Id.* at 142 n.23.

<sup>976</sup> *Id.* at 142–43.

<sup>977</sup> *Id.* at 144 (discussing *Dennis v. United States*, 341 U.S. 494 (1951)).

<sup>978</sup> *Id.* at 144–45 (discussing *In re Sawyer*, 360 U.S. 622 (1959)).

two prospective attorneys were prevented from admission to the bar because they would not terminate their First Amendment rights.<sup>979</sup>

The dissent in *Cohen* was, in part, a victim of its own making as ambulance chasing attorneys can hardly be argued as engendering public sympathy.<sup>980</sup> Douglas attempted to inject sarcasm into the dissent, writing in his draft that if he were “facetious, [he] could imitate a recent T.V. orator and say there must have been Communists among the Founding Fathers; why else did they write the Fifth Amendment.”<sup>981</sup> Once more Douglas decided to omit a caustic passage.<sup>982</sup> There is one other point of importance regarding *Cohen* and its relation to *Konigsberg II* and *In re Anastaplo*. In *Spevack v. Klein*,<sup>983</sup> a 1967 disbarment decision which arose from an attorney’s assertion of a Fifth Amendment privilege before a disciplinary investigation, the Court’s majority included the odd language, “[w]e conclude that *Cohen v. Hurley* should be overruled.”<sup>984</sup> But it did not overrule *Cohen*, and this partly had to do with Justice Fortas’s insistence on a narrowly tailored decision.<sup>985</sup> Nor would the Court ever expressly overrule *Konigsberg II* and *In re Anastaplo*.

In 1967, in *Felber v. Assoc. of the Bar of the City of New York*,<sup>986</sup> Black dissented from a denial of certiorari to a petitioner who unsuccessfully sued for reinstatement on grounds similar to those raised in *Theard*.<sup>987</sup> The petitioner in *Felber* was convicted in 1941, but an appellate court voided the conviction.<sup>988</sup> Nonetheless, the

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<sup>979</sup> *Id.* at 145.

<sup>980</sup> Douglas seemed to understand this issue writing to Black, “[i]n light of the *Beilan* . . . and *Lerner* . . . cases, this case, if granted, would seem to stand very little chance of being reversed. . . . [However,] [i]f the action in the *Konigsberg* case and *Anastaplo* is eventually determined to exceed due process because arbitrary, this case might well go the same way.” Letter from Justice William O. Douglas to Justice Hugo L. Black (June 1, 1960) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1249). Warren warned Black on this point too. See Letter from Chief Justice Earl Warren to Justice Hugo L. Black (Apr. 24, 1961) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1249).

<sup>981</sup> Draft *Cohen* Dissent by Justice William O. Douglas (undated) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1249). Douglas noted that he obtained this statement from Judge Rifkind. *Id.*

<sup>982</sup> *Cohen v. Hurley*, 366 U.S. 117, 150 (1961) (Douglas, J., dissenting).

<sup>983</sup> 385 U.S. 511 (1967).

<sup>984</sup> *Id.* at 514.

<sup>985</sup> On this point, see Letter from Justice William J. Brennan, Jr. to Justice William O. Douglas (Jan. 12, 1967) (on file with Library of Congress, Manuscript Division, Papers of William O. Douglas, Box 1388). Fortas believed that a broad opinion would enable police and public servant misconduct, and Black, Brennan, and Douglas acquiesced. *Id.*

<sup>986</sup> 386 U.S. 1005 (1967) (Black, J., dissenting).

<sup>987</sup> *Id.*; *Theard v. United States*, 354 U.S. 278 (1957) (regarding the disbarment of a lawyer for forging a promissory note).

<sup>988</sup> *Felber*, 386 U.S. at 1005.

Bar had continued to refuse to readmit the petitioner, and Black urged that the Court would strengthen *Konigsberg II* and *In re Anastaplo* unless it granted certiorari and reversed the New York bar.<sup>989</sup> However, he could only muster Douglas to join him.<sup>990</sup>

In two of Black's last decisions, *Baird v. State Bar of Arizona* and *In re Stolar* he was able to muster a majority to protect the First Amendment rights of attorney applicants,<sup>991</sup> but not to the point of overturning *Konigsberg II* or *In re Anastaplo*.<sup>992</sup> In *Baird*, the petitioner refused to answer whether she had ever been a CPUSA member or a member of another subversive organization, and the state bar subsequently denied her admission.<sup>993</sup> The state's perjury statute applied to the bar application.<sup>994</sup> The decision rested on the First Amendment, as well as the privilege against self incrimination,<sup>995</sup> and in it Black concluded that admission to the bar is a right conferred after proving moral character and attainment of learning.<sup>996</sup> Nonetheless, the Court did not overturn *Konigsberg II* or *In re Anastaplo*, a fact pointed out by Blackmun in his dissent.<sup>997</sup> Blackmun appeared to pick up where Harlan had left off. Indeed, Blackmun disregarded his clerk's advice, and was coached by Harlan.<sup>998</sup> "I realize that it is possible for one to have had membership in the party or even presently to have it and at the same time not subscribe to its advocacy of violent overthrow. Yet, I always get the impression that in cases of this kind, the applicant is dodging something," Blackmun informed his clerks.<sup>999</sup> "He is not arguing innocently First and Fifth and Fourteenth

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<sup>989</sup> *Id.* at 1006; see also Draft *Felber* Dissent by Justice Hugo L. Black (Apr. 14, 1967) (on file with Library of Congress, Manuscript Division, Papers of Hugo L. Black, Box 394). In his draft Black stated that *Konigsberg II* and *Anastaplo* were wrongly decided. *Id.*

<sup>990</sup> *Id.* at 1005.

<sup>991</sup> *In re Stolar*, 401 U.S. 23, 24 (1971); *Baird v. State Bar of Ariz.*, 401 U.S. 1, 2 (1971).

<sup>992</sup> *Baird*, 401 U.S. at 11–12 (Blackmun, J., dissenting).

<sup>993</sup> *Id.* at 4–5 (majority opinion).

<sup>994</sup> *Id.* at 5.

<sup>995</sup> *Id.* at 6.

<sup>996</sup> *Id.* at 8.

<sup>997</sup> *Id.* at 11–12 (Blackmun, J., dissenting).

<sup>998</sup> See Letter from Clerk D.B.E. to Justice Harry A. Blackmun (Jan. 29, 1971) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 119). After assuring Blackmun that *Konigsberg II* and *In re Anastaplo* would remain in effect regardless of Black's majority opinion, his clerk D.B.E. wrote, "I think that your argument that *Konigsberg* and *In re Anastaplo* somehow support the proposition that refusal to answer questions other than those touching on C.P. membership would be 'obstructive' is unconvincing." *Id.* On Harlan's input, see Letter from Justice John M. Harlan to Justice Harry A. Blackmun (Feb. 3, 1971) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 119). Blackmun, also wished to publicly air the Court's divide on this issue informing the reporter of decisions not to name Black, but to refer to his decision as "the plurality." Letter from Justice Harry A. Blackmun to Henry Putzel, Jr. (Mar. 5, 1971) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 119).

<sup>999</sup> Letter from Justice Harry A. Blackmun to Clerk D.B.E. (Oct. 13, 1970) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 119).

Amendment rights as a matter of theory, but as a protective device. He wants the privileges of our government, and yet would overthrow it.”<sup>1000</sup>

Black also prevailed in *In re Stolar*, a case decided on similar grounds as *Baird*, but without overturning *Konigsberg II* and *In re Anastaplo*.<sup>1001</sup> Blackmun’s clerk found the two licensure cases to be nearly successful attempts to rid the bar of the politically unpopular and limit representation for dissident groups.<sup>1002</sup> But in *Law Students Civil Rights Research Council, Inc., v. Wadmond*, Black once more found himself in the dissent.<sup>1003</sup> This decision arose from a challenge from law students who had not yet applied for bar admission, challenging state bar inquiries into past membership of listed subversive organizations.<sup>1004</sup> Stewart wrote the majority opinion,<sup>1005</sup> and Black dissented on First Amendment grounds.<sup>1006</sup> In a conference memorandum, Blackmun penned, “[i]t seems to me that the state may properly inquire whether the applicant is a knowing member of an organization that advocates violent overthrow of the government,” before claiming that entering the practice of law is a privilege and not a right.<sup>1007</sup> Black disagreed stating, “I do not think that a State can, consistently with the First Amendment, exclude an applicant because he has belonged to organizations that advocate violent overthrow of the Government, even if his membership was ‘knowing’ and he shared the organization’s aims.”<sup>1008</sup>

Justice Ginsburg authored her article before the “War on Terror.”<sup>1009</sup> As noted in the Introduction, in the past decade, some writers have argued that attorneys defending suspected terrorists have been held to a double standard,<sup>1010</sup> as Black feared existed.<sup>1011</sup> But, the state bars have not excluded persons on the basis of race or religious or political associations.<sup>1012</sup> Admittedly, al-Qaeda or other terrorist organizations do not have the numbers of members the CPUSA or fellow travelers once had,<sup>1013</sup> and the CPUSA

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<sup>1000</sup> *Id.*

<sup>1001</sup> *In re Stolar*, 401 U.S. 23, 30 (1971); *id.* at 31. (Blackmun, J., dissenting).

<sup>1002</sup> Letter from Clerk D.B.E. to Justice Harry A. Blackmun, *supra* note 998.

<sup>1003</sup> 401 U.S. 154, 174–75 (1974) (Black, J., dissenting).

<sup>1004</sup> *Id.* at 157, 164 (majority opinion).

<sup>1005</sup> *Id.* at 156.

<sup>1006</sup> *Id.* at 174. (Black, J., dissenting).

<sup>1007</sup> Memorandum from Justice Harry A. Blackmun to the Conference (undated) (on file with Library of Congress, Manuscript Division, Papers of Harry A. Blackmun, Box 121). Harlan agreed with Blackmun’s assessment. *Id.*

<sup>1008</sup> *Law Students Research Council*, 401 U.S. at 175 (Black, J., dissenting).

<sup>1009</sup> Ginsberg, *supra* note 962, at 183; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (joint resolution starting the “war on terror”).

<sup>1010</sup> See e.g., Basile, *supra* note 21, at 1831; Clare, *supra* note 21, at 661–62; Keeley, *supra* note 21, at 847; Margulies, *supra* note 21, at 192; Moliterno, *supra* note 21, at 752–53.

<sup>1011</sup> *In re Anastaplo*, 366 U.S. 86, 114–16 (1960) (Black, J., dissenting).

<sup>1012</sup> *But see In re Hale*, 723 N.E.2d 206 (Ill. 1999) (denying petitioner’s application to the bar due to his open racism).

<sup>1013</sup> Compare Ken Silverstein, *The Al-Qaeda Clubhouse: Members Lacking*, HARPERS, July 5, 2006, <http://harpers.org/archive/2006/07/sb-al-qaeda-new-members-badly-needed-1151963690>

was an adversary of a different nature.<sup>1014</sup> Yet, when a government attorney named Charles “Cully” Stimson, employed by the Department of Defense, publicly urged defense contractors discontinue their attorney-client relationship with counsel defending suspected terrorists, the Defense Department’s leadership distanced the government from Stimson’s comments, and the bar largely condemned the remarks.<sup>1015</sup> Thus, a different environment exists from what appalled Black during the Cold War. On the other hand, vigilance against the reuse and revival of *Konigsberg II* and *In re Anastaplo* is essential to ensuring the Cold War environment does not return, and the strength of the First Amendment is preserved as the preeminent right that Justice Black believed it to be. However, this is not to be successfully achieved by exaggerating or conflating the historic record.

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(postulating that there were between 500 and 1,000 members of al-Qaeda near September 11, 2001), with PHILIP R. YANNELLA, *AMERICAN LITERATURE IN CONTEXT AFTER 1929*, at 12–13 (2011) (estimating CPUSA had 65,000 members in 1935).

<sup>1014</sup> *Sharia: The Threat to America: An Exercise in Competitive Analysis (Report of Team ‘B’ II)*, CTR. FOR SEC. POLICY 9 (2010), available at [http://familysecuritymatters.org/doclib/20100915\\_Shariah-TheThreattoAmerica.pdf](http://familysecuritymatters.org/doclib/20100915_Shariah-TheThreattoAmerica.pdf).

<sup>1015</sup> See Charles J. Dunlap, Jr., *The Ethical Dimension of National Security Law*, 50 S. TEX. L. REV. 789, 799 (2009). As a caveat, the then–Deputy Judge Advocate of the Air Force, Judge Advocate General’s Corps, supervised this author, who remains an admirer and supporter of Major General Dunlap’s lawfare theories. For more information on the incident involving Stimson, see Editorial, *Unveiled Threats: A Bush Appointee’s Crude Gambit on Detainees’ Legal Rights*, WASH. POST, Jan. 12, 2007, at A18. Moreover, if an attorney or law firm believed that the comments actually reflected policy, it would likely place the prosecution in peril of losing jurisdiction.