

The Supreme Court and McCarthy-Era Repression

One Hundred Decisions



University of Illinois Press Urbana, Chicago, and Springfield

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Manufactured in the United States of America

C 5 4 3 2 1

This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data Lichtman, Robert M.

The Supreme Court and McCarthy-era repression : one hundred decisions / Robert M. Lichtman.

ISBN 978-0-252-03700-9 (hard cover : alk. paper) —

Includes bibliographical references and index.

ISBN 978-0-252-09412-5 (e-book)

1. United States. Supreme Court—History—20th century. 2. Civil rights—United States—Cases.

3. United States—Politics and government—1945-1989. I. Title.

KF8742.L53 2012

342.7308'5026409045—dc23 2011052767

The Supreme Court and McCarthy-Era Repression

To my children, Ellen, David, and Judith, my grandchildren, Michael and Lilah, and of course to Susan.

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"[I]t is 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."

—Alexander Hamilton, The Federalist Papers, No. 78

"The federal judges . . . must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws."

-Alexis de Tocqueville, Democracy in America

Author's Note

For those for whom the McCarthy era coincided with formative years, the memories are indelible. As college students, we saw parents' careers disrupted, professors fired, friends drafted into the Army to be faced with punitive discharges, all by reason of transient political associations. As a law student, I eagerly read the Supreme Court's decisions in "Communist" cases and, as a young lawyer in Washington, D.C., heard arguments at the Court. My resolve to write about these cases and the justices who decided them was deferred during decades spent in an all-consuming law practice but never abandoned.

I owe a debt of gratitude to Harold A. Ward, Judge Patricia M. Wald, Marc S. Galanter, Daniel J. Leab, Stephen Weissman, and Jacob Bronstein, each of whom undertook to read my manuscript (or portions of it) and to offer perceptive comment and encouragement. The archivists and librarians at the Library of Congress, Yale University, Princeton University, University of Kentucky, University of Texas, and the San Francisco Public Library gave invaluable assistance. I owe a special debt to Laurie Matheson of the University of Illinois Press for her consistent support and useful advice. And I am profoundly grateful to my family and friends who tolerated me during the years I spent writing this book.

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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."

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.²

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.³

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

With sanctions against Communists enjoying overwhelming public support, legislators and government officials were quick to oblige. Within a few short years, an elaborate set of loyalty-security procedures, oaths, and penalties was in place at both the national and local levels—laws that would continue in effect long after McCarthy's censure and death. The sweep of these measures and their intrusiveness led to a brisk and continuing flow of cases to the Supreme Court.

Two federal statutes, the Smith Act, a 1940 statute sponsored by Rep. Howard W. Smith, an archconservative Virginia Democrat, and the Internal Security Act of 1950, sponsored by Sen. Pat McCarran, a xenophobic Nevada Democrat, were at the heart of the Justice Department's anti-Communist effort. The Smith Act, which made it a crime to teach or advocate forcible overthrow of the government, was utilized in a wave of prosecutions of CPUSA officials. One hundred twenty-six were indicted and ninety-three convicted. The Supreme Court in several major decisions considered the Smith Act's constitutionality and also the type of proof required to establish a violation.³⁸

The Internal Security Act, enacted over President Truman's veto, was a hodge-podge of measures expanding espionage and deportation laws, with key provisions requiring registration of "communist-action" organizations (in other words, the CPUSA), their members, and "communist-front" organizations, and authorizing preventive detention of suspected "subversives." The registration provisions, implemented by a newly created agency, the Subversive Activities Control Board (SACB), led to administrative proceedings against the CPUSA and hundreds of alleged "fronts" and, in 1961, a Supreme Court decision on the statute's constitutionality.³⁹

Federal-employee loyalty programs affected a large number of persons. During the six-year period of the Truman administration's program (1947–53), 4,756,705 individuals were screened for "loyalty" by checking their questionnaires against FBI records. As a result, 26,236 cases, most involving alleged association with "subversive" organizations on the attorney general's list, were referred to loyalty boards. Evidence upon which the government relied and the names of its informants were withheld from the accused employees—"hearings" usually consisted only of the employee's attempted proof of his own loyalty—creating legal issues that reached the Supreme Court.⁴⁰

An executive order issued by President Eisenhower in April 1953, which replaced the Truman program, extended to every government agency a 1950 statute, previously applicable only to a small number of "sensitive" agencies, that empowered agency heads summarily to discharge employees in the interest of national security. The Supreme Court in 1956 considered whether Congress had authorized application of the summary-dismissal scheme to employees holding "non-sensitive" jobs. 41

Three million persons in private industry, whose employers held Defense Department contracts requiring access to classified information, were subjected to

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.⁷

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 feebleness 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."

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."

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." ¹⁰

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."

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."¹²

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 1800.¹³

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."

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.¹⁵

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." ¹⁶

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."

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 McCardle*, a habeas corpus action that challenged the constitutionality of Reconstruction legislation authorizing military trials for civilians charged with fomenting rebellion. McCardle 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 *McCardle*, Congress repealed the statute upon which the Court's jurisdiction over McCardle's appeal was founded. The Court immediately dismissed the appeal.¹⁸

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.¹⁹

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.²⁰

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.²¹

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." 22

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.²³

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.²⁴

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