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The Supreme Court's Un-Americanism Pendulum

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THE SUPREME COURT’S UN-AMERICANISM PENDULUM

*Nicholas L. Georgakopoulos**

ABSTRACT

Examining the Bill of Rights through the post-WWII Red Scare opinions of the Supreme Court reveals an array of strategies of judging and interplay between the judiciary, the legislature, and the electorate. The transitions are more gradual than appointments of justices would suggest and show judicial sensitivity to political undercurrents. Legislative action that mostly failed to pass had full impact on the Court’s majority. The choices of the liberal justices may have undermined their long-term interests.

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I. INTRODUCTION

During the Cold War, was Communism a threatening instrument of the adversary Soviet Union or one more political idea deserving of First Amendment protection? The Supreme Court's jurisprudence on un-Americanism prosecutions reveals a vacillation, taking both sides repeatedly: having the fear of Communism override the Bill of Rights, restoring the Bill of Rights to primacy, and repeating. Despite that the transitions are mostly related to specific events, the voting fits better the gradual transitions of a pendulum than large instant changes driven by judicial appointments. Interestingly, one of the transitions is a reaction to a legislative backlash. A closer look reveals that, whereas a minority of the Court disregarded the backlash, the majority treated it as a revelation of information about the national will rather than duress.

By *un-Americanism prosecutions* this Article refers to any action that produces any negative consequence and has its origin in any body that seeks to avert subversive influence. A prominent one was the House Un-American Activities Committee (but the spotlight of history is on Wisconsin Republican Senator Joseph McCarthy's excesses during his chairmanship of the Internal Security Subcommittee of the Senate Committee on Government Operations in 1953 till his censure by the Senate in December 1954).¹ State legislatures created similar committees, as did professional organizations, such as bar associations that were in control of licensing their members, but also bodies in industries that did not require licensing, notably in the entertainment industry.² The negative consequences they produced ranged from revocation of security clearances,³ dismissal from employment,⁴ requirement of loyalty oaths,⁵ denial of a license to practice a

¹ See generally *Joseph McCarthy*, ENCYCLOPEDIA BRITANNICA (Dec. 17, 2020), <https://www.britannica.com/biography/Joseph-McCarthy> [perma.cc/4GT4-8RZ5]; THE OXFORD COMPANION TO UNITED STATES HISTORY (Paul S. Boyer et al. eds., 2004), <https://www.oxfordreference.com/view/10.1093/acref/9780195082098.001.0001/acref-9780195082098-e-0965> [perma.cc/9TNN-R5LA].

² See, e.g., *infra* note 244 (discussing *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958)) (references to notes 63 and later refer to notes in Appendix A).

³ See, e.g., *infra* note 284 and accompanying text (discussing *Greene v. McElroy*, 360 U.S. 474 (1959)).

⁴ See, e.g., *infra* note 67 and accompanying text (discussing *United States v. Lovett*, 328 U.S. 303 (1946)).

⁵ See, e.g., *infra* note 83 (discussing *Garner v. Bd. of Pub. Works*, 341 U.S. 716, 718 (1951)); see *infra* note 88 (discussing *Gerende v. Bd. of Supervisors of Elections*, 341 U.S. 56, 56–57 (1951)); see *infra* note 139 (discussing *Wieman v. Updegraff*, 344 U.S. 183, 185–86 (1952)).

profession,⁶ deportation,⁷ and denaturalization,⁸ as well as criminal conviction, either directly for membership in subversive organizations,⁹ or indirectly, for refusing to answer questions or produce documents,¹⁰ or for perjury.¹¹

More specifically, besides resisting Congressional inquiries, four additional categories of un-Americanism prosecutions are discernible. (1) The Taft-Hartley Act of 1947 (enacted over Truman's veto) imposed criminal penalties on members of the Communist Party who took leadership positions in labor unions. A set of cases regarded such prosecutions until, in 1965, *US v. Brown* held the prohibition unconstitutional.¹² (2) By executive order, Truman and Eisenhower prohibited the government employment of communists.¹³ A set of cases regarded such dismissals which ceased in the late 1950s. (3) The Alien Registration Act of 1940 (Smith Act),¹⁴ the Internal Security Act of 1950,¹⁵ and the Communist Control Act of 1954¹⁶

⁶ See, e.g., *infra* note 158 (discussing *Barsky v. Bd. of Regents*, 347 U.S. 442, 445 (1954)) (physician); *infra* note 205 (discussing *Konigsberg v. State Bar of Cal. (Konigsberg I)*, 353 U.S. 252, 263 (1957)); *infra* note 310 (discussing *Konigsberg v. State Bar of Cal. (Konigsberg II)*, 366 U.S. 36, 37 (1960)); *infra* note 312 (discussing *In re Anastaplo*, 366 U.S. 82, 86 (1960) (bar admissions)).

⁷ See, e.g., *infra* note 143 and accompanying text (discussing *Harisiades v. Shaughnessy*, 342 U.S. 580, 582 (1952)); *infra* note 150 (discussing *United States v. Spector*, 343 U.S. 169, 170 (1952)); *infra* note 166 (discussing *Galvan v. Press*, 347 U.S. 522, 523 (1954)); *infra* note 212 (discussing *Barton v. Sentner*, 353 U.S. 963, 963 (1957)); *infra* note 246 (discussing *Rowoldt v. Perfetto*, 355 U.S. 115, 116 (1956)); *infra* note 257 (discussing *Bonetti v. Rogers*, 356 U.S. 691, 693 (1958)); *infra* note 293 (discussing *Niukkanen v. McAlexander*, 362 U.S. 390, 390 (1960)); *infra* note 194 (discussing *Kimm v. Rosenberg*, 363 U.S. 405, 405 (1960)).

⁸ See, e.g., *infra* note 155 and accompanying text (discussing *Bridges v. United States*, 346 U.S. 209, 234 (1953)); *infra* note 193 (discussing *United States v. Zucca*, 351 U.S. 91, 95 (1956)); *infra* note 249 (discussing *Brown v. United States (Brown-1958)*, 356 U.S. 148, 149 (1957)); *infra* note 255 (discussing *Nowak v. United States*, 356 U.S. 660, 668 (1958), and *Maisenberg v. United States*, 356 U.S. 670, 671–72 (1958)); *infra* note 301 (discussing *Polites v. United States*, 364 U.S. 426, 433–34 (1960)).

⁹ See, e.g., *infra* note 118 and accompanying text (discussing *Dennis v. United States (Dennis II)*, 341 U.S. 494, 496 (1950)); *infra* note 224 (discussing *Yates v. United States (Yates I)*, 354 U.S. 298, 300 (1956)).

¹⁰ See, e.g., *infra* note 89 (discussing *United States v. Bryan*, 339 U.S. 323, 329–30 (1949) and *United States v. Fleischman*, 339 U.S. 349, 351 (1949)), and many more cases.

¹¹ See, e.g., *infra* note 71 and accompanying text (discussing *Christoffel v. United States*, 338 U.S. 84, 91–92 (1949)).

¹² See *infra* note 385 and accompanying text (discussing *United States v. Brown (US v. Brown)*, 381 U.S. 437, 462 (1965)).

¹³ Truman issued Executive Order 9835 in March 1947. Exec Order No. 9835, 13 C.F.R. Cum. Supp. (1947). It was replaced by Eisenhower's corresponding Executive Order 10450, of 1953, Exec Order No. 10450, 3 C.F.R. (1953). Both were gradually invalidated and repealed. Eisenhower's order also prohibited the employment of loyal individuals who might be subject to extortion due to their lifestyle, which included homosexuality.

¹⁴ Alien Registration Act, Pub. L. No. 76-670, 54 Stat. 670 (1940).

¹⁵ Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (1950) (also enacted over the veto of President Truman).

¹⁶ Communist Control Act of 1954, Pub. L. No. 83-637, 68 Stat. 775 (1954).

outlawed the Communist Party, membership in it, and subversive activities. A set of prosecutions sprung from their application until *Yates* in 1957 hindered prosecutions.¹⁷ (4) The Nationality Act of 1940 strengthened the prohibition of the naturalization of communists and required their deportation.¹⁸ A set of cases regarded deportations and denaturalizations. The result is one hundred seventeen opinions.¹⁹ Aggregation is necessary to see the overall tendency.

Part II summarizes the attitudes of the justices that Appendix A analyzes in detail. Part III performs the quantitative analysis, showing that the gradual changes of the pendulum motion explain the justices' voting better than the large instant changes of a step process. Part IV shows that the reaction to the backlash was a permanent change for five members of the Court. Part V concludes, speculating on the long-term consequences of different judicial strategies.

II. A QUOTE-HEAVY SUMMARY

The Supreme Court's post-WWII decisions on un-Americanism matters span from 1946 to 1967 and cover at least five legal subject matters.²⁰ The Court changed attitudes four times about their treatment. No summarizing can do justice to this chapter of legal history. Indeed, a detailed history of the cases exists in the form of a magisterial book of 265 pages, 90 of which are endnotes, with copious references to the justices' own notes, made available posthumously.²¹ To a large part, the point of this Article is that only the visual and quantitative aggregations offered in Part III offer fair overviews of this vast and varied landscape.

The goal of this Article is to show the big picture, akin to revealing the shape of a forest or a coast. Understanding each opinion is akin to observing each tree or pebble. Yet, the trees make the forest and the pebbles the coastline. The texture of the opinions is revealing and Appendix A tries to show that texture through the justices' own words. Readers should not omit that detailed recounting, but a summary shows the tensions.

¹⁷ See *infra* note 224 and accompanying text.

¹⁸ Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1137 (1940).

¹⁹ The list of primary un-Americanism opinions has a hundred and one, Appendix B. The omitted opinions are sixteen, collected in notes 31–33. Not included in this enumeration is *Shelton v. Tucker*, 364 U.S. 479 (1960). See *infra* note 292.

²⁰ See *supra* notes 1–18 and accompanying text.

²¹ ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY-ERA REPRESSION: ONE HUNDRED DECISIONS* (2012). Although this article also produces a database of about one hundred opinions (Appendix B lists them with the vote of each justice), the overlap is imperfect. The primary differences are due to the present database starting earlier, ending later, and excluding espionage, bail, and private dispute opinions. For a listing of the opinions that do not join the database of primary un-Americanism opinions, see *infra* notes 31–33 and accompanying text.

The Supreme Court entered the term that started in 1946 with the world recovering from the maelstrom of WWII. The opposition of the United States to Nazism had rendered Soviet Communists into temporary allies. The end of WWII brought back the opposition and started the Cold War. The Court's composition was about to change. Four Truman appointees brought with them the sense of opposition to Soviet Communism that may not have been as pronounced for the rest of the Court, who were appointees of F.D. Roosevelt. Two of Roosevelt's appointees became pivotal, Jackson and Frankfurter.

Jackson becomes the chief prosecutor of the Nazi war criminals in Nuremberg and observes from close the Soviet expansion in Eastern Europe. He brings that experience to his concurrence that favors the prosecution in *Dennis II*:

Communist technique in the overturn of a free government was disclosed by the *coup d'etat* in which they seized power in Czechoslovakia. There the Communist Party during its preparatory stage claimed and received protection for its freedoms of speech, press, and assembly. Pretending to be but another political party, it eventually was conceded participation in government, where it entrenched reliable members chiefly in control of police and information services. When the government faced a foreign and domestic crisis, the Communist Party had established a leverage strong enough to threaten civil war. In a period of confusion the Communist plan unfolded and the underground organization came to the surface throughout the country in the form chiefly of labor 'action committees.' Communist officers of the unions took over transportation and allowed only persons with party permits to travel. Communist printers took over the newspapers and radio and put out only party-approved versions of events. Possession was taken of telegraph and telephone systems and communications were cut off wherever directed by party heads. Communist unions took over the factories, and in the cities a partisan distribution of food was managed by the Communist organization. A virtually bloodless abdication by the elected government admitted the Communists to power, whereupon they instituted a reign of oppression and terror, and ruthlessly denied to all others the freedoms which had sheltered their conspiracy.²²

In detail that is almost tedious, Jackson recounts how Communist infiltration became an overthrow of the Czech government.

²² *Dennis v. United States (Dennis II)*, 341 U.S. 494, 566 (1950) (footnote omitted).

Jackson is a liberal justice who often joins the conservative ones in placing the fear of Communism above the Bill of Rights.²³ In a case outside this setting, Jackson warns against the absolutist view of Black and Douglas, who insist on the primacy of the Bill of Rights, turning the Bill of Rights into a “suicide pact.”²⁴ Elsewhere, Jackson writes for the Court while embracing as his premise armed conflict “to stem the tide of Communism:”

[The Constitution] does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.²⁵

Jackson’s position reaches the substance and resolves it against the Bill of Rights on consequentialist grounds, a war against Communism.²⁶

Frankfurter’s judicial philosophy is one of restraint. Frankfurter often argues that the Court should not reach the constitutional merits of a dispute because the other branches of government have the authority to resolve the issue. The role of the judiciary in Frankfurter’s analysis is much more circumscribed. Where Jackson assists a war against Communism, Frankfurter’s concurrence acknowledges that the legislature’s actions may be odious, but the Court cannot override them. “[T]he place to resist unwise or cruel legislation . . . is the Congress, not this Court.”²⁷

The four Truman appointees (Burton, Vinson, Minton, and Clark), plus Reed, who was the one Roosevelt appointee who voted just as much for the prosecution, plus Jackson, and Frankfurter, were seven votes (against Black and Douglas).²⁸ Any five could make the prosecution victorious. And it often was, until—after Vinson had been replaced by Warren in 1953—

²³ The ranking of the justices by how often they voted for the prosecution is in Table 1, below. The conservative justices are the four Truman appointees (Burton, Vinson, Clark, and Minton) and Reed, an FDR appointee. Burton, however, votes less for the prosecution than Jackson does, 61 percent to Jackson’s 73 percent. For one more quote vividly illustrating the concern about communist subversion, see note 306. That comes from a 1961 majority opinion for the Court by Stewart, long after Jackson’s departure.

²⁴ See *infra* note 314 (discussing *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)). Frankfurter also wrote against Black and Douglas’s “dogmatic preference” for the Bill of Rights, for example in *Dennis II*. See *infra* note 124 and accompanying text.

²⁵ See *infra* note 144 and accompanying text (discussing *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952)).

²⁶ Jackson’s concurrence in *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382 (1950), upholding the obligation of labor unions to provide affidavits that no officer is a member of the Communist Party, is similarly framed in terms of that party’s unique and subversive nature. See *infra* note 102 and accompanying text.

²⁷ See *infra* note 147 and accompanying text (discussing *Harisiades*, 342 U.S. at 597–98).

²⁸ See *infra* Table 1, Part III.

Jackson passed away on October 9, 1954, to be replaced by Harlan on March 17, 1955. That began a brief period of idealism about the Bill of Rights, when the Court would favor the individuals in un-Americanism prosecutions. Those exonerations led to a legislative backlash in the summer of 1957. The legislature reversed one decision and was poised to exclude several issues from the jurisdiction of the Supreme Court.²⁹ After the backlash, five of the justices, including Frankfurter, increased their voting for the prosecution producing several 5–4 convictions.³⁰ In September 1962, Goldberg, who would never vote for the prosecution, replaced the retired Frankfurter, who had come to often do. Thereafter, individuals win every un-Americanism case, albeit often 5–4 and this historical chapter closes.

As Part III shows, the result is four periods. The last Truman appointment, of Minton in October 1949, initiates an era named for its herald, Jackson. The Jackson Era ends when Harlan replaces Jackson in March 1955. That begins the Premature Idealism Era till the legislative backlash of July 1958. The Backlash Era lasts until Goldberg's appointment in September 1962, starting the Post-Frankfurter Era, which closes un-Americanism prosecutions. The more detailed recounting of Appendix A focuses on reviewing all the cases and collecting quotes that reveal the texture of the thinking of each majority and dissent.

III. AGGREGATING AND VISUALIZING

The Court's treatment of un-Americanism prosecutions was complex and varied. The result is an opacity, which, however, is permeable through an aggregation and visualization of the large number of cases and votes.

The quantitative analysis rests on the primary opinions about un-Americanism prosecutions. In the narrative of Appendix A the secondary cases that are not counted are identified when described. Essentially they

²⁹ See *infra* note 232 and accompanying text. The statute to overrule *Jencks* passed the House 351–17. Pub. L. No. 85-269, 71 Stat. 595 (1957). Appendix A Part C discusses the backlash. For the justices' voting changes, see *infra* Table 2 and accompanying text.

³⁰ Whereas the text will use temporal language (here "after") due to convention, causal language (here "because of") would be perfectly appropriate. Philosophy of science has many competing understandings of causation, one of which is temporal sequence. Regardless of which theory of causation one adopts, the legislative backlash caused the change in the voting of the five conservative justices.

are the espionage cases,³¹ the single-justice and domestic cases about bail,³² and the private liability cases.³³ Espionage cases are atypical because they involve national security directly (rather than fear of communist infiltration or subversion). Single-justice bail cases are atypical because they do not involve the entire Court. Domestic bail cases differ because the considerations for bail are different than those for conviction. Private liability cases are atypical because the reaction to one private party's effort to impose liability on another is quite different than the response to a state-initiated administrative or criminal prosecution. Generally speaking, espionage cases tend to result in prosecution victories, bail cases in defendant victories, and private liability cases in no liability, with little apparent relation to the level of fear of communism. The predictability of their outcomes justifies their exclusion. Including them would not alter materially the analysis but would add noise. The other side of the same phenomenon is the realization that, in the remaining cases, outcomes fluctuated with no change in the law; the change was the level of fear of communism.

The resulting sample consists of 100 opinions, from *Lovett* in 1946 to *Robel* in 1967, listed in Appendix B. All nine justices cast votes in sixty-four cases, eight in twenty-seven, seven in ten, and six in two. The revolving composition of the Court included twenty justices, if we include Marshall, although he did not participate in the one case during his tenure, *Robel*. Table 1 orders them from the one voting the most in favor of the prosecution (Vinson with 86.4 percent), to those voting the least (a six-way tie at zero

³¹ They are *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Rosenberg v. United States*, 346 U.S. 273, 277 (1953); and *Ullmann v. United States*, 350 U.S. 422, 423 (1956). The government wins all. Two additional cases appear closer to national security than un-Americanism and are also not included. *Heikkila v. Barber*, 345 U.S. 229 (1953) (deportation challenge); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (indefinite detention for deportation of alien about whom the attorney general will not say why the alien is not admissible even in camera). They are also discussed below. See *infra* note 142 and accompanying text (discussing *Shaughnessy*). One more deportation case, *United States v. Witkovich*, 353 U.S. 194 (1957), is similarly excluded. See *infra* note 213 and accompanying text.

³² See *infra* note 115 (discussing *Williamson v. United States*, 1950 WL 42366 (September 25, 1950) (single-justice bail)); see *infra* note 116 (discussing *Stack v. Boyle*, 342 U.S. 1 (1951) (domestic bail)); *infra* note 169 (discussing *Yanish v. Barber*, 73 S. Ct. 1105 (1953) (single-justice foreign)); *infra* note 189 (discussing *Steinberg v. United States*, 76 S. Ct. 822 (1956) (single-justice domestic)). The individuals win all. The one foreign, entire-court case is included. See *infra* note 149 (discussing *Carlson v. Landon*, 342 U.S. 524 (1952) (the government wins due to fear of the defendants' spreading communism, which suggests that this government victory may have been influenced by the red scare and, therefore, is properly in the database)).

³³ See *infra* note 137 (discussing *Tenney v. Brandhove*, 341 U.S. 367 (1951)); *infra* note 138 (discussing *Collins v. Hardyman*, 341 U.S. 651, 656 (1951)); *infra* note 195 (discussing *Black v. Cutter Labs*, 351 U.S. 292 (1956)); *infra* note 202 (discussing *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 352 U.S. 153 (1956)); *infra* note 244 (discussing *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958)); *infra* note 372 (discussing *Wheeldin v. Wheeler*, 373 U.S. 647 (1963)). They all result in no liability, which appears as favoring un-Americanism prosecutions in the first three and *Wilson*.

that includes the pre-Truman Murphy and Rutledge, as well as the post-Truman Democrats Goldberg, Fortas, Marshall, and Brennan, who, albeit Republican-appointed, was a Democrat).

The first and fourth columns hold the last name of each Justice. The second and fifth columns hold the dates that they were active on the Court, from the month and year of their appointment to the month and year of their departure. The third and sixth columns hold the voting record of each justice in terms of percentage of votes cast against the individual (and in favor of the prosecution, government, or state) rounded to one decimal point.

Table 1: Justices' Voting Record

<i>Justice</i>	<i>Active</i>	<i>Vtg R</i>	<i>Justice</i>	<i>Active</i>	<i>Vtg R</i>
Vinson	6/46–9/53	86.4%	Frankfurter	1/39–8/62	39.1%
Minton	10/49–10/56	84.4%	Warren	10/53–6/69	2.7%
Reed	1/38–2/57	84.2%	Douglas	4/39–11/75	2.1%
Clark	8/49–6/67	80.2%	Black	8/37–9/71	1.0%
Jackson	7/41–10/54	72.7%	Murphy	2/40–7/49	0.0%
Whittaker	3/57–3/62	70.5%	Rutledge	2/43–9/49	0.0%
White	4/62–6/93	70.0%	Brennan	10/56–7/90	0.0%
Harlan	3/55–9/71	60.8%	Goldberg	9/62–7/65	0.0%
Burton	9/45–10/58	59.3%	Fortas	10/65–5/69	0.0%
Stewart	10/58–7/81	57.9%	Marshall	8/67–10/91	0.0%

This ranking of the Justices makes some interesting revelations.

(1) Jackson, the example of a jurist who subordinates the Bill of Rights to the fear of Communism, is fifth. Vinson, Minton, Reed, and Clark have more anti-Communist voting records than Jackson. (2) Warren, Douglas, and Black, the persistent votes for the individual, do not have perfect records, having cast some votes against individuals in the Jackson Era. Warren cast two before his change of heart. Douglas cast two, and Black cast one, in *Gerende*. (3) Frankfurter, who is seen as having defected from the pro-individual coalition after the legislative backlash of the summer of 1957, still has the next most liberal voting record. (4) Stewart and Harlan, who are seen as conservatives and were appointees of Republican President Eisenhower, vote for the prosecution quite a bit less than White or Jackson, both appointees of Democratic Presidents, respectively, Kennedy and Roosevelt.

A. A Summary View: The Pendulum

Visualize the Court's treatment of un-Americanism prosecutions on a graph where each opinion is placed depending on the date of its issuance along the horizontal axis and the fraction of votes for the prosecution on the

vertical axis. The result, Figure 1, shows the ebb and flow of the fraction of votes in favor of the prosecution.³⁴ The horizontal axis holds time, the date of each opinion. The vertical axis holds the fraction of the votes cast that were in favor of the prosecution, the government, or the state. Unanimity for the individual corresponds to zero and unanimity for the prosecution, which only occurs once, corresponds to one. Two horizontal lines mark the tight splits, 4/9ths and 5/9ths. Because the fraction is the result of dividing by the actual votes cast, not all values are in ninths. For example, four even splits appear.³⁵

Each diamond is one opinion. Diamonds that would be superimposed (because an opinion with the same voting fraction was issued on the same day) appear as a white center. Three superimposed decisions do not occur. The unanimous-against-the-prosecution four decisions of the early summer 1961 are too close in time to be distinguishable; their separation in time is increased for the purpose of the figure.³⁶

Vertical lines indicate the appointment of new justices and the legislative backlash against the Court in the summer of 1957. The former are dotted; the latter is solid. Of the several legislative actions of that summer,³⁷ the solid line corresponds to the introduction of the Jenner bill. The Jenner bill was the most sweeping legislative reaction and eventually failed; a different one was enacted. Each line that corresponds to the appointment of a justice also identifies the justice who was replaced. This text that identifies the replaced justice has in some instances a left or right arrow in a parenthesis. A right arrow identifies appointments that replace a justice who does not tend to vote for the prosecution with one who does and *vice versa* for a left arrow. Thus, for example, the line marked “Brennan for Minton (←)” corresponds to the date of the appointment of Brennan, who replaced Minton, and who would vote significantly less for the prosecution than Minton had.

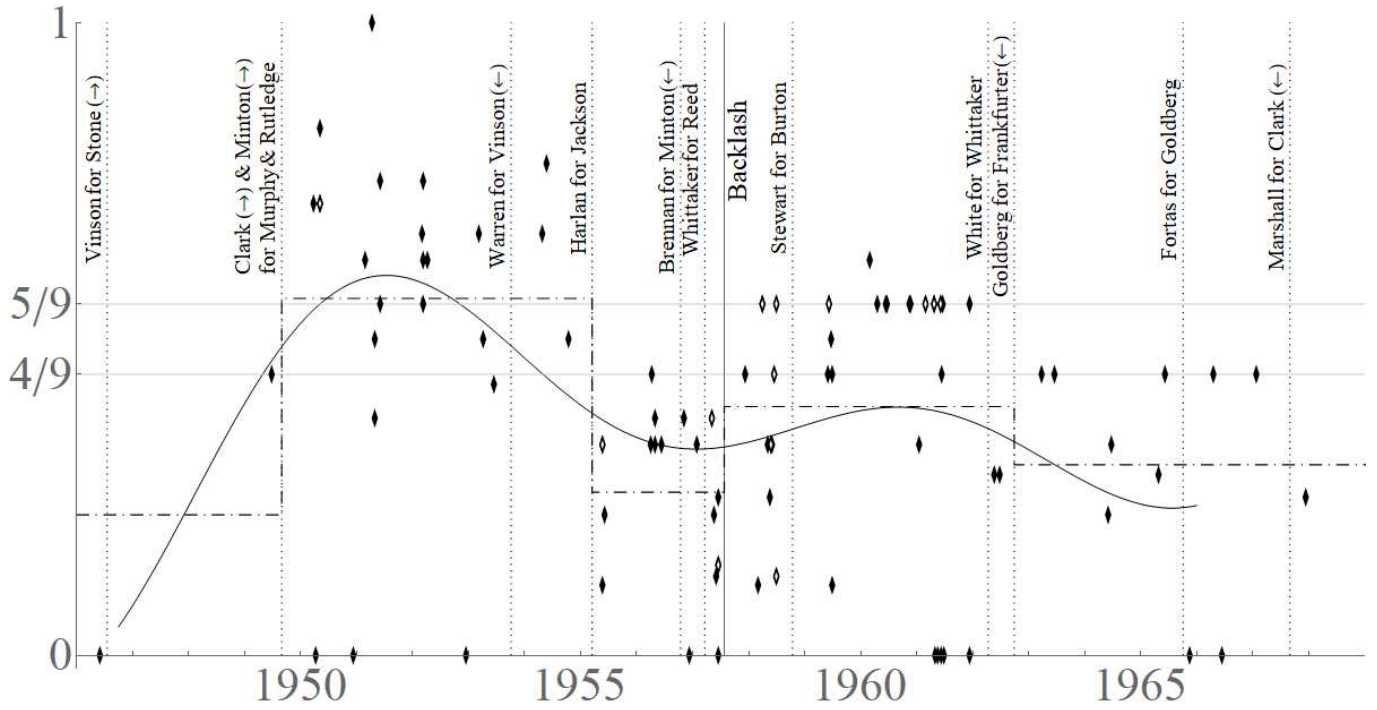
³⁴ A dynamic version of the figure, where pop-ups with case names, citation, and the voting appear when hovering over each point, appears at my website under the entry corresponding to this article. Also reachable at Nicholas L. Georgakopoulos, *The Supreme Court's Un-Americanism Pendulum*, IND. U. MCKINNEY SCH. L., tinyurl.com/uapend (last visited Feb. 8, 2021) [perma.cc/7D28-8LNL].

³⁵ For the equal splits see *infra* note 106 (discussing *Bailey*), note 133 (discussing *Isserman I*), note 136 (discussing *Isserman II*), and note 283 (discussing *Raley*).

³⁶ The four are discussed below in note 315 (discussing *Slagle v. Ohio*, 366 U.S. 259 (1961)), note 316 (discussing *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961)), note 322 (discussing *Noto v. United States*, 367 U.S. 290 (1961)), and note 323 (discussing *Communist Party v. Catherwood*, 367 U.S. 389 (1961)). The dates of the first and last are moved forward and back, respectively, by fifteen days; the dates of the middle two are similarly moved by four days. This only influences the figure. The analysis uses the actual dates.

³⁷ See *infra* notes 232–237 and accompanying text.

Figure 1: The fraction of votes for the prosecution in the primary un-Americanism decisions.



Order comes from two aggregation efforts. The first is the step-like dot-dashing line, which is the result of a regression using dummy variables that correspond to the eras of different un-Americanism attitudes on the Court. The second is a solid wave-like line, which is the result of trying to fit a pendulum equation to the data. Its ebb and flow match the eras. Both show the increased siding with the prosecution of the Jackson and Backlash Eras, and the opposite stance of the first two un-Americanism cases, the Premature Idealism, and Post-Frankfurter Eras.

B. Four Eras

From a statistical perspective, the proposition that these four eras produce different average voting fractions on the Supreme Court is testable by the linear regression that uses dummy variables corresponding to the eras, the step-like dash-dotted line on Figure 1. Dummy variables identify the periods: that before the appointment of Clark and Minton which only holds two cases; the Jackson Era; the Premature Idealism Era (which is set as the regression's constant); the Backlash Era; and the Post-Frankfurter Era. The fraction of votes for the government is higher in the Jackson Era and the Backlash Era than in the Premature Idealism Era with statistical confidence of 99.99 percent and 98 percent, respectively. However, this regression is not particularly powerful in describing the data. The regression only explains 20 percent to 24 percent of the variation of the voting (R^2 is .236 and adjusted R^2 is .204).

Much more explanatory power lies in the non-linear regression that rests on the equation that describes the motion of the pendulum, a product of time, a trigonometric sine of time, and Euler's constant raised to a power that is a function of time. This produces the solid fluctuating line of Figure 1. This regression explains 80 percent to 81 percent of the variation in the voting (R^2 is .806, adjusted R^2 is .796). This leads to the conclusion that voting on un-Americanism prosecutions is more accurately described as having followed that pendulum motion than the steps of the dummy regression. The full statistics of these two regressions are in Appendix C, Tables C1 and C2.

The difference between the two concepts—the sharp steps juxtaposed to the pendulum's gradual transitions—is that the changes of the voting are not as sharp as suggested by the time markers used to separate the periods. Consider, for example, the transition from the Jackson Era to the Premature Idealism Era, which starts with the appointment of Harlan. After the appointment of Warren and before the appointment of Harlan, a period of over a year from 1953 to 1955, the Court decided only two un-Americanism cases, rather than continuing the pace of the earlier years when voting for the prosecution reached its peak. In part, this slowdown is due to the gap

between the death of Jackson on October 9, 1954, and Harlan's appointment on March 17, 1955, a period during which the Court issued only one un-Americanism opinion, *Isserman II*, splitting 3–3 without Jackson, Clark, or Warren.³⁸ The close look at the Court's activity reveals that in this transitional period the Court also avoided deciding a case, ordering the reargument of *Emspak* at the end of the 1953 term.³⁹

Similarly, the transition is softened in the start of the Backlash Era, where the voting is quite mixed, a little less in favor of the prosecution than after the appointment of Stewart. The next transition also is softened by the Court's voting in favor of the individual in a few cases before the end of this era, before the appointment of Goldberg.

1. The Jackson Era

The first era, the Jackson Era, starts with the appointment of Clark and Minton in August and September 1949. Jackson died on October 9, 1954. Harlan was appointed in March 1955 to replace him. The latter date is the border. Jackson's express primacy of protection against Communist infiltration over the Bill of Rights defines this era and it is the only era when un-Americanism prosecutions garner seven or more votes. The Court during this period has several justices who see Soviet Communism as a significant threat, a threat that justifies the subordination of the Bill of Rights, the position exemplified by Jackson. Five of the justices with the voting records most in favor of the prosecution were on this composition of the Court: Vinson, Minton, Reed, Clark, and Jackson, with voting rates, respectively, of 86 percent, 84 percent, 84 percent, 80 percent, and 73 percent in favor of the prosecution. Burton is only a little behind with 59 percent.

The Court decided twenty-four un-Americanism cases during the Jackson Era. The prosecution was victorious in sixteen or 67 percent. The average fraction of justices voting for the prosecution was 57 percent. This era includes the only unanimous outcome in favor of the government: *Gerende*.⁴⁰

³⁸ See *infra* note 136 and accompanying text.

³⁹ *Emspak v. United States*, 347 U.S. 1006 (June 7, 1954) (*per curiam*) (ordering reargument); LICHTMAN, *supra* note 21, at 68. The reargument changed the outcome. After the initial hearing on *Emspak*, the Court was poised to rule for the prosecution 6–3, with Warren and Jackson in the majority for the government. The draft opinion would have ruled broadly in favor of the government. This made Black move for reargument, a motion which carried. In the interim, Jackson died, and Warren changed attitudes about un-Americanism prosecutions. Jackson's replacement, Harlan, sided with the government, so the death of Jackson may have less importance than it appears to have. Nevertheless, Black, Douglas, Warren, Frankfurter, Clark, and Burton, opposed the prosecution. See *infra* note 171 and accompanying text.

⁴⁰ See *infra* note 88 and accompanying text (noting that the opinion is *per curiam*).

Calculating the rate of the Court's output over time is complicated by the fact that the Court tends to operate in terms that start every October (and are named for that October's year), issuing a disproportionate number of decisions near the end of each term. The Jackson Era lasted a little over six terms. Only one decision was issued early in the 1954 term, *Isserman II*, after Jackson's death. The remaining twenty-three decisions over six terms indicate a rate of slightly under four un-Americanism decisions per term.

2. The Premature Idealism Era

The Premature Idealism Era lasts from the replacement of Jackson by Harlan in March 1955 until the legislative backlash of the summer of 1957. Among the several legislative reactions, a good contender for the most significant is the submission of the Jenner bill on July 26, 1957, in the Senate, which would have stripped jurisdiction over five types of un-Americanism disputes from the Supreme Court.⁴¹ This era is defined by the primacy that Warren, Black, and Douglas give to the Bill of Rights (as does Brennan, who joins the Court only at the end of this era). The replacement of Jackson by Harlan has a pronounced effect because in this era Harlan votes for the individuals. That changes in the next era.

The Court decides twenty cases during this era. The prosecution is victorious in none.⁴² The average fraction of justices voting for the prosecution is 26 percent. The era comprises three terms, making the Court's rate of output just under seven un-Americanism decisions per term.

3. The Backlash Era

The Backlash Era starts in the summer of 1957 and lasts until the appointment of Justice Goldberg on September 28, 1962, by President Kennedy. The Backlash Era sees a pronounced shift of the Court to favoring the government in un-Americanism prosecutions. However, Warren, Black, Douglas, and Brennan never vote against any individual accused of un-Americanism. The Court produces wins for the government with five votes against those four.⁴³

⁴¹ A different bill passed but the Jenner bill would have been the most sweeping. See *infra* note 235 and accompanying text.

⁴² Note, however, that *Black v. Cutter Labs*, see *infra* note 195—which was excluded for being between private parties, where the Court would uniformly refuse to interfere—can be considered a case in which the individual accused of communist sympathies loses, slightly weakening the pro-individual nature of the Premature Idealism Era.

⁴³ The result is a clustering of opinions at the 5/9ths line of Figure 1. The one case which seems to correspond to a majority greater than five out of nine is *Nelson-LA*, in which Warren does not participate. See *infra* note 288 and accompanying text. The five-to-three vote produces the slightly larger fraction.

The Court decides forty-four cases during the Backlash Era. The prosecution is victorious in twenty or 45 percent. The average fraction of justices voting for the prosecution is 39 percent. Treating this era as comprising five terms, the Court's output would be slightly over 8.5 un-Americanism decisions per term, the greatest rate of output compared to other eras.

One may counter that the voting might have changed later, upon the appointment of Stewart rather than upon the backlash. This is untenable for several reasons. The explanatory power of the dummy regression would drop.⁴⁴ The voting of the period before Stewart's appointment is closer to that after it, rather than to that before the backlash.⁴⁵ The applicable statistical test differentiates both the latter periods from the Premature Idealism Era.⁴⁶ Stewart actually voted less for the government than his predecessor, Burton, had come to vote after the backlash.⁴⁷ Moreover, the period between the backlash and Stewart's appointment has convictions that would be foreign to the Premature Idealism Era. The several exonerations that it also has are not inconsistent with the period after Stewart's appointment. Their slightly greater frequency before Stewart's appointment is part of the gradual nature of the transitions that make the pendulum motion have greater explanatory power than the step process.

4. The Post-Frankfurter Era

In the final era, the Post-Frankfurter Era, the Kennedy and Johnson appointees (after White; i.e., Goldberg, replaced by Fortas, and Marshall who replaced Clark) turn the Court against prosecutions and the historical chapter of un-Americanism prosecutions closes.

The Court decides eleven cases during this era. The prosecution wins none. The average fraction of justices voting for the prosecution is 30 percent.

⁴⁴ If the appointment of Stewart is set as the dividing line, then the explanatory power of the dummy-variable regression drops to 18.7 percent and 21.9 percent (adjusted R-squared and R-squared) from the 20.4 percent to 23.6 percent.

⁴⁵ Compare the rate of voting for the government in three periods, the Premature Idealism Era, the transitional period until the appointment of Stewart, and the remainder of the Backlash Era (starting from the appointment of Stewart). The first is 26 percent, the second 37 percent, and the third 41 percent. Granted, Stewart's appointment slightly increases the rate of voting for the government, but by a mere 4 percent. The larger leap follows the backlash, which leads to a change of 11 percent (from 26 percent to 37 percent), a change almost triple what Stewart brings. One of these three periods is unlike the others: The Premature Idealism Era. The other two belong together as the Backlash Era.

⁴⁶ The t-test against the Premature Idealism Era gives statistical confidence that the transitional period is different of 96 percent and that the period after Stewart is of 99 percent. The two latter periods are indistinguishable from the perspective of the t-test.

⁴⁷ See *infra* Table 2. Burton, after the backlash, voted 71 percent for the government. During the Backlash Era Stewart voted 61 percent for the government.

The Court's rate of output is unclear. Because this is the final era, its ending is poorly specified. At the earliest, it is the last un-Americanism case in this database, but much later dates are plausible. Perhaps its end is the end of the Cold War, perhaps the final collapse of the Soviet Union or some earlier date, such as a date when the Cold War is seen to reach a stalemate. Therefore, establishing the rate of output of the Court cannot be precise. Based on the last case in this sequence, one might treat this era as having a duration of six terms, as a minimum. Then the Court's output appears to be at a maximum a little short of two decisions per term, quite a bit less than any prior era, suggesting that the end of un-Americanism prosecutions was at least also a result of the lower courts not producing cases that the Supreme Court would review.

C. *Gradual Transitions*

The gradual nature of the transitions is a novel phenomenon that deserves further research and explanation. The 1955 decision to reargue *Emspak* is a good example of our lack of understanding of the corresponding dynamics. It could well be an accident—a majority draft opinion with excessive breadth which led to a loss of votes and a switch of the outcome.⁴⁸ Yet, would this have happened two years earlier? Perhaps two years earlier, at the peak of the Jackson Era, the forces of the environment in favor of un-Americanism convictions would have made the draft opinion not seem overbroad or would have countered any efforts at additional deliberation that the minority would have made, such as Black's motion for reargument, which perhaps only carried because the fervor against un-Americanism was ebbing.

Even the beginning of un-Americanism prosecutions holds expressions of gradualism. Consider Clark, a Truman appointee and one who strongly favored the government. Clark's impact on un-Americanism decisions is subdued by the fact that, likely due to the conflict of having served as Truman's Attorney General, he does not participate in eighteen cases, most of them early in his tenure. Whittaker presents a similar phenomenon, not participating in several cases early in his tenure, although he did not have a position in the Eisenhower administration.

The role of the two hot wars in this evolution also needs to be understood better. The Korean War—June 25, 1950, to July 27, 1953—partially overlaps with the peak of the pro-government attitude of the Jackson Era. It seems intuitive that the war may have contributed to the pro-government sentiment. However, the ramping up of convictions occurred before the war and the ebbing occurs before the war ends. Therefore, more

⁴⁸ See *infra* note 168 and 171 and accompanying text.

plausible is that both the war and the stance of the Supreme Court stem from the same forces, rather than that the war influenced the Court. Then, looking at the early ebbing of convictions, the question arises whether the war dissipated social pressures and a politically sensitive set of justices reacted accordingly. The Vietnam War's gradual escalation might frustrate efforts to understand why its impact may differ.

Puzzling is also the gradual change surrounding the replacement of Burton with Stewart. Their voting records are virtually identical. Yet, Stewart's appointment ends a transitional period where the Court was not voting quite as much for the government and ushers in the period of peak convictions of that era. The study of the votes, partitioned by era in Table 2, shows that Burton voted more for the prosecution during the Backlash Era than he had previously. Actually, Burton exceeds Stewart, voting 71 percent for the prosecution during the Backlash Era compared to Stewart's 61 percent, which means that, all else equal, the replacement of Burton by Stewart should not have increased voting for the government. Nevertheless, before the appointment of Stewart the Court produces a slightly more mixed set of outcomes. During Stewart's confirmation, the Senate expressed some un-Americanism sentiment.⁴⁹ Might that atmosphere have influenced some other justices to vote slightly more for the prosecution after Stewart's appointment? It is consistent with the notion that some of the justices were sensitive to the shifting political sentiment that the Backlash period and the gradual transitions between eras demonstrate.

Similarly puzzling is the softening of the transition into the Post-Frankfurter Era before it begins with the appointment of Goldberg. Nothing explains the few exonerations that seem to produce this softening, the unanimous siding with the individual in *Cramp*, and the 5–2 votes for the individuals in *Russell* and *Silber*.⁵⁰ Yet, Black's dissent in *Killian* (arguing

⁴⁹ The minority report of the Senate Judiciary Committee was opposed “because it is evident from the hearings that Justice Stewart thinks the Supreme Court has the power to legislate and to amend the Constitution of the United States.” ROY M. JACOBSTEIN & J. MYRON, *Nomination of Potter Stewart, Minority Views*, in SUPREME COURT OF THE U.S. HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 10 (1977). During the hearing several of the Court's decisions during the Premature Idealism Era came under attack. *Nomination of Potter Stewart to Be an Associate Justice of the Supreme Court of the United States: Hearing Before S. Comm. on the Judiciary*, 86th Cong. Vol. 2, 71–146 (1959) (Senator Ervin at p. 83 refers to *Nelson*; at p. 84 to *Yates*; p. 85 to *Koenigsberg*; at p. 86 to *Watkins*; at p. 88 to *Slochower*; at p. 90 to *Sweezy*; Senator Ervin's stressing of original intent and opposition to judicial activism spans from page 75 to page 130, taking up most of that day of the hearings). Despite that these attacks were phrased as anti-communist ones, the true motivation likely was an anti-integration one because only Southern senators voted against confirmation. See GovTrack, *Nomination of Potter Stewart as Assoc. Justice of Supreme Court*, <https://www.govtrack.us/congress/votes/86-1959/s58> (last visited Apr. 22, 2021) [perma.cc/WJ4M-8EKA]).

⁵⁰ See *infra* note 348 and accompanying text (discussing *Cramp*); *infra* note 356 and accompanying text (discussing *Russell*); *infra* note 361 and accompanying text (discussing *Silber*).

the impropriety of requiring labor union affidavits that deny communist views) foretells the reversal of *Douls*.⁵¹

Despite this gradual prelude, the end of un-Americanism prosecutions is not gradual. The end does not come from the conservatives gradually voting any less for convictions but from the abrupt replacement of Frankfurter by Goldberg. One more uncompromising liberal joins Warren, Black, Douglas, and Brennan. The resulting unshakable majority of five closes this historical chapter. The judicial sensitivity to political undercurrents that drove prior transitions is irrelevant at this final step, not coincidentally upon the departure of Frankfurter with his judicial modesty and political sensitivity.

IV. BACKLASH: DURESS OR LAW?

A closer look at the voting of individual justices around the Backlash Era reveals additional texture about their conduct and the interaction between Congress and the Court.

Table 2 collects the voting of each justice who served on the Court during the Backlash Era as well as either before or after it. The ten justices who meet this criterion are arranged by appointment date at the rows of the table. The columns of the table come in three groups, corresponding to the three periods of time, before, during, and after the Backlash Era. Each group has three columns. The left column headed "For Gov't" gives the number of votes each justice cast for the government in un-Americanism prosecutions over that period of time. The middle column headed "For Indiv." gives the number of votes cast by each justice for the individuals accused of un-Americanism during that period. The last column headed "Rate" gives the rate of voting for the government of the corresponding justice in the corresponding period as a percentage, rounded.⁵²

Table 2: Voting Around the Backlash Era

	<i>Pre-Backlash</i>			<i>Backlash</i>			<i>Post-Backlash</i>		
	<i>For Gov't</i>	<i>For Indiv.</i>	<i>Rate</i>	<i>For Gov't</i>	<i>For Indiv.</i>	<i>Rate</i>	<i>For Gov't</i>	<i>For Indiv.</i>	<i>Rate</i>
<i>Black</i>	1	45	2%	0	44	0%	0	10	0%
<i>Frankfurter</i>	8	38	17%	26	15	63%	Not on Court		
<i>Douglas</i>	2	40	5%	0	44	0%	0	11	0%
<i>Burton</i>	25	20	55%	10	4	71%	Not on Court		
<i>Clark</i>	18	9	67%	39	5	89%	8	2	80%

⁵¹ See *infra* note 351. *Douls* was reversed by *US v. Brown*. See *infra* note 385 and accompanying text.

⁵² Both Figure 1 and Table 2 offer a percentage of voting for the government, with an important difference, however. In the case of Figure 1, the percentage is of the justices voting in each case. In Table 2, it is the percentage of votes that each justice cast.

<i>Warren</i>	2	20	9%	0	41	0%	0	11	0%
<i>Harlan</i>	6	13	32	30	14	68%	9	2	82%
<i>Brennan</i>	0	9	0%	0	44	0%	0	11	0%
<i>Whittaker</i>	0	2	0%	31	11	74%	Not on Court		
<i>Stewart</i>	Not on Court			17	11	61%	5	5	50%

Compare, first, the rates of voting for the government before the Backlash Era to those during it. Notice how, other than Warren, Black, Douglas, and Brennan, the rate of voting for the government increases. Whittaker's goes from 0 to 74 percent.⁵³ Frankfurter's goes from 17 percent to 63 percent—more than tripling. Harlan's goes from 32 percent to 68 percent, more than doubling. Even the two justices who were already frequent dissenters in favor of the government, Clark and Burton, have their rates of voting for the government increase: Clark from 67 percent to 89 percent (a 33 percent increase) and Burton from 56 percent to 71 percent (a 28 percent increase). For five members of the Court, the legislative backlash led to increased voting for the government. Frankfurter's change was by far the most pronounced.⁵⁴

Second, compare the rate of voting for the government during the Backlash Era to the post-Backlash Era. Clark and Stewart slightly reduce their rate of voting for the government, Clark from 89 percent to 80 percent and Stewart from 61 percent to 50 percent. Harlan, however, increases the rate of voting for the government from 68 percent to 82 percent. Not included in Table 2 is the first JFK appointee, White, whose rate of voting for the government is 70 percent over ten cases. White replaced Whittaker, meaning that the voting rate for that seat hardly changed from Whittaker's 74 percent to White's 70 percent. Nor is included in the table JFK's second appointee, Goldberg, who never voted for the government in the six votes that he cast. Goldberg replaced Frankfurter, whose rate of voting for the government during the Backlash Era was 63 percent. The conservative voting of the seats of Clark, Harlan, Stewart, and White continues

⁵³ Granted, Whittaker's zero is less meaningful than the other justices' pre-Backlash rates because it is an expression of only two votes: that in the unanimous *Service* and that in the *per curiam*, 7-2 *Sentner*. See *infra* note 222 and accompanying text (discussing *Service*) and note 212 and accompanying text (discussing *Sentner*). The dissenters in *Sentner* were Clark and Burton. Using a locational concept of the arrangement of the justices, this voting record suggests that Whittaker must have been to the left of Burton who voted for the government 59 percent before the backlash. The fact that Whittaker votes 74 percent for the government during the Backlash Era whereas Burton votes for the government 71 percent allows us to infer that Whittaker not only did change significantly but also moved so far as to position himself likely to the right of Burton even after accounting for Burton's increased voting for the government.

⁵⁴ Frankfurter's change in voting is also the one that produces the greatest statistical confidence in the change when subjected to the chi-squared test, over 99.9 percent confidence. The other changes have small samples (as does Whittaker) and smaller changes (as do Harlan, Clark, and Burton) so that each individual judge's voting appears to possibly be the result of chance. But not of all five changing at the same time. When the chi-squared test is applied to all five justices, then it becomes clear that the voting of these justices did change with 99.9 percent statistical significance.

unchanged, as does the liberal voting of Black, Douglas, Warren, and Brennan. The outcomes of the cases changed because Goldberg replaced Frankfurter, rather than because any justices changed voting patterns (unlike the reaction to the backlash). For the four conservative members of the Court, the end of the Backlash Era does not come with any reduction of the subordinating the Bill of Rights to the fear of Communism, as their dissents emphasize.⁵⁵

Related to voting more for the government is the rate of output of un-Americanism cases by the Court during the Backlash Era. The output of 8.5 cases per term is the greatest ever seen. Granted, this rate of output is only marginally higher than that of the immediately preceding era, when the Court issued slightly under seven un-Americanism opinions per term. If the Court wanted to act against the legislative backlash, the Court could have easily slowed down the processing of cases. Neither the rate of output nor the actual handling of the cases suggests an effort to delay. Rather, the backlash persuaded most justices to vote differently, akin to it being binding legislation.

In evaluating the Court's reaction to the backlash of the summer of 1957, turn next to the Senate elections of 1958. The Democratic Party gained the largest swing in the history of the Senate.⁵⁶ Senator Jenner, the author and namesake of the most significant bill in the legislative backlash, retired and was replaced by moderate Democrat Vance Hartke.⁵⁷ This leftward shift of the Senate explains why the postponed legislation faded.⁵⁸ However, it also reduced the threat under which the Court operated in un-Americanism prosecutions. If the Court's move to favor the government in

⁵⁵ See, e.g., *infra* notes 367 and 371 (discussing Justice Harlan and White's separate dissents in *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 581–85 (1963), stressing the fear of communist infiltration of the NAACP); *infra* note 377 (discussing Justice White's dissent in *Yellin v. United States*, 374 U.S. 109, 126–27 (1963), discussing in detail the methods of infiltration of unions by educated youth); *infra* note 380 (discussing Justice Clark's support for the revocation of the communists' passports in *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964)); *infra* note 395 (showing Justice Clark's frustration at the undermining of the nation's self-preservation capacity in *Keyishian v. Bd. of Regents*, 385 U.S. 589, 628–29 (1967)).

⁵⁶ See, e.g., *Mid-Term Revolution*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Mid_term_Revolution.htm (last visited Mar. 2, 2020) [perma.cc/JN37-8GVL]; *Democrats Sweep 1958 Elections*, CONG. Q. ALMANAC ONLINE, <https://library.cqpress.com/cqalmanac/document.php?id=cqal58-1340275> (last visited Mar. 2, 2020) [perma.cc/EUP8-F83L]; *1958 United States Senate Elections*, WIKIPEDIA, https://en.wikipedia.org/wiki/1958_United_States_Senate_elections, (last visited Mar. 2, 2020) [perma.cc/5GE7-8QQU].

⁵⁷ See, e.g., *Notable Alumni: Rupert Vance Hartke*, IND. U. MAURER SCH. L., <https://www.repository.law.indiana.edu/notablealumni/21/> (last visited Mar. 2, 2020) [perma.cc/4SCE-XQLZ]; *Vance Hartke*, WIKIPEDIA, https://en.wikipedia.org/wiki/Vance_Hartke (last visited Mar. 2, 2020) [perma.cc/J4L3-MKTC].

⁵⁸ See, e.g., LICHTMAN, *supra* note 21, at 174. But Lichtman concludes that Frankfurter failed to recognize that the more liberal senate would have allowed Frankfurter to return to his pre-backlash stance; this is in contrast to the conclusion here that Frankfurter's side of the Court treated the 1957 backlash as a revelation of the national will, which permanently changed their interpretation.

reaction to the backlash was under duress, then the new composition of the Senate should mean that the threat had abated, and the Court could have returned to its practice during the Premature Idealism period of not subordinating the Bill of Rights to the fear of Communism.

That the Court's output increases, that the Court does not return to idealism after the 1958 Senate elections, along with the fact that four seats continue to subordinate the Bill of Rights to the fear of Communism after the end of the Backlash Era, suggests that the change due to the backlash was not one under the duress of legislative reprisals. The change was permanent, and the Court did not resist it.

The Court's reaction better fits the theory that the Court's majority interpreted the backlash as an expression of the national will. When the Justices were weighing the fear of Communism against the Bill of Rights before the summer of 1957, the justices were aware that they were making subjective evaluations. The backlash informed the Court that an overwhelming majority of the House and a majority of the Senate saw the Cold War and Communism as a major threat that justified subordinating the Bill of Rights to the fear of Communism.⁵⁹ The message was that Communism was not just one more ideology in the contest of ideas subject to the First Amendment but an instrument of the Cold War adversary. Having received this expression of the national will, the majority of the justices proceeded to revise their positions as a matter of law, permanently. The majority that was so shaped by this expression of the national will proceeded to take the government's side with greater frequency, a frequency that would not abate even when the threat of legislative reprisals faded.

V. CONCLUSION

In sum, the Court's stance regarding un-Americanism cases fluctuated with the level of fear of communism, with no real change in the text of the law. Congress's anti-Communism driven and largely failed backlash had an effectively binding effect on the majority of the justices.

Two are the predominant issues that this discussion of the evolution of un-Americanism prosecutions raises. First, the judiciary implements the constitutionally mandated freedoms of the Bill of Rights in a profoundly complex environment with far-reaching consequences. A corollary of this is the evaluation of the refusal of the four most liberal justices to take the nation's will into account and the re-evaluation of Frankfurter. Then, seeing this origin of today's freedoms reveals how surprisingly path-dependent they are.

⁵⁹ For the voting see *infra* notes 238–239 and accompanying text.

From the perspective that the backlash constituted an expression of the national will, the position of Warren, Black, Douglas, and Brennan, who never voted to affirm a conviction after 1954, rather than being celebrated, may be questioned. While the nation was intent on fighting the Cold War, their idealism undermined that desire on a practical level (however it may have helped in the war of ideas by demonstrating the liberty values of the United States). Their absolutism perhaps contributed to the deepening anti-intellectual sentiment of the political right.⁶⁰

This defiance of the popular will also appears in other courts. A notable example is what is known as the Rose Bird incident of the California Supreme Court. That court defied the popular will that favored the death penalty. When the California electorate passed, by voter mandate, a statute imposing the death penalty, the court held it unconstitutional. In reaction, the electorate amended the Constitution by referendum. The court still would not impose the death penalty. In 1986, in the unopposed retention elections for the Supreme Court Justices, the voters removed justices who were not imposing the death penalty.⁶¹ Warren, Black, Douglas, and Brennan had life tenure, which protected them against such a removal. This does not mean, however, that their defiance of the popular will had no lasting consequence on the electorate which further research needs to clarify.

Related is the reputation of Frankfurter as a justice. Today's consensus is that his judicial modesty is uninspiring.⁶² The championing of liberty by Warren, Black, Douglas, and Brennan is seen as exemplifying good judging. This conclusion has the benefit of hindsight. The United States survived the Cold War and continues to produce a very free society and a very productive economy. We cannot know how the balance of these three concerns would

⁶⁰ Anti-intellectualism and in particular its anti-elitist branch has a long and intensifying history associated with conservatism in the United States. See, e.g., Matthew Motta, *The Dynamics and Political Implications of Anti-Intellectualism in the United States*, 46 AM. POL. RES. 465, 466, 469 (2018) (“[R]ecent research (e.g., Gauchat, 2012) suggests that anti-intellectual attitude endorsement has been growing in the mass public for decades, especially on the ideological right.”); *id.* at 469 (“[I]deological conservatives’ levels of trust in the scientific community have decreased gradually since the early 1990s . . .”).

⁶¹ See Nicholas L. Georgakopoulos, *Judicial Reaction to Change: The California Supreme Court Around the 1986 Elections*, 13 CORNELL J. L. PUB. POL’Y 405 (2004).

⁶² See, e.g., JAMES F. SIMON, *EISENHOWER VS. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES* 177 (2018) (on the expectation that Frankfurter would lead the liberal wing of the Court whereas he practiced restraint); H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 5 (1981) (“When [Frankfurter] was appointed to the Court, many expected his long-time commitment to civil liberties to translate into judicial philosophy; instead, Frankfurter demonstrated an austere commitment to judicial self-restraint.”); NOAH FELDMAN, *SCORPIONS* 186 (2010) (“[T]he repudiation [of Frankfurter’s pro-flag-salute decision in *Minersville School District v. Gobitis*] would mark decisively Frankfurter’s fall from grace as a liberal leader on the Court. . . . Black and Douglas learned the lesson that following Frankfurter was no guarantee of liberal approbation. His constitutional subtlety had badly failed to anticipate actual reaction on the ground—and that did not make for a winning political strategy.”).

have unfolded if either Frankfurter had ignored the legislative backlash (joining the other four liberals), or if he had turned even more strongly in favor of prosecutions in un-Americanism matters, perhaps overruling the hampering of prosecutions by *Yates*. The location of today's American society is a result of Frankfurter's course.

A further issue regards the path-specific nature of the US-style socioeconomic freedom. It comes from a past of anti-Communist labor legislation, institutionalized loyalty oaths, and blacklisting. These origins are influential in the power of labor and the texture of much socioeconomic activity—especially learning and entertainment. A country which imitates the freedoms of the United States expecting to also produce a similar economic and social environment may get unexpected results. It may be no surprise that some countries that copy the freedoms of the United States find themselves with labor strife, sociopolitical disequilibria, or a more statist political discourse. Was today's flourishing won in the Cold War?

THE SUPREME COURT'S UN-AMERICANISM PENDULUM: APPENDICES

APPENDIX A: A QUOTE-RICH HISTORY

Observe the unabated fear of Communism through the conservative justices' own words. Notice the uncompromising primacy that the liberal justices place on the Bill of Rights. Despite those fixed landmarks, the ebb and flow of judicial activity produces four eras with different results, one remarkably spurred by legislative backlash.

A. Truman Appointees and Jackson's Fear of Communism

The House Un-American Activities Committee was established in 1938 to counter both Nazi and Soviet infiltration concerns.⁶³ The first notable un-Americanism prosecution against alleged communist sympathizers came in 1943. On February 1st, Representative Martin Dies, a Democrat from Texas and the chairman of the Committee, denounced 39 senior federal employees as communist sympathizers on the floor of the House of Representatives.⁶⁴ The House proceeded to investigate them and crafted an appropriations bill that prohibited the continued payment of their salaries.⁶⁵ Despite the disagreement of the Senate and the opposition of President Roosevelt, the bill was eventually signed into law.⁶⁶ Three of the employees challenged its validity, supported by the Solicitor General; Congress appointed special counsel to take the opposing view. The challenge reached the Supreme Court in 1946 in *Lovett*.⁶⁷ The Court unanimously invalidated the non-payment of the salaries. The six-member

⁶³ *United States v. Lovett*, 328 U.S. 303, 308 (1946) (citing H.R. 1282, 83d Cong. Rec. 7568–87).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 312–13 (“The Senate Appropriation Committee eliminated Section 304 and its action was sustained by the Senate. 89 Cong. Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left Section 304 in the bill. The House however insisted on the amendment and indicated that it would not approve any appropriation bill without Section 304. Finally after the fifth conference report showed that the House would not yield the Senate adopted Section 304. When the President signed the bill he stated: ‘The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.’”)

⁶⁷ *Id.* at 303.

majority, in an opinion authored by Hugo Black, considered the appropriations bill tantamount to a bill of attainder, prohibited by Article I.⁶⁸ The concurring opinion of Felix Frankfurter, joined by Stanley F. Reed, espoused constitutional avoidance. The majority treated the law as imposing a penalty of firing the employees, which turned the law into a bill of attainder. Frankfurter advocated restraint vociferously.⁶⁹ The mere prohibition of the payment of salary, read narrowly, was no punishment triggering attainder because it did not preclude the payment of compensation for the employees' continued services (as unpaid contractual obligations of the government, which the claimants had pursued below in the Court of Claims).⁷⁰

In 1949, in *Christoffel*, because a congressional committee did not have quorum, the Court exonerated a defendant convicted of perjury before it.⁷¹ In contrast to *Lovett's* unanimity, the Court split 5–4. Jackson's dissent argued that precedent allowed Congress to set its own rules explicitly or

⁶⁸ U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed”); *Lovett*, 328 U.S. at 313–14 (“The [challenged provision]’s language as well as the circumstances of its passage . . . show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Any other interpretation of the Section would completely frustrate the purpose of all who sponsored Section 304, which clearly was to ‘purge’ the then existing and all future lists of Government employees of those whom Congress deemed guilty of ‘subversive activities’ and therefore ‘unfit’ to hold a federal job. What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work” [citations omitted]). Justice Jackson did not participate in the decision.

⁶⁹ *Lovett*, 328 U.S. at 319–20 (“It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country’s well-being. . . . And so ‘it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’ This admonition was uttered by Mr. Justice Holmes in one of his earliest opinions and it needs to be recalled whenever an exceptionally offensive enactment tempts the Court beyond its strict confinements. Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations, of the professed limits of this Court’s power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason. The inclusion of § 304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. . . . [These practices have] the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.”).

⁷⁰ *Id.* at 330 (“[I]t merely prevented the ordinary disbursal of money to pay respondents’ salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.”).

⁷¹ See *Christoffel v. United States*, 338 U.S. 84 (1949) (reversing a perjury conviction of a communist who denied being one before the House of Representatives Committee on Education and Labor). The court split 5–4, with a dissent by Jackson, joined by Chief Justice Vinson, Reed, and Burton.

implicitly and Congress's implicit rule was that, after quorum was established by the presence of a majority of the members of a body, the body could take evidence without a majority present, and that nothing about the conviction was unfair.⁷²

President Truman made four appointments to the Court. Before the first case of the sample, Republican Burton was appointed in a bipartisanship gesture in September 1945, placing him outside the sample period. Before the second case, *Christoffel*, Treasury Secretary Vinson was appointed Chief Justice, replacing Stone, in June 1946. In August 1949, Attorney General Clark was appointed to replace Murphy. In October 1949, Minton was appointed to replace Rutledge. All three replaced justices had only cast votes for the individuals in un-Americanism cases, however small the sample may be (one vote in Stone's case, and two votes in the others). Vinson, Clark, and Minton would turn out to be some of the justices voting most often for the prosecution, respectively 86 percent, 81 percent, and 85 percent.⁷³ Truman's appointments likely moved the Court strongly in favor of un-Americanism prosecutions. Yet, the transition was not entirely abrupt. Already in *Christoffel*, the Court had moved from its unanimity of *Lovett* to a 5-4 split.

The year 1950 brought several disputes about un-Americanism prosecutions to the Supreme Court.⁷⁴ *Dennis I* involved the trial of the General Secretary of the Communist Party for not complying with a Congressional subpoena.⁷⁵ At trial in the District of Columbia, the defendant attempted to exclude for cause from the jury all government employees and, having been denied, challenged his conviction by a jury that included seven government employees. The majority opinion, adhering to precedent that only allowed government employees to be excused for cause if they had actual bias, upheld the conviction.⁷⁶ Both Black and Frankfurter dissented, writing separately that the political atmosphere about disloyalty was so intense that government employees should be excused as a class from such

⁷² *Christoffel*, 338 U.S. at 95 (Jackson, J., dissenting) ("We do not think we should devise a new rule for this particular case to extend aid to one who did not raise his objection when it could be met and who has been prejudiced by absence of a quorum only if we assume that, although he told a falsehood to eleven Congressmen, he would have been honest if two more had been present.").

⁷³ See *supra* Table 1, Part III and accompanying text.

⁷⁴ See *Dennis v. United States* (*Dennis I*), 339 U.S. 162 (1950); *Morford v. United States*, 339 U.S. 258 (1950); *United States v. Bryan*, 339 U.S. 323 (1950); *United States v. Fleischman*, 339 U.S. 349 (1950).

⁷⁵ *Dennis I*, 339 U.S. at 164.

⁷⁶ *Id.* at 171 ("[P]etitioner's contentions amount to this: Since he is a Communist, in view of all the surrounding circumstances an exception must be carved out of the rule laid down in the statute, and construed in *Wood* and *Frazier*, that there is no implied bias by reason of Government employment. Thus, the rule would apply to any one[,] but a Communist tried for contempt of a congressional committee, but not to a Communist. We think the rule in *Wood* and *Frazier* [requiring actual bias] should be uniformly applied.").

trials. Frankfurter focused on the political atmosphere's influence on jurors.⁷⁷ Black made a broader attack on the political climate itself.⁷⁸ Clark and Douglas did not participate.

The logical implication of *Dennis I* was to permit defendants to question jurors who were government employees to ascertain any actual bias. That questioning was denied in *Morford* and the Court reversed with a brief *per curiam* opinion unanimously without Clark's participation.⁷⁹ *Morford* is one of the opinions contributing to the gradual nature of the transition into the coming era of a greater rate of convictions.

In *Blau*, Justice Black wrote for a unanimous Court, without Clark's participation.⁸⁰ The opinion vindicated a Communist Party employee's right to remain silent in the face of a prosecution under the Smith Act for advocating the overthrow of the government. In contrast to *Blau*, the next year, in 1951, the Court, splitting 5–3, upheld the contempt conviction of the treasurer of the Communist Party in *Rogers*.⁸¹ The Court distinguished *Blau*. *Blau* involved a blanket assertion of the privilege against self-incrimination in favor of the defendant or others. However, in *Rogers*, the defendant, after having admitted being the treasurer of the Communist Party, asserted the privilege, expressly intending to prevent subjecting others to questioning and prosecution. The majority held that the treasurer's initial answer was a waiver of the right. In dissent, Black, with Frankfurter and Douglas, argued that answering the subsequent questions could subject the treasurer to additional criminal consequences. Therefore, the privilege should apply, and its waiver should not be interpreted broadly.

⁷⁷ *Id.* at 182 (Frankfurter, J., dissenting) (“There is a pervasiveness of atmosphere in Washington whereby forces are released in relation to jurors who may be deemed supporters of an accused under a cloud of disloyalty that are emotionally different from those which come into play in relation to jurors dealing with offenses which in their implications do not touch the security of the nation. . . . [I]t is asking more of human nature in ordinary government employees than history warrants to ask them to exercise that ‘uncommon portion of fortitude’ which the Founders of this nation thought judges could exercise only if given a life tenure. . . . A government employee ought not to be asked whether he would feel free to decide against the Government in cases that to the common understanding involve disloyalty to this country.”).

⁷⁸ *Id.* at 180 (Black, J., dissenting) (“Probably at no period of the nation’s history has the ‘loyalty’ of government employees been subjected to such constant scrutiny and investigation by so many government agents and secret informers. And for the past few years press and radio have been crowded with charges by responsible officials and others that the writings, friendships, or associations of some government employee have branded him ‘disloyal.’ Government employees have good reason to fear that an honest vote to acquit a Communist or any one else accused of ‘subversive’ beliefs, however flimsy the prosecution’s evidence, might be considered a ‘disloyal’ act which could easily cost them their job. That vote alone would in all probability evoke clamorous demands that he be publicly investigated or discharged outright; at the very least it would result in whisperings, suspicions, and a blemished reputation.”).

⁷⁹ See *Morford v. United States*, 339 U.S. 258 (1950).

⁸⁰ See *Blau v. United States*, 340 U.S. 159 (1950).

⁸¹ See *Rogers v. United States*, 340 U.S. 367 (1951).

The purge of communist sympathizers from municipal employment, effectuated through loyalty oaths, reached the Court in 1951 in *Garner*.⁸² The California legislature amended the Charter of the City of Los Angeles prohibiting the employment of individuals who advocated the violent overthrow of the government or were members of organizations that did. The city required oaths and affidavits from its employees. Some refused, were dismissed, and their challenges reached the Court. The Court split 5–4 in favor of the government. In an opinion by Clark, the majority found the regulations reasonable,⁸³ and not a bill of attainder.⁸⁴ Frankfurter’s partial concurrence agreed that the state has a right not to employ those who seek to overthrow its government,⁸⁵ but found the oath overbroad.⁸⁶ Justice Burton also concurred in part but found the oath inappropriate because it left “no room for a change of heart.”⁸⁷ The dissents of Douglas and Black stated that the majority’s distinction of *Lovett* was false—losing employment was punishment even if made through a general rule rather than the singling out of individuals as in *Lovett*. All the opinions distinguished a *per curiam* unanimous affirmance of loyalty oaths in Maryland: *Gerende*.⁸⁸ The Maryland statute was acceptable even to Black and Douglas because it was limited to current belief and intent to overthrow the government. Albeit *per curiam*, *Gerende* stands out as the only unanimous opinion of the Court in favor of the state on un-Americanism matters.

The prosecution of one organization, the Joint Anti-Fascist Refugee Committee, produced three opinions. Two were issued on the same day in 1950: *Bryan* and *Fleischman*.⁸⁹ The third, *Joint Anti-Fascist Refugee Committee v. McGrath*,⁹⁰ was issued a year later, in 1951. The first two regarded compliance with congressional subpoenas. *McGrath* was about the

⁸² See *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951).

⁸³ *Id.* at 720–21 (“[T]he Charter amendment is valid to the extent that it bars from the city’s public service persons who, subsequent to its adoption in 1941, advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so. The provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States.”).

⁸⁴ *Id.* at 722 (“We are unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment.”).

⁸⁵ *Id.* at 725 (“No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor.”).

⁸⁶ *Id.* at 726 (“The vice in this oath is that it is not limited to affiliation with organizations known at the time to have advocated overthrow of government.”).

⁸⁷ *Id.* at 729 (Burton, J., dissenting in part and concurring in part).

⁸⁸ See *Gerende v. Bd. of Supervisors of Elections*, 341 U.S. 56 (1951).

⁸⁹ See *United States v. Bryan*, 339 U.S. 323 (1950); see *United States v. Fleischman*, 339 U.S. 349 (1950). From the same group also sprung the later opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951). See *infra* note 90 and accompanying text. See also *infra* note 158 and accompanying text (discussing *Barsky*).

⁹⁰ See *McGrath*, 341 U.S. 123.

propriety of being included by the Attorney General in a list of communist organizations.

The organization sought to support fighters against Franco in Spain and had received prominent support.⁹¹ Congress sought the list of members of the organization and subpoenaed its entire executive board. Only the organization's secretary, Bryan, had actual possession of the list. Yet, all members of the executive board were convicted for not complying with the subpoena.

The *Fleischman* opinion applied to the members of the executive board who did not have possession of the list. The opinion engaged two issues, the defenses of lack of quorum and that only the secretary, who had actual possession of the list, violated the subpoena. The remaining members of the board could not unilaterally comply and produce the list.

The issue of lack of quorum was the primary issue in *Bryan* and applied to the House Committee on Un-American Activities. When the defendants appeared before the committee, and the committee demanded compliance with the subpoena, not enough members of the committee were present for it to have a quorum, raising again the issues of *Christoffel*. Nevertheless, the *Fleischman* and *Bryan* opinions held that any related objection had been waived because the defendants raised it for the first time during the trial. The opinion distinguished *Christoffel* by interpreting that the text of the statute about perjury, which required a "competent tribunal," implied the requirement of a quorum.⁹²

Interestingly, *Christoffel* was a 5–4 decision.⁹³ The majority was Black, Clark, Douglas, Frankfurter, and Murphy, who authored the majority opinion. Jackson's dissent was joined by Chief Justice Vinson, Burton, and Reed. Douglas and Clark, members of that tight majority, did not participate

⁹¹ See Joint Anti-Fascist Refugee Committee, WIKIPEDIA (Mar. 2, 2020), https://en.wikipedia.org/wiki/Joint_Anti-Fascist_Refugee_Committee [perma.cc/4NX4-U4FU].

⁹² *Bryan*, 339 U.S. at 329 ("The *Christoffel* case is inapposite. For that decision, which involved a prosecution for perjury before a congressional committee, rests in part upon the proposition that the applicable perjury statute requires that a 'competent tribunal' be present when the false statement is made. There is no such requirement in R.S. § 102. It does not contemplate some affirmative act which is made punishable only if performed before a competent tribunal, but an intentional failure to testify or produce papers, however the contumacy is manifested.").

⁹³ Jackson's concurrence in *Bryan*, 339 U.S. at 344–45, analogizes the presence of only eight justices at the announcement of *Christoffel* with the absence of a quorum in a congressional committee ("It is ironic that this interference with legislative procedures was promulgated by exercise within the Court of the very right of absentee participation denied to Congressmen. Examination of our journal on the day *Christoffel* was handed down shows only eight Justices present and that four Justices dissented in that case. . . . I want to make it clear that I am not . . . suggesting the slightest irregularity in what was done. I have no doubt that authorization to include the absent Justice was given; and I know that to vote and be counted in absentia has been sanctioned by practice and was without objection by anyone. It is the fact that it is strictly regular and customary, according to our unwritten practice, to count as present for purposes of Court action one physically absent that makes the denial of a comparable practice in Congress so anomalous.").

in *Bryan* and *Fleischman*. Black and Frankfurter dissented in *Fleischman* and *Bryan* and opposed the un-Americanism prosecutions. The new appointee, Minton, joined the majority in *Fleischman* and *Bryan* to be the fifth vote in support of un-Americanism prosecutions. Un-Americanism prosecutions produce a tight split of the Court, highly dependent on the Court's composition. Murphy appears as the swing vote between *Christoffel* and *Bryan/Fleischman*. The two members who did not participate were almost polar opposites on this matter. Douglas would very rarely vote in favor of un-Americanism prosecutions whereas Clark would often side with the prosecution, as Table 1 shows in Part III of the main text.

The *Fleischman* majority also rejected the idea that only the secretary violated the order to produce the list. Quoting precedent about corporate boards, the Court held that each had to use the powers of membership on the board to comply: to vote to instruct the secretary to deliver the list or to remove the secretary.⁹⁴

Black and Frankfurter in *Fleischman* wrote parallel dissenting opinions and Frankfurter also joined Black's opinion. Black's opinion looked closely at the section under which Fleischman's crime was charged. By its text, it only criminalized the failure to answer or to produce documents. The failure to cause action by a collective body to deliver documents, according to Black, was something different. The Committee may have had the power to issue orders to achieve that but did not.⁹⁵ Frankfurter's dissent underscores the same fault.⁹⁶ Similarly, in *Bryan*, Black, joined by Frankfurter, pointed to the text of the criminal provision alleged to be violated. It only penalized

⁹⁴ *Fleischman*, 339 U.S. at 356–57 (“When one accepts an office of joint responsibility, whether on a board of directors of a corporation, the governing board of a municipality, or any other position in which compliance with lawful orders requires joint action by a responsible body of which he is a member, he necessarily assumes an individual responsibility to act, within the limits of his power to do so, to bring about compliance with the order. It may be that the efforts of one member of the board will avail nothing. If he does all he can, he will not be punished because of the recalcitrance of others. But to hold that, because compliance with an order directed to the directors of a corporation or other organization requires common action by several persons, no one of them is individually responsible for the failure of the organization to comply, is effectually to remove such organizations beyond the reach of legislative and judicial commands.”) (internal citations omitted).

⁹⁵ *Id.* at 366 (Black, J., dissenting) (“A command to produce is not a command to get others to produce or assist in producing. Of course Congress, like a court, has broad powers to supplement its subpoena with other commands requiring the witness to take specific affirmative steps reasonably calculated to remove obstacles to production. But even though disobedience of such supplementary orders can be punished at the bar of Congress as contempt, *Jurney v. MacCracken*, 294 U.S. 125, it does not come within the limited scope of R.S. § 102.”).

⁹⁶ *Id.* at 381 (Frankfurter, J., dissenting) (“It may well be that the House committee should have asked respondent to try to have convened a meeting of the executive board with a view to asking the custodian of the records to produce them. Such a procedure is suggested by what was done in *Wilson v. United States*, 221 U.S. 361, 370–371. Had respondent refused she would have subjected herself to a contempt proceeding for disobedience of a command of the committee. But this is not such a proceeding. As to the offense for which she was prosecuted, I agree with Judge Edgerton that an acquittal should have been directed.”).

perjury, not the non-production of documents. Moreover, the right not to incriminate oneself, which the defendant had exercised, was firmly established.⁹⁷

In 1950, the Court in *Douds* also decided the constitutionality of requiring labor unions to provide annual affidavits that no officer was a member of the Communist Party.⁹⁸ Vinson wrote for the Court upholding the requirement as justified to avert politically-motivated strikes and not considering it a bill of attainder. Frankfurter's concurrence notes the sharp division of world opinion,⁹⁹ recognizes the expansive powers of the legislature,¹⁰⁰ and only slightly moves from the Court's position.¹⁰¹ Jackson's concurrence recognizes that requiring labor leaders to forswear allegiance to the Democratic or the Republican Party would be improper but argues that the Communist Party's foreign allegiance and belief in the overthrow of the government justify the different treatment.¹⁰² Black dissents alone. Douglas, Clark, and Minton did not participate.

The subpoenaing of the executive board of the Joint Anti-Fascist Refugee Committee was related to its being listed as a subversive organization by the Attorney General pursuant to a more general effort to

⁹⁷ *Bryan*, 339 U.S. at 345–46.

⁹⁸ *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382 (1950); see *infra* note 347 and accompanying text (discussing a related issue arising in *Killian*). In 1965, *Brown* held that the prohibition against Communists holding union officerships was unconstitutional. See *infra* note 385 and accompanying text.

⁹⁹ *Douds*, 339 U.S. at 415 (“[T]he conflict of political ideas now dividing the world more pervasively than any since this nation was founded . . .”).

¹⁰⁰ *Id.* at 416–17 (“The central problem presented by the enactment now challenged is the power of Congress, as part of its comprehensive scheme for industrial peace, to keep Communists out of controlling positions in labor unions as a condition to utilizing the opportunities afforded by the National Labor Relations Act. . . . Wrapped up in this problem are two great concerns of our democratic society—the right of association for economic and social betterment and the right of association for political purposes. . . . It is one thing to forbid heretical political thought merely as heretical thought. It is quite a different thing for Congress to restrict attempts to bring about another scheme of society, not through appeal to reason and the use of the ballot as democracy has been pursued throughout our history, but through an associated effort to disrupt industry.”).

¹⁰¹ *Id.* at 421–22 (“If I possibly could, to avoid questions of unconstitutionality I would construe the requirements of § 9(h) to be restricted to disavowal of actual membership in the Communist Party. . . . But what Congress has written does not permit such a gloss nor deletion of what it has written. . . . I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the policy of the Communist Party, though without any allegiance to it. To require oaths as to matters that open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country.”).

¹⁰² *Id.* at 423 (“There are, however, contradictions between what meets the eye and what is covertly done which, in my view of the issues, provide a rational basis upon which Congress reasonably could have concluded that the Communist Party is something different, in fact, from any other substantial party we have known, and hence may constitutionally be treated as something different in law.”) (internal footnotes omitted).

ensure that the rolls of public employees did not contain subversive individuals, as an expression of the emerging red scare. Essentially, as the administration of President Truman was being attacked from the political right for having allowed the infiltration of communists in the ranks of the civil service,¹⁰³ it sought to defend itself by (a) identifying communists or fascists and removing them from public employment; and (b) showing that the administration had established that the remaining employees were not subversive. Executive Order 9835 established a process to verify the loyalty of all employees in the executive branch, where loyalty meant not being a communist or fascist. If an employee's loyalty raised doubts, the employee received a hearing before a loyalty review board without various protections that a full trial would have afforded (and which would prove fatal for the scheme when the court would review its substance in *Peters v. Hobby* in 1955. See accompanying text in note 177). Because World War II effectively defeated fascism, the predominant target became communism. Also, the same Executive Order authorized the Attorney General to create a list of organizations "designate[d] as totalitarian, fascist, communist or subversive"¹⁰⁴

Two lines of litigation against this scheme reached the Supreme Court: (a) three organizations challenged their designation as subversive in *McGrath*,¹⁰⁵ and (b) a terminated employee challenged the process of review before the loyalty review boards in *Bailey v. Richardson*.¹⁰⁶ The Supreme Court issued both opinions on the same day, April 30, 1951.

Justice Clark, who had been Truman's Attorney General and presumably led the drafting of the Executive Order establishing loyalty review boards, recused himself from all related cases. The rest of the Court was sharply divided.

The Court split evenly in *Bailey*,¹⁰⁷ resulting in a one-sentence affirmance of the opinion below. The three-judge panel of the D.C. Circuit Court of Appeals upheld the firing of the employee 2–1. The majority saw employment in the executive branch as being an at-will relation at the discretion of the President, treating disloyalty as any other lack of fitness that would allow termination, to be determined at the discretion of the President.¹⁰⁸ The majority of the Circuit Court opinion distinguished *Lovett*

¹⁰³ The speech of Congressman Dies that led to *Lovett* was an example. See *supra* note 64.

¹⁰⁴ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125 (1951) (quoting Executive Order 9835). The loyalty review boards were abolished by a superseding order of President Eisenhower in 1953.

¹⁰⁵ *Id.*

¹⁰⁶ *Bailey v. Richardson*, 341 U.S. 918 (1951) (one-sentence affirmance by evenly split court).

¹⁰⁷ *Id.*

¹⁰⁸ *Bailey v. Richardson*, 182 F.2d 46, 51 (D.C. Cir. 1950) ("All such employees hold office at the pleasure of the appointing authority. . ."); *id.* at 58 ("[E]xecutive offices are held at the will of the appointing authority, not for life or for fixed terms.").

as prohibiting only permanent bars from public employment, rather than dismissals, the at-will nature of which was supported by ample precedent and established practices of dismissals for political affiliation.¹⁰⁹ The dissenting Circuit Court judge believed that, given that the employee's position was not sensitive, *Lovett* should apply. Therefore, the employee should receive a trial and her dismissal violated the freedoms of speech and assembly. Effectively, the split in the lower court mirrored the split in the Supreme Court; the even split with the recusal of the likely author of the Executive Order establishing Loyalty Boards, shows the attitudes of the Justices about this issue.

The three organizations—which challenged their designation as subversive—were the Joint Anti-Fascist Refugee Committee, the National Council of American-Soviet Friendship, Inc., and the International Workers Order, Inc. The Attorney General responded by moving to dismiss for failure to state a claim. The procedural posture of the motion to dismiss (before a trial to determine the facts) meant that the non-moving party's allegations were taken as true, namely that the organizations were charitable rather than subversive. That was dispositive for the narrowest plurality opinion.¹¹⁰ The Court's reaction was splintered, with five different opinions against dismissal and one dissenting opinion joined by the three Justices who favored dismissal. Jackson's opinion describes the range of views:

It is unfortunate that this Court should flounder in wordy disagreement The extravagance of some of the views expressed and the intemperance of their statement may create a suspicion that the decision of the case does not rise above the political controversy that engendered it. . . . Mr. Justice BLACK[']s concurrence] would have us hold that listing by the Attorney General of organizations alleged to be subversive is the equivalent of a bill of attainder for treason after the fashion of those of the Stuart kings, while Mr. Justice REED[']s

¹⁰⁹ *Id.* at 55–56 (“The Court [in *Lovett*] held permanent proscription from Government service to be such ‘punishment’, but it did not, as we read the case, hold mere dismissal from Government service to be punishment in that sense. It had held in the *Myers* case, and iterated in the *Humphrey* case, that the dismissal of an executive official performing purely executive duties is an executive function.”) (citation omitted); the opinion continues to discuss at length the precedent establishing the employment-at-will nature of executive employees.

¹¹⁰ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 125 (1951) (“For the reasons hereinafter stated, we conclude that, *if the allegations of the complaints are taken as true* (as they must be on the motions to dismiss), the Executive Order does not authorize the Attorney General to furnish the Loyalty Review Board with a list containing such a designation as he gave to each of these organizations without other justification. Under such circumstances his own admissions render his designations patently arbitrary because they are contrary to the alleged and uncontroverted facts constituting the entire record before us.”).

dissent] contends, in substance, that the designation is a mere press release without legal consequences.¹¹¹

Jackson's description omits the concurrence of Frankfurter and that of Douglas albeit perhaps justifiably as being within this range from treason to press release. The designation of the organizations as communist without a hearing violated their right of due process, agreed Frankfurter,¹¹² Douglas (who also proceeds to write about *Bailey*),¹¹³ and Jackson.¹¹⁴

Bail issues arose in 1950–51 in *Williamson* and *Stack v. Boyle*. In *Williamson*,¹¹⁵ Justice Jackson does not terminate bail for some of the defendants of *Dennis II*, allowing them to avoid jail while the petition for certiorari and adjudication were pending. Because *Williamson* is a domestic bail case, it is not included in the database of the primary un-Americanism opinions.

In *Stack*,¹¹⁶ the prosecutions targeted officials and members of the Communist Party in California. The defendants' bail was set significantly higher than bail for defendants charged with other offenses having similar penalties.¹¹⁷ The defendants attacked their bail as an Eighth Amendment violation and with *habeas corpus* petitions. The Court pointed out that the correct procedural step was to appeal the denial of the reduction of bail. Accordingly, the Court vacated the judgements below, and remanded for the District Court to establish bail correctly. Dissenting, Jackson, joined by Frankfurter, reviewed the complex web of rules surrounding review of bail and concluded that the appropriate Circuit Justice, in this case Douglas, had authority to set bail. *Stack*, being a domestic bail case, is also not included in the database of the primary un-Americanism opinions.

The court engaged the conflict between the political freedom of the First Amendment and the banning of the Communist Party in *Dennis II*,

¹¹¹ *Id.* at 183 (Jackson, J., concurring).

¹¹² *Id.* at 173–74 (Frankfurter, J., concurring) (“The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an ‘adjudication’ or a ‘regulation’ in the conventional use of those terms. Due process is not confined in its scope. . . . Due process is perhaps the most majestic concept in our whole constitutional system. . . . Therefore the petitioners did set forth causes of action which the District Court should have entertained.”).

¹¹³ *Id.* at 182–83 (Douglas, J., concurring) (“Of course, no one has a constitutional right to a government job. But every citizen has a right to a fair trial when his government seeks to deprive him of the privileges of first-class citizenship.”).

¹¹⁴ *Id.* at 187 (Jackson, J., concurring) (“I would reverse the decisions for lack of due process in denying a hearing at any stage.”).

¹¹⁵ *Williamson v. United States*, 1950 WL 42366 (September 25, 1950).

¹¹⁶ *Stack v. Boyle*, 342 U.S. 1 (1951).

¹¹⁷ *Id.* at 5 (“Upon final judgment of conviction, petitioners face imprisonment of not more than five years and a fine of not more than \$10,000. It is not denied that bail for each petitioner has been fixed in a sum [actually \$50,000] much higher than that usually imposed for offenses with like penalties and yet there has been no factual showing to justify such action in this case.”).

decided in 1951.¹¹⁸ Whereas *Dennis I* was about contempt of Congress prosecuted in Washington, DC, *Dennis II* was about conspiring to overthrow the government, a violation of the Smith Act, which led to convictions in the Southern District of New York, affirmed by the Second Circuit in an opinion by Learned Hand. The questions before the Supreme Court were the validity of the statute under the First Amendment and the issue of its potential vagueness.¹¹⁹ The Court produced three concurring opinions—none commanding a majority—and two dissents. The plurality was by Chief Justice Vinson joined by Reed, Burton, and Minton. Frankfurter and Jackson wrote the other two concurring opinions. Black and Douglas wrote dissents. Clark did not participate.

Vinson's plurality opinion began by pointing out that the lower courts established (in a voluminous record, with great detail) that "the general goal of the Party, was, during the period in question, to achieve a successful overthrow of the existing order by force and violence."¹²⁰ The opinion proceeds to accept that the government may protect itself against revolution. The issue was "whether the means which [the government] has employed conflict with the First and Fifth Amendments to the Constitution."¹²¹ Turning to the inviolability of freedom of speech, the plurality notes

that both the majority of the Court and the dissenters in particular cases have recognized that [freedom of speech] is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.¹²²

The plurality clarified that the clear and present danger necessary for limiting speech existed:

Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: "In each case (courts) must ask whether the gravity of the 'evil,' discounted by its

¹¹⁸ *Dennis II*, 341 U.S. 494 (1951). A year earlier, Jackson as circuit Justice continued bail for some of the same defendants. *Williamson*, 184 F.2d at 280. The Court also issued an opinion on civil liability of a state committee on un-American activities in *Tenney v. Brandhove*, 341 U.S. 367 (1951). Frankfurter wrote for the majority that no liability attaches pursuant to an allegedly politically motivated investigation. Black concurs to note that liability should arise more easily and Douglas dissents. Whether to categorize *Tenney* as an un-Americanism prosecution is not clear but since it regards private liability it does not belong in the set of primary un-Americanism opinions.

¹¹⁹ *Dennis II*, 341 U.S. at 495 ("We granted certiorari, 340 U.S. 863, limited to the following two questions: (1) Whether either § 2 or § 3 of the Smith Act, inherently or as construed and applied in the instant case, violates the First Amendment and other provisions of the Bill of Rights; (2) whether either § 2 or § 3 of the Act, inherently or as construed and applied in the instant case, violates the First and Fifth Amendments because of indefiniteness.").

¹²⁰ *Id.* at 498.

¹²¹ *Id.* at 501.

¹²² *Id.* at 503.

improbability, justifies such invasion of free speech as is necessary to avoid the danger.” We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances.

Likewise, we are in accord with the court below, which affirmed the trial court’s finding that the requisite danger existed. . . . [T]here was a group that was ready to make the attempt. The formation by petitioners of such 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. And this analysis disposes of the contention that a conspiracy to advocate, as distinguished from the advocacy itself, cannot be constitutionally restrained, because it comprises only the preparation. It is the existence of the conspiracy which creates the danger.¹²³

In other words, the foreign success of communist revolutions indicated that the danger was sufficient to justify limitations on free speech. The rest of the opinion disposed of the other possible defects of the convictions.

Frankfurter opposed Black and Douglas’s primacy of the Bill of Rights and was not persuaded by this Hand formula:

This conflict of interests [between free speech and security] cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict.¹²⁴

Rather than have the courts resolve the conflict between free speech and security, Frankfurter presents an exhaustive review of precedent to support his position that the balancing between free speech and security belongs to the legislature:

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the

¹²³ *Id.* at 510–11 (internal citations omitted).

¹²⁴ *Id.* at 519 (Frankfurter, J., concurring).

emotional appeal of situations such as that now before us. We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.¹²⁵

Essentially, Frankfurter limits the courts' role to verifying that the legislature has a rational basis for limiting speech.

Jackson's concurrence recounted the international success of communist subversions, with the description of the events in Czechoslovakia quoted in the main text.¹²⁶ He proceeded to stress that conspiracy to commit illegal acts can be prohibited validly with no regard to any limitations this may impose on speech.¹²⁷

Black's dissent took the opposite view, that this conviction was for speech alone.¹²⁸ Douglas's dissent similarly pointed out that this conspiracy pursued not violent acts but political action.¹²⁹ For Douglas, the jury should have assessed whether the defendants' activities constituted "clear and present danger."¹³⁰ Moreover, Douglas thought the weakness of communism in the United States was a result of the superior circumstances

¹²⁵ *Dennis II*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

¹²⁶ *Id.* at 566. *See also supra* note 22 and accompanying text.

¹²⁷ *Id.* at 572 ("What really is under review here is a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy. With due respect to my colleagues, they seem to me to discuss anything under the sun except the law of conspiracy. One of the dissenting opinions even appears to chide me for 'invoking the law of conspiracy.' As that is the case before us, it may be more amazing that its reversal can be proposed without even considering the law of conspiracy. The Constitution does not make conspiracy a civil right. The Court has never before done so and I think it should not do so now. Conspiracies of labor unions, trade associations, and news agencies have been condemned, although accomplished, evidenced and carried out, like the conspiracy here, chiefly by letter-writing, meetings, speeches and organization.").

¹²⁸ *Id.* at 579 (Black, J., dissenting) ("These petitioners were not charged with an attempt to overthrow the Government. They were not charged with overt acts of any kind designed to overthrow the Government. They were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble and to talk and publish certain ideas at a later date: The indictment is that they conspired to organize the Communist Party and to use speech or newspapers and other publications in the future to teach and advocate the forcible overthrow of the Government. No matter how it is worded, this is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids. I would hold § 3 of the Smith Act authorizing this prior restraint unconstitutional on its face and as applied.").

¹²⁹ *Id.* at 581 (Douglas, J., dissenting) ("If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial.").

¹³⁰ *Id.* at 587 ("I had assumed that the question of the clear and present danger, being so critical an issue in the case, would be a matter for submission to the jury.").

of the United States, including its economic success, literacy, and established democratic traditions.¹³¹

The three directions that the members of the Court took in *Dennis II* could have augured frequent victories for the prosecution, but victories waned. The three directions were Jackson's subordination of the Bill of Rights to the fight against communism, Black and Douglas's primacy of the Bill of Rights, and Frankfurter's acceptance of the legislature's weighing, which was consistently anti-communist. If this division persisted in other cases, then the prosecution would win with some regularity. However, the Court's support for the prosecution would diminish from this high point.

The trial of the leaders of the Communist Party in New York also produced contempt convictions of their lawyers. Reviewing the contempt convictions, the Supreme Court also divided, with Black, Frankfurter, and Douglas opposing the summary imposition of the penalty in *Sacher I*.¹³² One of the lawyers was also disbarred, and the following year the Court also disbarred him from the Supreme Court Bar, in *Isserman I*.¹³³ The Court split 4-4, with Clark not participating, resulting in disbarment. Vinson wrote for the Court, noting that Isserman had also not disclosed a conviction and suspension from practice in his original application.¹³⁴ Jackson, with Black, Frankfurter, and Douglas, wrote that the Court did not ask about past convictions and that Isserman's incarceration produced sufficient

¹³¹ *Id.* at 588-89 ("If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that as a political party they are of little consequence. Communists in this country have never made a respectable or serious showing in any election. I would doubt that there is a village, let alone a city or county or state, which the Communists could carry. Communism in the world scene is no bogeyman; but Communism as a political faction or party in this country plainly is. Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party. It is inconceivable that those who went up and down this country preaching the doctrine of revolution which petitioners espouse would have any success. In days of trouble and confusion, when bread lines were long, when the unemployed walked the streets, when people were starving, the advocates of a short-cut by revolution might have a chance to gain adherents. But today there are no such conditions. The country is not in despair; the people know Soviet Communism; the doctrine of Soviet revolution is exposed in all of its ugliness and the American people want none of it.

How it can be said that there is a clear and present danger that this advocacy will succeed is, therefore, a mystery. Some nations less resilient than the United States, where illiteracy is high and where democratic traditions are only budding, might have to take drastic steps and jail these men for merely speaking their creed. But in America they are miserable merchants of unwanted ideas; their wares remain unsold. The fact that their ideas are abhorrent does not make them powerful.").

¹³² *Sacher v. United States*, 343 U.S. 1 (1952).

¹³³ *In re Isserman (Isserman I)*, 345 U.S. 286 (1953).

¹³⁴ *Id.* at 290 (Vinson, J.) ("It may be noted, however, that the files in the office of our Clerk show that the respondent did not disclose this conviction and suspension from practice in his application for admission to our bar, so that we did not sanction that conduct in granting him admission. The order of the Court placed the burden upon respondent to show good cause why he should not be disbarred. In our judgment, he has failed to meet this test.").

deterrence.¹³⁵ The rule would be amended and when the case would come back for review a year later, after Jackson's death, the Court would again tie but, due to the amended text, the result would be the opposite.¹³⁶

Next, in *Tenney*, Frankfurter writes for the Court in favor of legislative immunity from liability for the political consequences of a state un-American activities committee.¹³⁷ Because *Tenney* is about liability, rather than sanctions for un-Americanism, it is not included in the primary cases about un-Americanism, as is not its sister case, *Collins*.¹³⁸

In *Updegraff*, the Court is unanimous in striking down state imposition of loyalty oaths on university professors. The Court's two erstwhile law professors, Frankfurter joined by Douglas, concur, underscoring the importance of academic freedom.¹³⁹ Black, joined by Douglas, also concurs for free speech, lest it only exist for the "cringing and the craven."¹⁴⁰

¹³⁵ *Id.* at 294 (Jackson, J.) ("If the purpose of disciplinary proceedings be correction of the delinquent, the courts defeat the purpose by ruining him whom they would reform. If the purpose be to deter others, disbarment is belated and superfluous, for what lawyer would not find deterrent enough in the jail sentence, the two-year suspension from the bar of the United States District Court, and the disapproval of his profession? If the disbarment rests, not on these specific proven offenses, but on atmospheric considerations of general undesirability and Communistic leanings or affiliation, these have not been charged and he has had no chance to meet them. We cannot take judicial notice of them. On the occasions when Isserman has been before this Court, or before an individual Justice, his conduct has been unexceptionable and his professional ability considerable.").

¹³⁶ *In re Isserman* (Isserman II), 348 U.S. 1 (1954) (3–3 tie with Justices Warren and Clark not participating).

¹³⁷ *Tenney v. Brandhove*, 341 U.S. 367 (1951).

¹³⁸ *Collins v. Hardyman*, 341 U.S. 651 (1951).

¹³⁹ *Wieman v. Updegraff*, 344 U.S. 183, 196–97 (1952) (Frankfurter, J., concurring) ("To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma. They must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.").

¹⁴⁰ *Updegraff*, 344 U.S. at 192–93 (Black, J., concurring) ("History indicates that individual liberty is intermittently subjected to extraordinary perils. Even countries dedicated to government by the people are not free from such cyclical dangers. The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few individuals and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of

At the same time, in *Adler*,¹⁴¹ the Court upholds 6–3 state laws that enable the dismissal of communist sympathizers from public service. Black, Frankfurter, and Douglas dissent.

The same year, 1952, also brings some cases that are more vaguely related to the struggle against communism. However, these cases are not necessarily related to un-Americanism prosecutions and, therefore, do not belong in the primary un-Americanism opinions.¹⁴²

The propriety of the deportation of long-resident aliens for past membership in the Communist Party arose in *Harisiades*.¹⁴³ The aliens retained their communist beliefs despite expulsion from the party. The Court splits 6–2 in favor of the government with Clark not participating. Three were the challenges to the deportations, that they violated Due Process, the First Amendment, and were *ex post facto* punishment. Jackson writes for the majority that national defense precludes a due process attack on deportations.¹⁴⁴ For the proposition that the deportations are not improper reactions to protected First Amendment rights because advocacy of violent overthrow of the government is not protected speech, Jackson points to *Dennis II*.¹⁴⁵ Finally, Jackson underlines that the prohibition against joining organizations that advocate the violent overthrow of the government was long in existence; and that punishing past membership was an appropriate

the Alien and Sedition Laws. Suppressive laws and practices are the fashion. . . . Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.”).

¹⁴¹ *Adler v. Bd of Educ.*, 342 U.S. 485 (1952).

¹⁴² The nearby opinions that are not discussed because they more likely are about espionage than un-Americanism are *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (exclusion of spouse); *Heikkila v. Barber*, 345 U.S. 229 (1953) (deportation challenge procedure); and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (indefinite detention for deportation of alien about whom the attorney general will not say why the alien is not admissible even in camera).

¹⁴³ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

¹⁴⁴ *Id.* at 591 (“[T]he Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien.”).

¹⁴⁵ *Id.* at 592 (“True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist Governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately. We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable.”).

reaction to the Communist Party's expulsion of all its alien members *en masse* to protect them from deportation.¹⁴⁶

Frankfurter's concurrence expresses his judicial restraint, regretting that "immigration laws have been crude and cruel, . . . may have reflected xenophobia in general or anti-Semitism or anti-Catholicism." Nevertheless, they are not reviewable.¹⁴⁷ Douglas's dissent, joined by Black, argues that the United States either forever banished ex-Communists or punished them for their erstwhile beliefs, and either

is foreign to our philosophy. We repudiate our traditions of tolerance and our articles of faith based upon the Bill of Rights when we bow to them by sustaining an Act of Congress which has them as a foundation.¹⁴⁸

*Carlson v. Landon*¹⁴⁹ regarded the right to bail of aliens under deportation. Bail had been denied because they were members of the Communist Party with the argument that their expected indoctrination activities were against the public interest. The Court, in an opinion by Reed, upheld the denial of bail 5–4, with Black, Frankfurter, Douglas, and Burton writing separate dissents.

The application of immigration laws in an un-Americanism setting also arose in *Spector*, where the Court favored the government 5–3.¹⁵⁰ Clark did not participate. *Spector* is also unusual in featuring Douglas as the author of an opinion favoring the state in an un-Americanism setting. An alien under a deportation order for advocating to overthrow the government failed to depart within six months, a felony. The District Court dismissed, considering the statute vague. The Court reversed, not finding vagueness. Black dissented because the alien could not know what documents would be needed to gain admission to travel to his country of choice. Jackson also

¹⁴⁶ *Id.* at 593–94 ("During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow . . . by force and violence. . . . There can be no contention that [these aliens] were not adequately forewarned. . . . [Granted, in *Kessler*] the Court concluded that . . . only contemporaneous membership would authorize deportation. The reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership. The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them.").

¹⁴⁷ *Id.* at 597–98 (Frankfurter, J., concurring) ("In recognizing this power and this responsibility of Congress, one does not in the remotest degree align oneself with fears unworthy of the American spirit or with hostility to the bracing air of the free spirit. One merely recognizes that the place to resist unwise or cruel legislation touching aliens is the Congress, not this Court.").

¹⁴⁸ *Id.* at 598 (Douglas, J., dissenting).

¹⁴⁹ 342 U.S. 524 (1952).

¹⁵⁰ *United States v. Spector*, 343 U.S. 169 (1952).

dissented, with Frankfurter, arguing that the inability of the alien to challenge in court the deportation order was improper, and that the world struggle against communism frustrated deportation, creating an unfair burden on the alien.¹⁵¹ Jackson's concern about the international expansion of communism, which usually led Jackson to favor the government, here makes Jackson favor the individual.

The summer of 1953 brought to the Court the notorious case of the Rosenbergs' death penalty for giving nuclear secrets to the Soviet Union. After Douglas granted a stay of execution, the Court summarily reviewed and affirmed the original judgement 6–3.¹⁵² Because this was a prosecution for espionage, not un-Americanism, it does not belong in this dataset. Moreover, notable is the outcry against Douglas for granting the stay, which led to a movement to impeach him.¹⁵³

This period closed with *Orloff*¹⁵⁴ and *Bridges*.¹⁵⁵ In *Orloff*, a medical doctor was drafted into the army and given the rank of Captain due to education and occupation—he was above the age of being drafted otherwise. When he refused a loyalty oath and would not answer questions about membership in the Communist Party, he was demoted and assigned to lesser duties. The Court, in an opinion by Jackson, upheld the military's exercise of discretion. Black, Frankfurter, and Douglas dissented, in opinions by Black and Frankfurter arguing that the drafting of doctors above the general draft age rested on their being commissioned officers and exercising medical duties.

Bridges was about fraud in the procurement of naturalization by a conspiracy to lie about no membership in the Communist Party. While Clark and Jackson do not participate, the Court decided 4–3 and favored the individuals by holding that the statute of limitations had lapsed. The dissent of Reed with Vinson and Minton argued that, according to the statutory language, the wartime suspension of the limitations period applied, and the prosecution was still timely.

¹⁵¹ *Id.* at 179–80 (Jackson, J., dissenting) (“A deportation policy can be successful only to the extent that some other state is willing to receive those we expel. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.”).

¹⁵² *Rosenberg v. United States*, 346 U.S. 273 (1953).

¹⁵³ The House proposed impeachment of Douglas within hours of his action, eliciting cheering in the chamber. The impeachment was referred to committee and, the sentence against the Rosenbergs having been carried out, faded. LICHTMAN, *supra* note 21, at 62–63.

¹⁵⁴ *Orloff v. Willoughby*, 345 U.S. 83 (1953).

¹⁵⁵ *Bridges v. United States*, 346 U.S. 209 (1953).

While un-Americanism prosecutions were facing this reaction in the Supreme Court, the Presidency changed parties. President Eisenhower took office and made the first appointment to the Court by a Republican President since F.D. Roosevelt took office, the appointment of Earl Warren as Chief Justice in October of 1953.¹⁵⁶ Warren replaced Chief Justice Vinson, who had mostly voted in favor of the prosecution in un-Americanism disputes. Warren arrived at the Court with an anti-Communist past. Warren had prosecuted the conviction of Communists for crimes committed in an effort to infiltrate unions.¹⁵⁷ Indeed, Warren did cast his first votes in un-Americanism cases for the prosecution, but he soon changed.

In *Barsky*, the issue was the validity of a six-month revocation of the license to practice medicine due to a contempt conviction for failing to comply with a subpoena of the House Committee on Un-American Activities.¹⁵⁸ The majority opinion, by Justice Burton, accepted that the state had the discretion to determine licensing conditions and was reasonable in its review and decisions. Black and Douglas dissented, writing separate opinions joining each other. Black's premise was that all this activity sprang from an illegal bill of attainder.¹⁵⁹ Perhaps Black should have stressed more the precedent of *Lovett*,¹⁶⁰ which also rested on the reasoning that the legislative firing of employees for their political beliefs was a bill of attainder. In hindsight, the reasoning that rests on the prohibition against bills of attainder has the appeal that it will also be one of the final utterances of the

¹⁵⁶ While this was the first appointment by a Republican President, it was not the first appointment of a Republican. Justice Burton, appointed by Truman in September 1945, was a member of the Republican Party and often sided with the prosecution in un-Americanism disputes. *See supra* Table 1.

¹⁵⁷ James F. Simon reports that Warren's most publicized case from Warren's years as a prosecutor was the trial for the 1936 murder of the chief engineer of the freighter *Los Lobos*, a plot linked in Warren's mind with communist influence in West Coast maritime unions, for which Warren, who otherwise supported labor, faced labor protests and picketing. When three of the four murderers were paroled by the Democratic Governor and likely electoral opponent of Warren, Warren lashed out that their parole was a political move due to their being "powerful communistic radicals." JAMES F. SIMON, *EISENHOWER V. WARREN: THE BATTLE FOR CIVIL RIGHTS AND LIBERTIES*, 10–11 (2018).

¹⁵⁸ *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954). This prosecution springs from the same prosecution of the Joint Anti-Fascist Refugee Committee as *Bryan* and *Fleischman*. *See supra* note 89 and accompanying text.

¹⁵⁹ *Id.* at 460 (Black, J., dissenting) ("The Grievance Committee made a formal finding of fact that the Refugee Committee had been listed as subversive. This Court, however, has held that the Attorney General's list was unlawful, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624. My view was and is that the list was the equivalent of a bill of attainder which the Constitution expressly forbids. The Regents' own reviewing Committee on Discipline recognized the illegality of the list and advised the Regents that no weight should be given to it. This reviewing committee also recommended that the Regents not accept the Grievance Committee's recommendation of a six months' suspension but instead give no suspension at all.")

¹⁶⁰ *See supra* notes 67–68 and accompanying text. Also, on attainder rested Black's reasoning in the dissents in *Douds* and *McGrath*. *See supra* note 98 and accompanying text (*Douds*); *supra* note 89 and accompanying text (*McGrath*).

Court on un-Americanism prosecutions, in *US v. Brown* in 1965, see note 385 and accompanying text, below.

Moreover, Black believed (as did Frankfurter) that, even if New York were to hold that people who associated with communists should have their medical licenses suspended, that would be an improper deprivation.¹⁶¹ Douglas's dissent stressed the importance of work and the primacy of the Bill of Rights.¹⁶² Douglas closed by mourning the national "neurosis."¹⁶³ Frankfurter dissented for similar reasons. Frankfurter would find error in the process that New York followed.¹⁶⁴ He also considered the decision to revoke a medical license for events entirely unrelated to the practice of medicine violative of due process.¹⁶⁵

The Court revisits the propriety of alien deportation for membership in the Communist Party in *Galvan*.¹⁶⁶ The Court's 7–2 majority, under Frankfurter's pen, reluctantly adheres to the Congressional mandate that mere past membership is sufficient for deportation.¹⁶⁷ Black and Douglas dissent.

¹⁶¹ *Barsky*, 347 U.S. at 463 (Black, J., dissenting) ("Of course it may be possible that the Regents thought that every doctor who refuses to testify before a congressional committee should be suspended from practice. But so far as we know the suspension may rest on the Board's unproven suspicions that Dr. Barsky had associated with Communists. This latter ground, if the basis of the Regents' action, would indicate that in New York a doctor's right to practice rests on no more than the will of the Regents.") (internal citations omitted).

¹⁶² *Id.* at 473 (Douglas, J., dissenting) ("If, for the same reason, New York had attempted to put Dr. Barsky to death or to put him in jail or to take his property, there would be a flagrant violation of due process. I do not understand the reasoning which holds that the State may not do these things, but may nevertheless suspend Dr. Barsky's power to practice his profession. I repeat, it does a man little good to stay alive and free and propertied, if he cannot work.").

¹⁶³ *Id.* at 474 ("When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.").

¹⁶⁴ *Id.* at 469 (Frankfurter, J., dissenting) ("[T]he highest court of the State of New York tells us, in effect, 'Yes, it may be that the Regents arbitrarily deprived a doctor of his license to practice medicine, but the courts of New York can do nothing about it.' Such a rule of law, by denying all relief from arbitrary action, implicitly sanctions it; and deprivation of interests that are part of a man's liberty and property, when based on such arbitrary grounds, contravenes the Due Process Clause of the Fourteenth Amendment.").

¹⁶⁵ *Id.* at 470 ("It is one thing thus to recognize the freedom which the Constitution wisely leaves to the States in regulating the professions. It is quite another thing, however, to sanction a State's deprivation or partial destruction of a man's professional life on grounds having no possible relation to fitness, intellectual or moral, to pursue his profession. Implicit in the grant of discretion to a State's medical board is the qualification that it must not exercise its supervisory powers on arbitrary, whimsical or irrational considerations. A license cannot be revoked because a man is red-headed or because he was divorced, except for a calling, if such there be, for which red-headedness or an unbroken marriage may have some rational bearing. If a State licensing agency lays bare its arbitrary action, or if the State law explicitly allows it to act arbitrarily, that is precisely the kind of State action which the Due Process Clause forbids.").

¹⁶⁶ *Galvan v. Press*, 347 U.S. 522 (1954).

¹⁶⁷ *Id.* at 532 ("[We] must therefore under our constitutional system recognize congressional power in dealing with aliens, on the basis of which we are unable to find the Act of 1950 unconstitutional.").

Noteworthy is that the newly appointed Warren sided with the prosecution in both *Barsky* and *Galvan*. After siding with the government one more time but only in conference in *Emspak* before the Court decided to order a rehearing, Warren would have a change of heart.¹⁶⁸ In the reargued *Emspak* and all subsequent un-Americanism cases, Warren would side with the individuals. Add the replacement of Jackson with the initially pro-defendant Harlan, and the future arrival of strongly pro-defendant Brennan, and the balance on the Court changes. The era that saw the Court siding with the prosecution the most often was ending. An era of idealism was about to begin.

B. Premature Idealism: To Red Monday

A bail issue produced a one-member opinion from Douglas, sitting as Circuit Justice, in *Yanish v. Barber*.¹⁶⁹ An alien was subject to summary deportation for being a member of the Communist Party. As a condition of being re-released on bail, the alien was required to not associate with Communists. Justice Douglas finds the resulting consequences unrelated to ensuring the defendant's appearance at trial,¹⁷⁰ and grants bail. Because this is a one-member bail case, it is not included in the primary un-Americanism opinions.

After Eisenhower makes one more appointment, John Marshall Harlan II to replace Robert H. Jackson, the Court issues three opinions related to un-Americanism prosecutions on May 23, 1955: *Emspak*,¹⁷¹ *Quinn*,¹⁷² and *Bart*.¹⁷³ In all three, witnesses refused to answer questions by the Committee

¹⁶⁸ See ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY-ERA REPRESSION* 68, n.17 (2012) (from conference notes the vote appears 6-3 with Black, Frankfurter, and Douglas dissenting; Warren assigned the opinion to Reed whose draft opinion exceeded the Fifth Amendment issue, entering First Amendment; Black moved for reargument; only Reed and Minton opposed it); see *infra* note 171 (discussing *Emspak*); see also *supra* note 39 (the reargument of *Emspak* contributes to the gradual nature of the transition to the next era, the Premature Idealism Era).

¹⁶⁹ See *Yanish v. Barber*, 73 S. Ct. 1105, 1106 (1953).

¹⁷⁰ *Id.* at 1108 (“The function of bail in situations such as the instant one is to provide security for the appearance of the prisoner on the one hand and to protect his right to appeal, on the other. . . . It is not apparent how at least some of the conditions attached to the bond serve those ends. Specifically, it is not obvious how the requirement that the alien given up his job with the Communist paper provides security for his appearance in case the Immigration and Naturalization Service can effect his deportation to Russia. . . . Condition (e), which would prevent the applicant ‘from associating with any person, knowing or having reasonable ground to believe’ that such person is a Communist, would, taken literally, prevent him from living with his Communist wife or going to a movie with his Communist son or seeing his Communist legal adviser or being treated by his Communist doctor. How that prohibition would do service in the tradition of Anglo-Saxon bail or how it would further the program of deportation which Congress has designed is not apparent.”).

¹⁷¹ *Emspak v. United States*, 349 U.S. 190 (1955).

¹⁷² *Quinn v. United States*, 349 U.S. 155 (1955).

¹⁷³ *Bart v. United States*, 349 U.S. 219 (1955).

on Un-American Activities of the House of Representatives or its one-member subcommittee (presumably designed to avoid the problems with quorum that *Fleischman*, *Bryan*, and *Christoffel* had raised¹⁷⁴). The defendants vaguely invoked their First and Fifth Amendment rights. The Court held those objections sufficient to defeat the subsequent convictions of the defendants for refusing to answer.

In all three, Warren writes for the Court exonerating the refusal to answer questions of a Congressional committee. The two first Eisenhower appointees, Warren and Harlan, took opposite sides in these un-Americanism prosecutions. Harlan partially concurs in one (*Quinn*) and dissents in two (*Emspak* and *Bart*). Harlan's concurrence in *Quinn* refers to his dissent in *Emspak*. Harlan disagrees with the Court when the majority finds that the refusal to answer did not have the requisite criminal intent, because the defendant relied on counsel's advice about the defendant's rights.¹⁷⁵ Harlan clearly states in his dissent in *Emspak* that the subcommittee had sufficiently demonstrated that the defendant's objections were not accepted and his answers were expected.¹⁷⁶ The dissenters—in *Emspak* and *Bart*—are Reed, Minton, and Harlan, and—in *Quinn*—Reed alone.

A week later, on June 6, 1955, the Court, again in an opinion by Warren for a split Court, found against practices of the Loyalty Review Boards in *Peters v. Hobby*.¹⁷⁷ A Yale Medical School professor had occasional employment reviewing grants for the Department of Health, Education, and Welfare. The work did not touch confidential or classified matters. The Executive Order on Loyalty Review Boards had been amended in 1951 to lead to dismissal, not on a finding of reasonable grounds for disloyalty, but if mere "reasonable doubt as to" an employee's loyalty existed.¹⁷⁸ The professor succeeded in a loyalty review using the old standard. Upon the amendment of the standard, however, the board reviewed the professor's case on its own initiative and remanded it for a hearing. The board notified the professor of certain charges which the professor answered under oath, including a denial that he had ever been a member of the Communist Party. A hearing followed in New Haven, during which the professor was the only one presenting information and was not allowed to cross-examine the

¹⁷⁴ See *supra* notes 71, 89 and accompanying text.

¹⁷⁵ *Quinn*, 349 U.S. at 166 ("In short, unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections, there can be no conviction under [Section] 192 for refusal to answer that question.").

¹⁷⁶ *Emspak*, 349 U.S. at 214–15 (Harlan, J., dissenting) ("[T]he record shows that Emspak was clearly apprised that, despite his objections, the Committee wanted answers . . .").

¹⁷⁷ See *Peters v. Hobby*, 349 U.S. 331 (1955).

¹⁷⁸ *Id.* at 334 (referring to the amended standard per Executive Order 10241, which replaced E.O. 9835); see *supra* text accompanying note 104.

sources of the board's information. The professor was subsequently notified that the board had found no reasonable doubt about his loyalty.

A year later, the board notified the professor that it would conduct a 'post-audit' of the determination and held a new hearing. Again, only the professor presented evidence, and could not cross-examine the five informants against him, only one of whose identities was known to the board, and whose statements were not all under oath. This time, the board concluded that a reasonable doubt about the professor's loyalty did exist, and notified the Secretary of Health, Education, and Welfare as well as the professor, informing him that he had been barred from government service for three years.

The Court split 7–2, with a dissent by Reed with Burton. Warren's majority opinion recognized that constitutional issues may exist in this process but decided in the professor's favor based on the board's violations of the Executive Order, which did not authorize *sua sponte* reviews.¹⁷⁹ Black's concurrence would have the Court reach the constitutional issues and doubts the validity of the scheme of loyalty review.¹⁸⁰ Reed's dissent, joined by Burton, would have found that the Executive Order was followed properly without reaching the constitutional issues. Douglas's concurrence conceded Reed's point that the board followed established practice and had proper authority. Therefore, Douglas would reach the constitutional issues

¹⁷⁹ *Peters*, 349 U.S. at 339–40 (“The authority thus conferred on the Loyalty Review Board was limited to ‘cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency . . .’ And, even as to these cases, the Loyalty Review Board was denied any power to undertake review on its own motion; only the employee recommended for dismissal, or his department or agency, could refer such a case to the Loyalty Review Board. In petitioner’s case, the Board failed to respect either of these limitations. Petitioner had been twice cleared by the Agency Board and hence did not fall in the category of ‘persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency.’ Moreover, petitioner’s case was never referred to the Loyalty Review Board by petitioner or the Agency. Instead, the Loyalty Review Board, acting solely on its own motion, undertook to ‘hold a hearing and reach its own decision.’”).

¹⁸⁰ *Id.* at 350 (Black, J., concurring) (“But I wish it distinctly understood that I have grave doubt as to whether the Presidential Order has been authorized by any Act of Congress. That order and others associated with it embody a broad, far-reaching espionage program over government employees. These orders look more like legislation to me than properly authorized regulations to carry out a clear and explicit command of Congress. I also doubt that the Congress could delegate power to do what the President has attempted to do in the Executive Order under consideration here.”).

and find the process inadequate.¹⁸¹ Douglas rebutted the idea that the fear of subversive activities trumped due process.¹⁸²

A year later, the same composition of the Court decided *Nelson*.¹⁸³ A state prosecution using anti-sedition legislation led to a twenty-year sentence of a member of the Communist Party. Both the Pennsylvania Supreme Court and the United States Supreme Court held the state prohibition to be superseded by the federal Smith Act, exonerating the defendant. Reed with Burton and Minton dissented, writing that the federal anti-sedition legislation was not intended to supersede state legislation and prosecutions.¹⁸⁴ *Nelson*'s would be one of the holdings that, in the backlash against the Supreme Court's resisting un-Americanism prosecutions, several legislative initiatives would seek to overturn in the summer of 1957.¹⁸⁵

The same year brought to the Court *Communist Party of the United States v. Subversive Activities Control Board*.¹⁸⁶ A 1950 statute, likely reacting to the concerns that led to *Joint Anti-Fascist Refugee Committee v. McGrath*,¹⁸⁷ proceeded to solidify the process for designating organizations as communist-action and established an administrative agency that would make the determination. The Communist Party of the United States was promptly designated a communist-action organization, which it challenged. As the challenge reached the Supreme Court, it had two grounds. First, it was an attack on the entire propriety of the scheme of designating an entity as a communist-action one, with the consequences this entailed. Second, the Communist Party alleged that three of the many witnesses used against it in the administrative agency's proceeding had later perjury convictions making their testimony suspect. The majority based the decision on narrow

¹⁸¹ *Id.* at 350–51 (Douglas, J., concurring) (The professor “was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles.”).

¹⁸² *Id.* at 352 (“Those who see the force of this position counter by saying that the Government’s sources of information must be protected, if the campaign against subversives is to be successful. The answer is plain. If the sources of information need protection, they should be kept secret. But once they are used to destroy a man’s reputation and deprive him of his ‘liberty,’ they must be put to the test of due process of law. The use of faceless informers is wholly at war with that concept. When we relax our standards to accommodate the faceless informer, we violate our basic constitutional guarantees and ape the tactics of those whom we despise.”).

¹⁸³ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

¹⁸⁴ *Id.* at 515 (“We cannot agree that the federal criminal sanctions against sedition directed at the United States are of such a pervasive character as to indicate an intention to void state action.”).

¹⁸⁵ See *infra* text accompanying notes 232–237.

¹⁸⁶ *Communist Party of the United States v. Subversive Activities Control Bd.* (Communist Party I), 351 U.S. 115 (1956) (on the tables and graphs, “*CPUSA I*”).

¹⁸⁷ See *supra* text accompanying note 90.

grounds, avoided the constitutional issues, and remanded for reconsideration without the tainted witnesses. The dissent of Clark, with Reed and Minton, considered remand pointless because the primary issues were not even challenged and the tainted witnesses were uncontroverted and secondary, decried the avoidance of the important issues, which preserved uncertainty six years after the passage of the statute.¹⁸⁸

Douglas issued one more opinion reducing bail on an un-Americanism prosecution in 1956, *Steinberg*.¹⁸⁹ The search incident to the arrest should have been done pursuant to a warrant; Douglas, therefore, made a large reduction of bail. Being a single-justice opinion, this is not included in the primary un-Americanism opinions that form the database for the quantitative analysis of Part III.

Under the same composition, in *Slochower*, the Court reaffirmed its *Updegraff* position in finding that the rule of New York City, which produced the automatic dismissal of a college professor who invoked the Fifth Amendment was improper.¹⁹⁰ The court split 5–4 in favor of the professor, holding that a section of the Charter of the City of New York that mandated the termination of employees who invoked the privilege against self-incrimination was unconstitutional as applied. Clark with Black, Douglas, Frankfurter, and Warren were in the majority. Two dissenting opinions came from Reed, with Burton and Minton,¹⁹¹ and Harlan.¹⁹²

The Court also upheld the dismissal of a denaturalization in *Zucca*.¹⁹³ The government alleged that Zucca obtained citizenship by lying that he had

¹⁸⁸ *Communist Party I*, 351 U.S. at 130 (Clark, J., dissenting) (“The Communist Party makes no claim that the Government knowingly used false testimony, and it is far too realistic to contend that the Board’s action will be any different on remand. The only purpose of this procedural maneuver is to gain additional time. . . . This proceeding has dragged out for many years now, and the function of the Board remains suspended and the congressional purpose frustrated to a most critical time in world history. Ironically enough, we are returning the case to a Board whose very existence is challenged on constitutional grounds. We are asking the Board to pass on the credibility of witnesses after we have refused to say whether it has the power to do so. The constitutional questions are fairly presented here for our decision. If all or any part of the Act is unconstitutional, it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress.”).

¹⁸⁹ *Steinberg v. United States*, 76 S. Ct. 822 (1956).

¹⁹⁰ *See Slochower v. Bd. of Higher Ed.*, 350 U.S. 551, 558 (1956) (the professor was questioned by the Internal Security subcommittee of the Judiciary Committee of the United States Senate).

¹⁹¹ *Id.* at 561 (Reed, J., dissenting) (“We assert the contrary—the city does have reasonable ground to require its employees either to give evidence regarding facts of official conduct within their knowledge or to give up the positions they hold.”).

¹⁹² *Id.* at 566 (Harlan, J., dissenting) (“In effect, what New York has done is to say that it will not employ teachers who refuse to cooperate with public authorities when asked questions relating to official conduct. Does such a statute bear a reasonable relation to New York’s interest in ensuring the qualifications of its teachers? The majority seems to decide that it does not. This Court has already held, however, that a State may properly make knowing membership in an organization dedicated to the overthrow of the Government by force a ground for disqualification from public school teaching.”).

¹⁹³ *United States v. Zucca*, 351 U.S. 91, 100 (1956).

not been a member of the Communist Party. The Court by a 5–3 majority upheld the District Court’s reading of the statute that required the United States Attorney to file an affidavit of good cause. Clark, joined by Minton and Reed, dissented.¹⁹⁴ Harlan did not participate.

In *Black v. Cutter Labs*,¹⁹⁵ an employee who was elected to union officership had falsified her employment record, was a member of the Communist Party, and was dismissed from employment. The arbitration board held that her dismissal was improper. The justifications for it were stale for having been known for two years and the true motive was her union activity. The Supreme Court of California reversed, considering her dismissal proper. Clark’s majority opinion for a 6–3 Court found that the California Supreme Court had stated adequate state grounds that her dismissal was for just cause under state law and avoided the constitutional claims. The dissent of Douglas, joined by Warren and Black, found no adequate state grounds, but a violation of the First and Fourteenth Amendments. Because *Black* is between private parties, it is not included as a primary un-Americanism opinion. If it were, it would have been the only decision during this era against the individual accused of communist sympathies.

The Court invalidated the employment termination of a federal employee in a non-sensitive position for disloyalty and association with communists in *Cole v. Young*.¹⁹⁶ Harlan wrote for the 6–3 majority. As in *Zucca*, Clark, joined by Minton and Reed, dissented.¹⁹⁷

In late 1956, Eisenhower appointed Democrat William Brennan to replace Minton. This appointment replaced Minton’s occasional vote in favor of un-Americanism prosecutions with a reliable vote against them. On the world stage, however, Soviet Communism faced two significant adverse developments. The new leader of the Soviet Union, Nikita Khrushchev, made a speech critical of Stalin’s purges in February.¹⁹⁸ But that did not

¹⁹⁴ *Id.* at 100–01 (Clark, J., dissenting) (“The Court’s ruling today seriously obstructs the Government in filing denaturalization proceedings in this type of case. It reverses a long line of cases in the lower federal courts and disregards a consistent administrative practice of over thirty years standing, a period which includes two recodifications of the immigration laws. Furthermore, the identical point on which the case today is decided was present in two earlier cases where it apparently was not considered important enough to be presented to this Court.”).

¹⁹⁵ *Black v. Cutter Labs*, 351 U.S. 292, 293 (1956).

¹⁹⁶ *Cole v. Young*, 351 U.S. 536 (1956).

¹⁹⁷ *Id.* at 879–80 (“[T]he Court’s order has stricken down the most effective weapon against subversive activity available to the Government. It is not realistic to say that the Government can be protected merely by applying the Act to sensitive jobs. One never knows just which job is sensitive. The janitor might prove to be in as important a spot security-wise as the top employee in the building.”).

¹⁹⁸ See generally, Khrushchev’s Secret Speech, ENCYCLOPAEDIA BRITANNICA (2019), <https://www.britannica.com/event/Khrushchevs-secret-speech> [perma.cc/4D7C-UW2N], transcript available at <https://digitalarchive.wilsoncenter.org/document/115995.pdf?v=3c-22b71b65bcbbe9fdfadead9419c995> [perma.cc/E8WS-L88F].

mean an end to violence. The same Fall, the Soviet Union would invade Hungary to suppress its uprising.¹⁹⁹ The oppressive nature of Soviet communism was becoming difficult to deny, slightly weakening its support in the West. (The Berlin Wall would not be built until 1961 and the creation of non-Soviet-aligned Eurocommunism would only come after the Prague Spring of 1968.)²⁰⁰

Without Brennan's participation, the Court split 5–3 in *Mesarosh*.²⁰¹ The Solicitor General acknowledged that Mazzei, a witness used in the conviction for violating the Smith Act, had repeatedly perjured himself in subsequent trials but assured the Court that he had no reason to doubt Mazzei's testimony in this one. The Court granted a new trial. The dissent of Harlan with Frankfurter and Burton would have remanded the question and allowed the District Court to decide whether a new trial was necessary.

The Court unanimously opposed the government's attempt to render unions noncompliant for false affidavits of non-communist affiliation in *Leedom* and *Amalgamated Meat Cutters*.²⁰² The employers sought to use the false affidavits as a means of avoiding their collective bargaining obligations. This private motivation makes these cases somewhat atypical. The support of the NLRB in *Leedom* renders it sufficiently governmental to include in the primary un-Americanism cases. *Amalgamated Meat Cutters* remains exclusively privately motivated and, therefore, is not in the database.

The last un-Americanism case before the appointment of Whittaker was *Gold*.²⁰³ The Court, with a short *per curiam* opinion, orders the retrial of a labor leader accused of filing a false affidavit of no affiliation with the Communist Party. Reed, Burton, and Clark dissented. Reed's joint dissent would find that the presumption of influence upon the jurors was rebutted. Clark rued that the Court refused to address important issues.

President Eisenhower nominated Whittaker to replace Reed. Whittaker was appointed in March of 1957. This change in the Court's composition had little effect on its stance on un-Americanism prosecutions. Reed and Whittaker would have similar pro-government attitudes, voting in favor of the government in, respectively, 87% and 70% of the primary opinions.²⁰⁴

¹⁹⁹ See generally, Malcolm Byrne, *Hungarian Revolution*, in INT'L ENCYCLOPEDIA OF THE SOCIAL SCIENCES 523 (William A. Darity, Jr., ed., 2d ed. 2008); *Hungarian Revolution (1956)*, ENCYCLOPAEDIA BRITANNICA <https://www.britannica.com/event/Hungarian-Revolution-1956> [perma.cc/ZV88-7495] (last visited Mar. 2, 2020).

²⁰⁰ See also *infra* notes 402–403 and accompanying text.

²⁰¹ *Mesarosh v. United States*, 352 U.S. 1 (1956). The dissent of Harlan with Frankfurter and Burton appears at 352 U.S. 15.

²⁰² *Leedom v. N.L.R.B.*, 352 U.S. 145 (1956); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 352 U.S. 153 (1956).

²⁰³ *Gold v. United States*, 352 U.S. 985 (1957).

²⁰⁴ See *infra* Table 1.

However, Whittaker's record may have only changed to favor the prosecution after the legislative backlash of the summer of 1957.

On May 6, 1957, the Court reached a decision about two states that denied admission to the practice of law for two applicants who were previously associated with the Communist Party. The states lost with Whittaker not participating.

*Konigsberg I*²⁰⁵ brought to this composition of the Supreme Court the question of the propriety of the denial to admit to the Bar an applicant who had refused to answer questions about membership in the Communist Party. The Committee of Bar Examiners refused admission to the Bar because the applicant had not demonstrated good moral character and he failed to show that he did not advocate the overthrow of the government by violent methods. The California Supreme Court had affirmed the refusal of admission to the bar 4-3. The Supreme Court, in an opinion by Black, without addressing the constitutional issues,²⁰⁶ found a lack of reasonable basis for the findings.²⁰⁷ Frankfurter wrote a dissent, as did Harlan, joined by Clark. Frankfurter's dissent focused on the jurisdiction of the Court; he would have remanded for the California Supreme Court to state if it passed on a federal due process claim. Harlan's dissent agreed that the Court did not have jurisdiction and argued that the Court's rational basis review made no sense.²⁰⁸

²⁰⁵ *Konigsberg I*, 353 U.S. 252 (1957).

²⁰⁶ *Id.* at 261-62 ("If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press[,] and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. We do not mean to intimate any view on that problem here. . . .").

²⁰⁷ *Id.* at 273 ("[W]e are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government.").

²⁰⁸ *Id.* at 311-12 (Harlan, J., dissenting) ("For me it would at least be more understandable if the Court were to hold that the Committee's questions called for matter privileged under the First and Fourteenth Amendments. But the Court carefully avoids doing so. . . . [W]e, on the basis of a bare printed record and with no opportunity to hear and observe the applicant, are in no such position as the State Bar Committee was to determine whether in fact the applicant was sincere and has a good moral character. Even were we not so disadvantaged, to make such a determination is not our function in reviewing state judgments under the Constitution. Moreover, resolution of this factual question is wholly irrelevant to the case before us, since it seems to me altogether beyond question that a State may refuse admission to its Bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area. The opinion of the Court does not really question this; it solves the problem by denying that it exists. But what the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern.").

Unlike the individual judgment that California gave to its applicant, New Mexico was more absolute to a similarly placed applicant in *Schware*.²⁰⁹ The same majority in an opinion again written by Black found that the evidence of membership in the Communist Party fifteen years before could not support the finding that the applicant did not have a good moral character. Frankfurter's concurrence, joined by Clark and Harlan, envisioned a more limited role for the Supreme Court in intervening on the states' determination of eligibility for the bar.²¹⁰ However, in absence of an individualized weighing of this applicant's past, this applicant's due process rights were violated.²¹¹

Two weeks later came a little-noticed *per curiam* opinion, *Sentner*.²¹² The Court followed its recent precedent of *Witcovich*,²¹³ but Burton and Clark dissented, finding that the Court was expanding *Witcovich* in a way that hampered the deportation of subversives. Because *Witcovich* does not necessarily involve un-Americanism nor mentions it, *Witcovich* is not included in the primary un-Americanism opinions, but *Sentner* is.

On June 3rd, 1957, the Court again sided with the individual in *Jencks*.²¹⁴ The president of a labor union had been convicted of filing a false affidavit of non-membership in the Communist Party. FBI informants testified at trial but their written reports were not made available to the defense for possible impeachment. The Court's plurality opinion of four justices by Brennan (Whittaker did not participate) held this violative of due process. Clark's lone dissent bristles at the idea that confidential FBI reports had to be made available to the defense, when even the defense did not ask.²¹⁵ The concurrence of Burton with Harlan also took the position that

²⁰⁹ *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232 (1957).

²¹⁰ *Id.* at 249 (Frankfurter, J., concurring) ("We cannot fail to accord such confidence to the state process, and we must attribute to its courts the exercise of a fair and not a biased judgment in passing upon the applications of those seeking entry into the profession.").

²¹¹ *Id.* at 251 ("This brings me to the inference that the court drew from petitioner's early, pre-1940 affiliations. To hold, as the court did, that Communist affiliation for six to seven years up to 1940, fifteen years prior to the court's assessment of it, in and of itself made the petitioner 'a person of questionable character' is so dogmatic an inference as to be wholly unwarranted. History overwhelmingly establishes that many youths like the petitioner were drawn by the mirage of communism during the depression era, only to have their eyes later opened to reality. Such experiences no doubt may disclose a woolly mind or naive notions regarding the problems of society. But facts of history that we would be arbitrary in rejecting bar the presumption, let alone an irrebuttable presumption, that response to foolish, baseless hopes regarding the betterment of society made those who had entertained them but who later undoubtedly came to their senses and their sense of responsibility 'questionable characters.' Since the Supreme Court of New Mexico as a matter of law took a contrary view of such a situation in denying petitioner's application, it denied him due process of law.").

²¹² *Barton v. Sentner*, 353 U.S. 963 (1957).

²¹³ *United States v. Wittcovich*, 353 U.S. 194 (1957).

²¹⁴ *Jencks v. United States*, 353 U.S. 657 (1957).

²¹⁵ *Id.* at 681–82 (Clark, J., dissenting) ("Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well

the main opinion went too far in requiring access to the reports by the defense. *Jencks* was one of the Court's liberal holdings that Congress sought to reverse and the only one where Congress was successful.²¹⁶

Next, the Court would issue four exonerating opinions on the same day, June 17, 1957. The anti-Communist press called it "Red Monday."²¹⁷

A New Hampshire un-Americanism prosecution arose in *Sweezy*.²¹⁸ The Court failed to produce a majority coalition and resolved the dispute by plurality. Chief Justice Warren's opinion, joined by Black, Douglas, and Brennan, held paramount the academic freedom and the freedom of association of the college professor who refused to answer questions and found inappropriate the delegation of legislative power to the Attorney General of NH. The concurrence of Frankfurter, joined by Harlan, balanced the investigative interests of the legislature against academic freedom and found in favor of academic freedom in those circumstances.²¹⁹ Clark dissented, joined by Burton. The dissenters, as did Frankfurter, did not think the Supreme Court could intervene in how a state legislature chose to delegate its power and considered that the Court's decision prevented New Hampshire from enforcing its own laws.²²⁰ Again, Whittaker did not participate.

The second opinion of the same day was *Watkins*.²²¹ In *Watkins* the refusal to answer questions was directed to a subcommittee of the federal House Un-American Activities Committee. The witness answered questions about his own activities and about current members of the Communist Party but refused to identify persons who, the witness believed, were no longer

close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets.").

²¹⁶ See *infra* note 232 and accompanying text; ROBERT M. LICHTMAN, THE SUPREME COURT AND MCCARTHY ERA REPRESSION 105–08, 107, n.75 (2012); 103 Cong. Rec. 10984–85; Pub. L. 85–269, 71 Stat. 595 (Sept. 2, 1957); 18 U.S.C. § 3500.

²¹⁷ Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop on Communism in the Late 1950s*, 43 HOFSTRA L. REV. 207, 209–210 (2014); "Red Monday": Supreme Court Limits Anti-Communist Measures, TODAY IN CIVIL LIBERTIES HISTORY, <https://todayinlh.com/?event=red-monday-supreme-court-limits-anti-communist-measures> [perma.cc/E667-DT8J] (last visited Oct. 5, 2019).

²¹⁸ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

²¹⁹ *Id.* at 261 (Frankfurter, J., concurring) ("When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate. Particularly is this so where the witness has sworn that neither in the lecture nor at any other time did he ever advocate overthrowing the Government by force and violence.").

²²⁰ *Id.* at 269 (Clark, J., dissenting) ("The short of it is that the Court blocks New Hampshire's effort to enforce its law. I had thought that in *Commonwealth of Pennsylvania v. Nelson* we had left open for legitimate state control any subversive activity leveled against the interest of the State.") (internal citations omitted).

²²¹ *Watkins v. United States*, 354 U.S. 178 (1957). Justices Burton and Whittaker did not participate.

associated with the Communist Party. His refusal to answer led to his conviction for contempt of Congress. The opinion by Chief Justice Warren discussed the English tradition of the unlimited supremacy of the parliament, contrasted it to the domestic variation of subjecting the legislature to the courts, and stressed the precedent recognizing the privilege against self-incrimination. The opinion turned to the difficulties of first amendment limits on congressional power and ended by finding the questions about association that far back in time outside the powers of the subcommittee and reversed. Frankfurter's concurrence clarified that acquiescence of Congress to the committee's exceeding its authority did not expand the committee's authority. Clark dissented with a broad attack on the majority's reasoning, arguing that the scope and exercise of the committee's powers were reasonable.

Third was the termination of a foreign service employee pursuant to a loyalty review, *Service*.²²² The employee had been accused of a leak, but the grand jury refused to indict him, and the employee had subsequently overcome several loyalty investigations until, in December 1951, upon a *sua sponte* appeal, the Loyalty Review Board expressed reasonable doubt about his loyalty and, without independent review by his ultimate superior, the Secretary of State, his employment was terminated. The Court, without Clark's participation, in an opinion by Harlan, unanimously held the dismissal wrongful, referring to *Peters*.²²³

The fourth and last Red Monday opinion may have been the most striking, *Yates I*.²²⁴ Fourteen organizers of the Communist Party in California had been convicted in a jury trial of violating the Smith Act,

conspiring (1) to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit.²²⁵

Brennan and Whittaker did not participate in the decision. Harlan wrote for the Court, acquitting five of the defendants and ordering the retrial of nine on the basis of a narrow reading of the statute's term "organizing"²²⁶

²²² *Service v. Dulles*, 354 U.S. 363, 365 (1957).

²²³ *See supra* text accompanying note 177.

²²⁴ *Yates v. United States*, 354 U.S. 298 (1957).

²²⁵ *Id.* at 300.

²²⁶ *Id.* at 308 ("While it is understandable that Congress should have wished to supplement the general provisions of the Smith Act by a special provision directed at the activities of those responsible for creating a new organization of the proscribed type, such as was the situation involved in the *Dennis* case, we find nothing which suggests that the 'organizing' provision was intended to reach beyond this,

and on the necessity that the jury instructions include incitement.²²⁷ Burton's concurrence disagreed with the Court's treatment of "organizing." Black concurred in part, joined by Douglas, arguing that all defendants should have been acquitted and the Court's interpretation allowed the Smith Act to trump freedom of speech,²²⁸ closing with a flourish for free speech.²²⁹ Clark dissented alone, arguing against the positions that the majority took.²³⁰

These four opinions—*Sweezy*, *Watkins*, *Service*, and *Yates I*—represent the high-water mark of opposition to un-Americanism prosecutions by the Supreme Court during this Red Scare era. Even after 1962, the Post-Frankfurter Era, when individuals win all the cases, the Court is more split than this.

C. Backlash: Anti-Jencks Legislation and the Jenner Bill

Congress was strongly opposed to the Court's refusal to have the fear of Communism trump the Bill of Rights. Southern legislators had the additional and pernicious reason to oppose the Court because of its efforts at racial integration.²³¹ When the FBI joined the anti-Court chorus by stating that *Jencks* would lead it to not prosecute (rather than having its confidential sources revealed per *Jencks*), the reaction was swift. Within just short of one month, both houses of Congress had passed legislation (the House by 351–

that is, to embrace the activities of those concerned with carrying on the affairs of an already existing organization. Such activities were already amply covered by other provisions of the Act. . . .").

²²⁷ *Id.* at 321–22 ("The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. This is quite a different thing from the view of the District Court here that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable *per se* under the Smith Act. That sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*." (internal citations omitted).

²²⁸ *Id.* at 340 (Black, J., dissenting) ("Under the Court's approach, defendants could still be convicted simply for agreeing to talk as distinguished from agreeing to act. I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.").

²²⁹ *Id.* at 344 ("The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.").

²³⁰ *Id.* at 346 (Clark, J., dissenting) ("I agree with the Court of Appeals, the District Court, and the jury that the evidence showed guilt beyond a reasonable doubt. It paralleled that in *Dennis* and *Flynn* and was equally as strong. In any event, this Court should not acquit anyone here." (citations omitted)).

²³¹ The Court had already started issuing desegregation opinions. Generally speaking, ROBERT M. LICHTMAN, *THE SUPREME COURT AND MCCARTHY ERA REPRESSION* 105–08, 122–26 (2012), provides an extremely detailed discussion of the cases and the legislative reaction.

17) restricting the disclosure of confidential information. President Eisenhower signed it into law on September 2, 1957.²³²

The reaction of Congress to other opinions did not have similar Administration support but was almost as strong. Even from the prior year, *Nelson's* overruling of state prosecutions due to federal preemption led to an anti-preemption bill, H.R. 3. The overruling of a public employee's firing in *Cole*,²³³ led both houses to pass legislation facilitating terminations for subversion.²³⁴ The strongest reaction came in the form of the Jenner Bill, which would remove jurisdiction from the Court over five anti-Communism matters.²³⁵ Legislation was also proposed to restore an easy-to-meet definition of "organizing" (reversing *Yates*²³⁶) and facilitating the withholding of passports.²³⁷

In contrast to the swift passage of the anti-*Jencks* legislation, the other bills were delayed for a year and watered down. Still, they passed the House by overwhelmingly wide margins.²³⁸ Some were also poised to pass the Senate—a motion to table the anti-*Nelson* H.R. 3 failed 46–39.²³⁹ Last-minute, masterful maneuvering and persuading by Lyndon B. Johnson as Senate Majority Leader in August 1958 prevented its passage by one vote. The others stalled in different parliamentary twists. The 1958 election produced a more liberal Senate that did not resurrect them.²⁴⁰

The Court was not at all oblivious to the legislative reaction. Frankfurter, who was particularly mindful of the Court's authority, expressed his concern to Brennan in a letter.²⁴¹ Indeed, others have argued that the reaction to Red Monday induced the Court, and especially

²³² *Id.* at 107 n.75; 103 CONG. REC. 10984-85 (1957); Act of Sept. 2, 1957, Pub. L. 85-269, 71 Stat. 595 (codified at 18 U.S.C. § 3500).

²³³ See *supra* note 296 and accompanying text.

²³⁴ See LICHTMAN, *supra* note 231, at 107 n.80.

²³⁵ The Jenner Bill, S. 2646, 85th Cong. (1957), would strip the Court of jurisdiction over litigation stemming from (1) Congressional investigations and contempt; (2) terminations from governmental employment; (3) state subversive activity prosecutions; (4) terminations and disciplining of teachers; and (5) bar admissions. See also *Jenner Attacks Court*, N. Y. TIMES, July 29, 1957, at 6 (reporting Jenner's comments and submission of bill on July 26).

²³⁶ See *supra* text accompanying note 224 (discussing *Yates*).

²³⁷ See LICHTMAN, *supra* note 231, at 125 n.80.

²³⁸ The anti-*Nelson* H.R. 3 received a 241–155 vote. The one reversing *Cole v. Young* received 298–46. The one reversing *Yates* did not even get a roll-call vote, as did not the passport-withholding bill. See *id.* at 123–24.

²³⁹ See *id.* at 124.

²⁴⁰ See *id.* at 127; see also *Mid-Term Revolution*, *supra* note 56.

²⁴¹ Frankfurter rued to Brennan, who authored *Jencks*, that Frankfurter should have written a concurrence demonstrating how narrow the holding was, as he had done in *Watkins* and *Sweezy*. See LICHTMAN, *supra* note 231, at 107 (quoting an Aug. 29, 1957, letter from the Brennan papers, Box I:3, *Jencks* file 3 of 3).

Frankfurter, to a more conservative stance.²⁴² Whereas Frankfurter does seem to have changed, he was not alone. Burton, Clark, Whittaker, and Harlan also changed.²⁴³ Warren, Black, Douglas, and Brennan would continue to insist on the primacy of the Bill of Rights but they would often be in the minority.

*Wilson v. Loew's, Inc.*²⁴⁴ is atypical in being about civil liability (and, therefore, not included in the primary cases about un-Americanism). The Court favored un-Americanism prosecutions. *Wilson* sprung from motion picture artists—writers, actors, and others—invoking their privilege against self-incrimination or refusing to appear before the House Un-American Activities Committee. Producers and distributors agreed not to employ them. Twenty-three artists sought damages and an injunction against this “blacklisting” in the California courts. Their complaint was dismissed, the dismissal was affirmed on appeal, and the United States Supreme Court granted *certiorari*. However, after the Court heard argument, the Court dismissed the writ of *certiorari* as improvidently granted without an opinion, with a single sentence explaining that “the judgment rest[ed] on an adequate state ground.” Douglas dissented alone.²⁴⁵

The Court still resisted the government in a deportation *habeas corpus* setting in *Rowoldt*.²⁴⁶ Frankfurter wrote for a 5–4 Court allowing the alien to remain but on essentially the same facts as *Galvan*.²⁴⁷ Harlan’s dissent found *Galvan* indistinguishable.

In a *per curiam* opinion, over Clark’s dissent, the Court favored individual soldiers who received less than honorable discharges in *Harmon*.²⁴⁸ The Court held that the Secretary of the Army exceeded his statutory authority when he took into account activities of the soldiers before their induction into the army. Clark’s dissent argued that just as civilians employed by the government received employment decisions for conduct before their employment, so could soldiers.

²⁴² Elizabeth J. Elias, *Red Monday and Its Aftermath: The Supreme Court's Flip-Flop on Communism in Late 1950s*, 43 HOFSTRA L. REV. 207, 227 (2014) (“Justice Frankfurter’s desertion of the position taken by the Supreme Court’s liberal Justices was the main reason for the Court’s ‘flip-flop’ from Red Monday to *Barenblatt* and *Uphaus*. An advocate of judicial restraint, Justice Frankfurter reined in the expansion of civil liberties protections, and showed deference to the power of Congress in order to dodge legislation introduced by anti-Communist legislators that would have stripped the Court of its appellate jurisdiction.”).

²⁴³ See Table 1 *supra* and accompanying text.

²⁴⁴ See generally *Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958).

²⁴⁵ *Id.* at 599 (“I can see no difference where the ‘right to work’ is denied because of race and where, as here, because the citizen has exercised Fifth Amendment rights. To draw such a line is to discriminate against the assertion of a particular federal constitutional right. That a State may not do consistently with the Equal Protection Clause of the Fourteenth Amendment.”).

²⁴⁶ See generally *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).

²⁴⁷ See *supra* note 166 and accompanying text.

²⁴⁸ See generally *Harmon v. Brucker*, 355 U.S. 579 (1958).

The Court's new severity against un-Americanism defendants before the appointment of Stewart was revealed in *Brown-1958*²⁴⁹ and *Green*,²⁵⁰ each decided 5–4 on March 31, 1958.

In a denaturalization proceeding, the defendant chose to testify in *Brown-1958*. After she had testified on direct examination that she had not been a member of the Communist Party, she invoked the privilege against self-incrimination against similar questions on cross-examination. The trial court required the defendant to answer as a consequence of the defendant's position in direct examination. The Supreme Court affirmed the conviction 5–4 with two dissenting opinions, Black's, joined by Warren and Douglas, and Brennan's. Black saw the Court improperly extending to a civil proceeding a rule that applies to a criminal one. Brennan agreed and also considered the punishment excessive.

In *Green*, two of the convicted defendants of *Dennis* failed to appear for their incarceration for four and a half years. The district court imposed a contempt conviction of three years, which the Supreme Court upheld. Warren, Black, Douglas, and Brennan dissented.

Whereas *Wilson*, *Brown-1958*, and *Green* had the Court support un-Americanism prosecutions, the criminal contempt conviction of defendants of *Yates I* gave rise to *Yates II*.²⁵¹ The Court by a 6–3 majority reduced their sentence to time served. Clark, with Burton and Whittaker, dissented.

On May 19, 1958, the Court issued a *per curiam* opinion on a *certiorari* petition, without oral argument, *Sacher II*.²⁵² The Court split 6–2 against an un-Americanism prosecution that drew a concurrence and a dissent. The defendant, a lawyer for defendants associated with the Communist Party, did not answer questions of a Senate subcommittee. The Court reversed and instructed the dismissal of the charges because the questions were not pertinent to the subcommittee's inquiry. Clark with Whittaker dissented, arguing that the questions were pertinent and the Court should hear oral argument, especially in view of the defendant's legal sophistication.²⁵³ Harlan's concurrence pointed out that pertinency turned on the record and was vague as evinced from the various interpretations received: oral argument would be pointless.²⁵⁴ Burton did not participate.

²⁴⁹ See generally *Brown v. United States*, 356 U.S. 148 (1958).

²⁵⁰ See generally *Green v. United States*, 356 U.S. 165 (1958).

²⁵¹ See generally *Yates v. United States*, 356 U.S. 363 (1958).

²⁵² See generally *Sacher v. United States*, 356 U.S. 576 (1958).

²⁵³ *Id.* at 580 (Clark, J., dissenting) (“Petitioner is a seasoned lawyer with trial experience. Both questions and answers may go afield in the examination of a witness—a truism to every trial practitioner—but that fact cannot license a witness'[s] refusal to answer questions which are relevant.”).

²⁵⁴ *Id.* at 578 (Harlan, J., concurring) (“For my part, it is abundantly evident that the pertinency of none of the three questions involved can be regarded as undisputably clear, as indeed is evidenced by the different interpretations of the record advanced by the members of this Court and of the Court of Appeals who have considered this issue.”).

Still in 1958, the Court resisted un-Americanism prosecutions in *Nowak*, *Bonetti*, *Kent*, *Dayton*, and *Speiser* and their companion cases.

Denaturalization due to Communist Party membership was the issue in *Nowak* (and a sister case, *Maisenberg*).²⁵⁵ Harlan wrote for a 6–3 Court reversing the lower courts’ denaturalizations. The allegedly fraudulent answers were to a question whether the applicants were members of an organization that believed in anarchy or the violent overthrow of the government. Their denial, while being members of the Communist Party and while the government’s burden in the denaturalization setting was very high, was seen by the majority as potentially innocent.²⁵⁶ Burton with Clark and Whittaker dissented, finding the question proper.

The Court reversed the deportation of an alien 6–3 in *Bonetti*.²⁵⁷ The alien had entered the United States in 1923, was a member of the Communist Party from 1932 to 1936 and went to fight in the Spanish Civil War in 1937. In 1938, he returned as a quota immigrant. In 1951, the United States sought to deport him for past communist affiliation. Whittaker wrote for the majority that the date of the alien’s admission was 1938. Because the alien had not been a member of the Communist Party since then, he was not deportable. Clark’s dissent, with Frankfurter and Harlan, found the holding contrary to precedent.

In *Kent* the Court would split 5–4 for individuals who had been denied passports due to communist sympathies and who intended to travel to communist conferences.²⁵⁸ Clark dissented with Burton, Harlan, and Whittaker.²⁵⁹ Douglas wrote for the majority that included Warren, Black, Brennan, and Frankfurter, finding an implied freedom to travel, which could only be restricted expressly in times of peace.²⁶⁰ This would be one of the

²⁵⁵ See generally *Nowak v. United States*, 356 U.S. 660 (1958). With the same reasoning, the court also disposed of *Maisenberg v. United States*, 356 U.S. 670 (1958).

²⁵⁶ *Nowak*, 356 U.S. at 664 (“We think that *Nowak* could reasonably have interpreted Question 28 as a two-pronged inquiry relating simply to anarchy. Its first part refers solely to anarchy. Its second part, which is in direct series with the first, begins with ‘anarchy,’ and then refers to ‘overthrow.’ It is true that the two terms are used in the disjunctive, but, having regard to the maxim *ejusdem generis*, we do not think that the Government’s burden can be satisfied simply by parsing the second sentence of the question according to strict rules of syntax. For the two references to ‘anarchy’ make it not implausible to read the question in its totality as inquiring solely about anarchy.”).

²⁵⁷ See generally *Bonetti v. Rogers*, 356 U.S. 691 (1958).

²⁵⁸ See generally *Kent v. Dulles*, 357 U.S. 116 (1958).

²⁵⁹ *Id.* at 143 (Clark, J., dissenting) (“[W]hile distinguishing away the Secretary’s passport denials in wartime, the majority makes no attempt to distinguish the Secretary’s practice during periods when there has been no official state of war but when nevertheless a presidential proclamation of national emergency has been in effect, the very situation which has prevailed since the end of World War II. Throughout that time, as I have pointed out, the Secretary refused passports to those ‘whose purpose in traveling abroad was believed to be to subvert the interest of the United States.’”).

²⁶⁰ *Id.* at 129 (majority opinion) (“[T]he right of exit [from the country] is a personal right included within the word ‘liberty’ as used in the Fifth Amendment. If that ‘liberty’ is to be regulated, it must be pursuant to the lawmaking functions of the Congress . . . Where activities or enjoyment, natural

Court's holdings that Congress would seek to undo in the coming legislative backlash.

The issue was similar in *Dayton*.²⁶¹ A physicist was refused a passport despite disclaiming any communist sympathies or affiliations. According to the Secretary of State, Dulles, he had connections to the Rosenberg espionage ring and his contrary testimony was not credible. Dulles also took the position that the physicist's proposed work at a research institute in India with a physicist who had renounced his US citizenship would be disadvantageous to the United States. The Supreme Court followed *Kent* with the same 5–4 vote. As a footnote with the benefit of hindsight, India did not develop its nuclear weapon capacity until much later, the late seventies.²⁶²

*Speiser v. Randall*²⁶³ and its companion, *First Unitarian*,²⁶⁴ were, unusually, about taxation. Both disputes turned on California's conditioning tax exemptions on loyalty oaths. In *Speiser*:

[t]he appellants [we]re honorably discharged veterans of World War II who claimed [a] veterans' property-tax exemption provided by . . . the California Constitution. . . . The form [which the applicants had to file annually] was revised in 1954 to add an oath by the applicant: 'I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities.' Each refused to subscribe the oath and struck it from the form which he executed and filed for the tax year 1954–1955. Each contended that the exaction of the oath as a condition of obtaining a tax exemption was forbidden by the Federal Constitution.²⁶⁵

The United States Supreme Court sided with the taxpayers with Clark dissenting. Warren did not participate. Douglas with Black wrote an additional concurrence in *First Unitarian* underscoring its religious belief denying the state the power to compel any oath about belief. Clark's dissent

and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them.") (citations omitted).

²⁶¹ *Dayton v. Dulles*, 357 U.S. 144, 145 (1958).

²⁶² See generally *The Spread of Nuclear Weapons*, ENCYCLOPAEDIA BRITANNICA (2019), <https://www.britannica.com/technology/nuclear-weapon/The-spread-of-nuclear-weapons> [perma.cc/UR26-HWSF] (moreover, India's advances in the 1950s and 1960s primarily took advantage of Eisenhower's Atoms for Peace program).

²⁶³ *Speiser v. Randall*, 357 U.S. 513, 514 (1958).

²⁶⁴ *First Unitarian Church of L.A. v. Cnty. of L.A.*, 357 U.S. 545, 546 (1958).

²⁶⁵ *Speiser*, 357 U.S. at 514–15.

pointed out the lower courts found no such tenet and that, even if held, it would not be religious in nature.

The Court would support firing state and local employees for not answering un-Americanism questions in *Beilan* and *Lerner*.²⁶⁶ Pennsylvania had a provision about teacher competency in its Public School Code and one about loyalty of its employees in the Pennsylvania Loyalty Act. Beilan, who had been a teacher for 22 years, refused to answer questions in 1952 about being active in a communist association in 1944 and was discharged. A 5–4 majority sided with the Pennsylvania authorities.²⁶⁷ Frankfurter concurred while hedging that the Fourteenth Amendment did not require a review of the wisdom of state decisions.²⁶⁸ Warren, Black, Douglas, and Brennan dissented. *Lerner*, with same votes and opinions, was about a New York City rule and a subway conductor who was fired for refusing to answer questions.

When Eisenhower appointed Stewart in 1958 to replace Burton, the Court's majority became Republican appointed. Upon the appointment of White in April 1962, the majority would again become Democrat appointed. Upon the appointment of Blackmun in June 1970, the majority would revert to Republican appointed and remain so to the date of this writing. Warren, Black, Douglas, and Brennan, continued to be the persistent dissenters. The impact of Stewart's appointment, however, was not central to the change in the outcomes.²⁶⁹

Indeed, the first opinion of the Stewart composition, *Vitarelli*,²⁷⁰ favored the individual. An educator holding a doctor's degree from Columbia University, who was appointed in 1952 by the Department of the Interior as an Education and Training Specialist the Trust Territory of the Pacific Islands, was dismissed for sympathetic association with individuals with sympathetic association with the Communist Party—a two-step link. Since he was not in a sensitive position, *Cole* precluded this dismissal.²⁷¹ The Secretary of Education, however, sent a second dismissal notice with no explanation. The 5–4 majority by Harlan, with Black, Douglas, Brennan,

²⁶⁶ *Beilan v. Bd. of Pub. Educ. of Phila.*, 357 U.S. 399, 400 (1958). The Court with the same reasoning also disposed of *Lerner v. Casey*, 357 U.S. 468, 470 (1958), involving the dismissal of a New York subway conductor under similar circumstances.

²⁶⁷ *Beilan*, 357 U.S. at 408 (“[T]he Pennsylvania Supreme Court has held that ‘incompetency’ includes petitioner’s ‘deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.’ 386 Pa. at page 91, 125 A.2d at page 331. This interpretation is not inconsistent with the Federal Constitution.”).

²⁶⁸ *Id.* at 411 (“I am not charged with administering . . . the school system of Pennsylvania. The Fourteenth Amendment does not check foolishness or unwisdom in such administration. The good sense and right standards of public administration in those States must be relied upon for that, and ultimately the electorate.”).

²⁶⁹ See *supra* text accompanying notes 44–47.

²⁷⁰ *Vitarelli v. Seaton*, 359 U.S. 535, 536 (1959).

²⁷¹ See *supra* note 196 and accompanying text.

and Warren, reinstated *Vitarelli*, treating the second dismissal as a repackaging of the first, illegal one. Frankfurter wrote, joined by Clark, Whittaker, and Stewart, that the second dismissal was proper. To Frankfurter, the majority's disregard of the second notice "attributes to governmental action the empty meaning of confetti throwing."²⁷²

After nodding in the direction of the individual in *Vitarelli*, the Stewart composition starts reversing the precedent of the idealist period that preceded it. The Court used *Barenblatt*²⁷³ to revise its interpretation of *Watkins*,²⁷⁴ as it would revise its treatment of *Nelson* and *Sweezy* in *Uphaus*.²⁷⁵ Whereas *Watkins* excused refusing to testify before the House Un-American Activities Committee, *Barenblatt* upheld a conviction for refusing to testify despite that it was related to higher education.²⁷⁶ Academic freedom retreated before the fear of communist activities. Black dissented, joined by Warren and Douglas, on the primacy of free association and the prohibition of any bill of attainder. Brennan's dissent attacked exposure for exposure's sake.

The New Hampshire issues of *Sweezy*²⁷⁷ return in *Uphaus v. Wyman*.²⁷⁸ The plurality of *Sweezy* considered that academic freedom allowed a college professor not to answer the loyalty questions of the attorney general, acting as a legislative committee. The plurality also considered inappropriate the delegation to the attorney general of powers of the legislature. However, the concurrence and the dissent disagreed and deferred to the state's legislature. The target of the probe in *Uphaus* resisted a subpoena by relying on *Nelson*'s holding²⁷⁹ to argue that the federal Smith Act superseded similar efforts by the state of New Hampshire and that the subpoenas violated free association. Justice Clark wrote for the new composition of the Court pointing out that, contrary to *Sweezy*, no issue of academic freedom arose. The majority interpreted *Nelson* narrowly,

²⁷² *Vitarelli*, 359 U.S. at 549 (Frankfurter, J., dissenting).

²⁷³ *Barenblatt v. United States*, 354 U.S. 930, 931 (1959).

²⁷⁴ See *supra* note 221 and accompanying text.

²⁷⁵ See *infra* note 278 and accompanying text.

²⁷⁶ Near the end of the Jackson Era, academic freedom had been on the winning side in *Updegraff*. See *supra* note 139 and accompanying text (invalidating the imposition of loyalty oaths on university professors).

²⁷⁷ See *supra* note 218 and accompanying text.

²⁷⁸ *Uphaus v. Wyman*, 360 U.S. 72, 73 (1959).

²⁷⁹ See *supra* notes 183–184 and accompanying text.

vindicating state prosecutions.²⁸⁰ Rather, Clark stressed that New Hampshire had valid grounds for its investigation of disloyalty.²⁸¹

Uphaus joined *Barenblatt*, decided on the same day, to show the Court's pivot on un-Americanism. Brennan authored the strongly worded and long dissent, joined by Warren, Black, and Douglas. Brennan saw the investigation as motivated merely by a desire to expose.²⁸² Black and Douglas underlined the primacy of free association and that the laws against subversives are prohibited bills of attainder.

In *Raley*,²⁸³ the Court split evenly with Stewart not participating. At issue were the contempt convictions of four defendants who invoked the privilege against self-incrimination before an Ohio legislative committee charged with investigating un-American activities. The Court had previously summarily vacated their convictions and remanded for the state courts to follow *Sweezy* and *Watkins*. This time, the Court reversed the conviction of three who had invoked the privilege against self-incrimination only to substantive questions but, by an equally divided Court, affirmed the conviction of the fourth, who invoked the privilege in refusing to state his home address. The Court was still allowing the refusal to answer questions but in a more limited way even when Stewart was not participating.

²⁸⁰ *Uphaus*, 360 U.S. at 76 (“All [*Nelson*] proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a State could proceed with prosecutions for sedition against the State itself; that it can legitimately investigate in this area follows *a fortiori*.”).

²⁸¹ *Uphaus*, 360 U.S. at 79 (“Certainly the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings.”); *id.* at 79–80 (“The Attorney General sought to learn if subversive persons were in the State because of the legislative determination that such persons, statutorily defined with a view toward the Communist Party, posed a serious threat to the security of the State. The investigation was, therefore, undertaken in the interest of self-preservation, ‘the ultimate value of any society,’” (citing *Dennis v. United States*, 341 U.S. 494, 509 (1951))); *id.* at 81 (“And the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons who, at least to the extent of the guest registration statute, made public at the inception the association they now wish to keep private.”).

²⁸² *Uphaus*, 360 U.S. at 82 (Brennan, J., dissenting) (“The Court holds today that the constitutionally protected rights of speech and assembly of appellant and those whom he may represent are to be subordinated to New Hampshire’s legislative investigation because, as applied in the demands made on him, the investigation is rationally connected with a discernible legislative purpose. With due respect for my Brothers’ views, I do not agree that a showing of any requisite legislative purpose or other state interest that constitutionally can subordinate appellant’s rights is to be found in this record. Exposure purely for the sake of exposure is not such a valid subordinating purpose.”); *id.* at 105–06 (“The Attorney General had World Fellowship’s speaker list and had already made publication of it. . . . He had considerable other data about World Fellowship, Inc., which he had already published. What reason has been demonstrated, in terms of a legislative inquiry, for going into the matter in further depth? Outside of the fact that it might afford some further evidence as to the existence of ‘subversive persons’ within the State, which I have endeavored to show was not in itself a matter related to any legislative function except self-contained investigation and exposure themselves, the relevance of further detail is not demonstrated. But its damaging effect on the persons to be named in the guest list is obvious.”).

²⁸³ *Raley v. Ohio* 360 U.S. 423, 424 (1959).

In *Greene*,²⁸⁴ the Court sided with a senior aeronautical engineer of a defense contractor. The contractor was notified that it would lose its government contracts because this senior manager would lose his security clearance. The majority remanded with the reasoning that the process of the removal of the security clearance was inadequate. Clark dissented, almost mockingly.²⁸⁵

In *In re Sawyer*, the Court reviewed a one-year suspension of a defense counsel in a Smith Act trial.²⁸⁶ Brennan wrote for a three-judge plurality that the attorney's free speech rights to criticize the state of the law and trial practice defeated the prosecution. Black concurred. Frankfurter dissented with Clark, Harlan, and Whittaker. Frankfurter argued that Brennan's interpretation of the violations was unreasonably narrow; the attorney actually accused the judge of conducting an unfair trial, several rounds of review had agreed, and the punishment was fair. Stewart, the swing vote on un-Americanism issues at this time, agreed with Frankfurter that counsel's free speech rights are limited.²⁸⁷ However, Stewart concurred with Brennan because the lawyer's speech did not interfere with the conduct of the trial.

The Court returned to favoring the prosecution in *Nelson v. County of Los Angeles* ("*Nelson-LA*").²⁸⁸ Two employees of the county refused to answer questions before a subcommittee of the House Un-American Activities Committee. One was a long-term employee and one a temporary employee. Both were dismissed and their dismissal was sustained by the California courts, including a 4–3 split over denial of review by the California Supreme Court. The United States Supreme Court affirmed the dismissal of the long-term employee by an equally divided Court, without issuing an opinion (Warren did not participate). The dismissal of the temporary employee split the Court 5–3, with Black, Douglas, and Brennan dissenting. Clark, who until 1957 often dissented alone, now wrote the

²⁸⁴ *Greene v. McElroy*, 360 U.S. 474, 475 (1959).

²⁸⁵ *Id.* at 511 (Clark, J., dissenting) ("Surely one does not have a constitutional right to have access to the Government's military secrets. But the Court says that because of the refusal to grant Greene further access, he has lost his position as vice president and general manager, a chief executive officer, of ERCO, whose business was devoted wholly to defense contracts with the United States, and that his training in aeronautical engineering, together with the facts that ERCO engages solely in government work and that the Government is the country's largest airplane customer, has in some unaccountable fashion parlayed his employment with ERCO into 'a constitutional right.' What for anyone else would be considered a privilege at best has for Greene been enshrouded in constitutional protection. This sleight of hand is too much for me.") (Omitted is a footnote where Clark answers Harlan's characterization in Harlan's concurrence of Clark's language as colorful).

²⁸⁶ *In Re Sawyer*, 360 U.S. 622, 623 (1959).

²⁸⁷ *Id.* at 646–47 (Stewart, J., concurring) ("Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.")

²⁸⁸ *Nelson v. Cnty. of L.A. (Nelson-LA)*, 362 U.S. 1 (1960).

majority opinion and distinguished *Slochower*.²⁸⁹ There, the statute penalized the privilege against self-incrimination, whereas this was a case of mere insubordination.²⁹⁰ The dissent of Brennan argued the distinction was nonexistent and *Slochower* should have been followed.²⁹¹ Black's dissent stressed the primacy of the Bill of Rights.

Four more cases were decided in 1960.²⁹² In the 5–4 *per curiam* opinion of *Niukkanen*, the Court upheld a deportation for membership in the Communist Party over a dissent by Douglas with Warren, Black, and Brennan.²⁹³ *Kimm v. Rosenberg*²⁹⁴ was also a 5–4 *per curiam* opinion with the same alignment. The issue was the deportation process of an alien. The statute provided that discretion existed to allow the alien to self-deport only if the alien could show his good moral character and show he was not a communist. The alien refused to answer questions about his membership in the Communist Party, invoking the privilege against self-incrimination. He was considered to have failed to show his good moral character. Douglas's dissent against penalizing the use of a constitutional right was joined by Warren and Black.²⁹⁵ Brennan's dissent, joined by Warren and Douglas, argued that the result of the statutory scheme in this instance became improper. If the government sought to remove an alien because of Communist Party membership, then the government would bear the burden of that proof. Here, where the removal was for a different reason, it was

²⁸⁹ See *supra* note 190 and accompanying text.

²⁹⁰ *Nelson-LA*, 361 U.S. at 7 (“But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any ‘built-in’ inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing.”).

²⁹¹ *Id.* at 16 (Brennan, J., dissenting) (“[T]his Court did not reverse the judgment of New York’s highest court because it had disrespected Slochower’s state tenure rights, but because it had sanctioned administrative action taken expressly on an unconstitutionally arbitrary basis. So here California could have summarily discharged Globe, and that would have been an end to the matter; without more appearing, its action would be taken to rest on a permissible judgment by his superiors as to his fitness. But if it chooses expressly to bottom his discharge on a basis—like that of an automatic, unparticularized reaction to a plea of self-incrimination—which cannot by itself be sustained constitutionally, it cannot escape its constitutional obligations . . .”).

²⁹² Not included for not focusing on subversive activities, is *Shelton v. Tucker*, 364 U.S. 479 (1960). Unlike *Adler*, *supra* note 141 and accompanying text, where the state required teachers and professors to list the subversive organizations to which they belonged, the state in *Shelton* required teachers and professors to list all the organizations to which they belonged, paid dues or made gifts in the last five years. A tightly split Court vindicated the teachers with an opinion by Stewart. Frankfurter, Clark, Harlan, and Whittaker wrote two dissenting opinions.

²⁹³ *Niukkanen v. McAlexander*, 362 U.S. 390 (1960).

²⁹⁴ *Kimm v. Rosenberg*, 363 U.S. 405 (1960).

²⁹⁵ *Id.* at 411 (Douglas, J., dissenting) (“The Court in terms does not, and cannot, rest its decision on the ground that by invoking the Fifth Amendment the petitioner gave evidence of bad moral character. Yet the effect of its decision is precisely the same.”).

improper that the burden shifted to the alien to prove that he was not a communist.²⁹⁶

Continuing the favoring of the government, *Flemming* upholds the termination of social security benefits of a deported alien for membership in the Communist Party.²⁹⁷ The Court splits in the same 5–4 way, with Black, Douglas, Warren, and Brennan dissenting.

*McPhaul*²⁹⁸ upholds a conviction. The secretary of an organization designated as communist was subpoenaed to produce the organization's documents to the House Un-American Activities Committee and refused, invoking the privilege against self-incrimination. Douglas's dissent, joined by Warren, Black, and Brennan, argues that a predicate for the conviction should be a showing that the witness could produce the documents.²⁹⁹ The majority had allowed the inference from the accused's silence; if he did not have access to the documents, he could have said so either to the committee or at trial.³⁰⁰

The year 1960 closes with an upholding of a denaturalization in *Polites*.³⁰¹ However, the Court did not quite reverse *Nowak* and *Maisenberg*.³⁰² Rather, the procedural posture was that the alien sought to use them to void his waiver of his appeal. The Court, in an opinion by Stewart, did not allow it. The usual dissenters, under Brennan's authorship, would have allowed the courts to effectuate *Nowak* and *Maisenberg* to prevent court rulings from becoming "instruments of wrong."³⁰³

In early 1961, in *Travis*, the Court would allow a question of venue to reverse a Colorado conviction of a labor leader filing a false affidavit of not being a communist.³⁰⁴ Harlan's dissent, with Clark and Frankfurter, argued that the government had a choice of venues; Colorado venue was appro-

²⁹⁶ *Id.* at 414 ("I would think it perfectly plain that such a regulation, as applied in this case, would be contrary to the statutory scheme, properly and responsibly construed. In the first place, as I have noted, it turns around the ordinary rules as to the burden of proof as to which party shall show 'deportability.' It requires the alien to prove a negative—that he never was a Communist since he entered the country—when no one has said or intimated that he was.") (footnotes omitted).

²⁹⁷ *Flemming v. Nestor*, 363 U.S. 603 (1960).

²⁹⁸ *McPhaul v. United States*, 364 U.S. 372 (1960).

²⁹⁹ *Id.* at 387 (Douglas, J., dissenting) ("If Congress desires to have the judiciary adjudge a man guilty for failure to produce documents, the prosecution should be required to prove that the man whom we send to prison had the power to produce them.").

³⁰⁰ *Id.* at 380 (majority opinion) ("Inasmuch as petitioner neither advised the Subcommittee that he was unable to produce the records nor attempted to introduce any evidence at his contempt trial of his inability to produce them, we hold that the trial court was justified in concluding and in charging the jury that the records called for by the subpoena were in existence and under petitioner's control at the time of the subpoena was served upon him.").

³⁰¹ *Polites v. United States*, 364 U.S. 426 (1960).

³⁰² See *supra* notes 255–256 and accompanying text.

³⁰³ *Polites*, 364 U.S. at 440.

³⁰⁴ *Travis v. United States*, 364 U.S. 631 (1961).

priate despite that the crime was not completed until the affidavit reached Washington, D.C.

The Court would return to a streak of decisions favoring the government. Two opinions arrived on February 27, 1961. Both were about convictions following refusals to answer questions of the House Un-American Activities Committee. Both affirmed the sentences 5–4. Both were written by Stewart.

In *Wilkinson*³⁰⁵ the defense argued that the lower courts' adherence to *Barenblatt* was error, the Committee lacked power, the questions were not pertinent to its legislative activity, and they violated Defendant's right of free association. Stewart's majority opinion adhered to *Barenblatt*, finding that the Committee's power was appropriate, the questions pertinent, and the danger that communist activities posed justified the incursion into the Bill of Rights.³⁰⁶ Warren, Black, Douglas, and Brennan wrote three vocal dissenting opinions.

The second opinion of the same day was *Braden*.³⁰⁷ The opinion referred to *Wilkinson*, but the distinguishing feature of the facts of *Braden* was that the defendant, Carl Braden, had been active in racial integration efforts in the South, which in other instances overcame un-Americanism concerns.³⁰⁸ The Court noted that his efforts and speech with respect to integration activities were not an issue. Despite the legitimate nature of those activities, before the House Un-American Activities Committee his membership in the Communist Party justified his questioning and his prosecution upon refusing to answer.³⁰⁹ Black and Douglas wrote two dissenting opinions, joined by each other.

³⁰⁵ *Wilkinson v. United States*, 365 U.S. 399 (1961).

³⁰⁶ *Id.* at 414–15 (“As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest. ‘To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II’ [*Barenblatt v. United States*, 360 U.S. 109, 28–129 (1959)] The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government. ‘The strict requirements of a prosecution under the Smith Act . . . are not the measure of the permissible scope of a congressional investigation into ‘overthrow,’ for of necessity the investigatory process must proceed step by step.’ [*Barenblatt*, 360 U.S. at 130.]”).

³⁰⁷ *Braden v. United States*, 365 U.S. 431 (1961).

³⁰⁸ See, e.g., *infra* note 316 and accompanying text (discussing *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961)); *infra* note 382 and accompanying text (discussing *Dombrowski v. Pfister*, 380 U.S. 479 (1965)).

³⁰⁹ *Braden*, 365 U.S. at 435 (“But *Barenblatt* did not confine congressional committee investigation to overt criminal activity Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in [the South], which were the subjects of the subcommittee investigation here, are surely

On April 24, the Court would issue two more 5–4 opinions against candidates for the bar who refused to answer questions about membership in the Communist Party. *Konigsberg II*³¹⁰ undid *Konigsberg I*.³¹¹ Harlan, Clark, and Frankfurter had dissented, siding with the state originally. This time they were joined by Stewart and Whittaker to make a majority against the usual dissenters. The same majority also affirmed a denial of an Ohio bar admission in *In re Anastaplo*.³¹²

In essence, *Wilkinson*, *Braden*, *Konigsberg II*, and *Anastaplo* solidified the message of *Barenblatt* and *Uphaus*. The treatment of un-Americanism prosecutions had changed. Likely due to the legislative backlash of the summer of 1957, the justices who occasionally favored un-Americanism prosecutions became much firmer in that stance. Clark, who earlier would often dissent alone in favor of the state, would now often be in the majority. Warren, Black, Douglas, and Brennan did not change, but the Court moved away from the primacy that these justices placed on the Bill of Rights and toward a pragmatism of fear of Communism. Granted, these majorities did not refer to Jackson's dissent in *Terminiello*.³¹³ Reading between the lines, however, one can see a paraphrasing of Jackson's warning:

This Court has gone far toward accepting the doctrine that civil liberty means the [investigations of communist activity] are impairments of the liberty of the citizen. . . . There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.³¹⁴

This majority accepted Jackson's 1949 warning against a "doctrinaire" idealism. The Bill of Rights retreated, allowing more investigations into communist activity.

The new attitude in favor of un-Americanism prosecutions knew exceptions. In *Slagle v. Ohio*,³¹⁵ the defendants, who had refused to answer questions of an Ohio Un-American Activities committee, argued that their

as much within its pervasive authority as Communist activity in educational institutions. The subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts. It was making a legislative inquiry into Communist Party propaganda activities in the southern States. Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in that region was surely not constitutionally beyond the reach of the subcommittee's inquiry.").

³¹⁰ *Konigsberg v. State Bar of Cal.*, 366 U.S. 36 (1961).

³¹¹ See *supra* note 205 and accompanying text.

³¹² *In re Anastaplo*, 366 U.S. 82 (1961).

³¹³ *Terminiello v. City of Chi.*, 337 U.S. 1 (1949).

³¹⁴ *Id.* at 37 (Jackson, J., dissenting).

³¹⁵ *Slagle v. Ohio*, 366 U.S. 259 (1961). The absence of a dissent here, as in *Noto*, *infra* note 322 and accompanying text, can be considered an expression of a more pliant nature that conservatism seemed to have on the Court until the mid-seventies.

due process rights were violated because the committee did not expressly reject their objections. The Court sided with the individuals, producing a unanimous opinion against the prosecution. Frankfurter did not participate.

Un-Americanism prosecutions gave way to racial integration efforts in *Louisiana v. NAACP*.³¹⁶ Two Louisiana statutes created the issue. One required all non-trading organizations to provide an annual affidavit that no officer or member of their board or of any of their affiliates nationally was a member of any subversive organization. The second required each organization to submit annually a list of its members. NAACP's listed members had experienced "economic reprisals."³¹⁷ The Court, under Douglas's pen, unanimously sided with the NAACP.³¹⁸

On June 5, 1961, the Court issued its three long-pending opinions on the application of anti-communist legislation to the Communist Party and some of its members.³¹⁹ The Court split 5–4 in favor of the prosecution in two, *Scales*³²⁰ and *Communist Party II*.³²¹ In the third, *Noto*,³²² the Court unanimously sided with the defendant. A week later would come *Catherwood*, and *Deutch*.³²³ In *Catherwood*, the Court sided unanimously against a negative tax consequence imposed on the Communist Party. In *Deutch*, Stewart would side with Warren, Black, Douglas, and Brennan and produce a tightly split exoneration for an un-Americanism defendant.

Communist Party II resulted from the efforts of Congress to treat organizations as subversive, while meeting the standard that the Court established in *Joint Anti-Fascist Refugee Committee v. McGrath*.³²⁴ The Court had previously remanded the same dispute without reaching the substance.³²⁵ The dispute was clearly important for the Court. It heard two days of oral argument, and the opinion is a very detailed one, from the pen

³¹⁶ *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

³¹⁷ *Id.* at 296.

³¹⁸ *Id.* at 297 ("At one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights. These lines mark the area in which the present controversy lies, as the District Court rightly observed.")

³¹⁹ The length of the pendency is apparent from a bail issue of *Noto* that arose in November 1955. *Noto v. United States*, 76 S. Ct. 225, 255 (1955). The initial grant of *certiorari* in *Scales v. United States* dated from March 1956. On February 5, 1960, the Court sets argument for October 10, 1960, with Clark dissenting against the delay.

³²⁰ *Scales v. United States*, 367 U.S. 203, 203 (1961).

³²¹ *Communist Party of the United States v. Subversive Activities Ctrl. Bd. (Communist Party II)*, 367 U.S. 1, 1 (1961).

³²² *Noto*, 367 U.S. at 290.

³²³ *Communist Party v. Catherwood*, 367 U.S. 389, 389 (1961); *Deutch v. United States*, 367 U.S. 456, 456 (1961).

³²⁴ See *supra* note 90 and accompanying text.

³²⁵ See *supra* note 186 and accompanying text.

of Frankfurter, spanning 111 pages in the U.S. Reporter. Including the four dissents, the opinion occupies 198 pages.

The majority opinion disposes of some procedural objections and several constitutional claims. The registration required of the Communist Party was not a bill of attainder because the statute merely imposed a registration obligation on entities engaged in the described type of conduct.³²⁶ The registration, as a regulation of freedom of association and speech, was justified by the danger of communism as an international revolutionary movement.³²⁷

Warren's dissent also covered a broad array of topics: The procedural imperfections should have led to a remand. The statute should have been held unconstitutional because it punished speech that did not incite action.³²⁸

Black's dissent argued that the statute was unconstitutional as a bill of attainder and antithetical to the freedoms that are central to the American ideals and the efforts to spread them.³²⁹

Douglas accepted the dangers of communism and that the procedural imperfections did not justify a remand. Nevertheless, he dissented because registration was an impermissible interference with freedom of association and because it constituted self-incrimination of the officers of the Communist Party.³³⁰

Brennan's dissent, joined by Warren, conceded that registration may be appropriately demanded from the party but said the same registration violated the privilege against self-incrimination of its officers.³³¹

³²⁶ *Communist Party II*, 367 U.S. at 86 (“The Act is not a bill of attainder. It attaches not to specified organizations but to described activities in which an organization may or may not engage.”).

³²⁷ *Id.* at 88–89 (“The Communist Party would have us hold that the First Amendment prohibits Congress from requiring the registration and filing of information, including membership lists, by organizations substantially dominated or controlled by the foreign powers controlling the world Communist movement and which operate primarily to advance the objectives of that movement: the overthrow of existing government by any means necessary and the establishment in its place of a Communist totalitarian dictatorship. We cannot find such a prohibition in the First Amendment. So to find would make a travesty of that Amendment and the great ends for the well-being of our democracy that it serves.”) (citations omitted).

³²⁸ *Id.* at 132 (Warren, C.J., dissenting) (“[T]he Court should hold that the Board cannot require a group to register as a Communist-action organization unless it first finds that the organization is engaged in advocacy aimed at inciting action.”).

³²⁹ *Id.* at 148 (Black, J., dissenting) (“Now, when this country is trying to spread the high ideals of democracy all over the world—ideals that are revolutionary in many countries—seems to be a particularly inappropriate time to stifle First Amendment freedoms in this Country. The same arguments that are used to justify the outlawry of Communist ideas here could be used to justify an outlawry of the ideas of democracy in other countries.”).

³³⁰ *Id.* at 190 (Douglas, J., dissenting) (“[T]he Fifth Amendment bars Congress from requiring full disclosure by one Act and by another Act making the facts admitted or disclosed under compulsion the ingredients of a crime.”).

³³¹ *Id.* at 201 (Brennan, J., dissenting in part) (“If the admission both of officership status and knowledge of Party activities cannot be compelled in oral testimony in a criminal proceeding, I do not

The juxtaposition of *Scales*³³² and *Noto*³³³ shows where exactly this majority placed the line for proper prosecutions against advocating the overthrow of the government. The defendant in *Scales* played an active organizing role in the party. The evidence showed training about specific revolutionary tactics of attack and retreat,³³⁴ pledges to fight and kill,³³⁵ and plans for arming the population and disarming it afterward to preserve the victory of the revolution.³³⁶ The Court rejected the defense's First Amendment arguments.³³⁷ Black's and Douglas's dissents stressed the First Amendment. Brennan's dissent, joined by Warren and Douglas, made a statutory argument.

In *Noto*,³³⁸ the unanimous exoneration for membership in the Communist Party turned on the distinction between advocacy of action to overthrow the government compared to conspiring to organize future action to then advocate overthrow. Witnesses testified that the defendant intended to recruit and organize among labor in basic industries in order for the Party to later be able to organize strikes that would paralyze the economy. Harlan's majority opinion considered this to be insufficient to find present advocacy.³³⁹ Black's concurrence bemoans the implicit message of the

see how compulsion in writing in a registration statement makes a difference for constitutional purposes.”).

³³² *Scales v. United States*, 367 U.S. 203, 203 (1961).

³³³ *Noto v. United States*, 367 U.S. 290, 290 (1961).

³³⁴ *Scales*, 367 U.S. at 242 (“In the ebbing we were to see that we ebb before the enemy wiped everybody out. Ebbing to the central point that had been barricaded, reorganization, and then at the correct time start flowing forward in the revolution.”).

³³⁵ *Id.* at 243 (“[T]he students were required by the instructor to take a pledge: ‘The pledge was each of us are Communists or members of the Party and each of us have a responsibility and we must carry out our responsibility and work for the interests of the Party and its recipients and carry out the full will of the Party even though it meant to fight and to kill, we must carry out the demands of the Party and all of them.’”).

³³⁶ *Id.* at 240 (“Q. Do I understand, Mr. Moreau (sic) that during this period of revolution the people, that is, the masses of the people, would be carrying guns? A. Yes, sir. ‘Q. And after the revolution do I understand that the Party would go around and collect these guns and take them away from the people? A. Yes, sir; take them away from those that helped them overthrow the capitalist system in order to assure the revolution itself.’”).

³³⁷ *Id.* at 228–29 (“It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.”).

³³⁸ *Noto*, 367 U.S. at 290.

³³⁹ *Id.* at 298 (“The ‘industrial concentration’ program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. The most that can be said is that the evidence as to that program might justify an

majority that the government must redouble its domestic spying and would rather stand on the First Amendment, as would Douglas.³⁴⁰

In *Catherwood*, the issue arose over the tax interpretation of a federal statute stripping all benefits from the Communist Party.³⁴¹ The argument was that the Communist Party lost a tax benefit, raising one of the taxes that it paid as an employer from 1 percent to 3 percent. The Court unanimously restored the normal employer tax treatment.

With *Deutch*,³⁴² the Court returned to the issue of refusing to answer questions before Congress and sided with the individual. Stewart's opinion turns on the pertinency of the questions without subscribing to the primacy of the Bill of Rights.³⁴³ Harlan's dissent, joined by Frankfurter, would consider that the pertinency issue had been answered adequately by the government. Whittaker's dissent, joined by Clark, finds the questions "clearly pertinent."³⁴⁴

C&RW Union would let the Court favor the government once again, albeit with the usual 5–4 split.³⁴⁵ The Naval Gun Factory's cafeteria was operated by a unionized business. The contract with the government prohibited the employment of communists in this facility where highly classified weapons were produced. An employee's identification badge was summarily seized by the commander of the facility for communist sympathies, prohibiting entry into the facility. The union and the employee tried to rely on the inadequate process found for stripping security clearance in

inference that the leadership of the Party was preparing the way for a situation in which future acts of sabotage might be facilitated, but there is no evidence that such acts of sabotage were presently advocated; and it is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause.").

³⁴⁰ *Id.* at 302 (Black, J., concurring) ("I cannot join an opinion which implies that the existence of liberty is dependent upon the efficiency of the Government's informers. I prefer to rest my concurrence in the judgment reversing petitioner's conviction on what I regard as the more solid ground that the First Amendment forbids the Government to abridge the rights of freedom of speech, press[,] and assembly.") The unanimity of the Court in *Noto*, as in *Slagle*, *supra* note 315 and accompanying text, may be an example of the pliant conservatism that appeared to be the practice of the conservative wing of the Court before 1975.

³⁴¹ *Communist Party v. Catherwood*, 367 U.S. 389, 390 (1961) (the provision at issue of the Communist Control Act of 1954 read "The Communist Party of the United States, or any successors . . . , whose object or purpose is to overthrow the Government . . . by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States.").

³⁴² *Deutch v. United States*, 367 U.S. 456, 456 (1961).

³⁴³ *Id.* at 470 ("Yet the questions which the petitioner was convicted of refusing to answer obviously had nothing to do with the Albany area or with Communist infiltration into labor unions.").

³⁴⁴ *Id.* at 475 (Whittaker, J., dissenting) ("[N]ot only did petitioner fail to complain of any uncertainty about the subject under inquiry, or object that the questions put to him were not pertinent to the inquiry, but, moreover, at least three of the questions he refused to answer were, on their face, clearly pertinent to the inquiry as a matter of law.").

³⁴⁵ *Cafeteria & Rest. Workers Union v. McElroy (C&RW Union)*, 367 U.S. 886, 886 (1961).

Greene.³⁴⁶ The Court held that the commander had appropriate authority and no additional process was due. Brennan's dissent would have required more process.

The last two opinions issued in 1961, *Killian*³⁴⁷ and *Cramp*,³⁴⁸ come from the next term, swiftly decided. In *Killian*, the issue was the conviction of a member of the Communist Party for supplying a false affidavit in his role as a senior member of a labor union.³⁴⁹ The Court remanded, in an opinion by Whittaker, considering that the conviction could be made properly and the First Amendment was not implicated because membership was not made into a crime.³⁵⁰ The four dissenters disagreed with the premise that this setting was less deserving of First Amendment protection than a criminal prosecution for membership in the Communist party. Black,³⁵¹ Douglas,³⁵² and Brennan³⁵³ wrote separately; Warren and Black joined Douglas's dissent.

Cramp featured a unanimously victorious public school teacher who refused a loyalty oath mandated by Florida law. Stewart wrote for the Court. The propriety of the requirement of an oath followed from *Adler*.³⁵⁴ However, this oath failed for vagueness.³⁵⁵

³⁴⁶ See *supra* note 284 and accompanying text.

³⁴⁷ See generally *Killian v. United States*, 368 U.S. 231 (1961).

³⁴⁸ See generally *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961).

³⁴⁹ Cf. *supra* note 98 and accompanying text (discussing *Douds*); *infra* note 385 and accompanying text (discussing *Brown*).

³⁵⁰ *Killian*, 368 U.S. at 254 (“[P]etitioner was not charged with criminality for being a member of or affiliated with the Communist Party, nor with participating in any criminal activities of or for the Communist Party, but only, with having made and submitted to the Government an affidavit falsely swearing that he was not a member of or affiliated with the Communist Party in violation of 18 U.S.C. § 1001, 18 U.S.C.A. § 1001. It would be strange doctrine, indeed, to say that membership in the Communist Party—when, as here, a lawful status—cannot be proved by evidence of lawful acts and statements, but only by evidence of unlawful acts and statements.”).

³⁵¹ *Id.* at 260 (Black, J., dissenting) (“I would overrule the decision in *Douds* and order this prosecution dismissed. As I said there, ‘Whether religious, political, or both, test oaths are implacable foes of free thought. By approving their imposition, this Court has injected compromise into a field where the First Amendment forbids compromise.’”) (citations omitted).

³⁵² *Id.* at 266 (Douglas, J., dissenting) (“In light of the *Scales* decision and the prior decision in *Yates v. United States*, 354 U.S. 298 (1957), it is difficult to see why, if membership is to be punished, a different standard should be applied here from that applied in the Smith Act. The constitutional overtones are as pronounced here as they were in *Yates* and *Scales*.”).

³⁵³ Brennan recognized that *Douds* meant that political strikes were a legitimate concern of Congress. *Id.* at 268 (Brennan, J., dissenting) (“Congress could validly impute to the Communist Party an institutional predilection for political strikes, and could reasonably act on the assumption that members of the Party or its affiliates would partake of that predisposition.”). Nevertheless, Brennan concludes that more than mere membership was necessary.

³⁵⁴ See *supra* note 141 and accompanying text.

³⁵⁵ *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 286 (1961) (“The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those

After having taken office in January of 1961, President Kennedy appointed White to replace Whittaker in April 1962. Their voting on un-Americanism prosecutions was similar. The year 1961 would also bring the construction of the Berlin Wall, a tangible testament to the illiberal nature of the Soviet Bloc, likely weakening Soviet Communism in the war of ideas.

Soon thereafter, the Court issued a defeat for un-Americanism prosecutions in *Russell*,³⁵⁶ which involved six prosecutions of journalists for refusing to answer questions of congressional subcommittees.³⁵⁷ The indictments stated that the questions were pertinent to the inquiry but did not identify the subject under inquiry.³⁵⁸ Stewart's majority opinion recounted that the subject had been identified differently and in contradicting ways at different steps in the process.³⁵⁹ The Court reversed and ordered the dismissal of the indictments because of their inadequacy. Clark and Harlan dissented separately, with Clark also joining Harlan. Both argued that the Court departed from a century of practice and established precedent and Clark underscored that the Court could have so decided in *Sacher*, rather than deciding that case on the much weaker issue of pertinency.³⁶⁰

who take this oath must swear, rather, that they have not in the unending past ever knowingly lent their 'aid,' or 'support,' or 'advice,' or 'counsel' or 'influence' to the Communist Party. What do these phrases mean? In the not too distant past Communist Party candidates appeared regularly and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party?").

³⁵⁶ See generally *Russell v. United States*, 369 U.S. 749 (1962).

³⁵⁷ See *id.* (Two defendants refused to answer questions of the House Un-American Activities Committee. Four defendants refused before the Internal Security Subcommittee of the Senate Judiciary Committee.).

³⁵⁸ *Id.* at 768 ("At every stage in the ensuing criminal proceeding [defendant] Price was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing Price of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal.").

³⁵⁹ *Id.* at 767 ("It was said that the hearings were 'not . . . an attack upon the free press,' that the investigation was of 'such attempt as may be disclosed on the part of the Communist Party . . . to influence or to subvert the American press.' It was also said that 'We are simply investigating communism wherever we find it.' In dealing with a witness who testified shortly before Price, *counsel for the subcommittee emphatically denied that it was the subcommittee's purpose 'to investigate Communist infiltration of the press and other forms of communication.'* But when Price was called to testify before the subcommittee no one offered even to attempt to inform him of what subject the subcommittee did have under inquiry. *At the trial the Government took the position that the subject under inquiry had been Communist activities generally.* The district judge before whom the case was tried found that 'the questions put were pertinent to the matter under inquiry' without indicating what he thought the subject under inquiry was. The Court of Appeals, in affirming the conviction, likewise omitted to state what it thought the subject under inquiry had been. *In this Court the Government contends that the subject under inquiry at the time the petitioner was called to testify was 'Communist activity in news media.'*") (emphasis added).

³⁶⁰ See *supra* note 252 and accompanying text.

Frankfurter and White did not participate in all six and Brennan did not participate in one. Thus, the four votes of Warren, Black, Douglas, and Brennan, would have been sufficient for five exonerations without Stewart's vote, whereas the sixth, in which Brennan did not participate, would be a tie if Stewart voted with Clark and Harlan, upholding the conviction below. We will not know how strongly Stewart was influenced, if at all, by the fact that the defendants were journalists, raising a First Amendment issue that was indirect and involved the freedom of the press. The issue was indirect in the sense that it did not involve freedom of association threatened by the questioning from the subcommittees. Freedom of the press was threatened by journalists' fear of un-Americanism prosecutions. Following the precedent of *Russell*, the Court also ordered summary dismissal of *Silber*,³⁶¹ with the same dissenters and the same composition, i.e., White and Frankfurter not participating.

D. After Frankfurter: The End of Un-Americanism Prosecutions

President Kennedy next appointed Arthur Goldberg, who in October of 1962 replaced Frankfurter. A reliable vote against un-Americanism prosecutions replaced an occasional vote for them, leaving the Court strongly against them. The government would win no more un-Americanism cases.

The new Justices, White and Goldberg, displayed their attitudes about un-Americanism prosecutions in 1963, in *Gibson*.³⁶² Goldberg wrote for the majority in a 5–4 split. Harlan was joined by Clark, Stewart, and White in a dissent, with White also writing separately an emphatic dissent. A Florida congressional committee sought from the president of the Miami chapter of the NAACP to answer whether 14 names of suspected communists were on its membership list.³⁶³ Goldberg's majority opinion stressed the weakness of the claim that despite its manifest efforts to avoid subversive influence, the NAACP presented a valid target for such an investigation.³⁶⁴ Black's

³⁶¹ See generally *Silber v. United States*, 370 U.S. 717 (1962).

³⁶² See generally *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963).

³⁶³ By not seeking the entire list, the committee avoided being governed by established contrary precedent. Cf. *supra* note 316 and accompanying text (discussing *Louisiana v. NAACP*).

³⁶⁴ *Gibson*, 372 U.S. at 555–56 (“Without any indication of present subversive infiltration in, or influence on, the Miami branch of the N.A.A.C.P., and without any reasonable, demonstrated factual basis to believe that such infiltration or influence existed in the past, or was actively attempted or sought in the present—in short without any showing of a meaningful relationship between the N.A.A.C.P., Miami branch, and subversives or subversive or other illegal activities—we are asked to find the compelling and subordinating state interest which must exist if essential freedoms are to be curtailed or inhibited. This we cannot do. The respondent Committee has laid no adequate foundation for its direct demands upon the officers and records of a wholly legitimate organization for disclosure of its membership; the Committee has neither demonstrated nor pointed out any threat to the State by virtue of the existence of the N.A.A.C.P. or the pursuit of its activities or the minimal associational ties of the

concurrence would have found a direct violation of freedom of association,³⁶⁵ as would Douglas's.³⁶⁶ Harlan's dissent argued that the majority's refusal to allow investigation due to lack of proof of nexus to fear of communist infiltration was self-contradictory.³⁶⁷ The very concern of the NAACP over communist infiltration laid it to rest.³⁶⁸ The limited use of the list as a memory aid to the witness was proper.³⁶⁹ White's dissent stressed the fear of communist infiltration.³⁷⁰ Using anti-communist language, White argued that the majority left the government powerless.³⁷¹

14 asserted Communists. The strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by the respondent.”)

³⁶⁵ *Id.* at 559 (Black, J., concurring) (“In my view the constitutional right of association includes the privilege of any person to associate with Communists or anti-Communists, Socialists or anti-Socialists, or, for that matter, with people of all kinds of beliefs, popular or unpopular. I have expressed these views in many other cases[,] and I adhere to them now. Since, as I believe, the National Association for the Advancement of Colored People and its members have a constitutional right to choose their own associates, I cannot understand by what constitutional authority Florida can compel answers to questions which abridge that right. Accordingly, I would reverse here on the ground that there has been a direct abridgment of the right of association of the National Association for the Advancement of Colored People and its members.”) (citations omitted).

³⁶⁶ *Id.* at 565 (Douglas, J., concurring) (“In my view, government is not only powerless to legislate with respect to membership in a lawful organization; it is also precluded from probing the intimacies of spiritual and intellectual relationships in the myriad of such societies and groups that exist in this country, regardless of the legislative purpose sought to be served.”).

³⁶⁷ *Id.* at 580 (Harlan, J., dissenting) (“For unless ‘nexus’ requires an investigating agency to prove in advance the very things it is trying to find out, I do not understand how it can be said that the information preliminarily developed by the Committee’s investigator was not sufficient to satisfy, under any reasonable test, the requirement of ‘nexus.’”).

³⁶⁸ *Id.* at 581 (“It hardly meets the point at issue to suggest, as the Court does, that the resolution only serves to show that the Miami Branch was in fact free of any Communist influences—unless self-investigation is deemed constitutionally to block official inquiry.”) (citations omitted).

³⁶⁹ *Id.* at 582 (“Given the willingness of the petitioner to testify from recollection as to individual memberships in the local branch of the N.A.A.C.P., the germaneness of the membership records to the subject matter of the Committee’s investigation, and the limited purpose for which their use was sought—as an aid to refreshing the witness[s] recollection, . . .—this case of course bears no resemblance whatever to [the precedent barring production of entire membership lists].”).

³⁷⁰ *Id.* at 583 (“Although one of the classic and recurring activities of the Communist Party is the infiltration and subversion of other organizations, either openly or in a clandestine manner, the Court holds that even where a legislature has evidence that a legitimate organization is under assault[,] and even though that organization is itself sounding open and public alarm, an investigating committee is nevertheless forbidden to compel the organization or its members to reveal the fact, or not, of membership in that organization of named Communists assigned to the infiltrating task.”).

³⁷¹ *Id.* at 585 (White, J., dissenting) (“The net effect of the Court’s decision is, of course, to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by dutybound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence.”).

Still, in 1963, the Court engaged a damages action against an investigator for the House Un-American Activities Committee in *Wheeldin v. Wheeler*.³⁷² The plaintiff alleged that the investigator was given signed blank subpoenas on one of which the investigator maliciously filled in plaintiff's name, causing him harm. The Court split 6–3. Douglas wrote for the majority against liability.³⁷³ Brennan's dissent, joined by Warren and Black, would remand, arguing that the lower court's opinion did not rest on an implied right of action but found immunity, yet immunity would not cover actions clearly beyond the employee's authority.³⁷⁴ Because *Wheeldin* is about liability, it is not included in the database of primary un-Americanism opinions.

Later in the same year, the Court split 5–4 against an un-Americanism prosecution in *Yellin*.³⁷⁵ The defendant was convicted of contempt of Congress for refusing to answer questions of the House Un-American Activities Committee. Warren's majority opinion practiced constitutional avoidance and exonerated because the Committee did not properly follow its own rules about granting a request for testimony in a closed session.³⁷⁶ The dissent of White, with Clark, Harlan, and Stewart, started by describing the testimony about communist infiltration of unions by educated youth who would hide their background,³⁷⁷ and that the defendant refused to answer questions about his college attendance before he sought employment in the steel industry.³⁷⁸ The dissent argued that, during his testimony, the defendant did not seek to testify in a closed session and the Committee did not violate its rules by not granting one.

³⁷² See generally *Wheeldin v. Wheeler*, 373 U.S. 647 (1963). Because the issue is private liability, the opinion is not included in the database of primary opinions.

³⁷³ *Id.* at 651 (“[I]t is difficult for us to see how the present statute, which only grants power to issue subpoenas, implies a cause of action for abuse of that power.”).

³⁷⁴ *Id.* at 653 (Brennan, J., dissenting) (“In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr v. Matteo*. In that case we upheld the governmental-officer immunity in respect of ‘action . . . taken . . . within the outer perimeter of petitioner’s line of duty.’ It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed ‘manifestly or palpably beyond his authority.’”) (citation omitted).

³⁷⁵ *Yellin v. United States*, 374 U.S. 109, 109 (1963).

³⁷⁶ *Id.* at 111 (“However, because of the view we take of the Committee’s action, which was at variance with its rules, we do not reach the constitutional questions raised.”) (citation omitted).

³⁷⁷ *Id.* at 126–27 (White, J., dissenting) (“The first witness, an organizer and high official in the Communist Party from 1930 to 1950, testified that the Party had begun a policy of infiltrating into basic industry, that Party ‘colonizers’ were sent to coordinate Party work in these industries, including the steel industry, and that these colonizers were mainly young men from colleges and universities. These colonizers, he continued, would misrepresent their backgrounds in applying for jobs and would conceal their educational qualifications so as to gain jobs alongside other less-educated workers without casting suspicion on their motives.”).

³⁷⁸ *Id.* at 128 (“[The defendant] was then asked to state his formal education and whether he was a student at the College of the City of New York, which he refused to do. . . .”).

The Court issued two opinions against the prosecution in 1964. In *Baggett v. Bullitt*,³⁷⁹ the Court revisited oaths of loyalty by university professors and ruled against the oaths 8–2 in an opinion by White that would find that statute improperly vague. Clark dissented, joined by Harlan.

*Aptheker*³⁸⁰ brought to the Court one of the consequences of being a member of a communist-action organization, the revocation of the passports of the senior members of the Communist Party. The Court decided 6–3 for the unconstitutionality of the statutory provision revoking the passports. The dissent of Clark, with Harlan and White, found the limitation reasonably related to national security.

In 1965 the Court vacated the order to register as a communist-front organization directed to the Abraham Lincoln Brigade,³⁸¹ formed to fight in the Spanish Civil War. The Court dismissed with a *per curiam* opinion on the stale record. A dissent by Douglas, joined by Black and Harlan, would have reached the merits. We may guess that the three would not have taken the same side if the merits had been reached.

Still in 1965, the Court encountered one more interaction of a black organization with an un-Americanism prosecution in the South. *Dombrowski v. Pfister*³⁸² involved Louisiana's allegation that a civil rights organization was a subversive one. The Court split 5–2, Black and Stewart not participating. In an opinion by Brennan, the majority considered the statute void for vagueness referring to *Baggett*,³⁸³ and ordered the grant to the defendants of an injunction against state prosecution. Harlan's dissent, with Clark, argued for restraint of the federal judiciary's involvement in state processes and would remand for monitoring and protection by the federal district court.³⁸⁴

After the two void-for-vagueness holdings in *Baggett* and *Dombrowski*, the five-member majority of the Court would further hamper un-Americanism prosecutions with *US v. Brown*,³⁸⁵ still in 1965. Chief Justice Warren writes for the Court, holding that the prohibition against communists holding officer positions in labor unions is a bill of attainder, thus vindicating Black's persistent theme that had first been expressed in the

³⁷⁹ *Baggett v. Bullitt*, 377 U.S. 360, 360 (1964).

³⁸⁰ *Aptheker v. Sec'y of State*, 378 U.S. 500, 500 (1964).

³⁸¹ *Veterans of Abraham Lincoln Brigade v. Subversive Activities Control Bd.*, 380 U.S. 513, 514 (1965).

³⁸² *Dombrowski v. Pfister*, 380 U.S. 479, 482 (1965).

³⁸³ See *supra* note 379 and accompanying text.

³⁸⁴ *Dombrowski*, 380 U.S. at 502 (“While I consider that abstention was called for, I think the District Court erred in dismissing the action. It should have retained jurisdiction for the purpose of affording appellants appropriate relief in the event that the state prosecution did not go forward in a prompt and *bona fide* manner.”).

³⁸⁵ *United States v. Brown (US v. Brown)*, 381 U.S. 437, 437 (1965).

very first un-Americanism opinion reviewed here, *Lovett*.³⁸⁶ The dissent is by White, with Clark, Harlan, and Stewart.

After the appointment of Justice Abe Fortas to replace Goldberg in October 1965, the Court issued a unanimous rejection of the registration obligation of members of the Communist Party in *Albertson v. Subversive Activities Control Bd.*³⁸⁷ The obligation to register violated the privilege against self-incrimination. Clark's concurrence pointed out that this was known from the time that he so advised in 1948 as Attorney General.³⁸⁸

The age of un-Americanism prosecutions was coming to an end. The Court still had to address occasional issues as they would arise. In *Elfbrandt v. Russell*,³⁸⁹ the Court invalidated an Arizona loyalty oath, albeit still divided 5–4. The Court would be unanimous, however, in *Gojack*,³⁹⁰ in rejecting the renewed contempt prosecution of one of the defendants of *Russell*.³⁹¹ Black would have used the opportunity to reverse *Barenblatt*.³⁹² Two years later, the Court's five member majority would invalidate New York's laws against the public employment of subversives in *Keyishian v. Bd. of Regents of Univ. of State of NY*.³⁹³ Clark authored a frustrated dissent, which Harlan, Stewart, and White joined. According to Clark, the majority sweepingly overruled precedent³⁹⁴ and undermined the nation's self-preservation.³⁹⁵

³⁸⁶ See *supra* note 67 and accompanying text.

³⁸⁷ *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 72–73 (1965).

³⁸⁸ *Id.* at 85 (Clark, J., concurring) (“[I]t was then pointed out that the ‘measure might be held . . . even to compel self-incrimination.’ This view was expressed in a letter over my signature as Attorney General. . .”) (citations omitted).

³⁸⁹ *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966).

³⁹⁰ *Gojack v. United States*, 384 U.S. 702, 702 (1965).

³⁹¹ See *supra* note 356 and accompanying text.

³⁹² See *supra* note 273 and accompanying text.

³⁹³ *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609 (1967).

³⁹⁴ *Id.* at 622 (Clark, J., dissenting) (“It is clear that the Feinberg Law, in which this Court found ‘no constitutional infirmity’ in 1952, has been given its death blow today. Just as the majority here finds that there ‘can be no doubt of the legitimacy of New York’s interest in protecting its education system from subversion’ there can also be no doubt that ‘the be-all and end-all’ of New York’s effort is here. And, regardless of its correctness, neither New York nor the several States that have followed the teaching of *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380, 96 L. Ed. 517, for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.”).

³⁹⁵ *Id.* at 628–29 (“I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there[,] and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have willfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence or other unlawful means; or to have willfully and deliberately printed, published, etc., any book

President Johnson would appoint Thurgood Marshall to replace Clark in August of 1967. Without Marshall's participation, the Court would split 6–2 in deciding *Robel*.³⁹⁶ An employee was a member of the Communist Party in a facility of a defense contractor. By virtue of the prohibition against a member of the Communist Party working in the defense industry, he was criminally prosecuted. The district court exonerated him on the basis that he was a passive member. The Supreme Court expanded the reasoning and exonerated him because the prohibition violated freedom of association.³⁹⁷ Harlan joined White's dissent.³⁹⁸ No more un-Americanism prosecutions would reach the Supreme Court.

The next year the Soviet Union would forcibly suppress a reformist uprising in Czechoslovakia, in what history has come to call the Prague Spring of 1968.³⁹⁹ This joined Khrushchev's 1956 recognition of Stalin's crimes,⁴⁰⁰ the violent suppression of the Hungarian revolution of 1956,⁴⁰¹ and the building of the Berlin Wall in 1961.⁴⁰² The result was a fading of the allure of Soviet Communism. From the spring of 1968, the pro-Soviet unity of communist parties broke. In some Western democracies, communist parties split into Soviet and Eurocommunist parties. In others (including the United States) they maintained the soviet orthodoxy, while often (but not in the United States) in a few more years a Eurocommunist offshoot would

or paper that so advocated and to have personally advocated such doctrine himself; or to have willfully and deliberately become a member of an organization that advocates such doctrine, is *prima facie* disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is 'Yes!'"

³⁹⁶ *United States v. Robel*, 389 U.S. 258, 258 (1967).

³⁹⁷ *Id.* at 262 ("We cannot agree with the District Court that [Section] 5(a)(1)(D) can be saved from constitutional infirmity by limiting its application to active members of Communist-action organizations who have the specific intent of furthering the unlawful goals of such organizations. . . . It is precisely because that statute sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, that it runs afoul of the First Amendment.").

³⁹⁸ *Id.* at 282–83 (White, J., dissenting) ("The constitutional right found to override the public interest in national security defined by Congress is the right of association, here the right of appellee Robel to remain a member of the Communist Party after being notified of its adjudication as a Communist-action organization. Nothing in the Constitution requires this result. The right of association is not mentioned in the Constitution. It is a judicial construct appended to the First Amendment rights to speak freely, to assemble, and to petition for redress of grievances.").

³⁹⁹ See *Prague Spring*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Prague-Spring> [perma.cc/PC4K-T6MQ] (last visited Apr. 7, 2021); *Prague Spring*, WIKIPEDIA, https://en.wikipedia.org/wiki/Prague_Spring [perma.cc/4RSA-JT53] (last visited Apr. 7, 2021).

⁴⁰⁰ See *supra* note 198 and accompanying text.

⁴⁰¹ See *supra* note 199 and accompanying text.

⁴⁰² See generally Thomas Lindenberger, *Berlin Wall*, in 1 EUROPE SINCE 1914: ENCYCLOPEDIA OF THE AGE OF WAR AND RECONSTRUCTION 354 (John Merriman & Jay Winter eds., 2006); *Berlin Wall*, ENCYCLOPAEDIA BRITANNICA (July 10, 2020), <https://www.britannica.com/topic/Berlin-Wall> [perma.cc/CLN8-HHJ3].

arise.⁴⁰³ In a sense, while the United States was losing the hot war against communism in Vietnam as well as injuring itself in the ideological war as the advocate for freedom by supporting right-leaning dictatorships, perhaps the Prague Spring lost the ideological war for the Soviet Union. Still far in the future was the end of the cold war.

⁴⁰³ See generally *Eurocommunism*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Eurocommunism> [perma.cc/5CHM-ZX4H] (last visited Apr. 7, 2021); *Gus Hall*, THE GUARDIAN (Oct. 17, 2000), <https://www.theguardian.com/news/2000/oct/18/guardianobituaries3> [perma.cc/B33T-2BR7] (on the soviet orthodoxy of the Communist Party of the United States).

APPENDIX B: THE VOTING RECORD BY CASE AND JUSTICE

Table A1 produces in each case the justices voting for the government, those voting for the individual and those not participating. The first column has the one-party abbreviation of the name of the case, the second has the citation to the United States Reporter, the third the date that the decision was issued. The justices voting for the individuals and against the prosecution are in the fourth column and those voting for the prosecution are in the fifth. Those not participating are in the sixth column. The opinions are ordered chronologically by date of issuance and citation to the US reporter. Text about the appointment and replacement of justices occupies entire rows.

Table A1, The primary un-Americanism cases

Case name abrv'n, note reference.	US cite	Date	Against un-Americanism prosecution	For un-Americanism prosecution	Not participating
Lovett, n. 67	328 U.S. 303	3-Jun-46	Black, Reed, Frankfurter, Douglas, Murphy, Rutledge, Burton		no Jackson
Christoffel, n. 71	338 U.S. 84	27-Jun-49	Douglas, Frankfurter, Black, Rutledge, Murphy	Burton, Jackson, Reed, Vinson	
Clark (8/49) and Minton (10/49) replace Murphy and Rutledge (change in favor of prosecutions)					
Dennis I, n. 75	339 U.S. 162	27-Mar-50	Black, Frankfurter	Minton, Burton, Jackson, Reed, Vinson	no Douglas or Clark
Morford, n. 79	339 U.S. 258	10-Apr-50	Minton, Burton, Jackson, Douglas, Frankfurter, Reed, Black, Vinson		no Clark
Bryan, n. 89	339 U.S. 323	8-May-50	Black, Frankfurter	Minton, Burton, Jackson, Reed, Vinson	no Douglas or Clark
Fleischman, n. 89	339 U.S. 349	8-May-50	Black, Frankfurter	Minton, Burton, Jackson, Reed, Vinson	no Douglas or Clark
Douds, n. 98	339 U.S. 382	8-May-50	Black	Burton, Jackson, Frankfurter, Reed, Vinson	no Minton, Clark, Douglas
Blau, n. 80	340 U.S. 159	11-Dec-50	Minton, Burton, Jackson, Douglas, Frankfurter, Reed, Black, Vinson		no Clark
Rogers, n. 81	340 U.S. 367	26-Feb-51	Black, Frankfurter, Douglas	Minton, Burton, Jackson, Reed, Vinson	no Clark
Gerende, n. 88	341 U.S. 56	12-Apr-51		Minton, Clark, Burton, Jackson, Douglas, Frankfurter, Reed, Black, Vinson	
JAFRC I, n. 90	341 U.S. 123	30-Apr-51	Burton, Black, Frankfurter, Douglas, Jackson	Minton, Reed, Vinson	no Clark
Dennis II, n. 118	341 U.S. 494	4-Jun-51	Black, Douglas	Vinson, Reed, Burton, Minton, Frankfurter, Jackson	no Clark
Garner, n. 82	341 U.S. 716	4-Jun-51	Burton, Douglas, Frankfurter, Black	Minton, Clark, Jackson, Reed, Vinson	

Bailey, n. 106	341 U.S. 918	30-Apr-51	Black, Frankfurter, Douglas, Jackson	Minton, Burton, Reed, Vinson	no Clark
Adler, n. 141	342 U.S. 485	3-Mar-52	Black, Frankfurter, Douglas	Vinson, Reed, Burton, Minton, Jackson, Clark	
Carlson, n. 149	342 U.S. 524	10-Mar-52	Black, Frankfurter, Douglas, Burton	Vinson, Reed, Minton, Jackson, Clark	
Harisiades, n. 143	342 U.S. 580	10-Mar-52	Douglas, Black	Minton, Burton, Jackson, Frankfurter, Reed, Vinson	No Clark
Sacher I, n. 132	343 U.S. 1	10-Mar-52	Black, Frankfurter, Douglas	Minton, Burton, Jackson, Reed, Vinson	no Clark
Spector, n. 150	343 U.S. 169	7-Apr-52	Jackson, Frankfurter, Black	Minton, Burton, Douglas, Reed, Vinson	No Clark
Updegraff, n. 139	344 U.S. 183	15-Dec-52	Minton, Clark, Burton, Douglas, Frankfurter, Reed, Black, Vinson		no Jackson
Orloff, n. 154	345 U.S. 83	9-Mar-53	Douglas, Frankfurter, Black	Minton, Clark, Burton, Jackson, Reed, Vinson	
Isserman I, n. 133	345 U.S. 286	6-Apr-53	Jackson, Douglas, Frankfurter, Black	Minton, Burton, Reed, Vinson	No Clark
Bridges, n. 155	346 U.S. 209	15-Jun-53	Burton, Douglas, Frankfurter, Black	Minton, Reed, Vinson	No Clark, Jackson
Warren replaces Vinson (change against prosecutions)					
Barsky, n. 158	347 U.S. 442	26-Apr-54	Black, Frankfurter, Douglas	Warren, Clark, Burton, Reed, Minton, Jackson	
Galvan, n. 166	347 U.S. 522	24-May-54	Black, Douglas	Warren, Clark, Frankfurter, Burton, Reed, Minton, Jackson	
Isserman II, n. 136	348 U.S. 1	14-Oct-54	Black, Douglas, Frankfurter	Burton, Reed, Minton	No Warren, Clark
Harlan replaces Jackson					
Quinn, n. 172	349 U.S. 155	23-May-55	Minton, Harlan, Black, Douglas, Warren, Clark, Frankfurter, Burton, Minton	Reed	
Emspak, n. 171	349 U.S. 190	23-May-55	Black, Douglas, Warren, Clark, Frankfurter, Burton	Reed, Minton, Harlan	
Bart, n. 173	349 U.S. 219	23-May-55	Black, Douglas, Warren, Clark, Frankfurter, Burton	Harlan, Reed, Minton	
Peters, n. 177	349 U.S. 331	6-Jun-55	Harlan, Black, Douglas, Warren, Clark, Frankfurter, Minton	Burton, Reed	
Nelson, n. 183	350 U.S. 497	2-Apr-56	Harlan, Black, Douglas, Warren, Clark, Frankfurter	Burton, Reed, Minton	
Slochower, n. 190	350 U.S. 551	9-Apr-56	Black, Douglas, Warren, Clark, Frankfurter	Harlan, Burton, Reed, Minton	
Zucca, n. 193	351 U.S. 91	30-Apr-56	Black, Douglas, Warren, Frankfurter, Burton	Clark, Reed, Minton	No Harlan
CPUSA I, n. 186	351 U.S. 115	30-Apr-56	Harlan, Black, Douglas, Warren, Frankfurter, Burton	Clark, Reed, Minton	
Cole, n. 196	351 U.S. 536	11-Jun-56	Harlan, Black, Douglas, Warren, Frankfurter, Burton	Clark, Reed, Minton	
Brennan replaces Minton (change against prosecutions)					
Mesarosh, n. 201	352 U.S. 1	5-Nov-56	Black, Douglas, Warren, Clark, Reed	Frankfurter, Harlan, Burton	No Brennan

Leedom, n. 202	352 U.S. 145	10-Dec-56	Harlan, Black, Douglas, Brennan, Warren, Clark, Frankfurter, Burton, Reed		
Gold, n. 203	352 U.S. 985	28-Jan-57	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark, Burton, Reed	
Whittaker replaces Reed					
Schwartz, n. 209	353 U.S. 232	6-May-57	Burton, Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter	No Whittaker
Konigsberg I, n. 205	353 U.S. 252	6-May-57	Burton, Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter	No Whittaker
Jencks, n. 214	353 U.S. 657	3-Jun-57	Harlan, Black, Douglas, WJBrennan, Warren, Frankfurter, Burton	Clark	No Whittaker
Sentner, n. 212	353 U.S. 963	20-May-57	Harlan, Black, Douglas, Brennan, Warren, Frankfurter, Whittaker	Clark, Burton	
Watkins, n. 221	354 U.S. 178	17-Jun-57	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark	No Whittaker or Burton
Sweezy, n. 218	354 U.S. 234	17-Jun-57	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark, Burton	No Whittaker
Yates I, n. 224	354 U.S. 298	17-Jun-57	Harlan, Black, Douglas, Warren, Frankfurter, Burton	Clark	No Whittaker or Brennan
Service, n. 222	354 U.S. 363	17-Jun-57	Harlan, Black, Douglas, Brennan, Warren, Frankfurter, Whittaker, Burton		No Clark
Rowoldt, n. 246	355 U.S. 115	9-Dec-57	Black, Douglas, Brennan, Warren, Frankfurter	Harlan, Clark, Whittaker, Burton	
Harmon, n. 248	355 U.S. 579	3-Mar-58	Harlan, Black, Douglas, Brennan, Warren, Frankfurter, Whittaker, Burton	Clark	
Brown, n. 249	356 U.S. 148	31-Mar-58	Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker, Burton	
Green, n. 250	356 U.S. 165	31-Mar-58	Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker, Burton	
Yates II, n. 251	356 U.S. 363	5-May-58	Black, Douglas, Brennan, Warren, Frankfurter, Harlan	Clark, Burton, Whittaker	
Sacher II, n. 252	356 U.S. 576	19-May-58	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark, Whittaker	No Burton
Nowak, n. 255	356 U.S. 660	26-May-58	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark, Whittaker, Burton	
Maisenberg, n. 255	356 U.S. 670	26-May-58	Harlan, Black, Douglas, Brennan, Warren, Frankfurter	Clark, Whittaker, Burton	
Bonetti, n. 257	356 U.S. 691	2-Jun-58	Black, Douglas, Brennan, Warren, Whittaker, Burton	Harlan, Clark, Frankfurter	
Kent, n. 258	357 U.S. 116	16-Jun-58	Black, Douglas, Brennan, Warren, Frankfurter	Harlan, Clark, Whittaker, Burton	
Dayton, n. 261	357 U.S. 144	16-Jun-58	Black, Douglas, Brennan, Warren, Frankfurter	Harlan, Clark, Whittaker, Burton	
Beilan, n. 266	357 U.S. 399	30-Jun-58	Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker, Burton	
Lerner, n. 266	357 U.S. 468	30-Jun-58	Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker, Burton	

Speiser, n. 263	357 U.S. 513	30-Jun-58	Harlan, Black, Douglas, Brennan, Frankfurter, Whittaker, Burton	Clark	No Warren
First Unitarian, n. 264	357 U.S. 545	30-Jun-58	Harlan, Black, Douglas, Brennan, Frankfurter, Whittaker, Burton	Clark	No Warren
Stewart replaces Burton					
Vitarelli, n. 270	359 U.S. 535	1-Jun-59	Harlan, Black, Douglas, Brennan, Warren	Stewart, Clark, Frankfurter, Whittaker	
Uphaus, n. 278	360 U.S. 72	8-Jun-59	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Barenblatt, n. 273	360 U.S. 109	8-Jun-59	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Raley, n. 283	360 U.S. 423	22-Jun-59	Black, Douglas, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker	No Stewart
Greene, n. 284	360 U.S. 474	29-Jun-59	Harlan, Black, Douglas, Stewart, Brennan, Warren, Frankfurter, Whittaker	Clark	
Sawyer, n. 286	360 U.S. 622	29-Jun-59	Black, Douglas, Stewart, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker	
Nelson-LA, n. 288	362 U.S. 1	29-Feb-60	Black, Douglas, Brennan	Harlan, Stewart, Clark, Frankfurter, Whittaker	No Warren
Niukkanen, n. 293	362 U.S. 390	18-Apr-60	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Kimm, n. 294	363 U.S. 405	13-Jun-60	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Flemming, n. 297	363 U.S. 603	20-Jun-60	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
McPhaul, n. 298	364 U.S. 372	14-Nov-60	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Polites, n. 301	364 U.S. 426	21-Nov-60	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Travis, n. 304	364 U.S. 631	16-Jan-61	Black, Douglas, Stewart, Brennan, Warren, Whittaker	Harlan, Clark, Frankfurter	
Wilkinson, n. 305	365 U.S. 399	27-Feb-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Braden, n. 307	365 U.S. 431	27-Feb-61	Warren, Black, Douglas, Brennan	Frankfurter, Clark, Harlan, Whittaker, Stewart	
Konigsberg II, n. 310	366 U.S. 36	24-Apr-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Anastaplo, n. 312	366 U.S. 82	24-Apr-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Slagle, n. 315	366 U.S. 259	15-May-61	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Whittaker		No Frankfurter
L v NAACP, n. 316	366 U.S. 293	22-May-61	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Frankfurter, Whittaker		
CPUSA II, n. 321	367 U.S. 1	5-Jun-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Scales, n. 320	367 U.S. 203	5-Jun-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Noto, n. 322	367 U.S. 290	5-Jun-61	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Frankfurter, Whittaker		

CP v Catherwood, n. 323	367 U.S. 389	12-Jun-61	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Frankfurter, Whittaker		
Deutch, n. 323	367 U.S. 456	12-Jun-61	Black, Douglas, Stewart, Brennan, Warren	Harlan, Clark, Frankfurter, Whittaker	
Caf. & Rest. , n. 345	367 U.S. 886	19-Jun-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Killian, n. 347	368 U.S. 231	11-Dec-61	Black, Douglas, Brennan, Warren	Harlan, Stewart, Clark, Frankfurter, Whittaker	
Cramp, n. 348	368 U.S. 278	11-Dec-61	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Frankfurter, Whittaker		
White replaces Whittaker					
Russell, n. 356	369 U.S. 749	21-May-62	Black, Douglas, Stewart, Brennan, Warren	Harlan, Clark	No White, Frankfurter
Silber, n. 361	370 U.S. 717	25-Jun-62	Black, Douglas, Stewart, Brennan, Warren	Harlan, Clark	No White, Frankfurter
Goldberg replaces Frankfurter (change against prosecutions)					
Gibson, n. 362	372 U.S. 539	25-Mar-63	Black, Douglas, Brennan, Warren, Goldberg	Harlan, Stewart, White, Clark	
Yellin, n. 375	374 U.S. 109	17-Jun-63	Black, Douglas, Brennan, Warren, Goldberg	Harlan, Stewart, White, Clark	
Baggett, n. 379	377 U.S. 360	1-Jun-64	Black, Douglas, Stewart, Brennan, White, Warren, Goldberg	Harlan, Clark	
Aptheker, n. 380	378 U.S. 500	22-Jun-64	Black, Douglas, Stewart, Brennan, Warren, Goldberg	Harlan, White, Clark	
Dombrowski, n. 382	380 U.S. 479	26-Apr-65	Douglas, Brennan, White, Warren, Goldberg	Harlan, Clark	No Black, Stewart
Brown, n. 385	381 U.S. 437	7-Jun-65	Black, Douglas, Brennan, Warren, Goldberg	Harlan, Stewart, White, Clark	
Fortas replaces Goldberg					
Albertson, n. 387	382 U.S. 70	15-Nov-65	Harlan, Black, Douglas, Stewart, Brennan, Warren, Clark, Fortas		No White
Elfbrandt, n. 389	384 U.S. 11	18-Apr-66	Black, Douglas, Brennan, Warren, Fortas	Harlan, Stewart, White, Clark	
Gojack, n. 390	384 U.S. 702	13-Jun-66	Harlan, Black, Douglas, Stewart, Brennan, White, Warren, Clark, Fortas		
Keyishian, n. 393	385 U.S. 589	23-Jan-67	Black, Douglas, Brennan, Warren, Fortas	Harlan, Stewart, White, Clark	
Marshall replaces Clark (change against prosecutions)					
Robel, n. 396	389 U.S. 258	11-Dec-67	Black, Douglas, Stewart, Brennan, Warren, Fortas	Harlan, White	No Marshall

APPENDIX C: REGRESSION DETAILS

The linear regression used dummies corresponding to the first two cases (variable “firsttwo”), the Jackson Era (variable “Jackson”), the idealist era (set as the constant), the Backlash Era (variable “Backlash”), and the Post-Frankfurter Era (“Post-Fr”) produced the statistics of Table C1. The independent variables were the dummy variables.

Table C1. The statistics of the linear regression with era dummies.

Variable	Estimate	St. Error	t-Statistic	P-Value	
constant	0.258	0.045	5.692	1.37E-07	
firsttwo	-0.036	0.150	-0.238	0.812	
Jackson	0.306	0.061	4.990	2.69E-06	
Backlash	0.135	0.055	2.475	0.015	
Post-Fr	0.043	0.076	0.568	0.572	
	Deg Fr	SS	MS	F-Stat	P-Value
firsttwo	1	0.060	0.060	1.461	0.230
Jackson	1	0.885	0.885	21.518	1.11E-05
Backlash	1	0.262	0.262	6.370	0.013
Post-Fr	1	0.013	0.013	0.322	0.572
Error	96	3.946	0.041		
Total	100	5.166			

The non-linear regression uses the model of the pendulum motion. The only independent variable is the date of the decision. The model is $a_0 + a_1 t \sin(a_2 + a_3 t) \exp(a_4 t)$. Table C2 holds its statistics.

Table C2. The statistics of the nonlinear regression.

Variable	Estimate	St. Error	t-Statistic	P-Value
a0	0.378	0.024	15.469	8.141E-28
a1	-0.027	0.009	-2.860	0.005
a2	5.217	0.350	14.913	9.844E-27
a3	0.489	0.044	11.017	9.886E-19
a4	-0.010	0.045	-0.213	0.832
	Deg. Fr.	SS	MS	
Model	5	16.797	3.359	
Error	96	4.029	0.042	
Uncorr'd T'l	101	20.826		
Corr'd T'l	100	5.166		

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