# BOOK REVIEW

## THE McCARTHY ERA: HISTORY AS SNAPSHOT

*The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower.* By David Caute. New York: Simon and Schuster, 1979. Pp. 697. $6.95, cloth.

*Reviewed by Michael F. Tigar**

So much has been written about the loyalty-security purges of the late 1940's and 1950's that a new book bears some burden to justify itself. Indeed, thirty-six pages of David Caute's book are devoted to a bibliography of published and unpublished works on this period. By what standard, then, is one to judge Caute's book? First, history as retelling—even history as anecdotes—about so terrible a time carries its own worth, provided that it is done with sensitivity, thoroughness and style. Caute, judged by such a standard, has done fairly well. Sifting through files and transcripts and examining the shards of shattered lives, he tells compelling stories of the machinery of repression and of the purge's impact upon old left parties, the civil service, the labor movement, the professions and the world of arts and letters.

Second, one might judge the book as legal or jurisprudential history. Caute undertakes to tell us, in broad outline, what the Supreme Court was and was not doing during this time, and to recount details from some of the countless administrative hearings and trials spawned by the purge. At the level of good reporting—the spinning of stories—he is once again at his best. But he doesn't really help us understand how the jurisprudence of the Supreme Court and the federal courts of appeals alternately aided and checked repression during that era.

A third criterion is that of social theory. On his own terms, does Caute really "indicate why the purge occurred when it did, and why it died away when it did"?[1] His thesis, that the purge was a byproduct of

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[1] D. CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 539 (1979).

the post-World War II Pax Americana, "an ideology both idealistic and imperialistic,"[2] is neither set out in great detail nor defended against plausible alternative views. And his assertion that the purge came to an end with the advent of "Kennedy liberalism" is simply stated in the last paragraph without qualification or justification.[3]

I take these three vantage points, history as retelling, history as jurisprudence, and history as social theory, each in turn.

## I. ANECDOTES: THE RETELLING OF THE GREAT PURGE

Without question, Caute has performed his research well, and writes for the most part compellingly, mordantly and even gracefully. He was not, however, as thorough as he might have been. He also lapses periodically into a snide, almost mocking tone in speaking of the victims of the purge. At times his writing falls from grace into cant or infelicity, and some of these falls have a slapstick character.

I recommend that he write himself a scathing little essay entitled "The Limits of Imagery" and post it on his library wall. The word "manure" appears in the book perhaps a dozen times, always as a metaphor for fertile soil, which is in turn a metaphor for a place where ideas grow or actions take root. This is eleven, even twelve, times too many. Consider the following: "It was the Truman Administration that manured the soil from which the prickly cactus called McCarthy suddenly and awkwardly shot up. The manure was called the Attorney General's list."[4] As a statement of historical fact, this is questionable. As a pronouncement on horticulture, it is nonsense: cactus doesn't do well in manure. Or consider:

> Without doubt, McCarthy's objective historical role was a healthy one. He pumped up the festering sore of the loyalty-security program and the Attorney General's list into a monstrously inflamed boil that, sooner or later, had to be lanced. He demonstrated that guilt by association may ultimately incriminate any association. He reminded the establishment, the "respectable elements" in both major parties, the pro-

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[2] *Id.* at 540.

[3] *Id.* at 542.

[4] *Id.* at 28.

> fessional associations, the press, the churches, that liberty is indivisible and that what is sauce for the goose is also sauce for the gander.[5]

Putting goose sauce on an inflamed boil doesn't do the sauce any good. It probably doesn't help the boil much either. This sort of purple writing appears when Caute is attempting to weave together his anecdotes or to provide a paragraph or two of analysis.

These stylistic quibbles aside, Caute tells his story fairly well. Here are the posturings and threats of McCarthy, the House Committee on Un-American Activities and the Senate Internal Security Subcommittee. Here are the mindless blatherings of a generation of loyalty and security board administrators and hearing officers. Here is the cowardice of intellectuals, professionals, journalists, politicians and judges of faint heart. Here, too, are the perjurers and informers: those who, out of avarice or ambition, artlessly wove tapestries of truth and deceit in the service of inquisitors of every degree.

Here, too, are the ruined lives in the trade unions, universities, professions, arts and civil service—in short, a generation silenced. When the 1960's began with the newly militant challenges to racism, the institutions which ought to and might have responded did so slowly and fitfully; they had, if only for safety's sake, lost the habit of speaking and acting. When the young found voice to protest the escalation of the Vietnam War, our government repressed the most vocal among them and, through a machinery of conscription at once unfair and unheeding, sent them to their deaths by the thousands. Caute regards this history of the 1960's as "another story." I disagree, for reasons I shall discuss later.

However we view the origins and consequences of this dreadful time, we must confront it, if only to prevent its continuation and repetition. For this purpose, Caute's book is among the best, although others recommend themselves as more thoughtful analyses of particular aspects of the purge. A minimum list of essential readings would include books by Alvah Bessie,[6] Eleanor Bontecou,[7] Haakon Cheva-

[5] *Id.* at 50.

[6] A. BESSIE, INQUISITION IN EDEN (1965).

[7] E. BONTECOU, THE FEDERAL LOYALTY-SECURITY PROGRAM (1953).

lier,[8] John Cogley,[9] Fred Cook,[10] Frank Donner,[11] Walter Goodman,[12] Stefan Kanfer,[13] Matles and Higgins,[14] Stern and Green[15] and Alexander Richmond.[16] Caute's book has the advantage of breadth of coverage over any of these books taken alone.

Caute's research skills fail him at one critical point, however. The Freedom of Information Act[17] and the Federal Privacy Act of 1974[18] recently have enabled us to learn a great deal about investigators' and inquisitors' actions during the 1940's and 1950's. Alger Hiss, in his continuing battle for vindication, has been a major protagonist in seeking FBI and Justice Department records withheld from him and his counsel before and during his trials.[19] And the families and supporters of Julius and Ethel Rosenberg have unearthed tens of thousands of pages of material which cast light not only upon the facts of that case but also upon the investigative and prosecutorial techniques enlisted in the service of the purge. Dozens of other applicants and plaintiffs, less well known, also have been exercising their right to obtain government investigative files. It would have been useful, and one regrets that Caute made little effort to pursue the matter, to crosscheck this newly

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[8] H. CHEVALIER, THE MAN WHO WOULD BE GOD (1959); H. CHEVALIER, OPPENHEIMER: THE STORY OF A FRIENDSHIP (1965).

[9] J. COGLEY, REPORT ON BLACKLISTING (1965).

[10] *E.g.*, F. COOK, THE FBI NOBODY KNOWS (1964); F. COOK, THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE MCCARTHY (1971).

[11] F. DONNER, THE UN-AMERICANS (1961).

[12] W. GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES (1968).

[13] S. KANFER, A JOURNAL OF THE PLAGUE YEARS (1973).

[14] J. HIGGINS & J. MATLES, THEM AND US: STRUGGLES OF A RANK-AND-FILE UNION (1974).

[15] H.P. GREEN & P.M. STERN, THE OPPENHEIMER CASE: SECURITY ON TRIAL (1971) (includes an excellent bibliography and some striking insights into the legal process).

[16] A. RICHMOND, A LONG VIEW FROM THE LEFT: MEMOIRS OF AN AMERICAN REVOLUTIONARY (1973).

[17] 5 U.S.C. § 552 (1976).

[18] 5 U.S.C. § 552a (1976).

[19] *See* IN RE ALGER HISS (E. Tiger ed. 1979) for reprint of Hiss' petition for writ of error coram nobis and reproduction of dozens of pages of material Hiss' attorneys obtained under the Freedom of Information and Privacy Acts. For a brief guide to these acts, *see* LITIGATION UNDER THE AMENDED FEDERAL FREEDOM OF INFORMATION ACT (4th ed. C. Marwick 1978).

disclosed material against the known historical record of informer perjury, FBI chicanery and prosecutorial and judicial connivance. Caute interviewed a great many people for his book, but appears to have spent no more than three or four weeks doing so.[20]

Caute's retelling is also flawed by some easy assumptions; their combined effect is to let off the hook a number of prominent American liberals of the period, and to accept all too readily the mythology of the non-Communist American left. He does acknowledge that one principal ideological prop of the great purge, "the myth of the vital secret," was just that—a myth. Contrary to the view violently expressed by Judge Irving Kaufman in sentencing the Rosenbergs to death, in 1945 the United States did not control the secret of nuclear fission. Everybody with any sense knew the Russians could build a bomb within five years after 1945 without any need for an espionage ring in Western countries.[21] The myth was often put forward as one justification for the theory of American Communists as a fifth column.

Yet Caute does accept other myths. He freely throws around the term "Stalinist" in referring to American Communists of the period, and he permits sarcasm and invective to color his accounts of Communist Party actions and tactics during the purge. To be sure, there is, in retrospect, ground for criticism of the behavior of American Communists in the 1950's. Many of the vagaries in tactics can be explained by the judicial posture in which the Party found itself. But the fundamental point is this: The Communist Party of the United States in the years 1945 through 1960 was not like that of the Soviet Union or of China or of Eastern European countries. It did not possess state power. Its members were remorselessly driven from the trade union movement,

[20] D. CAUTE, *supra* note 1, at 622.

[21] The postwar debates over atomic energy have been thoroughly chronicled in the literature. *See, e.g.*, 2, 4, 5, 6, 8, 9, 10 BULL. ATOMIC SCIENTISTS (1946, 1948, 1949, 1950, 1952, 1953, 1954). *See also* W. REUBEN, THE ATOM SPY HOAX (1955). The entire subject was debated by the scientific and military witnesses in the Oppenheimer security hearing. For example, Dr. K.T. Compton recounted his participation in discussions with prominent atomic scientists in 1946. They concluded that the U.S.S.R. could build an atom bomb in as little as five years and that "the predominant factor was not scientific information . . . but had to do with industrial capacity. . . ." U.S. ATOMIC ENERGY COMMISSION, HEARING BEFORE THE PERSONNEL SECURITY BOARD: IN THE MATTER OF J. ROBERT OPPENHEIMER 258 (1954) (hereinafter cited as IN THE MATTER OF J. ROBERT OPPENHEIMER). *See also* M. Tigar, Atomic Science and Social Responsibility (1961) (unpublished paper).

the civil service, the professions, the sciences and every influential area of American life. Their rights to hold jobs, to engage in professions, or to hold positions of trust in trade unions were systematically abridged and denied. To be snide about the twists and turns of the Communist Party and its members during this period is to equate the writhing of the tortured with the deliberate and calculated cruelty of the inquisitor. Caute's attitude is at times all too reminiscent of that of cold war liberal intellectuals who hated McCarthy, then aped his ways. In attacking such institutions as the Emergency Civil Liberties Committee or the United Electrical Workers, these liberals claimed "We are all for civil liberties, but . . . ." But we are for the cold war. But we are willing to use CIA money to help the American Congress for Cultural Freedom cripple the Emergency Civil Liberties Committee.[22] But one must recognize that members of the Communist Party have no legitimate place in American economic life.[23]

One of the saddest—in an often quite tragic sense—events of the purge was the utter collapse of American liberal thought on the question of democratic rights. There was almost no support for the simple proposition that the Bill of Rights applied to persons of every political persuasion. Caute recognizes this collapse in his survey of the editorial policy of the *New York Times*. But he himself continually slips into that unfortunate rhetoric which accepts the major premise of the *Times* editorialists: If McCarthy was evil, it was because he and his informers falsely identified as Communists those who were not.

His acceptance of this premise occassionally leads Caute uncritically to accept the claims of the purgers. I was surprised, for example, to read that the case of Judith Coplon was a "demonstrably proven" case of espionage.[24] Even accepting the government's version of the

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[22] M. MCAULIFFE, CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS, 1947–1954 at 115–21 (1978).

[23] On the split personality of liberal thought, see *id.*

[24] D. CAUTE, *supra* note 1, at 61 (referring to Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951), *cert. denied,* 342 U.S. 926 (1952); United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), *cert. denied,* 342 U.S. 920 (1952). One surprising thing about the jurisprudence of this period is that so little was done in the wake of United States v. Coplon, 185 F.2d 629 (2d Cir. 1950), in which Learned Hand held that, at the behest of any criminal defendant, the government must account for any illegal wiretapping it had committed. There does not appear to be any judicial opinion pursuing that suggestion until the 1960's.

facts, the documents which Coplon allegedly attempted to pass to a Soviet agent were not the sort of "national defense" information which both the espionage statute itself and the unequivocal command of the first amendment make the sole basis for prosecution of this most serious offense.[25] Indeed, in speaking of J. Edgar Hoover at a later point, Caute seems to recognize this fact, making the quoted reference all the more curious: "What he really feared—a fear well justified by the Judith Coplon trial in 1949—was that the Bureau's investigatory mentality would be exposed to ridicule and shame by disclosure of its files."[26]

In short, Caute lapses at times into the very clichés used by liberals to excuse their own faintheartedness during the purge; these clichés were born of uncritical acceptance of official myths about "the red menace." He ought to have heeded more closely his own warning words: "During the crucial years of the great fear the most influential, opinion-forming faction of the American intelligentsia largely (but not wholly) abandoned the *critical* function that all intellectuals in all countries ought to sustain toward government agencies and government actions."[27] After all, one purpose of the purge was to tame and to capture the scientific and intellectual community. When the nonconformists had been driven from its ranks, the remainder could be welcomed into the "think tanks," "research projects," "centers," "institutes" and other ghettos erected by the military, the intelligence agencies and corporate America.

## II. THE LEGAL HISTORY OF THE PURGE

I do not know if anyone has completely measured the impact of the purge upon American law. Certainly Caute has not done so. He does present sketches of the more significant judicial figures of the period—Chief Justice Fred Vinson, Attorney General and later Associate Justice Tom Clark, and Chief Justice Earl Warren. His bibliography indicates that he has reviewed a handful of legal briefs, and per-

[25] *See generally* Gorin v. United States, 312 U.S. 19 (1941); Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929 (1973).

[26] D. CAUTE, *supra* note 1, at 115.

[27] *Id.* at 53.

haps half a dozen decided cases. Of the several dozen people he interviewed, the majority appear to be lawyers or law professors. The second edition of Emerson and Haber, *Political and Civil Rights in the United States,*[28] is in his bibliography. It is rather surprising that he did not consult the third edition of the same work,[29] which contains a more thorough collection of cases and comments summarizing the most crucial legal issues of the period he seeks to describe. His treatment of the cases he does discuss is at times puzzling. He tells us that the decisions in *Yates v. United States,*[30] *Sweezy v. New Hampshire,*[31] and *Watkins v. United States,*[32] handed down by the Supreme Court on the same day in 1957, were "momentous," but he does not say why. He also wrongly intimates that after *Sweezy,* the Court did not decide a significant first amendment case in favor of freedom of speech until 1969 in *Brandenburg v. Ohio.*[33] Although Caute ably describes many important court battles over civil liberties, he makes no effort to see the legal history of this period as a whole, much less to identify its origins and legacies. This omission makes the book a great deal less useful.

An account of shifts in judicial doctrine might also have explained some of the abrupt and otherwise inexplicable changes in litigation tactics by the victims of the purge. During the early history of what came to be called McCarthyism, the courts were concerned with trials of dissenters and legal challenges to the administrative apparatus of repression. In the first wave of resistance to the purge, the basic proposition that knowing and active membership in the Communist Party deprived one of both due process and first amendment protection was established. In *Dennis v. United States,*[34] the Supreme

[28] T. EMERSON & P. HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (2d ed. 1958).

[29] T. EMERSON, P. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d ed. 1967). This work is the best of its kind. Major cases are set out with minimal editing; bibliographical and research data is copious. Yet, the work is not a paste job; the editors' own insights and analysis set the tone.

[30] 354 U.S. 298 (1957).

[31] 354 U.S. 234 (1957).

[32] 354 U.S. 178 (1957).

[33] 395 U.S. 444 (1969).

[34] 341 U.S. 494 (1951). *See also* United States v. Dennis, 183 F.2d 201 (2d Cir. 1950)(majority opinion by L. Hand, J.). For a thorough discussion of the first amendment issues under consideration here, see T. EMERSON, THE SYSTEM OF FREEDOM OF

Court accepted the set of myths which the government had thrown up as a justification for the Smith Act prosecution of the Communist leaders, and affirmed all the convictions. In *American Communications Association v. Douds*,[35] the Court's majority sustained the constitutionality of section 9(h) of the Taft-Hartley Act,[36] which required non-Communist affidavits from union leaders as a condition of certification and access to the National Labor Relations Board. The significance of *Douds* cannot be overemphasized. In 1935, the Wagner Act recognized unions' rights to bargain collectively, strike, and govern themselves, and created the National Labor Relations Board to oversee collective bargaining and insure labor peace.[37] Section 9(h) of the Taft-Hartley Act repudiated both the right of Communist Party members to hold union office and the right of union members to elect leaders of their choice. The statute did not do so explicitly; it merely made the noncomplying union ineligible for access to the collective bargaining system established by the Wagner Act. Of course, no union could survive without such access.[38] *Douds* is also remarkable for the concurring opinion of Mr. Justice Jackson, which represented a wholesale and largely uncritical capitulation to the prevailing hysteria.[39] In other cases, the fundamental tenets of the civil service loyalty-security programs were upheld.[40]

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EXPRESSION (1970). The peregrinations of the law from *Dennis* to *Brandenburg* are chronicled in Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970). "Clear and present danger," the touchstone of the decision in *Dennis*, is a chameleon word. It sent Dennis and his co-petitioners to jail, came back in a vigorous pro-free speech formulation in Wood v. Georgia, 370 U.S. 375 (1962), and appeared again in *Brandenburg*. For a trenchant criticism of the "clear and present danger" formulation, *see* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

[35] 339 U.S. 382 (1950)(holding that under the commerce power Congress could reasonably find that, if allowed to hold union leadership positions, Communists would represent a continuing danger of disruptive political strikes because they advocate the overthrow of the government).

[36] Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136, 146 (codified at 29 U.S.C. §§141, 159(h))(repealed 1959).

[37] Act of July 5, 1935, Pub. L. No. 74–198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151–169 (1976)).

[38] *See generally* T. EMERSON, *supra* note 34, at 32–35, 164–68.

[39] 339 U.S. at 422.

[40] *See generally* T. EMERSON, *supra* note 34, at 205–46.

After these defeats, lawyers and dissenters learned that if victories were to be won, they would be won on narrower grounds; the vindications of civil liberties in the late 1950's and early 1960's are monuments to the ingenuity of lawyers and judges alike.

In *Vitarelli v. Seaton*[41] and *Service v. Dulles*,[42] the Court established that an agency must follow its own rules. In *Kent v. Dulles*,[43] the Court determined that Congress had not intended to bestow upon the Secretary of State the power to withhold passports. In *Yellin v. United States*,[44] the Court invalidated a conviction because the House Committee on Un-American Activities had violated its Committee Rules in questioning the petitioner. *Quinn v. United States*[45] and *Emspak v. United States*[46] dealt with technical questions concerning the degree of specificity required for a witness to invoke a constitutional privilege. In *Russell v. United States*,[47] the Court found that, although the petitioner was obligated to answer any question pertinent to the subject under congressional inquiry, such pertinence could not be established because the House Committee on Un-American Activities had failed to state clearly the subject under inquiry. In *Greene v. McElroy*,[48] the Court, while bestowing great praise upon the right of cross-examination, held in petitioner's favor on the narrow ground that Congress had not specifically authorized the investigating agency to deprive him of this right.

I do not intend to demean either these decisions or the judges who wrote them. The decisions were narrower than they might have been because the fundamental battle had already been lost. And, for the petitioners and those like them, these decisions undoubtedly mitigated the awful impact of the purge. By deciding cases in favor of freedom on narrow grounds, the fragile majority of the Warren Court managed

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[41] 359 U.S. 535 (1959).

[42] 354 U.S. 363 (1957).

[43] 357 U.S. 116 (1958).

[44] 374 U.S. 109 (1963). *See also* Christoffel v. United States, 338 U.S. 84 (1949).

[45] 349 U.S. 155 (1955).

[46] 349 U.S. 190 (1955). *See also* Bart v. United States, 349 U.S. 219 (1955).

[47] 369 U.S. 749 (1962). *See also* United States v. Lamont, 236 F.2d 312 (2d Cir. 1956).

[48] 360 U.S. 474 (1959).

to avoid the flights of freedom-destroying rhetoric that had characterized the decisions of the Vinson Court.

But there is a great difference between a forthright declaration that the Constitution forbids government interference with personal beliefs and a relatively narrow, post hoc determination that some procedural requirement has not been met. The former kind of decision tells the administrator, the prosecutor, the legislator or the lower court judges: This far and no farther. The latter kind of decision, because of the nature of the bureaucratic process to which it is addressed, trickles down slowly and affects the action of lower-level officials feebly, belatedly and sometimes not at all. This phenomenon has been commented upon by others,[49] and helps to explain the continued savagery of the purge after a series of seemingly significant reversals in the courts.

Early in the purge the Court upheld the right of any witness before a congressional committee to invoke the privilege against self-incrimination.[50] This right, however, was qualified by the recognition that the fifth amendment privilege could be waived unintentionally by the unwary witness,[51] and that the privilege did not attach to an organizations's records and documents.[52] Moreover, recognition of the privilege against self-incrimination did not dispel the stigma that attached to all who invoked it.

In his truncated consideration of *Yates, Sweezy* and *Watkins,* Caute claims that these were significant decisions, and he seems to recognize that the promise they appeared to contain was not fulfilled. His failure to press the analysis further is a disappointment. *Yates* reversed the convictions of the "second string" Communist Party Smith Act defendants. It seemed to set standards for "political" prosecutions that could rarely if ever be met, and it was popularly assumed that no conviction of Communist Party members could again survive a first amendment challenge. In fact, the decision was somewhat nar-

[49] *See, e.g.,* Handler, *Controlling Official Behavior in Welfare Administration,* 54 CAL. L. REV. 479 (1966).

[50] Quinn v. United States, 349 U.S. 155, 162 (1955).

[51] *Id.* at 164–65.

[52] *See* Curcio v. United States, 354 U.S. 118, 122–23 (1957)(citing United States v. White, 322 U.S. 694, 699 (1944)); Meltzer, *Required Records, the McCarran Act and the Privilege Against Self-Incrimination,* 18 U. CHI. L. REV. 687 (1951).

rower, focusing upon the requirement of specific intent and the distinction between advocacy and imminently threatening activity.[53]

*Watkins*,[54] which reversed the conviction of a labor leader who refused to answer a congressional committee's questions, was full of language suggesting that the Court might consider the legitimacy of the Committee on Un-American Activities. Borrowing phrases from seventeenth- and eighteenth-century English dissenters' refusals to answer, and asking the pointed question, "Who can define the meaning of 'un-American'?"[55] the opinion by Chief Justice Warren marched on in measured cadence. His words were all the more welcome because by this time the Committee, and its stepbrother the Senate Internal Security Subcommittee, frequently entered communities at the behest of local reactionary politicians in order to pillory members of various professions and trade unions—a practice which Caute ably documents. But the question actually decided in *Watkins* rested upon an analysis of the statutory language "pertinent to the subject matter under inquiry"[56] and thus was narrower than the Chief Justice's rhetoric suggested.[57]

*Sweezy v. New Hampshire*[58] rested upon constitutional principle. While employed as a visiting professor at the University of New Hampshire, Sweezy, a Marxist economist of international renown, refused to answer the state attorney general's questions. The plurality opinion upholding his refusal stressed the first amendment values inherent in the concept of academic freedom. It must be recalled, however, that the questions Sweezy refused to answer dealt principally with matters other than Communist Party membership, such as the contents of a lecture Sweezy delivered and any knowledge Sweezy had of the New Hampshire Progressive Party and its members.[59] Having

[53] Yates v. United States, 354 U.S. 298, 312–27 (1957)(holding that the Smith Act does not prohibit advocacy and teaching of forcible overthrow of the United States government when such advocacy and teaching is divorced from any effort to instigate specific action toward that end). There was a flurry of post-*Yates* activity which lent support to the broader view of the effect of *Yates*. *See* 1 T. EMERSON & D. HABER, *supra* note 28, at 390–92.

[54] Watkins v. United States, 354 U.S. 178 (1957).

[55] *Id.* at 202.

[56] 2 U.S.C. § 192 (1976).

[57] 354 U.S. at 208–15.

[58] 354 U.S. 234 (1957).

[59] *Id.* at 243–44.

already decided in *Pennsylvania v. Nelson*[60] that most state sedition statutes were preempted by federal legislation, the *Sweezy* Court's decision stressed that the inquiry had been conducted by a state agency.[61]

The hopes raised by *Yates, Watkins,* and *Sweezy* were soon dashed. Lloyd Barenblatt,[62] Carl Braden[63] and Frank Wilkinson[64] had the temerity to believe that the first amendment would protect them against the inquisitors. They all went to jail, their convictions narrowly sustained by the Supreme Court. In June of 1961, the Court upheld a registration order against the Communist Party,[65] and affirmed Junius Scales' conviction under the Smith Act membership clause.[66] It was not simply that the Court refused to overturn earlier decisions placing the Communist Party beyond the reach of first amendment and due process protection—that was an occasion for regret, though perhaps not surprise. In the registration case, the wonder was that so broadly freedom-destroying a system of regulation could ever pass constitutional muster. And in both cases, the Court turned an uncritical eye to the purchased testimony upon which the determinations under review rested.[67]

This is not to imply agreement with Caute's belief that the first amendment showed a flicker of life on a day in 1957, had a stake driven through its heart on another day in 1961, and only revived somewhat later in 1969. Before and even after the decisions of June 1961, there were sporadic first amendment victories. The same Court which systematically turned aside leftist challenges to political repression systematically sustained such attacks on behalf of black organizations. In *Gibson v. Florida Legislative Investigation Committee*[68] and

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[60] 350 U.S. 497 (1956).

[61] 354 U.S. at 235.

[62] Barenblatt v. United States, 360 U.S. 109 (1959). *See generally* Bendich, *First Amendment Standards for Congressional Investigation,* 51 CAL. L. REV. 311 (1963).

[63] Braden v. United States, 365 U.S. 431 (1961).

[64] Wilkinson v. United States, 365 U.S. 399 (1961).

[65] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

[66] Scales v. United States, 367 U.S. 203 (1961); *cf.* Noto v. United States, 367 U.S. 290 (1961)(reversing a similar conviction).

[67] *But see* Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956) (concerning government informers).

[68] 372 U.S. 539 (1963). *See* T. EMERSON, *supra* note 34, at 267.

*Bates v. City of Little Rock*,[69] the Court upheld the right to join organizations working to vindicate the promises of the fourteenth amendment. In the NAACP cases,[70] the Court struck down legislation and judicial action similar in intent and even in methodology to the registration and other restrictive provisions of the Internal Security Act of 1950. The Court could not put blacks and black organizations outside the pale of first amendment protection, as it had Communists. A speaker whose message was neither red nor black, such as the sheriff in *Wood v. Georgia*,[71] might also expect charitable consideration of his first amendment claim. And, five years before *Brandenburg v. Ohio*[72]—which invalidated a state syndicalism statute—the Court struck down on constitutional grounds the restriction on Communists holding passports.[73] In 1967, the Court held in *United States v. Robel*[74] that the general prohibition on Communists working in defense plants violated the first amendment.

Caute has barely sketched this constitutional history of the purge. He has sought neither to understand that history nor to draw its essential lessons.

It is not surprising that the first amendment should have proved so fragile in the face of adversity. It has traditionally been so.[75] No act of Congress was struck down on first amendment grounds until the 1960's.[76] The Alien and Sedition Acts were not invalidated by judicial decree, but were undone by Congress itself. The Court on which Holmes and Brandeis sat affirmed several World War I convictions that

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[69] 361 U.S. 516 (1960).

[70] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961). *See also* Shelton v. Tucker, 364 U.S. 479 (1960)(the first of a line of cases in which the Court invalidated every state loyalty oath it considered).

[71] 370 U.S. 375 (1962)(holding that a county sheriff's first amendment right to criticize as politically motivated a judge's impanelling of a grand jury to investigate bloc voting by blacks outweighs any interference with the fair administration of justice such criticism might cause).

[72] 395 U.S. 444 (1969).

[73] Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[74] 389 U.S. 258 (1967).

[75] *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941).

[76] *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967).

were challenged on first amendment grounds.[77] No court dared interfere with the mass deportation of alien Communists in the wake of World War I[78] nor with the conviction in *Whitney v. California*[79] under a criminal syndicalism act. There were victories in the courts for the left during the period between the wars, but these were mostly jury trials, as readers of any good work on Clarence Darrow will recall.[80]

Change a few details, names and dates, and Zechariah Chafee's description of the purge during and after World War I is an accurate portrayal of the period of which Caute writes:

> [T]ens of thousands among those "forward-looking men and women" to whom President Wilson had appealed in earlier years were bewildered and depressed and silenced by the negation of freedom in the twenty-year sentences requested by his legal subordinates from complacent judges. So we had plenty of patriotism and very little criticism, except of the slowness of munition production. Wrong courses were followed like the despatch of troops to Archangel in 1918, which fatally alienated Russia from Wilson's aims for a peaceful Europe. Harmful facts like the secret treaties were concealed while they could have been cured, only to bob up later and wreck everything. What was equally disastrous, right positions, like our support of the League of Nations before the armistice, were taken unthinkingly merely because the President favored them; then they collapsed as soon as the excitement was over, because they had no depth and had never been hardened by the hammerblows of open discussion. And so when we attained military victory, we did not know what to do with it. No well-informed public opinion existed to carry through Wilson's war aims for a new world order to render impossible the recurrence of disaster.[81]

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[77] Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919).

[78] *See, e.g.*, Mahler v. Eby, 264 U.S. 32 (1924).

[79] 274 U.S. 357 (1927).

[80] *E.g.*, ATTORNEY FOR THE DAMNED (A. Weinberg ed. 1957); C. DARROW, THE STORY OF MY LIFE (1932). K. TIERNEY, DARROW: A BIOGRAPHY (1979), does not contribute much beyond what had already been written. *See* W. HAYWOOD, BILL HAYWOOD'S BOOK (1929)(a good firsthand account); R. GINGER, BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS (1949).

[81] Z. CHAFEE, *supra* note 75, at 561–62.

The legal history of the "great fear" ran a course charted in earlier decades. Had Caute taken notice of this, he might have been led to doubt his historical judgment that the "great fear" arose suddenly after World War II and completely ran its course by the time of John Kennedy's inauguration as President.

## III. THE SOCIAL HISTORY OF THE PURGE

As a social and political historian, Caute exhibits the same weakness he exhibits as a legal historian: an insular approach which deals primarily with the immediate years of the purge and therefore fails to consider that the most important causes of the purge may lie in the year before World War II. Just as the behavior of our courts during the McCarthy Era can be traced to their behavior in the early years of this century, so the political and social attitudes prevalent during the purge have roots deep in American history. There is not room in a brief review to present a complete alternative to Caute's view, but there is room to suggest that the main political and social attitudes of the purge—anti-unionism, global thinking characterized by imperialism and intervention, hypersensitivity to "national security," and animosity towards Russia—existed long before the post-war Pax Americana.

It is true that the United States did not achieve its position as the world's most powerful imperialist nation until after World War II. But this did not happen suddenly or by accident, as the most cursory consideration of American history shows. The Monroe Doctrine, American relations with Cuba after the Spanish-American War and American interventions in Mexico and other Latin American nations are all extensively documented historical facts which demonstrate that the United States had global interests of an economic and strategic nature long before World War II.[82] The Pax Americana was not the legacy of a single war, but the culmination of a long process.

It would also be a mistake to assume that red-baiting attacks on the trade union movement began, or even reached new heights, after

[82] For a general source regarding relations between Cuba and the United States, as well as a treatment of United States policy toward Latin America, *see* W.A. WILLIAMS, THE CONTOURS OF AMERICAN HISTORY (1961); W.A. WILLIAMS, THE TRAGEDY OF AMERICAN DIPLOMACY (1959). Williams' books also deal with the imperialist expansion thesis.

World War II.[83] Beginning at the turn of the century, employers, legislatures and federal and state prosecutors sought not only to crush the labor movement as a whole, but also to divide and weaken it by attacking its most left-wing elements. One has but to review the history of the prosecutions of the leaders of the International Workers of the World to see that singling out radical members of the labor movement was nothing new.[84]

Nor did anti-Soviet animosity suddenly materialize after World War II. During the war, the ground was being prepared for postwar confrontation with the Soviet Union. The seriousness of these preparations cannot be overstated, and they were accompanied by a studied effort to sabotage the institutions of collective security that were to be embodied in the United Nations Charter. When these efforts reached fruition after the War, among the principal victims of the purge were those who had played an important role in bringing the charter into being and in continuing the Roosevelt foreign policy. Also purged were those involved in reporting accurately on the corruption and weaknesses of the Chiang Kai-Shek government in China.[85]

The development and use of the atomic bomb provides a forceful, chilling instance of careful preparation for postwar animosity towards the Soviet Union. The Manhattan Project, created on August 16, 1942 as a part of the Army Corps of Engineers, was charged with the responsibility of developing a nuclear weapon; General Leslie R. Groves was appointed to head it on September 17 of that year. Years later, General Groves testified:

> I think it is important to state—I think it is well known—that there was never from about two weeks from the time I took charge of this project any illusion on my part but that Russia was our enemy and the project was conducted on that

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[83] For discussions of the red-baiting attacks on the trade union movement at the turn of the century *see* W. HAYWOOD, *supra* note 80; R. GINGER, EUGENE V. DEBS: A BIOGRAPHY (1962); P. FONER, IV HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES (1965).

[84] *See* W. HAYWOOD, *supra* note 80.

[85] *See generally* O.E. CLUBB, THE WITNESS AND I (1975); F. COOK, THE FBI NOBODY KNOWS, *supra* note 10; F. COOK, THE NIGHTMARE DECADE, *supra* note 10; Interview with Alger Hiss (November 28, 1979).

> basis. I didn't go along with the attitude of the country as a whole that Russia was a gallant ally.[86]

This attitude was not uniquely General Groves'; it permeated the entire undertaking. Many scientists on the project put aside their reservations about building so terrible a weapon only because they believed that Nazi Germany also possessed the capability to make one. The scientists were not told that in the late spring and summer of 1945, immediately following the surrender of Germany, the Japanese were making surrender overtures, rendering the need to use the weapon against Japan questionable at best. There is a great deal of evidence that the nuclear bombing of Hiroshima and Nagasaki was part of an effort to keep the Soviet Union from participating in a settlement in the Pacific theatre. Under the Potsdam Agreement, Stalin had agreed to enter the war against Japan within three months after the surrender of Germany. In fact, by early August Soviet troops had rolled through most of Manchuria. The scientists were told merely that the bomb had to be ready three months after Germany's surrender.[87] Atomic scientist Philip Morrison, reviewing P.M.S. Blackett's book, *The Military and Political Consequences of Atomic Energy,*[88] wrote: "I can testify personally that a date near August 10th was a mysterious final date which we, who had the daily technical job of readying the bomb, had to meet at whatever cost in risk or money or good development policy."[89]

To place the purge in context, then, one must study its antecedents in the carefully laid plans to undermine a postwar collective security system. Caute does not do so. He pays scant attention to the postwar development of those American policies whose critics the purge silenced. At the United Nations, for example, the United States

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[86] IN THE MATTER OF J. ROBERT OPPENHEIMER, *supra* note 21, at 173. *See generally* H. GREEN & P. STERN, *supra* note 15.

[87] IN THE MATTER OF J. ROBERT OPPENHEIMER, *supra* note 21, at 170, 260, 274. *See generally* P.M. BLACKETT, THE MILITARY AND POLITICAL CONSEQUENCES OF ATOMIC ENERGY (1948); W. LAURENCE, DAWN OVER ZERO: THE STORY OF THE ATOMIC BOMB (1946); Stimson, *The Decision To Use the Atomic Bomb,* HARPER'S, Feb. 1947, at 97.

[88] P.M. BLACKETT, THE MILITARY AND POLITICAL CONSEQUENCES OF ATOMIC ENERGY (1948).

[89] 5 BULLETIN OF THE ATOMIC SCIENTISTS 40 (1949).

proposed the Baruch Plan, which would have given this country a virtual monopoly in nuclear development. In derogation of the United Nations Charter, the United States formed a series of regional military alliances, drawing the nations of Western Europe into the policy of ringing the Soviet Union with military power.[90]

Where the iron ring around the socialist camp threatened to weaken or break, covert action alternated with overt force. The CIA intervened in Greece and Italy, and later in Guatemala. American intervention in Indochina was already beginning in the 1950's; by 1953, the United States was paying eighty percent of France's cost of waging that war.[91]

The main features of the purge—anti-unionism, anti-Communism, a keen awareness of American global interests whose protection required intervention and other global strategies—can thus be discovered in a quick survey of pre-World War II American history. The purge had deep roots; in focusing on the "ideology both idealistic and imperialistic" of the Pax Americana as the cause of the purge, Caute ignores the fact that the "idealistic and imperialistic" ideology was itself much older than he suggests.

Caute finishes his book as follows:

> When Kennedy took office there was both a joyous confirmation of the new liberalism and, in certain quarters, a sharp reaction, a paranoid scare campaign. Despite the Birch Society and other vigilante groups of the New Right, and despite Goldwater's success in capturing the Republican party, the liberal establishment easily disposed of the challenge until the Vietnam War and the rise of the militant New Left completely changed the face of the political landscape. But that is another story.[92]

"That," whatever its syntactical antecedent, is not another story. The maintenance of the American empire was a continuous process, which

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[90] *See generally* J.P. MORRAY, FROM YALTA TO DISARMAMENT: COLD WAR DEBATE (1961); K. ZILLIACUS, I CHOOSE PEACE (1950).

[91] For a general discussion of the history and actions of the CIA, *see* W. CORSON, THE ARMIES OF IGNORANCE (1977). The background to American involvement in Vietnam is told in E. HAMMER, THE STRUGGLE FOR INDOCHINA (1955); Roberts, *The Day We Didn't Go to War,* THE REPORTER, Sept. 14, 1954, at 31.

[92] D. CAUTE, *supra* note 1, at 541–42.

did not significantly abate with the passing of John Foster Dulles from the political scene. The revolts and uprisings of the 1960's bear a distinct relationship to the repression and resulting silence of the 1940's and 1950's. The purge silenced voices which otherwise would have spoken about controlling the actions of the state at home and abroad, and about racism, poverty and unemployment. When we emerged from the 1950's, no significant popular check had been placed upon American foreign policy for a decade, and no serious popular attention had been devoted to those problems which became the rallying cries for the movements of the 1960's. And when those voices were raised, the old weapons of the purge were trotted out again. Indeed, the tools of repression forged during the McCarthy period, newly sharpened and accompanied by those newly forged, are still in use. The concept of "national security," for example, has cropped up again and again in the last decade, and always as an excuse for limiting access to what the government knows, or for punishing those critical of what the government does.

The liberal establishment which existed at the time John F. Kennedy became President was an establishment cleansed of its leftist elements by the purge. It was an establishment staffed by those committed to the policies of intervention and confrontation with the Soviet Union which had begun after World War II and have continued through the Kennedy, Johnson, Nixon and Carter administrations.

More importantly, to say that "that is another story" is to make a mistake not simply about the United States in the postwar world, but about the writing of history in general. The study of history should not be simply a sharply bounded photograph of the past, no matter how valuable—and this book is valuable—such a photograph may be. History is useful because it is a mirror to the present and because in telling us what happened then, it helps us understand where we are now and where we are going.