

**From: *The Supreme Court and McCarthy-Era Repression: One Hundred Decisions***  
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## INTRODUCTION

# Political Repression and Court-Curbing

The McCarthy era, which began in the late 1940s and continued for more than a decade (years after Senator Joseph R. McCarthy's censure by the Senate in 1954 and his death in 1957), was the longest of the several periods of political repression that punctuate American history. These episodes were largely the products of wars and national crises. The McCarthy era stemmed from a prolonged "Cold War" with the Soviet Union and its satellites following World War II, accompanied by a much shorter "hot" war against two Asian Communist states, the Korean War (1950–53), that resulted in sizable American casualties and ended in a frustrating stalemate.

Repression in a democracy does not fit the classic mold: it is majoritarian, administered by elected officials, and supported by public opinion. Repeatedly, however, the verdict of history, decades later, has been that the perceived internal dangers that generated repression in America were exaggerated and the repressive measures used unwarranted. There is now a consensus, for example, that the nation's security did not require the internment of more than one hundred thousand ethnic Japanese—seventy thousand were American citizens—during World War II. Less than a decade earlier, in 1933, President Franklin D. Roosevelt granted a full pardon to persons convicted under World War I-era sedition statutes. "After each perceived security crisis ended," Justice William J. Brennan Jr., who served during the McCarthy era, observed, "the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."<sup>1</sup>

While historians may disagree as to precisely which periods of American history may accurately be termed repressive, a fair listing would include:

- the period of the “half war” with France that produced the 1798 Alien and Sedition Acts, authorizing the executive branch to deport aliens deemed dangerous and to prosecute and imprison critics of the government;
- the Civil War period, during which the government suspended the writ of habeas corpus and authorized trial by court-martial for persons deemed disloyal;
- World War I and the “Red Scare” of 1919–20, when hundreds were prosecuted under sedition statutes for speaking in opposition to the war, and aliens associated with socialist and anarchist groups were deported;
- World War II, when the government interned the ethnic Japanese population on the West Coast without charges or hearing and prosecuted for sedition pro-Nazi Americans who spoke in opposition to the war;
- the McCarthy era, when an array of repressive measures, including sedition prosecutions, deportations, and contempt prosecutions for refusal to disclose political associations, was directed at Communists and “subversives”;
- the Vietnam War, when the government brought conspiracy prosecutions against antiwar activists and prosecuted antiwar speech under a variety of state and federal statutes.<sup>2</sup>

The historians’ verdict on the current “war on terror” is, at this writing, still out. But Congress twice enacted legislation to strip federal courts of jurisdiction in habeas corpus cases brought by alleged terrorists detained at Guantanamo Bay. And warrantless government wiretapping of American citizens took place on an unprecedented scale.<sup>3</sup>

All of these repressive practices posed issues under the Constitution, and over time they became increasingly the subject of litigation, federal and state, with many cases reaching the U.S. Supreme Court. Because each period involved a perceived danger to the nation, with the government’s actions justified as necessary to protect the national security and supported by public opinion, Supreme Court justices repeatedly found themselves in an unenviable position, forced to choose in a time of crisis between upholding government action they deemed unlawful or deciding in favor of despised dissidents.

William O. Douglas, a member of the Court for more than three decades, whose tenure encompassed World War II and the McCarthy era, commented: “The Court is not isolated from life. Its members are very much a part of the community and know the fears, anxieties, cravings and wishes of their neighbors. That does not mean that community attitudes are necessarily translated by mysterious osmosis into new judicial doctrine. It does mean that the state of public opinion will often make the Court cautious when it should be bold.” Felix Frankfurter, who served on the Court with Douglas, wrote in 1951 during the McCarthy era that “judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by

the deep undercurrents of public feeling.” Earl Warren, chief justice for most of the McCarthy years and himself the target of fierce criticism, observed that “always agreeing with the dominant interests would be a serene way of life. It is comforting to be liked, and it would be pleasant to bask in the sunshine of perpetual public favor.”<sup>4</sup>

This book is about the situation faced by Supreme Court justices in the McCarthy era, obliged in scores of cases over more than a decade to decide the lawfulness of executive and legislative action directed at alleged Communists and “subversives.” The events demonstrate the Court’s vulnerability in a time of political repression, when a refusal to acquiesce in the repressive actions demanded by popular opinion may lead to harsh attacks in the press and in the Congress, and may result in legislation to curb the Court and limit its independence. The McCarthy-era court did acquiesce at the outset; but when, in 1956 and 1957, it issued a series of decisions in favor of accused Communists, it triggered a firestorm of public criticism and congressional action that forced it to retreat. The attacks and political pressures deepened existing divisions and rivalries among the justices. The Court’s retreat was accomplished almost entirely in 5–4 decisions.

The book’s primary focus is the decisions themselves. None is omitted, for even the least important illustrate the character and pervasiveness of the repression and the often conflicting legal principles at issue. The decisions provide the best evidence of the justices’ constitutional views—and shifts in views—and their responses to the severe pressures under which they labored.

The Founding Fathers, uncanny as always, accurately foresaw the justices’ situation.

## The Founding Fathers and Judicial Independence

Judicial independence was debated from the time of the nation’s beginning. Thomas Jefferson, when he drafted the Declaration of Independence in Philadelphia in June 1776, included as one of the “repeated injuries and usurpations” inflicted by George III that “[h]e has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”<sup>5</sup>

The colonists’ grievance was not abstract. Only fifteen years earlier the king had changed the tenure of colonial judges from service during the judge’s “good behavior” to service at the king’s pleasure. English judges continued under the earlier standard, a 1701 statute providing for service during good behavior with “their Salaries ascertained and established.” Colonial judges had received the benefits of this statute until 1761, and, in making the change, the king’s obvious intent was to make the judges subservient to the Crown.<sup>6</sup>

In 1787, the framers included in the Constitution presented for ratification by the thirteen states a provision aimed at securing the independence of federal

judges, not from the Crown but from the legislative and executive branches. This provision, in Article III, Section 1, guarantees lifetime tenure for both Supreme Court and lower-court judges, subject to a “good Behaviour” limitation, and requires that judges be paid “a Compensation” that cannot be diminished while they hold office.<sup>7</sup>

In *The Federalist Papers*, 78 and 79, Alexander Hamilton explained the rationale for this provision: “[T]he judiciary is beyond comparison the weakest of the three departments of power,” lacking “influence over either the sword or the purse” and “ultimately depend[ent] upon the aid of the executive arm even for the efficacy [i.e., enforcement] of its judgments.” “[F]rom the natural febleness of the judiciary,” he continued, “it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches,” and “nothing can contribute so much to its firmness and independence as permanency in office.”<sup>8</sup>

The tasks the federal judiciary were obliged to perform were likely, in Hamilton’s view, to involve it in controversy with “co-ordinate branches.” Under “a limited Constitution,” he wrote, one containing “specified exceptions to the legislative authority,” such as prohibitions against ex post facto laws and bills of attainder, it would be the judges’ “duty . . . to declare all acts contrary to the manifest tenor of the Constitution void.” “[P]ermanent tenure,” he said, will encourage “that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.”<sup>9</sup>

More specifically, federal judges would be called upon to make decisions upholding the rights of unpopular minorities against repressive government action. Judicial independence, Hamilton put it, was “requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men . . . sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion . . . serious oppressions of the minor party in the community.”<sup>10</sup>

The Article III provision, however, did not shield judges from all responsibility for their actions. Judges, Hamilton wrote, “are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified from holding any other.”<sup>11</sup>

Although Hamilton was not in doubt, the Constitution does not expressly empower federal courts to declare a congressional enactment or an executive-branch action unconstitutional. The principle of judicial review did not become settled until 1803, when Chief Justice John Marshall wrote in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is,” and if a statute is in conflict with the Constitution, “the Courts must decide on the operation of each.”<sup>12</sup>

Nonetheless, Supreme Court justices are appointed and confirmed by elected officials and are by no means immune from popular pressures. In addition to impeachment and removal by the legislative branch, they are subject to a number of other threats arising both within and outside the Constitution.

### Curbing the Supreme Court

Impeachment has proved to be less a threat to federal judges than Hamilton seemed to believe. In 1804, only seventeen years after the Constitution's ratification, the House instituted impeachment proceedings against an associate justice of the Supreme Court, Samuel Chase of Maryland. The charges against Chase, an overbearing Federalist, concerned his partisan actions as a trial judge performing circuit duties (not his concomitant duties as a Supreme Court justice) in prosecutions brought under the Sedition Act of 1798 against critics of President John Adams's administration. The impeachment proceedings against Chase were instituted by a Congress controlled by Jeffersonian Republicans—Adams having been defeated by Jefferson in the election of 1800.<sup>13</sup>

However, Chase, while impeached by the House, was acquitted by the Senate. Six Republicans joined with nine Federalist senators in the thirty-four-member body, precluding the two-thirds majority required to convict. Chase's acquittal became a formidable precedent. "[B]y assuring," Chief Justice William H. Rehnquist wrote nearly two centuries later "that impeachment would not be used in the future as a method to remove members of the Supreme Court for their judicial opinions, it helped to safeguard the independence of that body."<sup>14</sup>

Chase's case marks the only instance in which the House voted to impeach a Supreme Court justice. Eight lower-court judges have been impeached and removed, and two resigned after impeachment; but their offenses were bribery, tax evasion, or some other personal misconduct.<sup>15</sup>

Still, impeachment resolutions are on occasion introduced in the House in response to unpopular decisions by federal judges. A resolution to impeach Justice Douglas was introduced in 1953 after he stayed the execution of convicted spies Julius and Ethel Rosenberg. Calls for the impeachment of judges, without a formal resolution, are common. In the late 1950s, the Court's decisions in school-desegregation and "Communist" cases fueled a right-wing campaign that "blanketed America with 'Impeach Earl Warren' billboards." Judges are not unaware of calls for their impeachment. In 2004, Rehnquist deemed it necessary to warn that "Congress's authority to impeach and remove judges should not extend to decisions from the bench."<sup>16</sup>

Impeachment, however, is not the only means under the Constitution by which Congress can punish the Supreme Court when it makes unpopular decisions. Another method is jurisdiction-stripping. Article III, Section 2, which lists the

types of cases to which “[t]he judicial Power” extends, contains a significant limitation: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.” In other words, only two narrow types of cases are assigned to the Supreme Court by the Constitution: cases “affecting Ambassadors” and those in which a State “shall be Party.” “In all the other Cases”—comprising almost all of its work—the Court’s jurisdiction is “appellate” (*i.e.*, appeals from the decisions of other courts) and by virtue of the “Exceptions clause” is arguably limited to the categories of cases that Congress by statute has assigned to it.<sup>17</sup>

Over the years, Congress has repeatedly expressed its dissatisfaction with Supreme Court decisions by proposing to strip the Court of appellate jurisdiction to decide the same type of case in the future. Congress adopted such a proposal in 1868, when the Court had pending before it *Ex parte McCordle*, a habeas corpus action that challenged the constitutionality of Reconstruction legislation authorizing military trials for civilians charged with fomenting rebellion. McCordle was a Mississippi newspaper editor whose vitriolic writings led to his arrest by military authorities. Two years earlier, the Court had ruled in another case that the government could not suspend habeas corpus in areas where civil courts were functioning. Fearful that it would also invalidate the legislation at issue in *McCordle*, Congress repealed the statute upon which the Court’s jurisdiction over McCordle’s appeal was founded. The Court immediately dismissed the appeal.<sup>18</sup>

While rarely enacted, jurisdiction-stripping legislation has remained popular with congressional critics of the Court. In the McCarthy era, such legislation came close to being enacted. More recently, the House in 2004 passed by wide margins bills to strip federal courts of appellate jurisdiction in cases involving the Defense of Marriage Act (a federal statute allowing states to refuse to recognize same-sex marriages performed in other states) and the Pledge of Allegiance (this after a federal court of appeals barred public-school recitations of the words “under God” in the Pledge). The bills died in the Senate.<sup>19</sup>

In December 2005, however, shortly after the Court granted review in *Hamdan v. Rumsfeld*, a habeas corpus action brought by a detainee at the Guantanamo Bay prison, Congress passed, and the president signed, legislation to strip federal courts of jurisdiction (except for truncated authority in one court of appeals) over habeas actions by aliens held at Guantanamo. The elected branches’ dissatisfaction had begun a year earlier when the Court held that it had jurisdiction to consider challenges to detention at Guantanamo by foreign nationals captured abroad. After the Court agreed to hear Hamdan’s specific challenge, jurisdiction-stripping legislation swiftly followed. When the Court then held

that the legislation did not apply to pending cases (and, on the merits, sustained Hamdan's challenge to the military commission appointed to try him), the elected branches, in October 2006, enacted a second statute, unequivocally stripping the Court of jurisdiction even over pending cases. But the Court, in this instance, had the last word, invalidating the second statute as violative of the Constitution's guarantee of the habeas corpus remedy.<sup>20</sup>

A third method of curbing the Court is by "packing" it. The Constitution does not specify the number of Supreme Court justices. The current nine was fixed by a statute enacted by Congress in 1869. At other times, Congress has set the number of justices as high as ten and as low as five. Congressional displeasure with the Court's decisions can readily be manifested by an increase in the number of seats and appointment by the president of new and presumably more compliant or right-thinking justices.<sup>21</sup>

Most famously, during the Great Depression of the 1930s, President Roosevelt, his New Deal legislative program stymied by a Supreme Court majority, most of whose members were over age seventy, proposed a "court-packing" plan that would authorize appointment of an additional justice whenever a sitting justice reached age seventy. The proposal met intense criticism and failed—indeed, its legacy has been to discredit any subsequent attempt to respond to unpopular Supreme Court decisions by manipulating the number of justices. Historians have argued, however, that the mere vetting of FDR's proposal was responsible for a sudden and dramatic shift in the Court's decisions, with subsequent rulings uniformly upholding New Deal economic legislation—the so-called "switch in time that saved nine."<sup>22</sup>

Court-curbing efforts have assumed a variety of other forms. Most often, bills or constitutional amendments are introduced to overturn specific decisions. And even introduction of a bill unlikely to pass sends a message.<sup>23</sup>

The executive branch possesses its own means of expressing dissatisfaction with Supreme Court decisions: refusing to enforce them. The Civil War period provided a striking illustration (albeit the order flouted was issued by Chief Justice Roger B. Taney as a circuit judge, not by the full Court). The case involved John Merryman, charged with sabotage and held by the Union Army at Fort McHenry in Baltimore. Merryman's lawyer obtained a writ of habeas corpus, but the Army refused to produce him, contending habeas corpus had been suspended on President Lincoln's authorization. Taney, believing only Congress could suspend the writ, issued an order of attachment for contempt against Fort McHenry's commanding general. Lincoln, however, instructed that the order be ignored. The Court's marshal was stopped at the gate to the fort and was unable to serve Taney's order.<sup>24</sup>

Thirty years earlier, when the State of Georgia in a dispute with the Cherokee tribe defied the Court's orders, the executive branch, in the person of President

Andrew Jackson, took no action. Georgia's defiance could hardly have been more direct: in one case, after it had sentenced a Cherokee man to death and Chief Justice Marshall subsequently issued a writ of error, Georgia executed him anyway. President Jackson reportedly commented, "John Marshall has made his decision, now let him enforce it."<sup>25</sup>

But a short time later, when South Carolina claimed the power to nullify federal laws, Jackson "did an abrupt about-face," embracing the Court. By 1957, when President Dwight D. Eisenhower faced Arkansas's defiance of orders implementing the Court's school-desegregation edict, public perception of the Court's legitimacy left him no option. He sent federal troops to Little Rock to enforce the desegregation orders, telling a news conference that "[t]he courts must be sustained or it's not America."<sup>26</sup>

Yet, the Supreme Court's vulnerability has been evident throughout its history. Eisenhower's statement about Little Rock coincided with Congress's angry assault on the Court in response to its decisions in McCarthy-era "Communist" cases. Justice Robert H. Jackson, whose tenure on the Court spanned World War II and the first part of the McCarthy era, was acutely sensitive to its vulnerability. The Court, he wrote, "has no force to coerce obedience, and is subject to being stripped of jurisdiction or smothered with additional Justices any time such a disposition exists and is supported strongly enough by public opinion. I think the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency, especially during war time."<sup>27</sup>

### The Court in Periods of Political Repression

Implicit in Jackson's comment is that when the Court "yield[s] to expediency," the elected branches have no need to curb it. Put another way, the Court is not necessarily under attack in a time of political repression, for an accommodating Court does not invite attack.

The clearest example is the World War I period. Between 1919 and 1921, the Court issued eight significant decisions in cases instituted by the government against critics of the war under sedition and espionage statutes. It decided all eight cases for the government, uniformly rejecting the defendants' reliance on the First Amendment.<sup>28</sup>

Seven of the cases were criminal prosecutions in which the defendants were charged with disseminating antiwar views in speeches or written materials. The eighth was an administrative proceeding in which the Postmaster General revoked the second-class mailing privilege of a newspaper, the *Milwaukee Leader*, published by German-American Socialists, which took an antiwar stance. One of the criminal cases involved a speech by Eugene V. Debs, a union leader and



four-time Socialist Party presidential candidate. Addressing a party convention, Debs's "most egregious statement was '[Y]ou need to know that you are fit for something better than slavery and cannon fodder.'" His ten-year prison sentence was upheld by a unanimous Court in an opinion by Justice Oliver Wendell Holmes.<sup>29</sup>

A second case, *Abrams v. United States*, involved five Russian-Jewish immigrants, self-proclaimed anarchists, who published circulars, one in English and another in Yiddish, and threw some of them from the window of a New York City loft into the street below. The circulars criticized the U.S. government's dispatch of troops to Russia to oppose the Bolshevik revolution and called on readers to "spit in the face the false, hypocritic military propaganda." The Court upheld the defendants' prison sentences, which ranged from three to twenty years.<sup>30</sup>

This decision, however, drew a dissent from Holmes, joined by Justice Louis D. Brandeis, who articulated a clear-and-present-danger test in cases of direct restraints on speech. While this formula later became a fundamental part of First Amendment jurisprudence, the seven-justice majority in *Abrams* paid it little heed.<sup>31</sup>

The World War I decisions, Harry Kalven wrote, are "dismal evidence of the degree to which the mood of society penetrates judicial chambers." Concomitantly, public criticism of the Court was at a low ebb.<sup>32</sup>

In the World War II period, the Court again escaped serious criticism, albeit late in the period it decided several cases against the government. In earlier decisions, it denied habeas corpus protection to German saboteurs landed by submarine in the United States and held for trial by a military commission; declined to review sedition convictions of American Nazis who published a magazine opposed to the war; and, in the first round of Japanese-internment decisions, upheld the convictions of two citizens, one a University of Washington student and the other a member of the Oregon bar, for violating a curfew imposed by the military as a preliminary to internment.<sup>33</sup>

On December 18, 1944, one day after the War Department ordered the release of Japanese internees "whose records have stood the test of Army scrutiny during the past two years," the Court handed down its final Japanese-internment decisions. It upheld the conviction of Oakland-born Fred Korematsu for failing to evacuate the area in which his home was located, in violation of a military order. But it granted habeas corpus relief to Mitsuye Endo, a young Sacramento woman whom the government had interned but now conceded was "a loyal and law-abiding citizen." "There is good reason to believe," Geoffrey Stone wrote, "that the Court intentionally delayed its decision in *Endo* to allow the president rather than the Court to end the internment."<sup>34</sup>

However, in both the Civil War and McCarthy eras, political repression was at times resisted by the Court. In the Civil War period, Congress responded with

a jurisdiction-stripping measure passed over President Andrew Johnson's veto (the one aimed at *Ex parte McCardle*) and a statute that temporarily decreased the size of the Court to deny Johnson the opportunity to fill a vacancy. In the McCarthy era, Congress only narrowly failed to enact jurisdiction-stripping legislation and a host of other bills to overturn specific decisions, and one important bill did pass.<sup>35</sup>

### Court-Curbing Rationales, Judicial Activism, and Restraint

Over many years, and in widely differing circumstances, the rationales put forward for measures to curb the Supreme Court have remained the same. The justices, it is said, have acted as a “super-legislature,” not accountable to the people. They decided “political” questions instead of limiting themselves to “legal” issues. They imposed their own personal preferences, rather than applying the law. “Activist” judges, it is said, must be replaced by judges who are “strict constructionists” and who exercise “judicial restraint.”<sup>36</sup>

Complaints such as these, however, have invariably masked disputes over policy. The dispute in the 1930s, for example, was between a conservative Court majority hostile to New Deal economic policies—surely an “activist” Court, given the number of statutes it nullified and the creativity of its rationales—and liberals controlling both elective branches who believed economic reform was essential to combat the Great Depression. Three decades later, the liberal Warren court—which interpreted the Constitution to prohibit “separate but equal” public schools, to impose a “one man, one vote” requirement in elections, and to require specific rules for in-custody interrogation of state criminal defendants—was condemned as “activist” by conservatives who disagreed from a policy standpoint.<sup>37</sup>

When, in 1969, Warren E. Burger succeeded Warren as chief justice, his appointment by President Richard M. Nixon was hailed by conservatives as evidence that “Mr. Nixon had carried out his campaign promise to name ‘strict constructionists’ to the high court, jurists who . . . would not try to ‘legislate’ by their decisions.” But fourteen years later, and after three more Nixon appointments to the Court and one by his Republican successor, Gerald Ford, an observer concluded that “by almost any measure the Burger Court has been an activist court.” “In sixteen terms,” Vincent Blasi wrote, “the Warren Court invalidated nineteen provisions of federal statutes; in thirteen terms the Burger Court has struck down twenty-four.” The Burger court invalidated 309 state and local statutes on constitutional grounds. Its decisions included *Buckley v. Valeo*, striking down Congress's election-campaign spending limits as viola-

tive of the First Amendment, and *Roe v. Wade*, finding in the Constitution a woman's right to an abortion.<sup>38</sup>

In 1986, during Ronald Reagan's presidency, Burger was succeeded as chief justice by Rehnquist, an associate justice for fourteen years and a proven conservative. Rehnquist's seat was filled by Antonin Scalia, a conservative court-of-appeals judge. The Rehnquist court, between 1995 and 2003 alone, invalidated all or part of thirty-three federal statutes. Its Eleventh Amendment jurisprudence, Anthony Lewis wrote, was "breathtaking," "departing from constitutional texts," and "legislating from the bench" on a "wholesale" basis. It intervened in the 2000 presidential election, finding an Equal Protection Clause rationale to halt the counting of votes ordered by Florida courts and handing the election to a conservative Republican.<sup>39</sup>

Lewis, commenting on the Burger court in 1983, stated that "the great conflict between judicial 'restraint' and 'activism' is history," for "[w]e are all activists now," adding, "[a]ctivists for what is a different question."<sup>40</sup>

Nevertheless, no Supreme Court justice willingly accepts an "activist" label. Warren, in a 1958 opinion, gave this explanation for his vote to invalidate a federal statute: "The provisions of the Constitution are not time-worn adages or hollow shibboleths. . . . When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. . . . We cannot push back the limits of the Constitution merely to accommodate challenged legislation."<sup>41</sup>

## Tactical Decision Making and Judicial Independence

Tactical decision making by the Court in the face of threatened court-curbing measures is another matter, for the issue then is preserving the Court's independence. The Court that considered *McCardle* in 1868 probably had not changed the views it expressed two years earlier concerning trials of civilians by military courts; but by acquiescing in Congress's withdrawal of its jurisdiction over McCardle's appeal, it avoided further sanctions. The Court, moreover, did not abandon the fight; only months later, in *Ex parte Yerger*, it held that it did indeed possess habeas jurisdiction but via a different statutory route. Stanley I. Kutler concluded that "in the light of prevailing political passions, the Court's counter-response in the two cases indicates the quintessence of judicial independence and courage, besides being a clever bit of judicial strategy."<sup>42</sup>

In the McCarthy era, the Court, under attack and seeking to placate public opinion and avoid court-curbing legislation, employed a wide range of strategies. It evaded constitutional issues by ruling on narrow nonconstitutional grounds; ordered major cases reargued repeatedly to postpone decisions on inflamma-

tory issues; upheld the constitutionality of repressive statutes but interpreted them as imposing burdens of proof upon the government that it was hard put to sustain; used short, unsigned per curiam opinions to maintain a low profile for controversial decisions; and, when court-curbing legislation was close at hand, retreated (although at most only two justices switched on the closely-divided court), deciding new cases in the government's favor and distinguishing (often unconvincingly) earlier contrary decisions. These tactics, hardly noble, served a purpose. The Court gave substantial if incomplete protection to unpopular dissenters in a period of repression while avoiding more confrontational decisions that would have jeopardized its independence.<sup>43</sup>

Richard M. Fried did not exaggerate much when he wrote: “[I]f anti-Communist extremism was the Dracula prowling the mid-century darkness of American politics, it was the Supreme Court that drove the fatal stake through its heart.”<sup>44</sup>

The effort was prodigious. The McCarthy era spanned at least a dozen terms of court (in this reading, from the October 1949 through the October 1961 terms). The Court issued roughly one hundred decisions in “Communist” cases and, rarely unanimous, countless concurrences and dissents. Commencing with the October 1953 term, it took on a simultaneous fight against racial segregation in public schools, a bitter struggle that served greatly to increase its vulnerability. Its decisions in McCarthy-era “Communist” cases, scattered over some thirty volumes of the *United States Reports* and now mostly forgotten, set the stage for a later Court's more successful and straightforward defense of the First Amendment at the time of the Vietnam War.<sup>45</sup>