NYTimes NOV 23 1972

Liberty In Shackles

By Tom Wicker

IN THE NATION

It is not going to be much of a Thanksgiving Day for Samuel Popkin, the Harvard scholar who has been sent to jail for refusing to tell the Government how he knew of the existence of the Pentagon Papers before they were published. The day will be more cheerful for the five of the Chicago Seven whose convictions have been overturned by the Seventh Circuit Court of Appeals—but even they still have cause to fear the apparent willingness of the Government to jail people for political and intellectual activity.

That is because the circuit court reversed their convictions primarily because it found that Judge Julius J. Hoffman and the prosecutor, Thomas A. Foran, had so improperly conducted the trial—as any number of newspapermen reported at the time—that the defense had been unable to make its case. The court upheld, however, the so-called Rap Brown Act, which forbids anyone to cross state lines, or use other means of interstate commerce and communications, with the intent to incite violence.

What a person's "intent" may be at any given time, and what outcome may or may not result from whether that person did or did not have some particular intent, are the vaguest of questions, but their existence as the criteria of criminal activity obviously can be used, as Judge Wilbur Pell argued in dissent, for the "suppression of the free interchange of ideas and beliefs." As he said, that would be "a Pyrrhic sacrifice of a precious freedom for an illusory safety," but in Washington, spokesmen for the Department of Justice left open the possibility that the five defendants would be tried again under the same law—which was passed by a Democratic Congress and signed by Lyndon B. Johnson.

Professor Popkin's activities do not appear to have been at all political, but in his case "the free interchange of ideas and beliefs" is even more threatened. He has testified repeatedly that he knows nothing about the dissemination of the Pentagon Papers; he answered many of the questions put to him by a grand jury; what he is being jailed for is his refusal to say who told him of the Pentagon Papers' existence and nature.

At least two things ought to be borne in mind here. First, there is no statute by Congress that authorized anyone in the executive branch to classify the Pentagon Papers or anything else top secret; that was done by Executive order, which is the only instrument anyone could have violated in telling a scholar about these documents (a collection compiled, ironically enough, for historical purposes). The Government could not properly prosecute anyone for such a disclosure, even if Professor Popkin would identify his sources; but they *could* harass, reprimand, demote or fire such sources.

The fact is, furthermore, that the Government has demonstrated no purpose of any legitimate kind in taking a teacher off to prison in handcuffs. Mr. Justice Powell, in his concurring opinion in the Caldwell case, said that when the Government forced a newspaperman to disclose a source, it would have to show a compelling need for the information and demonstrate that the Government could get this needed information in no other way. In Boston, Judge W. A. Garrity said he construed the Caldwell decision to extend to scholars like Samuel Popkin—but Mr. Justice Powell's opinion in that case apparently did not.

These two points in conjunction—that there is no statute underlying this case, so that there has been no criminal act at which the investigation could be directed; and that the Government has shown no need for the information and no purpose in seeking it—raised the sad but necessary question whether the real intent here is to discourage Government officials from talking to newspapermen or scholars because of their fear that their identities will become known to Federal grand juries.

The result of that kind of interference with the free flow and exchange of ideas, in the Government's increased capacity to operate in secret, could be incalculable. Perhaps more important, however, is the apparent willingness of the Government—the origins of the Rap Brown Act and the Army's surveillance program show that it is not confined to the Republicans—to bring criminal prosecutions for political and intellectual activity if that activity does not suit the Government's purposes or convenience.

Those who have lived in the profound belief that in America the law and the Constitution *protected* political and intellectual activity, cannot take much comfort even on Thanksgiving Day in the Seventh Circuit Court ruling, much less in the spectacle of a brave and honest man shackled and imprisoned for his belief in a principle. As for all those eating their turkey today who believe this is only the problem of reporters and intellectuals, of the Eastern liberals and élitists, let them stand warned that what happens to a Harvard professor today can happen to a small-town school teacher tomorrow, or a union official, or a business accountant, or to anyone. "Tyranny over the mind of man" is tyranny for everyone.