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The McCarran Internal Security Act, 1950-2005: civil liberties versus national security

Marc Patenaude
Louisiana State University and Agricultural and Mechanical College

THE MCCARRAN INTERNAL SECURITY ACT, 1950-2005: CIVIL LIBERTIES VERSUS NATIONAL SECURITY

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Marc Patenaude
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Abstract

In response to increased tensions over the Cold War and internal security, and in response to increased anti-Communism during the Red Scare, Congress, in 1950, enacted a notorious piece of legislation. The McCarran Act was designed to combat both the increased threat of international aggression by Communist nations and, thanks to a Communist party inside the United States, the possibility of internal subversion on the domestic front. The McCarran Act created a Subversive Activities Control Board to register members of a "Communist-action organization or a Communist-front organization." Also contained within the McCarran Act was an Emergency Detention statute, which gave the President authority during times of internal security emergency, to apprehend and detain "each person as to whom there is a reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." The McCarran Internal Security Act was the most comprehensive and stringent piece of anti-Communist legislation signed into law during the post-1945 Red Scare.

The McCarran Act raised important questions regarding the constitutionality of internal security legislation and the debate over internal security and civil liberties. This thesis argues that the decisions made by the Supreme Court in cases involving the McCarran Act and other anti-Communist legislation created a framework within which Congress created future internal security legislation, including the USA Patriot Act of 2001.

Chapter 1:
Historical Antecedents of Anti-Communism

For many Americans, the McCarthy era of the late 1940s and early 1950s represents what America does not stand for. It was a time where ordinary Americans were persecuted and prosecuted on the basis of their beliefs; it seemed that Washington, and indeed the rest of the nation, had "gone crazy" in its search for Communists within government.[1] Most scholars view McCarthyism as a period in which American politics seemed to be controlled by fear rather than reason; the response to domestic Communism, according to these scholars, was disproportionate to the actual threat.[2] More recently, however, scholars have begun to interpret McCarthyism as part of an ongoing tradition of political repression against political and radical groups and the assertion of federal political authority over individual rights, more often than not based upon the alleged requirements of national security. [3]

While much of the focus of the McCarthy era is placed on the investigative side of anti-communism, there is a legislative aspect of McCarthyism that is often ignored. Senator Pat McCarran of Nevada dominated the legislative side of McCarthyism. Elected to the Senate as a Democrat in 1932, McCarran was by no means a "New Deal" Democrat or a Roosevelt supporter. Roosevelt, according to McCarran, took too many liberties with the Constitution in his attempts to pull the nation out of the grips of the Depression. Believing in a strict separation

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[1] Joseph Alsop, and Stewart Alsop, "Why has Washington Gone Crazy?" *The Saturday Evening Post*, July 29, 1950, 20-21, 59.

[2] David Caute, *The Great Fear: The Anti-Communist Purge under Truman and Eisenhower* (New York: Simon and Schuster, 1978). Robert Griffith, *The Politics of Fear: Joseph R. McCarthy and the Senate* (Amherst, Mass.: University of Massachusetts Press, 1987). Earl Latham, *The Meaning of McCarthyism* (Boston: Heath, 1965)

[3] There has been much debate regarding the use of the term "McCarthyism" to describe the Communist witch- hunts of the late 1940s and early 1950s. Most of the debate has centered around the relationship of the man and the "ism" and the cause and effect relationship between the two. While, as M.J. Heale has noted, "Red Scare Politics" is a more accurate term, McCarthyism will be used throughout this thesis as the term has passed into common parlance and is more widely known and understood. M. J. Heale, *McCarthy's Americans: Red Scare Politics in State and Nation, 1935-1965* (Athens, Georgia: University of Georgia Press, 1998). Michal Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, Ct.: Greenwood Press, 1977)

of powers, McCarran saw many New Deal programs as an usurpation of Congressional power by the executive; the President was using the Depression to make government "so immense that a quarrelsome Congress could no longer practically guide its operations, thereby endowing the president and his unelected minions with powers never dreamed of by the writers of the Constitution."[4]

Senator McCarran attached himself to anti-Communism shortly after his election to the Senate. At first, McCarran's opposition to Communism was primarily in the realm of foreign policy – in 1935, for example, McCarran objected to a trade agreement between the United States and the Soviet Union on the basis that it had been agreed to by the Secretary of State without being presented to Congress – but quickly shifted to opposition of domestic Communism.[5] In part, McCarran's opposition to domestic Communism was directly related to his opposition of New Deal programs; McCarran felt that Communists were finding their way into the expanded bureaucracy and that Roosevelt had surrounded himself with dangerous radicals that turned their departments into "citadels of revolution."[6] McCarran also emphasized the association of Communism with immigrants, believing that Communism was being imported to the United States through the large amounts of immigrants arriving each year. McCarran used his position as Chair of the Senate Judiciary Committee to promote internal security legislation that severely limited the effectiveness of the Communist Party; he created a Subversive Activities Control Board (SACB) designed to make mandatory the registration of all Communists and Communist organizations with the government. McCarran felt that the United States faced a "clear and present danger" of being attacked internally and externally from

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[4] Michael Ybarra, *Washington Gone Crazy: Senator Pat McCarran and the Great Communist Hunt* (Hanover, N.H.: Steerforth Press, 2004), 158.
[5] Ibid., 183.
[6] Ibid., 162.

Communists and that action, no matter how extreme, must be taken. [7] Legal challenges in the 1950s and 1960s to the McCarthy era internal security legislation of McCarran would create a framework within which Congress would deal with future internal security crises and, just as importantly, shape the interpretation of the First Amendment.

The rise of the Soviet Union in the aftermath of the Second World War as a superpower that rivaled the United States did not prompt the emergence of the virulent anti-Communism that helped define the McCarthy era. Nor, as some suggest, did the anti-communist movement emerge immediately after the rise of the Bolsheviks in Russia in 1918. Although there have been a number of different objections to communism, the beginnings of the anti-communist movement cannot be solely explained by the rise of the Bolsheviks in Russia in 1918.[8] It must instead be seen as part of a tradition of anti-radicalism in the United States dating back to the 1870s and 1880s. This anti-radicalism started as a series of responses to ideas that were either foreign in origin or seen as attacking fundamental American ideals. Attacks on free-market capitalism often prompted some of the harshest responses.

In Europe, critiques of capitalism developed in the middle of the nineteenth century. Writers such as Karl Marx, Friedrich Engels, Pierre-Joseph Proudhon, and Mikhail Bakunin criticized the rapid industrialization of Europe and the resulting loss of individual economic and political liberty to the growing power of the nation-state. While these critiques agree on the "evil" of capitalism, they differed over the role of the state in society. Some, such as Karl Marx and Friedrich Engels, focused their energies almost solely on the issue of capital versus labour; at

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[7] The phrase "clear and present danger" comes from the famous test designed by Chief Justice Oliver Wendell Holmes in *Schenck v. U.S.* 249 U.S. 47 (1919). Chief Justice Holmes argued that speech is protected up to the point that it proves to be a "clear and present danger" to others. Once this point is reached, the government is able to proscribe free speech.

[8] John E. Haynes, *Red Scare or Red Menace? American Communism and Anticommunism in the Cold War Era* (Chicago: Ivan R. Dee Publishers, 1996), 3.

times, they either ignored the state completely, relegated it to a subservient role to capital, or wanted to use the state for their own ends. Marx essentially equated the bourgeois class with the state, noting that as the means of production shift from the feudal system to a "modern" system and becomes centralized in the hands of the bourgeois, the lower classes essentially remain unchanged. Whereas serfs were formerly under the feudal obligation of the lord, the emerging proletariat -- the workers needed to operate the machinery of industry -- became little more than "a mere appendage to the machine," and any "costs occasioned by the worker are limited almost entirely to the subsistence which he requires for his maintenance and the reproduction of his race."[9] As society industrialized, Marx argued, the serf's place in society changed only in name.

Other critics, however, saw the state as an evil comparable to that of capital; in order to eliminate or reform capitalism, the state had to be eliminated or reformed as well. Pierre-Joseph Proudhon, for example, believed government to be nothing more than a co-conspirator of capital, noting that role of the governed is "to be requisitioned, drilled, fleeced, exploited, monopolized, extorted, squeezed, hoaxed, [and] robbed" by government.[10] The economic inequalities in society, argued Proudhon, could not be resolved by overthrowing one form of government and replacing it with another, as some hoped would occur with the French Revolution. Instead, these inequalities would be resolved through the dismantling of all macro-level government. Proudhon's ideal society was one of small, free communities bound economically through the idea of Mutualism, the notion of a market based on the exchange of labour; essentially the idea that a day's labour in a product is worth the same amount of labour in exchange.[11]

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[9] Karl Marx, and Friedrich Engels, "The Manifesto of the Communist Party." in *The Communist Manifesto: New Interpretations*, ed. Mark Cowling (Edinburgh: Edinburgh University Press, 1998), 19.

[10] Pierre-Joseph Proudhon, "What is Government?" in *Anarchism*, ed. Robert Hoffman. (New York: Lieber-Atherton, 1973.), 16.

[11] James D. Forman, *Anarchism: Political Innocence or Social Violence?* (New York: Franklin Watts, Inc., 1975), 20-22.

Socialist, Anarchist, and Communist groups formed the International Workingman's Association, also known as the First International, in 1864. The First International brought together various labour organizations from across Europe (and later the United States) in order to present a more unified front against Capital. Although the Socialists, Communists, and Anarchists found some common ground, for example, the common struggle for an eight-hour workday, the issue of control over the First International as well as arguments over the role of the state in society pulled the First International apart. The Anarchists, led by the Russian Anarchist Mikhail Bakunin, were expelled from the organization in 1872 for their attempts to move the First International in a more radical direction.[12] Although no longer within the same umbrella organization as the Socialists and Communists, Anarchism continued to be closely associated with the other two movements throughout the remainder of the nineteenth century through various labour unions.

The United States was not insulated from the changes occurring in Europe. Conditions resulting from the Civil War brought forth similar issues that lead to the European critiques of capitalism. The United States had to reintegrate the South politically and economically; shift the national economy from a wartime to a peacetime economy; and, with increased immigration from Europe (particularly Eastern and Southern Europe), had to deal with the problem of a rapidly increasing population. These conditions led to a greater disparity of wealth between the upper and lower classes and during the late 1860s and early 1870s, and increased competition for jobs. Federal and State government intervention on the side of capital in labour disputes made Socialist, Communist, and Anarchist ideas increasingly popular in America. These ideas spread thanks to Italian and German immigrants, many of whom were familiar with these ideas through the labour unrest in Europe during the 1850s and 1860s. However, it was an economic

[12] Forman, *Anarchism*, 30.

depression starting in 1873 and lasting the rest of the decade that pushed labour decidedly in a more radical direction.

As labour violence broke out in the United States, business turned towards the state and local governments for help. Labour strife was particularly evident in Northern cities, with crowded conditions, increased competition for limited jobs, and large immigrant populations. The first nationwide strike in the United States occurred in late July 1877. Prompted by a ten percent reduction in wages, workers for the Baltimore & Ohio Railroad walked off the job. This walkout spread amongst workers for other railroads throughout the United States and was soon joined by other elements of organized labour, including miners and mill workers. These walkouts followed a set pattern: After a walkout was called, the railroad (or other business) attempted to undermine the walkout through the use of scab labor. Conflict inevitably ensued between the strikers and employers, and business called upon the state to use police and militia to intervene on their behalf. This intervention by the state, in the form of the police and militia, more often than not lead to a bloody confrontation between the strikers (labour) and the state.[13]

The national strike of 1877 and the government and business reaction to it gave labour a greater degree of support among the poor. The effectiveness, although not the results, of the national strike of 1877 led to the formation in 1881of the International Workmen's Association, a distinct North American version of the First International with branches in a number of American cities, in an attempt to provide labour with a stronger voice through collective bargaining. At its height in the late nineteenth century, the International Workmen's Association attracted some three thousand active members and labour became more vocal as it took a more

[13] This is the pattern followed by most strikes in the latter three decades of the nineteenth century. As strikes became more and more prevalent, business relied more and more on government to break the strike. Paul Avrich, *The Haymarket Tragedy* (Princeton: Princeton University Press, 1984), 27. Almont Lindsey, *The Pullman Strike: The Story of a Unique Experiment and of a Great Labor Upheaval* (Chicago: University of Chicago Press, 1942), 8-9.

radical bent.[14] When it convened in Pittsburgh in 1883, the IWPA issued a manifesto showing how deeply affected the labour leadership was by radical ideas. The manifesto listed six key objectives:

> FIRST – Destruction of the existing class rule, by all means, i.e., by energetic, relentless, revolutionary and international action.
> SECOND – Establishment of a free society based upon co-operative organization of production
> THIRD – Free exchange of equivalent products by and between the productive organizations without commerce and profit-mongery.
> FOURTH – Organization of education on a secular, scientific, and equal basis for both sexes.
> FIFTH – Equal rights for all without distinction of sex or race.
> SIXTH – Regulation of all public affairs by free contracts between the autonomous (independent) communes and associations, resting on a federalistic basis.[15]

This Pittsburgh manifesto shows the clear intermingling of classic American ideas with some of the ideas associated with Socialists, Communists, and Anarchists. The call for the removal of class barriers and the free exchange of products without commerce presented the Communist influence. Arguing for a society based on cooperative organization, an idea promoted by Proudhon, reflected the manifesto's Anarchist roots. The sixth objective of the Pittsburgh manifesto, the regulation of public affairs via contracts between communes and associations, harkens back to the Articles of Confederation, albeit at a more localized level.

Between 1870 and 1890, a development occurred in the Anarchist movement that established how the American public would view it, as well as Socialism and Communism. During this period, some Anarchists began to fear that, although both the United States and Europe seemed primed for revolutionary change, their message was not getting through to the public at large. To these Anarchists, the speeches that they were making and the pamphlets and

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[14] Bruce C. Nelson, *Beyond the Martyrs: A Social History of Chicago's Anarchists, 1870-1900* (New Brunswick, N.J.: Rutgers University Press, 1988), 80.
[15] Avrich, *The Haymarket Tragedy*, 75.

journals that they used to promote their ideas either worked too slowly or did not work at all. Mikhail Bakunin proposed a shift in strategy that was designed to provide the necessary motivation. Known as "propaganda of the deed," this strategy was based on the idea that the populace had generally become non-responsive to verbal and written propaganda, but was responsive to displays of direct action. Bakunin believed that if people would not react to written or verbal propaganda, they would react to direct action taken by the Anarchists against capital, thus igniting the revolution. Theoretically, direct action included the possibility of violence, but not exclusively predicated on it. However, in practice, propaganda of the deed was generally reduced to violence and overshadowed any possible "message." Many viewed proponents of this strategy as criminals rather than the vanguard of revolution.[16]

Propaganda of the deed had unintended effects that not only affected the Anarchist movement, but also, by extension, Socialists and Communists. Propaganda of the deed was a powerful argument amongst the Anarchist movement, though few practiced it. However, those who did plan and execute direct action against the state did nothing to counter the widespread view of Anarchists as nothing more than "bomb-throwing terrorists." The 1880s and 1890s were the high point of propaganda of the deed in both the United States and Europe. In 1885, Johann Most published a pamphlet that described the preparation of bombs and suggested uses for them. Sold for ten cents a copy and entitled *Revolutionary War Science: A Little Handbook of Instruction in the Use and Preparation of Nitroglycerine, Dynamite, Gun-Cotton, Fulminating Mercury, Bombs, Fuses, Poisons, etc., etc.*, the pamphlet was a "how-to" guide for those wanting to engage in propaganda of the deed, including instructions on how to set the bombs and the most effective locations to assure the most damage.[17] In Chicago in 1886, during a labour rally

[16] David Miller, *Anarchism* (London: J.M. Dent, 1984), 99-101.
[17] Nelson, *Beyond the Martyrs*, 162.

in Haymarket Square, an unidentified bomber threw a bomb, similar in make to that described in Most's manual, towards a group of police, killing seven policemen, injuring sixty others, and leading to the deaths of an unknown number of civilians in the subsequent riot. The Haymarket bomb, an attempt at propaganda of the deed, appeared to many to be a random act of violence or a premeditated attack on police. The Haymarket bomb triggered what Paul Avrich and Henry David refer to as the "first major 'red scare' in American history." Not only Chicago, but also other major Northern cities feared that the Haymarket bomb was the start of a general wave of sedition planned by not only Anarchists, but all radical elements. Anger towards the Anarchists did not divide along class lines, but was general and widespread. This anger was also turned against immigrants, as German immigrants provided a majority of support for radical labour groups in Chicago. The Haymarket bomb did more than anything to help create a popular feeling that all Anarchists were "bomb-throwing terrorists."[18]

Chicago police arrested and detained virtually every known radical and labour activist in their search for the Haymarket bomber. Normal police procedure was put aside and police, without warrants, searched residences and offices belonging to radicals for evidence. In the end, eight men were arrested for the bombing and charged with the death of one of the officers as well as conspiracy and unlawful assembly. As these eight men went to trial, they faced a public that already considered them guilty, a jury that had already decided their fate, and, most importantly, a judge predisposed against them. [19]

The trial itself lasted from June 21 to August 20, 1886 and captured the attention of not only Chicago, but the rest of the country as well. The prosecution did not have much evidence

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[18] Avrich, *The Haymarket Tragedy,* 208, 215-20.

[19] In the end, the Chicago police arrested George Engel, Samuel Fielden, Adolph Fischer, Louis Lingg, Oscar Neebe, Albert Parsons, Michael Schwab, and August Spies in connection with the Haymarket bombing. Each was a prominent leader in the Chicago radical community. Ibid., 221-223.

directly linking the eight defendants to the actual bomb; the main focus was on the conspiracy charge. The prosecution argued that although none of the defendants actually constructed or threw the bomb, their speeches and writings in radical journals provoked the actual bomber and, because of this, each individual defendant was as guilty as if he had thrown the bomb himself. Judge Joseph Gary allowed the convening of a biased jury, even going so far as allowing a relative of one of the slain police officers to be a prospective juror. Judge Gary overruled almost every defence motion and objection. By allowing the defendants to be tried together, Judge Gary enhanced the prosecutor's ability to argue for the existence of a conspiracy. The jury agreed with the prosecution's case and found all eight men guilty. Seven of the defendants were sentenced to death for their "part" in the Haymarket bombing; an eighth was sentenced to fifteen years in prison.[20]

While intensely dramatic, the Haymarket Square bombing in Chicago was not the only example of propaganda of the deed prior to 1900. In the summer of 1892, miners working for the Carnegie steel company in Homestead, Pennsylvania, were locked out of the steel mill as their labour contract lapsed and negotiations over a new contract stalled. A tense standoff occurred between the locked-out workers and deputies during which the locked-out workers "convinced" the hired "scab" workers to leave and for the town sheriff and his deputies to not intervene. Henry Frick, the general manager of the plant, called in Pinkerton Detectives to break the strike. After several hours of fighting between the Pinkertons and the workers, the Pinkertons retreated, leaving three Pinkerton detectives and nine workers dead. Frick then turned to the state government to solve his labour problem. The governor ordered seven

[20] On appeal, two of the seven defendants sentenced to death, Samuel Fielden and Michael Schwab, had their sentences commuted to life imprisonment by Governor Richard Oglesby. Louis Lingg committed suicide the day before he was to be executed. George Engel, Adolph Fischer, Albert Parsons, and August Spies were executed by hanging on November 11, 1886. Avrich, *The Haymarket Tragedy*, 262-79.

thousand members of the Pennsylvania state militia, armed with Gatling guns, into Homestead to take control of the steel mill and end the strike.[21]

An unexpected consequence of the steel strike in Homestead, Pennsylvania, was the effect that it had on a young anarchist. Alexander Berkman, appalled by the use of force against a legitimate strike, turned to propaganda of the deed and traveled to Pittsburgh to kill Henry Frick. Berkman walked into Frick's office shot him several times, wounding him once. Berkman was arrested, convicted of attempted murder, and served fourteen years in prison.[22] Berkman's attempted assassination of Henry Frick marks a change in propaganda of the deed; no longer is it seen or used as a way of propelling the masses into action, but now used solely for retribution. Berkman did not try and kill Frick to make a statement or deliver a message to move the masses toward revolution; Berkman tried to kill Frick in retaliation for his strong-arm tactics at Homestead. Propaganda of the deed had become the means Anarchists had for addressing perceived wrongs and slights. Those few who practiced it encouraged and confirmed the public perception of all Anarchists as violent extremists.

The most sensational example of propaganda of the deed, or retributive justice, by Anarchists was the assassination of President William McKinley by professed Anarchist Leon Czolgosz in 1901. Czolgosz signed a full confession and declared that killing the President to be his duty as an Anarchist.[23] Although Czolgosz's ties to Anarchism were tenuous at best, the public seized upon the Anarchist connection. Just as with the Haymarket bombing in 1886,

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[21] Leon Wolff, *Lockout: the Story of the Homestead Strike of 1892* (New York: Harper & Row, 1965). Arthur G. Burgoyne, *The Homestead Strike of 1892,* (Pittsburgh: University of Pittsburgh Press, 1979). David P. Demarest, Jr., ed., *"The River Ran Red," Homestead 1892,* (Pittsburgh: University of Pittsburgh Press, 1992). Edward W. Bemis, "The Homestead Strike," *The Journal of Political Economy*, Vol. 2, No. 3 (June 1894): 379-384.

[22] Forman, *Anarchism*, 59.

[23] A number of Anarchists assassinated public officials in Europe in the 1890s. These included the assassinations of the Empress Elizabeth of Austria in 1898 and of King Humbert of Italy in 1900. Ibid.

President McKinley's assassination reinforced the belief that all Anarchists advocated violence and the violent overthrow of government. Although the perpetrator of the crime was known and in police custody, McKinley's assassination was seen as a part of a larger conspiracy – Emma Goldman and twelve Chicago Anarchists were arrested and charged in association with McKinley's assassination. However, unlike the Haymarket affair, there was no evidence of a conspiracy to kill President McKinley. The charges were soon dropped and Goldman and her associates were released.[24] In response to McKinley's assassination, Congress, in 1903, enacted immigration legislation in designed to limit the numbers of Anarchists and other radicals within the United States. This legislation disallowed "anarchists or persons who believe in or advocate the overthrow by force of the government of the United States, or the assassination of public officials" from immigrating to the United States.[25] This is the first instance in the twentieth-century that the federal government attempted to regulate either American citizens or immigrants on the basis of their beliefs.

Emma Goldman, the notorious "Red Queen of the Anarchists," continued speaking to crowds and publishing her Journal, *Mother Earth*, after McKinley's assassination and through the First World War. Although Goldman advocated propaganda of the deed earlier in her radical career and was a confidante of Alexander Berkman, Goldman's post-1901 career focused more on disassociating Anarchism from the violent image that it acquired. While not completely repudiating propaganda by the deed – or direct action as she refers to it – Goldman focused more on the positive aspects of direct action:

> Universal suffrage itself owes its existence to direct action. If not for the spirit of rebellion, of the defiance on the part of the American revolutionary fathers, their

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[24] Eric Rauchway, *Murdering McKinley: The Making of Theodore Roosevelt's America* (New York: Hill and Wang, 2003). Sidney Fine, "Anarchism and the Assassination of McKinley," *The American Historical Review*, Vol. 60, No. 4 (July 1955): 780-783.

[25] Ted Morgan, *Reds: McCarthyism in Twentieth-Century America* (New York: Random House, 2003), 57.

> posterity would still wear the King's coat. If not for the direct action of a John Brown and his comrades, America would still trade in the flesh of the black man [….] Trade-unionism, the economic arena of the modern gladiator, owes its existence to direct action.[26]

Goldman's goal during this period was to rehabilitate the image of both Anarchism and radicalism in the mind of the public. By drawing on positive American images that her readers readily knew and understood, Goldman attempted to relate labour radicalism to the spirit underlying the American Revolution and the abolition of slavery.

The First World War marked a turning point in both the history of radicalism in the United States and federal emphasis on internal security. Although the United States did not officially enter the First World War until April 6, 1917, America supplied Great Britain and France with weapons and other war materiel during the preceding three years of the war. Various radical groups, even though many recently emigrated from Europe, advocated for a non-interventionist policy towards the conflict. These groups viewed the First World War as a class conflict; it was "a rich man's war and a poor man's fight," according to a popular expression. President Wilson's concern over these radical groups led him to ask Congress for wartime anti-radical legislation. The result was the Espionage Act of June 15, 1917. In order to prevent radical groups from protesting conscription in the United States, section 3 of the Espionage Act made it illegal for anyone to

> wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States.[27]

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[26] Emma Goldman, "Anarchism: What it Really Stands For" in *Anarchism*. ed. Robert Hoffman (New York: Lieber-Atherton, 1973), 48.

[27] Espionage Act of 15 June 1917. Title I, Sec. 3. 40 Stat. 217 (1917).

This law effectively stifled most vocal opposition to conscription during the First World War. However, some radical groups continued to urge conscripts to refuse service in spite of the Espionage act.

In August 1917, the Socialist Party of the United States was charged with distributing pamphlets that urged citizens to refuse service should they be conscripted; Charles Schenck, as head of the party, was arrested and prosecuted under the Espionage Act. Schenck appealed his conviction to the Supreme Court on the basis that the Act contravened his First Amendment rights. The case made it to the United States Supreme Court and in *Schenck v. United States*, the court had to decide whether or not the pamphlets distributed by the Socialist Party of the United States were protected under the First Amendment. The court noted that the pamphlet in question argued that "conscription was despotism in the worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few" and that citizens had a right to assert opposition to the draft and those who did not assert this right were "helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain."[28] The majority opinion, written by Chief Justice Oliver Wendell Holmes, Jr., suggested that "the character of every act depends upon the circumstances in which it is done" and proposed a "clear and present danger" test. As Chief Justice Holmes argued, "the question […] is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Furthermore, when examining the "clear and present danger" posed by the words used, it is important to examine the proximity and degree of the danger brought forth. In the particular case of *Schenck v. U.S.*, Chief Justice Holmes found that, although it is not specifically mentioned within the Espionage Act, a draft is an implicit part of recruiting for the army, one of

[28] Schenck v. U.S., 429 U.S. 47 (1919).

many tools at its disposal. [29] The Supreme Court upheld Schenck's conviction and the "clear and present danger" test would have lasting implications through the remainder of the twentieth century.

With the fall of Russia to the Communists in 1917, the United States faced a new radical threat. Not only had the Communists already taken over the largest country in Europe, but they also proclaimed the start of a worldwide revolution. The United States and other Allied nations sent troops there in early 1918 to try and stabilize Russia and, so they hoped, bring it back into the war. Supporting the "White" Russians against the "Red" Russians (or Bolsheviks) of Lenin, Trotsky, and Stalin, American and Allied forces were tasked with stabilizing Russia through the victory of the "White" Russians; failing that, the Allies had to ensure that any supplies and materiel sent to Russia by the allies prior to the revolution were secure. There was little support in Congress for sustained operations in Russia and the uncoordinated combat efforts of the "White" Russians led to a Bolshevik victory in Russia and the eventual withdrawal of American forces from Siberia in early 1920.[30]

1919 represented a final effort by proponents of propaganda of the deed. During the summer of 1919, several bombs were mailed to prominent members of the government, including Attorney General A. Mitchell Palmer. Most of the bombs did not reach their targets because of insufficient postage and there were no fatalities due to this bombing campaign. The perpetrators of the bombing spree appeared to focus purely on violence as their goal. Already an ardent anti-radical and not predisposed towards labour, Attorney-General Palmer used the

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[29] Schenck v U. S., 249 U.S. 47 (1919).

[30] George Kennan, *Russia and the West Under Lenin and Stalin* (New York: New American Library, 1961). Christopher Lasch, *The American Liberals and the Russian Revolution* (New York: McGraw-Hill, 1962). George Kennan, *Russia Leaves the War* (New York: Atheneum, 1956). George Kennan, *The Decision to Intervene* (New York: Atheneum, 1958). Donald E. Davis and Eugene P. Trani, *The First Cold War: The Legacy of Woodrow Wilson in U.S.- Soviet Relations* (Columbia, Mo.: University of Missouri Press, 2002). Donald S. Fogelsong, *America's Secret War Against Bolshevism: U.S. Intervention in the Russian Civil War, 1917-1920,* (Chapel Hill: University of North Carolina Press, 1995).

bombings as a means to attack radical and labour groups. In December of 1919 and January of 1920, Palmer, working together with J. Edgar Hoover of the Bureau of Investigation (it became the Federal Bureau of Investigation in 1935) and the department of immigration, issued over 3,300 arrest warrants for Anarchists, members of the newly formed Communist parties, members of the Industrial Workers of the World (IWW or "Wobblies"), and other assorted radicals.[31] Prominent among the arrests included Emma Goldman and Alexander Berkman. Thousands of people were arrested and detained during the so-called Palmer Raids, and a number of radicals, including Emma Goldman, were deported to the Soviet Union.

The Communist Party of the United States (an amalgamation of the American Communist Party and the Communist Labor Party) became the preeminent radical organization in the United States and the main target for anti-radicals. The Communist Party of the United States (CPUSA) remained relatively small throughout the 1920s. Without the post-war turmoil found in Europe, the CPUSA could not easily attract new members. Some state legislatures, concerned about radicalism within their states, passed criminal syndicalism laws that were used against Communists; as in the Haymarket riot and with the wording of the Espionage act of 1917, the government tried to prosecute radicals through conspiracy statutes. Although anti-radicalism subsided as the nation turned back to "normalcy" in the 1920s, the CPUSA lost approximately 90% of its membership between 1920 and 1922.[32]

Anarchism in the 1920s became synonymous with two men in the 1920s: Nicola Sacco and Bartolemeo Vanzetti. Sacco and Vanzetti were arrested on May 5, 1920 for the payroll robbery of a shoe factory in which two men were murdered. They matched the descriptions of

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[31] Both the American Communist Party and the Communist Labor Party were formed in September of 1919 and the majority of warrants issued by Palmer were for members of these two organizations. Robert K. Murray, *Red Scare: A Study of National Hysteria, 1919-1920*, (New York: McGraw-Hill, 1955).

[32] Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties*, (Westport, Ct.: Greenwood Press, 1977).

the robbers, were in possession of firearms, and were acting in a strange manner at the time of their arrests. Sacco and Vanzetti were also confessed Anarchists. The evidence against Sacco and Vanzetti varied in strength, but was, for the most part, relatively weak. The prosecution tried producing eyewitnesses that put Sacco and Vanzetti at the crime scene, but the witnesses were unable to locate Sacco or Vanzetti at the scene of the crime. Most of the witnesses were too far away to identify either of the defendants. Several eyewitnesses were directly across the street from the robbery at the time of the shooting. Of these witnesses with an unobstructed view, none were able to testify for certain that Sacco or Vanzetti were involved in the robbery.[33] The prosecution's focus shifted from eyewitness testimony to the physical evidence of the guns found on Sacco and Vanzetti at the time of their arrest. The expert witnesses used by the prosecution were able to identify that the bullet that caused the death of one of the men came from the same make and caliber as the gun carried by Sacco, but the expert witnesses were not able to say conclusively that Sacco's gun fired the bullet. Captain William H. Proctor, chief of the state police, testified that he was certain that the fatal bullet was consistent with being fired from the same make of gun as the one found on Sacco at the time of his arrest, but could not tie the bullet conclusively to Sacco's weapon. Ballistics testing was still in its infancy at the time of the Sacco-Vanzetti trial and the equipment used was not accurate enough to connect a bullet casing precisely to the gun from which it was fired. The inability of the prosecution to prove that Sacco's weapon fired the fatal bullet allowed the defence to produce their own expert witnesses to exploit some of the ambiguities of Proctor's testimony. It was not until later that ballistics testing had advanced enough to tell which weapon fired the fatal bullet. As ballistics testing became more refined and exact, three separate and independent tests were performed on Sacco's

[33] William Young, *Postmortem: New Evidence in the Case of Sacco and Vanzetti* (Amherst, Mass.: University of Massachusetts Press, 1985), 60-63.

gun. The tests, performed in 1927, 1961, and 1983, proved that the bullet fired from Sacco's gun was the bullet that killed the guard, Alessondro Berardelli, during the robbery: Sacco was indeed guilty of the crime.[34]

The prosecution also argued that the strange behaviour exhibited by Sacco and Vanzetti after their arrest constituted a "consciousness of guilt." Judge Thayer asserted that it was upon the consciousness of guilt that Sacco and Vanzetti were convicted. Considering that the Palmer Raids occurred a short period of time before their arrest and the known difficulties between radicals and police, the defence argued that it was perfectly natural for these two men to be evasive when answering police questions; Sacco and Vanzetti were concerned with shielding their radical associates from being arrested themselves. Sacco and Vanzetti did have something to hide, but it was not murder[35]

Although Sacco and Vanzetti were convicted of capital murder in 1921, their case lingered for the next six years through motions for mistrials and appeals. While some radicals were convinced of Sacco and Vanzetti's innocence, many citizens doubted that Sacco and Vanzetti should be executed for their crime. Was the evidence against Sacco and Vanzetti strong enough to execute the two men? Joughin and Morgan argue that, for the most part during this period, the general public fell on the side of executing Sacco and Vanzetti; similar to the Haymarket affair in 1886, these two men would serve as examples to the rest of the radical movement.[36]

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[34] Francis Russell, *Sacco and Vanzetti: The Case Resolved* (New York: Harper and Row Publishers, 1986), 145-163.

[35] Louis Joughin and Edmund M. Morgan, *The Legacy of Sacco and Vanzetti* (New York: Harcourt-Brace, 1948), 81-82

[36] Ibid., 222, 241

"Normalcy" ended for the United States with the onset of the Great Depression in 1929. The Great Depression gave the Communist Party of the United States its greatest opportunity; as with most third parties in the United States, the CPUSA thrived at a time of political and economic crisis. With old economic systems seemingly not working and politicians unable to fix what's wrong, Americans turned to radical solutions. For some, this meant voting Democratic for the first time in generations; for others, it meant listening to what the CPUSA had to say. In five years, from 1930 to 1935, national membership in the Communist Party of the United States increased from 7,500 members to 30,000, and the CPUSA, for the first time in its history, had a native-born majority.[37] The party also had the support of several thousand "fellow-travelers," people who felt themselves ideologically close to the Communist Party and were generally sympathetic to some of the party's intellectual arguments, but were not members. During the 1930s, the CPUSA, on the orders of the Communist International, or Comintern (the Third International), shifted its national strategy from a party strategy to a "popular front" strategy. By making common cause with other less radical groups, the CPUSA hoped to gain greater support from the public at large and position itself as a desirable alternative. The popular front period lasted until the announcement of the Nazi-Soviet non-aggression pact on August 23, 1939. The CPUSA shifted its public policy from denouncing fascism to embracing Nazi Germany and demonizing the Allies. This abrupt shift in public attitude cost the CPUSA a large portion of its membership and most, if not all, of the "fellow-travelers."

"Underground" Communists, Communists who removed themselves from the active party, but still remained involved with the party, began to infiltrate their way into the Federal government. The rapid expansion of the Federal government through New Deal programs in order to battle the Great Depression allowed some fellow-travelers and underground

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[37] Belknap, *Cold War Political Justice*, 10.

Communists to find government positions. As revealed with the release of the Venona intercepts in 1995, the CPUSA, acting on orders from Moscow, actively encouraged certain members to go "underground" and engage in espionage activity against the United States.[38] Two of the best-known of these underground agents were Whittaker Chambers and Alger Hiss. Chambers organized a group of fellow-travelers and underground members of the CPUSA during the 1930s to acquire government secrets that were then passed to his Soviet handlers. Upon hearing the announcement of the non-aggression pact between Germany and the Soviet Union in 1939, Chambers "retired" from the spy business and attempted to inform the federal government about his former operation. Chambers finally came to the attention of Congress and a public confrontation ensued between Chambers and Hiss in 1948. Hiss was eventually convicted on perjury charges, claiming under oath that he never met Chambers, but the conviction was a *de facto* conviction of espionage.[39] Through the espionage of these underground agents, the Soviet Union received classified information from high levels of government including Alger Hiss (who was present at the Yalta conference) and Harry Dexter White, Assistant Secretary of the Treasury under Presidents Roosevelt and Truman.[40]

If the Communist Party enjoyed a resurgence in the mid-1930s, so did anti-radicalism. During the 1930s, anti-radicalism clearly shifted from a concern about radicalism in general to a concern about Communism in particular. Congress created several committees designed to expose Communism; the most prominent of which was the Dies committee, better known as the

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[38] Starting in 1943, the United States began collecting intercepted cables from the U.S. to the Soviet Union. Known as the Venona intercepts, these messages represent almost 40 years of Soviet espionage in the United States. Although not all the messages are completely deciphered, enough of the messages have been decoded to create a fairly full picture of Soviet spying in the U.S. For a fuller discussion of the Venona intercepts, see: John Earl Haynes and Harvey Klehr, *Venona: Decoding Soviet Espionage in America* (New Haven, Ct.: Yale University Press, 2000).

[39] The government was unable to charge Alger Hiss with espionage as the statute of limitations had expired.

[40] Haynes and Klehr. *Venona*. Appendix A. Appendix A contains a listing of 349 U.S. citizens, non-citizen immigrants, and permanent resident aliens who had confirmed covert relationships with Soviet intelligence agencies. Both Hiss and White are confirmed to have had such relationships and passed intelligence to the Soviets.

House Committee on Un-American Activities Committee (HUAC), in 1938.[41] The creation of HUAC was based on the doctrine and politics of exposure; that the most effective means of combating domestic Communism and possible subversion was by exposing it. Once Communism is exposed, it would lose its power and allure to the public at large.

HUAC was ostensibly created to expose un-American activities, primarily related to Fascism and Communism, within the United States. The Committee, led by Martin Dies, Jr., a conservative Texas Democrat, focused on the Communist aspects of "un-American" activities, specifically, the specter of Communists in government. Intent on exposing Communists within government and other aspects of American life, HUAC used its power to subpoena and charge witnesses with contempt of Congress to harass left-leaning persons and organizations. The committee's questioning generally focused on associates of the witness or their particular beliefs on a certain subject, generally related to Communism. The HUAC hearings eventually got to the point where a witness's refusal to answer a question, generally based upon Fifth Amendment rights, was considered a *de facto* admission of guilt. Inspired by the example of the HUAC hearings, "little HUAC's," such as California's Fact-Finding Committee on Un-American Activities (CUAC), which lasted from 1941 to 1971, surfaced at the state level.[42]

In 1940, Congressional anti-Communists shifted the tactics that they used against Communism. In addition to continuing to expose Communists, Congress also attempted to use registration requirements. The Alien Registration Act of 1940, also known as the Smith Act, required all aliens in the United States to be registered and fingerprinted at a post office or other designated federal building. The alien was required to provide the following information to the government:

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41 Heale, *McCarthy's Americans,* 4-5.

42 Ibid., 21-23.

> (1) the date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.[43]

The "Additional Matters" clause allowed the Attorney General to focus more on the alien's beliefs and feelings regarding Communism. Furthermore, The Smith Act required all resident aliens to notify the government of their location within five days of changing residences.

With regards to anti-Communism, the Smith Act was similar to the Espionage Act of 1917. However, the Smith Act did not limit itself to just wartime speech. In particular, the Smith Act made it illegal to:

> 1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;
> (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.
> (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.[44]

As the Marxist-Leninist school of Communism (i.e. Soviet Communism) taught the need for worldwide revolution and that the Communist Party of the United States followed this doctrine, the Smith Act, for all intents and purposes, made the CPUSA an illegal organization. To provide further legal ammunition against the Communist Party, the Smith Act also contained a conspiracy clause, which would allow the government to prosecute the Communist Party with comparative ease.

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[43] Alien Registration Act of 1940. Title III, Section 34 (a). 54 Stat. 670 (1940).
[44] Ibid. Title I, Section 2 (a).

Anti-Communism and anti-Communist sentiment in the United States did not emerge fully formed with the creation of the Soviet Union in 1919. The anti-Communism of the twentieth century developed and grew out of the prominent anti-radical tradition of the late nineteenth century. Anti-Communists retained the same view of radicalism that developed at the turn of the twentieth century, the view that radicals were violent extremists whose goal was to destroy America through direct action, but the emphasis shifted from radicalism in general to Communism in particular.

Chapter 2:
The McCarran Internal Security Act of 1950

Ideology was not the sole driving force behind McCarthyism and concerns over internal security. Senator Pat McCarran and other politicians had to deal with very real practical considerations in the immediate post-Second World War period. The revelation of Soviet espionage between 1945 and 1950 became the primary impetus for stronger internal security legislation. The *Amerasia* case in 1945, along with the Alger Hiss perjury trials of 1949 and 1950, raised concerns to Congress about "underground" Communists and others who could possibly commit espionage or other treasonous acts against the United States. These concerns eventually lead to the passage of the McCarran Internal Security Act in September 1950.

Prior to 1945, *Amerasia* was a small journal produced by the Institute of Pacific Relations (IPR), a left-leaning organization, and read mostly by American specialists in Far Eastern affairs. In February of 1945, however, *Amerasia* came to the attention of the Office of Strategic Services (the precursor to the CIA) and of the FBI. An OSS analyst reading *Amerasia* noticed, in an article about Thailand, several large paragraphs that came verbatim from a State Department file. The analyst quickly notified his superiors and, Frank Bielaski, the head of the Internal division in OSS, began investigating *Amerasia*. Bielaski went to the offices of the Institute of Pacific Relations and, on the basis of national security, entered and searched the offices. Bielaski discovered thousands of reports from virtually every governmental department. Quickly grabbing a number of documents, Bielaski left the offices and flew to Washington to report to his superiors.[45]

Government investigations into the Institute of Pacific Relations and how they came into possession of these government documents began immediately. The FBI placed the IPR offices

[45] Harvey Klehr and Ronald Radosh, *The Amerasia Spy Case: Prelude to McCarthyism* (Chapel Hill: University of North Carolina Press, 1996), 28-31.

under surveillance and placed illegal wiretaps in the offices and residences of likely suspects (including the editor of *Amerasia*, Phillip Jaffe). Because of these wiretaps and illegal searches, the FBI arrested Phillip Jaffe, Kate Mitchell, an assistant editor of *Amerasia*, and Mark Gayn, a well-known journalist. More importantly for the government, the FBI also arrested Emmanuel Larsen, a mid-level employee of the State Department, Lieutenant Andrew Roth of Naval Intelligence, and John Stewart Service, a foreign service officer in the State Department.[46] The arrests left the F.B.I. with two problems. Jaffe and Larsen were affiliated with the Communist party and were, at the very least, fellow-travelers. The Soviet Union was still ostensibly an ally of the United States at the time and care had to be taken not to unduly upset the CPUSA or the Soviet Union. Second, most of the evidence gathered against the suspects was gathered through illegal means, and, therefore, not admissible to court. The FBI determined that a majority of the leaked documents came from Larsen and Roth; Service was attempting to use Jaffe and *Amerasia* to influence American Far Eastern policy.[47] The Justice Department attempted to indict all six despite the relatively weak evidence against the accused. The evidence presented by the government to the Grand Jury against Service, Gayn, and Mitchell was weak; the Grand Jury dismissed the charges against Gayn and Mitchell and exonerated Service of any wrongdoing.[48] Jaffe, Larsen, and Roth were not so lucky; each was indicted with unlawful possession of government documents. Both Larsen and Jaffe plead guilty to the lesser charge and each paid a five thousand dollar fine; Roth, although indicted for the crime, had his case

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[46] Haynes, *Red Scare or Red Menace*, 50-51.

[47] Haynes, *Red Scare or Red Menace*, 52. Klehr and Radosh, *The Amerasia Spy Case*, 62.

[48] Although exonerated of any wrongdoing, Service's involvement in the *Amerasia* case would follow him throughout the rest of his career. Service would not be promoted within the State Department and would be harassed by both Congress and, after 1947, State Department Loyalty Boards until his resignation from the State Department in 1951.

dropped by the Justice Department in early 1946, based on affidavits by Larsen and Jaffe exonerating Roth of wrongdoing. [49]

While the *Amerasia* case resulted in little more than a slap on the wrist for those involved, the spy case awakened Congress and the federal government to the possibility of espionage and the relatively lax security measures. The *Amerasia* spy case was a major impetus for the push towards stricter security within the federal government and for renewed interest in internal security issues in Congress.

Alger Hiss first became publicly associated with Communism and espionage in August 1948, when Whittaker Chambers testified before HUAC that Hiss was a member of the same "underground" Communist group Chambers was involved with in the mid-1930s.[50] Originally brought before HUAC to corroborate the testimony of Elizabeth Bentley, an ex-Communist informer for the FBI, Chamber's revelation of Hiss as an underground Communist proved to be a highly newsworthy national sensation: the issue of "Communists-in-government."[51] Through early August 1948, both Hiss and Chambers testified before HUAC, each doggedly remaining firm to their versions of the story; that Chambers knew Hiss between 1935 and 1938 and both had been members of this underground organizations and that Hiss had never before met Chambers. Richard Nixon, then a freshman member of the House and junior member of HUAC, and Robert Stripling, HUAC's chief investigator, pushed Chambers for more information regarding his relationship with Hiss during the 1930s. Stripling and Nixon determined that Hiss was not being truthful about his past relationship with Chambers.

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[49] Klehr and Radosh, *The Amerasia Spy Case*, 129, 133.

[50] Allen Weinstein, *Perjury: The Hiss-Chambers Case* (New York: Random House, 1997), 5.

[51] Elizabeth Bentley broke from the Communist underground in 1944 and approached the F.B.I about informing on other underground Communists. Through 1947 and 1948, Bentley named names, including Whittaker Chambers, and it was through her testimony that Chambers came to the attention of Congress.

Had Alger Hiss simply continued to deny a past acquaintanceship with Whittaker Chambers and kept it at Chambers' word versus his, it is entirely possible that Hiss could have avoided both of his perjury trials. However, by suing Chambers for slander after Chambers appeared on "Meet the Press," Hiss opened the door to charges of perjury. The Hiss trial was a cause célèbre; all major media outlets covered the Hiss trials. The major point of contention between Hiss and Chambers was if they had known one another prior to 1938. During the HUAC hearings, it was mostly the word of Chambers against the word of Hiss. During the two trials, however, most of the attention turned towards physical evidence of such a friendship, including a series of typed documents, written notes, and undeveloped microfilm that Chambers dramatically produced late into the HUAC hearings: the so-called "pumpkin papers."[52] Both the prosecution and the defense focused on the typed documents and whether they could have been typed on a typewriter owned by the Hiss family back in 1937. The defense built its case around a broken chain of evidence; they argued that the typewriter left the Hiss family prior to the dates in question and also that there was no way to prove that the typewriter in question actually was used to type the pages in evidence. The prosecution argued that the Hiss family purposefully gave away the typewriter to their maid after Chambers had broken with the underground Communist party and was able to prove that the pages in question were indeed from the Hiss typewriter. The first trial resulted in a hung jury. A second perjury trial covered the same evidence. Alger Hiss was found guilty of two counts of perjury by the second jury and sentenced to five years in prison for each count.[53]

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[52] Late in the HUAC hearings, Chambers revealed that he had not disclosed all the evidence he possessed against Alger Hiss. Subpoenaed to disclose any and all information, Chambers took two investigators from the committee to his New Hampshire farm, went around to the pumpkin patch, and revealed the packet of documents known as the "pumpkin papers." The packet revealed documents that could only have been from a highly placed source in the State Department.

[53] Although convicted on perjury charges, the second Hiss perjury trial was a *de facto* espionage trial in the eyes of the public. The guilty verdict meant that Chambers did indeed receive the "pumpkin papers" from Hiss and

The trials of Alger Hiss illustrated the levels to which Soviet espionage reached in the federal government. No longer did espionage seem limited to the lower levels of government, but, now, a highly placed civil servant, someone who formed and informed policy, was shown to have been a member of an underground Communist group and had passed government documents to a foreign government. The Hiss trials further reinforced the need for increased internal security.

The increased use of "redbaiting," politicians charging their opponents with being associated with, or "soft" on, Communism, in the late 1940s further exacerbated the issue of "Communists-in-government" and the need for greater internal security. In the 1948 Presidential election, President Truman used redbaiting in order to position himself as the moderate choice between the Republican party and the Progressive party. Typical of Truman's attacks on Wallace and the Progressive Party was his St. Patrick's Day Address in New York City on March 17, 1948:

> I do not want and I will not accept the political support of Henry Wallace and his Communists. If joining them or permitting them to join me is the price of victory, I recommend defeat. These are days of high prices for everything, but any price for Wallace and his Communists is too much for me to pay. I'm not buying.[54]

By associating Wallace with Communism, Truman was able to attack Wallace without completely alienating support from the left wing of the Democratic Party. The continued use of redbaiting on the national level kept the issue of "Communists-in-government" in the public consciousness.

The final element in the push towards greater internal security was the outbreak of the Korean War in June 1950. Supplied by the Soviet Union, North Korea began a large-scale

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that some "secret" documents transferred hands. Sam Tanenhaus, *Whittaker Chambers* (New York: Random House, 1997), 373-411, 418-431, 435.

[54] Harry S. Truman, "St. Patrick's Day address: March 17, 1948," *Public Papers of the Presidents of the United States, Harry S. Truman, 1948* (Washington: Government Printing Office, 1964), 189.

invasion of South Korea on June 25, 1950.[55] This sudden Communist invasion precipitated fears of a broad-based Communist threat to all western nations. President Truman called the attack an "outright breach of the peace, in violation of the United Nations Charter" and that it "created a real and present danger to the security of every nation."[56] Furthermore, the invasion of South Korea reflected a shift in Communist tactics to policy makers in Washington, including President Truman:

> The attack upon the Republic of Korea makes it plain beyond all doubt that the international communist movement is prepared to use armed invasion to conquer independent nations. We must therefore recognize the possibility that armed aggression may take place in other areas.[57]

The shift in Communist tactics meant that, in the eyes of politicians in Washington, the CPUSA went from a party that advocated undesirable ideas to a genuine threat. Times of war often heightens the need to ensure the security of the home front and to prevent the enemy from gaining an intelligence advantage. Both Truman and Congress used the Korean War as an opportunity to strengthen internal security: a need illustrated by Communist espionage in the preceding five years.

The McCarran act, passed on September 12, 1950, was designed with two main goals in mind: the prevention of Communists and other subversives from finding government positions; and second, to make it easier to prosecute offenders and to strengthen immigration legislation. The Congressional testimony of the head of the FBI, J. Edgar Hoover, provided the rationale behind the McCarran Act. Senator Pat McCarran reported to the Senate that Hoover testified to the fact that while "there are only 54,174 members of the party, the fact remains that the party

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[55] William Stueck, *The Korean War: An International History* (Princeton: Princeton University Press, 1995), 45-48.

[56] Harry S. Truman, "Special Message to the Congress Reporting on the Situation in Korea: July 19, 1950," *Public Papers of the Presidents of the United States, Harry S. Truman, 1948* (Washington: Government Printing Office, 1965), 528.

[57] Ibid., 531.

leaders themselves boast that for every party member there are 10 others who follow the party line and who are ready, willing, and able to do the party's work."[58] The fear of a possible "fifth column" of supporters ready to strike against the United States was used through arguments emphasizing the conspiratorial nature of Communism and the necessity of this legislation.[59]

Senators Pat McCarran of Nevada and Karl Mundt of South Dakota, the architect and chief supporter, respectively, of the McCarran Act, emphasized the nature of Communism when defending the necessity of the act. Senator McCarran argued that the CPUSA and the threat of a fifth column directed by the party constituted both a "clear and present danger to this government and to all that we cherish in our democratic institutions" and that, through testimony garnered by various Congressional committees (including HUAC), there were "cold, hard facts respecting the interlocking of the Communist fifth column in this country with the international Communist espionage-sabotage subversion network."[60] Senator Mundt took this idea even further, declaring that

> Communism is a godless way of life which holds that all the means of productions, all the means of distribution, and the flow of capital shall be controlled […] in the central city of the land by a select group of individuals who permit no opposition, and who subscribe to a world doctrine that there shall be a Soviet dictatorship of the world, directed by the Communists in Moscow ….] That means that every Communist in America is a part of the international conspiracy to subjugate our freedom and to destroy our way of life.[61]

For Senator Mundt, legislation was necessary to remove the danger the CPUSA represented to the American way of life. Mundt, in particular, emphasized the recent trials of Alger Hiss as an example of the problem that this Communist conspiracy could pose should it remain unchecked.

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58 *Congressional Record*, 81st Congress, 2nd Session, 1950, 10: 14171.

59 The idea of a "fifth column" originated in the Spanish Civil War during General Francisco Franco's march on Madrid. As four columns of Franco's forces were approaching Madrid, one of his officers, General Emilio Mola, made a radio broadcast announcing that a fifth column of supporters from within Madrid would rise up and fight for Franco. Since 1940, however, the term has come to symbolize any group of potential traitors to the government that is, as of yet, undiscovered.

60 *Cong. Rec.*, 81st Cong., 2nd Sess., 10: 14171.

61 Ibid., 10: 14231.

The registration of Communists would allow the F.B.I. and the Justice Department to use informants and other former Communists to identify CPUSA members or former members who might have gone "underground" and prosecute them for not registering under the McCarran Act. The question of who should register and be registered under the McCarran act became a hotly debated issue. The act required the registration of Communist-action and Communist-front organizations. While defining Communist-action organizations as one "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement," the act defined a Communist-front organization in broader terms.[62] As defined by the McCarran Act, a Communist-front organization is one that is "substantially directed, dominated, or controlled by a Communist-action organization" and is "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement."[63] Attempting to decide whether or not an organization was dominated, controlled, or influenced by Communists was difficult enough, this problem was further compounded by the vagueness of "giving aid and support."

Some senators, including Senators Paul Douglas of Illinois, Herbert Lehman of New York, and Hubert Humphrey of Minnesota, questioned whether the vagueness of "giving aid and support" could be used to force the registration of otherwise patriotic organizations. Senator Douglas brought the issue close to home for members of the Senate, noting that, some of the positions and beliefs held by members of Congress were congruent with that of the CPUSA and, while not directed by a Communist-action organization, could be seen "giving aid and support" to Communist cause. Douglas suggested that, under such legislation, it would be possible "for

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[62] This registration statute does not, of course, include embassy and other diplomatic organizations and positions. *Internal Security Act of 1950*. Title I, Section 3 (3[a]). 64 Stat. 987 (1950).

[63] Ibid., Title I, Sec. 3 (4).

an injudicious Attorney General and a Subversive Activities Control Board to list an organization of such men as a Communist front, even though it were in reality innocent."[64]

Senator Lehman, on the other hand, questioned whether or not unions could be subject to registration. As we have seen, Unionism, through an umbrella of "radicalism," had been associated with Communism in the late-nineteenth and early-twentieth century and advocated similar policies to those that Communists advocated during the popular-front period. Lehman argued that a union such as the United Auto Workers (UAW) would be forced to register due to its support on certain liberal or progressive positions. As Lehman noted:

> Communists pay lip service to many causes, such as public housing, peace, antidiscrimination, and social security. These causes happen to be supported very enthusiastically by the UAW union. The UAW supports many other principles […] to which the Communist Party gives its questionable blessings[65]

Furthermore, Lehman argued, the UAW would have to register if even a small number of UAW officers demonstrated sympathy for the Communist cause as fellow travelers. Senator Humphrey suggested that the National Farmers Union, a multi-state organization of farmers and ranchers, might be forced to register as a Communist-front organization for some of the pro-socialist ideas promoted by the union, despite its consistent support of pro-western and pro-American policies such as NATO and continued military support of beleaguered nations.[66]

The registration section of the McCarran act was similar in most respects to that of the Alien Registration of 1940. Designated Communist organizations were required to submit the following information to the Attorney General's office:

(1) The name of the organization and the address of its principal office

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64 *Cong. Rec.*, 81st Cong. 2nd Sess., 11: 14412.

65 Ibid., 10:14193.

66 The main charges against the National Farmers Union (NFU) were that, as with other unions, some members were inclined towards Communism and became members of the CPUSA, as well as the NFU's promotion of cooperatives to help farmers. Ibid., 10: 14283-84.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such a statement, an officer of the organization […]
(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months […]
(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.
(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been know by more than one name, each name which such officer or member uses or has used or by which he is shown or has been known.[67]

This information submitted to the Attorney General's office was then opened to public scrutiny in a yearly list published by the Attorney General. The McCarran act left it up to individuals to ensure that, if they were a member of a designated Communist-action or –front organization, they were properly registered under the terms of the act. This meant that the FBI and the Justice Department could use this information to determine if the registered organization supplied its full membership list and to initiate investigations or prosecutions under the act.

The publication of this yearly list, however, made some Senators question whether the organizations or individuals would register themselves accurately and not submit false information; slandering innocent individuals or organizations. Senator Douglas made this point vividly:

> A man's patriotism is like a woman's honor, it is sullied by even being questioned or talked about. A stain is put upon it by being questioned which cannot be completely removed, no matter how devoted a man may be.[68]

Registration of this sort allowed for organizations and, more importantly, individuals to submit false information to avoid being registered and to do damage to the reputation of others.

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67 *Internal Security Act*. Title I, Sec. 7 (d). 64 Stat. 987 (1950).
68 *Cong. Rec.*, 81st Cong. 2nd Sess., 11: 14412.

Proponents of the McCarran Act, however, argued that the creation of a Subversive Activities Control Board (SACB) allowed falsely registered organizations and individuals a means of redress.

The McCarran Act designed the SACB to serve as a lower appellate court for organizations and individuals. The SACB, made up of five members appointed by the President, of which no more than three could be members of the same political party and subject to the approval of Senate, applied the definitions of the McCarran Act to registering organizations. Individuals and organizations could petition the SACB if they felt that they were improperly registered or to have their previous registration removed from the annual list. The SACB would then function in a manner similar to a Congressional committee, such as HUAC, with the power to subpoena witnesses, and the ability to administer oaths and debrief and interview witnesses and pertinent publications for the case at hand. The petition of the individual or organization to be removed from the annual list would then be presented in an open hearing, to allow the individual or organization to publicly plead its case.

The McCarran Act provided specific considerations that the SACB would take into account in determining the status of the petitioner. In determining whether the petitioner was or belonged to a Communist-action organization, the SACB took into consideration the policies, the finances, and, in the case of organizations, the membership of the petitioner. The SACB would then attempt to determine the extent to which the formulated policies and beliefs of the petitioner conformed to those of foreign governments and organizations. This meant that if the government, through the SACB, determined that the goals and beliefs of an organization differed from those of the United States and were directed by a foreign organization, the petitioner was one step closer to being considered a Communist-action organization. Allowing the SACB such

broad interpretive powers regarding the policies of an organization meant that organizations were placed under pressure to shift policies to conform to those of the current administration. This meant that, had the McCarran Act been law in 1948, the Progressive Party could have been considered a Communist-action organization because of its opposition to big business.[69]

The SACB could also examine the finances and support of the petitioner to determine the extent to which the petitioner received financial support from foreign governments or organization. The McCarran Act required full disclosure of financial information from individuals and organizations to ensure that these groups did not receive money directly or indirectly from unfriendly governments or organizations. The full disclosure of financial information would allow the SACB and its investigators to trace any financial aid to these organizations and to follow the money trail to see if the original organization was influencing others.

Most importantly, however, the SACB had to take into consideration the membership of the organizations involved. The SACB had to determine:

> (4) the extent to which [the petitioner] sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and
> (5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and
> (6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and
> (7) the extent to which […] (i) it fails to disclose, or resists effort to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

[69] *Internal Security Act*. Title I, Sec. 13 (e). 64 Stat. 987 (1950).

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.[70]

The membership requirements of a Communist-action organization were clearly written as to ensure that the Communist Party of the USA would be considered a Communist-action organization.

The SACB had an even broader set of criteria for determining whether or not a petitioner constituted a Communist-front organization. For example, to determine if an organization was a Communist-front organization, the SACB had to consider:

(1) the extent to which persons who are active in [the petitioner's] management, direction or supervision, whether are not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement […]; and
(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement […]; and
(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement […]; and
(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement.[71]

This broad definition meant than any number of organizations could be branded as Communist-front organizations. Any member of the CPUSA, previously defined as a Communist-action organization, could be interpreted as a representative of the CPUSA within another organization. Some could argue that organizations with a possible overlap in membership with the CPUSA were using personnel to further the objectives of the Communist Party. Any organization that supported policies similar to those supported by Communists could be seen as deriving support

[70] *Internal Security Act*. Title I, Sec. 13 (e). 64 Stat. 987 (1950).
[71] Ibid., Title I, Sec. 13 (f).

from the CPUSA. Organizations such as unions, whose membership included numbers of CPUSA members or supporters and supported some policies consistent with the Communist party, could conceivably be considered Communist-front organizations by the SACB.

To promote registration, the McCarran Act imposed a number of penalties for those failing to register or appeal their case to the SACB. As the FBI already had a detailed membership list of the CPUSA through informants and former party members, lawmakers felt that it would be easier to track down and punish those who didn't comply with registration. Upon conviction by the SACB for failure to register, organizations were fined up to ten thousand dollars for each member that they failed to register. Individuals convicted by the SACB for failure to register were also subject to a fine of up to ten thousand dollars or up to five years in prison. In the case of individuals providing false registration information, these individuals were subject to the same punishment as for failing to register.[72] Individuals and organizations could appeal the registration and penalties imposed by the SACB to the U.S. District Court of Appeals or, failing there, the U.S. Supreme Court.

Once registration determined the membership lists of Communist-action and Communist-front organizations, the government would then be able to remove possible subversive elements. The McCarran Act made it impossible to receive appointed positions within the federal government for members of Communist-action and Communist-front organizations. It became unlawful for any member of these organizations to hold any non-elective office within the federal government or to hold any position within the defence industry. Furthermore, it prevented any officer or employee of the United States from contributing aid to any member of a Communist-action or Communist-front organization.[73] This part of the legislation was mainly

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[72] *Internal Security Act*. Title I, Sec. 15. 64 Stat. 987 (1950).

[73] Ibid., Title I, Sec. 5.

directed towards the State Department, considered by most anti-Communists to be most susceptible to Communist infiltration. Any contact with a registered Communist organization, past, present, or future, resulted in the termination of the employee. Lawmakers felt that this legislation would more thoroughly remove possible subversive elements from the State department than did the Truman administration's loyalty program.[74]

The final means available to remove possible Communists from presenting a possible subversive threat during times of crisis was the Emergency Detention, often also referred to as the "Concentration Camp," amendment. The Emergency Detention amendment was originally offered to the Senate as a substitute to the McCarran Act, but was defeated by conservative opposition. The sponsors of the amendment, led by liberal Senators Harley Kilgore of West Virginia and Paul Douglas of Illinois, based the amendment on the experience of United States with the internment of Japanese-Americans during the Second World War. The Senators argued that the relocation of Japanese-Americans to camps in the heartland of American and the South during the Second World War was analogous to detaining Communists during a future crisis. Senator Humphrey, in his support for the Emergency Detention amendment, argued that the McCarran Act, used in conjunction with the Smith Act of 1940, made membership of the Communist Party a crime.[75] Senator Douglas took a slightly different tack and argued that

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[74] The Truman administration, in response to the same security issues that prompted the McCarran act, enacted a loyalty program throughout the executive branch and departments starting in 1947. Careful to avoid any Constitutional issues involving the first or fifth amendments, the Truman loyalty program carefully screened federal employees, particularly those working in the Departments of State and Defence, for possible subversion through a Loyalty Board. Similar to SACB in the McCarran act, the Loyalty Board would examine an employee's file and interview the employee to try and determine his or her loyalty. If, during this process, something raised questions or concerns for the Loyalty Board, the employee would be quietly removed from governmental work until the questions or concerns were satisfactorily answered. Executive Order 9835. *Code of Federal Regulations* Title 3, 1943-1948 Comp. p. 627.

[75] In 1948, the leadership of the CPUSA was charged under the conspiracy statutes of the Smith Act. The leadership appealed and, in early 1951, the Supreme Court, in *Dennis v. United States*, ruled upheld the conviction on the basis of the conspiratorial nature of CPUSA. Senator Humphrey argued that the registration statutes in the McCarran act would constitute self-incrimination. *Cong. Rec.*, 81st Cong., 2nd Sess., 11: 14421-22. Belknap, *Cold War Political Justice*. Dennis v. United States. 341 U.S. 494 (1951).

detention during times of crisis was preferable to incarceration and imprisonment during times of peace in that

> The worst part of imprisonment is the blot upon the name with comes from conviction for a crime. Defamation of character is worse than detention […] Defamation is really more injurious than detention[76]

Detention for the duration of a national security crisis, according to Douglas, would not carry the same stigma as the possibility of incarceration for belonging to an organization. A name can be reclaimed from detention, he argued, but not from incarceration.

With the defeat of the Emergency Detention amendment as a bill, supporters shifted tactics from trying to substitute another bill for the McCarran Act to attaching the bill to the act itself as an amendment. The amendment did not have its intended effects, however, as Senator McCarran worked with Majority Leader Scott Lucas of Illinois to attach the amendment to the McCarran Act in exchange for minor revisions to the amendment, particularly with respect to appropriations for detention.[77] The subsequent vote in the Senate attached the Emergency Detention amendment to the McCarran act by 70 to 7.[78]

Based upon the same information and framework as the rest of the McCarran Act – that the FBI has knowledge of and could arrest most of the Communist apparatus within the United States – the Emergency Detention amendment allowed the President, in times of national emergency, to

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[76] *Cong. Rec*., 81st Cong. 2nd Sess., 11: 14424.

[77] The appropriation revisions were important to McCarran, as it increased Congressional control over detentions and detention camps and restrained the Presidency in this aspect of internal security. McCarran was of the opinion that the President, like children, should be seen but not heard. Ybarra, *Washington Gone Crazy*, 157-58, 525.

[78] Liberal Senators such as Hubert Humphrey and Paul Douglas both voted for the McCarran Act with the Emergency Detention amendment even though they both opposed both proposals. They believed, wrongly as it turned out, that it would be possible to tie up the McCarran Act in committee until changes could be made. Ibid., 524-25.

> apprehend and by order detain […] each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage.[79]

This amendment, although originally designed to subvert the McCarran Act, actually took the McCarran Act to its ultimate conclusion. Although Senators McCarran and Mundt were concerned more with the deportation, rather than the detention, of possible subversives when the act came before the Senate, the registration statutes they proposed, particularly with the involvement of the Attorney General and the Justice Department in the registration process, logically moved towards detention during times of crisis.

Once the President has authorized a state of national emergency, the Detention amendment authorized the Attorney General and Justice Department to issue warrants to those individuals who have been registered under the McCarran act. The amendment prevented the Justice Department from issuing a blanket warrant to the entire list. However, each warrant, in accordance to US law, was issued only with probable cause and must specifically describe the person to be apprehended or detained.[80] Although designed to protect civil liberties, this would impede the Justice Department in detaining possible subversives during a state of national emergency. Registration under the McCarran Act meant that an individual was a member of either a Communist-action or Communist-front organization; organizations that, according to Congress, were both conspiratorial and possibly subversive. This meant that probable cause was already established based upon registration. Once the warrant was delivered, the individual would be transported to a more secure location and detained until the crisis has passed.

More care was taken with protecting the civil liberties of possible detainees in the Detention amendment than the rest of McCarran Act. The Detention amendment ensured that

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79 *Internal Security Act*. Title II, Sec. 103 (a). 64 Stat. 987 (1950).

80 Ibid., Title II, Section 104 (a [2])

each detainee understood his rights and the reason why they were being detained.[81] Furthermore, a preliminary hearing officer was appointed to each detainee and an overview of the evidence against the detainee was presented. At this time, the detainee was allowed to present, if possible, opposing evidence proving that it was unnecessary for them to be detained. Based on the evidence presented to the hearing officer, the officer would assess the evidence and decide if there is probably cause to detain the individual. The detainee would then either be remanded to the detention centre or released.[82]

The Detention amendment allowed detainees to appeal their original assessment and petition a new assessment. The Detention Review Board was similar to the SACB and Truman's Loyalty Boards in most respects. It had the power to subpoena relevant witnesses and had access to the government evidence against the detainee. Made up of nine members, the Detention Review Board considered the petition of any detainee to have their case reviewed and, if granted, oversaw each new hearing. Should the Detention Review Board decide that there is sufficient evidence to show that the detainee did not pose a threat to national security, the Board ordered the detainee released. The Detention Review Board also oversaw petitions of former detainees regarding claims, such as the loss of income, due to detention.[83]

The Detention amendment had certain criteria that both the preliminary hearing officer and the Detention Review Board had to look for in trying to assess whether just cause existed for the detention of an individual. Based upon the evidence presented by the government and by the detainee, both the Board and the hearing officer had to determine:

> (1) Whether such person has knowledge of or has received or given instruction or assignment in the espionage, counterespionage, or sabotage service or procedures

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[81] Although 16 years before the landmark Supreme Court case, *Miranda v. Arizona,* in 1966, the Detention amendment ensured that each detainee was read and understood their Miranda rights.

[82] *Internal Security Act*. Title II, Sec. 104 (d). 64 Stat. 987 (1950).

[83] Ibid., Title II, Sec. 109.

> of a government or political party of a foreign country, or in the espionage, counterespionage, or sabotage service or procedures of the Communist Party of the United States or of any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States or of any of its subdivisions and to substitute therefor a totalitarian dictatorship controlled by a foreign government, and whether such knowledge, instruction, or assignment has been acquired or given by reason of civilian, military, or police service with the United States Government, the governments of the several States, their political subdivisions, the District of Columbia, the Territories, the Canal Zone, or the insular possessions, or whether such knowledge has been acquired solely by reason of academic or personal interest not under the supervision of or in preparation for service with the government of a foreign country or a foreign political party, or whether, by reason of employment at any time by the Department of Justice or the Central Intelligence Agency, such person has made full written disclosure of such knowledge or instruction to officials within those agencies and such disclosure has been made a matter of record in the files of the agency concerned;
> (2) Any past act or acts of espionage or sabotage committed by such person, or any past participation by such person in any attempt or conspiracy to commit any act of espionage or sabotage, against the United States, any agency or instrumentality thereof, or any public or private national defense facility within the United States;
> (3) Activity in the espionage or sabotage operations of, or the holding at any time after January 1, 1949, of membership in, the Communist Party of the United States or any other organization or political party which seeks to overthrow or destroy by force and violence the Government of the United States or of any of its political subdivisions and the substitution therefor of a totalitarian dictatorship controlled by a foreign government.[84]

Under the Detention amendment, it was not necessary for each criterion to be met, but rather the hearing officer and Detention Review Board used the criteria as guidelines in weighing the possible threat that each detainee posed to national security. For example, the holding of membership in the CPUSA contributed to the justification by the hearing officer and the Detention Review Board of probable cause with respect to detainees. As with the SACB, detainees were able to appeal the findings of the Detention Review Board to the U.S. District Court of Appeals or the U.S. Supreme Court.

[84] *Internal Security Act*. Title II, Sec. 104 (h). 64 Stat. 987 (1950).

In addition to attempting to remove possible subversives from the government, the McCarran act also attempted to strengthen previous legislation. Most of these attempts were in response to and based on the legal actions against real and alleged Communists between 1948 and 1950. In 1948, the government charged the leadership of the CPUSA with violations of the Smith act. In preparing for the case, U.S. attorneys realized that it would be difficult to argue beyond a reasonable doubt that the Communist leadership had advocated for the violent overthrow of the United States and, thus, violated section 2 of the Smith Act; the defence would be able to argue that the evidence presented against the accused merely advocated change of the current system, not necessarily revolution by violence. The government avoided this problem by charging the Communist leadership under the conspiracy statutes of the Smith act, arguing that, while not outright advocating for violent revolution, the mere fact that they were leaders in the Communist party constituted *prima facie* evidence of a conspiracy against the United States government.[85] The use of conspiracy statutes and the successful prosecution of the Smith Act trials in 1948 led proponents of the McCarran Act to rely on the legal use of conspiracy to close any loopholes in previous Anti-Communist legislation.

The McCarran act made it illegal for any person knowingly to "combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship."[86] The purposefully broad language of the conspiracy clause allowed the FBI and the Justice Department to cast a wide net with regards to what constituted conspiratorial actions. The phrase "substantially contribute" was vague enough to encompass a broad number of acts including the donation of money to an

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[85] Most of the evidence against the accused consisted of Communist literary tracts and publications by the CPUSA. The prosecution then produced witnesses, including F.B.I. informants and former Communists such as Louis Budenz, to interpret the material so that it conformed to the charges at hand. Belknap, *Cold War Political Justice*., 77-116.

[86] *Internal Security Act*. Title I, Sec. 4 (a). 64 Stat. 987 (1950).

organization to the teaching of Marxist texts in universities.[87] The use of the conspiracy clause spoke to the view that legislators had regarding the nature of Communism and the best ways of combating it. Senators on both sides of the political spectrum emphasized the conspiratorial nature of the Communist movement. Senators Mundt and Douglas emphasized the conspiracy of Communism while promoting and denouncing the McCarran Act. The perceived nature of the Communist movement led legislators to use the conspiracy clause as a means to more effectively indict and prosecute Communists and other potential spies within government. Legislators were careful, however, to ensure that they framed the wording of the clause in such a way that the McCarran Act did not make membership of the Communist Party illegal under the conspiracy clause. While it would be possible for an overly-zealous Attorney General or Justice Department to use the conspiracy clause in such a manner that it would effectively declare the Communist party illegal – the CPUSA had been designated a Communist-action organization by the McCarran Act and, thus, an organization believed to be directed by the world Communist network and dedicated to the violent overthrow of the United States – legislators made sure to prevent this by noting that "neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation" of the conspiracy clause.[88]

The Alger Hiss case also revealed loopholes in the legal system that prevented the prosecution of former Communists. The actions of Whittaker Chambers, in particular, revealed the necessity for further safeguards. During the HUAC hearings leading up to the Hiss perjury trial, it was revealed that Chambers withheld documentation and evidence from HUAC. Only after a subpoena from HUAC did Chambers produced the typed evidence, as well as

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[87] The fear of Communists in the education system was also a big fear during this period. Some of the more conservative senators, including McCarran and McCarthy, felt that the use of Marxist texts in any context, such as its use as a comparative text in a political science or economics class, constituted the undermining of American values in the education system.

[88] *Internal Security Act*. Title I, Sec. 4 (f). 64 Stat. 987 (1950).

undeveloped microfilm of State Department memoranda. The prosecution used this evidence to show a clear connection between Whittaker Chambers and Alger Hiss, something that Hiss denied to HUAC, a Grand Jury, and during his first perjury trial. Although the first perjury trial resulted in a hung jury, the prosecution tied the hand-written papers and the typed evidence to Alger Hiss to secure a conviction of perjury in a second trial.[89] While the government was able to secure a conviction against Hiss, the government was unable to prosecute Whittaker Chambers for withholding evidence.

Chambers' withholding of evidence from the Congressional committee led legislators use the McCarran Act to close this particular loophole. The McCarran Act prohibited any officer or employee of the United States (or affiliated corporation) to transfer any written or oral information classified by the government as necessary for national security to an agent or representative of a foreign government or organization and prohibited any agent of a foreign government or organization from receiving said information.[90] This meant that, had the McCarran Act been enacted before the Hiss case came to trial, both Hiss and Chambers would have been prosecuted for the illegal possession of materials relating to national security. Another byproduct of the Hiss case was that the McCarran Act expanded the statute of limitations for espionage. The government was only able to prosecute Hiss on a charge of perjury – Hiss lied to both a Congressional committee and a Grand Jury about knowing Chambers – but the government was unable to prosecute him on charges of espionage because the statute of limitations had expired. The McCarran Act expanded the statute of limitations for espionage from three to ten years.

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89 Tanenhaus, *Whittaker Chambers,* 290-317.

90 *Internal Security Act*. Title I, Sec. 4 (b), (c). 64 Stat. 987 (1950).

The most vociferous debate in the Senate regarding the McCarran Act was over its Constitutionality. One of the primary arguments used against the McCarran Act was that it would force the government into the role of deciding whether a man's thoughts or ideas were dangerous to the state. Arguing that the McCarran Act would put the government in the business of policing the thoughts of citizens, Senator Lehman invoked the imagery of the French Revolution when he suggested that the McCarran Act would not "catch only those whose views you hate. All of us may become victims of the gallows we erect for the enemies of freedom."[91] Lehman, Humphrey, and other liberal Senators argued that the registration section of the McCarran Act would penalize citizens on the basis of their thoughts, opinions, and beliefs and in a manner which violated both the letter and the spirit of the First Amendment.

Liberals also attacked the McCarran act on Constitutional grounds was by arguing that it violated the Fifth Amendment. Senators Douglas and Lehman used the successful conviction of the leadership of the Communist Party in the Smith Act trial in 1948 to argue that the registration section of the McCarran Act would constitute self-incrimination and, thus, be in violation of the Fifth Amendment. The government successfully prosecuted the CPUSA leadership on the basis that the Communist Party was a conspiratorial organization that advocated the violent overthrow of the United States. Lehman argued that the registration of organizations and individuals as members of a Communist-action or Communist-front organization would "constitute self-incrimination, if not under the terms of this law, then under the terms of the Smith Act."[92]

Proponents of the McCarran Act insisted that the act conformed to the rights given to citizens under the Constitution. Senator McCarran argued the acts Constitutionality based both on judicial precedent and on his record of upholding the Constitution in the Senate and as Chair

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91 *Cong. Rec*., 81st Cong. 2nd Sess., 10: 14194.

92 Ibid., 10: 14190.

of the Senate Judiciary Committee. McCarran cited the "clear and present danger" test, and argued that the Communist conspiracy against the United States presented a clear and present danger to the government. McCarran also cited the precedent in the majority decision of the Supreme Court in *Gitlow v. People of New York* in which the Supreme Court found that the freedom of speech and the press "does not deprive a State of the primary and essential right of self-preservation; which, so long as human governments endure, they cannot be denied."[93] Along with these two precedents, McCarran used his twenty-year Senatorial career as a defender of the Constitution and his "respect and love for the organic law of the United States" to sway his fellow Senators.[94] Throughout his Senatorial career, McCarran challenged and fought against every attempt by the executive branch to overstep what he felt was its Constitutional authority.[95]

While McCarran attempted to use moral suasion on his fellow Senators, Senator Mundt introduced the testimony of experts regarding the Constitutionality of the McCarran Act. Mundt tried finding legal experts on both sides of the ideological divide to examine the Constitutionality of the McCarran Act. Among conservative organizations and individuals, both the American Bar Association and John W. Davis, who Mundt describes as "a very distinguished Democrat, onetime candidate for President on the Democratic ticket, and a […] highly able attorney with conservative impulses," endorsed the passage of the McCarran Act.[96] Senator Mundt claimed to have difficulty finding an honest liberal to review the McCarran Act, likening it to "Diogenes going about with a lantern looking for an honest man," but managed to find two.[97] Senator Mundt asked Donald Richberg, a former New Dealer and professor at law at the University of

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93 Gitlow v. People of the State of New York., 268 U.S. 652 (1925).

94 *Cong. Rec*., 81st Cong. 2nd Sess., 10: 14174.

95 McCarran opposed virtually every New Deal program put forward by the Roosevelt White House. McCarran felt that Roosevelt was asserting too much authority and was in danger of upsetting the Constitutional balance of government. Ybarra, *Washington Gone Crazy*, 141-143, 161-166.

96 *Cong. Rec*., 81st Cong. 2nd Sess., 10: 14232. William Henry Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* (New York: Oxford University Press, 1973).

97 *Cong. Rec*., 81st Cong. 2nd Sess., 10: 14232.

Virginia, and Louis Waldman, a labour attorney, to study the proposed legislation. According to Mundt, both liberal attorneys praised the McCarran Act, with Waldman going so far as suggesting that "it did not go quite far enough, and he would like to have us add a section which would deny the Communists the use of the ballot."[98]

The Constitutional debate of the McCarran Act prompted the framers of the act to incorporate a Constitutional defence within the act itself. Legislators prefaced the McCarran Act with a section laying out the "necessity for legislation;" a section that argued that Communism, in the opinion of Congress, presented a clear and present danger to the United States. The "necessity for legislation" argued that there existed a world Communist movement dedicated to establishing "a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."[99] This section further argued that this organization often used, but did not limit themselves to, political means to attempt to gain power and convert countries into a totalitarian dictatorship:

> The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship [i.e. the Soviet Union]. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.[100]

98 *Cong. Rec*., 81st Cong. 2nd Sess., 10: 14232.
99 *Internal Security Act*. Title I, Sec. 2 (1). 64 Stat. 987 (1950).
100 Ibid., Title I, Sec. 2 (6).

The goals of the Communist Party of the United States, Congress argued, were in lockstep with the goals of a world-wide Communist movement under the direction of the Soviet Union. The legislation further argues that the American apparatus of this Communist movement is

> an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement […] The Communist organization in the United States, pursing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions.[101]

The revealed Soviet espionage between 1945 and 1950, coupled with the outbreak of the Korean War and the general tension between the United States and the Soviet Union, created an environment that appeared to be ripe for the emergence in the United States of a Soviet "fifth column" in the guise of the CPUSA. The danger of the Communist party was clear to Congress and the general environment of the Cold War suggested that the danger was present.[102]

The McCarran Act did not address the main issue of Communists within government. A number of the people named as Communists in government, including Alger Hiss and Henry Dexter White, were not actual members of the CPUSA nor members of any Communist-Front organizations. There would be no need for them to register and their names would not appear on any membership lists. The McCarran act did restrict members of the CPUSA from going underground in the future and did prevent members of the CPUSA and Communist-front organizations from entering government positions, but did not prevent those already in power

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101 *Internal Security Act*. Title I, Sec. 2 (15). 64 Stat. 987 (1950).

102 A reinterpretation of the "clear and present danger" test based on the contemporary Cold War environment would appear in the heavily divided Supreme Court decision of *Dennis v. United States* (1951), the final review of the Smith act convictions. In *Dennis v. United States* (1951), Chief Justice Fred Vinson argued the majority decision that the environment created by the Cold War increased the proximity of the danger posed by Communists and the Communist party. Dennis v. United States, 341 U.S. 494 (1951).

from recruiting possible spies from outside the party apparatus. Greater internal security legislation was necessary by late 1950, but the response of the Senate to the Korean War and anti-Communist sentiment resulted in legislation that was less than adequate.

Both the *New York Times* and *Washington Post* came out against the McCarran Act. In reporting the Senate debate on the McCarran Act, the *Washington Post* noted cynically that, in the end, the passage of the McCarran Act came down to scoring political points rather than strengthening internal security: "Most liberals voted right along with conservatives for the composite bill, in the mass play for an 'anti-red' voting record."[103] The *New York Times* was even more opposed to the McCarran Act. A September 14, 1950 editorial argued the position of most liberals during this period:

> Of course it is necessary to protect our country from the menace of Communist aggression, whether in the form of Russian imperialism or of internal espionage and sabotage. But it has been and still is our belief that the principal features of the McCarran bill, far from achieving this goal, would interfere with it. Its registration provisions would ensnare federal authorities in interminable litigation, while the Communist party itself would be blithely going underground or making its appearance under a succession of aliases.[104]

Anti-Communist and anti-subversion registration legislation would limit, rather than expand, the government's ability to defend itself from internal subversion.

While both the Senate and the House passed the McCarran act overwhelmingly, it still needed to be signed into law by President Truman. When, in the summer of 1950, President Truman called for a special session of Congress to debate the issue of the internal security of the United States, he had hoped for a relatively short session and that Congress would deliver him internal security legislation similar to his loyalty program in the executive branch. It was not to be. Congress debated internal security legislation through most of the latter half of summer and

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[103] Robert C. Albright, "Senate Votes 70 to 7 for Drastic Anti-Communist Bill," *Washington Post*, September 13, 1950, A1,A15

[104] Editorial, "The Senate on Subversion," *New York Times*, September 14, 1950.

into the first weeks of September 1950 before presenting President Truman with the McCarran Act to sign into law - a piece of legislation the opposite of what Truman expected. The McCarran Act presented President Truman with a dilemma: The American public expected internal security legislation to be passed by Congress and accepted by the President, but the legislation passed by Congress infringed too heavily on the civil liberties of Americans.

Faced with a war against Communists in Korea, domestic fears of Communist subversion at home, and an unfriendly Congress, it took a great deal of political courage to veto the McCarran Act.[105] On September 22, 1950, President Truman addressed the nation to explain his rationale behind his veto, which contained many of the same arguments used by detractors during the Senate debate on the bill. Truman felt that the McCarran act "would not hurt the communists. Instead, it would help them."[106] President Truman had many objections to the McCarran Act:

1. It would aid potential enemies by requiring the publication of a complete list of vital defence plants, laboratories, and other installations [as was required by Section 5]
2. It would require the Department of Justice and its Federal Bureau of Investigation to waste immense amounts of time and energy attempting to carry out its unworkable registration provisions
3. It would deprive us of the great assistance of many aliens in intelligence matters
4. It would antagonize friendly governments
5. It would put the Government of the United States in the thought control business
6. It would make it easier for subversive aliens to become naturalized United States citizens

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[105] Although a member of Congress prior to being elected as Vice-President in 1944, President Truman had a rocky relationship with Congress as President. This relationship reached its nadir with Truman's veto over the Taft-Hartley act in 1947, and the President's derision of the Republican-controlled 80th Congress as a "do-nothing" Congress. The loss of the conservative Democratic South as a reliable voting block after the Dixiecrat revolt in 1948 also severely limited Truman's ability to push his agenda in Congress. David G. McCullough, *Truman* (New York: Simon and Shuster, 1992). Mark S. Byrnes, *The Truman Years, 1945-1953* (New York: Longman, 2000).

[106] Harry S. Truman, "Truman Veto of Internal Security Bill. September 22, 1950," *Public Papers of the President of the United States: Harry S. Truman, 1950* (Washington, D.C: Government Printing Office 1965), 645.

7. It would give government officials vast powers to harass all of our citizens in their exercise of their right to free speech.[107]

Truman's principal objections to the McCarran act fell into three categories: those that would directly aid possible subversives, those that would obstruct the United States in maintaining internal security, and those that infringe upon the civil rights of American citizens.

President Truman was justifiably concerned about certain aspects of the McCarran act that seemed to aid, rather than hinder, possible subversives. Section 5 of Title I authorized the Secretary of Defense to designate a list of defense and industrial facilities considered essential to the security of the United States and to post this list in the Federal Register. The management of each facility on this list would furthermore be required to post conspicuously a bulletin notifying all employees of the designation of the facility as essential to national security.[108] This section was originally added in an attempt to prevent industrial and military espionage, but was changed after concerns of its applicability towards foreign diplomats and military officers of friendly nations.[109]

President Truman's primary concern about the registration provisions, in addition to the time to be spent by the FBI and Department of Justice implementing them, was his belief that they were ill-conceived and virtually impossible to implement. Furthermore, Truman felt that the Department of Justice to do twice the work and that the provisions "would result in obtaining no information about communists that the FBI and our other security agencies do not already

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107 Ibid., 645-46.

108 *Internal Security Act*. Title I, Sec. 5 (b). 64 Stat. 987 (1950).

109 In the debate over this section, Senator Kefauver of Tennessee went so far as to suggest that, under the original wording of section 5, any non-American member of NATO would be prohibited from viewing classified materials. *Cong. Rec*., 81st Cong. 2nd Sess., 11: 14243.

have."[110] The registration provisions, based upon the lists already compiled by the Attorney General and FBI, would be superfluous.

In addition to taking time and energy away from the Department of Justice and other security agencies, President Truman felt that the registration provisions would diminish the intelligence-gathering capability of the United States. In investigating the Communist Party, the FBI relied on informants within the party for information to build its case. These informants, who were often paid for their information, provided key testimony in Grand Jury investigations. One of the more famous examples is that of Elizabeth Bentley, whose testimony helped bring Whittaker Chambers' activities to light and, through him, revealed Chambers and Alger Hiss as members of a Communist underground operating within Washington D.C. and the federal government.[111] The registration provisions would make it more difficult for the FBI to convince former members of Communist-Action or Communist-Front organizations to come forward and testify, as they would be subject to every penalty under the registration provisions.

More importantly, Truman felt that the McCarran Act threatened the civil liberties of American citizens. Truman insisted that the provisions of the McCarran Act, "instead of striking blows at communism, […] would strike blows at our own liberties and at our position in the forefront of those working for freedom in the world."[112] Truman feared that the McCarran Act would place the Department of Justice in the role of the Gestapo, ensuring that citizens were thinking and advocating "right" thoughts and ideas. To illustrate his point, Truman used the section of the McCarran Act (Title I, section 22) that amended the Deportation act of 1918:

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110 Harry S. Truman, "Truman Veto of Internal Security Bill. September 22, 1950," *Public Papers of the President: Harry S. Truman, 1950*, 646.

111 Tanenhaus, *Whittaker Chambers*, 210-11. Alistaire Cooke, *A Generation on Trial* (New York: Alfred A. Knopf, 1950), 49-54.

112 Harry S. Truman, "Truman Veto of Internal Security Bill. September 22, 1950." *Public Papers of the President: Harry S. Truman, 1950*, 648.

> Section 22 is so contrary to our national interests that it would actually put the government into the business of thought control by requiring the deportation of any alien who distributes or publishes, or who is affiliated with an organization which distributes or publishes, any written or printed matter advocating (or merely expressing belief in) the economic and governmental doctrines of any form of totalitarianism. This provision does not require an evil intent or purpose on the part of the alien.[113]

This section would set a precedent for anti-Communism to make inroads into higher education, with Senators such as Joseph McCarthy and Pat McCarran calling for, and at times succeeding with, the removal of "red" or "pinko" professors who's only crime might be refusing to take a loyalty test.

Although President Truman made a forceful case against the McCarran Act in his veto message to Congress, Congress overrode his veto by a large margin in both the House and the Senate. The McCarran Act became law on September 23, 1950. It was now up to the Judiciary to evaluate the McCarran Act.

[113] Ibid., 652.

Chapter 3
The Courts Limit the McCarran Act

As the McCarran Act was being debated in Congress, the Supreme Court was going through a period of transition of sorts with respect to its stand on Civil Liberties. The Court was moving from a court dominated by Roosevelt appointees, one more sympathetic and deferential to the government, towards the Warren court of the mid-1950s to mid-1960s, a more libertarian-oriented court.[114] The decisions on anti-Communist legislation made by the Supreme Court during this period create and shape the framework of future internal security legislation. It is during this transitional period, under Chief Justice Fred Vinson, that the first appeal of anti-Communist legislation reached the Supreme Court. The Court's decision shaped the debate of internal security and its relationship to civil liberties.

In 1951, *Dennis v. United States* came before the Supreme Court. Appealing the Smith Act convictions of the CPUSA leadership in 1949, the petitioners in *Dennis* argued that section 2 and 3 of the Smith Act – the sections making it illegal to advocate or organize groups that advocate the overthrow the government of the United States and the conspiracy statute – violated the constitutional rights of the leadership of the CPUSA under the First Amendment. The petitioners argued that these sections of the Smith Act prevented them from exercising their Constitutional right to free speech and that the Marxist-Leninist documents presented at their trial were misinterpreted; they argued that it was a change in the government and the political and economic structure of government that they advocated, not its complete overthrow. This left the Supreme Court to decide whether or not the First Amendment protected the ideas advocated

[114] "Conservative" and "libertarian" are here used in the context of civil liberties. A "conservative" court leans more towards the government over the individual, whereas a "libertarian" court leans more towards the individual. In 1950 and 1951, the mood of the court was slanted towards the notion of Judicial Restraint vis-à-vis the legislative and executive branches of government. Although Vinson was chief Justice during this period, Justices Felix Frankfurter and Robert Jackson, both advocates of Judicial Restraint, were the dominant personalities.

by the CPUSA or if these ideas, using the test developed by Justice Holmes in *Schenck v. United States* (1919), presented a "clear and present danger" to the security of the United States.

In a contentious decision, the Supreme Court ruled 6-2 to affirm the Smith Act convictions.[115] Chief Justice Vinson, writing the majority opinion for himself, and Justices Stanley Reed, Harold Burton, and Sherman Minton, based the decision, in part, on an interpretation of the "clear and present danger" test used by Judge Learned Hand, the chief judge of the appellate court that heard the original *Dennis* case. The Vinson-Hand interpretation of "clear and present danger" focused more on the intent of the speech and the "gravity," or proximity, of the danger presented by the speech. Vinson followed up Judge Hand's interpretation in his majority opinion:

> In each case [courts] must ask whether the gravity of the `evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[116]

Chief Justice Vinson noted that the government had a responsibility for self-defense and could not "wait until the putsch is about to be executed, the plans have been laid and the signal is awaited" before acting in its own self-interest.[117] Furthermore, Chief Justice Vinson argued, any attempt to overthrow the Government by force, irregardless of the probability of success, presented a sufficient evil for Congress to prevent.

The context of the speech now became part of the "clear and present danger" test. With respect to the *Dennis* case, this meant that the nature of the organization, in this case the CPUSA, mattered almost as much as the speech used. While, as Chief Justice Vinson notes, the CPUSA did not actively attempt to overthrow the government by force between 1945 and 1948 (i.e.

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[115] Although a 6:2 majority ruled for the government, a total of five separate opinions (3 affirming, 2 dissenting) constituted the Court's decision. Justice Tom Clark, Truman's Attorney General at the time of the original case, recused himself from the decision.

[116] Marvin Schick, *Learned Hand's Court* (Baltimore: Johns Hopkins Press, 1970), 180.

[117] Dennis v. United States, 341 US 494 (1951).

between the reformation of the CPUSA and its conviction under the Smith Act), the overthrow of the government was its ultimate goal. Chief Justice Vinson argued that the CPUSA existed within a particular context that was not compatible to the internal security of the United States to affirm the conviction of the CPUSA under the Smith Act. The majority opinion noted that the CPUSA was

> a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.[118]

The environment of the early cold-war period, according the Chief Justice Vinson, provided the context through which the ideas advocated by the Communist leadership were to be viewed. In this context, both the constitutionality of sections 2 and 3 of the Smith Act and the right of Congress to legislate its internal security were affirmed because of the danger posed by ideas advocated by the CPUSA.

Both Justice Felix Frankfurter and Justice Robert Jackson wrote concurring opinions, Justice Frankfurter affirmed the conviction of the Communist leadership not based on the "clear and present danger" test, but rather on the role of the judiciary vis-à-vis the legislature. Justice Frankfurter argued that it was not the job of the judiciary to decide what constituted a danger to the government of the United States, but rather that duty fell upon the legislative branch. Justice Frankfurter argued that

> Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.[119]

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[118] Dennis v. United States. (1951).

[119] Ibid. This "volume of legislation" included both the Smith Act and the McCarran Act.

This argument fit with Justice Frankfurter's belief in Judicial Restraint. Congress should be allowed to determine what poses a danger to it rather than the judiciary interpreting what constitutes a danger. This, however, did not mean that Justice Frankfurter felt that Congress had a carte blanche. For Justice Frankfurter, Congressional

> Power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations [….] Our Constitution has no provision lifting restrictions upon governmental authority during periods of emergence, although the scope of restriction may depend on the circumstances in which it is invoked.
>
> The First Amendment is such a restriction. It exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are.[120]

For Justice Frankfurter, the inherent right of Congress to defend itself and the rights given to citizens under the Constitution must achieve some form of balance.

Justice Jackson's concurring opinion differed from that of both the Majority and Justice Frankfurter's. Jackson wanted to disregard the "clear and present danger" test. In Jackson's view, the "clear and present danger" test was not applicable to the *Dennis* case, nor to any other Communist cases, because the test simply was not applicable to the stratagems of Communist conspiracy. While keeping the "clear and present danger" test "for the application as a 'rule of reason' in the kind of case for which it was devised," Justice Jackson argued that the universal applicability of the test would extend to the Communists a host of immunities and would end with holding the "government captive in a judge-made verbal trap."[121]

Justice Jackson emphasized the conspiratorial nature of the Communist movement. Noting that the Court had previously dispensed with the "clear and present danger" test with respect to conspiracies and that the court had also made clear that the conspiracy to commit a

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120 Dennis v. United States. (1951).

121 Ibid.

crime is a criminal act in and of itself, Justice Jackson argued that it would be a logical fallacy to use the "clear and present danger" test in this, or any other Communist, case;[122] in doing so, the Judiciary would "compel the Government to prove two crimes [conspiracy and intent] in order to convict for one."[123] Justice Jackson argued that conspiracy statutes have been the primary weapons used against organizations and there is no constitutional authority to remove them from the government's arsenal.

While the opinions of Justice Frankfurter and Justice Jackson are important in the evolution of the use of the "clear and present danger" test, the Majority opinion's focus on the "gravity" and proximity of the danger in *Dennis* would shape the view of Communism throughout most of the 1950s. This interpretation allowed the McCarran Act to register Communist-Action and Communist-Front organizations.

The McCarran Act first came before the Supreme Court in 1952 in *Carlson v. Landon*. Section 23 of the McCarran Act amended the Immigration Act of 1917 to allow for the deportation of aliens based upon their undesirability as members of the CPUSA. In this case, the Attorney General had warrants served to five alien members of the CPUSA and detained them without bail until such a time they could be deported. Each alien requested a writ of Habeas Corpus, alleging that they were being held without due process and that the legislation under which they were charged was unconstitutional. The Attorney General produced evidence that supplied probable cause for concern of internal security and the aliens were remanded back to custody pending deportation. *Carlson*'s importance to the McCarran Act is that if it were decided that the Attorney General could not hold possibly dangerous aliens pending the removal of some danger, then precedents would be created against Title II of the McCarran Act (the

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122 For conspiracy as a separate crime, see: American Tobacco Co. v. United States, 328 U.S. 781 (1946).

123 Dennis v. United States (1951).

detention statute). In a 5-4 decision, the Court agreed with the government, upholding section 23 of the McCarran Act, and allowing the government to hold the petitioners without bail pending deportation.

Writing the Majority opinion, Justice Stanley Reed argued primarily along the lines of the separation of power among the branches of the government. Justice Reed noted that "the power to expel aliens, being essentially a power of the political branches, […] may be exercised entirely through executive officers."[124] Just as aliens who do become citizens of the United States are allowed in the country by executive and legislative branches, they can also be deported based on the sovereign right of Congress to determine which non-citizens reside in the country. With regards to the charge that the Attorney General abused his power and denied due process to the petitioners, Justice Reed argued that "deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution."[125] In matters of deportation, both the Executive and Judicial branches rely on the discretion of the Attorney General. This does not mean, however, that the discretion of the Attorney General cannot be questioned or even overturned by the Executive and Judicial branches; in clear cases of abuse, both the Executive and Judicial branches have an obligation to overturn a decision of the Attorney General.

Justice Reed argued the case for detention in similar terms to Justice Jackson's concurring opinion in *Dennis*. The Majority opinion argued that Congress' understanding of the Communism and the strategy of the CPUSA, coupled with the active participation of the petitioners, constituted adequate reason for detention and deportation. Furthermore, "it cannot be expected that the government should be required in addition to show specific acts of sabotage

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124 Carlson v. Landon, 342 U.S. 524 (1952).

125 Ibid.

or incitement to subversive action."[126] Thus, with Communism and the CPUSA seen in conspiratorial terms, knowingly participating in the party by resident aliens constituted probable and reasonable cause for deportation.

By 1956, the Supreme Court shifted from a conservative viewpoint to a more libertarian one. Earl Warren and William Brennan replaced Conservatives such as Chief Justice Vinson, who died in 1953, and Justice Robert Jackson, who died in 1954. The effect on this shift on internal security debate was subtle in the late 1950s, but would be more apparent by the early 1960s. In 1956, the Supreme Court decided in *Pennsylvania v. Nelson*, a case that would determine the preeminence of the federal government over the state with regards to internal security.

The main concern of *Pennsylvania v. Nelson* was the question of jurisdiction with regards to internal security. A member of the CPUSA, Steve Nelson, was convicted of violating the Pennsylvania Sedition Act and sentenced to twenty years imprisonment. Nelson appealed his case to the Pennsylvania Supreme Court where he was acquitted on the grounds that, while there was evidence against him advocating sedition against the United States, none of the evidence against him pointed to his committing sedition or even uttering one malicious word about the state of Pennsylvania. This meant that Nelson could not be charged under any federal statutes because of the Constitutional protection against double jeopardy. While unable to decide for or against Mr. Nelson, the Supreme Court was able to decide the jurisdiction of internal security between the federal government and the states.

Chief Justice Earl Warren, writing the 6-3 Majority opinion, argued that the federal legislation between 1940 and 1954, including, but not limited to, the Smith Act, McCarran Act, and the Communist Control Act of 1954, showed the determination of Congress to control

[126] Carlson v. Landon, 342 U.S. 524 (1952).

internal security. The McCarran Act, in particular, showed Congress' opposition to Communists within the United States. Chief Justice Warren further argued that sedition, whether against local, state, or federal governments, was a federal crime and therefore falls under the federal obligation to provide for a common defense. Chief Justice Warren notes that the federal government

> appropriated vast sums, not only for our own protection, but also to strengthen freedom throughout the world. It has charged the Federal Bureau of Investigation and the Central Intelligence Agency with responsibility for intelligence concerning Communist seditious activities against our government, and has denominated such activities as part of a world conspiracy.[127]

The fact that Congress had designated sedition, particularly Communist sedition, as part of a worldwide conspiracy against the United States shifted the burden of prosecution from the individual states to the Federal government. Warren felt that by placing sedition under federal jurisdiction a uniformity of law would be imposed with respect to sedition rather than the hodgepodge of over forty different state and federal laws.[128] Uniformity of law would prevent conflicting decisions from the various levels of state and federal courts.

Since 1951, *Dennis* shaped the debate over internal security. In 1957, the debate shifted again with the Supreme Court's decision in *Yates v. United States*. *Yates* was another Smith Act trial, in this case, involving fourteen lower ranking members from California. In a 6-1 decision, the Supreme Court decided for the petitioners, with five direct acquittals and nine remanded for retrial, effectively moving the Supreme Court away from the government and its position on Communism. Justice John Marshall Harlan II wrote the majority decision.

As in *Dennis*, the main question raised in *Yates* was the difference between "advocacy of

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127 Pennsylvania v. Nelson, 350 U.S. 497 (1956).

128 By 1956, 43 states, the territory of Alaska, the territory of Hawaii, and the federal government all had some form of anti-sedition or anti-Communist laws.

abstract doctrine and advocacy directed at promoting unlawful action."[129] The crux of the argument in *Yates* was the instructions given to the jury prior to deliberation. In the original trial, the jury, with regards to advocacy, was instructed:

> Any advocacy or teaching which does not include the urging of force and violence as the means of overthrowing and destroying the Government of the United States is not within the issue of the indictment here and can constitute no basis for any finding against the defendants.
>
> The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.[130]

Justice Harlan argued that these instructions to the jury left no distinction between the advocacy of abstract notions and the incitement to action. Both lower courts, according to Harlan, compressed the distinction and argued that the mere advocacy of a doctrine was criminal, regardless of its intent.

As with *Dennis*, "intent" versus "action" formed a large portion of the argument in *Yates*. Whereas in *Dennis*, the Court decided that advocacy with intent for an illegal act was prohibited, the Majority opinion in *Yates* argued that "the advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching is engaged in with evil intent" was not prohibited.[131] Under the *Yates* decision, "intent" was now protected under Free Speech in the First Amendment, provided that no actions were taken towards the end being advocated. The key difference between *Dennis* and *Yates* became the "gravity," or proximity, of the danger posed. This "retreat from *Dennis*," as

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129 Yates v. United States, 345 U.S. 298 (1957).
130 Ibid.
131 Ibid.

some have called *Yates*, was due in part to the changing political and international environment. On the domestic front, in 1954, Senator Joseph McCarthy had been censured by the Senate and lost most of his political clout; that same year, Senator Pat McCarran died, leaving McCarthyism without its dynamic legislative force; and, by 1957, the issue of race, rather than that of anti-Communism, had become the major national issue. The Cold War was relatively stabilized: fighting in Korea had been over for four years; Nikita Khrushchev was less antagonistic towards the West than Stalin; and the general fear of global Communism appeared to be on the decline. Overall, by 1957, Communists in the United States seemed to be far less likely to overthrow the government of the United States than they had in 1950. This shift in position between *Dennis* and *Yates* also had to do with the changing nature of the Supreme Court.[132] Along with Justices Hugo Black and William O. Douglas, the "libertarian" wing of the Supreme Court now included Chief Justice Earl Warren, Justice William Brennan, and, for a brief time, Justice Harlan.

Based upon the reasoning put forth by *Yates*, the Supreme Court further "retreated" from the *Dennis* decision in 1961 when it heard arguments for *Noto v. United States*. John Noto was convicted under the Smith Act for being a member of an organization that advocated the violent overthrow of the Government of the United States. In delivering the Majority opinion, Justice Harlan once again argued for a difference between the advocacy of abstract doctrine and incitement to action. Because the charge brought against Noto was membership in a party that advocated the violent overthrow of the Government, the *Noto* decision, unlike *Yates*, focused more on the tenets of the Communist Party than those being professed by its membership. Harlan argued that in order for advocacy to be pushed outside the realm of abstract doctrine, there must be

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[132] G. Theodore Mitau, *Decade of Decision: The Supreme Court and the Constitutional Revolution, 1954-1964* (New York: Charles Scribner's Sons, 1967), 29.

> some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently persuasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching and to justify the inference that such a call to violence may fairly be imputed to the party as a whole, and not merely to some narrow segment of it.[133]

In essence, Harlan used the same interpretation of the "clear and present danger" test that Chief Justice Vinson and others used in *Dennis*. In both *Yates* and *Noto*, the Warren court found that any danger inherent in the advocacy of the Communist doctrine is remote enough not to pose a danger to the government; the danger may be clear, but it is by no means present.

Also in 1961, the registration legislation in the McCarran Act came before the Supreme Court. Justice Felix Frankfurter wrote the majority decision for *Communist Party of the United States v. Subversive Activities Control Board*. The question at hand in the contentious case was whether the registration legislation in the McCarran Act constituted a bill of attainder against the Communist Party.

The petitioners made two main arguments against the McCarran act: first, that the SACB did not prove that the CPUSA was a Communist-Action organization.[134] Secondly, that most, if not all, of the McCarran Act was unconstitutional as it violated both the First and Fifth Amendment rights of its membership, and thus, was a bill of attainder against the Communist Party. Justice Frankfurter flatly rejected the first argument, dismissing the CPUSA suggestion that "substantial" control, direction, or domination of the organization meant purely that there was enforceable and coercive element in the relationship between the CPUSA and the worldwide Communist organization and that any lesser relationship, such as voluntary compliance to doctrine, did not equal control. Basing the rebuttal on the doctrine of judicial restraint,

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[133] Noto v. United States, 367 U.S. 290 (1961).

[134] The CPUSA argued that the Board misinterpreted the "control" and "objective" portions of the McCarran Act registration statute. Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1 (1961).

Frankfurter used the will on Congress, as evidenced by the Congressional debate on the McCarran Act in both the House and Senate, and the extensive documentation presented by the Government during both the initial SACB hearing and the appellate hearing to hold that both the SACB and the appellate court did not err in their interpretation that, based on the actions of the organization both before and after the enactment of the McCarran Act, the CPUSA was substantially dominated and controlled by the worldwide Communist organization.

With regards to the "objective" portion of the McCarran Act, whether the organization "operates primarily to advance the objectives of such world Communist movement," Justice Frankfurter followed the precedence created with the rulings of *Yates* and *Noto*.[135] Just as *Yates* and *Noto* found a difference between the advocacy of abstract doctrine and the incitement to action, so, too, did Justice Frankfurter argue in *Communist Party* that "an organization may be found to operate to advance objectives so defined although it does not incite the present use of force."[136] Although the doctrines advocated by the CPUSA may be constitutionally protected under the First Amendment – they contain no immediate incitement to action – the same doctrines do meet the criteria set forth by the McCarran Act in determining a Communist-Action organization.

The Majority opinion also dismissed the CPUSA's argument that the registration constituted a bill of attainder. Justice Frankfurter noted that the registration legislation focused not on "specified organizations but to described activities in which an organization may or may not engage."[137] It is the past and present activity of individuals and organizations that determine whether or not they are required to register. Furthermore, the McCarran act did not punish individuals for registering with the government, but rather for failing to register if required to do

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135 *Internal Security Act of 1950*. Title I, Sec. 3 (3 [a]). 64 Stat. 987 (1950).

136 Communist Party of the United States v. Subversive Activities Control Board (1961).

137 Ibid.

so. Justice Frankfurter avoided questions about the constitutionality of the McCarran Act by arguing that such questions were being prematurely raised in this litigation. Frankfurter argued that the "potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated."[138]

Although the registration statute of the McCarran Act was upheld in *Communist Party*, the CPUSA failed to register voluntarily with the SACB and, thus, the Attorney General ordered the party to register. Again, refusing to register, the registration statute of McCarran Act came before the Supreme Court in 1965 in the case of *Albertson v. SACB*. With Justice Frankfurter's retirement in 1962, the Supreme Court could address the constitutional issues so carefully avoided by Justice Frankfurter in the *Communist Party* decision. The crux of the argument in *Albertson* was that the registration portion of the McCarran Act infringed upon the members Fifth Amendment rights against self-incrimination.

Writing the Majority opinion for a unanimous court, Justice Brennan argued that the members registering under the McCarran Act would be open for prosecution as a member of the CPUSA under both the Smith Act and the McCarran Act. Such registration would be tantamount to an admission of guilt under those two acts, and, thus, members are able to invoke their Fifth Amendment rights when faced with an order to register. Justice Brennan likened the registration statute to similar cases involving the Fifth Amendment and the court. [139] In particular, Justice Brennan argued that the rights guaranteed under the Fifth Amendment for individuals on the witness stand could also apply to those required to register, noting that if admission "cannot be compelled in oral testimony, [the court does] not see how compulsion in writing makes a

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[138] Communist Party of the United States v. Subversive Activities Control Board (1961).

[139] In particular, Justice Brennan noted the Fifth Amendment protections created through the precedence of Blau v. United States, 340 U.S. 332 (1951), Quinn v. United States, 349 U.S. 155 (1955), and Scales v. United States, 367 U.S. 203 (1961).

difference for constitutional purposes."[140] The Majority opinion in *Albertson*, by extending constitutional protection to individuals required to register with the government, essentially marks the end of anti-Communist legislation and attempts to register and legislate the Communist Party.

As the Supreme Court evolved to a more libertarian court in the mid-1960s, limits were placed on the government in the field of internal security, particularly with increased First and Fifth Amendment protection of citizens. This prevented the government from creating laws that limited Free Speech and Free association and forced Congress to emphasize due process when crafting new legislation. These limits are evident in the reaction to the next crisis of internal security: the war on terror.

[140] Albertson v. SACB, 382 U.S. 70 (1965)

Chapter 4:
September 11, 2001, and the Future of Internal Security

The issue of domestic anti-Communism during the Cold War, and thus, the issue of internal security, lost its saliency in the forty years following the McCarthy era. Other domestic concerns took precedence and internal security became tied to foreign, rather than domestic, policy. The nation, the reasoning went, was safe at home when it was secure abroad. September 11, 2001, changed this relationship. While the terrorist attacks marked a watershed in American foreign policy, its influence on domestic internal security raised similar issues to those dealt with during the McCarthy period. Once again, the nation had to deal with an internal security threat while maintaining the civil liberties of its citizens. During this most recent internal security crisis, however, the public has placed greater scrutiny and emphasis on maintaining civil liberties while securing the homeland.

The politics that produced the McCarran Act revolved around fear mongering and the desire to expose and register Communists within the government in order to protect society.[141] With the increased threat of domestic terrorism in the 21st century, the United States is entering a similar situation; with politics based not around the desire to expose and register threats, but rather politics based on surveillance and security. The politics of surveillance are most evident in the debates over the USA Patriot Act and the NSA wiretapping controversy.

In the aftermath of the September 11th attack, President George W. Bush asked Congress for legislation dealing with perceived deficiencies in areas relating to internal security. On September 24, 2001, Attorney General John Ashcroft appeared before the House Committee on the Judiciary and testified to what changes he, and the administration, believed were necessary to

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[141] Heale, *McCarthy's Americans*, 55-56, 75-78.

better protect the homeland, with an emphasis on means and methods of surveillance.[142] Within a month of Attorney General Ashcroft's testimony before the House Judiciary Committee, Congress produced an omnibus bill enhancing the federal government's intelligence-gathering and counter-terrorist capabilities. The USA Patriot Act was an combination of the Senate's Uniting and Strengthening America (USA) Act and the Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act proposed by the House. While containing provisions dealing with immigration and with other aspects of counter-terrorism, such as tightening money-laundering laws, the prime emphasis of the USA Patriot Act was the surveillance and early detection of terrorists and others who threatened the internal security of the United States.

The USA Patriot Act addressed three main issues with regards to surveillance. First, it gave intelligence services the right to intercept electronic (email, cell phones, etc.) communications as they pertain to possible terrorism and computer fraud. Secondly, the USA Patriot Act provided the federal government with a broader scope to address terrorism under the Foreign Intelligence Surveillance Act (FISA).[143] Finally, the USA Patriot Act expanded the government's surveillance ability with respect to search warrants, particularly expanding the use of so-called "sneak-and-peek" search warrants. These three issues comprised the bulk of surveillance legislation within the USA Patriot Act.

One of the major concerns of the federal government when it approached Congress about increased surveillance capability was bringing the surveillance capability of the FBI and CIA

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142 Congress, House, Committee on the Judiciary, *Hearing on Administration's Draft "Anti-Terrorism Act of 2001"* 107th Cong., 1st Sess., September 24, 2001. http://commdocs.house.gov/committees/judiciary/hju75288.000/hju75288_0f.htm

143 Originally enacted by Congress in 1978 in response to concerns over domestic wiretapping, FISA outlined the boundaries of the National Security Agency with respect to domestic surveillance. James Bamford, *Body of Secrets: Anatomy of the Ultra-Secret National Security Agency* (New York: Anchor Books, 2002), 440.

into the 21st century. Congress complied by granting the federal government "authority to intercept wire, oral, and electronic communications relating to terrorism."[144] This gave the FBI and the CIA the ability to intercept email, public internet access, cell phone conversations, voice-mail recordings, and other forms of electronic communication pursuant to terrorism investigations. This authority extended as far as the ability of the law enforcement agencies to obtain warrants of probable cause for said communication.

This enhanced ability for the FBI and CIA to intercept electronic communications pushed Congress to use the USA Patriot Act to expand the FISA legislation to accommodate the new authority of the intelligence agencies. The original FISA legislation "outlawed wholesale, warrantless acquisition of raw telegrams" and "the arbitrary compilation of watch lists containing the names of Americans."[145] In order for the NSA, FBI, or CIA to perform surveillance on an American citizen, permanent resident alien, or alien within the United States, the agencies had to go before a specially designated FISA court and show reasonable suspicion, rather than probable cause, in order to obtain a warrant. The USA Patriot Act expanded the duration of under which the intelligence agencies could perform surveillance of "non-United States persons" from ninety to up to one hundred twenty days and expanded the time frame of search warrants against these same persons from forty-five to ninety days, with extensions for both available for up to one year. This extra time allowed the intelligence agencies to investigate more thoroughly possible terrorists and other subversive aliens without time restraints deemed too restrictive. Furthermore, FISA was amended to expand its the scope of surveillance. The application process of FISA was changed from the purpose of surveillance to gather foreign intelligence to a more broadly construed "significant purpose." While this may seem a small change, the

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144 *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act)*. Title II, Section 201. 115 Stat. 272. (2001).

145 Bamford., *Body of Secrets*, 440.

definition of "foreign intelligence information" allowed for an expanded use of FISA in domestic surveillance. FISA defined "foreign intelligence information" as

> Information with respect to a foreign power or foreign territory that relates to, and if concerning an United States person is necessary to –
> (a) the national defence or security of the United States; or
> (b) the conduct of the foreign affairs of the United States[146]

The "significant purpose" of gathering foreign intelligence information, coupled with the already broad definition of foreign intelligence information, expanded the scope of FISA investigations further into domestic surveillance. This expanded scope allowed FISA to investigate beyond the limitation of "agent of a foreign power" to allow for domestic surveillance of those who meet the requirement of a FISA warrant: reasonable suspicion of actions against the national defence or security of the United States.

The other major change to FISA was the expanded authority for the CIA and FBI to use Pen Registers and Trap and Trace devices with regards to electronic communications. Pen Registers are defined by the government as any "device which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted."[147] Pen Registers are limited in that they cannot include the contents of the communication, but rather trace the locations of other recipients of this communication. Trap and Trace devices are similar to Pen Registers in that they are designed to trace the location of other recipients of communication, but these devices capture, rather than record, the information. Both these devices are used to determine who contacted the particular device and who the user of the device contacts. The USA Patriot Act

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146 *Foreign Intelligence Surveillance Act.* 50 *USC* 1801 (e) (1978).

147 *Pen Registers and Trap and Trace Devices.* 18 *USC* 3127 (3).

expanded both these definitions to include the routing agencies, such as IP providers, to allow the FBI and CIA to track and trace electronic communication such as email and cell phones.[148]

The USA Patriot Act expanded search warrants in two important ways. First, the USA Patriot act exerted federal jurisdiction over the crime of domestic and international terrorism. Only "a Federal Magistrate judge in any district in which activities related to the terrorism may have occurred" can issue a search warrant in a terrorism-related investigation.[149] This ensures that terrorism investigations remain solely within the realm of the Federal government. Secondly, and more importantly, the USA Patriot Act amended the U.S. code to allow for so-called "sneak-and-peek" search warrants. Normally, the owners of the premises are provided notification and served the warrant at the time of the search or a copy of the warrant is left with a receipt of all property seized during the search. The USA Patriot Act allowed for a delay in serving the warrant, provided:

> (1) The court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result […];
> (2) The warrant prohibits the seizure of any tangible property, any wire, or electronic communication […] or, except as expressly provided in Chapter 121, any stored wire or electronic information, except where the court finds reasonable necessity for the seizure; and
> (3) The warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.[150]

This "sneak-and-peak" amendment allows for the investigating party to delay in serving the search warrant, allowing one to execute the search of the premises or property without notification, provided the investigating party has good cause. This includes electronic information such as that provided by Pen Registers and trap and trace devices.

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148 *USA PATRIOT Act.* Title II, Section 214. 115 Stat. 272. (2001).
149 Ibid., Title II, Section 219.
150 Ibid., Title II, Section 213.

Although Congress was under pressure from both the administration and the general public to pass the USA Patriot Act – in essence, to "do" something about internal security – vigourous debate occurred over the USA Patriot Act. Senator Patrick Leahy, Democrat of Vermont, while not arguing expressly against the Act, was leery of its Constitutionality, argued for "proposed checks on Government powers – checks that were not contained in the Attorney General's original proposal" to Congress.[151] Senator Leahy argued for stricter limits to "sneak-and-peak" warrants than requested by the government, suggesting the investigating party provide good cause for delaying execution of the warrant to a court rather than the government's plan of legislation that "broadly authorized officers not only to conduct surreptitious searches, but to also to secretly seize any type of property without any additional showing of necessity."[152] Democratic Senators Barbara Feinstein of California and John Edwards of North Carolina, as well as Republican Senator Arlen Specter of Pennsylvania, were concerned about the government's request for an uninhibited expansion of FISA into domestic surveillance through a broad interpretation of FISA's mandate to investigate "agents of a foreign power." These three Senators pushed for the "significant purpose" clause as a compromise between the government request for FISA expansion into domestic surveillance and the protection of civil liberties. Concern over maintaining a balance between expanded governmental power versus civil liberties is evident in the inclusion of "sunset" clauses for certain provisions of the USA Patriot act, including the surveillance provisions. These "sunset" clauses require the renewal of certain provisions in the USA Patriot Act after a period of three years. This suggests that the concern over civil liberties was such that Congress viewed portions of the USA Patriot act, such as the

151 *Cong. Rec.* 107th Cong. 1st Sess. Volume 147, Number 137, 10548.
152 Ibid., 10557.

expanded duration of FISA warrants, as temporary, or "emergency" measures, and not permanent changes.

Under the FISA legislation, the intelligence and security agencies of the federal government are given the ability to place foreign aliens under surveillance The FISA legislation also gives these agencies the ability to place citizens of the United States under surveillance provided that reasonable suspicion is provided to a secret court established by the legislation and a warrant is obtained. On December 16, 2005, the *New York Times* published an article on domestic surveillance without FISA approved warrants. These "warrantless taps" grew out of a Presidential order to the NSA to monitor "the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants."[153]

The administration argued that the authority to authorize warrantless wiretaps rested in the assertion that 'the president has broad powers to order such searches" and these powers are derived, in part, from "the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups."[154] Furthermore, Attorney General Alberto Gonzalez testified before the Senate Judiciary committee on February 6, 2006, and, in a prepared statement, argued:

> The terrorist surveillance program is firmly grounded in the President's constitutional authorities. The Constitution charges the President with the primary responsibility for protecting the safety of all Americans, and the Constitution gives the President the authority necessary to fulfill this solemn duty. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863). It has long been recognized that the President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States.

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153 James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers without Courts: A Secret Order to Ease Domestic Monitoring," *New York Times*, December 16, 2005, A1, A22.

154 Ibid., A22.

> Presidents have repeatedly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military, and the federal courts have consistently upheld this longstanding practice. See In re Sealed Case, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).[155]

Attorney General Gonzalez and the administration claim that the executive branch has the Constitutional authority and, indeed, is required to conduct warrantless surveillance – provided it is "aimed at detecting and preventing armed attacks on the United States."[156] This raises several questions concerning the politics of surveillance and the balance of power within the government.

The primary question raised is the issue of separation of powers between the Executive and Legislative branches. The Federal government approached Congress shortly after September 11, 2001, and requested changes to FISA in order to gather intelligence relating to the security of the United States in a more timely manner. Congress complied and amended the FISA legislation in the USA Patriot Act. If the President and the administration believed that the power to authorize warrantless wiretaps was within the President's Constitutional authority, why approach Congress and request changes to FISA at the same time the administration was requesting other internal security changes? These actions suggest that the administration went forward with the warrantless wiretapping program prior to the passage of the USA Patriot Act on the assumption that the requested changes by the administration would simply be rubberstamped by Congress in the name of National Security. Why else would President Bush confront Congress on what the administration essentially considered a non-issue? Part of the problem faced by the administration is that Congress placed the sole power of electronic surveillance in the FISA legislation:

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[155] Congress, Senate, Committee of the Judiciary, *Hearing on Wartime Executive Power and the NSA's Surveillance Authority*, 109th Cong. 2nd Sess., February 6, 2006. http://judiciary.senate.gov/testimony.cfm?id=1727&wit_id=3936

[156] Ibid.

> The Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.[157]

This means that, although Congress authorized the President to use any means necessary to combat terrorism in the joint resolution authorizing the use of military force in combating terrorism, the President was still forced to use the FISA courts for any domestic surveillance regardless of claims of Constitutional authority.[158] As long as FISA remains on the books, and thus Constitutional, the President should be forced to use the FISA courts in the course of domestic surveillance. This clash between the President and Congress over control of domestic surveillance and internal security will reflect Congress' future power vis-à-vis the Presidency.

This raises the question of the protection of civil liberties, particularly with respect to privacy issues. If the President succeeds in arguing the Constitutional authority of domestic surveillance by the Executive branch, this would leave no effective check on these powers outside of the President himself. Congress would have no authority to place limits on domestic surveillance outside of a Constitutional amendment, and, with the current realignment of the Supreme Court under Chief Justice John Roberts, it is too early to tell how the Judiciary would react to a challenge of this new authority.

There is one uniting issue between the McCarthy era politics and the politics of surveillance in a post-September 11th world: The issue of civil liberties versus national security. The striking difference is where the emphasis is placed. During the McCarthy era, national security gained precedence; in the post-September 11th world, civil liberties remain equal to, if not more important than, national security. The shift towards greater scrutiny of civil liberties, in part, can be traced back to the early politics of the McCarthy era. The McCarthy era has become

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157 *Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited.* 18 *USC* 2511 (2) (f).

158 Congress, Senate, *Authorization for Use of Military Force,* 107th Cong., 1st Sess., S. J. Res 23.

demonized in the public mind as a period of Communist witch hunts; a period where civil liberties were ignored thanks to the requirements of internal security. This public perception of McCarthyism as a time of recklessness, gives civil liberties greater support today.

In addition to McCarthy era politics, the legislative actions of the McCarthy era and the subsequent judicial reactions placed further emphasis on civil liberties. In particular, the McCarran Act elevated concerns over issues such as freedom of speech, freedom of assembly and association, and due process. At this level, the McCarran Act helped to shape the politics of surveillance found within the USA Patriot Act. Supreme Court decisions limiting the McCarran Act and other anti-Communist legislation increased Constitutional protections to make it more difficult for Congress to proscribe dissent against the government. In striking down the registration legislation of the McCarran Act, the Supreme Court attempted to protect citizens from charges of guilt by association. The failure of anti-Communism legislation also forced Congress to place more emphasis on due process when considering internal security legislation. In considering the amendments to FISA located in the USA Patriot Act, both Democratic Senator Edwards and Republican Senator Specter emphasized due process protections within the USA Patriot Act.[159] By ensuring the protection of due process, Congress protects the legislation from attack on Constitutional grounds, as well as safeguarding any information gathered under the act for criminal proceedings. The emphasis on due process also protects the government from casting too wide a net with regards to domestic surveillance.

The McCarran Act is one of the most important pieces of anti-Communist legislation passed during the McCarthy era and one of the least studied. The McCarran Act epitomized the mood of the McCarthy era, calling for the registration of all Communists and any others associated with Communism, in order to fully expose the perceived threat to the United States.

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159 *Cong. Rec.* 107th Cong. 1st Sess. Vol 147, No. 137., 10567, 10589.

Judicial reactions to the McCarran Act, and other anti-Communist legislation, provide a framework for Congress in designing future internal security legislation. Congress designed the USA Patriot Act and its surveillance amendments within this framework, attempting to maintain the Constitutional protections of the freedom of speech, association, and due process, while providing the government tools for increased internal security.

The conflict between the contradictory needs of national security and civil liberties has occurred throughout much of American history and will continue to occur. The republican ideology of balancing power and liberty runs through the debate between national security and civil liberties.[160] Both national security and civil liberties require a government with strong powers, but differ in how this power should be used. Advocates for national security believe that no limits should be placed on the national government when security issues are involved, while advocates of civil liberties believe in strict Constitutional protections for the rights of citizens. A successful democracy requires that both these needs be satisfied; it requires a citizenry that is safe and secure from both external threats and from its own government. While zealots on both sides make it difficult, compromises can and must be reached between the competing needs of internal security and civil liberties. Compromises are necessary to protect needs of both internal security and civil liberties; should the balance shift too far one way or the other, the system breaks down. The competing needs are best met through the system advocated by the founding fathers: a system of checks and balances. Removing these checks, whether by legislative action or executive order, creates a situation of dangerous imbalance. Though every serious crisis brings demands to give one side precedence over the other, it is essentially to maintain a balance

[160] For republican ideology, see: Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York: Hill and Wang, 1990), 43-45.

between the needs of civil liberties and national security; a process which must not be allowed to end with one side's lasting success.

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Vita

Marc Patenaude was born in Prince Albert, Saskatchewan, Canada. Having later spent nearly a quarter of his life in Canada's Arctic, Marc decided to experience culture shock by moving to America's Deep South. He received his Baccalaureate degree in English and history from the University of Arkansas at Little Rock in 2003. Marc is currently a resident of Baton Rouge.