McCarthyism and the Court: The Need for "an uncommon portion of fortitude in the judges"

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American history is punctuated by periods of political repression, invariably the product of wars or national crises. Among these are the period of the Sedition Act of 1798 (when President John Adams' administration, on the verge of war with France, prosecuted and imprisoned Jeffersonian critics); the Civil War period (when President Abraham Lincoln suspended habeas corpus and the government tried persons deemed disloyal by court-martial); the World War I period (when individuals who spoke against the war were jailed under espionage and sedition statutes); World War II (when over 100,000 Japanese on the West Coast, the vast majority American citizens, were interned without charges or hearing); and the McCarthy era (by far the longest of the episodes, when a wide range of repressive measures was directed at Communists and "subversives").[1]

This country, Justice William J. Brennan, Jr. observed in a 1987 address, "has a long history of failing to preserve civil liberties when it perceived its national security threatened." "After each perceived security crisis ended," he added, "the United States has remorsefully realized that the abrogation of civil liberties was unnecessary."[2]

Political repression in America is majoritarian, administered by elected officials and supported by public opinion. As a consequence, if the Supreme Court in a time of repression frustrates the government's goals by deciding cases in favor of targeted groups or individuals, it risks attack by the Congress, the press, and the public at large. This risk was foreseen by the Founders when they provided lifetime tenure for federal judges. Alexander Hamilton, in *The Federalist Papers, No. 78*, found it "easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."[3]

The Court, however, is not necessarily under attack in a time of political repression, for it may acquiesce in repressive measures. An accommodating Court does not invite attack. The clearest example is the World War I period. In 1919 and 1920, the Court issued a string of decisions in criminal prosecutions against individuals whose only crime was disseminating anti-war views in speeches or written materials—every decision in the government's favor. 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.[4]

The Court's McCarthy era, which (in this reading) spanned the October 1949 through October 1961 Terms—during which it issued roughly one hundred decisions in "Communist" cases—began with a period in which it largely acquiesced in repressive measures. In the 1955 and 1956 Terms, however, it issued a number of decisions in favor of accused Communists that triggered harsh attacks upon the Court. Critics accused it of aiding Communist "subversion" and questioned the Justices' patriotism and competence. Scores of anti-Court bills were introduced in Congress.[5]

Aware of public opinion, the Court employed an assortment of defensive strategies. When ruling against the government, it evaded constitutional issues, deciding on narrow, this-case-only grounds. It repeatedly postponed decision in major cases. It upheld the constitutionality of a key sedition statute but interpreted it as imposing a formidable burden of proof upon the government. And, when enactment of anti-Court legislation was close at hand, it retreated, deciding new cases in the government's favor and distinguishing, substantially nullifying, earlier contrary decisions.

This article traces the course of the Court's decisions in McCarthy-era "Communist" cases, the attacks upon it and the anti-Court legislation in the Congress, and the Court's response.