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Free Speech in the Age of McCarthy: A Cautionary Tale

Geoffrey R. Stone†

Editor's Note: Professor Stone adapted the following Article from his keynote address at the Thomas M. Jorde Symposium, February 12, 2004, at the School of Law, University of California, Berkeley (Boalt Hall). The annual symposium is co-sponsored by Boalt Hall and the Brennan Center for Justice at NYU School of Law.

An Address in Honor of William J. Brennan, Jr.

I am delighted to have the privilege of giving this lecture in honor of Justice Brennan. The year I spent as his law clerk—October Term 1972—was one of the most challenging and rewarding of my life. Justice Brennan was a man of extraordinary courage, insight, and vision. The idea of remembering him each year with a lecture dedicated to his spirit is both fitting and inspiring.

Why, then, a lecture on the Age of McCarthy? This year marks the fiftieth anniversary of Senator Joseph McCarthy's condemnation, and fifty years is always a good time to take stock. Moreover, the Age of McCarthy bears some relation to the present. Though history never repeats itself precisely, it does repeat its general themes, and it is helpful to know our past if we are to cope well with our present. Finally, there has been a disturbing movement recently to rehabilitate Joseph McCarthy. In her new book, *Slander*, for example, Ann Coulter refers to McCarthyism as a "paranoid liberal fantas[y],"¹ and in a more serious work, Arthur Herman argues that Joseph McCarthy was "more right than wrong in terms of the larger picture."² His mistake, Herman says, was to make "a good point badly."³ I

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† Harry Kalven, Jr. Distinguished Service Professor of Law, The University of Chicago. This Article is adapted from my speech at the 2004 Jorde Symposium and from GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004). I would like to thank Shana Wallace, Kelsi Corkran, and Ajay Kundaria for their superb research assistance.

1. ANN COULTER, *SLANDER: LIBERAL LIES ABOUT THE AMERICAN RIGHT* 86 (2002).
2. ARTHUR HERMAN, *JOSEPH MCCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA'S*

want to correct the record. What I want to do is tell you a story. Think of it as a bedtime story, but one with goblins. It is a cautionary tale.

* * *

It is August 1945. World War II draws to a close. The world is at peace. The United States has the strongest economy and the most powerful military in the world. The prospect for civil liberties seems bright, and the ACLU looks optimistically to the future. It is a time for Americans to enjoy the hard-won fruits of national sacrifice. But optimism fades quickly. The year 1946 brings severe economic dislocations. Shortages and strikes rack the nation, and the collapse of the Soviet-American wartime alliance sours the national mood. Franklin Roosevelt had promised an era of U.S.-Soviet collaboration, but President Truman now bitterly assails the Soviets for blocking free elections in Eastern Europe.

Two spy scares deepen the nation's anxiety. The public learns that secret documents about China have been leaked to a leftist journal, *Amerasia*, and Canada charges that during the war twenty-two individuals had conspired to steal information about the atom bomb for the Soviet Union. Shortly thereafter, a House subcommittee recommends a new federal loyalty program to protect the United States "against individuals whose primary loyalty is to governments other than our own."⁴

As the 1946 midterm elections approach, President Truman comes under increasing attack from an anti-New Deal coalition of Republicans and Southern Democrats who excite fears of Communist subversion. In California, Richard Nixon, just thirty-three years old, charges that his congressional opponent, Jerry Voorhis, votes the "Moscow" line.⁵ In Nebraska, Republican Senator Hugh Butler charges that "if the New Deal is still in control of Congress after the election, it will owe that control to the Communist Party."⁶ B. Carroll Reece, chairman of the Republican National Committee, proclaims that the "stark choice" which confronts Americans is between Republicanism and Communism.⁷ The Republicans win a stunning victory, picking up fifty-four seats in the House and eleven in the Senate and taking control of both chambers. Fear has proved a potent

MOST HATED SENATOR 139 (2000).

3. *Id.* at 100.

4. Thomas I. Emerson & David M. Helfeld, *Loyalty Among Government Employees*, 58 *YALE L.J.* 1, 18 (1948) (quoting COMMITTEE ON THE CIVIL SERVICE, 79TH CONG., REPORT OF INVESTIGATION WITH RESPECT TO EMPLOYEE LOYALTY AND EMPLOYMENT POLICIES AND PRACTICES IN THE GOVERNMENT OF THE UNITED STATES 7 (1946)).

5. EARL MAZO & STEPHEN HESS, *NIXON: A POLITICAL PORTRAIT* 40 (1968).

6. DAVID M. OSHINSKY, *SENATOR JOSEPH MCCARTHY AND THE AMERICAN LABOR MOVEMENT* 53 (1976).

7. DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 26 (1978); see ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 295-96 (1978); ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* 11-12 (1970); HERMAN, *supra* note 2, at 39; THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* 100 (1982).

political weapon. The Democrats scramble to respond. Truman's Labor Secretary demands that the Communist Party be outlawed. "Why," he asks, "should they be able to elect people to public office?"⁸

The new Republican-controlled Congress promptly declares its intention to play the Red card. The House Un-American Activities Committee (HUAC) announces an aggressive program to expose Communists and Communist-sympathizers. J. Parnell Thomas, the rabid new Republican chairman of HUAC, pledges that his committee will "ferret out" those who seek to subvert the American way of life.⁹

Truman is caught in a vise. Republicans accuse him of being soft on Communism, while progressives in his own party accuse him of being too rigid in dealing with the Russians.

The President launches a bold two-pronged program to protect his flanks. On March 12, 1947, he announces what became known as the Truman Doctrine.¹⁰ The policy pledged that the United States would commit, as U.S. diplomat George Kennan later put it, all of its might to contain and confront the Soviets whenever and wherever they encroach "upon the interests of a peaceful and stable world."¹¹ Noting the enormity of this commitment, Senator Arthur Vandenburg advises Truman that if he wants the American people to support this policy he will have to "scare the hell" out of them.¹² Truman agrees. With this stroke, Truman effectively defines the progressives as soft on Communism.

Nine days later, Truman announces the second prong of his strategy. In order to defang the Republicans, he establishes by executive order a loyalty program for all federal employees.¹³ Under this program, the first of its kind in American history, *every* present and prospective federal employee—more than 4 million people—will be subjected to a loyalty investigation.¹⁴ The executive order provides that no individual may henceforth work for the federal government if "reasonable grounds exist" for believing

8. CAUTE, *supra* note 7, at 27.

9. John D. Morris, *House Body Maps Exposing of Reds in Labor Unions, Schools and Films*, N.Y. TIMES, Jan. 23, 1947, at A1; see also RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM: FOREIGN POLICY, DOMESTIC POLITICS, AND INTERNAL SECURITY 1946-1948*, at 132-33 (1972).

10. President Harry S. Truman, Address Before a Joint Session of Congress (Mar. 12, 1947), available at <http://www.yale.edu/lawweb/avalon/trudoc.htm>.

11. George F. Kennan, *The Sources of Soviet Conduct*, 25 FOREIGN AFF. 566, 581 (1946) (written under the pseudonym "X").

12. ATHAN THEOHARIS, *SEEDS OF REPRESSION: HARRY S. TRUMAN AND THE ORIGINS OF MCCARTHYISM 55-56* (1971).

13. Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 25, 1947) (entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government"). See generally RALPH S. BROWN, *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* (1958); GOLDSTEIN, *supra* note 7, at 299-302; REEVES, *supra* note 7, at 124-25; GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 323-30* (2004). For historical background on the Federal Employee Program, see FREELAND, *supra* note 9, at 117-20.

14. See Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 25, 1947).

that he may be “disloyal to the Government of the United States.”¹⁵ Among the activities that can be deemed “disloyal” is any “[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization . . . designated by the Attorney General as . . . communist, or subversive.”¹⁶

* * *

This is a critical juncture in our story, for it is at this moment that the era of “McCarthyism” begins to unfold. This is therefore an opportune moment for a brief interlude. Who were these “Reds” about whom everyone was so excited?

The Communist Party of the United States (CPUSA) was founded in 1919. It never attained any appreciable size. At the peak of its membership, in 1940, it had barely 100,000 dues-paying members, and from an electoral standpoint, the Party was effectively irrelevant. Whereas Eugene Debs had received about 900,000 votes in both 1912 and 1920 as the Socialist Party candidate for President, Communist Party candidates never garnered much beyond 10% of that number, and no member of the Communist Party was ever elected to Congress.¹⁷

Who joined the Communist Party or became a so-called fellow traveler? The vast majority of American “Reds” were drawn to Communism in the 1930s, not to serve the Soviet Union, but because Communism seemed a viable hope in the struggle for justice at home and against fascism abroad. Most of those who turned to Communism did so as a consequence of the Depression, which brought with it a profound sense of despair and dislocation. With a third of all Americans unemployed, the Depression triggered a severe loss of confidence in America’s business and political leaders, a widespread demand for economic and social reform, and a desperate search for answers.¹⁸

After 1929, people listened more attentively to pleas for a planned, classless society in which each individual would contribute according to his ability. On urban breadlines and devastated farms, Americans increasingly questioned the cruel consequences of capitalism.¹⁹ With President Roosevelt’s recognition of the Soviet Union in 1933, Americans were more open than ever to learning about Communism. The CPUSA advocated

15. *Id.* at 1938.

16. *Id.*

17. In the 1924 presidential election, the Communist Party candidate received 33,361 votes; in 1928, 48,770 votes; in 1932, 102,991 votes; in 1936, 80,159 votes; and in 1940, 46,251 votes. In 1944, there was no Communist Party candidate for President, and in 1948 the party supported the Progressive Party candidate, Henry Wallace. See ALAN BARTH, *THE LOYALTY OF FREE MEN* 24-25 (1952); CAUTE, *supra* note 7, at 185-86. The original two Communist parties in the United States fused into the CPUSA in 1923.

18. Cf. HERMAN, *supra* note 2, at 65.

19. Cf. *id.* (citing EUGENE LYONS, *THE RED DECADE: THE CLASSIC WORK ON COMMUNISM IN AMERICA DURING THE THIRTIES* 191 (1941)).

public housing to replace slums and public works to provide jobs; it championed racial equality and the rights of labor; it opposed fascism abroad and repressive social and economic structures at home. As such progressive voices as the *New Republic* and the *Nation* acknowledged, New Deal liberalism and Communism shared some of the same ideals.²⁰

Moreover, in an era of intense social turbulence and political exuberance, hundreds of clubs, associations, committees, and alliances sprang into being to fight for economic, social, political, racial, and international justice. The overlap between these groups and the CPUSA in the causes they supported, their memberships, and their cooperation in sponsoring rallies and other events was often extensive. Most members of these groups were not Communists, or even Communist “sympathizers,” but they and the Communists shared many of the same goals. Hundreds of thousands—perhaps millions—of Americans joined such organizations in the 1930s, not because they wanted to overthrow the government, but because they wanted to help good causes as a civic duty.²¹

After the United States entered World War II as an ally of the Soviet Union, Americans viewed both Russia and the CPUSA more favorably than at any time since the Russian Revolution. FDR confidently assured Americans that “we are going to get along very well with . . . the Russian people—very well indeed.”²² With the end of World War II, and as the international situation deteriorated, most Americans who still had ties to the Communist Party or to organizations or causes with connections to the Communist Party quickly severed them.²³ But by then, it was too late. The most infamous question of the next two decades—“Are you now *or have you ever been* . . . ?”—encompassed the past.²⁴

20. See HERMAN, *supra* note 2, at 65.

21. As future Supreme Court Justice Abe Fortas observed: [I]n the thirties and part of the forties, thousands of fine, thoroughly non-Communist people contributed to Spanish relief organizations, attended anti-Fascist meetings, participated in rallies against Hitler, joined in organizations to promote friendship with the Soviet Union when it was our wartime ally, and even took out memberships in book clubs to get books and phonograph records at a discount.

Abe Fortas, *Outside the Law*, ATL. MONTHLY, Aug. 1953, at 42, 44-45, excerpted in LAURA KALMAN, ABE FORTAS: A BIOGRAPHY 131 (1990).

22. JAMES MACGREGOR BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM 416 (1970); see also FREELAND, *supra* note 9, at 38-39; GOLDSTEIN, *supra* note 7, at 287-88.

23. After August 23, 1939, when the Soviet Union and Nazi Germany signed a nonaggression pact, the CPUSA lost most of its members. During World War II, the CPUSA, under the leadership of General Secretary Earl Browder, worked closely with the United States to support the war effort. In anticipation of continued cooperation between the United States and the Soviet Union, the party even softened its opposition to capitalism. As the war drew to a close, however, and Soviet-American relations began to deteriorate, Earl Browder was replaced by leaders who reflected a more hard-line approach. Under William Z. Foster, Eugene Dennis, and Robert Thompson, the CPUSA embraced a more confrontational attitude. But even in the darkest days of the Cold War, the party did not seriously entertain any revolutionary schemes, and there was no credible evidence that the CPUSA ever drew up any plans for sabotage or espionage, even in the event of war with the Soviet Union. CAUTE, *supra* note 7, at 186-87.

24. See STONE, *supra* note 13, at 322.

* * *

We return now to 1947 and the Truman loyalty program, which defined “disloyal” as any “[m]embership in, affiliation with or sympathetic association with any foreign or domestic organization . . . designated by the Attorney General as . . . communist, or subversive.”²⁵ One can begin to see the implications.

The Attorney General’s list initially encompassed seventy-eight organizations, but quickly swelled to more than 250, including, for example, the International Workers Order, a fraternal benefit society that specialized in low-cost insurance, and the Joint Anti-Fascist Refugee Committee, which provided relief for refugees of the Spanish Civil War.²⁶ Inclusion of an organization on the Attorney General’s list was tantamount to public branding. Contributions dried up, membership dwindled, meeting places disappeared. The greatest impact of the list, however, was on the freedom of American citizens. Because the list’s criteria were vague and undisclosed, because organizations had no right to contest their listing, and because new groups were constantly being added to the list, individuals had to be wary about joining *any* organization. The only “safe” course was to join nothing.²⁷

How did the loyalty program work? Every federal employee and every applicant for federal employment was subjected to a preliminary investigation. If that investigation uncovered any “derogatory” information, the FBI would conduct a “full field investigation”—a thorough probe of the individual’s relationships, sympathies, associations, beliefs, writings, and intentions. FBI agents would interview the individual’s current and former friends, neighbors, teachers, coworkers, employers, and employees in an effort to learn what they thought of his loyalty, what organizations he had joined, what journals and books he had read, and what sentiments he had expressed. Forty-thousand Americans were subjected to such investigations.²⁸

All this information was then compiled in an FBI dossier and turned over to a loyalty board, which convened a formal hearing if there were “reasonable grounds” to doubt the individual’s loyalty.²⁹ Although the “suspect” could appear before the loyalty board, consult with counsel, and present witnesses in his “defense,” he had no right to confront the witnesses against him or, more important, even to learn their identity.³⁰ These

25. Exec. Order No. 9835, 12 Fed. Reg. 1935, 1938 (Mar. 25, 1947).

26. See CAUTE, *supra* note 7, at 172-78.

27. See ELEANOR BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM 204 (1953); GOLDSTEIN, *supra* note 7, at 310-11.

28. STONE, *supra* note 13, at 348. From the FBI’s perspective, it was useful to retain all information because one could never know what tidbit might someday prove helpful.

29. See CAUTE, *supra* note 7, at 115-16; THEOHARIS, *supra* note 12, at 109-10.

30. BARTH, *supra* note 17, at 109, 158. See generally BONTECOU, *supra* note 27, at 82-95.

hearings took on the character of a “medieval inquisition.”³¹ The charges were often vague and almost impossible to rebut, as in this hypothetical interrogation: “You have been accused of sympathetically associating with members of an organization known to be subversive. What say you?” But with whom? Which organization? Where? When? How? A signature on a petition, a small donation, a name on a mailing list, presence at a public meeting—all could trigger suspicion of “sympathetic” association.

Even passing over the unfairness to those who were discharged or denied employment, the impact of the program was devastating. Merely to be suspected and called to defend oneself in a loyalty investigation was terrifying and ruinous to reputation, regardless of outcome.

Moreover, because of the elusiveness of the very concept of disloyalty—is it disloyal to call for disarmament, to say the Communist Party should be legal, to subscribe to the Communist Party newspaper?—no federal employee or prospective federal employee could ever consider herself exempt from the perils of investigation. Any slip of the tongue, any unguarded statement, any criticism of government policy could lead to one’s undoing. The anonymity of informers left every individual open to fools, schemers, paid informers, scandalmongers, and personal enemies.³² The only sane approach was to keep one’s head down and never look up. As one government employee tellingly remarked, “If Communists like apple pie and I do, I see no reason why I should stop eating it. But I would.”³³

* * *

We return now to the central timeline of the story. In 1949, China fell to the Communists. Overnight, almost a fifth of the world’s population was “lost” to the Reds. Americans were stunned and frightened. At almost the same time, the Soviet Union detonated its first atom bomb. Americans were thrown into a panic. Some communities issued dog tags to children so their bodies could be identified after a nuclear attack. Editorials advocated a preemptive war against the Soviet Union “before it is too late.” Everywhere were the questions: How had we lost China? How had Russia gotten the bomb?³⁴

Republicans immediately linked these questions to their charges of Communist infiltration. Only perfidy, they argued, could have caused such disasters. Americans increasingly came to believe that the greatest threat to the national security was the betrayal of America by Americans.³⁵

31. GOLDSTEIN, *supra* note 7, at 302; *see also* BARTH, *supra* note 17, at 49.

32. BONTECOU, *supra* note 27, at 129; CAUTE, *supra* note 7, at 277-78.

33. CAUTE, *supra* note 7, at 276; *see also* BARTH, *supra* note 17, at 127; BROWN, *supra* note 13, at 183-93; STONE, *supra* note 13, at 341-52.

34. DAVID H. BENNETT, *THE PARTY OF FEAR: FROM NATIVIST MOVEMENTS TO THE NEW RIGHT IN AMERICAN HISTORY* 291 (1988).

35. *See* THEOHARIS, *supra* note 12, at 98-99.

In early 1950, President Truman announced that the United States would develop a hydrogen bomb. Albert Einstein warned that such a weapon could end all life on Earth. Americans began to build bomb shelters and to discuss the need for mass graves in the event of nuclear war.³⁶ Four days later, Klaus Fuchs, a British physicist, confessed to passing U.S. atomic secrets to the Soviets.³⁷ Fuchs's confession led to the arrest of several alleged conspirators, including Julius and Ethel Rosenberg.³⁸ Republican Senator Homer Capehart fumed, "How much more are we going to have to take? . . . In the name of heaven, is this the best America can do?"³⁹

It was at this moment that Senator Joseph McCarthy burst upon the scene. After graduating from Marquette University Law School, McCarthy struggled for several years as a small-town lawyer in Wisconsin. Then, in 1939, he ran successfully for a state circuit judgeship. At thirty years of age, he was the youngest judge ever elected in the county. His campaign tactics were described at the time as bare-knuckled, ferocious, dishonest, and devastatingly effective.

After Pearl Harbor, McCarthy enlisted in the Marines and was sent to the South Pacific. Planning a run for the Senate, he issued his own press releases and labeled himself "Tail Gunner Joe"—though he was not a tail-gunner. After fracturing his foot during a prank, he falsified a military citation, claiming he had been injured in combat. In 1946, he campaigned for the Senate, first playing the "Communist card" when he charged his opponent with paving the way for the Russians in Eastern Europe.⁴⁰ As the election neared, he promised to remove the "Communists from the public payroll" and accused President Truman of attempting to "Sovietize our farms."⁴¹ He won handily.

At the age of thirty-eight, Joe McCarthy arrived in the Senate with an impressive head of steam. But he soon floundered. He was perceived as an "uncouth outsider" devoid of personal charm or legislative ability.⁴² He earned the degrading nickname "The Pepsi-Cola Kid" because of his work for the soft-drink lobby.⁴³ In need of a "new direction,"⁴⁴ he turned to the Communist issue.⁴⁵

36. REEVES, *supra* note 7, at 221-22.

37. BENNETT, *supra* note 34, at 291.

38. See generally ROBERT MEEROPOL & MICHAEL MEEROPOL, WE ARE YOUR SONS: THE LEGACY OF ETHEL AND JULIUS ROSENBERG (1975); RONALD RADOSH & JOYCE MILTON, THE ROSENBERG FILE: A SEARCH FOR THE TRUTH (1983); WALTER SCHNEIR & MIRIAM SCHNEIR, INVITATION TO AN INQUEST (1965).

39. GOLDSTEIN, *supra* note 7, at 320; see also JOSEPH R. MCCARTHY 8-9 (Allen J. Matusow ed., 1970); 540,000 Reds in U.S., *Hoover Tells Senators*, CHI. TRIB., Feb. 8, 1950, at 3; Walter Trohan, *G.O.P. Maps 1950 Campaign: Sees Struggle Over "Liberty or Socialism,"* CHI. TRIB., Feb. 7, 1950, at 1.

40. REEVES, *supra* note 7, at 85.

41. *Id.* at 104-05.

42. BENNETT, *supra* note 34, at 296.

43. *Id.*; GRIFFITH, *supra* note 7, at 16.

And so it was that on February 9, 1950, this little-known first-term senator from Wisconsin exploded into the national headlines.⁴⁶ McCarthy was scheduled to deliver a routine Lincoln Day address at a dinner sponsored by a Republican women's club in Wheeling, West Virginia.⁴⁷ His speech incorporated the usual conservative bombast about traitors in the federal government.⁴⁸ But McCarthy then departed from his script and asserted that he was privy to inside information. He said:

Ladies and gentlemen, while I cannot take the time to name all the men in the State Department who have been named as active members of the Communist Party and members of a spy ring, I have here in my hand a list of 205—a list of names that were made known to the Secretary of State as being members of the Communist Party and who nevertheless are still working on and shaping policy in the State Department.⁴⁹

This was a complete fabrication; McCarthy had no such list.⁵⁰ The State Department immediately issued a furious denial. Nonetheless, over the next few days, the story picked up steam, and McCarthy found himself at the center of a storm. When called on his lie, he bluffed. On February 10, he offered to show his “list” to a reporter, but then “discovered” he had left it in another suit. President Truman declared there was not a word of truth in McCarthy's charges. With a breathtaking audacity that was to become his hallmark, McCarthy scornfully replied that the President “should refresh his memory.”⁵¹

Senate Democrats demanded that McCarthy prove his accusations. After lengthy machinations, McCarthy agreed to give a Senate committee “detailed information” about Communists in the State Department. Senator Millard Tydings of Maryland, a conservative Democrat, was appointed to chair the committee.⁵² As the Tydings Committee worked on its report, McCarthy lashed out, decrying those “egg-sucking phony liberals” whose “pitiful squealing . . . would hold sacrosanct those Communists and queers” who had sold China into “atheistic slavery.”⁵³ He warned that

44. BENNETT, *supra* note 34, at 296.

45. See DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* 54-84, 107 (1983); HERMAN, *supra* note 2, at 51-56; REEVES, *supra* note 7, at 161, 195.

46. BENNETT, *supra* note 34, at 294.

47. *Id.* at 293.

48. See 96 CONG. REC. 1954 (1950) (McCarthy reading, on the Senate floor, a speech he claims he delivered in Wheeling); see also BENNETT, *supra* note 34, at 293 (speech excerpt on alleged traitors in government).

49. STATE DEP'T EMPLOYEE LOYALTY INVESTIGATION: REPORT OF THE COMM. ON FOREIGN RELATIONS PURSUANT TO S. RES. 231, S. REP. NO. 81-2108, at 152-53 (2d Sess. 1950) [hereinafter LOYALTY INVESTIGATION REPORT]; see also 96 CONG. REC. 1954 (1950). See generally BENNETT, *supra* note 34, at 293-94; OSHINSKY, *supra* note 45, at 108-10; RICHARD H. ROVERE, SENATOR JOE MCCARTHY 124-26 (1959).

50. See GRIFFITH, *supra* note 7, at 41-42, 49-51 (tracing origins of McCarthy's figures).

51. REEVES, *supra* note 7, at 232.

52. *Senate Inquiry Set on Acheson Staff*, N.Y. TIMES, Feb. 26, 1950, at 26.

53. GRIFFITH, *supra* note 7, at 89.

"[t]he time has come . . . to pinpoint individually the most dangerous Communists, and if lumberjack tactics are the only kind they understand then we shall use those tactics."⁵⁴

On July 14, 1950, the Tydings Committee issued its report. It concluded that McCarthy's accusations represented "perhaps the most nefarious campaign of half-truths and untruth in the history of this republic."⁵⁵ McCarthy immediately labeled the report "a signal" to the traitors in our government that they need not fear "exposure from this Administration."⁵⁶ Although McCarthy's charges had been proved both spurious and highly damaging to innocent individuals, most Republicans rallied to his cause. Bolstered by opinion polls showing growing support for his crusade, mainstream Republicans, then out of the White House for sixteen years, saw McCarthy as their ticket to political power. He was suddenly the most sought-after speaker in the nation. In addresses across America, McCarthy charged that there was a "plot" at the highest levels of government "to reduce security . . . to a nullity."⁵⁷ Audiences were swept away by his certitude and his patriotism.

* * *

On June 25, 1950, North Korean artillery opened fire on South Korea. Five days later, with U. N. approval, Truman authorized General Douglas MacArthur to invade North Korea. Within a year, 300,000 Communist Chinese troops would enter the war, and American soldiers would be bogged down in a miserable conflict in which more than 30,000 would lose their lives. Coming hard on the heels of the loyalty program, the arrest of the Rosenbergs, the fall of China, and McCarthy's accusations, the Korean War unleashed a frenzy of anti-Red hysteria. State and local governments frantically enacted their own loyalty programs, established their own investigating committees, and removed thousands of "Communitistic" books from schools and public libraries.

In a similar frenzy, Congress hastily enacted the McCarran Internal Security Act of 1950, which required all organizations deemed Communist

54. REEVES, *supra* note 7, at 299; see also Edwin R. Bayley, *McCarthy Scores Acheson, Again Calls for His Removal*, MILWAUKEE J., June 9, 1950, at 1G; *M'Carthy Labels Marshall "Unfit"*, N.Y. TIMES, Apr. 21, 1950, at 3.

55. William S. White, *Red Charges by M'Carthy Ruled False*, N.Y. TIMES, July 18, 1950, at 1; LOYALTY INVESTIGATION REPORT, *supra* note 49, at 151-52; see also REEVES, *supra* note 7, at 304-07; William S. White, *Tydings Charges M'Carthy Perjured Himself at Inquiry*, N.Y. TIMES, July 21, 1950, at 1. In expressing his "Individual Views," Republican Foreign Relations Committee member Senator Henry Cabot Lodge complained that the investigation had been "superficial and inconclusive." *The M'Carthy Charges*, N.Y. TIMES, July 18, 1950, at 28. Even McCarthy apologists like William F. Buckley, Jr. conceded that McCarthy could legitimately have been censured for lying about the source and nature of his information. See WILLIAM F. BUCKLEY & L. BRENT BOZELL, *MCCARTHY AND HIS ENEMIES: THE RECORD AND ITS MEANING* 60 (1954).

56. White, *supra* note 55.

57. REEVES, *supra* note 7, at 322; see LOYALTY INVESTIGATION REPORT, *supra* note 49, at 315-26.

or subversive to disclose the names of their members.⁵⁸ The Act prohibited any person who was a member of such an organization from working in any capacity for the government or for any private employer engaged in defense work.⁵⁹ Harry Truman vetoed the legislation, explaining that “[i]nstead of striking blows at communism,” the Act would “strike blows at our own liberties.”⁶⁰ Truman’s veto was surely courageous, but by 1950 his own anti-Communism undermined his plea for moderation.⁶¹ In the rising tide of fear, Truman’s veto was swiftly overridden.⁶²

As the 1950 elections approached, Joe McCarthy raced across the country campaigning for his favored candidates and against those he opposed.⁶³ He attacked Democrats as “parlor pinks and parlor punks.”⁶⁴ He pilloried Senator Millard Tydings with a particular vengeance, accusing him of “protecting Communists.”⁶⁵ McCarthy’s staff worked hand-in-glove with Tydings’s opponent in an effort to bring him to his knees.⁶⁶ They even helped orchestrate the circulation of a doctored photograph that purported to show Tydings huddling in secret conversation with leaders of the Communist Party.⁶⁷

Nationally, Republican Red-baiting reached unprecedented levels. John Foster Dulles, challenging Herbert Lehman for the U.S. Senate in New York, said of Lehman: “I know he is no Communist, but I know also that the Communists are in his corner.”⁶⁸ In California, Congressman Richard Nixon secured election to the Senate by circulating a pink sheet accusing his Democratic opponent, Helen Gahagan Douglas, of voting the

58. Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (repealed 1993). The Act had originated in legislation proposed in 1947 by Republicans Karl Mundt and Richard Nixon. The Mundt-Nixon bill sputtered in Congress for several years, but in 1950, with American troops fighting and dying in Korea, the Senate overwhelmingly approved the legislation. It sailed through the House on a bipartisan vote of 354 to 20.

59. *Id.*; see also GOLDSTEIN, *supra* note 7, at 359; STEFAN KANFER, *A JOURNAL OF THE PLAGUE YEARS* 151 (1973).

60. Internal Security Act, 1950: Veto Message from the President of the United States, 96 CONG. REC. 15,629-30 (1950).

61. See generally MILTON R. KONVITZ, *EXPANDING LIBERTIES: FREEDOM’S GAINS IN POSTWAR AMERICA* 140-41 (1966); William R. Tanner & Robert Griffith, *Legislative Politics and “McCarthyism”: The Internal Security Act of 1950*, in *THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGINS OF MCCARTHYISM* 174-89 (Robert Griffith & Athan Theoharis eds., 1974); THEOHARIS, *supra* note 12, at 116-17, 120-21. For a critical view of Truman’s unwillingness to “expend political capital . . . to protect individual liberties,” see Athan Theoharis, *The Threat to Civil Liberties*, in *COLD WAR CRITICS: ALTERNATIVES TO AMERICAN FOREIGN POLICY IN THE TRUMAN YEARS* 283-93 (Thomas G. Paterson ed., 1971).

62. See 96 CONG. REC. 15,632 (1950) (House vote); 96 CONG. REC. 15,736 (1950) (Senate vote).

63. BENNETT, *supra* note 34, at 300.

64. See STONE, *supra* note 13, at 336.

65. *Id.*

66. *Id.*; see also REEVES, *supra* note 7, at 315-46.

67. BENNETT, *supra* note 34, at 300; REEVES, *supra* note 7, at 339. The extent of McCarthy’s actual political influence, as distinct from his perceived political influence, has often been questioned. See GRIFFITH, *supra* note 7, at 195, 239-42.

68. See STONE, *supra* note 13, at 313.

Communist line. And in Florida, Congressman George Smathers defeated Claude Pepper by attacking him as “Red Pepper.”⁶⁹

The Democrats attempted desperately to fend off these assaults. Truman argued that those who claimed that the nation was in peril from domestic subversion had “lost all proportion, all sense of restraint, all sense of patriotic decency.”⁷⁰ But to no avail. The Republicans scored major gains in both the House and the Senate and, most satisfying of all to Joseph McCarthy, his nemesis—Millard Tydings—was driven from office.

Mainstream Republicans drew even closer to McCarthy. They invited him to deliver a major address at the 1952 Republican National Convention. He roused the audience, thundering: “I say one Communist in a defense plant is one Communist too many. . . . One Communist on the faculty of one university is one Communist too many. . . . And even if there were only one Communist in the State Department, that would still be one Communist too many.”⁷¹ The 1952 Republican platform formally charged the Democrats with shielding “traitors,” and the Republican nominee for President, General Dwight D. Eisenhower, selected as his running-mate Richard Nixon, one of the nation’s most infamous Red-baiters.⁷² The Republicans swept the ‘52 elections, winning not only the House and Senate but the White House as well.

Joe McCarthy, reelected to the Senate, was now seen as invincible and as the most feared man in America. Democrats were thoroughly intimidated. Even Lyndon Johnson, leader of the Senate Democrats, was wary of McCarthy, cautioning his colleagues, “[Y]ou don’t get in a pissin’ contest with a polecat.”⁷³ The extent to which McCarthy had intimidated the Senate was evident in an exchange between McCarthy and Herbert Lehman. During a speech on the floor, McCarthy piled hundreds of documents in front of himself, supposedly substantiating charges of Communist infiltration. He defiantly dared any senator to inspect them. Senator Lehman, the distinguished public servant accused by Dulles of “having Communists in his corner,” walked to McCarthy’s desk and held out his hand for the documents. There was silence. Then, “McCarthy giggled his strange, rather terrifying little giggle.”⁷⁴ As Lehman looked around the chamber for support, “[n]ot a man rose.” His fellow senators lowered their

69. *See id.*; Griffith, *supra* note 7, at 115.

70. U.S. GOV’T PRINTING OFFICE, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN, CONTAINING THE PUBLIC MESSAGES, SPEECHES, AND STATEMENTS OF THE PRESIDENT, JANUARY 1 TO DECEMBER 31, 1950, at 702 (1965) (Address in Kiel Auditorium, St. Louis, on Nov. 4, 1950); *see also* MAX LOWENTHAL, THE FEDERAL BUREAU OF INVESTIGATION 448, 450 (1950); *Senators Will Ask Budenz to Identify Secret Communists*, N.Y. TIMES, Apr. 16, 1950, at 1.

71. REEVES, *supra* note 7, at 426.

72. *See* GOLDSTEIN, *supra* note 7, at 327; MAZO & HESS, *supra* note 5, at 76-89; HERBERT S. PARMET, EISENHOWER AND THE AMERICAN CRUSADES 97 (1972).

73. ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON 546 (2002); ROBERT DALLEK, AN UNFINISHED LIFE: JOHN F. KENNEDY, 1917-1963, at 188 (2003).

74. *See* STONE, *supra* note 13, at 391.

eyes or looked away. McCarthy snarled under his breath, "Go back to your seat, old man."⁷⁵

* * *

With the Senate now firmly in Republican hands, McCarthy became chair of the Permanent Subcommittee on Investigations. He immediately declared his intention to investigate Communist infiltration of the federal government and of the nation's colleges and universities. He ruthlessly pursued his targets in a marble caucus room that, in the words of one witness, "stank with the odor of fear."⁷⁶

In February 1953, McCarthy launched an investigation of Voice of America (VOA), an agency established during World War II to promote a positive view of the United States around the world. McCarthy charged that the VOA was riddled with Communists and fellow-travelers. In televised hearings, he asserted that VOA libraries contained books by "known Communists." When his staff examined VOA catalogues, they rooted out more than 30,000 volumes written by such "Communist" and "un-American" authors as Lillian Hellman, Jean Paul Sartre, Dashiell Hammett, Theodore White, Arthur Schlesinger, Jr., John Dewey, W. H. Auden, Edna Ferber, and Steven Vincent Benet.⁷⁷

The Eisenhower State Department, which oversaw the VOA, immediately banned all books, music, and paintings by "Communists, fellow travelers, et cetera" from all VOA programs.⁷⁸ Terrified VOA librarians hurriedly discarded and even burned books that had been placed on what appeared to be an official blacklist.⁷⁹ McCarthy badgered and humiliated VOA personnel. Some resigned in protest; others were fired for refusing to cooperate.⁸⁰ During the investigation, one VOA employee committed suicide, writing to his wife, "once the dogs are set on you everything you have done since the beginning of time is suspect."⁸¹ The hearings uncovered no evidence of unlawful conduct.⁸²

By mid-1953, both *Newsweek* and the *New York Times* were speculating that McCarthy was aiming for the White House in 1956.⁸³ Fearing for the nation, former President Truman made a nationally televised speech in

75. STEWART ALSOP, *THE CENTER: PEOPLE AND POWER IN POLITICAL WASHINGTON* 8 (1968).

76. WILLIAM S. WHITE, *CITADEL: THE STORY OF THE U.S. SENATE* 258 (1956); GRIFFITH, *supra* note 7, at 210-11.

77. *See* STONE, *supra* note 13, at 382.

78. REEVES, *supra* note 7, at 480.

79. *Id.*

80. *See id.* at 482-83; CAUTE, *supra* note 7, at 321-24 (background on VOA investigation).

81. REEVES, *supra* note 7, at 485.

82. *Id.*; *see also* MARTIN MERSON, *THE PRIVATE DIARY OF A PUBLIC SERVANT* 14-16 (1955); JAMES A. WECHSLER, *THE AGE OF SUSPICION* 264 (1953); *New Hearings Set on "Red" Book Issue*, N.Y. TIMES, June 24, 1953, at 16; Wayne Phillips, *Harassing Feared by "Voice" Suicide*, N.Y. TIMES, Mar. 7, 1953, at 10; C. P. Trussell, *Voice Must Drop Works of Leftists*, N.Y. TIMES, Feb. 20, 1953, at 9.

83. REEVES, *supra* note 7, at 493-94.

which he accused "this Administration" of "shameful demagoguery" and defined McCarthyism as a "horrible cancer [that] is eating at the vitals of America."⁸⁴ Even Republicans began to grow nervous. Eisenhower's brother publicly described McCarthy as "the most dangerous menace" to the nation.⁸⁵

In the meantime, the long shadow of the House Un-American Activities Committee fell across our campuses and our culture. Robert Maynard Hutchins, the great education scholar and university administrator, observed at the time that "[t]he entire teaching profession of the U.S. is now intimidated."⁸⁶ In hearings before HUAC, a parade of prominent actors and movie producers testified that Hollywood had been infected by un-American propaganda. Red-hunters demanded, and got, the blacklisting of such writers as Dorothy Parker, Dalton Trumbo, James Thurber, and Arthur Miller.⁸⁷ Like the Puritans in the Salem witch trials, HUAC demanded public denunciation, purgation, humiliation, and betrayal.⁸⁸

Government at all levels hunted down "disloyal" individuals and denounced them. Anyone so stigmatized became a liability to his friends and an outcast to society. More than 11,000 people were fired from federal, state, local, or private employment for alleged disloyalty. More than a hundred were prosecuted under the Smith Act because of their involvement in the Communist Party. One hundred thirty-five were prosecuted for contempt of Congress because they refused to cooperate with HUAC. Fear of ideological contamination swept the nation. As Harry Truman had warned, "scaremongers" had generated such a wave of fear that their attacks on civil liberties now went "almost unchallenged."⁸⁹

A reporter in Madison, Wisconsin, circulated a petition asking people to support the preamble to the Declaration of Independence. Ninety-nine percent of them refused to sign. Columnist Drew Pearson noted that this was unprecedented and diagnosed it as "a disease of fear."⁹⁰ The "Silent Generation" of the 1950s was afflicted with this disease. As historian Henry Steele Commager observed, the political repression of this era bred a stifling "conformity" and an "unquestioning acceptance of . . . America

84. *Text of Address by Truman Explaining to Nation His Actions in the White Case*, N.Y. TIMES, Nov. 17, 1953, at 26.

85. *President's Brother Scores McCarthy*, N.Y. TIMES, July 25, 1953, at 6; see William S. White, *Joe McCarthy: The Man with the Power*, LOOK, June 16, 1953, at 30.

86. CAUTE, *supra* note 7, at 429.

87. See GOLDSTEIN, *supra* note 7, at 307-08; THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1938-1968, at 110-244 (Eric Bentley ed., 1971). See generally CAUTE, *supra* note 7, at 487-520.

88. See STONE, *supra* note 13, at 352-74.

89. *Text of President's Speech at Dedication of New Legion Building*, WASH. POST, Aug. 15, 1951, at 7; see also REEVES, *supra* note 7, at 379-80.

90. See STONE, *supra* note 13, at 419. There is good evidence to suggest that the public's confidence in democratic values and freedom of expression deteriorated significantly during this era. See JOHN LORD O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 69-70 (1955).

as a finished product, perfect and complete.”⁹¹ Reflecting on these years, Norman Mailer observed that the nation had suffered “from a collective failure of nerve.”⁹²

* * *

In our national consciousness, the indelible symbol of this era was Joseph McCarthy. Things did not end well for him, however. President Eisenhower, like so many others, steered clear of McCarthy. As he told his friends, he refused to “get into the gutter with that guy.”⁹³ But when McCarthy attacked the former general’s Army in a series of highly publicize investigations to expose alleged Communist infiltration of the military, he went too far even for Eisenhower. During the course of those hearings, he interrogated General Ralph Zwicker, a battlefield hero of World War II, about a former Army dentist who had ties to the Communist Party before joining the military.⁹⁴ McCarthy ridiculed Zwicker, contemptuously declaring that he was unfit “to wear that uniform” and that he lacked “the brains of a 5-year-old.”⁹⁵ During McCarthy’s effort to humiliate the Army, the tide began to turn against him.

Ironically, the instruments of McCarthy’s destruction were his own lieutenants, David Schine and Roy Cohn, key members of his congressional staff.⁹⁶ Schine had been drafted into the Army.⁹⁷ Cohn, acting out the arrogance of McCarthy’s unrestrained power, ordered Schine’s commander to grant him privileged treatment.⁹⁸ The uproar that followed led to the Army-McCarthy hearings. Although the issue in the hearings was technically whether Cohn and McCarthy had attempted to intimidate Schine’s commander, no one had any doubt that the real issue was whether the hearings would bring McCarthy down. Knowing this would be the climactic confrontation, Senator Lyndon Johnson arranged for every moment of the hearings to be televised in the hope that, given enough rope, McCarthy would hang himself.⁹⁹ It seemed that every eye in America was locked onto the unfolding drama.

91. GOLDSTEIN, *supra* note 7, at 383-84.

92. Norman Mailer, *The White Negro*, excerpted in *THE NEW LEFT: A DOCUMENTARY HISTORY* 10 (Massimo Teodori ed., 1969).

93. REEVES, *supra* note 7, at 474; WALTER JOHNSON, *1600 PENNSYLVANIA AVENUE: PRESIDENTS AND THE PEOPLE, 1929-1959*, at 292 (1960).

94. *Communist Infiltration in the Army: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Gov't Operations*, 83d Cong. 147-53 (1953) [hereinafter *Infiltration Hearings*]. The dentist, Irving Peress, had lied on his army application about whether he had ever been a member of the Communist Party. The Army loyalty screeners had failed to catch the lie. See HERMAN, *supra* note 2, at 247-50.

95. *Infiltration Hearings*, *supra* note 94, at 153.

96. BENNETT, *supra* note 34, at 305.

97. *Id.*

98. See *id.*; REEVES, *supra* note 7, at 536-37.

99. DALLEK, *supra* note 73, at 188-89; see also HERMAN, *supra* note 2, at 256.

McCarthy made a spectacle of himself. As Roy Cohn later recalled, "With his easily erupting temper, his menacing monotone, his unsmiling mien, and his perpetual 5-o'clock shadow," McCarthy was "the perfect stock villain."¹⁰⁰ Seated across from McCarthy was Joseph Welch, a sixty-three-year-old Boston lawyer who had been retained to represent the Army. Welch had a keen mind, a folksy manner, and incisive instincts. He had originally intended to bring with him to Washington two young associates, Jim St. Clair, who twenty years later would represent President Richard Nixon in the Watergate investigation, and Fred Fisher. But when Fisher informed Welch that as a law student he had belonged to the radical National Lawyers Guild, Welch sent him back to Boston. He did not want anything to divert attention from the task at hand.¹⁰¹

The critical moment of the hearings occurred during Welch's cross-examination of Roy Cohn. In a voice dripping with malevolence, McCarthy interrupted Welch and announced to the world that Welch "has in his law firm a young man named Fisher . . . who has been for a number of years a member of an organization which was named, oh, years and years ago, as the legal bulwark of the Communist Party."¹⁰² Welch's response, seen live by millions on television, was withering: "Until this moment, Senator, I think I never really gaged [sic] your cruelty or your recklessness. . . . Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you left no sense of decency?"¹⁰³ Welch then rose and walked from the room, which exploded in applause.¹⁰⁴ It was the moment that finally and indelibly exposed Joseph McCarthy for what he was: a bully willing to tear apart anyone who tried to stop his crusade.¹⁰⁵

In the weeks after the hearings, his popularity plummeted.¹⁰⁶ The *Christian Science Monitor* pointedly observed that despite all of his investigations and accusations, McCarthy had not produced the conviction of a

100. ROY COHN, *McCARTHY* 208 (1968).

101. See REEVES, *supra* note 7, at 588-89.

102. *Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr: Hearing Before the Special Subcomm. on Investigations of the Comm. on Gov't Operations*, 83d Cong. 2426-27 (1954) [hereinafter *Army-McCarthy Hearings*].

103. *Id.* at 2428-30; see also W. H. Lawrence, *Exchange Bitter: Counsel is Near Tears as Crowd Applauds Him at Finish*, N.Y. TIMES, June 10, 1954, at 1.

104. BENNETT, *supra* note 34, at 309.

105. McCarthy's decision to raise this issue about Fisher violated an agreement Cohn had made two days earlier with Welch. They had agreed that McCarthy would not mention Fisher's involvement with the National Lawyers Guild and Welch would not mention Cohn's failure to pass his military physical. Cohn was horrified when McCarthy blatantly disregarded this understanding. It has been suggested that Welch had plotted out this entire scene in advance.

Fisher went on to success, being elected president of the Massachusetts Bar Association in 1973. See BENNETT, *supra* note 34, at 309; GRIFFITH, *supra* note 7, at 259-60 n.46; HERMAN, *supra* note 2, at 275-76; REEVES, *supra* note 7, at 628-29.

106. See George Gallup, *Group of Those Undecided about McCarthy up by 6%*, WASH. POST, Nov. 12, 1954, at 29.

single spy or uncovered a single Communist working in a classified defense position.¹⁰⁷

On June 11, 1954, a seventy-four-year-old Republican senator, Ralph Flanders of Vermont, acted in direct defiance of the Republican leaders by introducing a resolution to censure McCarthy.¹⁰⁸ Before doing so, however, Flanders walked up to McCarthy on the Senate floor and personally handed him a written invitation to attend the Senate session at which he would present the resolution. Flanders's resolution charged that McCarthy had engaged in conduct "unbecoming a member of the United States Senate."¹⁰⁹

Even Democrats were uneasy. The resolution risked upsetting the Senate's longstanding tradition of "live and let live."¹¹⁰ Over the next several months, the matter percolated slowly through the Senate process. Finally, on September 27, 1954, a six-member committee unanimously recommended that McCarthy be "condemned"—the word had been changed from "censured"—for "contemptuous" and "reprehensible" conduct.¹¹¹

McCarthy roared that he was the "victim" of a Communist conspiracy and that the Communist Party "has now extended its tentacles even to . . . the United States Senate."¹¹² After two weeks of harsh debate, the Senate adopted the resolution by a vote of 67 to 22.¹¹³ Every Democrat who was present voted for censure; the Republicans were evenly divided. Six weeks later, in the 1954 election, the Democrats regained control of both Houses of Congress, and candidates tied to McCarthy were defeated throughout the nation. Two years later, an abandoned, bitter, and chronically alcoholic Joseph McCarthy died of cirrhosis of the liver at the age of 49.¹¹⁴

* * *

McCarthy's rise and fall spanned five inglorious years, but the era of what we loosely call "McCarthyism" lasted well over a decade. During all that time, in which tens of thousands of innocent individuals had their

107. Robert M. Hallett, *Results of McCarthy Investigations into Communist Activities Analyzed*, CHRISTIAN SCI. MONITOR, Aug. 24, 1954, at 3; see also REEVES, *supra* note 7, at 639-43 (describing McCarthy's waning popularity and asserting that his investigations did not lead to any convictions).

108. See 100 CONG. REC. 8032-33 (1954); see also C. P. Trussells, *Flanders Moves in Senate to Strip McCarthy of Posts*, N.Y. TIMES, June 12, 1954, at 1.

109. See 100 CONG. REC. 8032-33 (1954); see also RALPH E. FLANDERS, SENATOR FROM VERMONT 250-68 (1961) (Flanders's account of the events surrounding the censure); MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA 261 (1992); GRIFFITH, *supra* note 7, at 270-77.

110. See GRIFFITH, *supra* note 7, at 277 (describing Democrats' fears about the proposed censure resolution).

111. See REPORT OF THE SELECT COMM. TO STUDY CENSURE CHARGES, S. REP. NO. 83-2508, at 30-31, 60-61 (2d Sess. 1954).

112. 100 CONG. REC. 15,953 (1954).

113. 100 CONG. REC. 16,392 (1954); see also GRIFFITH, *supra* note 7, at 314.

114. See COHN, *supra* note 100, at 262-64; REEVES, *supra* note 7, at xv; STONE, *supra* note 13, at 90-91.

reputations, their careers, and their personal lives destroyed, most civil libertarians, most lawyers, most public officials, most intellectuals, and most others who should have known better, including the justices of the Supreme Court, dithered over what to do. What made this possible?

Certainly, at the height of the Cold War, a small, highly disciplined cohort of dedicated Communists, working in secret with agents of the Soviet Union, sought to harm the United States. We know from recently available KGB files that this network included 200 to 400 people. I do not mean to make light of this danger or of the perilous state of the world. But the danger these individuals presented was not the subversion of the American people. It was the danger of espionage and sabotage. The appropriate way for a democratic government to address that danger is not to broadly stifle public discourse or foster a climate of repression. It is to focus precisely on the unlawful conduct and to use appropriate *law enforcement* tools to identify, punish, and deter lawbreakers. This is the essential distinction between a free society and a police state.

Partisan exploitation caused the leap from a reasoned fear of espionage and sabotage to an unreasoned fear of difference and disloyalty. With the Iron Curtain, the fall of China, the Korean War, and the fear of A- and H-bombs raining down on American cities, public hysteria lurked just beneath the surface. This was a natural breeding ground for opportunistic politicians. For anti-New Deal Republicans trying desperately to claw their way back into power in the late 1940s and early '50s, it was truly the opportunity of a lifetime. And they seized it.

As former Attorney General Francis Biddle observed at the height of this era, power in America had come to depend on public opinion. The struggle for freedom is therefore no longer a struggle against an "oppressive tyrant," but a struggle against "the people themselves."¹¹⁵ Fear, Biddle observed, "is an infection that spreads quickly."¹¹⁶ During the McCarthy era, Americans were exhorted to fear not only Soviet agents but "un-Americanism." And we responded to this exhortation. We grew fearful not only about our national security but about the subversion of our religious, moral, and national values, our media, and our educational system. Fanned by unprincipled politicians, this fear of an insidious enemy led Americans to fear Americans, to confuse panic with patriotism, and to blindly repress others in a frantic bid to ensure our security.

For fifty years, Joseph McCarthy's name has evoked associations of fear, meanness, irresponsibility, and cruelty. He is the quintessential American goblin. Recently, a not-so-subtle campaign has been launched to

115. FRANCIS BIDDLE, *THE FEAR OF FREEDOM* 7 (1951).

116. *Id.* at 18-19.

rehabilitate McCarthy as a loyal American who did our nation a great service.¹¹⁷ This version of history runs essentially as follows:

Once the United States and the Soviet Union became mortal enemies in the late '40s, those public employees who might once have seemed reasonable security risks could no longer be trusted. But the Democrats in charge of the federal government had no stomach for investigating fellow liberals to determine whether they might be closet Communists. Because the Democrats refused to protect the nation, HUAC, Richard Nixon, Joe McCarthy, and their fellow-traveling Republicans had to do it for them.

To be sure, even the revisionists concede that McCarthy lied, bullied, abused, and humiliated innocent individuals. But what McCarthy contributed, they argue, was a fearless, stubborn, unyielding insistence on pursuing a profoundly important inquiry in the face of Democratic obstructionism. Confronted by a concerted liberal effort to sweep under the carpet the Democratic failure to protect our national security at a time of great peril, McCarthy was an essential lightning rod. Even if he was wrong in the details, the argument goes, he was right in the big things.

This is wrong, and dangerously so. The goal of preserving the nation's security from unlawful espionage, sabotage, and foreign influence is certainly legitimate—indeed, compelling—and there were well-justified concerns about these matters during the Cold War. But a democracy is about means as well as ends. As the Supreme Court has consistently recognized in protecting our fundamental rights, not only must the ends be compelling, but the means must be necessary. It disserves our history to say that Joseph McCarthy meant well but merely went about it the wrong way. McCarthy's methods violated the most fundamental norms and the most essential values of the American constitutional system. There is simply no excusing, defending, or mitigating that reality.

* * *

When I began this lecture, I said I had selected my topic for several reasons. But there was another I did not mention. Justice Brennan had a bit to do with McCarthyism. Indeed, Brennan loved to boast that the only senator who voted against his confirmation was Joseph McCarthy himself. In the hearing room that day in 1957, McCarthy wondered scornfully whether this nominee could “distinguish between Americanism and Communism.”¹¹⁸ He explained that, after reading Brennan's writings and speeches, he was convinced that Brennan had “demonstrated an underlying hostility to congressional attempts to expose the Communist conspiracy,” and therefore announced that he would vote against confirmation unless

117. See, e.g., COULTER, *supra* note 1, at 118; HERMAN, *supra* note 2, at 100.

118. KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 109 (1993).

Brennan “is able to persuade me . . . that I am not in possession of the true facts with regard to his views. I shall want to know if it is true that Justice Brennan, in his public speeches, has referred to congressional investigations of communism . . . as ‘Salem witch-hunts’ and ‘inquisitions,’ and has accused congressional committees of ‘barbarism.’”¹¹⁹

Ironically, in his own perverse way, Joseph McCarthy may have been the only member of the Senate who saw clearly into the heart and mind of William Brennan, for once Brennan joined the Court, he was an implacable foe of the witch hunts. Before Brennan’s confirmation, the Court had consistently upheld almost every effort of the government to prosecute, expose, harass, humiliate, blacklist, and persecute members of the Communist Party and their “fellow travelers.” Beginning in June 1957, however, the Court suddenly shifted gears, and Brennan was a central figure in shaping the First Amendment principles that reversed the course of constitutional history. In decisions like *Yates*,¹²⁰ *Watkins*,¹²¹ *Sweezy*,¹²² *Scales*,¹²³ *Keyishian*,¹²⁴ *Elfbrandt*,¹²⁵ and *Speiser*,¹²⁶ the Supreme Court began to dismantle the apparatus and mindset that had so poisoned our national debate. Just as McCarthy had feared, Justice Brennan was the pivotal voice in this process.

* * *

What is the relevance of all this for our own time? The terrorist attacks of September 11, 2001 horrified the American people. Images of the World Trade Center’s collapsing towers left the nation in a profound state of grief, fear, fury, and uncertainty. Afraid that September 11 brought merely the first of a wave of terrorist attacks, Americans expected and, indeed, demanded that their government take immediate and decisive steps to protect the nation.

Like many previous wartime leaders, the members of the Bush administration have used fear to their political advantage and tarred their opponents as “disloyal.” Shortly after September 11, President Bush warned, “You are either with us or with the terrorists.” Although the President was referring specifically to other nations, Attorney General John Ashcroft went even further, castigating American citizens who challenged the necessity or constitutionality of the government’s restrictions of civil

119. *Id.*

120. *Yates v. United States*, 354 U.S. 298 (1957).

121. *Watkins v. United States*, 354 U.S. 178 (1957).

122. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

123. *Scales v. United States*, 367 U.S. 203 (1961).

124. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

125. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

126. *Speiser v. Randall*, 357 U.S. 513 (1958).

liberties: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies."¹²⁷

In the wake of September 11, Americans were more than willing to accept significant encroachments on their freedoms in order to forestall further attacks. To reinforce this willingness, the Bush administration repeatedly declared that the terrorists had taken "advantage of the vulnerability of an open society" and that the government therefore needed to impose new restrictions on civil liberties.¹²⁸ Some of these restrictions were modest in scope and addressed serious deficiencies in the nation's intelligence apparatus. Others, however, have proven far more problematic.

The more questionable restrictions include indefinite detention, with no access to judicial review, of more than a thousand *noncitizens* who were lawfully in the United States and had not been charged with any crime; blanket secrecy concerning the identity of these detainees;¹²⁹ refusal to permit many of these detainees to communicate with an attorney; an unprecedented assertion of authority to eavesdrop on constitutionally protected attorney-client communications;¹³⁰ secret deportation proceedings; the incarceration for more than two years of an American citizen, arrested on American soil, incommunicado, with no access to a lawyer, solely on the basis of an executive determination that he was an "enemy combatant;"¹³¹ significant new limitations on the scope of the Freedom of Information Act;¹³² expanded authority to conduct undercover infiltration and surveillance of political and religious groups; increased power to wiretap, engage in electronic eavesdropping, and covertly review Internet and e-mail communications; new power secretly to review banking, brokerage,

127. Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 50 (Richard C. Leone & Greg Anrig, Jr. eds., 2003); Richard C. Leone, *The Quiet Republic: The Missing Debate About Civil Liberties After 9/11, in THE WAR ON OUR FREEDOMS, supra* note 127, at 8.

128. Leone, *supra* note 127, at 5.

129. See Office of the Inspector General, U.S. Dep't of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2, 2003); Dan Eggen & Susan Schmidt, *Count of Released Detainees is Hard to Pin Down*, WASH. POST, Nov. 6, 2001, at A10; Danny Hakim, *States Are Told To Keep Detainee Information Secret*, N.Y. TIMES, Apr. 19, 2002, at A14; Tamar Lewin, *Rights Groups Press for Names of Muslims Held in New Jersey*, N.Y. TIMES, Jan. 23, 2002, at A9; Katharine Q. Seelye, *Moscow, Seeking Extradition, Says 3 Detainees Are Russian*, N.Y. TIMES, Apr. 3, 2002, at A13.

130. See 29 C.F.R. § 501.3(d) (2005); George Lardner, Jr., *U.S. Will Monitor Call to Lawyers: Rule on Detainees Called "Terrifying"*, WASH. POST, Nov. 9, 2001, at A1.

131. See *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004); *see also Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (upholding the executive's declaration that an individual was an "enemy combatant"), *vacated by* 124 S. Ct. 2633 (2004) (stating that detainee had right to consult with lawyer and contest accusations).

132. See 6 U.S.C. § 122 (2000).

and other financial records; and expanded authority to conduct clandestine physical searches.¹³³

The centerpiece of the Bush administration's antiterrorism strategy was the USA PATRIOT Act,¹³⁴ an exceedingly complex statute drafted by the Justice Department and rammed through a grief-stricken Congress only six weeks after September 11. Attorney General Ashcroft and other federal officials accused anyone who questioned the necessity or constitutionality of the proposed legislation of being "soft on terrorism," and Congress passed the Act in an atmosphere of urgency and alarm that precluded serious deliberation. Indeed, no more than a handful of members of Congress had even read the legislation before it was rushed into law. Although civil-liberties organizations identified serious flaws in the PATRIOT Act, even members of Congress known as "strong voices in favor of civil liberties" failed to object.¹³⁵

The result was a statute that has fairly been characterized as opportunistic and excessive. The PATRIOT Act smuggled into law several investigative practices that have nothing to do with fighting terrorism, but that law enforcement officials had for years tried unsuccessfully to persuade Congress to authorize. It failed to require reasonable executive-branch accountability, undermined traditional—and essential—checks and balances, and disregarded the fundamental principle that government intrusions on civil liberties should be narrowly tailored to avoid unnecessary invasions of constitutional rights.¹³⁶

Perhaps even more troubling than the PATRIOT Act was Attorney General Ashcroft's evisceration of the 1976 Levi Guidelines. After the FBI's counterintelligence programs against dissident groups (COINTELPROs) came to light in the 1970s, Attorney General Edward Levi promulgated stringent guidelines restricting the FBI's authority to

133. See STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11*, at 2-3 (2002); Oren Gross, *Chaos and Rules: Should Responses To Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1017-18 (2003).

134. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

135. Leone, *supra* note 127, at 8; see also NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* 43 (2002); DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 151 (2002). The PATRIOT Act passed the Senate by a vote of 99 to 1. The only senator to vote against the legislation was Russ Feingold, Democrat of Wisconsin. Thereafter, several other senators told him privately that they agreed with him but were afraid to appear to the public as "soft on terrorism." Timothy Lynch, *Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism*, POL'Y ANALYSIS No. 443, June 26, 2002, at 1, 7, available at <http://www.catoinstitute.net/pubs/pas/pa443.pdf>; Robert E. Pierre, *Wisconsin Senator Emerges as a Maverick*, *WASH. POST*, Oct. 27, 2001, at A8. In the House, the vote was 356 to 66.

136. See CHANG, *supra* note 135, at 43-66; Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles, in WAR ON OUR FREEDOMS*, *supra* note 127, at 74, 76-77. For defenses of the PATRIOT Act, see Orin S. Kerr, *Internet Surveillance Law after the USA Patriot Act: The Big Brother That Isn't*, 97 *NW. U. L. REV.* 607 (2003); Eric Posner & John Yoo, *The PATRIOT Act under Fire*, *WALL ST. J.*, Dec. 9, 2003, at A26.

investigate political and religious activities. The 1976 guidelines prohibited the Bureau from investigating any group or individual on the basis of First Amendment activity, from monitoring any First Amendment activity except in a narrowly tailored effort to enforce the criminal law, and from investigating any organization engaged in First Amendment activity in the absence of “specific and articulable facts” justifying a criminal investigation.¹³⁷

In the quarter century after Levi formulated his guidelines, two of his successors, William French Smith and Richard Thornburgh, weakened the guidelines but left their essential core intact.¹³⁸ On May 30, 2002, however, Attorney General Ashcroft effectively dismantled the Levi guidelines.¹³⁹ Ashcroft expressly authorized the FBI to enter any place or attend any event that is open to the public in order to gather information that may be relevant to criminal activity, thus enabling the FBI once again to monitor a wide range of political and religious activities without any showing that unlawful conduct might be afoot. According to the *New York Times*, the FBI has been busy collecting “extensive information on the tactics, training and organization of antiwar demonstrators.”¹⁴⁰ In a familiar refrain, the FBI has explained that its goal is to identify “anarchists and ‘extremist elements’” and not to monitor “the political speech of law-abiding protesters.”¹⁴¹

Now, it may seem only sensible, as Ashcroft argued in defense of this change in the guidelines, that FBI agents be able to monitor public events in the same manner as other members of the public can monitor such events. But it is not so simple. An individual planning to attend a political meeting or a rally protesting the war in Iraq will be much more hesitant to attend if he knows FBI agents may be taking names. Such surveillance, whether open or surreptitious, can have a chilling effect on First Amendment freedoms.

The Ashcroft guidelines also eliminated the long-standing requirement that FBI investigations affecting political and religious activities be undertaken with special care. The new rules authorized the FBI, in investigating political and religious organizations, to “use the same investigative techniques they would use when investigating any other type of organization,” such as organized crime or a terrorist cell.¹⁴² The effect is

137. See STONE, *supra* note 13, at 496-97.

138. See CHANG, *supra* note 135, at 32-37.

139. See The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations, §§ VI(A)-(B), at 21-23 (2002), at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last visited Mar. 14, 2004); see also Neil A. Lewis, *Ashcroft Permits F.B.I. to Monitor Internet and Public Activities*, N.Y. TIMES, May 31, 2002, at A20.

140. Eric Lichtblau, *F.B.I. Scrutinizes Antiwar Rallies*, N.Y. TIMES, Nov. 23, 2003, at A1.

141. *Id.*

142. Department of Justice, Fact Sheet, *Attorney General’s Guidelines: Detecting and Preventing Terrorist Attacks* (May 30, 2002), cited in SCHULHOFER, *supra* note 133, at 62.

to expose religious and political organizations to *extensive* FBI monitoring without *any* objective grounds for suspicion and with much *reduced* supervisory control.¹⁴³

An even more troubling free-speech issue arising out of the “war” on terrorism concerns the Bush administration’s obsession with secrecy. Overbroad assertions of secrecy in government cripple informed public discourse. It is impossible for the public responsibly to engage in political debate if it is denied access to critical information about the actions of its elected officials. As Senator Daniel Patrick Moynihan once observed, “secrecy is the ultimate form of regulation because the people don’t even know they are being regulated.”¹⁴⁴

Excessive secrecy has been a consistent feature of the Bush administration, ranging from its refusal to disclose the names of those it detained after September 11 to its narrowing of the Freedom of Information Act, from its unprecedented closure of deportation proceedings to its redaction of “sensitive” information from tens of thousands of government documents and websites.¹⁴⁵

Some measure of secrecy in the interest of national security is, of course, essential, especially in wartime. But the Bush administration’s obsessive secrecy effectively constrains oversight by both the press and the public and directly undermines the vitality of democratic governance. As the legal scholar Stephen Schulhofer has noted, one cannot escape the inference that the cloak of secrecy imposed by the Bush administration has “less to do with the war on terrorism” than with its desire “to insulate executive action from public scrutiny.”¹⁴⁶ This policy will weaken our democratic institutions and “leave the country less secure in the long run.”¹⁴⁷

* * *

Although Congress readily acquiesced in the administration’s demand for the PATRIOT Act, it soon grew more skeptical about further

143. The Levi, Smith, and Thornburgh guidelines required senior Justice Department approval *prior* to investigating political and religious groups. In announcing the new guidelines, Attorney General Ashcroft criticized this requirement as “unnecessary procedural red tape.” Remarks of Attorney General John Ashcroft, Attorney General Guidelines (May 30, 2002), *available at* <http://www.fas.org/irp/news/2002/05/ag053002.html>. The Ashcroft guidelines thus decentralize this decision making, granting much greater independence to the fifty-six local FBI field offices. What Ashcroft calls red tape, Levi rightly understood to be essential to government accountability.

144. John Podesta, *Need to Know: Governing in Secret*, in *THE WAR ON OUR FREEDOMS*, *supra* note 127, at 227.

145. *Id.* at 221-25; Leone, *supra* note 127, at 9; John F. Stacks, *Watchdogs on a Leash: Closing Doors on the Media*, in *THE WAR ON OUR FREEDOMS*, *supra* note 127, at 237.

146. Schulhofer, *supra* note 136, at 91; *see* Leone, *supra* note 127, at 9; Podesta, *supra* note 144, at 221-25; SCHULHOFER, *supra* note 133, at 4, 11-13; Stacks, *supra* note 145, at 237. On the secrecy of deportation hearings, compare *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (closed hearing unconstitutional) with *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (closed hearing constitutional).

147. Podesta, *supra* note 144, at 225.

calls to limit civil liberties. When Attorney General Ashcroft announced his intention to institute a new program, Terrorism Information and Prevent System (TIPS), which would have exhorted citizens to monitor and report on other citizens, Congress objected, forcing Ashcroft to withdraw the proposal.¹⁴⁸

Congress also blocked funding for the administration's Total Information Awareness (TIA) program, which was designed to develop a vast surveillance system and database of personal and commercial information in order to detect "suspicious" behavior patterns among American citizens. Even leading Republicans balked at this proposal. Senator Charles Grassley of Iowa, for example, rightly objected that TIA posed a "chilling" threat to civil liberties.¹⁴⁹

In January 2003, the Justice Department floated plans for PATRIOT Act II, entitled the Domestic Security Enhancement Act of 2003. This legislation would have reduced judicial oversight over surveillance, created a DNA database resting on unchecked executive "suspicion," lifted existing judicial restraints on local police's spying on religious and political organizations,¹⁵⁰ authorized the federal government to obtain library and credit-card records without a judicial warrant, and permitted the federal government to keep secret the identity of *anyone* detained in a terror investigation—including American citizens. PATRIOT Act II met with howls of public, press, and bipartisan congressional opposition, and the administration buried the proposal, at least for the moment.

Thus, although the initial response of Congress and the public was to support the administration's demands for additional powers, once fears had settled, the response was more clear-eyed and more resistant to further expansions of executive authority.¹⁵¹ As Jeffrey Rosen wrote in May 2003, "a principled, bipartisan libertarian constituency" emerged that was willing to defend civil liberties "even in the face of popular fears" and aggressive executive plans to expand its power.¹⁵²

148. Among the Republicans who opposed Operation TIPS was House Majority Leader Dick Army of Texas. See Jackie Koszczuk, *Ashcroft Drawing Criticism from Both Sides of the Aisle*, CONG. Q. WKLY., Sept. 7, 2002, at 2286.

149. Leone, *supra* note 127, at 9-10; see also Kathleen M. Sullivan, *Under a Watchful Eye: Incursions on Personal Privacy, in THE WAR ON OUR FREEDOMS*, *supra* note 127, at 128, 132-33; Jonathan Riehl, *Lawmakers Likely to Limit New High-Tech Eavesdropping*, CONG. Q. WKLY., Feb. 15, 2003, at 406.

150. See *Alliance to End Repression v. City of Chicago*, 237 F.3d 799 (7th Cir. 2001).

151. A number of Republicans, including Senators Larry Craig and Mike Crapo of Idaho, Lisa Murkowski of Alaska, and John Sununu of New Hampshire, are among those who condemned PATRIOT Act II. See Jesse J. Holland, *Bush Aims to Expand USA Patriot Act*, GUARDIAN, Jan. 22, 2004. For the text of the proposed legislation, see <http://www.dailyrotten.com/source-docs/patriot2draft.html>.

152. Jeffrey Rosen, *Why Congress is Brave, and the Courts Aren't: Privacy Pleas*, NEW REPUBLIC, May 26, 2003, at 19; see also Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 45 (2004).

Moreover, in its decisions in June 2004 concerning Yaser Hamdi, Jose Padilla, and the detainees at Guantanamo Bay, the Supreme Court took a strong stand against the unprecedented assertions of the Bush administration concerning its authority to detain both Americans citizens and noncitizens without any independent judicial review.¹⁵³

What, then, is the relevance of my “cautionary tale”? Most basically, it comes down to this. Just as hard cases make bad law, hard times make bad judgments. It is our responsibility as citizens, lawyers, elected officials, and judges to resist those bad judgments, to maintain a clear-eyed confidence in our national values, and to have the courage to support those values when our support matters. Justice Brennan would expect no less.

153. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Guantanamo Bay case).