Red-Hunting and Internal Security: Conflict in the Age of Consensus

"[The Red Scare] has charged the atmosphere of the national life with a fear that has become familiar. We cannot interpret it in terms of a single politician, whether he be McCarthy or someone who might succeed him. The hope has always been raised that by discrediting the personal villain in the redscare drama the drama itself would end. This is as delusive as the belief on the international plane that 'we are the most revolutionary nation on earth.' For it is of the very essence of our unusual response to Communism, whatever its immediate sources may be in national groups or political alignments, that it reflects an absolute 'Americanism' as old as the country itself."

Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (1955).

The witness who had been testifying before the Senate Judiciary Committee's Subcommittee on Constitutional Rights for the past several hours was the compelling, loquacious Harry P. Cain, former Republican senator from Washington. Between his election to the Senate in 1946 and his defeat in 1952, Cain had been not so much a textbook McCarthyite as a caricature of one, sitting somewhere to the right of Senator Robert A. Taft in the Republican party's conservative wing on nearly all issues of note. Elected after running one of the first red-baiting smear campaigns of the post-war era, Cain distinguished himself as a vocal opponent of the New Deal and Fair Deal, federal infrastructure spending, Social Security and the minimum wage. He supported the Taft-Hartley Act and boasted of his leading role as the voice of the landlord in the fight against rent control, which he compared to involuntary servitude.[1] He opposed efforts to eliminate discrimination against Catholics and Jews in the 1948 Displaced Persons bill, and voted against Alben Barkley's efforts to revise the rules on Senate cloture to weaken the Southern filibuster. On foreign affairs, he had been an outspoken critic of the Truman administration: standing out as one of only two senators to oppose an increase in the size of the air force from 55 to 70 groups, resisting aid to nationalist China, Greece, Turkey, Korea, the Philippines and any of the NATO signatory countries, and opposing Point Four aid to developing nations. After the Korean War broke out, he repeatedly decried the administration's perceived efforts to tie the hands of General Douglas MacArthur, and introduced a quixotic resolution in early 1951 that demanded Congress either issue an open declaration of war against China or call for the complete withdrawal of troops from the Korean peninsula. "Harry P. Cain," concluded the *New York Herald Tribune*, "is endowed with matchless ignorance on foreign affairs."[2] In a survey

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[1] Richard L. Neuberger, 'Washington's "Dry Run" Primary', *The Nation*, April 8, 1950; 'Explanation of Senate Voting Chart', *New Republic*, October 9, 1950.
[2] 'Winning Without a Third World War', *New Republic*, October 9, 1950; 'Resolutions for War or Withdrawal Are Offered By Cain in Debate', *Washington Post*, April 18, 1951; 'The Choice in Korea', *New Republic*, April

conducted by the *New Republic* in March 1952, where political scientists had been asked to rate the performance of sitting senators, Cain had been ranked 91st of 95 – just ahead of Joseph McCarthy of Wisconsin and William E. Jenner of Indiana, who ranked bottom and second-from-bottom respectively, but below the equally aggressive McCarthyite Democrat, Pat McCarran of Nevada.[3]

After his defeat in 1952 by Henry M. "Scoop" Jackson, Cain's close friendship with and support for McCarthy saw him move to a position on the Subversive Activities Control Board (SACB), which had been established under the 1950 McCarran Internal Security Act to lead the hunt against Communists supposedly hiding in government. Here he served for three years. However, as the tide began to turn against McCarthy in 1954, Cain underwent a rapid and dramatic conversion. He began complaining that the loyalty-security apparatus that had swelled under Truman and Eisenhower was not only a source of injustice but potentially even a threat to the Constitution. In the aftermath of the Senate's censure of McCarthy in December, Cain began appearing in the most unlikely locations, speaking to meetings of the American Civil Liberties Union, giving speeches reprinted in the *New Republic* that spoke of the "shortsightedness, ruthlessness, smugness and brutality" of the loyalty-security review process at its worst, and appearing on "Face the Nation" to explain his remarkable change of heart.[4] In the final stages of what quickly became known as the "Cain Mutiny," in the spring of 1955, the former senator told the press that Attorney General Herbert Brownell had been misleading the president about the effectiveness of the loyalty apparatus. He was rebuked by presidential assistant Sherman Adams and dropped from the SACB soon after.[5] "The gyrations of Harry 'Pinwheel' Cain have become somewhat dizzying," the *National Review* observed, with something less than sympathy.[6]

The testimony Cain was giving to the Subcommittee on Constitutional Rights in June 1956 was therefore quite unlike what one might have expected from a long-time McCarthyite fellow traveler. The committee, chaired by Senator Thomas Hennings – who had been fighting McCarthy since his own election to Congress in 1950 and had, in his biographer's words, "contributed as much as any single public figure to McCarthy's decline in power" – was conducting a systematic examination of McCarthy-era violations of the First and Fifth Amendments, and Cain was

30, 1951; 'The GOP Choice', *New Republic* July 7, 1952; 'Knights and Knaves in Eisenhower's Great Crusade', *New Republic*, July 28, 1952.

[3] Byron L. Johnson and W. E. Butt, 'Rating the Senators', *New Republic*, March 3, 1952. The other two Senators below Cain were George W. Malone of Nevada and Kenneth McKellar of Tennessee.

[4] Harry P. Cain, 'Security of the Republic', *New Republic*, January 31, 1955; Harry P. Cain, 'Faith in Persons and Authority', *New Republic*, March 28, 1955; 'Cain Urges Respect for Freedoms', *Washington Post*, June 6, 1955.

[5] 'Cain Sees Ouster from U.S. Board', *New York Times*, May 18, 1956; 'Cain is Leaving Security Board', *New York Times*, July 26, 1956. On Cain's impact, see Robert Justin Goldstein, *American Blacklist: The Attorney General's List of Subversive Organizations* (Lawrence: University Press of Kansas, 2008), 205-6.

[6] 'On the Left', *National Review*, 4 January 1956. By mid-1956 he was advising Richard Nixon to stop using the fear of Communists in government as a campaign issue. 'Nixon Advised by Cain Not to Use Reds Issue', *Washington Post*, June 18, 1956.

participating as a friendly witness during its second set of hearings.[7] As well as warning in general terms that the path of unchecked executive supremacy led to fascism, Cain presented a series of specific examples of how the loyalty-security process had led to the unjust treatment of citizens, both in and out of government. These included one individual who, after working for the federal government for a quarter century, had been declared a loyalty risk based on the sole testimony of an anonymous informant who turned out to be a rival from a different department. After more than two years of legal challenges and private investigations, the accused had eventually been able to uncover details of the charges leveled against him, which had previously been classified, and hunted down witnesses who conclusively disproved them. The victim was then briefly reinstated before retiring on a full pension. Shortly afterward, he was the recipient of a form letter of thanks, sent to him for his long service by the same Deputy Undersecretary of State who had approved his dismissal, and which read: "I shall never forget the loyal and effective assistance which you rendered me during periods which at times were rather difficult."[8] Hearing this, the gathered reporters, senators and committee staff members began to laugh, presumably in disbelief at the tendency of bureaucracy to veer toward the absurd, even in its most repressive moments. In one sense, laughter was an unremarkable response. But the ripple of amusement that passed through the audience testified powerfully to the fact that the pervasive climate of fear which had characterized Washington for much of the previous decade had begun to dissipate.

Godfrey Hodgson argued that the age of consensus began sometime around 1954 or 1955, in the "pudding time when moderation came back into fashion after the acerbities of the Korean War and the McCarthy era" – when politicians and public servants could laugh again while discussing the politics of internal security, after a half-decade of intense seriousness.[9] Certainly, Cain's decision to abandon his erstwhile ally reflected the wider isolation McCarthy had fallen into by mid-decade. Following the erosion of support for him during the televised Army-McCarthy hearings in the summer of 1954 and a growing chorus of public figures speaking out against "political hysteria", the congenitally-cautious Senate finally acted to discipline its most troublesome member. Harvey Matusow, who, incidentally, had been sent by McCarthy to campaign for Cain in his failed re-election bid, revealed to the Senate Internal Security Subcommittee (SISS) in February 1955 that he had been encouraged by McCarthy and Roy Cohn to perjure himself in testimony given against alleged Communist Party agents, and later in the year published his memoir, *False Witness*, giving further details of his murky life as FBI-sponsored anticommunist witness. Shortly afterwards, Attorney General Brownell announced that the

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[7] Donald J. Kemper, *Decade of Fear: Senator Hennings and Civil Liberties* (Columbia: University of Missouri Press, 1965), 23.
[8] 'Security and Constitutional Rights', Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 84th Congress, 1st Sess., June 12-13, 1956, 890.
[9] Godfrey Hodgson, *In Our Time: America from World War II to Nixon* (Basingstoke: Macmillan, 1976), 71.

Bureau would no longer retain paid witnesses on regular salaries as "consultants." That spring a "McCarthy Day" celebration in Boscobel, Wisconsin, an event of the sort that once fetched crowds in the tens of thousands, only attracted 1,500 attendees – many of whom, it was noted, "were members of high school bands."[10] Even before his decline into alcoholism, McCarthy's spell was broken, and many politicians and citizens alike breathed a collective sigh of relief. "The Washington summer is as hot as ever," wrote DC reporter John B. Oakes in August, "but in one way this Washington summer differs sharply from several that have preceded it. The difference is not in the temperature but in the atmosphere. There is a relaxation of tension, particularly over the great issue of individual liberty vs. national security that has characterized so much of Washington life, conversation and politics for so long."[11]

The dominant strain of politics in Hodgson's age of consensus seemed to be anticommunist, but also anti-McCarthy, then.[12] But although many agreed that there was a change in the political climate, they disagreed as to both its causes and significance. For some, the new tone came from politicians' gradual discovery that McCarthy did not have the terrifying power attributed to him during the 1950 elections. For others, the victory of the Republicans in 1952 had simply eliminated the political utility of red-baiting. Others, contradictorily, emphasized the shift in 1955 to a Democratic Congress, with its attendant effect of removing Republicans from the chairs of the major committees. Centrists credited Eisenhower's temperate strategy for McCarthy's defeat: by rising above the cheap theatrics of the senator from Wisconsin, it was said, the president helped to build a new spirit of decorum. The left, by contrast, criticized him for not moving fast enough, for depending too heavily on conservatives in his party, and for expanding the loyalty-security apparatus in order to defend his own security credentials and outflank the senator.[13] Moderate conservatives, meanwhile, claimed that the fear of communism was in decline for wholly different reasons: because the problem had largely been solved. The spirit of vigilance that produced the Attorney General's list of subversive organizations and the passage of more than five million federal employees through the loyalty-security apparatus, a half decade of congressional hearings, and efforts by official and private organizations across the country to exclude radicals from American life had, according to this view, succeeded. "The program has accomplished its purpose of restoring respectability to Federal

[10] Thomas C. Reeves, *The Life and Times of Joe McCarthy: A Biography* (New York: Stein and Day, 1982), 668; David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: Oxford University Press, 2005; 1st Edition 1983), 502.

[11] 'The Security Issue: A Changing Atmosphere', *New York Times* August 14, 1955.

[12] In a more reductive sense, "consensus" could simply be used to describe the fact that nearly all Americans were, at some basic level, anticommunist; it is used this way in William Bragg Ewald's *McCarthyism and Consensus?* (Lanham, MD: University Press of America, 1986). On these narrow grounds it seems hard to deny a degree of unity in the fifties, or at any time – although even here, the question of the process through which unanimity was arrived at suggests that "consensus" might not be the most appropriate word.

[13] On Eisenhower and McCarthy, see Richard M. Fried, *Nightmare in Red: The McCarthy Era in Perspective* (Oxford: Oxford University Press, 1990), 133-5; Jeff Broadwater, *Eisenhower and the Anti-Communist Crusade* (Chapel Hill: University of North Carolina Press, 1992); David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (Oxford: Oxford University Press, 2005), ch. 16.

employment as well as protecting the national security," one senior administration official argued. Voices further to the right agreed that the politics of security was on the back foot, but mourned McCarthy's defeat, blaming it on a conspiracy of powerful elites and liberal journalists who had invented a demon of "McCarthyism" in order to reinvigorate Rooseveltian radicalism. "Some of them are almost indecently eager to assure the fellow-travelers that Ogre Joe is dead and that it's all right to come out now," complained *Human Events*.[14]

Indeed, almost as if to prove that McCarthy's censure should offer no simple lessons on anticommunism and civil liberties, the Senate passed a resolution soon afterwards, in early 1955, reaffirming their right in principle to investigate subversive activities.[15] The post-McCarthy armistice may have exposed a temporary exhaustion of ammunition among the warring parties, then, but, in the words of a contemporary commentator, it did not suggest that "deep-seated conflicts over this question have been resolved. They have not."[16]

Thomas S. Langston has argued that, "As an ideology that failed, 'McCarthyism' helped to establish the boundaries of the postwar consensus. Anticommunism abroad would be the focus of major American politicians for the remainder of the Cold War; anticommunism at home would hereafter be left at the margins."[17] But the truth is that there was little consensus to be found on domestic security even after the defeat of McCarthy; nor did it become a marginal issue for groups on the right that continued to use fear of American Communism as an issue on which to find out whose side individuals were on. It may have been that, absent the simplifying figure around which most news coverage oriented, the mainstream press turned its attention elsewhere. It was certainly true that the defeat of McCarthy was both a product of and a stimulant to a broader fight-back from civil liberties activists who had for several years been silenced. Outgunned by a nationalist enemy, liberals and leftists in the early fifties had been capable only of guerrilla skirmishes, but by the middle of the decade these minor actions had, cumulatively, begun to undermine the more sweeping aspects of the security state. The Supreme Court duly began to impose new limits on executive and judicial power. However, as Louis Hartz had presciently noted, it was a mistake to presume that "by discrediting the personal villain in the redscare drama the drama itself would end."[18] Liberal advances were met by howls of anger from a right wing that continued to believe in the danger of communism at home as well as abroad, that was unaffected by McCarthy's slouch from the political stage, energized by new fears of social dislocation, and eager to respond to challenges from the left with innovations in political strategy and rhetoric of their own. Indeed, the battle to defend the machinery of internal

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[14] Handicapper, 'Those "Liberal" Journalists', *Human Events,* December 22, 1954.
[15] Fried, *Nightmare in Red,* 172.
[16] 'The Security Issue: A Changing Atmosphere', *New York Times*, August 14, 1955.
[17] Thomas S. Langston. 'Ideology and Ideologues in the Modern Presidency'. *Presidential Studies Quarterly* 42, no. 4 (December 2012), 742.
[18] Louis Hartz, *The Liberal Tradition in America: An Interpretation of Political Thought Since the Revolution* (New York: Harcourt, Brace, 1991; 1st Edn. 1955), 306-7.

security in a time of retrenchment turned out to be a critical point of encounter between states' rights Southern Democrats and pro-business Republicans, groups who had stymied Roosevelt's New Deal before World War Two and would come to play a major role in the Republican revival of the seventies and eighties.[19] In this sense, conflicts over security politics in the "age of consensus" exposed similar political fault-lines to those seen in the generations before and after, and were fought on similar terrain, as Americans continued their never-ending debate over the appropriate balance to be struck between individual liberty and national security.

Senator Hennings' Subcommittee on Constitutional Rights was one of three committees Senate liberals used to shift public perceptions away from anticommunist orthodoxy in the aftermath of McCarthy's fall from grace.[20] Hubert Humphrey, who had been a joint sponsor in 1954 of the notorious Communist Control Act (a measure outlawing the Communist Party that was supported by Democrats almost exclusively for political reasons, and which had almost no effect), had sensed the changing political climate and launched investigations into anticommunist excess.[21] Meanwhile, South Carolina's Olin Johnston used his position on the Committee on the Post Office and Civil Service to conduct his own investigations into the loyalty apparatus, following dubious claims about its effectiveness circulated by Richard Nixon.

As McCarthy had shown more effectively than anyone, the congressional investigation had become a powerful tool for political advocacy, mainlining talking points into the veins of the national press corps. Even the most cogent unfriendly witnesses struggled to challenge a narrative constructed by committee researchers, investigators and counsel, not least because congressional hearings had few of the structural safeguards built into the judicial process. As a result, the anti-McCarthy committees were able to draw attention to the failings of the security system that had been constructed in such haste in the early Cold War years. For instance, the Chief Administrator of the Bureau of Security and Constitutional Affairs, Scott McLeod, who appeared before both Hennings and Johnston to defend the loyalty system (alongside an army of advisors and lawyers), was forced to reveal that it was customary for the United States Passport Office, which had denied travel rights to hundreds of American citizens after World War Two, to take anonymous denunciations into consideration when deciding whether or not to initiate a security investigation of an individual who applied for a passport.

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[19] Indeed, in one case, Howard W. Smith of Virginia, the same individual was involved in the conservative coalition of the 1930s and the anti-liberal backlash of the 1950s. James T. Patterson, 'A Conservative Coalition Forms in Congress, 1933-1939', *Journal of American History* 52, no. 4 (1966), 757.

[20] Lawrence Speiser suggests, persuasively, that Henning's committee was modeled on the 1930s La Follette Committee, which was intended to bring about a similar effect in publicizing abuses of authority, albeit in the private sector. 'The Constitutional Rights Subcommittee: The Lengthened Shadow of One Man', *Missouri Law Review* 26 (November 1961): 449-69.

[21] Mary S. McAuliffe, 'Liberals and the Communist Control Act of 1954', *Journal of American History* 63, no. 2 (September 1976): 351-367.

The FBI would then be asked to indicate whether they had any information in their files that might have a bearing on the individual's security status. The Bureau rarely revealed its sources, so allegations would often reach the passport administrators without meaningful contextualization against which to weigh their merits. But since the Bureau also denied that it was drawing any conclusion as to the security status of the individual from the information it passed on – its "raw files" were intended to gather information, not assess its quality – it was the Passport Office that was technically supposed to adjudicate. This meant than an individual could be denied a passport on the basis of information that was not only hidden from the accused, but also in part from the administrator actually charged with reaching the verdict:

> Senator HENNINGS. How could you evaluate, Mr. McLeod – I do not believe I quite understand – maybe we are not using the word with the same meaning – how can you evaluate information from sources of which you know nothing – how do you go about evaluating such information?

> Mr. McLEOD. The process of evaluating the information is most difficult, as I am sure you will understand.[22]

Such hearings tended to focus on minor individuals in government who had been subjected to damaging smear attacks. As Landon Storrs has recently shown, many senior figures with socialist or social democratic histories had also been harassed, but often they chose not to take a public stand, hoping to remain in, or return to, political life.[23] The most well-known individuals who testified were therefore not government employees, but private figures more willing to risk antagonizing the Eisenhower administration. One of the more famous was the biochemist Linus Pauling, whose passport had been issued and revoked repeatedly because of his association with the nuclear peace movement. Testifying before Hennings, Pauling listed dozens of awards, honorary doctorates and degrees given to him over the years, alongside the honors he received for his work on explosives and jet propulsion during the war, culminating in the Medal of Merit. He disclaimed all interest in or support for Communism. He explained that, at the time his passport was being denied on grounds of being a secret member of the Party, he was also being attacked in the Soviet press as an agent of capitalism. Pauling was reissued a permanent passport only in 1954, when the administrators noticed that the latest request had been sent in so that he could go to Stockholm to pick up the Nobel Prize for Chemistry.

Coming in quick succession, and with abundant, carefully-gathered evidence, the investigations helped to transform the public image of the loyalty-security apparatus from a shield of the republic to an arbitrary and incompetent bureaucratic mess: Washington as reimagined by Kafka.

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[22] Hennings Committee, November 16, 1955, 195-6.
[23] Landon R. Y. Storrs, *The Second Red Scare and the Unmaking of the New Deal Left* (Princeton: Princeton University Press, 2013), 179. For a tentative estimate of the impact of the elimination of the socialist left from government, see discussion in chapter seven of the same book.

However, as Richard Fried has observed, the testimony "fell short of the 'Hiss-case-in-reverse' that journalist Joseph Alsop predicted the security program would eventually produce", not least because most congressional liberals sought to present themselves as cautious reformers of a malfunctioning loyalty-security program rather than sweeping critics of the basic principle of domestic counter-subversion.[24] Conservatives quickly realized that they could appropriate these same efficiency arguments for their own purposes, endorsing the principle of reform but in practice seeking to entrench, rather than roll back, the powers of the state to police its citizens' politics. Indeed, the Commission on Government Security created in response to Humphrey's hearings, whose membership included HUAC chairman Francis Walter of Pennsylvania, asserted that the threat from domestic communist conspiracy remained "real and formidable," recommended a broadening of the security program, and defended the anonymity of intelligence sources, even as it claimed to be eliminating the potential for future miscarriages of justice.[25]

In the judiciary, the post-McCarthy era also witnessed movement away from the more extreme policies of previous years, but along a similarly erratic course, subject to multiple reverses and intense opposition on the right. The Vinson court had supported the anticommunist legislation of the Roosevelt and Truman years, and Earl Warren was slower to take a stand for civil liberties than against segregation upon his accession to the Chief Justice's position in 1953. Even after he joined William A. Douglas and Hugo Black as a regular member of the court's liberal wing, the majority – a combine of conservatives and Cold War liberals – sought to avoid controversial security decisions, preferring to delay or issue negative rulings on procedural grounds rather than confront the legislature directly. By the middle of the decade, taking a stand for the Bill of Rights had begun to look less risky. In the term beginning in the fall of 1955, the justices began to defend individual rights more assiduously: *Cole* v. *Young* overturned Eisenhower's expansion of the loyalty-security apparatus from nine sensitive departments to all federal agencies, and *Pennsylvania* v. *Nelson* asserted that federal counter-subversive laws had "pre-empted" state sedition laws and thereby invalidated dozens of regional statutes that had been used to prosecute radicals across the country. Further rulings followed in the 1956 term, culminating with the four decisions of "Red Monday," June 17, 1957. Most significant among these, *Yates* v. *United States* freed over a dozen low-level Communist Party members who had been convicted under the Smith Act, on grounds that made it virtually impossible to continue to use the law to prosecute individuals for simply belonging to a revolutionary organization. Effectively eliminating the principle of guilt by association that had crept into security

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[24] Fried, *Nightmare in Red,* 183.
[25] 'Study Proves Red Threat Both "Real, Formidable"', *Chicago Daily Tribune*, June 23, 1957; 'Summary of Recommendations on Federal Security', *New York Times* June 23, 1957.

law over the previous generation, the *Yates* decision was, in Belknap's words, "a devastating blow to the Justice Department's war on the Communist Party."[26]

Hugo Black, the most courageous member of the Supreme Court in the McCarthy era, had famously written in his *Dennis* dissent of 1951 that he hoped "in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." Many liberals concluded that such times had now come, and were quick to celebrate. The editors of the *New York Times* called Red Monday "A Day for Freedom."[27]

However, even as these rulings reined in the executive, they generated an outpouring of anger that, when combined with the continuing fury over the *Brown* decision, stimulated the greatest wave of hostility to the Supreme Court since the anti-New Deal decisions of Roosevelt's first term. A particular point of contention was the doctrine of pre-emption, applied in the *Nelson* decision and elsewhere, which held that state laws were rendered invalid when a federal law was passed dealing with the same subject. Pre-emption was being used by the Supreme Court across a wide range of policy areas in the fifties to strike down conservative state-level laws in favour of (typically more liberal) federal jurisprudence. But it was the application of the doctrine to the 1939 Smith Act, which had established a peacetime sedition law for the first time, that produced perhaps some of the most furious responses, not least because the man who gave his name to the act, Senator Howard W. Smith of Virginia, was still in the Senate and insisted that he and the other drafters had absolutely no intention to replace state level counter-subversive measures with their own act, only augment them. As the *National Review* complained, "the Court has implicitly claimed the power not merely to 'find' in congressional legislation an intent to supersede state laws even when Congress has neither expressed nor implied one, but also to find such an intent when Congress has explicitly disclaimed one."[28] J. Edgar Hoover said that the Court's use of what he called a "technical rather than logical interpretation of the law" was tantamount to "commit[ting] national suicide."[29] "The boys in the Kremlin may wonder why they need a fifth column in the United States so long as the Supreme court is determined to be helpful," the *Chicago Tribune* concluded.[30]

In hearings before SISS in the summer of 1956, chaired by the Southern segregationist James Eastland, anticommunists denounced the Supreme Court as inspired by radical, even communist, tendencies. Joseph McCarthy was asked to give the opening testimony. The *Nelson* decision, he

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[26] Michal R. Belknap, *The Supreme Court Under Earl Warren, 1953-1969* (Columbia: University of South Carolina Press, 2004), 248.

[27] 'A Day for Freedom', *New York Times,* June 18, 1957.

[28] 'Intent of Congress', *National Review,* August 1, 1959.

[29] J. Edgar Hoover, 'Two Enemies Within Our Gates: The Twin Threats of Communism and Crime', *Human Events,* October 12, 1957.

[30] 'The Supreme Court Jumps the Track', *Chicago Daily Tribune*, June 19, 1957.

averred, was "the most flagrant instance of judicial legislation that has ever come to my attention." Asked by Eastland whether there was "any more certain road to the destruction of the American system of government than an irresponsible Supreme Court usurping the powers of the Congress?", McCarthy replied that the mistake had been in confirming "as Chief Justice of the Supreme Court a man who had no judicial experience, who had practically no legal experience except as a district attorney for a short period of time, and whose entire experience was as a politician."[31]

Anger with the Warren Court over internal security built consistently over the next two years. Far from confined to the radical fringes, opposition to judicial activism could be found at the American Bar Association, at state and national Chambers of Commerce, and the annual conventions of state governors and state chief justices.[32] In the wake of the successful Sputnik launch and the highly-publicized failure in December 1957 of the United States' Vanguard missile, an event which some put down to sabotage, calls began to be heard for tightened military security and a renewed spirit of vigilance of a sort that had rarely been voiced since the end of the Korean War.

Seeking to capitalise on this anger, congressional conservatives introduced a raft of bills to rebuild the domestic security state: more than seventy in the 84th Congress alone.[33] Most sought to recreate aspects of internal security laws that had been undermined by the Court, but two went further. Senator Smith had proposed a States' Rights Bill (HR 3) in January 1955, which would have outlawed federal pre-emption altogether. In the wake of *Nelson* and *Yates* it was revived by the anti-Court forces. A retroactive measure, it would not only have revived state sedition laws like the one in Pennsylvania struck down in *Nelson*, but also have destroyed dozens of other post-war rulings that used the pre-emption doctrine to override conservative state laws. Even more explosively, Senator Jenner offered a bill that would have removed the Supreme Court's jurisdiction on matters of internal security entirely. If passed, this would have represented the single most substantial limitation to the principle of judicial oversight in the history of the United States – and in its most sensitive area. Warren Murphy described it as "the most fundamental challenge to judicial power in twenty years."[34]

After some delay due to political maneuvering, the major court-curbing bills passed comfortably through the House in 1958.[35] Liberals were able to respond more effectively in the Senate. In committee, both the Jenner bill (now "Jenner-Butler") and HR 3 were forced to roll back their most sweeping elements to focus on challenging the Supreme Court on internal security alone.

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[31] 'Jurisdiction in Sedition Cases', Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, US Senate, 84th Congress, 2nd Sess., May 11, 1956, 2, 8.
[32] 'State Justices Rebuke High Court: Historic Document Analyzes Court's Leftward Trend', *Human Events*, September 1, 1958; Sabin, *In Calmer Times: The Supreme Court and Red Monday* (Philadelphia: University of Pennsylvania Press, 1999), 97.
[33] Warren F. Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962), 97.
[34] Murphy, *Congress and the Court,* 156.
[35] Arthur J. Sabin, *In Calmer Times*, 196.

Despite this, even in modified form, the passage of either measure would have been deeply damaging to both the Court and the Eisenhower administration, as well as profoundly altering historians' subsequent perceptions of conservatism's relative political weakness in the late 1950s. Senate Majority Leader Lyndon Johnson of Texas – seeking to appear a moderate as part of his not-so-hidden agenda to win the presidency in 1960 – was able to secure a majority to table the Jenner-Butler bill when it came to the floor, but his mythic reputation for vote-counting nearly came undone when a similar effort to end debate on HR 3 was defeated by seven votes. In the aftermath of the defeat, the chamber fell into "pandemonium."[36] Johnson was forced to stand at his desk on the Senate floor, demonstratively marking down on a list the way senators voted in order to intimidate his peers into an overnight adjournment, then had to stretch his political ingenuity to the utmost to defeat the bill the next day.[37] Not until five o'clock in the evening had he managed to bully sufficient numbers into changing their votes, and even then he and his aide Bobby Baker were forced to drag Oklahoma's Senator Robert Kerr bodily from the floor of the Senate to stop him from supporting the rebellion. A hard-won tie was eventually broken by the retreat of a strongly anti-Court figure, Utah's Wallace Bennett, who acquiesced only to avoid forcing the vice president and Senate chair, Richard Nixon, into an embarrassing vote of his own to defend the administration.[38]

Determined to see McCarthyism as an aberration whose time had passed, many liberals wrote off these events as simply a "steam letting operation."[39] Similarly, historians have tended to stress the consistent failure of court-curbing bills to pass and the gradual shift away from domestic security law as a hot-button issue in the early sixties.[40] Not only were anti-Court proposals stymied by Johnson's control of the Senate and the possibility of a liberal filibuster, but Eisenhower would also almost certainly have vetoed all but the most minor of measures had they made it to his desk. As Gary Gerstle argues elsewhere in this volume, at the end of the day the pre-emption doctrine survived. Despite this, the battle over HR 3 remains a moment of high legislative drama no less worthy of historical attention than the Supreme Court crisis of 1937 – an event whose legislative tally was also zero. Indeed, as Sabin notes, at certain points more senators supported anti-Court legislation in 1958 than had voted against FDR's 'court-packing' plan.[41] Although support for court-curbing was weakened after the 1958 mid-terms, several bills were reintroduced in 1959, and the most committed conservatives continued to make their case into the 1960s. More importantly, even without legislative validation, the conservative backlash produced a retreat by the Court on civil liberties in the last years

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[36] Murphy, *Congress and the Court,* 211.

[37] Robert A. Caro, *The Years of Lyndon Johnson, Vol. 3: Master of the Senate* (London: Jonathan Cape, 2002), 1031-33.

[38] Murphy, *Congress and the Court*, 211-217.

[39] 'Letting Off Steam', *Washington Post*, July 19, 1958.

[40] See, for instance, Belknap, *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties* (Westport, CT: Greenwood, 1977).

[41] Sabin, *In Calmer Times*, 196.

of the 1950s, as Robert M. Lichtman has convincingly shown.[42] Justice Felix Frankfurter led the forced march back from the Supreme Court's assertive position on Red Monday, and the majority repeatedly reaffirmed the basic thrust of the McCarthy-era decisions on internal security throughout the later fifties. Only with the sudden retirement of Frankfurter following a stroke in 1961, and his replacement by the consistently liberal Arthur J. Goldberg, did the Supreme Court finally present a consistent line against the populist impulses of the legislature: not at the beginning of the era but at the time that the age of consensus was, according to Hodgson, supposedly coming to an end.[43]

The political significance of the conservative backlash against the Court was greater still, and persisted long after the judicial and legislative elements had been effectively settled. The court-curbing fight was a formative moment in the early history of the modern conservative movement: the missing link between the McCarthy era and the emerging New Right. Until Goldwater's run for the presidency in 1964, no single campaign was able to mobilize conservatives across the country as effectively, not least since court-curbing offered the first sustained opportunity for cross-sectional collaboration on an issue that, superficially at least, did not seem to be about race. In January 1961, for instance, the radical right-wing organization, the John Birch Society, launched a national campaign to impeach Chief Justice Warren, and advertisements calling for his removal appeared across the country. Although the head of the John Birch Society, Robert Welch, denounced the *Brown* decision as "the most brazen and flagrant usurpation of power that has been seen in three hundred years," he also pointed to *Nelson* and other civil liberties decisions to make the case against the Chief Justice.[44]

Of course, as the "Red Monday" moniker (echoing the "Black Monday" of the *Brown* decision) and the routine usage of states' rights language revealed, the court-curbing bills were clearly intended in part to hit back at Warren for striking down *Plessy* v. *Ferguson*. Anticommunist attacks on reformers had long been used by southern segregationists to defend the existing racial order, and it became central to their case after World War Two, when more explicit forms of white supremacy had fallen out of favor. It was, however, by no means an unproblematic rhetorical tool. As George Lewis

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[42] Robert M. Lichtman, *The Supreme Court and McCarthy-era Repression: One Hundred Decisions* (Urbana: University of Illinois Press, 2012), chs. 9-10.

[43] Frankfurter got little credit from conservatives for his switch in time. Speculating eagerly about his retirement, *Human Events* proposed he be replaced by none other than Irving Kaufman, the judge who had presided over, and ordered the executions of, the Rosenbergs. It was concluded that he would "doubtless improve the present Court, with its continuing spate of 'Red Monday' decisions." *Human Events*, December 29, 1958.

[44] Cited in D. J. Mulloy, *The World of the John Birch Society: Conspiracy, Conservatism, and the Cold War* (Nashville: Vanderbilt University Press, 2014), 111. For more on state-level and grassroots anticommunism in the post-McCarthy era, and the role of the John Birch Society, see M. J. Heale, *American Anticommunism: Combating the Enemy Within, 1830-1970* (Baltimore: Johns Hopkins University Press, 1990); Richard Gid Powers, *Not Without Honor: The History of American Anticommunism* (New York: Free Press, 1995); M. J. Heale, *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965* (Athens: University of Georgia Press, 1998); Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton: Princeton University Press, 2001).

notes, the militant anticommunism of the streets that had been promoted by the Massive Resistance movement had damaged the segregationist cause among northern audiences, putting southerners on the wrong side of the law-and-order debate, and by the later 1950s had largely run out of steam. While many in the South had admired McCarthy's patriotism, some still felt ambivalent about the federal power that was being amassed in the name of national security in the early Cold War years.[45] Moreover, whatever else he was, Senator McCarthy was an unabashed partisan. Even ideologically-supportive southern Democrats had therefore been forced to come to terms with a campaign intended to win Congress and the White House back for the GOP. By contrast, the court-curbing effort of the post-McCarthy era brought states' rights constitutionalism, law and order, and anticommunism back into alignment, and without the presence of a figure as polarizing as McCarthy. For this reason, as counter-intuitive as it sounds, southern elites found it easier to fight the Supreme Court for restraining the executive branch on internal security than to support the executive's acquisition of those self-same powers just a few years earlier.

As a recent generation of scholars have stressed, Southern politics can only fully be understood by integrating it into a larger national narrative.[46] George Wallace's campaigns for the presidential nomination and presidency in 1964 and 1968 respectively would show most clearly that white southerners seeking to reinvigorate their arguments at the national level had to tone down their racism and play up their anticommunism. But the enemies of the Court had been engaged in these efforts long before Wallace went to Washington.[47] Eastland, among the most determined of the southern anticommunists, had red-baited supporters of the civil rights movement during the Second World War, in conflicts over the poll tax and the Fair Employment Practices Commission (FEPC), and had been complaining about "communistic" Supreme Court decisions since *Smith* v. *Allwright* in 1944. Although LBJ had once said of Eastland that he could be "standing right in the middle of the worst Mississippi flood ever known and he'd say the niggers caused it, helped out by some communists," the senator generally took care to situate his anticommunism within a national and legislative, rather than local and militant, framework, working closely with the FBI and SISS to promote his views as part of a shared struggle for national security that just so happened to benefit southern segregationists.[48] Apparently unaware of the arrival of an age of consensus, in the wake of McCarthy's censure Eastland launched a blistering attack on the national media for supposed liberal

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[45] George Lewis, *The White South and the Red Menace: Segregationists, Anticommunism, and Massive Resistance, 1945-1965* (Gainesville: University Press of Florida, 2004), 171-2; Broadwater, *Eisenhower and the Anti-Communist Crusade,* 170.

[46] For a summary of this historiographical trend, see Matthew D. Lassiter and Joseph Crespino, eds., *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2009).

[47] Dan T. Carter, *The Politics of Rage: George Wallace, the Origins of the New Conservatism, and the Transformation of American Politics* (New York: Simon and Schuster, 1995).

[48] Cited in Keith M. Finlay, *Delaying the Dream: Southern Senators and the Fight Against Civil Rights, 1938-1965* (Baton Rouge: Louisiana State University Press, 2008), 76.

bias, and opened SISS hearings into communist influences at the *New York Times*.[49] By the time of the *Nelson* decision, he had assumed the chair of the Judiciary Committee, and used this to investigate, and assail, the new spirit of judicial activism.[50]

Another Southern "nationalizer", Senator Strom Thurmond of South Carolina, was also a forceful presence in the court-curbing fight, warning that "if the Supreme Court can assume power without rebuff, the complete tyranny of the judiciary is close at hand. Then the Federal Government will cease to be Federal and become national in stature, imposing its will upon the states and local governments of this great country."[51] Thurmond's biographer, Joseph Crespino, notes the importance of the anti-Court campaign to the senator's political evolution, describing it as "the starting point for his anti-Communist crusade that would mature several years later."[52] It was Thurmond's threat to introduce HR 3 as an amendment to every bill before the Senate that forced Johnson into agreeing to a floor debate, and the senator from South Carolina was instrumental in building the backroom coalition that would deliver the vote against tabling the bill that so unsettled the political equilibrium.[53]

In seeking to appeal to northern voters through anticommunist discourse, southern rhetoricians stressed affinities between the Jim Crow system and modern capitalism that would have been anathema to their antebellum forefathers. This effort can be traced back to Congressman Martin Dies' investigations of the CIO and southern unionization in the late 1930s, and became increasingly common in the forties. In 1944, for instance, Senator Walter F. George of Georgia had complained that the FEPC would "strip owners of private rights in private property" and "convert the present economic system into a communistic or national socialistic system."[54] However, this connection took on a new intensity in the fifties, as business groups began to fear that the pre-emption doctrine might be used to revoke state-level right-to-work laws that conservative activists were using to undermine the Wagner Act and other pro-union legislation.[55] As the conservative movement reconstructed itself from the grassroots, business groups had come to see that they could control state legislatures more easily than the national Congress, and that by extension it had almost as much to gain from states' rights as southern segregationists, a point that would be revealed in Barry Goldwater's defense of states' rights and his resulting popularity in the Old South in 1964.[56] In *The Conscience of a Conservative* (1960)*,* Goldwater complained that it had become a matter of routine for "the federal government to threaten to move in unless state governments take action that Washington deems

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[49] Chris Myers Asch, *The Senator and the Sharecropper: The Freedom Struggles of James O. Eastland and Fannie Lou Hamer* (Chapel Hill: University of North Carolina Press, 2008), 155.
[50] ibid., 137.
[51] *Human Events*, March 17, 1958.
[52] Joseph Crespino, *Strom Thurmond's America* (New York: Hill and Wang, 2012), 103.
[53] Murphy, *Congress and the Court,* 207.
[54] Cited in Finlay, *Delaying the Dream,* 80.
[55] See, for instance, Elizabeth Tandy Shermer, *Sunbelt Capitalism: Phoenix and the Transformation of American Politics* (Philadelphia: University of Pennsylvania Press, 2013), 93-105.
[56] Murphy, *Congress and the Court,* 92.

appropriate."[57] The Southern Manifesto's resurrection of interposition thus meshed with the hostility of northern business interests to pre-emption, and organizations such as the US Chamber of Commerce and the National Association of Manufacturers, through congressional allies such as Francis Walter, Noah Mason, Styles Bridges, John Marshall Butler, Karl Mundt, John Bricker and William Jenner, moved in to support the campaign against the Court. The amendment of HR 3 to focus solely on internal security would ostensibly have posed no problem for its supporters had they been motivated by domestic security alone. It was therefore revealing that Howard Smith refused to accept the compromised version, which would have sustained the principle of pre-emption in labor relations, insisting that, if necessary, he would reintroduce the original, more sweeping version by amendment: an attitude that won him no friends among the senate leadership and ultimately contributed to the bill's demise, but clearly signaled to business conservatives that this bill was designed to support their interests as well as the South's.[58] Indeed, given this context even the failed bill might have achieved its larger objective: one can only speculate how much further Supreme Court pre-emption might have gone had the two-year backlash to *Nelson* not been so intense, but the answer is almost certainly further than if it had not met such a powerful countervailing force.

Court-curbing allowed conservatives on both sides of the Mason-Dixon to play the victim, a role in which many had traditionally felt comfortable but which by no means implied that they had given up the fight. McCarthyism had been traumatic in the conservative North as well as the South, and for similar reasons. Indeed, the divisions on the right caused by McCarthy's excesses prefigured the dilemmas conservatives would face later in the century, in government, as they struggled to fuse small government idealism with a desire to use elected office to promote social and political conformity.[59] Eminent conservatives such as Whittaker Chambers and Russell Kirk had disassociated themselves from McCarthyite histrionics in much the same way that Southern senators had steered clear of more militant forms of southern anticommunism under Massive Resistance. Nevertheless, as George H. Nash notes, the debate over McCarthy had been "intense and virtually impossible to avoid."[60] As well as bringing North and South together, the post-McCarthy return to the defensive therefore also helped to clarify the conservative struggle for its participants, re-energizing the movement and allowing the right to reclaim their credentials as defenders of reason, balance and the constitutional order after several years of successful liberal efforts to show they were undermining it.

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[57] Barry Goldwater, *The Conscience of a Conservative* (Princeton: Princeton University Press, 2007; 1st Edn. 1960), 19.
[58] Murphy, *Congress and the Court,* 95.
[59] Julian E. Zelizer, 'Reflections: Rethinking the History of American Conservatism', *Reviews in American History* 38, no. 2 (June 2010): 367-392.
[60] George H. Nash, *The Conservative Intellectual Movement in America* (New York: Basic Books, 1975), 117-8.

On matters of internal security, then, there was no consensus in the age of consensus. The pendulum had moved toward liberalism, but the Right remained actively concerned with domestic security, and campaigns against supposed liberal apathy provided important early opportunities for conservatives of different stripes to build new collaborative relationships. Whether one sees these campaigns as the last gasp of the old McCarthyism or as the birth pangs of the New Right, it was clear that conservatives were far from quiescent in the late fifties and early sixties.

Like the laughter provoked by Harry Cain's testimony to Senator Hennings, in the end, the language of consensus owes more to the relief of commentators and historians that McCarthy's brief moment in the sun had come to an end than to any agreement that had been reached on the balance between individual rights and national security. "Consensus" was a term that had been evoked in early Cold War texts such as Daniel J. Boorstin's *The Genius of American Politics*, and was returned to by implication in Richard Hofstadter's later essay, 'The Paranoid Style in American Politics' – theses which differed substantially but shared a tendency to characterize radical dissent as abnormal. At one level, both these works implied that all but the most marginal or disturbed American citizens endorsed a set of core, liberal norms. And yet even a cursory exploration would show that each was scarred by the antipathies, anxieties and divisions of post-war security politics. Boorstin's evocations of a natural unity in American life were part of an effort to explain away his youthful flirtation with communism, which had been investigated by Congress and threatened to destroy his career.[61] Hofstadter, meanwhile, attacked the politics of countersubversion to which Boorstin was acquiescing, a politics that had shaken his presumptions of academic security. In both cases, forced homogenization somehow emerged as "consensus." In later years the term would be read and invoked as representative of the era while the mechanics of its gestation were forgotten.

Nor *could* such a permanent balance between individual rights and collective responsibilities be struck, for there is, ultimately, no timeless solution to the question of security. Reading James Reston or Walter Lippmann, one might believe that, through painful struggle, America had acquired a singular voice on such matters – one that was anticommunist, but also opposed to McCarthy and his methods. However, this was to ignore or dismiss those who disagreed with the liberal majority, often vehemently, on the Right as well as the Left. Ultimately the idea of consensus, a vision of political continuity emerging from agreement and consent rather than competition and force, is the stuff of ideology, not history. It is a mythic evocation that drifts above the nation without regard to evidence

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[61] To understand the way in which anticommunist investigations had pushed Boorstin into reductive assertions of national consensus in order to explain away his youthful flirtation with communism, see his testimony in 'Communist Methods of Infiltration (Education),' Hearings Before the Committee on Un-American Activities, House of Representatives, 83rd Congress, 1st Sess., February 25-27, 1953. Also Michael Robbins, 'The Cosmic Significance of Trivia', *Washington Post*, August 12, 1973; Robert E. Treuhaft, 'A Reunion to Remember', *The Nation,* July 7-14, 1984; Jon Weiner, 'A Life in History: The Odyssey of Daniel Boorstin,' *The Nation* September 26, 1987, and, of course, Daniel J. Boorstin, *The Genius of American Politics* (Chicago: University of Chicago Press, 1953).

on the ground, floating alongside its equally hazy sibling in foreign affairs, exceptionalism. In fact, in matters of domestic security, as in many others, the Age of Consensus was infused at every level with conflict.