

# Harper's

## MAGAZINE

### The Communists in America

*Robert H. Jackson*

*On May 8, 1950, the Supreme Court handed down its opinions in the case of the American Communications Association vs. Douds. The question involved was the validity of the Taft-Hartley Act, which requires, as a condition of making use of its provisions, that officers of a labor union file an affidavit (1) that they are not members of the Communist party, and (2) that they do not believe in and are not members of any organization that supports the overthrow of the United States government by force. Four of the Justices wrote opinions; three took no part. Two dissented in part, but joined their colleagues in upholding the statute as far as the oath of non-membership in the Communist party was concerned. The opinion of Mr. Justice Jackson, concurring in part and dissenting in part, has already been published in condensed form in the New York Times Magazine and elsewhere, but is so clear and forceful a statement that we believe it merits thoughtful reading by a wide public in more complete form. The following text, somewhat abbreviated and divested of legal references, is taken from the "Advance Opinions" of the Supreme Court.—The Editors.*

**I**F THE statute before us required labor union officers to forswear membership in the Republican party, the Democratic party, or the Socialist party, I suppose all agree that it would be unconstitutional. But why, if it is valid as to the Communist party?

The answer, for me, is in the decisive differences between the Communist party and every other party of any importance in the long experience of the United States with party government. . . .

To state controlling criteria definitively is both important and difficult, because those Communist party activities visible to the public closely resemble those of any other party. Parties, whether in office or out, are often irresponsible in their use and abuse of freedoms of speech and press. They all make scapegoats of unpopular persons or classes and make promises of dubious sincerity or feasibility in order to win votes. All parties, when in opposition, strive to discredit and

embarrass the government of the day by spreading exaggerations and untruths and by inciting prejudiced or unreasoning discontent, not even hesitating to injure the nation's prestige among the family of nations. The Communist party, at least outwardly, only exaggerates these well-worn political techniques and many persons are thus led to think of it as just another more radical political party. If it were nothing but that, I think this legislation would be unconstitutional. There are, however, contradictions between what meets the eye and what is covertly done, which, in my view of the issues, provide a rational basis upon which Congress reasonably could have concluded that 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.

## II

**F**ROM information before its several committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party façade, the Communist party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics.

(1) *The goal of the Communist party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate.* It seeks not merely a change of administration, or of Congress, or reform legislation within the constitutional framework. Its program is not merely to socialize property more rapidly and extensively than the other parties are doing. . . .

The Communist program only begins with seizure of government, which then becomes a means to impose upon society an organization on principles fundamentally opposed to those presupposed by our Constitution. . . .

If, by their better organization and discipline, they were successful, candid Communists admit that it would be to an accompaniment of violence, but at the same time

they disclaim responsibility by blaming the violence upon those who engage in resistance or reprisal. It matters little by whom the first blow would be struck; no one can doubt that an era of violence and oppression, confiscations and liquidations would be concurrent with a regime of communism.

Such goals set up a cleavage among us too fundamental to be composed by democratic processes. . . .

(2) *The 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. . . .

The Old World may be rich in lessons which our statesmen could consult with advantage. But it is one thing to learn from, or support, a foreign power because that policy serves American interests, and another thing to support American policies because they will serve foreign interests. In each country where the Communists have seized control, they have so denationalized its foreign policy as to make it a satellite and vassal of the Soviet Union and enforced a domestic policy in complete conformity with the Soviet pattern, tolerating no deviation in deference to any people's separate history, tradition, or national interests.

(3) *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist party's goal.* It would be incredible naïveté to expect the American branch of this movement to forego the only methods by which a Communist party has anywhere come into power. In not one of the countries it now dominates was the Communist party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, *coup d'état*, terrorism, and assassination. . . .

The American Communists have imported the totalitarian organization's disciplines and techniques, notwithstanding the fact that this country offers them and other discontented elements a way to peaceful revolution by ballot. . . . But instead of resting their case upon persuasion and any appeal inherent in their

ideas and principles, the Communist party adopts the techniques of a secret cabal—false names, forged passports, code messages, clandestine meetings. To these it adds occasional terroristic and threatening methods, such as picketing courts and juries, political strikes, and sabotage.

This cabalism and terrorism is understandable in the light of what they want to accomplish and what they have to overcome. The Communist program does not presently, nor in foreseeable future elections, commend itself to enough American voters to be a substantial political force. Unless the Communist party can obtain some powerful leverage on the population, it is doomed to remain a negligible factor in the United States. . . .

(4) *The Communist party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement.* All political parties have wooed labor and its leaders. But what other parties seek is principally the vote of labor. The Communist party, on the other hand, is not primarily interested in labor's vote, for it does not expect to win by votes. It strives for control of labor's coercive power—the strike, the sit-down, the slow-down, sabotage, or other means of producing industrial paralysis. Congress has legalized the strike as labor's weapon for improving its own lot. But where Communists have labor control, the strike can be and sometimes is perverted to a party weapon. In 1940 and 1941 undisclosed Communists used their labor offices to sabotage this nation's effort to rebuild its own defenses. . . .

This labor leverage, however, usually can be obtained only by concealing the Communist tie from the union membership. Whatever grievances American workmen may have with American employers, they are too intelligent and informed to seek a remedy through a Communist party which defends Soviet conscription of labor, forced labor camps, and the police state. Hence the resort to concealment, and hence the resentment of laws to compel disclosure of Communist party ties.

The membership is not likely to entrust its bargaining power, its records, and its treasury to such hands. When it does, the union finds itself a more or less helpless captive of the Communist party. Its officers cease

to be interested in correcting grievances but seek to worsen and exploit them; they care less for winning strikes than that they be long, bitter, and disruptive. They always follow the Communist party line, without even knowing its source or its objectives. The most promising course of the Communist party has been the under-cover capture of the coercive power of strategic labor unions as a leverage to magnify its power over the American people.

(5) *Every member of the Communist party is an agent to execute the Communist program.* What constitutes a party? Major political parties in the United States have never been closely knit or secret organizations. Anyone who usually votes the party ticket is reckoned a member, although he has not applied for or been admitted to membership, pays no dues, has taken no pledge, and is free to vote, speak, and act as he wills. Followers are held together by rather casual acceptance of general principles, the influence of leaders, and sometimes by the cohesive power of patronage. Membership in the party carries with it little assurance that the member understands or believes in its principles and none at all that he will take orders from its leaders. One may quarrel with the party and bolt its candidates and return again as much a member as those who were regular. And it is often a source of grief to those who have labored long in the vineyard that late arrivals are taken into the party councils from other parties without scrutiny. Of course, when party organization is of this character, there is little ground for inference that all members are committed to party plans or that they are agents for their execution.

Membership in the Communist party is totally different. The party is a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the party who hold the code. Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute "cells" in the factory, the office, the political society, or the labor union. For any

deviation from the party line they are purged and excluded.

Inferences from membership in such an organization are justifiably different from those to be drawn from membership in the usual type of political party. Individuals who assume such obligations are chargeable, on ordinary conspiracy principles, with responsibility for and participation in all that makes up the party's program. The conspiracy principle has traditionally been employed to protect society against all "ganging up" or concerted action in violation of its laws. No term passes that this Court does not sustain convictions based on that doctrine for violations of the anti-trust laws or other statutes. . . . It is wholly a question of the sufficiency of evidence of association to imply conspiracy. There is certainly sufficient evidence that all members owe allegiance to every detail of the Communist party program and have assumed a duty actively to help execute it, so that Congress could, on familiar conspiracy principles, charge each member with responsibility for the goals and means of the party.

Such then is the background which Congress could reasonably find as a basis for exerting its constitutional powers, and which the judiciary cannot disregard in testing them. . . .

### III

**I** CANNOT believe that Congress has less power to protect a labor union from Communist party domination than it has from employer domination. This Court has uncompromisingly upheld the power of Congress to disestablish labor unions where they are company-dominated and to eradicate employer influence, even when exerted only through spoken or written words which any person not the employer would be free to utter.

Congress has conferred upon labor unions important rights and powers in matters that affect industry, transport, communications, and commerce. And Congress has not now denied any union full self-government nor prohibited any union from choosing Communist officers. It seeks to protect the union from doing so unknowingly. And if members deliberately choose to put the union in the hands of Communist officers, Congress withdraws the privileges it has conferred on

the assumption that they will be devoted to the welfare of their members. It would be strange indeed if it were constitutionally powerless to protect these delegated functions from abuse and misappropriation to the service of the Communist party and the Soviet Union. Our Constitution is not a covenant of non-resistance toward organized efforts at disruption and betrayal, either of labor or of the country.

Counsel stress that this is a civil rights or a free-speech or a free-press case. But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist party, nor prohibit it or its members from engaging in any above-board activity normal in party struggles under our political system. It may continue to nominate candidates, hold meetings, conduct campaigns, and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the party. No one is penalized for writing or speaking in favor of the party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with, the Communist party. It applies only to one who becomes an officer of a labor union.

I am aware that the oath is resented by many labor leaders of unquestioned loyalty and above suspicion of Communist connections, indeed by some who have themselves taken bold and difficult steps to rid the labor movement of Communists. I suppose no one likes to be compelled to exonerate himself from connections he has never acquired. I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers, and that there are Communists among labor leaders. The public welfare, in identifying both, outweighs any affront to individual dignity. . . .

### IV

**C**ONGRESS has, however, required an additional disclaimer, which in my view does encounter serious constitutional objections. A union officer must also swear that "he does not believe in . . . the overthrow

of the United States government by force or by any illegal or unconstitutional methods.”

If Congress has power to condition any right or privilege of an American citizen upon disclosure and disavowal of belief on any subject, it is obviously this one. But the serious issue is whether Congress has power to proscribe any opinion or belief which has not manifested itself in any overt act. . . . In fact, the oath requires *one to form and express a conviction on an abstract proposition which many good citizens, if they have thought of it at all, have considered too academic and remote to bother about.*

That this difference is decisive on the question of power becomes unmistakable when we consider measures of enforcement. The only sanction prescribed, and probably the only one possible in dealing with a false affidavit, is punishment for perjury. If one is accused of falsely stating that he was not a member of, or affiliated with, the Communist party, his conviction would depend upon proof of visible and knowable overt acts or courses of conduct sufficient to establish that relationship. But if one is accused of falsely swearing that he did not believe something that he really did believe, the trial must revolve around the conjecture as to whether he candidly exposed his state of mind.

The law sometimes does inquire as to mental state, but only so far as I recall when it is incidental to, and determines the quality of, some overt act in question. From its circumstances, courts sometimes must decide whether an act was committed intentionally or whether its results were intended, or whether the action taken was in malice, or after deliberation, or with knowledge of certain facts. But in such cases the law pries into the mind only to determine the nature and culpability of an act, as a mitigating or aggravating circumstance, and I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has had no outward manifestation. . . .

Our Constitution explicitly precludes punishment of the malignant mental state alone as treason, most serious of all political crimes,

of which the mental state of adherence to the enemy is an essential part. It requires a duly witnessed overt act of aid and comfort to the enemy. It is true that in England of olden times men were tried for treason for mental indiscretions, such as imagining the death of the king. But our Constitution was intended to end such prosecutions. Only in the darkest periods of human history has any Western government concerned itself with mere belief, however eccentric or mischievous, when it has not matured into overt action; and if that practice survives anywhere, it is in the Communist countries whose philosophies we loathe.

How far we must revert toward these discredited systems if we are to sustain this oath is made vivid by the Court's reasoning that the Act applies only to those "whose beliefs strongly indicate a will to engage in political strikes. . . ." Since Congress has never outlawed the political strike itself, the Court must be holding that Congress may root out mere ideas, which, even if acted upon, would not result in crime. It is a strange paradox if one may be forbidden to have an idea in mind that he is free to put into execution. But apart from this, efforts to weed erroneous beliefs from the minds of men have always been supported by the argument which the Court invokes today, that beliefs are springs to action, that evil thoughts tend to become forbidden deeds. Probably so. But if power to forbid acts includes power to forbid contemplating them, then the power of government over beliefs is as unlimited as its power over conduct and the way is open to force disclosure of attitudes on all manner of social, economic, moral, and political issues.

**T**HESE suggestions may be discounted as fanciful and far-fetched. But we must not forget that in our country are evangelists and zealots of many different political, economic, and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous. Communists are not the only faction which would put us all in mental strait jackets. Indeed all ideological struggles, religious or political, are primarily battles for dominance over the minds of people. It is not to be supposed that the age-old readiness

to try to convert minds by pressure or suppression, instead of reason and persuasion, is extinct. Our protection against all kinds of fanatics and extremists, none of whom can be trusted with unlimited power over others, lies not in their forbearance but in the limitations of our Constitution.

It happens that the belief in overthrow of representative government by force and violence which Congress conditionally proscribes is one that I agree is erroneous. But, as Justice Holmes put it, "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." Moreover, in judging the power to deny a privilege to think otherwise, we cannot ignore the fact that our own government originated in revolution and is legitimate only if overthrow by force may sometimes be justified. That circumstances sometimes justify it is not Communist doctrine but an old American belief.

The men who led the struggle forcibly to overthrow lawfully constituted British authority found moral support by asserting a natural law under which their revolution was justified, and they broadly proclaimed these beliefs in the document basic to our freedom. Such sentiments have also been given ardent and rather extravagant expression by Americans of undoubted patriotism. . . . While I think Congress may make it a crime to take one overt step to use or to incite violence or force against our government, I do not see how in the light of our history a mere belief that one has a natural right under some circumstances to do so can subject an American citizen to prejudice any more than possession of any other erroneous belief. . . .

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. Our forefathers found the evils of free thinking more to be endured than the evils of inquest or suppression. They gave the status of almost absolute individual rights to the outward means of expressing belief. I cannot believe that they left open a way for legislation to embarrass or impede the mere intellectual

processes by which those expressions of belief are examined and formulated. This is not only because individual thinking presents no danger to society, but because thoughtful, bold, and independent minds are essential to wise and considered self-government.

**P**ROGRESS generally begins in skepticism about accepted truths. Intellectual freedom means the right to re-examine much that has been long taken for granted. A free man must be a reasoning man, and he must dare to doubt what a legislative or electoral majority may most passionately assert. The danger that citizens will think wrongly is serious, but less dangerous than atrophy from not thinking at all. Our Constitution relies on our electorate's complete ideological freedom to nourish independent and responsible intelligence and preserve our democracy from that submissiveness, timidity, and herd-mindedness of the masses which would foster a tyranny of mediocrity. The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our government to keep the citizen from falling into error; it is the function of the citizen to keep the government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored.

The idea that a constitution should protect individual nonconformity is essentially American and is the last thing in the world that Communists will tolerate. Nothing exceeds the bitterness of their demands for freedom for themselves in this country except the bitterness of their intolerance of freedom for others where they are in power. An exaction of some profession of belief or nonbelief is precisely what the Communist would enact—each individual must adopt the ideas that are common to the ruling group. Their whole philosophy is to minimize man as an individual and to increase the power of man acting in the mass. If any single characteristic distinguishes our democracy from communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state.

I adhere to views I have heretofore ex-

pressed, whether the Court agreed or disagreed, that our Constitution excludes both general and local governments from the realm of opinions and ideas, beliefs and doubts, heresy and orthodoxy, political, religious, or scientific. The right to speak out, or to publish, also is protected when it does not clearly and presently threaten some injury to society which the government has a right to protect. But I have protested the degradation of these constitutional liberties to immunize and approve mob movements, whether those mobs be religious or political, radical or conservative, liberal or illiberal, or to authorize pressure groups to use amplifying devices to drown out the natural voice and destroy the peace of other individuals. And I have pointed out that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy. . . .

I think that under our system, it is time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. *I think we must let his mind alone.*

## V

THE task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday. The seesaw between freedom and power makes up most of the history of governments, which, as Bryce points out, on a long view consists of repeating a painful cycle from anarchy to tyranny and back again. The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend the existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression. . . .

I conclude that today's task can only be discharged by holding that all parts of this oath which require disclosure of overt acts of affiliation or membership in the Communist party are within the competence of Congress to enact and that any parts of it that call for a disclosure of belief unconnected with any overt act are beyond its power.