

To what extent did anti-communist legislation during the second Red Scare obstruct first amendment rights?

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Section 1: the Identification and Evaluation of Sources

This investigation will examine the question: To what extent did anti-communist legislation during the second Red Scare obstruct first amendment rights? The 1940s and 1950s will be the focus of this investigation in order to allow analysis of key legislation such as the Alien Registration Act of 1940 and the Internal Security Act of 1950. The sources “The Status of Freedom of Expression Under the Smith Act” and “Communism and the Court: An Examination of Recent Developments” are particularly useful to this investigation because of the range of perspectives they give regarding the constitutionality of legislation with reference to the first amendment.

The first source that will be evaluated is “The Status of Freedom of Expression Under the Smith Act,” an article written by Claudius O. Johnson in 1958. The origin of this source is valuable because Johnson was a professor of political science and the head of the department of history and political science at the State College of Washington. Therefore, he was knowledgeable on this topic and is a useful source of information. This article is limited in that it was written in 1958, shortly after the *Yates v. United States* decision. Johnson could not fully benefit from viewing how the *Yates* decision would be applied to other court cases. However, he did have the opportunity to see how the *Dennis v. United States* decision was applied to other court cases and how the opinions of the *Dennis* and *Yates* cases differed.

The purpose of this source is to analyze the *Dennis* and *Yates* decisions in order to determine how the Supreme Court changed its interpretation of the Smith Act and how the Smith Act can be enforced while respecting freedom of expression. The purpose is valuable because it led Johnson to consider objectively the opinions of each justice on the Supreme Court. He did not attempt to single out one opinion as being the most accurate; instead, he compared and contrasted differing opinions, explaining the point of view of each justice.

However, this absolute objectivity is also limiting. Johnson's focus on not introducing any bias whatsoever prevents him from taking a stance on whether freedom of speech has been obstructed. Readers are unsure what kinds of speech should have been or were allowed during the second Red Scare.

The second source that will be evaluated is "Communism and the Court: An Examination of Recent Developments," an article written by Frank B. Ober in 1958. The origin of this source is valuable because Ober was on the Maryland bar and was a founding partner of a Baltimore law firm. This implies that Ober was well educated in the law and consequently able to explain the justifications for and the implications of influential acts and legal cases from his era. His knowledge and experience is valuable in interpreting various court decisions. Though Ober was a legal expert, his authorship of this article is a limit because he was an ardent anti-communist. This led him to favor the convictions of accused communist conspiracists, assuming that being part of a communist organization was in and of itself a crime or at least a reason for suspicion. Ober emphasized the opinions of justices that expressed similar anti-communist views while only mentioning dissimilar opinions in passing.

The purpose of this source is to encourage the courts to prioritize national security in the face of internal communist threats. This is valuable because it presents the point of view that during war time or other periods where there are major threats to national security, the first amendment may not completely apply and freedom of speech may be restricted. However, this purpose is also limited in that this point of view is based upon what can be seen as an irrational fear of communism. Those who hold sensationalist views of communists as people that all conspire to overthrow the United States government often neglect the civil rights of the accused, refusing the implementation of basic constitutional rights.

Section 2: the Investigation

During the 1940s and 1950s, the Cold War led to an escalation of anti-communist hysteria known as the second Red Scare. Many Americans believed that subversive communist organizations were attempting to overthrow the United States government from the inside¹. Some historians claim that preserving national security was much much more important than protecting civil liberties, making it necessary to construe the Constitution in a way that prioritized survival of the nation over civil rights². Others disagree, stressing the importance of free speech as the foundation for rational thought, even in the face of urgent situations³. These commentators maintain that first amendment rights were unjustly obstructed during the second Red Scare⁴. They question the constitutionality of speech-restricting legislation that was ostensibly meant to bolster national security^{5,6}.

The context for this legislation is important. Public figures such as Senator Joseph McCarthy were ruthless in accusing others of association with subversive groups⁷. These often false accusations could have dire consequences for the victims. Any comment that could be seen as supporting or defending communist principles could be used to question one's allegiance to the United States and destroy one's reputation. In some cases, this led to

¹ Frank B. Ober, "Communism and the Court: An Examination of Recent Developments," *American Bar Association Journal* 44 (1), American Bar Association: 35, <http://www.jstor.org/stable/25720233> (accessed January 12, 2016).

² Ober, "Communism and the Court: An Examination of Recent Developments," 89.

³ Thomas I. Emerson, "Toward a General Theory of the First Amendment," *The Yale Law Journal* 72 (5), The Yale Law Journal Company, Inc.: 884-886. doi:10.2307/794655 (accessed January 11, 2016).

⁴ Thomas I. Emerson, "Freedom of Expression in Wartime," *University of Pennsylvania Law Review* 116 (6), The University of Pennsylvania Law Review: 975-976. doi:10.2307/3311117 (accessed January 11, 2016).

⁵ "Congress and the Communist Monolith: Communist-front Organizations Under the Internal Security Act," *The Yale Law Journal* 74 (4), The Yale Law Journal Company, Inc.: 751, doi:10.2307/794620 (accessed January 12, 2016).

⁶ H. B. Kirshen, "The Internal Security Act of 1950," *Bulletin of the American Association of University Professors (1915-1955)* 37 (2), American Association of University Professors: 263-264, doi:10.2307/40220812 (accessed January 12, 2016).

⁷ *Senator Joseph McCarthy in 1952, Waving a Document While Delivering a Report Claiming That...* Gale Encyclopedia of U.S. History: Government and Politics, Vol. 2, Detroit, (accessed January 12, 2016).

individuals being fired or denied positions they would have otherwise received⁸. With many powerful, as well as ordinary, people throughout the United States being accused of association with communist conspiracies, large parts of the population lived in fear of communist subversion. Not even Supreme Court justices were immune from a fear of communists. Justice Jackson stated that the communist party “seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion⁹.” This fear of internal subversion led some people to believe that the best way to prevent the United States from the dangers of communism was to promote national security by closely monitoring potentially harmful rhetoric¹⁰.

Proponents of legislation limiting free speech took advantage of this fear. They ridiculed opposing views through accusations that those who held them were communist sympathizers. For example, when one spoke out against the McCarran Act, one would often be asked, “Are you defending Communist organizations¹¹?” This would end debates before they even started. Strategies like this proved effective; the McCarran Act was passed despite President Truman’s veto¹². President Truman stated in his veto message that “the application of the registration requirements of so-called Communist-front organizations can be the greatest danger to freedom of speech and assembly since the Alien and Sedition Laws of 1789¹³.” The McCarran Act put restrictions on members of communist organizations. They could not conceal that they were part of such organizations when holding certain occupations, applying for or using a passport, or broadcasting a radio or television program without some indication that the program was

⁸ Ober, “Communism and the Court: An Examination of Recent Developments,” 37.

⁹ Ibid, 36.

¹⁰ Ibid, 35-36.

¹¹ Kirshen, “The Internal Security Act of 1950,” 263.

¹² Ibid, 264.

¹³ Ibid.

sponsored by a communist organization¹⁴. Violations of these terms were met with heavy penalties. What made this law so harmful is how easily an organization could be labeled communist. The attorney general and his five-man board could call any group a communist organization even when little to no evidence was available¹⁵. However, the process for challenging and removing these labels was much more difficult¹⁶. A lack of balance in convictions clearly favored accusers. Accusers faced no penalty for accusing others, while the accused could easily face serious consequences¹⁷. In this way, people with controversial points of view could simply be accused of being part of a communist organization, effectively silencing them¹⁸. The very broad construction and questionable constitutionality of the McCarran Act resulted in numerous false convictions of organizations participating in lawful speech¹⁹.

Another controversial law passed during the second Red Scare was the Alien Registration Act of 1940, more commonly known as the Smith Act. This investigation will focus on sections 2 and 3 of the Smith Act, “which make it unlawful to advocate the overthrow of any government in the United States by force or violence, to promote an organization for such a purpose, or to conspire to do either of those things²⁰.” Two landmark decisions in the interpretation of the Smith Act were *Dennis v. United States* (1948) and *Yates v. United States* (1956). In *Dennis v. United States*, 11 members of the communist party were convicted under the Smith Act for having organized the party and “willingly and knowingly conspired to teach and advocate the overthrow of government in the United States by force and violence²¹.” The court

¹⁴ Ibid, 265-266.

¹⁵ “Congress and the Communist Monolith: Communist-front Organizations Under the Internal Security Act,” 740-744.

¹⁶ Kirshen, “The Internal Security Act of 1950,” 267.

¹⁷ Ibid.

¹⁸ “Congress and the Communist Monolith: Communist-front Organizations Under the Internal Security Act,” 743.

¹⁹ Ibid, 751.

²⁰ Claudius O. Johnson, “The Status of Freedom of Expression Under the Smith Act,” *The Western Political Quarterly* 11 (3), University of Utah: 469, doi:10.2307/444561 (accessed January 6, 2016).

²¹ Ibid, 471.

held that this ruling was constitutional because the Smith Act did not ban the discussion of communist philosophies²². This kind of productive discussion, similar to that which might be held in a university, was perfectly legal²³. What was illegal was the advocacy of overthrowing the government. Chief Justice Vinson claimed that the right to rebel against a government did not exist when the government allowed for structured, peaceful change²⁴. The court held that advocacy was not protected under the first amendment and consequently did away with the “clear and present danger” rule that restricted only speech that clearly would lead to a tangible danger²⁵. The government no longer had to wait until speech actually led to a crime or a situation developed that would most likely lead to a crime. This vague ruling is part of a long history supporting similarly ill-defined conspiracy laws²⁶. Groups could be convicted for having a goal that is illegal because, as a group, individuals would be more likely to attain the goal²⁷. Groups could also be convicted for participating in actions that would otherwise be considered legal if done by an individual because group action creates “a pervasive anxiety in society²⁸.” However, a few justices, such as Justice Hugo Black, dissented. He wrote, “No matter how it is worded, this [Smith Act] is a virulent form of prior censorship of speech and press, which I believe the First Amendment forbids²⁹.” Justices in *Yates v. United States* seemed to agree with this sentiment, overturning many aspects of the *Dennis* case. Simply being part of the communist party would no longer be grounds for conviction under the Smith Act, and advocacy was given a much more rigorous definition, almost reinstating the validity of the “clear and

²² Ibid.

²³ Ibid.

²⁴ Ibid, 471-472.

²⁵ Ibid, 472-474.

²⁶ “Conspiracy and the First Amendment,” *The Yale Law Journal* 79 (5), The Yale Law Journal Company, Inc.: 875–77, doi:10.2307/795201 (accessed January 11, 2016).

²⁷ Ibid, 875-876.

²⁸ Ibid, 876.

²⁹ Johnson, “The Status of Freedom of Expression Under the Smith Act,” 474.

present danger” rule³⁰. As a result, all defendants in the Yates case were acquitted, and the convictions of 33 individuals under the Smith Act were reversed³¹.

Throughout the second Red Scare, various First Amendment rights were violated in the name of protecting the United States from communist subversion. These violations created a repressive atmosphere all over the United States and did little to improve national security. The lesson is clear: During wartime or in periods of national crisis it is important to be vigilant in protecting First Amendment rights, rather than capitulating to fear mongering and compromising those rights. Only in this way will the government remain true to the principles on which it was founded, and the people of the United States remain safe from abuses of power.

³⁰ Ibid, 475-477.

³¹ Ibid, 477.

Section 3: the Reflection

Writing this investigation has allowed me to use a variety of research methods and has made me more aware of the challenges that historians face when attempting to find and interpret valuable source material. One challenge that was especially pertinent to this investigation was the analysis of bias.

The relationship between the freedom of speech and wartime restrictions is a heavily politicized issue. The resulting bias acted as both a value and limitation for source material. For example, Ober's role as an anti-communist led him to emphasize views similar to his own that encouraged restrictions on free speech, while scarcely mentioning opinions that claimed censorship during the second Red Scare was unconstitutional. The oppressive atmosphere in the United States during this era, caused by an ingrained fear of communist subversion, led to a dearth of source material that supported free speech. Once the Red Scare was over, much more source material condemned restrictions on first amendment rights. This shows that historians must not blindly accept the interpretations of history in the documents they find. They must also investigate what opinions have been repressed by society and are consequently less present in the historical record.

Some people believe that historians are meant to establish some absolute truth that is completely free of any form of subjectivity; however, I found it useful to not simply avoid sources that contradicted my thesis or contained bias, but to instead analyze this bias, treating it as useful information. Rather than discarding Ober's article due to its anti-communist leanings and his willingness to suppress the ideas of others, I took the article to be indicative of the anti-communist hysteria of the second Red Scare. Ober's description of history showed how McCarthyism influenced not only the opinions of the common man, but also the opinions of legal experts. Through this whole process, I have learned that historians must be intentional in

selecting a broad range of sources with differing perspectives and biases. In this way, there is not one singular form of immutable historic truth; instead multifaceted answers to intriguing historical question emerge, allowing for further research and a perpetual evolution of thought.

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