HOW WOULD THEY EVER LEARN BETTER?
THE SEDITION ACT, THE MCCARRAN INTERNAL SECURITY ACT, AND CONGRESSIONAL FAILURE

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"The First Amendment cuts against human nature. It demands that we be better than we would be."
~Geoffrey Stone

ABSTRACT:

The Alien and Sedition Acts of 1798 created a United States very intolerant of dissent. This article argues that Congress should have taken to heart the lessons of the Alien and Sedition Acts when enacting legislation like the McCarran Internal Security Act during the Cold War. It was largely congressional failure coupled with extensive investigation and application that led to the rampant repression of the Cold War era. However, evaluating the actions of Congress in a vacuum is counter productive, and it is important to note that the during the Cold War, the judiciary served to temper some of the harm done by Congressional legislation. This article concludes, however, that the Cold War was the more dangerous period for free speech because the results could have easily been predicted and prevented by recognizing the lessons of the 1798 Sedition Act.

INTRODUCTION:

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The United States during the Alien and Sedition Acts was very intolerant of dissenting views. On face, the Alien and Sedition Acts could perhaps be the most repressive pieces of legislation passed in this country. From the acts, the government should have learned a lesson about the importance of protecting free expression during wartime, but policymakers failed to take to heed. Geoffrey Stone writes that the Cold War "would prove to be one of the most repressive periods in American history."[1] Unfortunately, the reason the period proved to be so much more repressive than the Alien and Sedition Acts was largely due to the failure of Congress. There was cause for hope for the United States government during the Cold War due to the actions of the judiciary, which tempered some of the harm done by Congress. Thus, when examining potential threats to free expression during each conflict, it is important to examine each time period in totality. Congress does not exist in a vacuum. As the Alien and Sedition Acts demonstrate, legislators legislate within a cultural context and are just susceptible to war hysteria as ordinary citizens. With that in mind, it is fruitless to simply compare the two pieces of legislation without taking into account the general atmosphere of each time. The huge mistakes committed by Congress during the Cold War were ultimately more threatening to freedom of expression than the Alien and Sedition Acts of 1798, however, Congress's mistakes were somewhat tempered by a judiciary that was finally coming around to protecting First Amendment rights. To understand how it was that Congress failed so miserably during the Cold War even when compared to the Alien and Sedition Acts, this essay will examine the legislation passed at each time period, how that legislation bequeathed investigation, and finally, how the Supreme Court had the potential to solve for some of these Congressional excesses.

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[1] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 312.

DANGEROUS LEGISLATION

First, the legislation passed during the Cold War was so dangerous to free expression because Congress should have known better than to pass such repressive acts. By this time, the Congress should have had a much better appreciation for what their responsibilities were during wartime. The repressive actions that occurred under this legislation could have been very easily predicted and as such, could have been prevented, making this a huge Congressional mistake.

Of course, this is not to suggest that the Alien and Sedition Acts were not detrimental to free speech. The act itself was a grievous assault on the First Amendment. The Sedition Act of 1798 prohibited any person from writing, publishing, or uttering anything of a "false, scandalous, and malicious" nature against the United States government.[2] A blanket statement that prohibited all dissent, Congress passed the Sedition Act in the context of an impending war with France. "In this atmosphere, the nation's commitment to civil liberties was quickly rationalized out of existence" as the Constitution faced its first major test.[3] Moreover, a fiercely partisan Congress enacted the act to be utilized as a political tool against opponents, defining dissent as disloyalty for the first time in United States history.

During the debates over the passage of the act, legislators were blatantly unconcerned with the potential impact of the Act on individual free expression because no precedent had been set for protecting it. (Contrast this with an evolving First Amendment discussion that happens in debates over the tailoring of the Espionage Act of 1917 and it becomes even more clear that Congress should have known what would happen with its passage of the Cold War legislation.) Similar pressures, fear and paranoia ran through the country as it geared up for a war with

[2] Ibid., 20.
[3] Ibid., 25.

France. However, because the hysteria during these times was so similar, Congress failed in not learning from the previous events. Fear of spies and informants caused legislators to get caught up in hysteria and fail to worry about free expression. Congressman John Allen argued during debates over the passage of the acts that dissenters ought to stay quiet, "When measures are deliberately adopted, unanimity ought to prevail in carrying them into effect, but nothing is in fact heard but the jarring sounds of discord and division…"[4] Many congressmen agreed with this view. Allen continues, "The system of espionage thus established, the country will swarm with informers, spies, delators, and all that odious reptile tribe that breed in the sunshine of despotic power; that suck the blood of the unfortunate and creep into the bosom of sleeping innocence…"[5] There are many more examples of fierce disapprobation of dissent in the congressional record. The vote over this legislation broke down along strict party lines, showing that there was some disagreement over the importance and necessity of this legislation. Congressman Nicholas explained, "Under such circumstances, it must be seen that the printers of papers would be deterred from printing anything which should be to in the least bit offensive to a power which might so greatly harass them."[6] Although there was disagreement in Congress over the legislation, no discussion took place about limiting the legislation to make it more protective of dissent. Stone writes that important patterns of discourse emerge in these debates that were repeated throughout history in times of real or threatened national crises. Indeed, these were patterns that Congress should have heeded down the road.

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[4] Debates and Proceedings in the Congress of the United States: Fifth Congress Comprising the Period From May 15, 1797, to March 3, 1799. Washington D.C: Gales and Seaton, 1851. 1480.
[5] Ibid., 2095.
[6] Ibid., 2139-2142.

Additionally, Congress passed the Alien Acts, which declared that citizens or nationals of an enemy nation in the US could be detained or deported at the discretion of the president.[7] The Alien Friends Act empowered the president to seize, detain, and deport any noncitizen deemed dangerous. An arbitrary expansion of the powers of the president, Republicans argued the act was "a xenophobic betrayal of the nation's most fundamental principles."[8] It presented a real threat to freedoms, and the racist and xenophobic sentiment that swept the nation would be repeated in other conflicts. Taken together, the Alien and Sedition Acts are recognized as a dark period in the nation's history. Disrupting the balance of power, severely penalizing dissent, and threatening any noncitizen with deportation on a whim, are draconian actions. These responses can only be understood knowing that the Congress had never been in a situation like that before and was unsure how to respond and how to apply the Constitution in such circumstances. Although their actions cannot be excused, no legacy existed for protection of individual First Amendment freedoms.

One key lesson of the Alien and Sedition Acts controversy is that "the very concept of a false political opinion is incompatible with the First Amendment."[9] The logical extension of this argument as Stone explains, is that it is not for a judge, jury, or even a popular vote to decide which ideas are good or bad, or true or false.[10] Moreover, Congress declared the Alien and Sedition Acts a "mistaken exercise" of power in 1840. Jefferson pardoned those who had been convicted and freed those still in jail. Congress also repaid all the fines paid under the Sedition Act. A congressional committee report announced that "the unconstitutionality of the act had

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[7] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 30
[8] Ibid., 31.
[9] Ibid., 75.
[10] Ibid., 76.

been conclusively settled."[11] Thus, Congress already knew as it entered the Cold War that such restrictive legislation is bound to end in embarrassment and yet still passed incredibly repressive legislation during the Cold War.

Next, despite President Truman's hesitation to enact sweeping legislation regarding wartime dissent, the Congress during the Cold War acted with flagrant disregard for free expression. Congress's major piece of legislation during this time period was the McCarran Internal Security Act of 1950, which Stone describes as "of the most grievous assaults on freedom of speech and association ever launched in American history."[12] This bill was hastily enacted in response to an anti-Communist fervor that Stone claims was out of control by late summer 1950.[13] Of course, the fact that President Truman had just authorized an invasion of North Korea and that Senator McCarthy's accusations were in full swing may make the rush to pass this legislation more understandable, but certainly does not justify it. Moreover, the wartime hysteria of the Alien and Sedition Acts should have provided an example for what happens when Congress passes speech-restrictive legislation hastily. Congress justified the McCarran Internal Security Act by a preamble that "contained the legislative conclusion that world communism had as its one purpose the establishment of a totalitarian dictatorship in America to be brought about by treachery, infiltration, sabotage and terrorism."[14] With a frame like this, it is little wonder that such draconian measures seemed justified to those that voted to pass this legislation. The act required all Communist organizations to register with the attorney general. In addition, they had to disclose the names of their officers, their funding sources, and a list of members. This seriously breaches rights of association. Within the context of a fierce

[11] Ibid., 73.
[12] Ibid., 335.
[13] Ibid., 334.
[14] Redish, Martin H. The Logic of Persecution: Free Expression and the McCarthy Era. Stanford: Stanford UP, 2005. 36.

anti-Communist fever and knowing that they would have to register with the attorney general, the act effectively made it impossible for such organizations to function. The act made it possible for these groups to be targeted and shunned without requiring proof of any unlawful conduct by any member.[15]

The McCarran Internal Security Act of 1950 also created the Subversive Activities Control Board (SACB), which Congress empowered to declare any group that did not register voluntarily as a Communist organization. The act barred all members of such organizations from government employment or employment in domestic defense. It also denied registered organizations benefits like tax exemptions. Congress also incorporated a provision that authorized the creation of detention camps in national emergencies.[16] This act gave enormous power to Congress and the SACB to arbitrarily label groups as Communist and deny them the ability to function and communicate their opinions. Redish writes that Congress had a zealous desire to destroy the Communist Party.[17]

Four years later, Congress passed the Communist Control Act of 1954, which effectively stripped Communists of all rights and immunities. It effectively barred the Communist Party from appearing on the ballot in any election. The act further claimed that the party ought to be banned.[18] Only one senator dared to cast a ballot in opposition to the Act, illustrating the paranoia and pressures of the time.[19] Declaring certain viewpoints illegal or un-American drastically undermines the First Amendment, and the political prosecutions that occurred under the Alien and Sedition Acts serve as an example of what happens when leaders wield wartime

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[15] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 335.
[16] Redish, Martin H. The Logic of Persecution: Free Expression and the McCarthy Era. Stanford: Stanford UP, 2005. 36.
[17] Ibid., 37.
[18] Redish, Martin H. The Logic of Persecution: Free Expression and the McCarthy Era. Stanford: Stanford UP, 2005. 36.
[19] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 313.

legislation as a political tool. Congress also relied extensively on the Smith Act of 1940 as ammunition against those the government claimed were conspiring or advocating the overthrow of government.[20] Although President Truman had attempted to stand up for civil liberties, Congress ultimately cowed him into supporting their restrictive legislation. This is so dangerous to freedom of speech because it is clear that Congress had a lot of weapons at their disposal to punish dissent, and they utilized them vigorously in a manner reminiscent of the Alien and Sedition Acts as political weapons. It was ultimately for political pressures that many legislators caved into intense pressure to appear tough on Communism that the anti-Communist fervor gained so much momentum. Moreover, draconian legislation begets draconian enforcement. Congress should have known better and what happened next comes as no surprise.

INSIDIOUS INVESTIGATION

Second, Congressional legislation leads to Congressional investigation and the Cold War was a dangerous time to be speaking out against the government because of extensive surveillance and investigation techniques. By contrast, during the Sedition Act, the government applied enforcement mechanisms sporadically. No Congressional committees were convened to investigate, so it is unclear exactly what Congress's role was in the enforcement of the act. Several Republican members of Congress did find themselves victims of the act, however. Convictions for violating the Sedition Act were limited to public statements made in forums like newspapers. The executive branch enforced the Act by combing Republican newspapers searching for sedition. Secretary of State Thomas Pickering led the attack on disloyalty. Pickering vigorously searched for French sympathizers through the papers and also through a

[20] Ibid., 328.

network of spies.[21] Federalists praised Pickering and his vigilance as the "Scourge of Jacobinism."[22] The Adams administration eagerly arrested newspaper editors and prominent Republicans for publishing sentiments in violation of the Act. From July 1798 to March 1801, federalists arrested twenty-five well-known Republicans. They later indicted fifteen of those arrested. The ten cases that went to trial all brought back convictions. Federalists initiated several common-law prosecutions for sedition libel.[23] Twenty-five prosecutions over a period of three years pales in comparison to actions undertaken by Congress during the Cold War.

Secretary of State Pickering led a hunt for sedition, but ultimately did not convict or arrest that many citizens. If one was not a published, well-known opinion leader, one was likely safe from prosecution. Notable prosecutions under the Sedition Act include well-known Republican politician Matthew Lyon, Republican journalist James Callender, and Republican newspaper editor William Duane. That ordinary citizens were not in danger of conviction is one of the reasons the Sedition Act seems relatively benign in comparison with the Cold War. Perhaps merely because technology had not caught up with Federalists' desires to spy on, investigate, and convict Republicans for sedition, ordinary citizens were spared a culture of pervasive fear and repression.

Unfortunately, 160 years later during the Cold War, ordinary citizens would not be so lucky. Technological changes allowed Congress to create a much wider surveillance program that targeted more than just opinion leaders. The sheer amount of citizens investigated during this time was staggering. Additionally, the operation of the House Un-American Activities Committee (HUAC) took the idea of exposure to an unprecedented level. An invention of the Dies Committee, the House Un-American Activities Committee had new plans for the Cold War.

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[21] Ibid., 46.
[22] Ibid.
[23] Ibid., 63.

The scope of their investigations was broad and sweeping. In 1947 and 1948, HUAC compiled information on 25,591 citizens and 1,786 organizations. It had also created a list of 363,119 people who had signed a Communist Party election petition in the past.[24] HUAC's chief investigator proudly asserted that the HUAC files contained "more than one million names, records, dossiers, and data pertaining to subversion."[25] From 1947 to 1957, HUAC heard testimony from more than 3,000 witnesses and cited 135 individuals for contempt of court, more than the entire Congress had cited for contempt in the entire history of the United States.[26] This demonstrates the level of activity of Congressional committees, leading to the investigation of so many citizens.

As technology advances, the government gets new ways to monitor and spy on its citizens, demonstrated by the ever-increasing numbers of people investigated and prosecuted during the Cold War. In addition, the invention of television made it much easier for the government to expose citizens as Communists. This makes it infinitely harder to keep one's personal political convictions and associations private. As Redish explains, the hearings of the Hollywood Ten attracted widespread media attention, especially the new television broadcast industry.[27] Members of HUAC gained incredible publicity and furthered their own political careers, while those investigated were exposed in front of a national audience.[28] The ultimate implication of this widespread exposure was the beginning of the Hollywood blacklist. The blacklist was far reaching, and openly Communist screenwriters, actors, or directors could obtain no work for more than a decade.[29] Merely for the unpopularity of their political views, the

[24] Ibid., 355.
[25] Ibid.
[26] Ibid., 372.
[27] Redish, Martin H. The Logic of Persecution: Free Expression and the McCarthy Era. Stanford: Stanford UP, 2005. 139.
[28] Ibid.
[29] Ibid., 141.

members of the Hollywood Ten were deprived of their livelihoods. The implications are clear. "To tolerate such chilling of individual viewpoints both retards the democratic process and undermines the intellectual dignity and autonomy of the individual."[30] These technological changes made it much easier to disseminate information so individuals with unpopular views could be shunned more easily.

The House Un-American Committee is the clearest illustration of the excesses of Congressional investigation during the Cold War, but they were far from the only committee caught up in the action of pursing vehement anti-Communism. Other committees involved included the House Committees on Military Affairs, Education, Labor, Public Works, Foreign Affairs, and Veterans Affairs, and the Senate Committees on Government Operations, Interstate and Foreign Commerce, Labor and the Judiciary.[31] Everyone, it seems, caught the anti-Communist fever; especially Senator Joseph McCarthy who accused 205 State Department employees of being card-carrying Communists. The excesses of his fabricated list and doctored documents inflamed controversy in Congress, and convinced most Americans that he had in fact uncovered Soviet spies.[32] Despite being finally implicated in a report that he had engaged in misconduct, he had completely and totally intimidated Democratic Senators.[33]

Exposure was the primary weapon of HUAC, as the committee claimed in 1940 that its primary purpose was to "protect constitutional democracy by pitiless publicity."[34] HUAC's leadership during the Cold War announced that it sought to:

> expose and ferret out…Communists and Communist sympathizers in the federal government; expose Communists who had infiltrated the labor movement, education, and

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[30] Ibid., 141.
[31] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 353.
[32] Ibid., 375.
[33] Ibid., 381.
[34] Ibid., 354.

> Hollywood; institute a counter-educational program against un-American propaganda; and develop comprehensive files on subversive and potentially subversive organizations and individuals.[35]

The committee pursued extravagant hearings with relish, including the aforementioned trial of the Hollywood Ten. Despite the raucous nature of the hearings, the committee convicted all ten and sentenced them for contempt of court. HUAC lacked procedural safeguards, making it more attractive to utilize than a grand jury, which demonstrated itself to be more reluctant to indict names released by snitches like Elizabeth Bentley. Moreover, HUAC is now known to have been quite reckless and careless in its investigations. Its reports of lists of subversive people often contained lots of innocents, contributing to a culture of fear and chill of speech and activity. HUAC also issued many unfounded accusations, threatened those who attempted to stand up to it, and used evidence irresponsibly.[36] With the goal of exposure, HUAC left many innocents at the mercy of their neighbors to be attacked by vigilante violence, barred from work by blacklists, or shunned.

Extensive investigations by loyalty boards and Congressional committees created a pervasive sense of being watched. As one government employee remarked, "If Communists like apple pie and I do, I see no reason why I should stop eating it. But I would."[37] "It was dangerous to be seen speaking with the wrong person or reading the wrong journal."[38] Procedural unfairness was rampant in loyalty board investigations as well. In fact, in 1953, President Eisenhower amended an executive order that now stated that invoking the Fifth Amendment privilege against self-incrimination was grounds for automatic dismissal from a government job. As a result, between 1947 and 1956, the government fired 2,700 federal civil

[35] Ibid., 355.
[36] Ibid., 372.
[37] Ibid., 350.
[38] Ibid.

service employees and another 12,000 "voluntarily" resigned.[39] Although not specifically Congressional methods of enforcement, it is important to mention the federal loyalty program because it speaks to how the branches of government failed to check each other and illustrates a general feeling of paranoia.

The implications of these Congressional committees committed to widespread exposure are clear: a culture of paranoia and fear. Unlike federal loyalty programs, Congressional investigations intruded into every sphere of American life, including "labor, education, entertainment, religion, journalism, business, and philanthropy."[40] Unlike during the Alien and Sedition Acts when political opinion leaders were the targets of investigation, during the Cold War, Congress investigated actors, screenwriters, and teachers in addition to politicians. Two Congressional committees conducted investigations into Communists teaching in schools.[41] J. Edgar Hoover warned about the dangers of Communists in the schools, "every Communist uprooted from our educational system is one more assurance that it will not degenerate into a medium of propaganda for Marxism."[42] Pervasive use of loyalty oaths led to the dismissal of hundreds of teachers and the intimidation of many thousands of others. One teacher said that one lecture could "damn anybody" and another explained, "after finishing a lecture, I sometimes wonder if somebody is going to take it to Papa or some reporter."[43] Teachers and professors were chilled into conformity and deans reported that students were frightened to voice any liberal views for fear they would be associated with Communism.[44]

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[39] Ibid., 351.
[40] Ibid., 352.
[41] Redish, Martin H. The Logic of Persecution: Free Expression and the McCarthy Era. Stanford: Stanford UP, 2005. 175.
[42] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 421.
[43] Ibid., 422.
[44] Ibid.

More generally, there was a pervasive sense of national silence. Stone writes that by the mid-1950s, an entire decade of political repression had taught Americans that they could suffer serious consequences if they openly expressed their opinions.[45] This time period truly created a "Silent Generation" because of the pervasive fear. The media failed to stand up for civil liberties in the face of hysteria and liberal politicians simply collapsed in the face of the repression, despite being lifelong champions of freedom. Stone concludes that another reason this enforcement was so dangerous was that the government decide which thoughts and ideas were permitted. This was facilitated by extensive investigation that created an atmosphere that made citizens afraid to do anything that could be seen as too liberal. As a result, "nothing so dangerously corrupts the integrity of a democracy as a loss of faith in its own citizens."[46] "HUAC aggressively fostered the mind-set of the witch hunt."[47] Stone writes that one thing the Congress should have done to act more in line with its responsibilities during wartime was to focus on espionage and sabotage, that is, criminal conduct, instead of stifling debate.[48] So, much more than during the Alien and Sedition Acts, the investigation that occurred during the Cold War created a generation of chilled citizens, unwilling to express their views for fear of punishment.

PICKING UP THE SLACK

In both circumstances, Congress failed by passing legislation that was repressive and by vigorously enforcing it. However, there is a light at the end of the tunnel after the Cold War

[45] Ibid., 419.
[46] Ibid., 352.
[47] Ibid., 373.
[48] Ibid., 374.

because the judiciary started to take strides toward protecting dissent. That was certainly not true at the turn of the eighteenth century. First, under the Sedition Act, judges and jurors were unable to divorce themselves from the hysteria of the time and failed in their duty and obligation to check power. The Sedition Act was enacted as a political tool along strict party lines, and the Supreme Court failed to stop it from being used as such.[49] One Supreme Court Justice, Samuel Chase, traveled the circuit and "made it his personal mission to destroy those whose political opinions threatened his vision of the United States."[50] Federalists dubbed his behavior "Chase's Bloody Circuit."[51] All ten sedition cases that went to trial also led to convictions, calling into question whether citizens can trust judges and jurors to be protective of civil liberties during war.[52] Historian Leonard Levy argues, "Eminent judges of the twentieth century, including Holmes, Brandeis, Black, Douglas, Jackson, Brennan, and others, declared that the statute was unconstitutional. But every member of the Supreme Court in 1798-1800, in rulings on circuit, thought otherwise."[53] Justice Chase's circuit riding certainly was a violation, and a failure to check power and protect dissent.

Additionally, interpretation of the Sedition Act by the federal courts left practically no defense for those convicted of violating the act. Federalists argued that provisions of the act left much room for defense, including proving the truth of one's allegedly seditious statement. Anthony Lewis writes:

> The federal courts, its judges all appointed by Federalist presidents, interpreted the requirement of falsity to make the defendant bear the burden of providing the truth; a critical statement was presumed to be false unless the defendant could prove it true in all respects. The courts applied this rigorous requirement even to statements of mere

[49] Ibid., 67,
[50] Ibid., 69.
[51] Ibid.
[52] Ibid., 63-74.
[53] Levy, Leonard W. Emergency of a Free Press. Chicago: Ivan R. Dee, 2004. 280.

> opinion. If an editor wrote that government policy was headed for disaster, he had to prove the prediction true-which of course he could not.[54]

Judge instructions to juries left them with nothing to do but decide whether the accused had published the statement in question.[55] With this context, it is no doubt that all those brought before juries were convicted. However, also when looking at the actions of the judiciary, it is important to keep in mind that there existed no First Amendment jurisprudence that demonstrated the importance of protecting individual freedoms of expression. During the Alien and Sedition Acts, the judiciary failed to check the excesses of Congress.

Finally, during the Cold War, the judiciary made strides in the right direction as far in determining the proper relationship between war and dissent. Unlike during the Alien and Sedition Acts, serious hope for dissent came out of this time period. Although not taking serious action to protect dissent in the height of the Cold War, as the war wound down, the Supreme Court made progress in articulating a protective jurisprudence. *Dennis v. United States* was the Supreme Court's major decision during this time period, and was one that showed a confused application of doctrine. The defendants in *Dennis*, national board members of the Communist Party, were charged "not with attempting to overthrow the government, not with conspiring to overthrow the government, not with advocating the overthrow of government, but with conspiring to advocate the overthrow of government."[56] The prevailing test at this time was clear and present danger, but it was unclear exactly what that required. Moreover, under this test, as articulated by Holmes and Brandeis, the members of the CPUSA could not be punished. Yet, the lower court argued that although it was not illegal to advocate an abstract doctrine of the principle of overthrowing organized government by illegal means, it was illegal to advocate

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[54] Lewis, Anthony. Make No Law: the Sullivan Case and the First Amendment. New York: Vintage Books, 1991. 192.
[55] Ibid.
[56] Stone, Geoffrey. Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism. New York: Norton and Company, 2004. 396

action for the accomplishment of that purpose.[57] The case then went up to the U.S. Court of Appeals for the Second Circuit where Judge Learned Hand upheld the conviction. Hand argued that although political opinions cannot be wrong, "nobody doubts that, when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected by the Amendment."[58] He concluded that to judge such cases, the court must weigh the gravity of the evil discounted by its improbability. Applying this to the defendants in *Dennis*, Judge Hand argued that when the government is aware of a conspiracy, it must not have to wait until strikes have already taken place.[59] Judge Hand said later that he personally never would have prosecuted the defendants, but he had to apply the prevailing precedent at the time, demonstrating that the courts were making the same mistakes during the Cold War as they had in the past. Despite an articulation of a more protective speech standard, courts were still loath to apply it during times of war.

Dennis then went up to the Supreme Court. In a 6-to-2 decision, the Court upheld the convictions. Despite an opportunity to clarify the law during war, the Court produced no majority opinion. Justice Vinson's plurality opinion argued that the Smith Act did not prohibit academic discussion of Marxism and Leninism. He then said that the Court had moved toward adopting the Holmes-Brandeis clear and present danger test, although never overruling *Schenck*, *Debs*, *Gitlow*, and *Whitney*. Then, he argued that the Court must decide the meaning of clear and present danger. Finally, he applied the test and found the advocacy in *Dennis* to be both clear and present, even though it was neither.[60] Justice Frankfurter concurred, arguing that decisions must involve careful weighing of conflicting interests and there is a low value of protection for

[57] Ibid., 398.
[58] Ibid., 400.
[59] Ibid., 401.
[60] Ibid., 403-404.

speech that advocates violent overthrow of government.[61] Justice Jackson also concurred arguing that express advocacy of unlawful conduct can be a crime even if the government cannot prove it is almost guaranteed to happen.[62] Justices Black and Douglas dissented, arguing that there was no evidence the defendants actually taught techniques of sabotage or presidential assassination.[63] Justice Black was likewise "appalled" by the way the other Justices had distorted the "established" clear and present danger test to affirm these convictions.[64] Thus, as Stone writes, it seems that the Court's decision in *Dennis* raised more questions than it answered, including does express advocacy of unlawful conduct deserve First Amendment protection? At this point in the Cold War, it seems that the Court is in a similar predicament to the situation after World War I. The justices were making steps toward articulating a clear standard for protection of dissent, but *Dennis* is a somewhat confused fist step.

The Court did finally get its act together in 1957, which is why their actions undercut some of the damage done by the rampage of the Congressional committees. As time passed, the Court began to regard *Dennis* as an embarrassment. On June 17, 1957, the Supreme Court effectively declared the end the Cold War by issuing four decisions, most notably *Yates v. United States*. The Supreme Court overturned, in a 6-to-1 decision, the conviction of Oleta Yates. During the trial, the prosecution proved that the defendants had advocated Marxist-Leninist principles, which would in the past, have almost guaranteed her conviction. However, Justice Harlan argued that the Smith Act did not prohibit advocacy of forcible overthrow of government as an abstract principle. He continued that the advocacy of unlawful conduct must have a specific call for concrete action. Harlan's review of the record found no such direct calls to

[61] Ibid., 405.
[62] Ibid.
[63] Ibid.
[64] Ibid., 407.

action.[65] The Court then ordered the acquittal of five of the defendants in *Yates*. The government later dropped the charges against the remaining defendants in *Yates* and dismissed pending charges against Communist leaders in Boston, Cleveland, Connecticut, Detroit, Philadelphia, Pittsburgh, Puerto Rico, and St. Louis.[66] The immediate implication was clear: the government filed no more prosecutions under the Smith Act.[67] This represents a major step forward in First Amendment jurisprudence. Although ideally this decision would have come at the beginning of the Cold War, the Court finally did recognize the importance of drawing a line between academic discussion of political opinions and even extending some protection to advocating them as long as the advocacy stopped short of a direct call to act illegally. It did take the Court 160 years to learn what it should have realized after the Alien and Sedition Acts: that political opinions cannot be wrong and the danger of repression is much greater than the danger of open debate. Both the Alien and Sedition Acts and the Cold War Congressional investigations teach this lesson. Thus, because the Court made strides toward protection of dissent, it is important to take this into account when debating the true danger of the Cold War compared to the Alien and Sedition Acts.

Also on July 17, 1957, the Court handed down *Watkins v. United States*. Watkins was a labor leader who refused to answer HUAC's questions about his contacts' political activities. The Court reversed his conviction on technical ground, but clearly argued that there is no "legitimate congressional power to expose for the sake of exposure."[68] Thus, the Court repudiated the program of public exposure to harass and humiliate individuals. The Court also ruled four years later in *Scales v. United States* that merely belonging to an organization such as

[65] Ibid., 415.
[66] Ibid.
[67] Ibid.
[68] Ibid., 417.

the Communist or Communist-front groups could not be punished unless the individual knew of the organization's illegal activity and was an "active member" with the "specific intent" to further those illegal ends.[69] These decisions represent victories over the extensive Cold War programs of exposure and embarrassment for group membership.

CONCLUSION

Ultimately, the danger of the Cold War cuts both ways. The Supreme Court finally made moves to protect First Amendment rights, but the Congress should have known better than to enact such draconian legislation in the first place. The results, including hundreds of thousands exposed, embarrassed, and fired from their jobs, could have been predicted and as such, should have been prevented. After comparing the Alien and Sedition Acts to the Cold War through the lens of Congressional legislation and enforcement, it is clear that the Cold War was ultimately more dangerous to freedom of expression than the Alien and Sedition Acts were because of new technology that made intrusive monitoring possible. However, the judiciary during the Cold War was able to neutralize some of the danger by finally articulating First Amendment protection for dissent during war. Although there is no excusing Congress's action in passing the legislation and investigating, the judiciary picked up the slack and handed down commendable decisions. Stone concludes that to declare that there is no such thing as a false idea is to "embrace ambivalence, to foster an ongoing reexamination of our beliefs, and to insist upon toleration of those opinions we might too readily dismiss. In short, it is to insist upon the right to doubt. That is the most fundamental lesson of the Sedition Act of 1798."[70]

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[69] Ibid., 415.
[70] Ibid., 76.