"We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter. ..."—Justice HARLAN

"I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process."—Justice BLACK

Barenblatt v. United States

360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115 (1959).

Rule XI of the House of Representatives authorized the Committee on Un–American Activities to investigate propaganda that was "un-American" or attacked the "principle of the form of government guaranteed by our Constitution." Investigating supposed communist influence in education, the committee called as a witness Lloyd Barenblatt, who had been a graduate student and teaching assistant at the University of Michigan and later an instructor at Vassar and had been identified by another witness as having been a communist while at Michigan. He refused to answer questions, claiming that the committee was abridging his rights under the First, Ninth, and Tenth Amendments, conducting a legislative trial, and subjecting him to a bill of attainder. He was cited for contempt of Congress and convicted in a district court; the court of appeals affirmed.

Meanwhile, Watkins v. United States (1957) reversed another conviction for contempt of Congress on narrow grounds: The committee had not clearly informed Watkins of the relevance of its questions to a valid legislative purpose. Warren's opinion for the Court, however, had gone out of its way to castigate congressional investigations that tried to expose and punish people for their political views. In and outside of Congress, *Watkins* was read as a warning that the Court was going to protect the First Amendment against congressional campaigns for political orthodoxy. And, when Barenblatt petitioned for certiorari, the Court granted the writ and remanded the case to the court of appeals for reconsideration in light of *Watkins.*

The court of appeals reaffirmed its decision and Barenblatt again sought and obtained certiorari. In the interim between *Watkins* and *Barenblatt,* another set of events occurred. Southern Democrats and conservative Republicans had joined together in a multi-pronged attack on the Supreme Court for its decisions in *Watkins,* the School Segregation Cases, *Yates,* and several other rulings that had protected alleged subversives in government as well as the rights of the criminally accused. Due to the work of a coalition of liberal Democrats and Republicans and to Lyndon Johnson's adroitness as majority leader of the Senate and his ambition to become President, all but one of the attacks failed, although several came very close to passage—close enough to constitute a warning to the justices of congressional power.

Mr. Justice **HARLAN** delivered the opinion of the Court.

Once more the Court is required to resolve the conflicting constitutional claims of

congressional power and of an individual's right to resist its exercise. ...

... In the present case congressional efforts to learn the extent of a nationwide, indeed world wide, problem have brought one of its investigating committees into the field of education. Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain. But this does not mean that the Congress is precluded from interrogating a witness merely because he is a teacher. An educational institution is not a constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain merely for the reason that inquiry is made of someone within its walls. ...

Our function, at this point, is purely one of constitutional adjudication in the particular case and upon the particular record before us, not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field. The precise constitutional issue confronting us is whether the Subcommittee's inquiry into petitioner's past or present membership in the Communist Party transgressed the provisions of the First Amendment, which of course reach and limit congressional investigations. *Watkins* [1957].

The Court's past cases establish sure guides to decision. Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown. These principles were recognized in the Watkins Case, where, in speaking of the First Amendment in relation to congressional inquiries, we said: "It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred. ... The critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness." More recently in NAACP v. Alabama [1958] we applied the same principles in judging state action claimed to infringe rights of association assured by the Due Process Clause of the Fourteenth Amendment, and stated that the " 'subordinating interest of the State must be compelling' " in order to overcome the individual constitutional rights at stake. See Sweezy v. N.H. concur. op. [1957]. In light of these principles we now consider petitioner's First Amendment claims.

The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose. See *Watkins.*

That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of

legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, "the ultimate value of any society." Dennis v. United States [1951]. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. ... To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II ... and to the vast burdens which these conditions have entailed for the entire Nation.

We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. ...

Nor can we accept the further contention that this investigation should not be deemed to have been in furtherance of a legislative purpose because the true objective of the Committee and of the Congress was purely "exposure." So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power. Arizona v. California [1931].

"It is, of course, true," as was said in McCray v. United States [1904], "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

Finally, the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures. ... And the relevancy of the questions put to him by the Subcommittee is not open to doubt.

We conclude that the balance between the individual and the governmental interests here

at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.

Mr. Justice **BLACK,** with whom The Chief Justice **[WARREN]** and Mr. Justice **DOUGLAS** concur, dissenting. ...

II

The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition. The activities of this Committee, authorized by Congress, do precisely that, through exposure, obloquy and public scorn. See *Watkins*. ... The Court does not really deny this fact but relies on a combination of three reasons for permitting the infringement: **(A)** The notion that despite the First Amendment's command Congress can abridge speech and association if this Court decides that the governmental interest in abridging speech is greater than an individual's interest in exercising that freedom, **(B)** the Government's right to "preserve itself," **(C)** the fact that the Committee is only after Communists or suspected Communists in this investigation.

A

I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process. There are, of course, cases suggesting that a law which primarily regulates conduct but which might also indirectly affect speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. With these cases I agree. Typical of them are Cantwell v. Connecticut [1940] and Schneider v. Irvington [1939]. Both of these involved the right of a city to control its streets. In *Cantwell*, a man had been convicted of breach of the peace for playing a phonograph on the street. He defended on the ground that he was disseminating religious views and could not, therefore, be stopped. We upheld his defense, but in so doing we pointed out that the city did have substantial power over conduct on the streets even where this power might to some extent affect speech. A State, we said, might "by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and holding meetings thereon." ... But even such laws governing conduct, we emphasized, must be tested, though only by a balancing process, if they indirectly affect ideas. On one side of the balance, we pointed out, is the interest of the United States in seeing that its fundamental law protecting freedom of communication is not abridged; on the other the obvious interest of the State to regulate conduct within its boundaries. In *Cantwell* we held that the need to control the streets could not justify the restriction made on speech. We stressed the fact that where a man had a right to be on a street, "he had a right peacefully to impart his views to others." ... Similar views were expressed in *Schneider,* which concerned ordinances prohibiting the distribution of handbills to prevent littering. ... But we did not in *Schneider,* any more than in *Cantwell,* even remotely suggest that a law directly aimed at curtailing speech and political persuasion could be saved through a balancing process. Neither these cases, nor any others, can be read as allowing legislative bodies to pass laws abridging freedom of speech, press and association merely because of hostility to views peacefully expressed in a place where the speaker had a right to be. Rule XI, on its face and as here applied, since it attempts inquiry into beliefs, not action—ideas and associations, not

conduct—does just that.

To apply the Court's balancing test under such circumstances is to read the First Amendment to say

> Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised.

This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. ... [T]his violate[s] the genius of our *written* Constitution. ...

But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness. Instead, the obloquy which results from investigations such as this not only stifles "mistakes" but prevents all but the most courageous from hazarding any views which might at some later time become disfavored. This result, whose importance cannot be overestimated, is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country's welfare. It is these interests of society, rather that Barenblatt's own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated. Instead they are not mentioned. ... Such a result reduces "balancing" to a mere play on words and is completely inconsistent with the rules this Court has previously given for applying a "balancing test," where it is proper: "[T]he courts should be *astute* to examine the *effect* of the challenged legislation. Mere *legislative preferences or beliefs* ... may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider*. (Italics supplied.)

B

Moreover, I cannot agree with the Court's notion that First Amendment freedoms must be abridged in order to "preserve" our country. That notion rests on the unarticulated premise that this Nation's security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes. ... I challenge this premise, and deny that ideas can be proscribed under our Constitution. I agree that despotic

governments cannot exist without stifling the voice of opposition to their oppressive practices. The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed; "Therein lies the security of the Republic, the very foundation of constitutional government." [De Jonge v. Oregon (1937).] ...

C

The Court implies, however, that the ordinary rules and requirements of the Constitution do not apply because the Committee is merely after Communists and they do not constitute a political party but only a criminal gang. ... Of course it has always been recognized that members of the Party who, either individually or in combination, commit acts in violation of valid laws can be prosecuted. But the Party as a whole and innocent members of it could not be attainted merely because it had some illegal aims and because some of its members were lawbreakers. ...

... [N]o matter how often or how quickly we repeat the claim that the Communist Party is not a political party, we cannot outlaw it, as a group, without endangering the liberty of all of us. The reason is not hard to find, for mixed among those aims of communism which are illegal are perfectly normal political and social goals. ...

... History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time. ...

III

Finally, I think Barenblatt's conviction violates the Constitution because the chief aim, purpose and practice of the House Un–American Activities Committee, as disclosed by its many reports, is to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliations. The punishment imposed is generally punishment by humiliation and public shame. There is nothing strange or novel about this kind of punishment. It is in fact one of the oldest forms of governmental punishment known to mankind; branding, the pillory, ostracism and subjection to public hatred being but a few examples of it. ...

... [T]he Constitution proscribes *all* bills of attainder by State or Nation. ... It does this because the Founders believed that punishment was too serious a matter to be entrusted to any group other than an independent judiciary and a jury of twelve men acting on previously passed, unambiguous laws, with all the procedural safeguards they put in the Constitution as essential to

a fair trial. ...

Mr. Justice **BRENNAN,** dissenting. ...

Editors' Notes

(1) **Query:** *Barenblatt* raises a host of questions concerning proper approaches to constitutional interpretation. The debate between Harlan and Black is the classic debate over *balancing*. See Chapter 9 for a general discussion of that approach.

(2) **Query:** To what extent was Harlan using a form of a *prudential approach*? That is, to what extent was he trimming the Court's sails to avoid Congress's wrath? See Walter F. Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962), espec. Pt. III.

(3) **Query:** Black spoke of "the genius of our *written* Constitution." What is that "genius"? Did Black limit himself to using a *textualist* 's understanding of that "genius"? Might there be more abstract understandings of that "genuis," understandings that are less specifically limited to the particular wordings of certain texts?

(4) *Barenblatt* was one of a number of cases decided at the height of the Cold War era involving legislative investigation (both federal and state) into political association, especially membership in the Communist party, and convictions for contempt for refusing to answer questions concerning such membership.

(5) **Query:** In Scales v. United States (1961), the Court per Justice Harlan upheld, 5–4, the conviction of Junius Irving Scales, former chairman of the Communist party in North and South Carolina, under the clause of the Smith Act making it a crime to be a member of an organization that advocated violent overthrow of a government in the United States. How can one distinguish between, on the one hand, *Barenblatt* and *Scales*, and, on the other hand, NAACP v. Alabama (1958; reprinted above, p. 798), in which Harlan also wrote the opinion of the Court? Are the former cases more akin to the KKK Case (1928; reprinted above, p. 795)?

By the time the Court decided *Scales* in 1961, he had broken with the party. Thus a reformed communist was the only person in prison in the United States for being a communist. President Kennedy pardoned Scales at Christmas, 1962.

(6) Noto v. United States (1961), decided the same day as *Scales* and by the same majority, again speaking through Harlan, reversed the conviction of another communist under the Smith Act's membership clause. The Court did so on grounds that the evidence had been insufficient to prove that the Communist party had advocated direct action to overthrow the government by force. Also on the same day, Communist Party v. Subversive Activities Control Board (SACB) (1961) upheld, again 5–4, the constitutionality of a requirement of the Internal Security Act of 1950 that groups held by the SACB to be "communist controlled" register with the attorney general and give, among other items, the names and addresses of all members.

When the Communist party refused to register, the attorney general tried to enforce

another section of the 1950 act that required, under such circumstances, all individual members to register. Albertson v. SACB (1965) unanimously held that section of the law unconstitutional. The effects of the Smith Act as upheld by *Scales*, the Court reasoned, made compulsory registration equivalent to compulsory self-incrimination. Aptheker v. Secretary of State (1964) invalidated the section of the Internal Security Act of 1950 that refused passports to American citizens who belonged to a communist organization, and United States v. Robel (1967) struck down the section that made it a crime for a member of such an organization to hold a job in a defense industry once the SACB had ordered the organization to register. In 1973 the Nixon administration allowed the SACB to die by declining to ask Congress to appropriate funds to keep it in existence.

(7) Gibson v. Florida Legislative Committee (1963) involved a state legislative investigation into alleged subversive influences in the NAACP. The Committee announced that "the inquiry would be directed at Communists and Communist activities, including infiltration of Communists into organizations operating [in] described fields" such as race relations. Gibson, the President of the Miami branch of the NAACP, refused to produce the records relating to the identity of members of and contributors to the Miami and state NAACP organizations. The state court found him in contempt; the U.S. Supreme Court reversed, distinguishing *Barenblatt* on the basis of differences between the NAACP (a "concededly legitimate" group that "was and is against communism") and the Communist Party ("not an ordinary or legitimate political party") and emphasizing that the "evidence discloses the utter failure to demonstrate the existence of any substantial relationship between the NAACP and subversive or Communist activities."

(8) With the treatment of the Communist party during the height of the Cold War era, contrast Brown v. Socialist Workers Party (1982), which held that the defendant party, "a minor political party which historically has been the object of harassment by government officials and private parties," could not be constitutionally required to disclose information concerning contributions to its campaigns. This case is also discussed in the Editors' Notes to Buckley v. Valeo (1976; reprinted below, p. 828).

(9) In the aftermath of the terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, Congress and the Attorney General have instituted numerous measures to pursue terrorists. The foregoing cases involving Congress's attempts to deal with the earlier threat of Communism to our national security may be invoked to challenge some of the measures specifically directed at organizations believed to be terrorist organizations or at organizers believed to be supporters of terrorist organizations.