

Freedom of Association, the Communist Party, and the Hollywood Ten: The Forgotten First Amendment Legacy of Charles Hamilton Houston

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I. INTRODUCTION

There is little doubt that the most important civil rights lawyer during the first half of the twentieth century was Charles Hamilton Houston.¹ His historical and professional accomplishments have long been recognized in academic circles.² He is known as the person who developed the litigation strategy in *Brown v. Board of Education*.³ He also mentored Supreme Court Justice Thurgood Marshall and other lawyers who implemented Houston's civil rights

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1. Despite being a hero of his time, Houston is not well known today:

Washington-born . . . [he] graduated A.B. and Phi Beta Kappa from Amherst in 1915. A teacher at Howard university he helped set up Ft. Des Moines officers training school, became a second lieutenant after fighting successfully for Negroes in field artillery, and served 22-months with the 351st in France [during WWI]. Graduated from Harvard Law school in 1922, he returned for a doctorate in 1923, and continued study in Spain at University of Madrid in 1924. Late in 1924 he entered law practice with his father and taught at Howard university, where he became vice dean of the law school in 1929. From 1935 to 1940 he was special counsel for NAACP, and a member of the D. C. School Board from 1933 to 1935. He [was a] . . . member of the national legal committee of the American Civil Liberties Union, National Bar Association, National Lawyer's Guild, and . . . general counsel of the Colored Railway Trainman and Locomotive Firemen, and International Association of Railway Employees.

Alfred E. Smith, *Houston Makes Law Work For Negro, Not Against Him*, CHI. DEFENDER, July 24, 1943, at 7.

2. Houston was the first African American to be elected to the Harvard Law Review editorial board. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 51-52 (1983).

3. 347 U.S. 483 (1954).

2009 / Freedom of Association the Communist Party and the Hollywood Ten

strategies.⁴ Houston achieved important legal victories in voting rights,⁵ jury selection,⁶ labor law,⁷ and criminal justice.⁸

Houston was instrumental in removing the legal barriers that protected racially segregated residential communities in another group of cases known as *Shelley v. Kraemer*.⁹ All of these important contributions to the law have gained well deserved, but modest recognition.¹⁰ However, some of his most challenging and controversial civil rights litigation was in the area of the First Amendment, work that has received little attention.¹¹

Charles Houston's historic representation of a group of Hollywood insiders, known as the Hollywood Ten,¹² took place toward the end of his legal career.¹³

4. The mentoring relationship between Thurgood Marshall and Charles H. Houston is legendary. It began when Houston was Marshall's teacher and dean of the Howard University School of Law. That relationship continued through the early days of Marshall's career when he was a poor lawyer in need of work and beyond. One of Marshall's Biographers wrote:

Marshall's lack of work meant that he had time to take some more NAACP fact finding trips with Charles Houston. They toured Virginia, Kentucky, Missouri, Tennessee, the Carolinas, and Mississippi to investigate segregation in schools. Houston often used a movie camera to document the horrid conditions. The Schools were wooden structures, no more than shacks . . . The two men prepared reports to send back to the NAACP. "Charlie Houston and I used to type sitting in the car with a typewriter in our laps," recalls Marshall. The sight of two men investigating segregated schools led to threats from local whites. In Mississippi these concerns were so great that the state NAACP president assigned a funeral hearse, with two riflemen inside, to ride behind Houston and Marshall for protection.

Houston's relationship with Marshall changed during these trips. No longer just Marshall's teacher, he became a senior partner as to how they could effect race relations.

JUAN WILLIAMS, THURGOOD MARSHALL, AMERICAN REVOLUTIONARY 63-64 (1998).

5. *Nixon v. Condon*, 286 U.S. 73 (1932).

6. *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

7. Houston set two important Supreme Court precedents that still stand today in the field of labor law: *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 207 (1944), and *Tunstall v. Brotherhood of Locomotive Fireman & Enginemen*, 323 U.S. 210 (1944).

8. See José Felipé Anderson, *The Criminal Justice Principles of Charles Hamilton Houston: Lessons in Innovation*, 35 U. BALT. L. REV. 313 (2006).

9. 334 U.S. 1 (1948).

10. Both Harvard and Clemson Universities have named research centers to honor Houston's accomplishments. Anderson, *supra* note 8, at 341 n.208.

11. Houston's work in *Brown* has so overshadowed his other accomplishments that few have examined in detail his other excellent legal work. For a complete account of Houston's role in the *Brown* case, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 186-94* (1975).

12. The Hollywood Ten included:

motion-picture producers, directors, and screenwriters who appeared before the House Un-American Activities Committee in October 1947, refusing to answer questions regarding their possible communist affiliations, and, after spending time in prison for contempt of Congress, were mostly blacklisted by the Hollywood studios. The 10 were Alvah Bessie, Herbert Biberman, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Samuel Ornitz, Adrian Scott, and Dalton Trumbo.

Hollywood Ten, Encyclopedia Britannica Online, <http://www.britannica.com/eb/article-9040813/Hollywood-Ten> (last visited Apr. 14, 2008) (on file with the *McGeorge Law Review*).

13. The Hollywood Ten case appears to be the last federal case that Houston litigated from the trial on

These individuals, mostly Hollywood screen writers, were vigorously pursued by the Federal Bureau of Investigation (FBI) because of their alleged affiliation with the Communist Party.¹⁴ During the 1930's and 1940's, many perceived the Communist Party as the greatest enemy to American democracy.¹⁵ Many politicians expressed their concern that Communism was a threat to the nation, especially after the conclusion of World War II.¹⁶ To protect the United States from the Communist threat, Congress formed a special committee to probe the activities of persons suspected to be affiliated, in any way, with Communism.¹⁷

the merits to the conclusion of the proceedings in the Supreme Court. The petition for rehearing, which his legal team filed in the case, was denied on May 29, 1950, over one month after Houston's death. *See* *Lawson v. United States*, 339 U.S. 972 (1950) (mem.).

14. Kalah Auchincloss, *Congressional Investigations and the Role of Privilege*, 43 AM. CRIM. L. REV. 165 (2006).

First, in 1947, concerned that communism had infiltrated the American movie industry, HUAC subpoenaed dozens of Hollywood celebrities, questioning them about their supposed communist activities. The famed "Hollywood Ten" refused to answer these questions, claiming such inquiries violated their First Amendment rights to freedom of association and speech. The committee cited all ten for contempt, fined them \$1,000, and jailed them for one year.

Id. at 176.

15. So feared were the Communists in the summer of 1934, that law enforcement officials in San Francisco, California permitted raids of locations of suspected Communists. The American Civil Liberties Union lawyers, among them Charles Houston, protested the police action. The New York Times reported the ACLU's signed protest as follows:

On July 17 it was publicly known in San Francisco that certain private individuals contemplated raiding the meeting places of certain other private individuals. The police provided no protection. The National Guard, called out to preserve the peace, provided no protection.

The police arrested not the raiders, but the victims of the raids. The police seized the papers of their prisoners. The police closed their meeting places. Three hundred of these men have been jailed. The Charge is vagrancy. Vagrants do not have meeting places to be closed. Vagrancy does not call for lawless seizure of papers. The police have imprisoned these men for their political views. The police have imprisoned 300 men on American soil in defiance of the American Constitution. The mayor of San Francisco sees fit to say that these 300 men have Communist beliefs. The Mayor of San Francisco has stated to the press that he will not tolerate in the city persons whom he chooses to think Communists.

Lawyers Protest Raids on Radicals, N.Y. TIMES, Aug. 12, 1934, at N1.

16. In the 1950's, the long-time Director of the Federal Bureau of Investigation, J. Edgar Hoover, made his feelings clear about his disdain for Communists. He wrote:

The acts of the subversive, particularly the "dyed-in-the-wool" Communist, call for increased vigilance. The security of our country has suffered because too many of our people were "hoodwinked" by the propaganda which claimed that the Communist Party was a political party like the Democratic or Republican Party. Likewise, too many of our people have fallen for the line that spies, subversives, agents of foreign governments and Communists who have been convicted and sent to prison are "political prisoners." "Political prisoners" do not exist in the United States. . . .

.....

In recent years, a campaign of falsehood and vilification has been directed against the FBI by some ignorant and some subversive elements. In the world-wide struggle of free peoples, the truth is still one of our most potent weapons. And the record of the FBI speaks for itself. It is the best answer to the falsehoods, half-truths and rumors spread by Communists, their stooges and defenders.

DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE*, Foreword (1956).

17. At the heart of the fear of Communism in the nation was the belief that the goal of the party was to overthrow the capitalist form of government. This fear was bolstered by the language of the principal document

The House Un-American Activities Committee (HUAC) was formed to investigate persons believed to be part of the “Red threat” against America.¹⁸ For decades, the pursuit of suspected Communists was the focus of much public discussion. The HUAC, and its later Senate counterpart lead by the infamous Senator Joseph McCarthy,¹⁹ is credited with destroying the lives of many people in the motion picture and entertainment industries.²⁰

establishing Communist theory, which states as its primary objective the overthrow of all governments in opposition of its working class constituents:

The immediate aim of the Communists is the same as that of all other proletarian parties: Formation of the proletariat into a class, overthrow of bourgeois supremacy, conquest of political power by the proletariat. . . . In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

KARL MARX & FRIEDRICH ENGLE, *THE COMMUNIST MANIFESTO* 23-24 (Samuel H. Beer ed., Harlan Davidson Inc. 1955) (1848).

18. The idea that the Communist party would have a negative effect on the American way of life began at least as far back as the years following World War I when a revolution in Russia and labor unrest in the United States generated interest in Communism in America. Many men returning from the war believed this “Red Threat” needed to be suppressed. Congress passed various loyalty laws, and many riots were touched off in major cities during this volatile period. One historian described the events as follows:

In September 1919 two domestic Communist parties were formed, and while the movement remained very small, its noise more than compensated for its size. These American Communists held parades and meetings, distributed leaflets and other incendiary literature, and issued revolutionary manifestoes and calls for action.

In an intolerant postwar year in which people were still conditioned to the danger of spies and sabotage, these domestic Bolsheviki seemed particularly dangerous. As labor unrest increased and the nation was treated to such abnormal events as general strikes, riots, and the planting of bombs, the assumption that the country was under serious attack by the Reds found a wide acceptance. In the long run, each social and industrial disturbance was received as prima-facie evidence of the successful spread of radicalism. Even the temporary instability arising from demobilization and reconversion, and the many justified protests concerning high prices, were traced to the Reds.

As a result, exaggerated conclusions were reached concerning the size and influence of the movement. Indeed, never before had the nation been so overwhelmed with fear. . . . Harassed by the rantings and ravings of a small group of radicals, buffeted by the dire warnings of business and employer organizations, and assaulted daily by the scare propaganda of the patriotic societies and the general press, the national mind ultimately succumbed to hysteria.

ROBERT K. MURRAY, *RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920*, at 16 (Univ. of Minn. Press 1955).

19. One noted civil rights attorney described the era of the aggressive Congressional committees in this way:

The problem here was that the McCarthy Committee and the House Un-American Committee had so successfully jammed the phrase “Fifth-Amendment Commie” into everyone’s head that to take the Fifth was viewed simply as an admission of guilt. Any concept of the Fifth Amendment as a barrier against governmental tyranny had been lost in the tumult of fear and defensiveness into which most people were thrown by the inquisitors.

ARTHUR KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER* 144 (1983).

20. The pursuit of Communists during this period was not limited to the motion picture industry. The late Chief Justice Earl Warren reported that

all governmental institutions ran into the witch-hunting disease epitomized by Senator Joseph McCarthy of Wisconsin in his sadistic attacks upon the State Department, the Army, and even private citizens for any association with people of unorthodox or dissenting views. In particular there was hysteria about Communism. It all seems nightmarish now that American Presidents are seeking friendship with Red China, which then and now is the seat of the very Communism that was

Charles Houston played a key role in the representation of the Hollywood Ten, a group of individuals that made the courageous decision to refuse to answer many of Congress's questions about its members' political affiliation.²¹ Indeed, he pursued justice in these cases until his untimely death in April of 1950.²²

As was the case with *Brown v. Board of Education*,²³ it was not until after Houston's death that his contributions in the Hollywood Ten matter were fully recognized. His work in that case laid the foundation for a strong fundamental right to political association. During the 1950's and 1960's, the Warren Court embraced the ingenious seeds of Houston's logic, developing constitutional doctrine influenced by his early First Amendment litigation on behalf of the Hollywood Ten.²⁴ The Hollywood Ten case was yet another example of brilliant collaborative litigation, structured by Houston, that created the national standard for freedom of political association that exists today.²⁵

condemned so vituperously by us in McCarthy's time.

In those days, however, anti-Communist feeling permeated the atmosphere with fear, distrust of neighbors, bitterness, and persecution.

EARL WARREN, *THE MEMOIRS OF EARL WARREN* 218 (1977).

21. *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949).

22. MCNEIL, *supra* note 2, at 211.

23. 347 U.S. 483 (1954).

24. Houston's approach to advocacy in constitutional litigation matched Warren's judicial philosophy which sought to identify individual rights and basic fairness. One former United States Solicitor General described Warren's legacy on the Supreme Court in this way:

Earl Warren, the fourteenth Chief Justice of the United States, not only led the Court but epitomized the spirit of constitutional law during the creative years 1953 to 1969. . . . Increasingly often during the next sixteen years lawyers at the bar found that arguments based on precedent, accepted legal doctrine, and long-range institutional concepts concerning the proper role of the Judiciary and the distribution of power in a federal system foundered on Chief Justice Warren's persistent questions "Is that fair?" and "Is that what America stands for?" Such questions were profoundly disturbing to those engrossed by the intellectual and institutional side of the law

ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 181-82 (1987).

25. Houston was known for working with many groups of lawyers throughout his career in cases that resulted in important precedents. Indeed, he preferred collaborating with other lawyers where he could have several minds contribute to solving a new legal problem. Because much of Houston's interest in constitutional litigation was fostered by his interest in the Fourteenth Amendment, he needed a state court in which to make such challenges. However, Houston was a resident of Washington D.C., which is not a state. As a result, he would often collaborate with lawyers from the Baltimore firm, Nicholas and Gosnell. His long relationship with this firm and its named partners, Dallas Nicholas and William I. Gosnell, would generate years of creative litigation. When combined with the Baltimore branch of the NAACP to identify interesting cases, Houston would set in motion the "think tank" to develop a case. The challenge to Maryland's "Work or Fight" law was typical of this approach. In a letter to Baltimore's NAACP Executive Secretary, Randall L. Tyus, Houston wrote:

The more I think about the Maryland "Work or Fight" law the more I am convinced that the complete absence of standards or safeguards makes it unconstitutional

. . . .

Please have this letter reproduced and passed around to the other lawyers in the group, to get their opinions so that the next time we meet we can discuss these points and all others which they may have in mind, so as to arrive at a definite conclusion.

Letter from Charles H. Houston to Randall L. Tyus, Executive Sec'y, Balt. Branch of the NAACP (May 3, 1943) (on file with the *McGeorge Law Review*). Houston was not simply one who delegated responsibility to

This article discusses the First Amendment litigation pursued by Houston on behalf of those persons who voiced political dissent or associated with those who did.²⁶ Although most of the cases he handled on this issue were not successful when litigated,²⁷ his vision for free expression in political commentary and dialogue provided an uncompromising standard that became a key part of the due process revolution that followed in the decades immediately after his death.²⁸ Like other areas of the legal landscape, Houston's participation led to permanent changes which still affect our society.²⁹

other lawyers. In the case of the Maryland "Work or Fight" law, he desired to personally visit the defendant who was incarcerated in a Maryland prison. In that regard, he wrote to members of the Nicholas and Gosnell firm the following letter:

Dear Al and Dallas:

I have been requested by the N.A.A.C.P. to investigate the case of the man recently sentenced to the Maryland House of Correction for violation of the Maryland "Work or Fight" law. The N.A.A.C.P. is interested in the constitutionality of the law.

Please have Tyus telephone me what time you can go with me, either of you, to the House of Correction to interview the man. I should like to go Tuesday afternoon, May 18.

Yours sincerely,

Charlie

Letter from Charles H. Houston to Al Gosnell & Dallas F. Nicholas (May 15, 1943) (on file with the *McGeorge Law Review*).

26. As early as 1940, Houston, along with other lawyers, filed suit against the District of Columbia Metropolitan Police Department, the Capital Police, and the National Park Service for "police action in arresting leaflet distributors, refusing to allow the display of badges or buttons and banners on automobiles, and violently breaking up peaceful meetings and public prayers in the course of a protest against passage of the Burke-Wadsworth conscription bill then before Congress." *City Sued as D.C. Cops Halt Peace Parade*, CHI. DEFENDER, Sept. 21, 1940, at 9.

27. Houston also represented other alleged Communists in cases that were rejected by the Supreme Court. In one of those cases he represented alleged Communist party leaders Henry Winston and Henry Potash as well as several others.

Mr. Houston asked the Supreme Court to void the indictments brought by the Federal grand jury chosen by this system and halt the forthcoming trial before a petit jury selected by the same procedure. He presented exhibits to show that the New York court had . . . abandoned the use of voters' registers in selecting panels and had resorted to a system which assures a preponderant representation by wealthy and privileged persons.

Mr. Houston's brief charged that the New York Court selects jurors from the Social Register, Who's Who in New York, and other "class" directories and discriminates against women, poor people, Negroes and other racial minorities, members of minority political parties like the Communist party and the American Labor party workers and those who live in certain geographic localities in Manhattan which are characterized as slums.

Ask High Court to Clear Alleged Reds, PITTSBURGH COURIER, Jan. 15, 1949, at 2.

28. During Earl Warren's tenure as Chief Justice of the Supreme Court, the criminal justice system received more constitutional-based protections. One commentator argues that the Warren Court's approach to due process in criminal justice reflects "a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes." Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 202 (1983).

29. Harvard Law School Dean Elena Kagan recently noted that

[i]n little more than two decades, Houston's path-breaking work in civil rights forever transformed our nation's legal landscape, and some fifty years after his untimely death at the age of 54, Houston continues to stand as a beacon—a reminder both of how far we have come and of all that is yet to be

As was often the case, Houston's prophetic, sometimes unsuccessful pursuit of the protections provided for by the Bill of Rights was ahead of its time. His theories developed into the modern civil rights standard for freedom of association.³⁰ Accordingly, this article analyzes Houston's theory of freedom of association,³¹ which took shape in the Hollywood Ten cases, and then speculates about the impact of his ideas on contemporary First Amendment issues.

II. THE COMMUNIST PARTY MAKES ITS CASE TO AMERICA

To understand the events before Congress in the late 1940's, it is necessary to discuss the nation's feelings toward the Communist Party during the two prior decades. In the 1920's, the Communist Party was a small but determined group that captured the interest of a few Americans but was never particularly influential.³² During the early 1930's the party became more closely linked with the labor movement in the United States and began to attract the interest of a broader range of people.³³ Although few persons involved in the labor movement

done.

Letter from Elena Kagan, Dean, Harvard Law Sch., to Friends and Alumni of Harvard Law School (Sept. 2, 2005) (on file with the *McGeorge Law Review*).

30. As early as 1941, Houston filed a brief that advanced the issues of freedom of association. He directly criticized the actions of the United States Government and argued in favor of individual rights.

Houston and Abraham Isserman for the National Federation for Constitutional Liberties had filed in 1941 an amicus curiae brief urging that "in the interest of protecting democratic rights as guaranteed in the first, fourth and fifth amendments of the Constitution, the indictments against [certain] Communist Party officials charged with contempt of the Dies Committee, be dismissed."

MCNIEL, *supra* note 2, at 203. Later, in defense of educator Mary McCloud Bethune, he insisted, "[o]ne should not have to denounce the Communist Party just to clear [oneself] of unfounded charges . . ." *Id.*

31. Houston encouraged activism and believed that the right to be a critic of the government was an essential American value. In his regular column in the Richmond Afro American Newspaper in the late 1940's he wrote:

What significance for us has the purge of Communists by the Federal Government?

The fact one does not agree with the Communist party line does require either persecution or extermination of Communists. I had always thought that one of the most sacred rights in a democracy was the right to disagree.

Charles H. Houston, Editorial, *The Highway*, RICHMOND AFRO-AM., Apr. 12, 1947, at 4.

32. "In reality, the Communists were always a distinct minority. In 1932 there were about 15,000 members of the U.S. Communist Party; the national population was almost 123,000,000. Membership rose to an estimated 75,000 in a population of almost 132,000,000 between the winter of 1938 and the spring of 1939 . . ." SELMA R. WILLIAMS, RED-LISTED: HAUNTED BY THE WASHINGTON WITCH HUNT 5-6 (1993).

33. One interested observer has commented:

In the 1930's with the beginning of the depression, the Communist Party broadened its propaganda-agitation work. Economic disorder was exploited. The Party organized parades, hunger marches, petition campaigns, mass demonstrations. It plunged with vigor strikes such as the San Francisco general strike of 1934 and the textile and bituminous coal strikes of 1934-35. In November, 1935, the Congress of Industrial Organizations (CIO) was launched, and [C]ommunists attempted to burrow themselves in its member unions. In addition, they attempted to convert members of other labor unions, minority groups, especially Negroes and individuals recently arrived in the country.

The Party increased in numbers. By 1935 it had jumped to 30,000 and to 80,000 in 1944. The Young Communist League, the Youth organization of the Party, reached 20,000 by 1938.

would ever actually join the Communist Party, they would accept the help of its organizers and activists in their struggle for better wages and working conditions.³⁴

Later in the 1930's the United States experienced the Great Depression, during which the nation's financial market collapsed and a large number of people in the country were unable to find work.³⁵ Although the economic collapse of the 1930's affected all Americans, the African American community, which was already in a position of little political influence, suffered greater hardships than the rest of the nation.³⁶ With few private or government resources available to help anyone in the nation, African Americans were in no position to refuse help no matter where it came from. During this time of hardship, the Communist Party strived to gain favor with the African American community. They offered assistance in the form of legal defense in a few high profile criminal cases, which they hoped would persuade African Americans to join the party.³⁷

A. *The Scottsboro Boys*

The best example of this type of legal assistance was the Communist Party's effort to become involved in the infamous case known as the trials of the Scottsboro Boys.³⁸ The case involved the alleged rape of two white women who

Communist "cells" were being formed in industrial plants

J. EDGAR HOOVER, *MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT* 70 (1958).

34. See MCNEIL, *supra* note 2, at 86-87 (describing the conditions facing African Americans in the 1930's).

35. *Id.*

36. One insightful writer observed,

[i]t was not a good time America was in the midst of the Great Depression—the worst economic crisis in the nation's history. Millions of people were out of work. Back then, there were no unemployment benefits, and thousands of families lost their homes. Many people were on the brink of starvation.

Life was even more difficult in black communities. Jobs, money, and food were scarce.

LELAND WARE, *THURGOOD MARSHALL: FREEDOM'S DEFENDER* 39 (1999).

37. There is reason to believe that the Communists did not offer African Americans important leadership roles in the party. As one African American FBI informant explained,

[g]enerally speaking, Negroes can not rise unrestrictedly as officers of the [Communist Party]. A very few, it is true, have titles which are impressive. Actually, they have little authority, and are only window-dressing to lure other Negroes inside. They are completely dominated and controlled by white higher-ups. This was the cause of no little dissatisfaction and dissension among Negro members. I was present at a number of meetings called for the purpose of determining ways to achieve equal status.

JULIA BROWN, *I TESTIFY: MY YEARS AS AN F.B.I. UNDERCOVER AGENT* 116 (1966).

38. According to historian Howard Ball, Charles Houston himself considered the Scottsboro case a "historic departure for African Americans." HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL AND THE PERSISTENCE OF RACISM IN AMERICA* 33 (1999).

The trials and the environment in which [it] took place [was a] mocker[y] of justice. Mobs estimated at over ten thousand persons came in from the countryside each day . . . "yelled for a lynching and greeted the death verdict for the first two boys with cheers and music from a brass band. . . ."

were traveling on a train with groups of both black and white youths through Scottsboro, Alabama.³⁹

On March 25, 1931, a fight broke out on the train between the two groups.⁴⁰ After some of the white youths complained to the stationmaster, a posse stopped the train at Paint Rock, Alabama and arrested nine black youths.⁴¹ Twelve days later they were put on trial for rape. In four days, four separate juries found eight of them guilty⁴² and sentenced them to death.⁴³ “The Central Committee of the Communist Party of the United States assailed the verdicts, and the Party’s legal affiliate, the International Labor Defense, announced that it would defend the boys. Countless people were outraged by the trials and death sentences.”⁴⁴

From the time the trial began, there was speculation that the white youths filed the complaint because they were beaten in a fight they started.⁴⁵ “Communist Party officials said the charge was a frame-up and the trials were a circus, nothing but a legal lynching: the women were prostitutes who had to be coerced to cry rape. Thousand of northerners, white and black, agreed with the Communists and joined them in protesting the convictions.”⁴⁶ Ultimately, the case led to two landmark Supreme Court decisions and a host of other legal proceedings that would take decades to resolve.⁴⁷ The case also set the tone between the Communist party, the Black community, the relatively new National Association for the Advancement of Colored People (NAACP), and the organization’s newly formed legal committee.⁴⁸

. . . [T]he tragedy lasted two decades. Despite many appeals, all grew into manhood in prison while imprisoned for crimes they did not commit. A number sat on death row in the Alabama prison for many years. They endured seven retrials and secured two separate Supreme Court judgments in their favor. Four spent six years and one nineteen years in state prison.

Id. at 34.

39. See JAMES GOODMAN, *STORIES OF SCOTTSBORO* xi (1994).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Author Harvard Sitkoff describes these post Scottsboro Boys civil rights cases:

The decisions in the Norris and Patterson cases were the most progressive civil rights victories yet won before the Supreme Court. Black spokesmen credited their leftist allies with these achievements. A host of non-Communist organizations, including the ACLU, the Methodist Federation for Social Action, and the Socialist League for Industrial Democracy, labored with the Communists and the NAACP throughout the remainder of the decade in the Scottsboro Defense Committee to secure the release of all the defendants. Tension and disharmony pervaded the inner workings of the joint committee, but publicly a solid front was presented.

HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE, VOLUME I: THE DEPRESSION DECADE* 149 (1978).

48. MCNEIL, *supra* note 2, at 86-87.

Charles Hamilton Houston was on that legal committee and, despite having only recently graduated from Harvard Law School, was already deeply involved in the organization's criminal justice and legal committee agenda.⁴⁹ Houston took part in the discussion about what role the NAACP should play in the Scottsboro Boys case.⁵⁰ The organization did not want to get too closely involved given the Communist Party's larger national agenda.⁵¹ On the other hand, the organization recognized that the Scottsboro Boys case represented an injustice upon which they could build their own national credibility by addressing issues important to the race.⁵²

Houston, serving then as Special Counsel for the NAACP, advised the organization on how to balance the interests of the organization when a dispute arose concerning the Communist influence over the boys and their families.⁵³ The Communist Party and the International Labor Defense (ILD) paid for the legal representation of the Scottsboro Boys.⁵⁴ Discrediting the ILD created the

49. *Id.*

50. DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* 315 (Louisiana State Univ. Press 1979) (1969).

51. *Id.*

52. *Id.* Houston was not afraid to discuss the issue of Communist influence in the Scottsboro cases in public forums. In his May 1934 address to the National YMCA convention, he remarked:

The contribution of the Communists to the Negro has been to turn the race issue into a class issue. They have been the first, at least in recent times, to have appealed to the masses, as distinguished from the classes. Whereas all prior approaches to the masses had been paternalistic, the Communist came and walked among them, like the disciples of old, and offered full brotherhood, without respect to race, creed, or previous condition of servitude. Finally, the Communists have been the first to fire the masses with a sense of their raw, potential power, and the first openly to preach the doctrine of mass resistance It is not necessary to organize a Watch and Ward Society. Communism is too new and Negroes are still too conservative to rush into any radical revolutionary program. But the fact remains that the fight which Liebowitz and the Communists have made and are making in the Scottsboro Cases has caught the imaginations of Negroes as nothing else within a decade.

Charles H. Houston, *An Approach to Better Race Relations, Address at the National YMCA Convention* (May 5, 1934) (on file with the *McGeorge Law Review*).

53. Even from the early days of the Scottsboro Boys case there had been conflict between the Communist ILD and the NAACP.

[O]n the day of sentencing the ILD sent counsel to demand a stay of execution. There followed incessant quarreling between the radical ILD and the cautious NAACP, with political slurs and maneuvering—particularly involving the Communists—interfering with the efficient handling of the Scottsboro case until the ILD secured written retainers from the youths and their families.

MCNEIL, *supra* note 2, at 109. Houston encouraged the uncooperative coalition of groups and lawyers to continue fighting the case despite their differences. Indeed, after famed attorney Samuel Liebowitz had entered the case, Houston urged the NAACP's Walter White that

“regardless of any division between the NAACP and the ILD . . . use all of the Association's press contacts to guarantee that the third [Scottsboro] trial will be covered. . . . [Get] the Branches to move, send telegrams, protests, ect. . . . It needs all the steam which the branches can raise to ensure publicity which will protect Liebowitz and the rest . . . in Alabama.”

Id. at 110.

54. In April of 1931 the ILD Executive Committee voted to defend the Scottsboro Boys. “ILD representatives requested permission to speak to the April 18 meeting of the Chattanooga Negro Ministerial

risk that the NAACP would lose credibility with Blacks across the nation. There were also efforts to ask local officials to limit contact between the Communist Party and the boys.⁵⁵ The NAACP was asked to help keep the Communists away from the boys by using the organization's influence. Houston warned that "if the Communists are put out and the boys are finally lost, [the NAACP and its leadership] have played right into the hands of the I.L.D."⁵⁶ At that time, Houston advised that the NAACP avoid becoming directly involved in the case,

Alliance. . . [T]hey promised the organization they would take over the entire financial burden of the case." CARTER, *supra* note 50, at 54-55.

55. At one point during a Scottsboro trial, defense counsel Samuel Leibowitz made a request to the Alabama Governor "to issue orders preventing the Communists and their agents" from visiting the defendants. *Id.* at 314. In a memorandum reflecting Houston's behind the scenes work in the Scottsboro Boys cases, it is clear that Houston recognized the difficulty of balancing the various interests at stake. He wrote:

A Small conference was held in Mr. [Walter] White's office on Thursday October 10, between Roy Wilkins, George Hunton, and George E. Haynes.

The question was definitely put to the American Scottsboro Committee as to what its position was and whom it represented. Mr. Haynes stated that the representation was not clear; that four of the boys were probably represented by the I.L.D., but that they switch back and forth. . . . Mr. Haynes stated that his committee had no funds on hand; it had raised \$3,000.00 which had been exhausted making investigations, combating the I.L.D. and providing pocket money for the boys. The American Scottsboro Committee had not paid any legal expenses for the case before the United States Supreme Court This office had made it clear that it was opposed to forcing the Communists out of the case and, as a matter of fact, since the American Scottsboro Committee had not paid any of the legal expenses, it did not see how it was in a position to ask the I.L.D. to withdraw. Likewise everyone was clearly advised that sitting in on the conference, Messrs. White, Wilkins, and Houston acted in their personal capacity and not as representatives of the NAACP.

Memorandum from Charles H. Houston regarding Joint Action in Scottsboro cases, held October 10, 1935 (on file with the *McGeorge Law Review*). On October 30, 1944 Houston received a letter from his former client, Communist agitator Bernard Ades who was living in New York at the time and practicing as a certified public accountant. The letter sought Houston's help as Ades sought to become a member of the New York Bar. The letter read as follows:

Dear Charlie:

I am applying for admission to the Bar in New York under the reciprocity arrangement between New York and Maryland. In support of my application it is necessary that I present affidavits by lawyers in Maryland to the effect that I am a person of good moral character. If you care to make such an affidavit I would appreciate your sending it to me.

The affidavit should state your name and residence, that you are practicing law, your office address, in what courts you have been admitted to practice and what position you held at the University. It should also state the facts on which you base your opinion as to my good moral character.

Sincerely,

Bernard Ades

Letter from Bernard Ades to Charles H. Houston (Oct. 30, 1949) (on file with the *McGeorge Law Review*).

A hand written notation on the letter indicates there was no reply to the request. *Id.* A search of all archives where Houston's known papers are maintained has not indicated that he responded to Ades' request.

56. CARTER, *supra* note 50, at 135.

while keeping informed of all developments.⁵⁷ In the years following, Houston broke from the leadership of the NAACP by disagreeing with the strategy used in the Scottsboro Boys cases. He believed the African American community should be more aggressive in its support of the case even though the Communist party was still deeply involved.⁵⁸

This careful balancing between the rights of the Communist party and loyalty to the American system and its democratic process would become one of the permanent struggles in Houston's legal career.⁵⁹ The Communist Party later criticized Houston for the manner in which he handled the case of George Crawford, a man accused of double murder of two white women in Virginia.⁶⁰ After a vigorous defense, Houston and his legal team settled for a life sentence rather than the death penalty.⁶¹ Houston did not appeal the case for fear that on remand Crawford would receive the death penalty.⁶² Under the circumstances, such a result should have been hailed as a victory because the evidence suggested Crawford's guilt.⁶³ Thurgood Marshall, one of the members of Houston's legal defense team, commented that "[i]f you get a life term for a Negro charged with

57. *Id.*

58. MCNEIL, *supra* note 2, at 109.

59. One historian described Houston's challenge in dealing with the Communists in this way:

In the 1930's, groups like the American Jewish Committee and the National Conference of Christians and Jews actively promoted ethnic and religious tolerance. But whether in Harlem or East Los Angeles, the Communist party was the era's only predominantly white organization to make fighting racism a top priority. "The communists," declared Charles H. Houston . . . "have made it impossible for any aspirant to Negro leadership to advocate less than full economic, political and social equality."

ERIC FONER, *THE STORY OF AMERICAN FREEDOM* 214 (1998).

60. MCNEIL, *supra* note 2, at 89-95.

61. KLUGER, *supra* note 11, at 153. "Just how weak Crawford's case was became apparent as the four-day trial unfolded. The alibi witnesses that Crawford once claimed would bear him out had evaporated." *Id.* at 152.

62. It was not until 1969 that the Supreme Court held that it was a violation of Due Process to give a greater sentence on retrial unless there was a valid justification. *See North Carolina v. Pearce*, 395 U.S. 711 (1969).

63. As a noted Pulitzer Prize winning historian explained:

The case was closely followed by major white and black newspapers, South and North, as trial preliminaries commenced in December 1933. Houston and company challenged the state's case on grounds of the historic exclusion of people of color from grand and petit jury rolls. Dismissal and exclusion motions, unheard of in trials involving a black defendant, rattled the Leesburg prosecutors. Then, in a shattering confidence to Houston from the prosecutor, the Crawford bubble burst with the discovery that the defendant had, after all, returned to Virginia to see his wife at the time of the murders and fallen in with bad company. . . . Shifting gears seamlessly, Houston turned the Crawford trial not into a plea for a guilty man but an opportunity for the state of Virginia to rise above judicial vindictiveness. Against every precedent and all expectations, the Loudoun County jurors declined to recommend the death penalty.

DAVID LEVERING LEWIS, *W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963*, at 333 (2000).

killing a white person in Virginia, you've won . . . because normally they were hanging them."⁶⁴

Some Communists in the ILD did not feel that the outcome was a victory. For example, in an editorial in *The Nation*, two members of the ILD were critical of Houston's approach to the case:

We realize that this was a difficult case and that any course Crawford's counsel might take had its dangers, but Mr. Houston's failure to appeal shows that he dared not put Virginia to any real test. . . .

. . . The precedent established in the Crawford case is, to the best of our belief, a new one in the history of the N.A.A.C.P. . . . Is this policy to be exchanged for one of abject surrender? Has the N.A.A.C.P. decided on retreat?⁶⁵

B. Defense of Bernard Ades

Later in the 1930's Houston again became involved with the ILD and the Communist party when he decided to represent radical lawyer Bernard Ades in his disbarment proceedings in a Maryland Federal Court.⁶⁶ Those proceedings arose from a murder case, *Lee v. State*, where Ades represented a black man named Euel Lee, also known as "orphan Jones." Lee was ultimately executed after three appeals.⁶⁷

The case involved the murder of "a farmer, his wife, and two daughters" on October 11, 1931.⁶⁸ The case generated great excitement and anger, and "lawless elements in the population attempted more than once to seize [Lee] and wreak vengeance upon him, and he was taken by the public authorities to the jail in Baltimore [C]ity for security"⁶⁹ One petition alleged that, after his arrest, Lee "was for sixteen hours subjected to maltreatment by officials of Worcester [C]ounty, and kept without food or drink; that on October 13 a mob of citizens of Worcester [C]ounty prepared to lynch the prisoner"⁷⁰ Several other instances of civil unrest and attempted lynching on the Eastern Shore of Maryland led the court to conclude that "a fair jury from the county selected as the place for the trial of the charges against this man, and any defenses he may

64. WARE, *supra* note 36, at 34.

65. Helen Boardman & Martha Gruening, *Is the N.A.A.C.P. Retreating?*, THE NATION, June 1934, at 732.

66. *In re Ades*, 6 F. Supp. 467 (D. Md. 1934).

67. *See Lee v. State*, 165 A. 614 (Md. 1933); *Lee v. State*, 161 A. 284 (Md. 1932); *Lee v. State*, 157 A. 723 (Md. 1931).

68. *Lee*, 157 A. at 724-25.

69. *Id.* at 724.

70. *Id.* at 725.

make, is unlikely, and that to attain the object of the Constitution and statutes the cause must be removed for trial to some other portion of the state”⁷¹

Upon removal to Baltimore County, Lee was convicted of the murders. The Court of Appeals overturned the conviction because the defendant established exclusion of Negroes as jurors through a “long-established custom in Baltimore [C]ounty.”⁷² On Lee’s third appeal, although he raised other jury selection issues, his conviction was finally affirmed.⁷³

After Lee was executed, Charles Houston and Thurgood Marshall represented Ades in his disbarment proceedings.⁷⁴ The primary allegation was a claim of unprofessional conduct arising from three cases he had handled involving black defendants.⁷⁵ “Ades was charged with professional misconduct, malpractice, fraud, deceit, and conduct prejudicial to the administration of justice”⁷⁶ The most serious of the charges was that on the day before Lee’s execution

and without his request . . . [Ades] visited him in the deathhouse of the Maryland penitentiary, and caused him to execute a will, making Ades his beneficiary; and after his death, Ades sought by legal proceedings in the circuit court No. 2 of Baltimore City to secure the body of Lee in order that he might take it to New York and hold a memorial meeting over it in order to incite race prejudice.⁷⁷

These proceedings were influenced by the fact that Ades was employed by the ILD, a group with Communist ties.⁷⁸ In its disbarment opinion, the Federal Court explained that the ILD,

while not formally connected with the Communist party, is officered by Communists, and within its scope, has like purposes and beliefs. It

71. *Id.* at 727.

72. *Lee*, 161 A. at 286.

73. *Lee v. State*, 165 A. 614, 615 (Md. 1933).

74. *In re Ades*, 6 F. Supp. 467, 468 (D. Md. 1934).

75. *Id.* at 469.

76. *Id.*

77. *Id.* The Court’s opinion explained this intention in greater detail:

After all of his efforts on behalf of Euel Lee had failed, [Ades] brought an action in the Baltimore City court against the warden of the Maryland penitentiary on the day after the execution had taken place in order to require the delivery of Lee’s body to him. He filed with the papers in the case a will of the deceased, executed the day before his death, in which the deceased bequeathed his body to Ades. The latter testified that the idea of such a will had originated with him, and that it was his purpose to take the body to New York City for a memorial service . . . under the auspices of the International Labor Defense so as to show . . . that the state of Maryland oppresses the colored race and does not recognize their legal rights.

Id. at 479-80.

78. SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTIETH CENTURY 33 (2007).

interests itself in cases in the courts which involve classes of persons whom it regards as victims of oppression or prejudice, and frequently offers its assistance when such persons are charged with crime.⁷⁹

However, looking at Ades' conduct as a whole and noting that he had even been physically beaten during his representation of Lee,⁸⁰ the court concluded that "the extreme punishment of disbarment" should not be inflicted.⁸¹

The Ades disbarment case presented an interesting circumstance for Houston. Ades had become an unpopular and controversial figure in Maryland with his aggressive defense of Euel Lee.⁸² Although avoiding further discipline from the practice of law would seem to be a victory by some, members of the Communist party did not feel that it was.⁸³ Just as he had been criticized in the Crawford case, Houston again found himself subject to public attack by his allies in litigation.⁸⁴ There is no indication that Houston ever publicly responded to his critics. He respected the advocacy that Ades had provided to a black man who had a difficult criminal case and little or nothing in his favor.⁸⁵

The Ades case represented the first time in Maryland history that a black lawyer represented a white lawyer in a disbarment proceeding.⁸⁶ The fact that the case involved a known Communist added additional risk to Houston's advocacy. Nonetheless, Houston stood by his decision to represent Ades and other suspected Communists throughout his career.

III. THE FBI AND THE COMMUNIST PARTY

J. Edgar Hoover and the FBI's dogged pursuit of suspected Communists during the early twentieth century exemplified the risks associated with being affiliated with the Communist Party.⁸⁷ Hoover concluded that the party was

79. *In re Ades*, 6 F. Supp. at 470.

80. JOSEPH E. MOORE, *MURDER ON MARYLAND'S EASTERN SHORE: RACE, POLITICS AND THE CASE OF ORPHAN JONES* 213 (2006).

81. *In re Ades*, 6 F. Supp. at 481. According to the court, "[t]aking into consideration the unquestioned service rendered in the Lee case, the injuries which the respondent suffered at the hands of lawless men while acting as counsel in that case, and the fact that he had already suffered a suspension from the bar . . . for approximately five months, it is believed that a public reprimand will suffice." *Id.* at 482.

82. MOORE, *supra* note 80, at 213.

83. *Id.* at 142.

84. MCNEIL, *supra* note 2, at 102-06.

85. One scholar has observed that

[a]lthough he could not have known it at the time, the precedent Houston set in *Ades* would become important when the NAACP clashed with legal ethics authorities in hostile southern states in the 1950's and 1960's. It was also important in demonstrating to Houston the NAACP's vulnerability to legal ethics charges in hostile jurisdictions.

Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 297 (2001).

86. MOORE, *supra* note 80, at 212.

87. See CURT GENTRY, *J. EDGAR HOOVER: THE MAN AND THE SECRETS* 80-81 (1991) (discussing

engaged in an attempt to destroy American values and was the “most evil monstrous conspiracy against man since time began.”⁸⁸ Hoover further demonstrated his rigor against the Communist movement by scrutinizing another organization with which Houston was closely affiliated: the American Civil Liberties Union (ACLU). Although denying to the organization’s leader Roger Baldwin that the ACLU was under scrutiny, the FBI sought as much information as possible to use against the Civil Rights organization.⁸⁹ “The [ACLU] had been a subject of intensive investigation from almost the day it was founded and remained so for at least another fifty-two years.”⁹⁰ Indeed, the depth of scrutiny into the organization’s activities included recording speeches, examining bank records, and installing bugging devices.⁹¹

Even Felix Frankfurter, a Harvard Law professor at the time the FBI investigations began, did not escape the FBI’s scrutiny. Frankfurter served as a teacher and mentor to Charles Houston and worked closely with him on many ACLU projects.⁹² In addition, Frankfurter worked closely with Houston on many projects for the NAACP’s legal committee, which was also under the FBI’s watch.⁹³

In the end, no group captured the FBI’s investigative interest more than the motion picture industry. According to an early FBI report, the Bureau adopted the view of an unidentified informant that “it is becoming more and more apparent that the Communists are using prominent sympathizers in the motion picture industry to further their policies. . . . [B]y using these persons of high standing and influence, the Communist Party hopes to cover up these individuals’ real Communist connections.”⁹⁴ Other informants alleged that

a large percentage of this pro-Communist element was brought into Hollywood during the period from 1935 to 1944. Many of these individuals were European refugees who came to this country following

generally Hoover’s role as long-time director of the FBI in investigating the Communist party in America).

88. *Id.* at 81.

89. *Id.* at 140.

90. *Id.*

91. *Id.* at 141 (“Each member of the ACLU’s national board rated a file. Several, such as those on Baldwin and Frankfurter, were already sizable. . . . [Frankfurter] according to his dossier, was ‘considered a dangerous man.’ Helen Keller whom history would remember as the famed blind deaf and mute author-lecturer, was to the Bureau ‘a writer of radical subjects.’”).

92. “Frankfurter came to the Court with impeccable credentials as a liberal. He had served with distinction as counsel to the National Association for the Advancement of Colored People, and as an adviser to the American Civil Liberties Union.” BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 249 (1982).

93. *Id.*

94. Office Memorandum at 6, Fed. Bureau of Investigation, Communist Infiltration-Motion Picture Industry (COMPIC) (July 21, 1949) [hereinafter FBI Office Memorandum] (on file with the *McGeorge Law Review*).

the rise of Nazism in Europe and were employed in reliable positions in the field of writing and directing.⁹⁵

The FBI report identified Hollywood writers and directors John Howard Lawson and Dalton Trumbo as being leading Communists attempting to influence Americans toward Communist principles through movies. The FBI report stated that “the first real impetus to the infiltration of the motion picture industry was the sending by the Communist Party of John Howard Lawson to Hollywood in about 1941 for the purpose of promoting the Party’s influence in the motion picture industry.”⁹⁶ The report further noted that Dalton Trumbo was considered one of the members of the Hollywood community alleged to be “under Lawson’s influence.”⁹⁷ Many other Hollywood actors were suspected of having ties with the Communist party including Edward G. Robinson, Paul Robeson, and Gene Kelly.⁹⁸

The FBI intensified its scrutiny of Lawson when he became the first president of the Screen Writer’s Guild.⁹⁹ This role, in the Bureau’s view, played into the overall infiltration scheme to turn the movie industry into a tool of Communist propaganda by “captur[ing] labor unions, influence[ing] management, [and] mak[ing] friends among the company executives”¹⁰⁰ According to an unnamed informant, “by mobilizing the Communist Party back[ing] of a particular picture which was to the liking of the Communists, management was put on notice that it could expect tremendous support from the Communist Party in an effort to make the picture a success.”¹⁰¹ Other allegations stated that top producers and studios employed Communists and that some motion picture producers and executives had “protected them whenever their names or reputations have been exposed”¹⁰² It was these alleged protectors of “secret communists” in the motion picture industry that the Congress of the United States had become interested in investigating.

In October 1947, the HUAC called Lawson and Trumbo as witnesses in hearings concerning the “Communist infiltration of the motion picture

95. *Id.* at 7.

96. *Id.* at 79.

97. *Id.*

98. *Id.* at 79-80.

99. *Id.* at 13. Not only were screen writers part of Congress’s focus, but actors were also a part of the Congressional inquiry. One newspaper reported:

More than two scores of Hollywood celebrities, sleepy and buffeted by autograph seekers, landed at the National Airport last night to protest procedures of the House Un-American Activities Committee. . . . The notables headed by actor Humphrey Bogart and said to represent the Hollywood Committee for the First Amendment will be in the House Caucus room today

40 *Film Folks Fly Here for Probe Protest*, WASH. POST, Oct. 27, 1947, at A1.

100. FBI Office Memorandum, *supra* note 94, at 12.

101. *Id.*

102. *Id.* at 7.

industry.”¹⁰³ The HUAC issued subpoenas for the two writers to appear before the HUAC and its subcommittee.¹⁰⁴ Lawson was called to testify on October 27, 1947, with Trumbo testifying the following day.¹⁰⁵

“The single-count indictment against Lawson charged him with refusal to answer a question as to whether or not he was or had ever been a member of the Communist Party.”¹⁰⁶ Trumbo’s two-count indictment charged him with failing to answer two questions.¹⁰⁷ The first was “whether or not he was a member of the Screen Writers Guild”¹⁰⁸ The second, “whether or not he was or had ever been a member of the Communist Party.”¹⁰⁹ Lawson and Trumbo were tried by separate juries,¹¹⁰ and each was convicted and received the “maximum sentence . . . of one year imprisonment and a \$1,000 fine.”¹¹¹ The D.C. Circuit court noted that

[a]ppellants strongly urge at the outset that they are protected under specified Amendments to the Constitution from being compelled to disclose their private beliefs and associations and thus the questions asked appellants by the subcommittee were improper and the trial judge therefore erred in upholding the subcommittee’s inquiry and in allowing a conviction for refusal to answer.¹¹²

It is interesting to note that the Court of Appeals actually consolidated the issues in a way not considered by the legal briefs.¹¹³ Indeed, after announcing that it would proceed in this manner, the court further explained that “[i]n the few instances . . . where a particular claim is not raised by both, because of the different records on which these appeals are based, separate treatment will be given and will relate only to the appellant who made the claim.”¹¹⁴ The manner in

103. See *Lawson v. United States*, 176 F.2d 49, 50 (D.C. Cir. 1949).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 50-51.

109. *Id.* at 51.

110. *Id.*

111. *Id.*

112. *Id.*

113. Rather than address the separate issues presented by Petitioners in their briefs, the Appellate Court reframed them as a general contention that

[t]heir argument is that the Bill of Rights protects all individuals against being compelled to disclose their private beliefs and associations regardless of what those beliefs may be, that the right of privacy is absolute, and that an individual may not be punished for remaining silent as to those beliefs and associations.

Id. at 50. This allowed the court to dismiss Appellants’ contentions without engaging in much analysis of the novel claims presented by Houston and his co-counsel. Indeed, the court dismissed the contentions as not even being “novel.” *Id.*

114. *Id.*

which the appeal is consolidated was important because the court actually obscured the gravity of the complicated constitutional questions involved.¹¹⁵

115. In the petition for writ of certiorari to the Supreme Court of the United States, the true gravity of Lawson and Trumbo's constitutional claims are revealed. The specific questions appealed and later presented to the Supreme Court by Houston and his co-counsel are set forth in painstaking detail here:

Questions Presented

I.

As a matter of law in a contempt proceeding such as this, is there a conclusive presumption which attends every Congressional investigation that such investigation is lawful, that the Committee had jurisdiction of the subject matter under inquiry, that the Committee acted within the lawful bounds of its power, and that it denied no Constitutional rights or privileges to the witnesses, as was all conclusively presumed by the trial and appellate courts below in the face of petitioner's attempt to prove the contrary in each respect?

II.

May a private individual, called as a witness by the Committee in an investigation into a private industry wherein he is employed, be compelled to disclose his political opinions and associations, particularly where the Committee's proceedings are used to impose loss of employment and other penalties upon him; or does such compulsion violate Article One, Section Nine, and the First, Fourth, Fifth, Ninth and Tenth Amendments to the Constitution?

III.

Does an investigation in which the Committee uses its powers to censor the content of motion pictures lay outside the lawful bounds of the Committee's power; and may a witness before the Committee be compelled to answer a question which is put as part of the process of censorship, or would such compulsion violate the First Amendment?

IV.

Does an investigation in which the Committee uses its powers to secure the discharge and blacklisting of persons who alleged ideas and affiliations are deemed "un-American" and "subversive" by the Committee lay outside the lawful bounds of the Committee's power; and may a witness before the Committee be compelled to answer a question which is put as part of the process to secure his discharge and blacklisting, or would such compulsion be a[n] usurpation of power and a violation of the due process clause of the Fifth Amendment?

V.

When a witness before the Committee is being threatened with discharge and blacklisting in and by the Committee's use of its power, is it a denial of due process under the Fifth Amendment to refuse to allow the witness the effective aid of counsel, the right to make a statement and offer evidence in his own behalf, the right to cross-examine witnesses who attack him, and other essentials of a fair hearing?

VI.

Is the statute establishing the House Committee on Un-American Activities, on its face and as construed and applied generally and in the present case by the Committee, unconstitutional as in contravention of the First, Fourth, Fifth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution?

VII.

Did the trial court, by its instructions, refusals to admit evidence and quashing of subpoenas *duces tecum*, commit prejudicial error in taking away from the jury the questions of fact relating to the issue of the existence of a lawfully constituted tribunal and, in effect, determining that issue as a matter of law?

VIII.

Did the trial court commit prejudicial error in instructing the jury that a failure to give a responsive answer or the giving of a reply which is unclear to the jury is *per se* conclusive proof of a refusal to answer, and in commenting to the jury that the petitioner was not trying to answer the question?

Relying heavily on its precedent in *Barsky v. United States*,¹¹⁶ the Court of Appeals held that Congress had the power to make the inquiry into political affiliation.¹¹⁷ The court explained that “[n]o one can doubt in these chaotic times that the destiny of all nations hangs in balance in the current ideological struggle between communistic-thinking and democratic-thinking peoples of the world.”¹¹⁸ It embraced the notion that “[n]either Congress nor any court is required to disregard the impact of world events”¹¹⁹ Furthermore, the court asserted that “[i]t is equally beyond dispute that the motion picture industry plays a critically prominent role in the molding of public opinion and that motion pictures are, or are capable of being, a potent medium of propaganda dissemination which may influence the minds of millions of American people.”¹²⁰

The Court of Appeals described as absurd appellants’ arguments, that screen writers did not need to tell Congress their political affiliations, because they “vitally influence the ultimate production of motion pictures seen by millions”¹²¹ The court reasoned that it would be “hard to envisage how there could be any more pertinent question in these circumstances where the

IX.

Did the trial court commit prejudicial error in sharply curtailing cross-examination of the only prosecution witness as to some issues and refusing to permit cross-examination at all as to others?

X.

Did the trial court commit prejudicial error by refusing to admit evidence that the Committee, in presenting to the House of Representatives the citation for contempt, did not inform it as to all of the material parts thereof?

XI.

Did the utilization, over the objection of petitioner, of government employees as jurors in this particular case, involving the House Committee on Un-American Activities as the governmental agency directly interested in the prosecution and based upon the charge that petitioner refused to disclose whether or not he was a member of the Communist Party constitutes prejudicial error?

XII.

May the Jury Commission of the District of Columbia validly impose as a requirement for jury service a negative answer to the question, “Do you have any views opposed to the American form of government?”; and did the trial court commit prejudicial error in denying petitioner’s challenge and motion to dismiss the jury panel based on the aforesaid requirement?

XIII.

Was petitioner’s right to an impartial jury drawn from a cross-section of the community abrogated by the establishment of qualifications for jury service other than those required by statute and which limited the representative character of the jury; and did the denial of the challenge and motion to dismiss the jury panel based upon the aforesaid grounds constitute prejudicial error?

XIV.

Was petitioner denied a fair trial in violation of the Sixth Amendment by reason of the matters set forth in questions VII to XIII, inclusive?

Petition for Writ of Certiorari at 23-26, *Lawson*, 176 F.2d 49 (No. 248).

116. 167 F.2d 241 (D.C. Cir. 1948).

117. *Lawson*, 176 F.2d at 51.

118. *Id.* at 53.

119. *Id.*

120. *Id.*

121. *Id.*

Committee was then investigating, pursuant to statutory authorization, ‘the extent, character, and objects of un-American propaganda activities in the United States’¹²²

The Court of Appeals also rejected several other procedural objections raised by the appellants. Lawson and Trumbo both objected to certain jury instructions as vague or misleading¹²³ and to certain limitations on their cross examinations.¹²⁴ Lawson’s argument that the congressional sub-committee was not properly constituted was also rejected.¹²⁵

Both appellants also claimed that the jury panels were not impartially drawn from a fair cross section of the community.¹²⁶ Among their claims was the court’s refusal to remove Government employees from the jury for cause.¹²⁷ Finally, “Lawson and Trumbo both urge[d] that the refusal to transfer the trials from the District of Columbia was erroneous” because of the influence that had been placed on Government workers against associating with Communists.¹²⁸

The anti-Communist climate in Washington at the time of this litigation likely influenced the appellate court’s unwillingness to grant any relief to Lawson or Trumbo.¹²⁹ After the two screenwriters lost in the Court of Appeals, they petitioned the Supreme Court of the United States to grant certiorari review.¹³⁰ The petitions included an extraordinary assault on the government’s tactics to ferret out alleged Communists.¹³¹

In Lawson’s petition, Houston and his co-counsel asserted that

[t]he Committee conducted its Hollywood investigation, determined the pertinency of questions, and otherwise proceeded upon the basis that its authority was established by its own definition and application of the terms “un-American propaganda activity” and “subversive and un-American propaganda that . . . attacked the principles of the form of government as guaranteed by our Constitution.”¹³²

The petition further argued that “[t]he [HUAC]’s concept of what is un-American and subversive runs the whole gamut of what are often denominated progressive ideas in American life, from support of the New Deal to opposition to the

122. *Id.*

123. *Id.*

124. *Id.* at 53-54.

125. *Id.* at 54.

126. *Id.*

127. *Id.*

128. *Id.*

129. Many people in Washington were required to take loyalty oaths in order to keep their federal jobs at this time.

130. Petition for Writ of Certiorari, *supra* note 115.

131. *See supra* note 17.

132. Petition for Writ of Certiorari, *supra* note 115, at 13.

[HUAC]; from opposition to monopoly to defense of sit-down strikes . . . ”¹³³ The petition characterized the HUAC as the “Grand Jury of America”¹³⁴ “buil[ding] up files containing names of more than a million individuals and more than a thousand organizations accused of being subversive.”¹³⁵ It further asserted that Congress was acting as little more than a “‘vigilante committee’ and . . . a ‘democratic’ substitute for the ‘gestapo.’”¹³⁶ The petition continued, stating that “[t]here is nothing in American motion pictures generally or in the motion pictures written by petitioner specifically which by any reasonable standard or definition could be considered subversive”¹³⁷ The petition also informed that “[a]s a matter of undeviating practice in the motion picture industry it is impossible for any screen writer to put anything into a motion picture to which the executive producers object”¹³⁸ Finally, Lawson stated that producers’ control, rather than that of the screen writers, was a “matter[] of common knowledge when petitioner Lawson was subpoenaed by the House Committee.”¹³⁹

Trumbo argued that the broad assertion of authority to require compulsory disclosure would have a trickle-down effect on other government entities. Specifically,

[t]he determination of this issue is essential, for not only has [HUAC] claimed and exercised such power of compulsory disclosure, but the precedent set by [this] agency of government has sired a host of similar claims to like power throughout the length and breadth of the nation.¹⁴⁰

Suggesting that Congress was attempting to criminalize “dangerous thoughts,”¹⁴¹ Trumbo posited that “[n]o such power has ever before been claimed by any agency of our government.”¹⁴² “Furthermore, the Committee used this broad and fearsome power to censor the content of motion pictures and to purge from the motion picture industry alleged ‘disbelievers’ in the ‘Americanism’ to which the members of the Committee subscribed.”¹⁴³

The petition did not simply offer overtures to grand constitutional values, it also pointed out some serious practical consequences of Congress’s broad assertion of power. The petition pointed out that “the Committee as an agency of

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 14.

137. *Id.* at 16.

138. *Id.* at 17.

139. *Id.*

140. *Id.* at 28.

141. *Id.* at 29.

142. *Id.* at 30.

143. *Id.*

government used its power to penalize individuals, including petitioner, because of their alleged beliefs and affiliations. The penalties imposed by such governmental action included blacklisting, character assassination and incitement of public retribution.”¹⁴⁴

The Supreme Court denied the petition after the government filed its brief in opposition, which asserted that the HUAC was constitutionally authorized to investigate Communist infiltration of the motion picture industry.¹⁴⁵ The government suggested that the “conspiratorial nature of the Communist Party’s infiltration” of the motion picture industry supported its argument for compelled disclosure of party affiliation.¹⁴⁶ The government asserted that although the First Amendment might embody a freedom to be silent generally, “it certainly does not accord a privilege to be silent when called upon to testify before a lawful body of inquiry,” reasoning that under that standard “no investigation would be constitutional if that were the case.”¹⁴⁷ This argument seems to advance the basic proposition that one must be compelled to answer any association-related inquiry from any government body. The government further asserted that “[i]f . . . the Committee . . . transgressed the bounds of the power which was entrusted to the Committee by Congress, the remedy lies with Congress and, ultimately, with the voters.”¹⁴⁸ Giving short shrift to the issues raised by petitioners, the Government concluded its brief in opposition by stating that “[a]lthough the issue as to the Committee’s authority to question petitioners as to their membership in the Communist Party is of great importance, it has been twice resolved against the petitioners’ contentions by the court below”¹⁴⁹

After the Court denied the petition,¹⁵⁰ Lawson and Trumbo felt compelled through their counsel to file a petition for rehearing.¹⁵¹ Though rarely granted, such a petition is allowed under the Court’s rules of practice.¹⁵²

Unfortunately, the petition for rehearing was filed on April 24, 1950, two days after Houston’s death.¹⁵³ Houston’s influence on this document, however, was very clear.¹⁵⁴ The petition made powerful policy arguments and pointed out

144. *Id.*

145. *See generally* Brief for the United States in Opposition, *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949) (Nos. 248-249).

146. *Id.* at 15.

147. *Id.* at 17.

148. *Id.* at 19-20.

149. *Id.* at 29.

150. *Id.* at 30 (giving the date as October of 1949).

151. Petition for Rehearing, *Lawson v. United States*, 176 F.2d 49 (D.C. Cir. 1949) (Nos. 248-249).

152. SUP. CT. R. 44.

153. Houston died April 22, 1950 after being confined to a hospital in Washington D.C. He continued to consult in several legal matters right up until his death. MCNEIL, *supra* note 2, at 209-11.

154. The freedom of speech and association claims raised by Houston on behalf of the Communist party during his last decade of practice all reflected a similar Due Process theme that was the hallmark of Houston’s group litigation theory. In January 1949, the New York Times reported that in a case that raised similar First Amendment claims regarding members of the Communist Party, Charles Houston led the litigation strategy:

obvious contradictions in the government's position on Constitutional rights.¹⁵⁵ In that filing, Houston and his co-counsel asserted that the case involved not simply the First Amendment, but the privilege against self-incrimination.¹⁵⁶ The government's position required that individuals be forced "to aid in their own prosecution regardless of whether a valid conviction can be obtained."¹⁵⁷ They argued that "[t]he privilege against self-incrimination was designed to protect the people precisely in situations such as this—to prevent the use of governmental authority to compel witnesses to testify against themselves, where they might be prosecuted because of their alleged beliefs or associations."¹⁵⁸

Noting that the film industry does business in California, the Petitioners pointed out that "[t]he Communist Party is a lawful political party in the state of California and electors of that State are free to affiliate with it."¹⁵⁹ Furthermore, according to the law of California, "persons desiring to affiliate with [the Communist] party may decline to state publicly whether they have or have not so affiliated."¹⁶⁰ The rehearing petition argued that Congress's action interfered with the political process of the State to conduct its elections.¹⁶¹ The Petitioners noted that "[t]he right to be free to declare, or to decline to declare, political affiliation is no minor privilege."¹⁶² They further warned that "[t]he denial of certiorari in the cases here is a green light for the 'village tyrants' to pursue a course which recent history teaches us can have only disastrous results for our democratic institutions."¹⁶³ They feared that families "are now the prey of any governmental official who may with impunity pry into their private lives and subject them to the ostracism of the community with the stigma of disloyalty."¹⁶⁴

The Petitioners predicted that because of "the uncertainty created by this Court's action, the legal remedies afforded citizens against inroads into their liberties have become largely illusory."¹⁶⁵ Their petition noted the many Amicus briefs¹⁶⁶ calling for review and "[v]irtually every newspaper editor in the nation has assured the public that the question of the Committee's power would be the

"Counsel for twelve Communist leaders charged with conspiracy to 'teach and advocate' the forcible overthrow of the United States Government announces yesterday a petition to the United States Supreme Court to void the indictments." Russell Porter, *Communist Plea Goes to High Court*, N.Y. TIMES, Jan. 8, 1949, at 13. Charles H. Houston of Washington, Counsel for Henry Winston and Irvin Potash, two of the defendants, but acting on behalf of all twelve, drew up the petition. *Id.*

155. Petition for Rehearing, *supra* note 151.

156. *Id.* at 2.

157. *Id.*

158. *Id.* at 4-5.

159. *Id.* at 20.

160. *Id.*

161. *Id.*

162. *Id.* at 22.

163. *Id.* at 28.

164. *Id.* at 29.

165. *Id.*

166. *Id.* at 30.

subject of scrutiny by the Supreme Court of the United States.”¹⁶⁷ Calling it “the most significant constitutional question to come before [the Court] in . . . three decades,”¹⁶⁸ the Petitioners repeated their urgent request to decide the controversy.¹⁶⁹ They noted that “the conflicts between boards of regents and academic staffs over loyalty oaths rock campuses, as scientists in larger numbers leave their vocations in protest against political surveillance”¹⁷⁰

The rehearing petition also addressed the international implications of the Supreme Court’s failure to grant review, noting that these intrusive inquiries “sanctioned by governmental agencies run afoul [of] the international obligations solemnly undertaken by the Charter of the United Nations, of which the Government of the United States is a signatory”¹⁷¹ In support of this assertion, the Petitioners cited Article 19 of the United Nations’ Declaration of Human Rights passed on December 10, 1948, which provides that “[e]veryone has the right to freedom of opinion and expression. This right includes freedom to . . . impart information and ideas through any media”¹⁷² Further, the Declaration of Human Rights also quite plainly states that “[e]veryone has the right to freedom of peaceful assembly and association.”¹⁷³ The Petitioners warned that the Supreme Court’s failure to grant review “may be inexplicable to the peoples and the nations of the world and inconsistent with the positions taken by our representatives at home and abroad regarding universal respect for and observance of human rights.”¹⁷⁴ The Petitioners reasserted that the case was “ripe for adjudication”¹⁷⁵ and “no considerations . . . can outweigh the need for this Court to settle the constitutional question involved in these proceedings”¹⁷⁶

With no comment, the Supreme Court declined the petition for rehearing.¹⁷⁷

IV. MISSED OPPORTUNITY

The Supreme Court’s decision to let stand the Court of Appeal’s ruling was an unfortunate and tragic decision for American Democracy. This action made Congress bolder in its pursuit of alleged Communists and ushered in an intense period of public scrutiny which made many Americans uneasy with their

167. *Id.*

168. *Id.* at 32.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 33.

173. *Id.*

174. *Id.* at 34.

175. *Id.*

176. *Id.*

177. *Lawson v. United States*, 339 U.S. 972 (1950) (mem.); *Trumbo v. United States*, 339 U.S. 972 (1950) (mem.). The rehearing was denied in May 1950. *See Lawson*, 339 U.S. 972; *Trumbo*, 339 U.S. 972.

government.¹⁷⁸ The decision also allowed politicians like Senator Joseph McCarthy¹⁷⁹ to engage in witch hunts,¹⁸⁰ similar to what happened to Lawson, Trumbo, and the rest of the Hollywood Ten.¹⁸¹ The tragedy was that so many lives were destroyed with so little justification.¹⁸²

This important test case on the First Amendment and the legal theories it produced were the template for a host of rights which would be fought for and won in subsequent decades.¹⁸³ An analysis of the legal theories presented in the Hollywood Ten cases presents a mosaic of the personal liberty theories that would ultimately dominate the Warren Court agenda.¹⁸⁴ By identifying the intersection between the First Amendment, the Fifth Amendment, and the emerging idea of the right to privacy, Houston and his co-counsel identified the true essence of “fundamental freedom.”¹⁸⁵ As he had done in other collaborative litigation, Houston combined legal theory and practical human need to develop a framework for building a safe haven for citizens to operate in a free society.¹⁸⁶ Although it would take many years for these rights to come to fruition, it was Houston and his litigation partners who provided the vision and the legal theories that would ultimately breathe life into emerging First Amendment Freedom of Association jurisprudence.¹⁸⁷

178. See *supra* note 20.

179. *Id.*

180. See *supra* note 12, 14.

181. *Id.*

182. *Id.*

183. See *supra* note 12.

184. “Warren’s mission . . . was to suppress behavior that he found obnoxious or repressive from his perspective of deep commitment to the freedoms inherent in American citizenship.” G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 365 (1976).

185. As one commentator has cogently explained, “[t]he preservation of freedom requires a positive and continuing commitment. Specifically the maintenance of the United States as a free society confronts the American people with an immediate responsibility in two areas in particular: civil rights and civil liberties.” ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* 189 (1949).

186. Houston was truly the father of progressive lawyers in America and embraced that role. It has been observed that

[p]rogressive lawyers can be politically engaged narrators who tell analytically illuminating stories about how the law has impeded or impelled struggles for justice and freedom. . . . Lawyers can perform this role more easily than others due to the prestige and authority of the law in American society. Progressive lawyers can seize this opportunity to highlight internal contradictions and blatant hypocrisy of much of the law in the name of the very ideals—fairness, protection, formal equality—heralded by the legal system.

CORNEL WEST, *KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* 242 (1993).

187. In criticizing Congress’s attempts to expose Communists, Houston commented:

I must say that I believe that every victim of its attempts to stifle free speech and the struggle for real democracy has the sympathy of Negro Americans regardless of their political philosophy . . . at the same time it offers such an opportunity to protect the constitutional rights of American citizens and the integrity of true democratic procedure as any lawyer would welcome.

Lem Graves Jr., *Houston to Defend Red Party Secretary*, *PITTSBURGH COURIER*, Jun. 21, 1947, at 2.

The Supreme Court failed in its responsibility when it passed up the opportunity to review the Hollywood Ten case. Perhaps the case came along at a time in history when the Court was unwilling to confront the obvious overreaching of Congress because of Cold War concerns after World War II.¹⁸⁸ Perhaps the other pressing civil rights issues facing the Court, largely due to Houston's direction, made it less appealing for the Court to also confront this additional issue.¹⁸⁹ Perhaps they feared it would affect the nation's view of the Court's legitimacy in deciding issues between branches of government.¹⁹⁰

V. CONCLUSION

Charles Hamilton Houston's long and complex relationship with the Communist Party spanned almost two decades.¹⁹¹ From the early days of the Scottsboro Boys cases, to his final federal and state court litigation defending the right to express political dissent, he was always a passionate advocate of the First Amendment freedoms.¹⁹² His involvement with alleged subversives during his legal career was a shining example of principled advocacy of the freedom of association and expression.

Even though other advocates in later years wavered in their commitment, Houston's devotion to the democratic ideal of freedom of association could not reasonably be questioned.¹⁹³ He served honorably in the United States military

188. See STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* 244 (1982) (stating that fear and intolerance helped to create the Cold War environment that permitted overreaching in both the public and private sector).

189. As some commentators have noted,

From the perspective of pure human drama, the case of the Hollywood Ten is a tragic one. Individuals were imprisoned and for many years denied the opportunity to work and express themselves in their profession for no reason other than their personally held political beliefs. Under this view, those who organized or supported the boycott of the Hollywood Ten and other members of the motion picture community are viewed as authoritarian suppressors of any political view they consider unacceptable, in contravention of the basic premises of democratic theory. . . . As far as we have been able to determine, conservative historians have failed to mount an adequate defense of either the HUAC investigation or the blacklist.

Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1725 (2001).

190. One commentator has explained that

[c]ases that have come before the courts give no clear guidance as to when the equities will favor Congress

. . . [C]ongressional oversight allows Congress to effectively legislate, provides a check on executive power, and informs the public about federal activity. Distinctly different than a judicial trial, yet at times alarmingly similar, it is fitting that each privilege must be examined individually to determine how and when it can be asserted before Congress.

Auchincloss, *supra* note 14, at 197.

191. See *supra* notes 27, 30-31, 52.

192. See *infra* note 200.

193. Interestingly, Houston's understudy and successor at the NAACP, Thurgood Marshall, would in the 1950's, after Houston's death, cooperate with the FBI and Hoover "to find out which civil rights groups were

and followed the constitutional principles of democracy and the rule of law his entire life.¹⁹⁴ Clearly he believed the constitution could withstand even rigorous dissent. Like James Madison, Alexander Hamilton, John Adams, and other patriots who rose up in dissent to form the very basis for our free nation which we treasure, Houston took the view that political disagreement strengthened democracy.¹⁹⁵

Houston was a twentieth-century patriot who sought to maintain the careful balance between guarding democracy and allowing freedom to share ideas and criticize government.¹⁹⁶ His First Amendment advocacy came at a critical time in American history, a time when the country struggled to protect freedom of speech while remaining cognizant of international threats. Houston took courageous steps in fighting to shape the balance between those two conflicting ideals in the nation's courts.

The battles he waged were public, vocal, and conspicuous. He fought against Congress,¹⁹⁷ the FBI,¹⁹⁸ and the national paranoia against Communists that dominated pre- and post-World War II America.¹⁹⁹ In his dying days, Houston poured his little remaining energy into these First Amendment causes.²⁰⁰

His efforts would not return dividends until twenty years after his death. The foundation he laid for stronger protections for those who would voice protest against government became part of the historic Warren Court's due process revolution.²⁰¹ His work helped confirm the cherished notion of the right to associate free from government interference.²⁰² History should recognize Houston's contributions to this effort.

Communist fronts." Marshall would later become the first African American Justice on the Supreme Court. *See* JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 225 (1998).

194. MCNEIL, *supra* note 2, at 40-42.

195. *See infra* note 202.

196. *Id.*

197. Houston testified in favor of Anti-Lynching Laws. *See*, MCNEIL, *supra* note 2, at 97.

198. The extensive records of the FBI make clear the Bureau kept a close eye on the NAACP legal campaign.

199. MCNEIL, *supra* note 2, at 40-42.

200. In the year prior to his death, Houston was defending the right of free speech for those who were critics of the government while still extolling the virtues of patriotism. Houston once stated that "[w]e would fight any enemy of this country. Prior to hostilities we might do our best to avoid war, but once our country is committed we go with our country." *Robeson Blasted for Paris Speech; White, Other Leaders Repudiate his Stand*, CHI. DEFENDER, Apr. 30, 1949, at 1.

201. William O. Douglas, one of Earl Warren's bench mates for many years, believed Chief Justice Warren's leadership on the Court was a key factor in bringing Congress under control:

The arrival of Earl Warren made part of the difference. Moreover, I think the notorious and high-handed way in which the loyalty security program was administered was making itself felt on the judicial conscience. In any event, the Court construed executive orders and regulations concerning the discharge of "subversives" from government employment quite strictly, to give the accused employees a full measure of procedural due process of law.

WILLIAM O. DOUGLAS, THE COURT YEARS: 1939-1975, at 96-97 (1980).

202. Houston was among those who signed a 1947 published position statement, which included this portion:

Houston's attempt to expand and clarify First Amendment protections could have a profound effect on contemporary issues facing the United States. In the post 9/11 world, America faces challenges concerning how it should protect itself from what it believes are its unseen enemies, while at the same time preserving its valued freedoms. The power of the Executive Branch and Congress to investigate relationships of people whom it might deem suspicious is as relevant today as it was when the post war communist hysteria gripped the nation.²⁰³ Suspected foreigners who might be hostile to the United States' current interests are likewise no less of a concern for our current political leader.²⁰⁴ Striking a careful balance between the right to free political discourse and real threats to national security is always a difficult endeavor.²⁰⁵

The ability to balance these equally important, but competing, interests is what makes the United States Constitution a special document capable of adapting to circumstances and occasionally affords the opportunity for courts to embrace freedoms previously overlooked. Whether reviewing the President's procedures for determining the "enemy combatant"²⁰⁶ status, or Congress's contempt power to investigate illegal drug use in baseball,²⁰⁷ Houston's well

We submit this petition in the interest of the democratic rights of the Negro people and of all other Americans, not as an endorsement of the philosophy and program of the Communist party.

It is clear that the Negro's historic goal of freedom from racial discrimination and oppression can be attained only in a society where the civil and political liberties of minorities are fully protected by government. We view with utmost concern, therefore, the proposal of a member of the President's Cabinet to negate the fundamental democratic premises of our nation by suppressing a minority political party with whose program the government in power is at odds.

We Negro Americans . . . To the President and Congress of the United States, CHI. DEFENDER, Apr. 26, 1947, at 11.

203. See *supra* note 20.

204. See Keith Werhan, *Rethinking Freedom of the Press After 9/11*, 82 TUL. L. REV. 1561 (2008).

205. *Id.*

206. Even today the nation struggles with what to do about people who advocate violence against the government. Sometimes lowering the standards for Due Process is the first response to such persons. The Supreme Court has somewhat recently addressed the constitutional implications of labeling someone a suspected terrorist for purposes of reducing the constitutional protection that can be afforded him or her. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court reversed the dismissal of a petition for Habeas Corpus brought on behalf of Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an "illegal enemy combatant." The Court held that while the government had the power to detain unlawful combatants, those accused of having such a status who are citizens must have the ability to challenge their detention before an impartial judge rather than a military tribunal.

207. Congress has recently been investigating performance enhancing illegal drug use in baseball by using its power to call witnesses before its committees and ask questions of those suspected of such conduct. In January 2008, the House Committee on Oversight and Government Reform "announced that it would hold hearings to clarify information contained in the report by George J. Mitchell on the use of performance enhancing drugs in baseball." William C. Rhoden, *It's Time for Clemens to Face the Legal Posse*, N.Y. TIMES, Jan. 5, 2008, at D2.

Various players, baseball officials, and athletic training staff were to be called to answer to Congress in a proceeding that could lead to the disclosure of incriminating information. *Id.* Although not a case of freedom of association, the baseball drug hearings do have some parallel to the HUAC hearings of Houston's day. It is not clear how far Congress should go in demanding answers to questions that could result in a criminal outcome. Congress is not a court of law. A legislative body is unsuited to provide the kind of due process we have come

focused issues in the Hollywood Ten cases provide the Supreme Court with a standard to test new limitations on the First Amendment right to association.²⁰⁸ Perhaps because of Houston's contributions to this important area of constitutional law, we may avoid another shameful episode in American history where mere disagreement with the government results in criminal consequences.

The future is not clear. The need to guard against an overzealous Congress or passive courts, unwilling to protect personal freedoms, is still a daily risk for citizens who may dissent from the status quo. Congress will still find the need to investigate matters it deems important to the public interest. Courts are still charged with the responsibility to assure that due process is properly recognized in matters that come before it, but without lawyers willing to press hard for individual liberty, the freedom of association will always be at risk.

In the Hollywood Ten cases, both the courts and Congress fell short of their respective responsibility. Without the visionary and vigorous advocacy of Charles Hamilton Houston, the successes of later favorable Supreme Court decisions in the area of fundamental rights during the 1950's and 1960's may never have been achieved.

to take for granted in our criminal courts.

208. Eight years after Houston's death, the Supreme Court, consistent with Houston's arguments in the Hollywood Ten cases, finally held that Congress cannot proscribe the formation of a particular group or mere abstract teaching of an idea—it can only legislate against specific illegal acts or advocacy to engage in those acts by the group. *Yates v. United States*, 354 U.S. 298, 310-12, 329-31 (1957).